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THOMAS HEALY*

One of the oldest principles of constitutional adjudication is that federal courts will decide only those constitutional questions that are necessary to the resolution of cases or controversies. This principle provides a key justification for judicial review and underlies much of the law of justiciability. Yet in recent years, the Supreme Court has systematically departed from this principle by authorizing (and in some cases, ordering) lower federal courts to decide constitutional questions even when doing so is clearly not necessary to the resolution of a case.

This Article provides the first account of this troubling development and examines it from several perspectives. The Article begins by arguing that the rise of unnecessary constitutional rulings is both part of a larger trend toward judicial supremacy and the result of pressures specific to each of the areas in which the Court has authorized such rulings. It then considers whether the Court's embrace of unnecessary constitutional rulings in four areas—qualified immunity, habeas corpus, harmless error, and Fourth Amendment "good faith" cases—can be squared with Article III's ban on advisory opinions, which prohibits federal courts from deciding legal questions that will have no effect on a dispute between adverse litigants. Finally, the Article considers whether the Court's recent approach, even if consistent with Article III, is good policy. Although several scholars have advocated unnecessary constitutional rulings in qualified immunity cases as a way to ensure the evolution of new rights, the Article shows that these rulings are far more likely to retard than promote the development of constitutional rights.

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INTRODUCTION

For as long as federal courts have been interpreting the Constitution, they have been assuring us that they do so only out of necessity. From John Marshall's opinion in *Marbury v. Madison*[1] to the majority opinion in *Bush v. Gore*,[2] the federal courts—and in particular the Supreme Court—have repeatedly insisted that resolving the many ambiguities of the Constitution is a responsibility that comes with their duty to decide cases and is not one they seek out.[3] "If there is one doctrine more deeply rooted than any other in

1. 5 U.S. (1 Cranch) 137, 177 (1803).
2. 531 U.S. 98 (2000) (per curiam).
3. *See Marbury*, 5 U.S. (1 Cranch) at 177 ("Those who apply the rule to particular

the process of constitutional adjudication," the Court has often stated, "it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."[4] The Court's reluctance to decide constitutional questions that are not necessary to the resolution of cases and controversies has influenced many of its most important jurisdictional and jurisprudential doctrines. It informs much of the law of abstention, particularly the branch known as *Pullman* abstention.[5] It has figured prominently in the development of the political question and other justiciability doctrines.[6] And it underlies the familiar canon that the courts should construe statutes so as to avoid difficult constitutional questions.[7]

Of course, the Court has never followed the principle of constitutional avoidance to the letter. Even in *Marbury*, Chief Justice Marshall went out of his way to address several matters that were not strictly necessary to the resolution of the case.[8] And he apparently gave no consideration to the possibility that a narrow construction of the Judiciary Act might have averted the issue of judicial review entirely.[9] Later courts also have reached constitutional questions that

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cases must of necessity expound and interpret that rule."); *Bush*, 531 U.S. at 111 (describing the Court's decision to hear the 2000 presidential election dispute as an "unsought responsibility"); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400 (1819) (describing the Court's "awful responsibility" to decide constitutional questions).

4. Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 343 (1999) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)); Rescue Army v. Mun. Court, 331 U.S. 549, 570 n.34 (1947) (same).

5. *See* R.R. Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941) (holding that federal courts should abstain from deciding a case when a state court's clarification of uncertain state law might make ruling on a constitutional issue unnecessary).

6. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 211 (1992) (noting that many of the justiciability doctrines—standing, ripeness, mootness, political questions—can be understood as an effort to exemplify the relevant "passive virtues").

7. *See* Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (citation omitted)).

8. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1800–01 (1991). For instance, the Court held that Marbury had a right to the commission he sought and that the laws of the country afforded him a remedy even though those decisions were unnecessary because the Court found that the specific remedy Marbury sought—a writ of mandamus—was beyond the Court's original jurisdiction. *See Marbury*, 5 U.S. (1 Cranch) at 162–74.

9. *See, e.g.*, William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 30 (1969) (arguing that Marshall could have construed the Judiciary Act so as to avoid deciding whether the Constitution gives federal courts the power of judicial review); Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 57 (1961) (same). *But see* James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV.

did not lie squarely in the path of decision. In *Ashwander v. Tennessee Valley Authority*[10]—a case made notable by Justice Brandeis's emphatic endorsement of the avoidance principle in a concurring opinion—the Court addressed the constitutionality of the Wilson Dam even though, in Brandeis's view, there was no need to reach that issue.[11] Still, such cases have mainly been aberrations, driven by unusual circumstances or the desire to reach a particular result. 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.

In several areas, however, the Court has recently departed from this principle. Instead of delaying the adjudication of constitutional issues until the last possible moment, the Court has reached out to decide constitutional questions even when doing so is clearly not necessary to the outcome of the case. Moreover, the Court has ordered lower federal courts to follow the same approach in similar cases. In *Saucier v. Katz*,[12] for instance, the Court held that when considering claims of qualified immunity, federal courts should first determine whether the plaintiff has alleged the violation of a constitutional right before deciding whether the right was clearly established at the time of the events giving rise to the lawsuit.[13] Because a government official has qualified immunity if the right was not clearly established, lower courts had usually proceeded straight to that question, reasoning that to decide whether the right exists at all would be an unnecessary constitutional ruling.[14] But the Court rejected that approach, stating that lower courts "must" decide whether the constitutional right exists, even when they subsequently dismiss the case because the right was not clearly established.[15] According to the Court, this procedure will enable federal judges to clarify standards of official conduct and set forth constitutional principles that "will become the basis for a holding that a right is clearly established" in subsequent cases.[16]

1515, 1531–49 (2001) (defending Marshall's interpretation of the Judiciary Act as consistent with contemporary views of that Act).

10. 297 U.S. 288 (1936).

11. *Id.* at 341 (Brandeis, J., concurring).

12. 533 U.S. 194 (2001).

13. *Id.* at 200–01.

14. *See infra* Part I.B.1.

15. *See Saucier*, 533 U.S. at 200–01.

16. *Id.* at 201; *see also* County of Sacramento v. Lewis, 523 U.S. 833, 842 n.5 (1998) (explaining that the Court's approach to qualified immunity cases is to determine first whether the plaintiff has alleged a violation of his or her constitutional rights).

The Court has endorsed a similar procedure in cases involving harmless constitutional error. In *Lockhart v. Fretwell*,[17] the Court rejected a common practice among lower courts, which had been to assume that a constitutional error occurred and skip to the question of whether the error was harmless.[18] As in qualified immunity cases, many courts thought there was no reason to decide the difficult constitutional question if the error was harmless anyway.[19] But the Court thought otherwise: "Harmless-error analysis," it stated in *Fretwell*, "is triggered only *after* the reviewing court discovers that an error has been committed."[20]

In some contexts, the Court, while not dictating that lower federal courts follow a particular procedure, has nonetheless suggested that it would be appropriate to resolve constitutional questions unnecessary to the outcome of the case. Consider *United States v. Leon*,[21] in which the Court ruled that evidence obtained in an unconstitutional search should not be excluded at trial if the officer relied in good faith on a search warrant later found invalid.[22] As a result of this decision, the key issue in many cases is whether the officer reasonably believed the warrant was constitutional, not whether it actually was. Yet the Court did not warn lower federal courts against deciding the constitutional issue in cases where the officer acted in good faith. Instead of adopting this "inflexible practice," the Court stated, lower courts are free to reach the merits of the constitutional claim even when doing so is unnecessary because the officer's belief was reasonable.[23] When the Court later extended *Leon* to cases in which an officer conducts a search in reasonable reliance upon a statute later declared unconstitutional, it once again made clear that a finding that an officer acted in good faith would not "preclude review of the constitutionality of the search or seizure."[24]

Some lower federal courts have expressed dismay about the Court's willingness to issue unnecessary constitutional rulings. When the Court first recommended the procedure for deciding qualified immunity cases that it later mandated in *Saucier*, the Second Circuit

17. 506 U.S. 364 (1993).

18. *See infra* Part I.B.4.

19. *See, e.g.*, United States v. Pravato, 505 F.2d 703, 704 (2d Cir. 1974) (refusing to address right to privacy claim upon concluding that admission of evidence received during search was harmless).

20. *Fretwell*, 506 U.S. at 370 n.2.

21. 468 U.S. 897 (1984).

22. *Id.* at 926.

23. *See id.* at 924–25.

24. Illinois v. Krull, 480 U.S. 340, 353–54 (1987).

hesitated to follow it.[25] Citing the long tradition of constitutional avoidance, the Second Circuit reasoned that the Court must have intended for the new procedure to be followed only where (1) it was obvious that the constitutional right did not exist, and (2) the constitutional issue would otherwise never be resolved because of the plaintiff's inability to sue for injunctive relief (qualified immunity bars only suits for money damages).[26] But *Saucier* made clear that lower courts must decide the constitutional issue first and that the new procedure should be followed even when the constitutional question is difficult and injunctive relief is readily available.[27]

Other courts have embraced the Supreme Court's approach and have applied it in new contexts. For instance, the Ninth Circuit has cited the Court's qualified immunity cases as support for its procedural approach in habeas cases.[28] Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a federal court may grant habeas relief to a state prisoner only if the state court judgment was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court.[29] As a result of AEDPA, federal courts need not decide whether the state court decision was wrong, only whether it was contrary to clearly established federal law. But the Ninth Circuit disapproves of that approach. It has held that lower courts must first determine whether the state court judgment was incorrect and only then decide whether the petitioner is entitled to habeas relief under AEDPA.[30] The Ninth Circuit acknowledges that a decision on the merits of the state court judgment is not binding on state courts and can never form the basis for a habeas challenge under AEDPA.[31] But citing the Supreme

25. *See* Mollica v. Volker, 229 F.3d 366, 371–72 (2d Cir. 2000); Horne v. Coughlin, 178 F.3d 603, 604–06 (2d Cir. 1999).

26. *See Coughlin*, 178 F.3d at 605–06.

27. *See* Saucier v. Katz, 533 U.S. 194, 200–01 (2001) ("A court required to rule upon the qualified immunity question *must* consider, then, this threshold question: taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This *must* be the initial inquiry." (emphasis added)). Shortly before publication of this Article, three Supreme Court Justices expressed uneasiness with the approach mandated by *Saucier*. *See* Brosseau v. Haugen, 125 S. Ct. 596, 601 (2004) (Breyer, J., concurring) (expressing concern that *Saucier* "rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision" and urging reconsideration of the *Saucier* approach). But a majority of the Court has thus far declined to reconsider the issue. *See id.* at 598 n.3.

28. *See* Van Tran v. Lindsey, 212 F.3d 1143, 1154–55 (9th Cir. 2000).

29. 28 U.S.C. § 2254(d)(1) (2000).

30. *See Van Tran*, 212 F.3d at 1155.

31. *See id.* at 1154.

Court's qualified immunity cases, it says its approach "promotes clarity in our own constitutional jurisprudence and also provides guidance for state courts, which can look to our decisions for their persuasive value."[32]

The Supreme Court recently rejected the Ninth Circuit's ruling that district courts *must* decide the merits of the state court decision before applying the AEDPA standard.[33] But it conspicuously left open the possibility that federal courts could *choose* to decide whether the state court decision was wrong in a given case.[34] Moreover, the Court has followed this procedure itself under AEDPA, first deciding whether the state court misinterpreted the Constitution and only then deciding whether the state court judgment was contrary to clearly established federal law.[35] Thus, the Court appears to have authorized unnecessary constitutional rulings in habeas cases as well.

The Court's embrace of unnecessary constitutional rulings in these four areas has gone almost completely unnoticed. Although a few scholars have discussed the Court's approach in qualified immunity cases,[36] no one has identified the Court's broader embrace of unnecessary constitutional rulings or examined the implications of this development. This is a serious oversight. The rise of unnecessary constitutional rulings is in significant tension with the long-established premises of federal court jurisdiction. In its rejection of advisory opinions, its refusal to adjudicate political questions, and its stringent standing requirements, the Supreme Court traditionally has rejected the view of federal courts as roving expositors of constitutional norms in favor of a dispute resolution model in which the exclusive function of the federal courts—at least at the lower levels—is to decide cases and controversies.[37] So what accounts for the Court's apparent change of attitude? And can it be reconciled with the constraints of

32. *Id.* at 1155.

33. *See* Lockyer v. Andrade, 538 U.S. 63, 71 (2003).

34. *See id.* at 71 ("AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law.").

35. *See* Weeks v. Angelone, 528 U.S. 225, 237 (2000).

36. For discussions about the impact of the Court's qualified immunity approach on the development of substantive constitutional law, see generally John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403 (1999); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1 (2002).

37. *See* FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67–74 (5th ed. 2003) [hereinafter HART & WECHSLER].

Article III and the long tradition of avoiding constitutional adjudication?

In this Article, I attempt to answer both questions. I begin in Part I by explaining that the Court's embrace of unnecessary constitutional rulings is part of a larger trend in which the Court has gradually squeezed the other branches of government out of the business of constitutional interpretation and has come to view its own role primarily as the articulation of constitutional principles rather than the arbitration of ordinary disputes. This trend, which began with the shift to certiorari discretion in the early twentieth century, can be seen in the Court's careful management of its docket and stated preference for cases that pose important and far-reaching questions of law.[38] It is also evident in the decline of the political question doctrine and in the weakening of other justiciability requirements, such as mootness. Finally, this trend is reflected in the diminished deference the Court has shown Congress over the past decade and in its refusal to allow Congress to provide broader constitutional protections than those announced from the bench.

Part I also argues that the Court's approval of unnecessary constitutional rulings can be seen, to some degree, as an effort to preserve opportunities for the federal courts to develop constitutional norms. In each of the areas in which such rulings have been authorized—qualified immunity, habeas corpus, harmless constitutional error, and Fourth Amendment good faith cases—earlier developments limited the opportunities for federal courts to directly interpret the Constitution. The evolution of qualified immunity, for instance, shifted emphasis away from the constitutional issues in civil rights actions and toward the sub-constitutional question of whether the right asserted by the plaintiff was clearly established. The enactment of AEDPA likewise limited judicial interpretation of the Constitution, forcing courts to focus only on principles clearly established by the Supreme Court. The current Court undoubtedly supports doctrines such as qualified immunity and AEDPA that shield government officials from the consequences of their unconstitutional conduct. But given its recent assertions of judicial supremacy and its growing acceptance of the norm declaration model, the Court may be troubled by the way these doctrines limit the federal courts' role in constitutional interpretation. If so, its embrace of unnecessary constitutional rulings may be, in part, an attempt to remedy the situation.

38. *See* SUP. CT. R. 10.

After setting forth this descriptive account of the Court's recent approach to unnecessary constitutional rulings, Part II explores a question that the Court and most scholars have overlooked: whether this approach violates Article III's ban on advisory opinions.[39] One of the underlying principles of the ban on advisory opinions is that federal courts may issue only rulings that have some effect on the resolution of a dispute between adverse parties.[40] This principle is reflected in the rule that a plaintiff lacks standing unless he can show that his injury will be redressed by a favorable ruling.[41] It is also seen in the mootness doctrine, which requires federal courts to dismiss cases when a dispute has been resolved such that a legal ruling is not likely to make any difference.[42] In addition, the principle that federal courts may issue only rulings that have some effect can be seen in the Adequate and Independent State Grounds doctrine ("the State Grounds doctrine"). Under this doctrine, the Court has held that it lacks jurisdiction to review state court rulings on issues of federal law if the state court judgment rests on an adequate and independent state law ground. "If the same judgment would be rendered by the state court after we corrected its views of federal law," the Court has explained, "our review could amount to nothing more than an advisory opinion."[43]

The principle that federal courts may issue only rulings that have some effect raises serious questions about the practice of deciding the constitutional merits in qualified immunity, habeas corpus, harmless error, and Fourth Amendment good faith cases. In these cases, a ruling on the constitutional merits often has no effect because the court's determination that the governmental actor has immunity or that an error was harmless is adequate to resolve the dispute. One might respond that a court cannot know whether its resolution of the

39. John Greabe has argued that unnecessary constitutional rulings in qualified immunity cases do not violate Article III. *See* Greabe, *supra* note 36, at 418–26. But he has not examined unnecessary constitutional rulings in the other areas under discussion here. And, as will become apparent in Part II, I disagree with his conclusions with respect to qualified immunity.

40. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2, at 51–54 (4th ed. 2003).

41. *See id.* § 2.2 at 54.

42. *See, e.g.*, North Carolina v. Rice, 404 U.S. 244, 246 (1971) ("[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."); Mills v. Green, 159 U.S. 651, 653 (1895) (stating that a federal court has no authority "to declare principles or rules of law which cannot affect the matter in issue in the case before it").

43. *See* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (quoting Herb v. Pitcairn, 324 U.S. 117, 126 (1945)).

merits will have some effect until after it decides the question of immunity or harmlessness. Therefore, as long as the court decides the merits first, its ruling will not be advisory. But as I show in Part II, a separate ruling on the merits in qualified immunity and habeas cases is never necessary to resolve the dispute and can never change the outcome of the case. A ruling on the merits can sometimes affect the outcome in harmless error and Fourth Amendment good faith cases, and a court will not know one way or another until after it decides the issue of harmlessness or good faith. But this does not eliminate the Article III problem. In cases involving the State Grounds doctrine, it is also unclear whether a ruling on the federal question will have some effect until after the Court determines whether the state court judgment rests on an adequate and independent state ground. Yet the Court does not allow itself to avoid the ban on advisory opinions simply by deciding the federal issue first. Instead, the Court first determines whether the state court judgment rests on adequate and independent state grounds. Only if it does not—in other words, only if the Court's decision on the federal issue can affect the outcome of the case—will the Court decide the federal issue.

Despite these arguments, there are good reasons to conclude that unnecessary constitutional rulings—at least in harmless error and Fourth Amendment good faith cases—do not violate the ban on advisory opinions. For one thing, scholars have heavily criticized the State Grounds doctrine itself and have argued that it is not required by Article III.[44] More importantly, the practice of deciding the constitutional issue in these cases does not undermine the values served by the ban on advisory opinions. Because the constitutional issues are still presented in the context of a concrete dispute between adverse parties, there is little danger that the Court will issue hypothetical legal judgments or that its rulings will not be viewed as final and authoritative by the other branches of government. The same thing is not true in qualified immunity and habeas cases, however. Because a ruling on the constitutional issue in these cases can never affect the outcome, there is a greater risk that the issue will not be argued vigorously and that the Court's decision will therefore be inadequately informed. For that reason, I conclude that unnecessary constitutional rulings in these two areas violate the ban

44. *See* Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1301–10 (1986).

on advisory opinions.

Even if the Court's practice of reaching constitutional questions unnecessarily in some contexts is permissible under Article III, we might still question whether it is good policy. The principle of constitutional avoidance has a long and distinguished pedigree and is grounded in the recognition that constitutional interpretation and judicial review are delicate functions. In Part III, I explore the foundations of this principle and the ways it has been manifested over the past two centuries. I then consider whether, in light of this tradition, the Court's recent approach can be justified. The most prominent justification for the Court's approach is that it ensures the continued evolution of constitutional rights.[45] By reaching constitutional issues even in cases where a non-constitutional issue is dispositive, courts are able to articulate new constitutional rights that will benefit later litigants. This is especially important in areas such as qualified immunity and habeas corpus, where relief can be granted only if the right has been clearly established.

Although this is a powerful justification for unnecessary constitutional rulings, it overlooks an important consideration. When a court reaches out to decide the constitutional issue, it will not necessarily rule that the right exists. As I argue in Part III, a court deciding the constitutional issue in one of these cases is just as likely to decide that the constitutional right does not exist. In fact, my review of qualified immunity cases over two years shows that appellate courts ruled against plaintiffs asserting the existence of a constitutional right far more often than they ruled in favor of them. One might argue that this is irrelevant because a ruling that a right does not exist leaves future litigants no worse off than a ruling that the right is not clearly established; either way, they will be denied relief. But such rulings do harm future criminal defendants and civil rights plaintiffs seeking equitable relief, since they are entitled to relief as long as the right exists, even if it is not clearly established. Such rulings also may have a domino effect, leading to the denial of constitutional rights in analogous situations. Finally, a ruling that a right does not exist authorizes government officials to engage in conduct they otherwise might have avoided for fear of jeopardizing criminal convictions. Some might welcome this development, believing that law enforcement has been unnecessarily shackled by

45. See Greabe, *supra* note 36, at 433–34; Kamin, *supra* note 36, at 4 (noting that the failure to reach constitutional questions can serve "to hamper the recovery of those who have suffered constitutional wrongs and to prevent the development of constitutional law").

uncertainty about what is constitutionally permissible. But for those who support unnecessary constitutional rulings out of concern for the rights of criminal defendants and civil rights plaintiffs, this is likely to be unwelcome news.

I do not deny that permitting unnecessary constitutional rulings in certain contexts may also have benefits. My point is simply that the sword is double-edged and that courts may use the opportunity to issue unnecessary constitutional rulings both to expand and to contain constitutional rights. This point is fairly intuitive, but it needs restating occasionally. People who came of age during or after the Warren era tend to associate an aggressive approach to federal court jurisdiction with a liberal, rights-expanding agenda. But activism is neutral. It can be used to achieve whatever ends are desired by those who engage in it, and that should give pause to those who, out of affinity for the Warren Court, have instinctually applauded the Rehnquist Court's approval of unnecessary constitutional rulings.

I. UNNECESSARY CONSTITUTIONAL RULINGS: A DESCRIPTIVE ACCOUNT

Whatever one thinks of the Court's recent approach to unnecessary constitutional rulings, it is a clear departure both from the Court's rhetoric and its long tradition of avoiding constitutional questions. The first question to be addressed, therefore, is what accounts for this departure. In this Part, I provide two possible explanations. In Section A, I argue that the Court's recent embrace of unnecessary constitutional rulings is part of a larger trend in which the Court has gradually shifted from a dispute resolution model to a norm declaration model and has asserted the exclusive competence of the federal judiciary to interpret the Constitution. Section B then proposes a more particularized explanation, which is that the Court's embrace of unnecessary constitutional rulings can be seen, at least in part, as a response to developments that have limited the opportunity of federal courts to engage in constitutional analysis. Though neither of these explanations is intended to justify the Court's recent approach, they shed light on the conceits and concerns motivating the rise of unnecessary constitutional rulings.

A. A Court Supreme

Perhaps at no time since the height of the Warren era has the Supreme Court been criticized so widely for what critics perceive as a pattern of judicial activism and arrogance. In the past several years,

numerous writers have called attention to the Rehnquist Court's diminishing deference to the constitutional judgments of Congress and growing confidence in its own ability to tackle difficult national questions.[46] Whether this drift toward judicial supremacy can be justified is an important and engaging question, but not one I address here. Instead, my more modest goal is to sketch the highlights of this general trend and explain its relationship to the specific issue of unnecessary constitutional rulings. I begin by discussing the Court's move to a discretionary docket and how this has affected the Court's self-image. I then discuss several more recent developments: the decline of the political question doctrine, the weakening of the mootness doctrine, and the Court's diminished deference to Congressional judgments.

1. Docket Discretion

While contemporary discussions of judicial supremacy focus on the Rehnquist Court, the seeds of the modern trend were planted a century ago with a series of laws that gave the Court nearly complete control over its docket.[47] Prior to this period, the Court was obligated to hear whatever cases Congress included within its jurisdiction. But beginning in 1891 and culminating in the Judges' Bill of 1925, Congress ceded control over the Court's docket to the justices themselves, so that with a few exceptions the Court was free to hear (or decline to hear) any case within its appellate jurisdiction.[48] The Court subsequently strengthened this discretion by declining to hear selected cases within its original jurisdiction, choosing to decide particular questions in a petition for certiorari rather than the whole

46. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092–93, 1106 (2001) (claiming that we are living through a "constitutional revolution" and describing the Rehnquist Court as "an institution run dangerously amok, heedless of sound legal standards, and determined, by hook or by crook, to impose its preferred political views upon" the country); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 302–19 (2002); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1273–78 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1718–27 (2002); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 13–14 (2001); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 905–07 (2003); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2005–10 (2003).

47. *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 *passim* (2000).

48. *See id.* at 1649–60, 1704.

case, and discouraging the courts of appeals from certifying questions for Supreme Court resolution.[49]

The transition to a discretionary docket has significantly altered the Court's conception of itself. Under the prior system, the Court could plausibly view itself as merely another judicial body—albeit with final say—whose primary purpose was to decide ordinary disputes. But with nearly absolute control over which cases it hears and which issues it decides within those cases, that view of the Court's role is no longer credible. A court that is not required to decide any particular case—or any cases at all, with a few exceptions—can hardly see itself as just another court resolving cases and controversies. Instead, the Court has come to view itself as a unique institution with a special role in articulating constitutional norms and resolving the country's deepest cultural and political disputes.[50]

The Court's changing image of itself has, in turn, affected the way it exercises its certiorari discretion. The Court no longer decides all cases presenting non-frivolous constitutional issues, as it assured Congress it would during debates over the Judges' Bill.[51] Instead, it decides only those cases presenting important and far-reaching questions of law.[52] It also carefully allots its resources and engages in the type of agenda-setting more commonly associated with the political branches.[53] The Rehnquist Court, for instance, has reduced the number of cases it hears each year from roughly 150 to about half

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49. *See id.* at 1704–11.

50. *See* Honig v. Doe, 484 U.S. 305, 332 (1988) (Rehnquist, C.J., concurring) (describing the "unique resources" of the Court and its "unique and valuable ability . . . to decide a case"); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting) ("[T]he interpretation of the text of the Constitution in light of changed circumstances and unforeseen events—and with full regard for the purposes underlying the text—has always been the unique role of this Court."); Carmona v. Ward, 439 U.S. 1091, 1095 (1979) (Marshall, J., dissenting) (referring to the Court's "constitutional function to draw a meaning . . . consonant with 'the evolving standards of decency that mark the progress of a maturing society' " (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 68 (1962) [hereinafter BICKEL, LEAST DANGEROUS BRANCH] (arguing that the "constitutional function" of the Supreme Court is to "define values and proclaim principles").

51. *See* Hartnett, *supra* note 47, at 1699 (quoting letter from Chief Justice Taft to Senator Copeland).

52. *See* SUP. CT. R. 10 (stating that the Supreme Court will only grant certiorari for "compelling reasons," such as to resolve a conflict among state courts or lower federal courts on "important" federal questions, and will "rarely" grant certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

53. *See* Hartnett, *supra* note 47, at 1718–19, 1733; Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 728–29 (2001).

that number.[54] At the same time, the Court has managed its docket with ever more care and precision, moving methodically through one area of the law after another. Consider the Court's Commerce Clause cases. Starting in 1992, the Court systematically reversed fifty years of Commerce Clause jurisprudence in a series of decisions beginning with *New York v. United States*[55] and culminating recently in *United States v. Morrison*.[56] The Court has brought a similar focus to the issue of state sovereign immunity, deciding seven cases in a period of eight years concerning the states' immunity from federal lawsuits.[57] In the criminal context, the Court has recently decided a series of cases involving the sentencing authority of judges[58] and has now embarked on a reevaluation of capital punishment.[59]

One might suggest that the Court's tendency to hear cases in groups or clusters[60] is due to the fact that once the Court issues a major opinion it feels obliged to resolve questions raised by that opinion. But it seems just as likely that the Justices are following an unstated agenda, concentrating on areas of law they believe are in need of reform or clarity.[61] It is no secret, for instance, that Chief

54. *See* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 578 (2003); Remarks by Chief Justice William H. Rehnquist, Lecture at the Faculty of Law of the University of Guanajuato, Mexico (Sept. 27, 2001), http://www.supremecourtus.gov/publicinfo/speeches/sp_09-27-01.html (on file with the North Carolina Law Review). The reduction in the Court's caseload may be due, in part, to the "virtual abolition of the Court's mandatory appellate jurisdiction in 1988." *See* HART & WECHSLER, *supra* note 37, at 54. But it also appears, in part, to have "resulted from deliberate choices by the Justices." *See id.*

55. 505 U.S. 144 (1992) (striking down provision of Low-Level Radioactive Waste Policy Amendments Act that required states to either regulate pursuant to Congress's direction or take title to, and possession of, low-level radioactive waste generated within their borders).

56. 529 U.S. 598, 611, 617 (2000) (holding that Congress's power to regulate activities that, in the aggregate, substantially affect interstate commerce is limited to "economic" activities).

57. Tennessee v. Lane, 124 S. Ct. 1978 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

58. United States v. Booker, 125 S. Ct. 738 (2005); Blakely v. Washington, 124 S. Ct. 2531 (2004); Schriro v. Summerlin, 124 S. Ct. 2519 (2004); Ring v. Arizona, 536 U.S. 584 (2002); Harris v. United States, 536 U.S. 545 (2002), United States v. Cotton, 535 U.S. 625 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000).

59. Roper v. Simmons, 125 S. Ct. 1183 (2005); Ring v. Arizona, 536 U.S. 584 (2002); Atkins v. Virginia, 536 U.S. 782 (2002); Penry v. Johnson, 532 U.S. 782 (2001).

60. This tendency was first pointed out to me by Eric Shumsky.

61. *See* Smith, *supra* note 53, at 759, 768–69 (examining the determinants of the Court's agenda setting and noting that the Court may also be acting to correct ideological differences).

Justice Rehnquist had long aimed to impose federalism-based limits on Congress's power under the Commerce Clause.[62] Nor has Justice Scalia concealed his opposition to the United States Sentencing Commission,[63] which issues the federal sentencing guidelines called into question by his recent opinion in *Blakely v. Washington*.[64]

The Court also carefully chooses when to interject itself into highly contentious debates. When the Fifth Circuit ruled in *Hopwood v. State of Texas*[65] that diversity was not a compelling justification for affirmative action in higher education, the Court declined to review the issue for eight years before reversing the ruling in *Grutter v. University of Michigan*.[66] Was the Court's delay due to a lack of petitions presenting the issue? Not likely. The state of Texas twice asked the Court to review the Fifth Circuit's decision,[67] and a Ninth Circuit decision conflicting with *Hopwood* was the subject of another petition for certiorari in 2001.[68] But the Justices waited until they were ready to enter the debate and were presented with a case they wanted to decide.

My point is not to criticize the Court's discretion over its docket or the way it exercises that discretion.[69] My point is simply that the

62. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 309–10 (1981) (Rehnquist, J., concurring) (insisting that in spite of the Court's deference to Congress, "there *are* constitutional limits" to the commerce power, and asserting that "[s]ome activities may be so private or local in nature that they simply may not be *in* commerce"); Nat'l League of Cities v. Usery, 426 U.S. 833, 837–40 (1976) (Rehnquist, J.) (holding that Congress lacked power under the Commerce Clause to regulate the wages and hours of state employees).

63. *See* Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

64. 124 S. Ct. 2531 (2004). The Court subsequently ruled that the sentencing guidelines could not be treated as mandatory by federal judges. *See* United States v. Booker, 125 S. Ct. 738, 743 (2005).

65. 78 F.3d 932 (5th Cir. 1996).

66. 539 U.S. 306 (2003).

67. Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). Although the Court does not usually explain denials of certiorari, Justice Ginsburg stated in an opinion accompanying the first denial of certiorari that she voted not to hear the case because the admissions policy found unconstitutional by the district court "has long since been discontinued and will not be reinstated." *Hopwood*, 518 U.S. at 1033. She added that the Supreme Court " 'reviews judgments, not opinions.' Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition." *Id.*

68. Smith v. Univ. of Wash. Law School, 233 F.3d 1188 (2000), *cert. denied*, 532 U.S. 1051 (2001).

69. Others have already offered forceful critiques. *See* Hartnett, *supra* note 47, at

existence of that discretion has gradually changed the Court's conception of itself and of its role. The Court no longer views itself as an ordinary court deciding ordinary disputes. Instead, it views itself as a special institution with a unique capability to resolve our deepest constitutional disagreements. We should not be surprised, therefore, that the Court is sometimes unwilling to put off resolution of those disagreements for another day.

2. Decline of the Political Question Doctrine

Another sign of the trend toward judicial supremacy can be seen in the Court's treatment of the political question doctrine. Rooted in the text and structure of the Constitution,[70] the political question doctrine recognizes that some legal questions are so intertwined with policy considerations and so unamenable to judicial scrutiny that their resolution must be left to the political branches. The doctrine is as old as the federal judiciary itself and is one of the principal means of limiting the Court's interference with the other branches.[71] As Justice Marshall wrote in *Marbury v. Madison*, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[72]

In recent decades, however, the Court has substantially weakened the political question doctrine.[73] Only twice in the past forty years have a majority of the Justices held that a case presented a nonjusticiable political question.[74] And in both cases, the

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1704–30.

70. Textual support for the political question doctrine is found in a handful of constitutional provisions that vest the other branches of government with sole discretion over certain matters. For instance, the Court has held that Article I, section 3, clause 6, which states that "The Senate shall have the sole Power to try all Impeachments," precludes the judiciary from reviewing the Senate's decision about what constitutes a trial. *See* Nixon v. United States, 506 U.S. 224, 229–38 (1993). The doctrine is also supported by the separation of powers inherent in the Constitution's structure. *See* Baker v. Carr, 369 U.S. 186, 210 (1962) ("[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question' "); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 497–99 (1996) ("This 'political question doctrine' has always been based on 'separation of powers,' but those two concepts mean far different things to the modern Court than they did to the Framers.").

71. *See* Barkow, *supra* note 46, at 331 ("The classical political question doctrine reflects the constitutional structure of deference, for it is rooted in the language, structure, and history of the Constitution itself."); Bickel, *supra* note 9, at 43.

72. 5 U.S. (1 Cranch) 137, 170 (1803).

73. See Barkow, *supra* note 46, at 263–73; David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1441 (1999).

74. *See* Barkow, *supra* note 46, at 267–68. The two cases are *Nixon v. United States*,

Constitution clearly committed the issue at hand to the judgment of Congress, leaving the Court little room to maneuver.[75] In other cases where it has been less clear whether the Constitution committed resolution of the question to the political branches, the Court has rejected application of the political question doctrine,[76] often with little discussion.[77] The Court has also paid little attention to the prudential considerations that once informed the doctrine,[78] leading

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506 U.S. 224, 226 (1993) (refusing to review the impeachment trial of a federal judge because the Senate has sole authority to craft impeachment procedures under Article I, section 3, clause 6) and *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973) (denying a request to regulate the activities of the Ohio National Guard because the Constitution vests in Congress the "responsibility for organizing, arming, and disciplining the Militia"). In the recent case of *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (plurality opinion), four Justices held that claims of partisan gerrymandering present nonjusticiable political questions. *Id.* at 1778. But Justice Kennedy, who joined the plurality in the judgment, declined to foreclose the possibility of judicial relief in all future partisan gerrymandering cases. *See id.* at 1793 (Kennedy, J., concurring). Likewise, in *Goldwater v. Carter*, 444 U.S. 996 (1979), a plurality of the Court agreed that the issue of the President's power to terminate a treaty without consulting the Senate was a nonjusticiable political question. But there was no majority for this view, and the case was dismissed on the merits. *See id.* at 996–1006.

It is unclear how many cases were dismissed under the political question doctrine prior to this forty-year period. But it seems clear that the doctrine was invoked more frequently than in recent decades. *See* Robert J. Pushaw, Jr., Baker v. Carr*: A Commemorative Symposium: Panel I: Justiciability and the Political Thicket: Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1168–71 (2002) (noting that prior to *Baker v. Carr* in 1962 the Court applied the political question doctrine to bar numerous constitutional claims).

75. *See* Barkow, *supra* note 46, at 268 (arguing that the two cases in which the Court found a political question "both involved strong textual anchors for finding that the constitutional decision rested with the political branches").

76. *See* Davis v. Bandemer, 478 U.S. 109, 118–27 (1986) (finding no political question in challenge to Indiana's apportionment plan); Powell v. McCormack, 395 U.S. 486, 518–22, 527–28 (1969) (rejecting claim that constitutional provision making each House "the Judge of the . . . Qualifications of its own Members" renders nonjusticiable a claim by a congressman that he was improperly excluded from the House of Representatives).

77. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 248–50 (1985) (rejecting claim that Congress's plenary power over Indian affairs renders Indian tribes' dispute with New York counties nonjusticiable); INS v. Chadha, 462 U.S. 919, 940–43 (1983) (rejecting claim that challenge to legislative veto presented nonjusticiable political question); Elrod v. Burns, 427 U.S. 347, 351–53 (1976) (rejecting application of political question doctrine to claims by county employees that they were fired by sheriff's office because of political views); Williams v. Rhodes, 393 U.S. 23, 28 (1968) (finding no political question in suit challenging validity of Ohio election laws).

78. *See* Nixon v. United States, 506 U.S. 224, 238 (1993) (holding that plaintiff's claim presented a political question, but limiting the role of prudential considerations); *Powell*, 395 U.S. at 550 (rejecting application of the political question doctrine without discussing prudential factors). *But see* Vieth v. Jubelirer, 124 S. Ct. 1769, 1778–92 (2004) (plurality opinion) (relying on the lack of judicially discoverable and manageable standards to conclude that claims of partisan gerrymandering present political questions).

several commentators to conclude that the prudential aspect of the doctrine, if not the entire doctrine, is no longer viable.[79]

One might suggest that the demise of the political question doctrine is due primarily to the lack of cases presenting true political questions, not to a "juricentric"[80] bias on the part of the Justices.[81] But given the Court's intervention in the 2000 presidential election dispute, this seems doubtful. In a recently published article, Rachel Barkow makes a strong case that the Article II question at the heart of *Bush v. Gore I*[82] (and upon which three Justices based their decisions in *Bush v. Gore II*[83]) presented a nonjusticiable political question.[84] Relying upon the text of Article II, original understanding, and subsequent constitutional history, Barkow argues that Congress is responsible for determining whether the slate of electors submitted by a state has been selected in the manner chosen by the state legislature and that the Court therefore should have refrained from hearing the case.[85] Barkow's conclusions are debatable, and even she does not claim that the argument for deferring to Congress was a slam-dunk. But what is striking, as

79. *See* Barkow, *supra* note 46, at 267 (arguing that *Baker v. Carr* signaled the "beginning of the end of the prudential political question doctrine"); Bederman, *supra* note 73, at 1441 (arguing that the political question doctrine "is largely out of favor today in the Supreme Court, even with respect to foreign affairs controversies"); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1427–28 (1999) (arguing that the Supreme Court's decision in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), marked a shift away from the prudential political question doctrine); Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 406 (1984) ("[T]he political question doctrine appears to have nearly fallen into desuetude . . . .").

80. The term comes from Robert Post and Reva Siegel. *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003).

81. Some scholars also have argued that the function once served by the political question doctrine is now being served by standing doctrine. *See* Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 306, 333 (1996) (arguing that the standing and political question doctrines both center on separation of powers, making the latter unnecessary); Mark Tushnet, Baker v. Carr*: A Commemorative Symposium: Panel I: Justiciability and the Political Thicket: Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1204–05 (2002) (arguing that the prudential limitation under the political question doctrine has been transferred to standing doctrine); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1509–10 (1988) (noting that while standing may have replaced the political question doctrine, it may not adequately serve the same purpose).

82. 531 U.S. 98 (2000).

83. 531 U.S. 1046 (2000).

84. *See* Barkow, *supra* note 46, at 273–77.

85. *See id.* at 277–78.

Barkow points out, is that the Court did not even consider doing so.[86]

The political question doctrine is primarily concerned with the judiciary's power to decide constitutional questions vis-à-vis the political branches, whereas the principle of avoidance concerns the wisdom of deciding constitutional questions later rather than sooner. But the two doctrines are nonetheless related. Both reflect a degree of humility about the Court's competence and a measure of awe for the task of constitutional interpretation. In addition, although the avoidance principle divides power between courts now and in the future—instead of between the courts and the political branches—it provides time for the political branches to reach their own conclusions on constitutional questions. Thus, the demise of the political question doctrine is another indicator that the rise of unnecessary constitutional questions is part of a larger, more comprehensive trend.

3. Weakening of the Mootness Doctrine

A third area in which the Court has embraced a more expansive approach to its jurisdiction is the doctrine of mootness. Although many critics have complained that the Court's conception of standing is too rigid,[87] its view of mootness has become decidedly flexible.[88] Particularly in the class action context, the Court has been reluctant to declare cases moot once the wheels of multi-party litigation have been set in motion. In *Sosna v. Iowa*,[89] for instance, the plaintiff filed a class action suit challenging an Iowa law that prohibited residents

86. *See id.* at 275–76.

87. *See generally* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002) (arguing that the standing doctrine harms the less privileged); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986) (stating that the Court's private right approach to standing contradicts the history and understanding of Article III); William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (arguing that standing should be a "question on the merits of plaintiff's claim" rather than a preliminary jurisdictional formula); Sunstein, *supra* note 6 (arguing that the "injury in fact" standing requirement is a misinterpretation of the Constitution); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988) (arguing that the Court's injury analysis for standing purposes leads to inconsistent results and little guidance for lower courts); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977) (arguing that decisions on questions of standing are concealed decisions on the merits of the underlying constitutional claim).

88. *See* United States Parole Comm'n v. Geraghty, 445 U.S. 388, 400 (1980) (noting "the flexible character of the Art. III mootness doctrine"); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 67 (14th ed. 2001) ("[T]he Court has recurrently relaxed the mootness barrier and found a number of exceptions to it . . . .").

89. 419 U.S. 393 (1975).

from obtaining a divorce in an Iowa court until they had lived in the state for one year. The district court ruled in favor of the state, and while the case was pending on appeal, the plaintiff fulfilled the one-year residency requirement and obtained a divorce.[90] But the Court declined to dismiss the case as moot. As long as the class representative had standing when the suit was brought and there were members of a properly certified class whose claims were still live, the Court held, the case remained live.[91] The Court extended this ruling in *United States Parole Commission v. Geraghty*,[92] holding that a plaintiff who files a class action suit may even appeal the denial of class certification after the plaintiff's own claims have become moot.[93]

The Court has also dispensed with the requirement of a live dispute in cases involving an issue that is capable of repetition yet evading review. Although the Court first articulated this exception to the mootness doctrine in 1911,[94] it was rarely invoked until the late 1960s, since which time it has been cited frequently by the Court.[95] Moreover, the exception has at times threatened to swallow the rule. In the Court's formal definition, a case is moot unless there is "a reasonable expectation or a demonstrated probability that the same controversy will recur involving the *same* complaining party."[96] Yet in several cases, the Court has applied the exception without any evidence that the same plaintiff would be subjected to the same action again.[97] Chief Justice Rehnquist has urged the Court to go

90. *See id.* at 397–98.

91. *See id.* at 401; *see also* Franks v. Bowman Transp. Co., 424 U.S. 747, 752–57 (1976) (allowing plaintiff to continue to represent class in discrimination suit even after it became clear that plaintiff did not have a valid discrimination claim of his own); Gerstein v. Pugh, 420 U.S. 103, 110–11 n.11 (1975) (finding class action suit challenging pretrial detention practices not moot even though named plaintiff was no longer in pretrial detention).

92. 445 U.S. 388 (1980).

93. *See id.* at 404; *see also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 (1980) (allowing plaintiffs to appeal denial of class certification even after settling claims with defendant).

94. *See* S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911).

95. According to a Westlaw search of "capable of repetition yet evading review" conducted on August 10, 2004, the Court did not cite the exception from 1911 until 1968 in *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968). Since *Carroll*, it has cited the exception in sixty-four cases. It is possible that the Court has relied on the doctrine in fewer cases since it may have cited the doctrine in some cases without applying it. The Court may also have applied the doctrine in some cases without using the term "capable of repetition yet evading review."

96. *See, e.g.*, Murphy v. Hunt, 455 U.S. 478, 482 (1982) (emphasis added) (internal quotations omitted); Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam).

97. *See* Honig v. Doe, 484 U.S. 305, 317–23 (1988) (holding case not moot despite absence of evidence that disabled student would: (a) seek benefits under federal law; (b)

even further, suggesting an exception for cases that become moot after the Court grants certiorari or notes probable jurisdiction. Citing the "unique and valuable ability of this Court to decide a case" and the "unique resources . . . [that] are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented," Rehnquist argues that the Court should "abandon the doctrine of mootness altogether in cases which this Court has decided to review . . . ."[98]

As with my discussion of the Court's certiorari discretion, the point here is not to criticize the Court's approach. To the contrary, the mootness exceptions carved out by the Court seem sensible in light of the difficulties presented by multi-party litigation and the fleeting nature of some injuries.[99] But the weakening of the mootness doctrine highlights a willingness by the Court to relax constraints on its jurisdiction in the interest of resolving larger disputes and answering important legal questions. And in that regard, it provides important context for the rise of unnecessary constitutional rulings.

4. Diminished Deference to Congress

The final way in which the Court has asserted its supremacy is in the diminished deference it has shown to congressional exercises of power. For more than fifty years after the New Deal, the Court gave Congress nearly unlimited latitude to define the scope of its power under the Commerce Clause.[100] As long as Congress had a rational basis for concluding that a regulated activity affected interstate commerce, the Court made clear that it would respect that judgment and not impose its own view of the matter.[101] In the past decade,

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engage in same misconduct that subjected him to unilateral change of placement; and (c) be unilaterally moved by different school district than the one that precipitated suit); Roe v. Wade, 410 U.S. 113, 125 (1973) (finding case not moot because plaintiff could become pregnant again and might wish to exercise her right to an abortion); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (accepting jurisdiction over plaintiff's challenge to voting law's one-year residency requirement even though plaintiff was eligible to vote by the time the case reached the Supreme Court).

98. *Honig*, 484 U.S. at 332 (Rehnquist, C.J., concurring).

99. *See* CHEMERINSKY, *supra* note 40, § 2.5.5, at 142–43.

100. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

101. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276–83 (1981) (upholding Surface Mining Act); Perez v. United States, 402 U.S. 146, 155–57 (1971) (holding Congress has power to control local loan sharking under the Commerce Clause); Katzenbach v. McClung, 379 U.S. 294, 299–302 (1964) (upholding Civil Rights Act of 1964 as applied to restaurants); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252–62 (1964) (upholding Civil Rights Act of 1964 as applied to a hotel).

however, the Court has reformulated its Commerce Clause jurisprudence, holding that Congress may regulate only *commercial* or *economic* activities that have a *substantial* affect on interstate commerce.[102] The Court also has made clear that it will no longer defer to Congress's judgment that a particular activity substantially affects interstate commerce, but will instead scrutinize the evidence supporting that judgment on its own.[103]

An even more striking example of the Court's diminished deference to Congress can be seen in cases involving Section 5 of the Fourteenth Amendment, which gives Congress "power to enforce, by appropriate legislation, the provisions of this article."[104] Because Section 5 gives Congress enforcement power under the Fourteenth Amendment, scholars and judges have long argued that Congress has a special role to play in defining the Amendment's substantive protections.[105] And for a time, at least, the Court agreed. In *Katzenbach v. Morgan*,[106] the Court held that it would not second-guess congressional judgments about the appropriateness of legislation under Section 5.[107] "It is not for us to review the

102. *See* United States v. Morrison, 529 U.S. 598, 611 (2000) ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."); United States v. Lopez, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). Congress may also regulate the channels or instrumentalities of interstate commerce. *See id.* at 558.

103. *See Morrison*, 529 U.S. at 614–19. In *Morrison*, the record showed that Congress held four years of hearings on the relationship between violence against women and interstate commerce. Those hearings included testimony from physicians, law professors, survivors of rape and domestic violence, representatives of state law enforcement and private business, and reports on gender bias from task forces in twenty-one states. This "mountain of data," as Justice Souter described it, resulted in eight separate reports issued by Congress and far outweighed the evidence compiled by Congress in passing the Civil Rights Act of 1964. *See id.* at 628–31, 635. (Souter, J., dissenting). Nonetheless, the Court rejected the findings because they were based "on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *See id.* at 615.

104. U.S. CONST. amend. XIV, § 5.

105. *See* Kimberly E. Dean, *In Light of the Evil Presented: What Kind of Prophylactic Anti-Discrimination Legislation Can Congress Enact After* Garrett*?*, 43 B.C. L. REV. 697, 702 (2002) (arguing that the "Amendment's drafters . . . gave Congress, not the Court, the primary role in securing the Amendment's protections"); Earl Warren, *Fourteenth Amendment: Retrospect and Prospect*, *in* THE FOURTEENTH AMENDMENT 212, 216 (Bernard Schwartz ed., 1970). Former Chief Justice Earl Warren wrote: "[Section 5] was a rather clear mandate to Congress to undertake the task of defining and securing the rights guaranteed . . . by the amendment." *Id.*

106. 384 U.S. 641 (1966).

107. *Id.* at 649–58.

congressional resolution of these factors," the Court stated.[108] "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[109] But the Rehnquist Court has held that Congress has no more interpretive authority in this context than in cases involving the Commerce Clause. In *City of Boerne v. Flores*,[110] the Court struck down an attempt by Congress to provide greater protection under the Free Exercise Clause than the Court itself had provided in an earlier case.[111] According to the Court, Section 5 only gives Congress "the power 'to enforce' " the substantive provisions of the Fourteenth Amendment, "not the power to determine what constitutes a constitutional violation."[112]

The Court has expanded on *Boerne* in cases involving congressional attempts to abrogate state sovereign immunity under Section 5. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[113] the Court held that Congress exceeded its power under Section 5 when it authorized plaintiffs to sue states in federal court for patent infringement.[114] The Court relied heavily on the lack of evidence in the legislative record that patent infringements by the states violated the Fourteenth Amendment or had "become a problem of national import."[115] But even where Congress has offered substantial evidence to support its actions, the Court has shown little deference. In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that Congress did not validly abrogate state sovereign immunity under the Americans with Disabilities Act despite a legislative record that included evidence of "massive, society-wide discrimination" against the disabled.[116] That record was the result of hearings in every state attended by more than 30,000 people, as well as census data, national

108. *Id.* at 653.

109. *Id.*

110. 521 U.S. 507 (1997).

111. *Id.* at 512. The earlier case was *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that generally applicable laws that incidentally burden the free exercise of religion are not subject to heightened scrutiny. *Id.* at 883–86. *Boerne* involved the Religious Freedom Restoration Act, which prohibited the government from substantially burdening the free exercise of religion unless the burden was narrowly tailored to further a compelling governmental interest. *Boerne*, 521 U.S. at 515–16.

112. 521 U.S. at 519.

113. 527 U.S. 627 (1999).

114. *Id.* at 630.

115. *Id.* at 641 ("The Senate Report . . . contains no evidence that unremedied patent infringement by States had become a problem of national import.").

116. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 377 (2001) (Breyer, J., dissenting) (quoting testimony of Justin Dart, chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities, S. REP. NO. 101-116, at 8–9 (1989)).

polls, and other studies.[117] According to the Court, however, the record was inadequate because it did not suggest a clear pattern of unconstitutional discrimination on the part of the states that was significant enough to justify an abrogation of state sovereign immunity.[118]

What does the Court's diminished deference to Congress have to do with the rise of unnecessary constitutional rulings? Like the political question doctrine, the concept of deference is based on a belief that judicial review should be exercised cautiously and that the other branches of government have a role to play in constitutional interpretation.[119] Deference derives from an acknowledgement that the Court may not have all the answers and therefore should not decide all the questions. This same acknowledgment underlies the principle that courts should not decide every constitutional question that comes before them, but should resolve only those necessary to the outcome of a case or controversy. To abandon deference, therefore, is to reject the very premise of the avoidance principle. To put it another way, a court that is unwilling to share interpretive authority with Congress is unlikely to share interpretive authority with later courts by deferring some questions for another day.

In sum, the rise of unnecessary constitutional rulings is not an isolated development. In its shift to a discretionary docket, its weakening of the political question and mootness doctrines, and in its diminished deference to congressional judgments, the Court has embraced an expansive role for the federal judiciary in which unnecessary constitutional rulings are merely par for the course.

B. Doctrinal Explanations

The trend toward judicial supremacy is only part of the

117. *See id.* at 377–78 (Breyer, J., dissenting).

118. *See id.* at 357 ("[E]ven if it were to be determined that each incident [in the record] upon fuller examination showed unconstitutional action on the part of the States, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which [section] 5 legislation must be based."). The Court also rejected Congress's effort to abrogate state sovereign immunity under Section 5 in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 67 (2000). Although the Court has upheld attempts at abrogation in two recent cases, *see* Tennessee v. Lane, 124 S. Ct. 1978, 1983–84 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003), the trend is still toward limiting congressional power under Section 5.

119. *See* Barkow, *supra* note 46, at 319–23 (arguing that there exists "a spectrum of deference that recognizes that the Constitution delegates authority to the political branches to different degrees, and that some of those delegations permit the political branches to give substantive meaning to the constitutional provisions in the exercise of their discretion").

explanation, though. The rise of unnecessary constitutional rulings is also the result of considerations specific to each of the doctrinal areas in which the Court has authorized such rulings. In this Section, I describe the evolution of these doctrines and explain how the Court has departed from the principle of constitutional avoidance in each. I also argue that although there are differences in the evolution of these doctrines, there is one theme common to all. In each area in which the Court has authorized unnecessary constitutional rulings, earlier developments limited the opportunities for federal courts to engage in constitutional interpretation. It is unclear the extent to which this has motivated the Court, and I am hesitant to speculate too much about the unstated reasons behind Court decisions. But given the trend toward judicial supremacy, it is plausible to view the Court's embrace of unnecessary constitutional rulings, at least in part, as an effort to preserve opportunities for federal court interpretation of the Constitution.

1. Qualified Immunity

The doctrine of official immunity has its roots in the common law, which provided absolute immunity for legislators and judges and limited, or qualified, immunity for many executive officials.[120] The doctrine was initially a defense only to common law torts such as false arrest and malicious prosecution. In 1951, however, the Supreme Court held that legislators could invoke absolute immunity as a defense to constitutional torts under 42 U.S.C. § 1983.[121] The decision had limited significance at the time; in the first eighty years after passage of the Civil Rights Acts, only a few lawsuits were brought under § 1983.[122] But when the Court expanded the scope of § 1983 in *Monroe v. Pape*,[123] interpreting the words "under color of state law" to include unauthorized conduct by public officials,[124] the decision took on new importance.[125] Facing a wave of lawsuits under § 1983,

120. *See* Pierson v. Ray, 386 U.S. 547, 553–54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . ."); *id.* at 555 (discussing the limited immunity of police officers under the common law); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (Black, J., concurring) (referring to the "long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities").

121. *See Tenney*, 341 U.S. at 376.

122. *See* PETER W. LOW & JOHN CALVIN JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 11–12 (2d ed. 1994).

123. 365 U.S. 167 (1961).

124. *Id.* at 183–87.

125. The upshot of *Monroe v. Pape* was that an officer who acted outside the scope of

public officials turned to immunity as a way to avoid liability. And the Court obliged.

In the 1967 case of *Pierson v. Ray*,[126] the Court held that judges are absolutely immune from suit under § 1983 for acts committed within their judicial jurisdiction.[127] The Court later extended this holding to cover prosecutors and the President.[128] Also in *Pierson*, the Court held that although police officers do not have absolute immunity, they do enjoy qualified immunity under § 1983 for arrests made in good faith and with probable cause.[129] "[I]f the jury found that the officers reasonably believed in good faith that the arrest was constitutional," the Court wrote, "then a verdict for the officers would follow even though the arrest was in fact unconstitutional."[130]

As articulated in *Pierson* and subsequent cases, the qualified immunity standard included both a subjective and objective test.[131] The subjective test was whether the official acted in good faith or with "the malicious intention to cause a deprivation of constitutional rights or other injury."[132] The objective test was whether the official violated "clearly established constitutional rights" of which he "reasonably should have known."[133] If the official failed either the subjective or objective test, he was not immune from liability.[134]

Because the subjective test depended upon evidence about the official's state of mind, the issue of qualified immunity usually was not resolved until after the official had testified at trial, or at least in a

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his duties or who departed from state law could be sued under § 1983. Had the dissent prevailed in *Monroe*, § 1983 would have applied only to officers who violated federal rights while acting within the bounds of state law. Officers who violated federal rights while departing from state law would have been subject to suit only under state law.

126. 386 U.S. 547 (1967).

127. *Id.* at 554.

128. *See* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that the president has absolute immunity); Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (holding that prosecutors have absolute immunity).

129. *Pierson*, 386 U.S. at 557.

130. *Id.*

131. Wood v. Strickland, 420 U.S. 308, 321 (1975) ("[T]he appropriate standard necessarily contains elements of both [an objective and subjective test].").

132. *Id.* at 322; *see also* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.").

133. *See Wood*, 420 U.S. at 322.

134. *See id.* (holding that a school board member "is not immune from liability . . . if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights").

deposition.[135] This had two consequences. First, it meant that before courts decided the issue of qualified immunity, they frequently were required to decide the underlying constitutional question on a motion to dismiss. For example, a defendant might argue that the plaintiff failed to state a claim because, even if all the allegations in the complaint were true, the constitutional right asserted by the plaintiff did not exist.[136] Second, the subjective test meant that even if a defendant ultimately was granted qualified immunity, he would still have to spend time and money defending the suit at least until the end of discovery.

The Court confronted this second consequence in *Harlow v. Fitzgerald*.[137] There, the Court eliminated the subjective aspect of the doctrine so that qualified immunity could be granted earlier in the litigation.[138] The new standard, the Court held, was purely objective: whether the officer violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[139] As the Court later explained, the *Harlow* decision "completely reformulated qualified immunity along principles not at all embodied in the common law."[140]

Harlow also had implications for the first consequence. Because qualified immunity now turned solely on whether the right was "clearly established," and because this is a legal question that can be answered on the pleadings alone, *Harlow* implied that in cases in which the defendant had qualified immunity, courts would no longer have to decide the underlying constitutional issue; they could simply rule that the right was not clearly established. The opinion in *Harlow* was ambiguous on this point, however. "On summary judgment," the Court stated, "the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred."[141]

The Court's effort to strengthen qualified immunity continued

135. *See, e.g.*, DeVasto v. Faherty, 658 F.2d 859, 865–66 (1st Cir. 1981) (holding that issue of good faith can only be decided on basis of official's trial or deposition testimony).

136. *See, e.g.*, Evans v. Dillahunty, 662 F.2d 522, 527 (8th Cir. 1981) (reversing district court's dismissal of plaintiff's complaint for failure to state a cause of action); Harris v. City of Roseburg, 664 F.2d 1121, 1136 (9th Cir. 1981) (reversing district court's decision on constitutional issue, but affirming grant of summary judgment to defendant on qualified immunity grounds); Street v. Cherba, 662 F.2d 1037, 1040 (4th Cir. 1981) (reaching the constitutional issue, but holding that defendants had qualified immunity).

137. 457 U.S. 800 (1982).

138. *Id.* at 818.

139. *Id.*

140. Anderson v. Creighton, 483 U.S. 635, 645 (1987).

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

three years later in *Mitchell v. Forsythe*.[142] The issue there was whether a district court's denial of qualified immunity could be immediately appealed under the collateral order doctrine.[143] The defendants argued that if they could not immediately appeal the denial, one of the primary benefits of qualified immunity—the avoidance of litigation altogether—would be lost.[144] The Court agreed, holding that qualified immunity is "*immunity from suit* rather than a mere defense to liability."[145]

In reaching this decision, the Court appeared to back away from its suggestion in *Harlow* that courts could decide not only whether the right asserted by the plaintiff was clearly established but also whether the right existed at all. One factor in determining whether a lower court decision can be immediately appealed is whether the decision involves a "claim of right separable from, and collateral to, rights asserted in the action."[146] Applying this factor to qualified immunity, the Court concluded that a "claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated."[147] Why? Because an "appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, *nor even determine whether the plaintiff's allegations actually state a claim*."[148] Rather, all the court need determine is "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions."[149]

Combined, *Mitchell* and *Harlow* significantly curtailed the extent to which lower courts would decide constitutional questions in qualified immunity cases. Whereas lower courts had once frequently been required to decide the underlying constitutional question before

142. 472 U.S. 511 (1985).

143. *Id.* at 518–19.

144. *Id.* at 526.

145. *Id.*

146. *Id.* at 527 (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

147. *Id.* at 527–28.

148. *Id.* at 528 (emphasis added).

149. *Id.* Not all the justices agreed with this assertion. In dissent, Justice Brennan argued that although the qualified immunity question is not identical to the underlying constitutional question in a case, "the two are quite closely related." *Id.* at 545 (Brennan, J., dissenting). Moreover, Brennan argued, "a trial court seeking to answer either question would refer to the same or similar cases and statutes, would consult the same treatises and secondary materials, and would undertake a rather similar course of reasoning." *Id.* Brennan is correct to a certain extent. But as I will argue in Part II.C.1, the analysis of the qualified immunity question is much more limited than the analysis of the underlying constitutional question.

resolving a claim of qualified immunity, they could now resolve the qualified immunity claim much earlier in the case. In addition, although the Supreme Court had technically left lower courts free to decide the constitutional question at the same time they resolved the qualified immunity claim, it had strongly signaled that doing so was unnecessary. Because the two questions are "conceptually distinct," the Court had stated, a lower court could skip the constitutional issue and go straight to qualified immunity.[150]

In light of this signal, it is not surprising that many courts did just that. In the decade following *Mitchell*, the vast majority of circuit courts bypassed the underlying constitutional question and proceeded directly to the issue of qualified immunity.[151] In doing so, many cited *Mitchell*'s statement that a court reviewing a qualified immunity claim need not "determine whether the plaintiff's allegations actually state a claim."[152]

One might have thought the Supreme Court would be gratified by this development. Lower courts were following its mandate to resolve qualified immunity claims as soon as possible. They were also exercising admirable restraint by declining to decide constitutional questions unnecessarily. But apparently the Court was not pleased, for beginning in 1991 it sent a different message to lower courts. In *Siegert v. Gilley*,[153] the plaintiff appealed the dismissal of his complaint on qualified immunity grounds, arguing that the lower court had incorrectly applied a heightened pleading standard.[154] The Supreme Court did not address this issue, however. Instead, it ruled that the plaintiff's claim should have been dismissed because "[h]is allegations, even if accepted as true, did not state a claim for violation of any rights secured to him under the United States Constitution."[155] As was common at the time, the lower court had skipped this question. But according to Chief Justice Rehnquist's majority

150. *See Mitchell*, 472 U.S. at 527–28.

151. *See* Hutton v. Strickland, 919 F.2d 1531, 1536 (11th Cir. 1990); Pachaly v. City of Lynchburg, 897 F.2d 723, 727 (4th Cir. 1990); Geter v. Fortenberry, 882 F.2d 167, 169 (5th Cir. 1989); Lum v. Jensen, 876 F.2d 1385, 1386–87 (9th Cir. 1989); Runge v. Dove, 857 F.2d 469, 471 (8th Cir. 1988); Wrigley v. Greanias, 842 F.2d 955, 960 (7th Cir. 1988); Cheveras Pacheco v. Rivera Gonzalez, 809 F.2d 125, 127 (1st Cir. 1987); Hynson v. City of Chester, 827 F.2d 932, 934 (3rd Cir. 1987); Huron Valley Hosp. v. City of Pontiac, 792 F.2d 563, 568 (6th Cir. 1986). According to one count, appellate courts bypassed the constitutional issue in about sixty-five percent of qualified immunity cases. *See* Greabe, *supra* note 36, at 410 n.35.

152. *See, e.g.*, *Pachaly*, 897 F.2d at 727; *Hynson*, 827 F.2d at 934.

153. 500 U.S. 226 (1991).

154. *Id.* at 227.

155. *Id.*

opinion, that was a mistake: "[T]he Court of Appeals should not have assumed, without deciding, this preliminary issue in this case."[156]

As support for this ruling, Rehnquist quoted *Harlow*'s statement that a judge considering a qualified immunity claim "appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred."[157] This statement, of course, suggested only that lower courts were *permitted* to decide the underlying constitutional question, not that they were *required* to. So Rehnquist offered an alternative argument:

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.[158]

Rehnquist's argument is flawed in two respects. First, deciding whether the plaintiff has asserted the violation of a constitutional right is not a necessary concomitant to deciding whether the right asserted by the plaintiff is clearly established. As I explain more fully in Part II.C.1, these two inquiries overlap somewhat, but are not identical. Deciding whether a right was clearly established at a given time involves only an analysis of precedent as of that date, while deciding whether a right exists at all involves other considerations—such as whether the right is supported by constitutional text, structure, history, or analogies to other rights. The upshot is that although a right cannot be clearly established unless it exists, it can exist without being clearly established. It is possible that even though no court has ever articulated the right, a full constitutional analysis would reveal its existence. Thus, deciding whether the right exists is in no way "a necessary concomitant" to deciding whether the right is clearly established. The latter determination can be made entirely independent of the former.

The second flaw in Rehnquist's argument is his claim that deciding whether the right exists at all "permits courts expeditiously

156. *Id.* at 232.
157. *Id.* at 231 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
158. *Id.* at 232.

to weed out suits" without requiring a defendant to engage in needless litigation. It is true that *Harlow*'s elimination of the subjective component of qualified immunity made it easier for courts to dismiss cases early in litigation. Defendants also benefited from *Mitchell*'s holding that a denial of qualified immunity is immediately appealable. But the Court's instruction that lower courts should decide the underlying constitutional question at the same time they decide the qualified immunity question does not speed up litigation. Both questions are purely legal and can be answered on the basis of the pleadings alone. Moreover, answering the former question does not provide any additional benefit to defendants. If the court grants qualified immunity, the defendant is unaffected by a decision that the right does not exist. And if the court denies qualified immunity, it has decided that the right is clearly established, which necessarily means that the right exists. Either way, a separate decision on whether the right exists makes no difference to the defendant.

If Rehnquist's argument does not provide a plausible explanation for the decision in *Siegert*, what does? In subsequent cases, other members of the Court have suggested that deciding whether the right exists helps to settle rules of conduct and to establish rights that can later be the basis for suits under § 1983.[159] But the Court did not mention either of these rationales in *Siegert*, and in light of Rehnquist's general reluctance to recognize new constitutional rights,[160] it seems unlikely that he was motivated by the latter consideration. In fact, given the outcome in *Siegert*, one might argue

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159. *See infra* note 168 and accompanying text. Writing for the majority in *County of Sacramento v. Lewis*, Justice Souter explained:

> [I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional.

County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

160. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586–605 (2003) (joining Justice Scalia's dissent from majority opinion striking down prohibition on same-sex sodomy); DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 191 (1989) (writing for the Court, holding that state's failure to protect a child against parental abuse does not violate the due process clause); Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997) (writing for the Court, holding that asserted right to assisted suicide is not a fundamental liberty interest protected by the due process clause); John Denvir, *Justice Brennan, Justice Rehnquist, and Free Speech*, 80 NW. U. L. REV. 285, 293–99 (1985); John Denvir, *Justice Rehnquist and Constitutional Interpretation*, 34 HASTINGS. L.J. 1011, 1021–25 (1983); Larry Reibstein, *Whose Right Is It?*, NEWSWEEK, Jan. 20, 1997, at 36 ("[T]he Rehnquist Court has never been eager to create new constitutional rights . . . .").

that Rehnquist reached out to decide the constitutional issue for precisely the opposite reason: to deny the existence of the right before it could take root. Some of the language in his opinion supports this view. In the passage quoted above, Rehnquist states that the underlying constitutional question should be decided so the courts can "weed out" suits that fail to state a claim. Is it a stretch to think that Rehnquist was motivated primarily by a desire to *weed out* claims before they *take root*? For those familiar with his record, the question answers itself.[161]

Even lower courts seemed to sense the illogic of Rehnquist's opinion. In the years after *Siegert*, many continued to skip the underlying constitutional question and proceed straight to the issue of qualified immunity.[162] Some explicitly rejected *Siegert*'s instruction, holding that courts should reach the constitutional issue only if: (1) it is clear that the right does not exist; and (2) the plaintiff's inability to sue for injunctive relief would prevent the issue from ever being resolved (qualified immunity is only a defense to suits for money damages).[163] For the former conclusion, they found support from Justice Stevens, who wrote in a concurring opinion in a subsequent case that a court should reach the underlying constitutional issue only if it could be easily resolved.[164] But where the issue was complicated, Stevens argued, courts should proceed straight to the qualified

161. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 320–26 (3d ed. 1992) (reviewing Rehnquist's jurisprudence as associate justice). In Part III.B, I describe more fully how the Court often reaches out to deny the existence of constitutional rights when doing so is not necessary to resolve the case before it.

162. *See, e.g.*, Powers v. CSX Transp., Inc., 105 F. Supp. 2d 1295, 1308 (S.D. Ala. 2000) ("[T]he Court concludes that it is appropriate to ... address first whether the constitutional and statutory rights asserted by the plaintiff were clearly established ...."); Shepherd v. Sanchez, No. 96-9012, 2000 WL 1010829, *4–5 (S.D.N.Y. 2000) (stating that it would "consider the qualified immunity question without reaching the underlying issue of whether plaintiff has a constitutional right not to have his dreadlocks touched"); Does v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554, 576 (M.D. Ala. 1996) (stating that "determining whether the plaintiffs have first asserted a constitutional violation would be a futile exercise. The defendants, in their official capacities, are without a doubt entitled to qualified immunity ...."); Bapat v. Conn. Dep't of Health Servs., 815 F. Supp. 525, 535 (D. Conn. 1992) ("The threshold issue raised by the defendants' claim of qualified immunity is whether the right alleged to have been violated was 'clearly established.' ").

163. *See* Mollica v. Volker, 229 F.3d 366, 373–74 (2d Cir. 2000); Horne v. Coughlin, 178 F.3d 603, 605–06 (2d Cir. 1999), *amended by* Horne v. Coughlin, 191 F.3d 244, 249 n.5 (1999); Santamorena v. Ga. Military Coll., 147 F.3d 1337, 1343–44 (11th Cir. 1998); Spivey v. Elliott, 41 F.3d 1497, 1498–99 (11th Cir. 1995).

164. *See* County of Sacramento v. Lewis, 523 U.S. 833, 859 (1998) (Stevens, J., concurring).

immunity question.[165]

The Supreme Court put an end to this uncertainty in the 2001 case of *Saucier v. Katz*.[166] In his majority opinion, Justice Kennedy wrote that a court required to rule upon a qualified immunity claim "must consider" as a threshold issue whether the plaintiff has asserted the violation of a constitutional right.[167] Only if the answer is yes, Kennedy stated, should the lower court proceed to the qualified immunity question. In explaining this approach, Kennedy wrote:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.[168]

Two things are worth noting about Kennedy's opinion. First, when Chief Justice Rehnquist initially instructed lower courts to decide the underlying constitutional issue in *Siegert*, Kennedy had objected. "I do not . . . agree that the Court of Appeals 'should not have assumed, without deciding,' this issue," he wrote in a concurrence.[169] "[I]t seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first."[170] Kennedy also noted that the constitutional issue in *Siegert* was "itself one of some difficulty," adding that "it is unwise to resolve the point without the benefit of a decision by the Court of Appeals and full briefing and argument here."[171]

Second, Kennedy argues in *Saucier* that unless a lower court decides the constitutional issue in a case, "the law might be deprived

165. *Id.* ("When, however, the question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions.").

166. 533 U.S. 194 (2001).

167. *See id.* at 201.

168. *Id.*

169. Siegert v. Gilley, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring).

170. *Id.*

171. *Id.*

of this explanation."[172] This is true, but beside the point. Whenever the Court avoids a constitutional question, the law is deprived of further elaboration and explanation. That is the point of the avoidance principle: to put off the elaboration of important principles of law. Thus, Kennedy cannot mean that the avoidance principle should be abandoned whenever its application would deprive the law of further elaboration. So what does Kennedy mean and why has the Court instructed lower courts to always decide the underlying constitutional issue in qualified immunity cases?

One possibility is that the Justices recognize the inherent tension between the qualified immunity doctrine and the avoidance principle. Plaintiffs cannot overcome qualified immunity unless the right they assert is clearly established. Yet if courts always avoid the underlying constitutional issues in qualified immunity cases, they will have fewer opportunities to establish clearly new constitutional rights.[173] This Catch-22 has been highlighted by several scholars[174] and likely explains why the more liberal members of the Court—and perhaps even Kennedy—have embraced the *Siegert/Saucier* approach.[175]

But for the Court's more conservative members, this explanation is simply not credible. They have never expressed concern that the avoidance of constitutional issues in qualified immunity cases creates a Catch-22 for civil rights plaintiffs. Nor are the Court's conservative members particularly supportive of the creation of new constitutional rights.[176] To the contrary, they generally object to the creation of new constitutional rights as a form of judicial activism. So what explains their support of the new approach?

One possible answer is suggested by the arc of the Court's qualified immunity doctrine. Prior to *Harlow* and *Mitchell*, federal courts frequently decided constitutional questions in § 1983 cases. But after those two decisions, courts largely limited themselves to the sub-constitutional question of whether the right was clearly established. The conservatives on the Court undoubtedly support the expansion of qualified immunity under *Harlow* and *Mitchell*.[177] But

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

173. I say "fewer opportunities" because courts would still be able to establish new constitutional civil rights in criminal cases and in civil rights suits seeking injunctive or declaratory relief.

174. *See* Greabe, *supra* note 36, at 405; Kamin, *supra* note 36, at 45–50.

175. Indeed, this is why liberal scholars have supported the *Siegert/Saucier* approach. *See* discussion in Part III.B.

176. *See supra* note 160.

177. Chief Justice Rehnquist, for instance, has argued that absolute immunity should be extended to high-ranking federal executive officials acting within the outer bounds of

given the Court's embrace of the norm declaration model, they may be troubled by the extent to which those decisions have limited the role of the federal judiciary. If so, their embrace of unnecessary constitutional rulings may be, at least in part, an effort to remedy the situation.

Admittedly, there is no direct evidence to support this theory. Instead, it is an inference from the evolution of qualified immunity and from the Court's broader march toward judicial supremacy. But it is also consistent with developments in the other areas in which the Court has authorized unnecessary constitutional rulings.

2. Habeas Corpus

The history of habeas corpus doctrine is closely tied to the Court's evolving view of retroactivity. During the Warren era, the Court initially held that new rules of constitutional criminal procedure would only be applied in the cases in which they were announced and would not automatically be applied retroactively.[178] This holding resulted from an unusual alliance of conservative and liberal justices. Conservatives endorsed non-retroactivity as a way to limit the impact of the Warren Court's "criminal procedure revolution," while liberals supported it on the assumption that many of the reforms they desired would be unpalatable if applied retroactively.[179]

This alliance gradually broke down, and the Court articulated a new approach to retroactivity. First, in *Griffith v. Kentucky*,[180] it held that new rules of criminal procedure would always apply retroactively

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their authority. *See* Butz v. Economou, 438 U.S. 478, 517–30 (1978) (Rehnquist, J., dissenting) (claiming that the lack of absolute immunity for executive officials will disrupt government); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 822 (1982) (Rehnquist, J., concurring) (arguing that the denial of absolute immunity to executive officials in *Butz v. Economou* should be re-examined).

178. Writing for the majority in *Linkletter v. Walker*, Justice Clark explained:

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Linkletter v. Walker, 381 U.S. 618, 629 (1965).

179. *See* Fallon & Meltzer, *supra* note 8, at 1739; Kamin, *supra* note 36, at 29 ("[T]here is certainly reason to suspect that the ability to create rules that would only be applied prospectively encouraged the Warren Court to engage in the reshaping of criminal procedure for which it is so well-known.").

180. 479 U.S. 314 (1987).

to cases on direct review. This meant that as long as a defendant's appeal was still pending, he could rely on any rule announced by the Court, even after his conviction.[181] Second, in *Teague v. Lane*,[182] the Court held that although new rules are retroactive on direct review, they may not be applied to cases on collateral review except under two very limited exceptions.[183] In addition, whereas the Warren and Burger Courts had often announced a new rule and applied it to the case at hand,[184] the plurality in *Teague* stated that a new rule could never be the basis for a successful habeas petition.[185]

In articulating this doctrine, Justice O'Connor's plurality opinion also provided procedural instructions to the lower courts. Because a new rule could never be applied on collateral review, O'Connor wrote, the threshold issue in every habeas case is whether the petitioner's claim relies on a new rule of criminal procedure.[186] If the answer is yes, the court should dismiss the petition outright, without considering the merits of the asserted rule.[187] If the answer is no, the court should proceed to hear the habeas claim.[188] O'Connor justified this approach by reasoning that because a habeas petition may not be granted on the basis of a new rule, any opinion expressed by the court on the merits of the rule would be merely advisory.[189] A majority of the Court adopted Justice O'Connor's procedural approach shortly afterward in *Saffle v. Parks*.[190]

The core of *Teague*'s holding was codified seven years later when Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[191] AEDPA provides that a federal court may grant habeas relief to a state prisoner only if the state court judgment

181. *See id.* at 328.

182. 489 U.S. 288 (1989).

183. *See id.* at 304–05. The two exceptions are for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" and for new rules that require "the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Id.* at 307 (citations and quotations omitted).

184. *See Teague*, 489 U.S. at 299–300 (collecting cases).

185. *See id.* at 299–305.

186. *See id.* at 300–01.

187. *See id.*

188. *See id.*

189. *See id.* at 315–16. As explained in Part II, Justice Stevens objected to this procedural approach.

190. 494 U.S. 484, 487–88 (1990). The Court also followed Justice O'Connor's approach in *Gray v. Netherland*, 518 U.S. 152, 166–70 (1996) (rejecting petitioner's habeas claim because it would require the adoption of a new rule).

191. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court.[192] Like *Teague*, AEDPA precludes federal courts from granting habeas relief on the basis of new rules of criminal procedure. But AEDPA adds a twist, declaring that only a rule established by the Supreme Court can serve as the basis for a successful habeas petition. Rules recognized by lower federal courts but not yet recognized by the Supreme Court are, for habeas purposes at least, still "new."

The combined effect of *Teague* and AEDPA was largely to exclude lower federal courts from the business of developing rules of constitutional criminal procedure.[193] Although lower courts are permitted to establish new rules in federal criminal cases, under AEDPA those rules can never serve as the basis for habeas petitions by state prisoners. Moreover, when a habeas petitioner asserts a new rule of constitutional criminal procedure, *Teague* and *Saffle* instruct courts to dismiss the petition outright, without expressing any view on the merits of the petitioner's claim.

Numerous judges, advocates, and writers have criticized this state of affairs.[194] Because so few habeas petitions ever reach the Supreme Court, critics argue that the law of constitutional criminal procedure will stagnate, leaving state criminal defendants with no recourse to challenge unfair state procedures. Critics also object to the inability of lower federal courts to develop rules of criminal procedure.[195] As

192. 28 U.S.C. § 2254(d)(1) (2000).

193. *See* Kamin, *supra* note 36, at 33 (stating that *Teague* "spared the federal courts an enormous amount of constitutional adjudication").

194. *See, e.g.*, Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371, 373 (1991) (arguing that *Teague* will shift the focus of federal courts away from the merits of habeas litigation and toward procedural issues); Susan Bandes, *Taking Justice to its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453, 2453 (1993) (arguing that "*Teague v. Lane* is a decision which, on many levels, concerns the failure of judges to take responsibility for their decisions"); John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 326 (1990–1991) (concluding that "*Teague* does not measurably contribute to either of the [Court's] proposed goals"); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 823 (1992) (stating that *Teague* redefines the purposes of habeas corpus "in a way that seemingly will require flat-out repudiation to change"); Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 426 (1994) (commenting on "the broader jurisprudential implications of *Teague*'s 'new rule' doctrine," and arguing that "*Teague* threatens conventional jurisprudence"); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2382 (1993) (arguing that *Teague* and subsequent decisions "threaten to establish a general rule of deference to ordinary state judgments on the merits of federal claims").

195. *See* Bandes, *supra* note 194, at 2459 ("*Teague*'s approach to controlling federal judicial access had obvious and intentional consequences for the lower federal courts' ability to participate in the evolution of constitutional standards for state criminal cases.

Article III tribunals, these courts are empowered to "say what the law is."[196] Yet under *Teague* and AEDPA, they are not only forbidden from saying what the law is in habeas cases, but anything they do say cannot form the basis for a habeas petition.[197]

Following the Court's announcement of its two-step process in qualified immunity cases, some lower courts saw an opportunity to correct this situation. In *Van Tran v. Lindsey*,[198] the Ninth Circuit held that when considering habeas petitions from state prisoners, district courts must first determine whether the state court decision was wrong and only then determine whether it was contrary to or an unreasonable application of clearly established federal law. The court acknowledged that any new rule announced by a district court when addressing the merits of a state court decision could never form the basis for a habeas petition. But citing the Supreme Court's qualified immunity cases, it reasoned that this approach would allow federal courts to develop rules of criminal procedure that would at least provide guidance for state judges.[199]

Some circuit courts have criticized *Van Tran*, arguing that the procedure for qualified immunity cases should not be applied in the habeas context.[200] But surprisingly, the Supreme Court has not faulted the Ninth Circuit for ignoring *Teague*'s procedural instructions, despite several opportunities to do so. In *Bell v. Cone*,[201] for instance, the Court considered an appeal from a Sixth Circuit opinion granting a habeas petition for ineffective assistance of counsel.[202] Although several of the briefs described the dispute between the Ninth Circuit and other courts and encouraged the Justices to resolve it, the Court steered clear of the issue in its ruling.[203] The Court did address the issue in the more recent case of

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The rule announced in *Teague* prohibits lower federal courts from such participation."); Friedman, *supra* note 194, at 823 ("*Teague* shuts down the habeas courts. Where once these courts played an active, important role in defining the content of criminal procedure, they now can do little but patrol the perimeters of criminal constitutional law.").

196. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

197. *See* Arkin, *supra* note 194, at 371 (arguing that *Teague* has curtailed the lower federal courts' consideration of the merits in habeas cases); Meyer, *supra* note 194, at 423 (arguing that *Teague* "introduced the sweeping rule that 'new' constitutional law would be neither announced nor applied in federal habeas corpus cases.").

198. 212 F.3d 1143, 1154–55 (9th Cir. 2000).

199. *See id.* at 1155.

200. *See* Bell v. Jarvis, 236 F.3d 149, 161–62 (4th Cir. 2000); Francis v. Stone, 221 F.3d 100, 110 (2d Cir. 2000).

201. 535 U.S. 685 (2002).

202. *Id.* at 688–89.

203. *See* Petition for Writ of Certiorari, Bell v. Cone, 2001 WL 34092010, at *20–23 (Aug. 30, 2001); Brief of Respondent, Bell v. Cone, 2002 WL 405097, at *41 (Mar. 4, 2002).

Lockyer v. Andrade,[204] but its discussion was far from a reaffirmation of *Teague*:

> The Ninth Circuit requires federal habeas courts to review the state court decision de novo before applying the AEDPA standard of review. We disagree with this approach. AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law. In this case, we do not reach the question whether the state court erred and instead focus solely on whether § 2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim.[205]

As a close reading of this paragraph shows, *Andrade* does not state that lower courts are prohibited from reviewing the state court decision de novo before applying the AEDPA standard. Instead, it rejects the Ninth Circuit's holding that lower courts *must* review the state court decision. The Court does note that the only decision that matters under AEDPA is whether the state court decision was "contrary to, or involved an unreasonable application of, clearly established federal law." But it also points out that AEDPA does not "require a federal habeas court to adopt any one methodology" in deciding this question, meaning, presumably, that AEDPA does not preclude federal courts from reviewing the state court decision de novo before applying AEDPA. The Court seems to confirm this meaning in the next sentence when it states, "In this case, we do not reach the question whether the state court erred and instead focus solely on whether § 2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim." This sentence suggests that the Court has merely chosen not to reach the merits of the state court decision in this case. Yet if AEDPA precluded federal courts from reviewing the state court decision de novo, this choice would not be the Court's to make.[206]

The Justices did discuss the issue at oral argument, and a question asked by one of the Justices is revealing: "Don't you think it would be a little coy for us to decide, well, it wasn't an unreasonable application of—of federal law when we, in fact, know that—or believe that it was a correct application of Federal law?" *See* Transcript of Oral Argument, Bell v. Cone, 2002 WL 521361, at *10 (Mar. 25, 2002).

204. 538 U.S. 63 (2003).

205. *Id.* at 71.

206. Since *Andrade*, the Ninth Circuit has abandoned its practice of reviewing the merits of state court decisions before applying the AEDPA standard. *See* Kesser v.

Another sign that the Court has abandoned *Teague*'s procedural approach is its own practice in post-AEDPA cases. In *Weeks v. Angelone*,[207] a state prisoner sentenced to death argued that the trial judge had inadequately responded to a question from the jury about mitigating factors.[208] In considering the prisoner's habeas petition, the Court first analyzed whether the Constitution required the judge to do more than he did.[209] Only after answering no to that question did the Court discuss the relevant standard under AEDPA and conclude that the petitioner was not entitled to habeas relief.[210] Thus, *Weeks* followed the Ninth Circuit's approach of deciding the underlying constitutional question before deciding the habeas issue.

The Court has not explained its neglect of *Teague*'s procedural instructions, and no explanation is readily apparent.[211] One might suggest that because *Teague*'s habeas standard was replaced by AEDPA, *Teague*'s holding on the proper procedural approach is no longer valid. But this seems a stretch. Although AEDPA altered the *Teague* standard, it also validated the entire framework for analyzing habeas cases that *Teague* introduced.[212] It seems unlikely, therefore, that AEDPA overruled those aspects of *Teague* not directly addressed by the statute. The more plausible view is that AEDPA's silence on those aspects reflects Congressional approval of the Court's opinion. Thus, the fact that *Weeks* and *Andrade* post-date AEDPA does not sufficiently explain why the Court has seemingly abandoned *Teague*'s procedural framework.

Cambra, 2004 WL 2903976, at *9 (2004). But at least one Ninth Circuit opinion has recognized that *Andrade* rejects only the circuit's *requirement* that lower courts first decide the constitutional question, but does not *prohibit* them from doing so. *See* Clark v. Murphy, 331 F.3d 1062, 1068–69 (9th Cir. 2003) ("Thus, to the extent *Van Tran* and our subsequent precedent *requires* a two-step consideration of habeas petitions, such precedent has been overruled.").

207. 528 U.S. 225 (2000).

208. *Id.* at 230–31.

209. *See id.* at 234–37.

210. *See id.* at 237.

211. The Court's neglect cannot be explained by the fact that only a plurality of the Court signed on to the procedural instructions in *Teague*. As pointed out above, a majority of the Court later adopted *Teague*'s procedural approach. *See supra* note 190 and accompanying text.

212. *See* Williams v. Taylor, 529 U.S. 362, 380 (2000) ("It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."); CHEMERINSKY, *supra* note 40, § 15.4.1, at 880–81 (explaining that AEDPA "essentially codifies" *Teague*); A. Christopher Bryant, *Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 19 (2002) ("[A]ll nine Justices[] read AEDPA to codify some, but not necessarily all, of the Court's retroactivity jurisprudence.").

In the absence of a clear-cut explanation, it is worthwhile to consider what the evolution of the Court's habeas doctrine reveals. The Court's primary concern in *Teague* was to ensure that federal courts would not overturn state court convictions on collateral review unless the state court had departed from clearly established federal rules.[213] This approach had been advocated by Justice Harlan[214] and fit nicely with the Rehnquist Court's emerging federalism jurisprudence. But *Teague* revived an old dispute about the application of new rules in cases in which they are announced. Under the Warren Court's doctrine of non-retroactivity, when the Court announced a new rule it often applied that rule to the case at hand.[215] The reason for this practice was simple: if the new rule could not be applied to the case at hand, defendants would have no incentive to make novel constitutional arguments.[216] Nevertheless, some members of the Court objected to this practice, arguing that it was unfair for one defendant to receive the benefit of the new rule, while other defendants who were convicted at the same time were barred from invoking the rule because of the doctrine of non-retroactivity.[217]

The Court's embrace of retroactivity in *Griffith v. Kentucky* resolved this problem for cases on direct review; now all defendants whose direct appeals are pending receive the benefit of any new

213. *See* Teague v. Lane, 489 U.S. 288, 306–10 (1989).

214. *See id.* (discussing Justice Harlan's views about the purpose of habeas corpus).

215. *See id.* at 299.

216. *See* Fallon & Meltzer, *supra* note 8, at 1806 (noting that if a court denies "retroactive application to new law decisions on direct review . . . criminal defendants would have no adequate incentive to raise novel claims, and that there would be insufficient opportunities for federal courts to expand the stock of recognized constitutional rights"); Paul J. Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60–61 (1965) (arguing that "[w]hen a new rule of law is given purely prospective effect, it of course does not determine the judgment awarded in the case in which it is announced. It follows that if parties anticipate such a prospective limitation, they will have no stimulus to argue for change in the law.").

217. *See* United States v. Johnson, 457 U.S. 537, 546–47 (1982) (Harlan, J., dissenting) (arguing that "it is the nature of judicial review that precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule' "); Desist v. United States, 394 U.S. 244, 257–58 (1969) (Harlan, J., dissenting) (arguing that "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by the Court at the time the 'new' decision is handed down. Matters of basic principle are at stake."); *see also* DeStafano v. Woods, 392 U.S. 631, 635 n.2 (1968) (Douglas, J., dissenting) ("We see no basis for a distinction between convictions that have become final and cases at various stages of trial and appeal."); Linkletter v. Walker, 381 U.S. 618, 640 (1965) (Black, J., dissenting) ("The Court offers no defense based on any known principle of justice for discriminating against defendants who were similarly convicted.").

rules.[218] But when *Teague* held that new rules could not be applied retroactively to habeas cases, the problem reappeared. This time, however, the Court found a different solution. Instead of permitting courts to apply new rules in the cases in which they were announced—thus leading to inequality among habeas petitioners—the Court held that new rules simply could not be announced in habeas cases.[219] This way, no one would benefit from new rules on collateral review, and there would be no inequality among habeas petitioners.[220]

As explained above, however, this resolution had its own drawbacks, one of which was that it limited the ability of federal courts—including the Supreme Court—to announce new rules of constitutional criminal procedure. AEDPA only made matters worse with its declaration that rules established by lower federal courts are not binding on state courts and cannot serve as the basis for a successful habeas petition. So it was not surprising when the Ninth Circuit seized upon the Supreme Court's qualified immunity cases to declare that lower courts should first address the merits of the petitioner's claim before deciding whether to grant relief under AEDPA. Nor is it entirely surprising that the Court has not rejected this approach outright. Given its growing acceptance of the norm declaration model, it makes sense that the Court would seek to preserve opportunities for both itself and for the lower courts to develop constitutional norms.

3. Fourth Amendment Good Faith Cases

The evolution of the Court's approach to Fourth Amendment good faith cases is much shorter and simpler than the history of habeas corpus and qualified immunity. But the pattern is the same. The Court made an initial decision to relieve state actors from the consequences of their unconstitutional conduct. Then, in order to preserve opportunities for constitutional interpretation by the federal courts, it authorized unnecessary constitutional rulings.

The story here revolves around the Court's decision in *United States v. Leon*.[221] The case grew out of a criminal trial in which the district court suppressed evidence that was obtained with an invalid

218. *See* Griffith v. Kentucky, 479 U.S. 314, 323–24 (1987) (stating that "selective application of new rules violates the principle of treating similarly situated defendants the same").

219. *See* Teague v. Lane, 489 U.S. 288, 315–16 (1989).

220. *See id.*

221. 468 U.S. 897 (1984).

search warrant.[222] Although the district court found that the officers acted in good faith, it ruled that the magistrate should not have issued the warrant because there was no probable cause.[223] The government appealed, arguing that because the officers had relied in good faith on the search warrant, the evidence should be admitted. The Supreme Court agreed. Asserting that the exclusionary rule was designed to deter police misconduct, not errors by magistrates, it held that evidence obtained in an unconstitutional search should not be excluded at trial if the officers reasonably relied in good faith on a search warrant later found invalid.[224]

In announcing this rule, the Court responded to a concern that adoption of the good faith exception would preclude courts from deciding the underlying constitutional issues in search and seizure cases because they could simply skip to the question of good faith. According to the Court, this concern was unfounded:

> Nor are we persuaded that application of a good-faith exception to searches will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state. *There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated....* As cases addressing questions of good-faith immunity under 42 U.S.C. § 1983 and cases involving the harmless-error doctrine make clear, courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases.[225]

Three years later, the Court extended *Leon* in *Illinois v. Krull*,[226] ruling that evidence obtained in an unconstitutional search should not be excluded if the officers reasonably relied on a statute authorizing warrantless searches that was later declared invalid.[227] Once again, the defendant argued that this outcome would eliminate incentives for criminal defendants to challenge searches and would preclude courts from ruling on the constitutionality of police action. And once

222. *Id.* at 901–05.
223. *See id.* at 903–04.
224. *See id.* at 909.
225. *Id.* at 924–25 (emphasis added) (internal citations omitted).
226. 480 U.S. 340 (1987).
227. *See id.* at 349–50.

again, the Court dismissed this concern, citing its statement in *Leon* that application of the good-faith exception would not "preclude review of the constitutionality of the search or seizure" and would not "cause defendants to lose their incentive to litigate meritorious Fourth Amendment claims."[228]

Leon and *Krull* demonstrate that the Court's embrace of unnecessary constitutional rulings can be seen, at least in part, as a response to developments that would otherwise limit the opportunity for federal courts to engage in constitutional interpretation. The Court's decisions in these cases eliminated the need for federal courts to decide the constitutional issue in cases where the officers acted in good faith. Indeed, a court looking to save time would almost certainly decide the issue of good faith first and only address the constitutional issue if necessary. But the Court appears concerned about the inability of federal courts to decide the constitutional issue in these cases. So as it has done in other contexts, the Court authorized lower courts to decide the constitutional issue even when doing so is not necessary to resolve the case.

4. Harmless Error

Harmless error is a relatively recent doctrine. For the first 130 years after the founding, American courts followed the English rule that any error in a criminal trial was grounds for automatic reversal.[229] This rule was based largely on respect for the jury; if appellate courts upheld convictions that resulted from flawed trials, they would usurp the jury's role as the ultimate decider of guilt or innocence.[230] But the rule also had drawbacks. Courts often reversed convictions for minor errors, such as misplaced words in an indictment.[231] Lawyers took advantage of this situation, finding ways to plant errors in the trial record in the event they were forced to appeal.[232]

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228. *Id.* at 353–54 (citing United States v. Leon, 468 U.S. 897, 924–25 & n.25 (1984)).

229. *See* Kamin, *supra* note 36, at 9–10.

230. *See* Donald A. Winslow, Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 CORNELL L. REV. 538, 540 (1979).

231. One of the most egregious examples is *State v. Campbell*, 109 S.W. 706 (Mo. 1908), in which a state appellate court reversed a rape conviction because the indictment alleged that the rape occurred "against the peace and dignity of state" rather than "against the peace and dignity of *the* state." *See id.* at 707–13 (emphasis added); *see also* Williams v. State, 27 Wis. 402, 402–03 (1871) (reversing conviction because indictment read "against the peace of the State of Wisconsin" instead of "against the peace and dignity of the State"); People v. Vice, 21 Cal. 345, 345 (1863) (reversing robbery conviction because the indictment failed to allege that the property stolen did not belong to the defendant).

232. *See* Kotteakos v. United States, 328 U.S. 750, 759 (1946) (describing abuses under the rule of automatic reversal).

Congress responded to this problem in 1919 with legislation that instructed federal appellate courts to give judgment "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."[233] Under this rule, courts would not reverse convictions for non-constitutional errors that were deemed "harmless." But they continued automatically to reverse constitutional errors until 1967. In that year, the Supreme Court held in *Chapman v. California*[234] that the harmless error rule could be applied to the violation of some constitutional rights if a court found that the error was "harmless beyond a reasonable doubt."[235]

Both before and after *Chapman*, appellate courts often used the harmless error rule as a way to avoid deciding difficult questions.[236] The Supreme Court also occasionally took this approach. In *Milton v. Wainwright*,[237] for instance, a habeas petitioner argued that his right to counsel was violated when the jury was told of a confession he made to an undercover police officer posing as a fellow prisoner.[238] But the Court declined to reach the merits of his claim, ruling that any error in the trial was "beyond reasonable doubt, harmless."[239]

Although this practice was relatively uncontroversial, some writers questioned it. "The purpose of the harmless error doctrine is to save the time and effort of retrial," wrote one commentator. "It was not meant to shelter courts from difficult questions of law."[240] Judge Harry Edwards expressed a similar view, arguing that when courts sidestep "an important question of trial error," they offer no

233. Judicial Code of Feb. 26, 1919, ch. 48, § 269 (codified as amended at 28 U.S.C. § 391 (1946)) (repealed 1948). The law is currently codified at 28 U.S.C. § 2111 (2000).

234. 386 U.S. 18 (1967).

235. *Id.* at 24.

236. *See* United States v. Allen, 960 F.2d 1055, 1059 (D.C. Cir. 1992), United States v. Lyman, 592 F.2d 496, 500–02 (9th Cir. 1978); United States v. Johnson, 572 F.2d 227, 235 (9th Cir. 1978); United States v. Mackay, 571 F.2d 376, 384–90 (7th Cir. 1978); United States v. Bynum, 566 F.2d 914, 926 (5th Cir. 1978); Wright v. Estelle, 549 F.2d 971, 974 (5th Cir. 1977); United States v. Jones, 542 F.2d 186, 213 (4th Cir. 1976); United States v. Pravato, 505 F.2d 703, 703–04 (2d Cir. 1974). Courts also occasionally decided the issues in the opposite order. *See* Sanders v. Lane, 861 F.2d 1033, 1039 (7th Cir. 1988); Fleming v. Kemp, 837 F.2d 940, 948 (11th Cir. 1988); Harryman v. Estelle, 616 F.2d 870, 875 (5th Cir. 1980); Arias v. United States, 484 F.2d 577, 578–79 (7th Cir. 1973).

237. 407 U.S. 371 (1972).

238. *Id.* at 372, 378.

239. *Id.*; *see also* Rose v. Clark, 478 U.S. 570, 576 n.5 (1986) (assuming that the court of appeals properly held that jury instructions were unconstitutional, but dismissing the case under harmless error analysis); United States v. Hastings, 461 U.S. 499, 506 n.4 (1983) (granting certiorari only on harmless error issue and declining to reach merits of criminal defendants' claim).

240. *See* Winslow, *supra* note 230, at 542.

guidance to trial courts.[241]

Abruptly, and with little fanfare, the Court also adopted this position. In *Lockhart v. Fretwell*,[242] a habeas petitioner argued that he had received ineffective assistance of counsel.[243] Although the government did not dispute that his attorney's performance was deficient, it argued that the petitioner had not been prejudiced.[244] In accepting this argument, Chief Justice Rehnquist's majority opinion disputed the dissent's claim that the Court was engaging in harmless-error analysis. "Contrary to the dissent's suggestion," he wrote in a footnote, "today's decision does not involve or require a harmless-error inquiry. Harmless error analysis is triggered only *after* the reviewing court discovers that an error has occurred."[245]

Rehnquist did not explain the rationale behind this statement, and the Court has not cited his footnote in *Fretwell* since. As a result, lower courts seem not to be taking the Court's instruction seriously. Although some courts occasionally follow the *Fretwell* approach,[246] others continue to avoid the merits and to proceed straight to the question of harmlessness.[247]

But at least one recent case suggests that the Court meant what it said in *Fretwell*. In *Jones v. United States*,[248] the defendant appealed his death sentence, arguing that the jury's consideration of certain aggravating factors violated the Eighth Amendment.[249] The appeals court agreed with the defendant's claim, but upheld his sentence on the ground that the error was harmless beyond a reasonable doubt.[250] On review before the Supreme Court, the government defended the sentence not only on harmless error grounds but also on grounds that there was no error.[251] Justice Ginsburg contended that the government had waived this argument because it did not challenge the circuit court's ruling in its opposition to certiorari and because the

241. *See* Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1182 (1995).

242. 506 U.S. 364 (1993).

243. *Id.* at 366.

244. *Id.* at 370 n.1.

245. *Id.* at 370 n.2.

246. *See, e.g.*, United States v. Virgen-Moreno, 265 F.3d 276, 291 (5th Cir. 2001); Hassine v. Zimmerman, 160 F.3d 941, 949 (3rd Cir. 1998).

247. *See, e.g.*, United States v. Runyan, 290 F.3d 223, 249–50 (5th Cir. 2002); Toles v. Gibson, 269 F.3d 1167, 1176 (10th Cir. 2001); United States v. Lipford, 203 F.3d 259, 273 (4th Cir. 2000).

248. 527 U.S. 373 (1999).

249. *See id.* at 384.

250. *See id.* at 396.

251. *See id.*

question on certiorari, which the government had reformulated, presumed that error had occurred.[252] She also noted that a decision on the sentencing claim was unnecessary because a majority of the Court agreed that any error was harmless.[253] But writing for the majority, Justice Thomas decided the merits of the sentencing claim anyway.[254] Rejecting Ginsburg's view that the government had waived this argument, Thomas wrote that "[a]ssessing the error (including whether there was error at all) is essential to an intelligent resolution of whether such error was harmless."[255] He then decided the claim in the government's favor.[256]

Thomas did not explain why deciding whether an error occurred is essential to an intelligent resolution of the harmless error question, and his assertion seems questionable. It is true that a court needs to understand the precise nature of the error alleged by the defendant in order to decide whether such an error could ever be harmless. A court also must understand exactly what effect the defendant claims the alleged error had on the trial. But a court does not need to decide whether the actions complained of by the defendant amounted to error in order to determine whether those actions affected the outcome of the trial.[257] The two questions are distinct, and courts have been intelligently deciding the latter question by itself for many years.

So what explains the Court's approach in the harmless error context? It is worth noting that here, as in the qualified immunity context, the Court has embraced unnecessary constitutional rulings in cases in which it has denied the underlying constitutional claim. In *Fretwell*, Chief Justice Rehnquist rejected the petitioner's claim of ineffective assistance of counsel, while in *Jones*, Justice Thomas rejected the defendant's Eighth Amendment claim. It is also worth noting that, as in the other areas in which the Court has authorized unnecessary constitutional rulings, earlier developments limited the extent to which federal courts engaged in constitutional analysis. Prior to the emergence of harmless error, appellate courts always

252. *See id.* at 420 n.24 (Ginsburg, J., dissenting).
253. *See id.*
254. *See id.* at 396–97.
255. *Id.* at 397 n.12.
256. *See id.* at 398–402.
257. *But see* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2046 (1994) (arguing that "it simply makes more sense to resolve the question whether there was any error before deciding whether a putative error was harmless" because "until the court passes on the substantive question, it will not know exactly what the error is that it must test for harmlessness").

addressed the underlying constitutional issue because any error was subject to automatic reversal. But that changed after *Chapman*. Instead of deciding important constitutional issues, appellate courts became reviewers of fact: did the alleged error affect the outcome of the trial? This was a significant change in the role of the courts, and it occurred just as the Supreme Court began to expand its jurisdiction and assert the exclusive competence of the federal courts to decide constitutional questions. Thus, one might view the Court's embrace of unnecessary constitutional rulings in harmless error cases as an effort to restore a role for the federal courts that, at least for a time, had become diminished.

II. UNNECESSARY CONSTITUTIONAL RULINGS AND THE BAN ON ADVISORY OPINIONS

Regardless of why the Court has embraced unnecessary constitutional rulings, its recent approach raises important questions. In this Part, I address one of those questions, which is whether unnecessary constitutional rulings can be squared with the ban on advisory opinions. I begin by describing the ban on advisory opinions and one of its underlying principles, which is that courts may not issue rulings that will not have an effect on the outcome of a dispute between adverse litigants. I then explain why this principle raises serious questions about the practice of issuing unnecessary constitutional rulings in qualified immunity, habeas corpus, harmless error, and Fourth Amendment good faith cases. Finally, I consider counterarguments and conclude that although deciding the underlying merits in harmless error and Fourth Amendment good faith cases may not violate the ban on advisory opinions, reaching the merits in qualified immunity and habeas cases does.

A. The Effect Principle

The ban on advisory opinions is as old and well established as any of the justiciability doctrines.[258] Rooted in the "case or controversy" requirement of Article III, it prohibits federal courts from deciding legal questions in the absence of an actual dispute between adverse litigants.[259] This means that courts cannot answer legal questions submitted to them by the political branches for

258. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 65 (5th ed. 1994) (describing the ban on advisory opinions as "the oldest and most consistent thread in the federal law of justiciability").

259. *See* CHEMERINSKY, *supra* note 40, § 2.2, at 48–49.

advice,[260] nor can they hear suits in which the plaintiff and defendant have colluded to bring an issue before the courts for resolution.[261] The ban on advisory opinions also prevents courts from deciding questions that will not have any effect on the litigants before them.[262] Thus, the courts could not participate in a legislative scheme for awarding benefits to Revolutionary War veterans that permitted the Secretary of War to overrule their recommendations.[263] As five of the six Justices explained in separate opinions while riding circuit, permitting the courts to issue opinions that could be "revised and controuled [sic] by the legislature, and by an officer in the executive department" is "radically inconsistent with the independence of that judicial power which is vested in the courts."[264] The full Court embraced this reasoning in a later case, stating that to decide a question that could be modified by the President "would be to render an advisory opinion in its most obnoxious form."[265]

Despite its centrality to Article III, the ban on advisory opinions is rarely enforced as a separate doctrine. Instead, it is usually implemented through other justiciability doctrines, such as standing, ripeness, and mootness.[266] For instance, the principle that courts may issue rulings only in the context of an actual dispute between adverse litigants is given force through the doctrine of standing, which limits the jurisdiction of the federal courts to cases in which the plaintiff has suffered a concrete injury that is fairly traceable to the defendant's conduct.[267] The presence of an actual dispute is also ensured by the ripeness doctrine, which prohibits courts from deciding cases in which the injury alleged by the plaintiff has not already occurred or is not imminent.[268]

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260. *See Correspondence of the Justices* (1793), *reprinted in* HART & WECHSLER, *supra* note 37, at 78–79.

261. *See* United States v. Johnson, 319 U.S. 302, 305 (1943) (dismissing a suit brought by the plaintiff at the request of the defendant, who also paid for and directed the suit).

262. *See* CHEMERINSKY, *supra* note 40, § 2.2, at 53.

263. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 409–10 (1792).

264. *Id.* at 411.

265. *See* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 114 (1948) (dismissing as nonjusticiable a case in which the Court was asked to review Civil Aeronautics Board decisions because the president retained the power to ignore the Court's decision); *see also* United States v. Ferreira, 54 U.S. (13 How.) 40, 52 (1852) (dismissing claims under a treaty for lack of jurisdiction because the secretary of treasury could refuse payment of claims if he deemed them not to be just and equitable).

266. *See* CHEMERINSKY, *supra* note 40, § 2.2, at 56.

267. *See* Allen v. Wright, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

268. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (asserting the "basic

The principle that courts may issue only rulings that will have some effect on the parties before it—what I will call the "effect principle"—is also reflected in a variety of justiciability doctrines. To begin with, the principle can be seen as the basis for the redressability prong of the standing doctrine.[269] Under this prong, a plaintiff has standing—and a court has jurisdiction—only if the injury complained of would be redressed by a ruling in the plaintiff's favor.[270] In *Warth v. Seldin*,[271] for instance, the plaintiffs challenged zoning laws in Penfield, New York that prevented multifamily dwellings and low-income housing.[272] The plaintiffs argued that the zoning laws injured them by making it more difficult to find affordable housing in Penfield.[273] But the Court held that the plaintiffs failed the redressability requirement. Even if the laws were struck down, the Court explained, there was no assurance that builders would choose to construct low-income housing in Penfield or, if they did, that the plaintiffs would be able to afford to live there.[274] Thus, a ruling in the plaintiffs' favor was not likely to have any effect on their lives.[275]

The effect principle is also reflected in the mootness doctrine, which prohibits federal courts from deciding cases in which the dispute between the parties has been resolved or is no longer live. Mootness has been described as the "doctrine of standing set in a

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rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements"); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (noting that plaintiff's injury must be, among other things, actual and imminent); O'Shea v. Littleton, 414 U.S. 488, 498 (1974) ("[T]he threat of injury of the alleged course of conduct they attack is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court.").

269. See Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 647 (1985) (noting that the redressability requirement "prevents judicial decrees that have no effect in the real world").

270. *See Allen*, 468 U.S. at 751; Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) ("In sum, when a plaintiff's standing is brought into issue, the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision.").

271. 422 U.S. 490 (1975).

272. *See id.* at 493.

273. *See id.*

274. *See id.* at 505–06.

275. *Id.* at 508 ("We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention.") (emphasis in original); *see also* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (affirming dismissal for want of redressability, and holding that the "appellant has made an insufficient showing of a direct nexus between the vindication of her interest, and the enforcement of the State's criminal laws[,]" where an unwed mother sought to have her child's father prosecuted for failure to pay child support).

time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[276] More precisely, mootness is the redressability prong of standing in a time frame. The plaintiff may still be able to satisfy the first two prongs of the standing requirement—that is, he may have suffered an injury in fact that is fairly traceable to the defendant's conduct. But either because the injury is no longer palpable or because the parties have agreed to a resolution of their dispute, a decision by the court can no longer redress the harm of which the plaintiff initially complained.[277]

A classic case of mootness is *DeFunis v. Odegaard*,[278] in which a white college student was denied admission to the University of Washington Law School. The student sued, arguing that the school's affirmative action policy discriminated against him on the basis of his race.[279] While the student's suit was pending, the trial court granted an injunction permitting him to enroll in the school and begin his studies. By the time the case reached the Supreme Court, the student was in his third year, and school officials said they would not seek to prevent him from graduating.[280] Raising the issue of mootness on its own, the Court cited "the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' "[281] It then concluded that the case was moot because "in no event will the status of DeFunis now be affected by any view this Court might express on the merits of this controversy."[282]

The third area in which the effect principle can be seen is the State Grounds doctrine. Under this doctrine, the Court has held that it lacks jurisdiction to review state court rulings on issues of federal law if the state court judgment is based on an adequate and

276. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973). *But see* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000) (rejecting this comparison between mootness and standing).

277. For example, in *Sapp v. Renfroe*, 511 F.2d 172 (5th Cir. 1975), a public high school student argued that mandatory ROTC instruction violated his First Amendment rights. *Id.* at 174. The court dismissed his claim for declaratory relief as moot, but not because the student did not suffer an injury. Instead, the court dismissed the student's claim because he had already graduated from a private high school, meaning that a declaration in his favor could no longer remedy the student's injury. *See id.* at 175–76.

278. 416 U.S. 312 (1974).

279. *See id.* at 314.

280. *See id.* at 315–16 & n.2.

281. *Id.* at 316 (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)).

282. *Id.* at 317.

independent state law ground.[283] Although the Judiciary Act gives the Supreme Court authority to review state court pronouncements on federal law, the Court has interpreted the Act to prohibit review of state court decisions on state law questions.[284] Therefore, if a state court judgment is based on an independent and adequate state law ground, the Supreme Court's review of the federal law issue can have no effect on the state court judgment. "[O]ur power is to correct wrong judgments, not to revise opinions," the Court has explained.[285] "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."[286]

Finally, the Court has endorsed the effect principle in its discussions of retroactivity and prospectivity. During the Warren era, the Court held that it would not apply new rules of constitutional law automatically to cases pending on direct review, but would instead conduct a balancing test to determine which rules would be applied retroactively.[287] Although the Court usually applied new rules in the cases in which they were announced, it initially suggested that even this was not required and that purely prospective decisions—that is, decisions that only apply to future cases—posed no constitutional problems.[288] Shortly afterward, in *Stovall v. Denno*,[289] the Court sent

283. *See* Arizona v. Evans, 514 U.S. 1, 7–9 (1995); Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

284. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630–31 (1875).

285. Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

286. *Id.*; *see* Michigan v. Long, 463 U.S. 1032, 1042 (1983); South Dakota v. Neville, 459 U.S. 553, 569 n.3 (1983). The Court has also declined to review federal issues decided by lower courts where the lower court judgment is adequately supported by some ground beyond the Supreme Court's review. *See* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 292–95 (1982) (refusing to examine lower court's interpretation of federal Constitution because lower court also based its decision on state constitution, and Congress did not give Supreme Court jurisdiction over the state law issue); United States v. Hastings, 296 U.S. 188, 193 (1935) (holding review of a federal court "judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly"). But unlike in the State Grounds cases, the Court has not stated clearly whether this approach is required by Article III or is simply a prudential policy grounded in the principle of avoiding unnecessary constitutional rulings.

287. *See* Linkletter v. Walker, 381 U.S. 618, 629 (1965) (stating that the Court will "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation").

288. *See id.* at 621–22 & n.3 (1965) (noting that "[i]t has been suggested that this Court is prevented by Article III from adopting the technique of purely prospective overruling," but citing cases in which the Court had done just that).

289. 388 U.S. 293 (1967).

a different message, stating that "[s]ound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, ... militate against" pure prospectivity.[290]

The Court's about-face on pure prospectivity was mostly a result of the larger debate about retroactivity. Critics of the Court's retroactivity doctrine argued that not applying new rules of constitutional law to cases pending on direct review resulted in inequitable treatment of similarly situated defendants.[291] Because new rules were usually applied in the cases in which they were announced, critics maintained, it was unfair to deny defendants in other pending cases the benefit of the same rules.[292] But defenders of non-retroactivity argued that this inequity was "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum."[293] In other words, the Court was not permitted to announce a new rule without applying it to the case at hand, but it did have discretion to determine whether that rule should apply retroactively to other cases.

Although the Court's views on pure prospectivity may have been influenced by its defense of non-retroactivity, the Court has largely adhered to its position in *Stovall*—despite having since overhauled its retroactivity doctrine.[294] In *Harper v. Virginia Department of Taxation*,[295] for instance, the Court rejected non-retroactivity in civil cases, holding that "[w]hen this Court applies a rule of federal law to the parties before it, that rule ... must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[296] The Court did not directly address the issue of "pure prospectivity," but suggested that purely prospective decisions exceed the judicial power under Article III.[297] Justice Scalia was more

290. *See id.* at 301.

291. *See supra* note 218 and accompanying text; *see also* Mishkin, *supra* note 216, at 74–76 (arguing against using the date a criminal defendant's conviction became final as the basis for whether a new rule of constitutional law will apply to his case).

292. *See supra* note 218 and accompanying text.

293. Desist v. United States, 394 U.S. 244, 254–55 n.24 (1969) (quoting *Stovall*, 388 U.S. at 301).

294. *See* HART & WECHSLER, *supra* note 37, at 75 (noting that since *Stovall*, "pure prospectivity has seldom been treated as a live alternative").

295. 509 U.S. 86 (1993).

296. *Id.* at 97. The Court had earlier rejected non-retroactivity in criminal cases. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

297. *See Harper*, 509 U.S. at 97 (stating that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law"); *see also id.* at 115

explicit. In a concurring opinion, he argued that prospective decisionmaking of any sort is "the handmaid of judicial activism" and "quite incompatible with the judicial power."[298]

A majority of the Court has embraced a similar view in habeas corpus cases. In *Teague v. Lane*,[299] the Court held that new constitutional rules of criminal procedure would not be applied in cases that became final before the rules were announced. A plurality of the Court also stated that because habeas petitioners could not benefit from new rules of constitutional law, courts could not announce new rules in habeas cases.[300] If a court announced a new rule on habeas, the plurality explained, it would have to apply that rule to the petitioner at hand because of "the necessity that constitutional adjudications not stand as mere dictum."[301] By declining to announce new rules of constitutional procedure on habeas, however, courts would "avoid rendering advisory opinions" and ensure that all similarly situated petitioners were treated equally.[302] Justice Stevens disagreed with that part of the plurality opinion, arguing that a habeas court should first determine "whether the trial process violated any of the petitioner's constitutional rights" before deciding whether the petitioner is entitled to relief.[303] But a majority of the Court has since embraced the *Teague* approach,[304] strongly suggesting that purely prospective decisions violate Article III.

B. Constitutional Rulings Without Effect

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

(O'Connor, J., dissenting) (noting that the majority opinion "intimates that pure prospectivity may be prohibited as well"); HART & WECHSLER, *supra* note 37, at 76 (observing that "much of the opinion's reasoning raises doubts that the Court would regard purely prospective adjudication as legitimate").

298. *Harper*, 509 U.S. at 105–06 (Scalia, J., concurring).

299. 489 U.S. 288 (1989).

300. *Id.* at 315–16.

301. *Id.* at 315 (quoting Stovall v. Denno, 388 U.S. 293, 301 (1967)).

302. *See id.* at 316. An oddity about *Teague* is that it was written by Justice O'Connor, who in her *Harper* dissent had criticized the majority for suggesting that purely prospective decisions were unconstitutional. *See Harper*, 509 U.S. at 115–17 (O'Connor, J., dissenting).

303. *See id.* at 318–19 & n.2 (Stevens, J., concurring).

304. *See supra* note 190 and accompanying text.

has immunity or that an error was harmless is adequate to resolve the dispute. In qualified immunity cases, for instance, a decision that the plaintiff has alleged the violation of a constitutional right is immaterial if the court finds that the right was not clearly established at the time of the events giving rise to the lawsuit. Because government officials can be held liable in damages only for violating rights that are clearly established,[305] the court will dismiss the lawsuit in spite of its conclusion that the constitutional right exists. Likewise, a decision that a state court incorrectly applied the Constitution has no effect on the outcome of a habeas case if the federal court also determines that the state court judgment was not contrary to or an unreasonable application of clearly established federal law as articulated by the Supreme Court.[306]

One might respond that a court cannot know whether its decision on the constitutional issue will have some effect until after it determines whether the governmental actor has immunity or the error was harmless. Therefore, as long as a court decides the constitutional issue first, it will not knowingly issue an ineffectual ruling. But at least with respect to qualified immunity and habeas cases, this argument is unpersuasive. In these two contexts, a decision on the constitutional issue can never have any independent effect and can never change the outcome of the case. The reason is that a decision on the non-constitutional issue is always sufficient to resolve the case. To see this point more clearly, consider the possible combinations of rulings available in a qualified immunity case:

(1) The right exists and is clearly established.

(2) The right exists, but is not clearly established.

(3) The right does not exist, and is not clearly established.[307]

Under the first scenario, the court's ruling that the right is clearly established necessarily answers the question whether the right exists. Therefore, a decision that the right exists is superfluous and has no independent effect on the outcome of the case.[308] Under the second

305. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

306. *See* 28 U.S.C. § 2254(d)(1) (2000); Lockyer v. Andrade, 538 U.S. 63, 66 (2003); Weeks v. Angelone, 528 U.S. 225, 237 (2000); Williams v. Taylor, 529 U.S. 420, 434 (2000).

307. Note that, with one theoretical exception, a court could never decide that the right is clearly established, but does not exist. *See infra* note 309.

308. In Part II.C.1, I explain why a court does not need to determine whether the right exists in order to decide whether it is clearly established.

and third scenarios, a decision that the right is not clearly established does not tell us whether the right exists. But because a defendant has qualified immunity if the right is not clearly established, deciding whether the right exists can make no difference. Either way, the case must be dismissed, and a ruling on the constitutional issue can have no effect. The same is true in habeas cases. A decision that the state court decision is contrary to or an unreasonable application of clearly established federal law necessarily means that the state court incorrectly interpreted the Constitution. And if the state court decision is not contrary to or an unreasonable application of clearly established law, a ruling that the state court decision is incorrect is immaterial.[309]

This analysis illustrates that in qualified immunity and habeas cases, a court always knows in advance that its decision on the constitutional issue will not affect the outcome of the case. It can therefore proceed straight to the non-constitutional issue to fulfill its duty of resolving the case. But the same is not true in harmless error and Fourth Amendment good faith cases. In these cases, a decision on the constitutional issue *can* sometimes affect the outcome of the case, and a court will not know whether this is so until after it addresses the non-constitutional issue. This is because a decision on the non-constitutional issue (harmlessness and good faith) is not always sufficient to resolve the case. Again, we can see the point most clearly by considering the possible combinations of rulings available in a harmless error case:

(1) The conduct complained of is unconstitutional and harmless.

(2) The conduct complained of is constitutional and harmless.

(3) The conduct complained of is unconstitutional and not harmless.

309. There is one caveat to my claim that a decision on the constitutional merits can never have any independent effect in qualified immunity and habeas cases. It is possible that even if the right is clearly established, the defendant could argue that the right does not exist. In other words, the defendant could acknowledge that the right was established by an earlier case, but then argue that the earlier case was an incorrect interpretation of the Constitution and should be overruled. In this situation, a decision on the constitutional issue would have independent effect and could change the outcome of the case. But because I am unaware of any cases in which defendants have made such an argument (let alone any cases in which a court has accepted such an argument), I view this as a theoretical caveat that does not undermine my basic claim.

(4) The conduct complained of is constitutional and not harmless.

Under the first and second scenarios, a decision that the conduct complained of was harmless makes it unnecessary for the court to consider whether the conduct is unconstitutional. Even if it is, the defendant's conviction must be affirmed.[310] But a decision that the conduct was not harmless under the third and fourth scenarios does not resolve the case. Because a finding that the conduct was not harmless does not tell us anything about whether the conduct was constitutional, a court must still proceed to answer that question.[311] Its decision on the constitutional issue will thus determine the outcome of the case. The same is true in Fourth Amendment good faith cases. If the court rules that the officer acted in good faith, there is no reason to determine whether the search violated the Fourth Amendment. But if the officer did not have a good faith belief in the validity of the search, the Fourth Amendment issue becomes dispositive.

In harmless error and Fourth Amendment good faith cases, then, a decision on the constitutional issue can sometimes affect the outcome of the case. And because a court will not know whether its constitutional ruling makes a difference until after it decides the non-constitutional issue, one might argue that a court does not knowingly issue an ineffectual ruling when it decides the constitutional issue first. But this argument has two flaws. First, courts rarely issue decisions instantaneously from the bench.[312] Instead, judges typically write their opinions in chambers over several weeks or months and release the decision only when it is complete. So although a court may not know when it sets out to resolve the constitutional issue whether its ruling on that issue will have some effect, it certainly knows before it releases the opinion. And if the court proceeds to announce a ruling on the constitutional issue even though the non-

310. *See* 28 U.S.C. § 2111 (2000); Chapman v. California, 386 U.S. 18, 23–24 (1967).

311. It may seem odd to suggest that conduct that is "not harmless" to the defendant could be constitutional. But "not harmless" in this sense means simply that the conduct had an effect on the outcome of the trial. *See* Kamin, *supra* note 36, at 6 n.15 (defining harmless error). Thus, the introduction of incriminating evidence might be viewed as "not harmless" to the defendant even though the evidence was obtained in a constitutionally valid search.

312. Decisions from the bench are more common in district courts than in appellate courts. But with the exception of Motions to Reconsider under Federal Rules of Civil Procedure 59(e), harmless error cases are always heard in appellate courts. It is true that district courts often decide search claims under the "good faith" doctrine, but it is unclear how often judges issue these opinions from the bench immediately after argument.

constitutional issue is dispositive, it has knowingly decided a question "that cannot affect the rights of litigants in the case before [it]."[313]

Second, strategically ordering the questions to avoid an Article III problem would seem foreclosed by the Supreme Court's approach to cases involving the State Grounds doctrine. In these cases, the Court does not know whether a decision on the federal issue will have some effect until after it determines whether the state court judgment rests on an adequate and independent state ground. Thus, the Court could conceivably decide the federal issue first and then decide whether the state court judgment rests on an adequate and independent state ground. But the Court does not follow that approach.[314] Instead, the Court first determines whether there is an adequate and independent state ground. Only if there is not (i.e., only if a ruling on the federal issue can affect the outcome of the dispute) does the Court proceed to decide the federal issue. Thus, even in harmless error and Fourth Amendment good faith cases, unnecessary constitutional rulings would seem to violate the effect principle.

C. *Counterarguments*

As the preceding Section shows, a strong case can be made that unnecessary constitutional rulings in qualified immunity, habeas corpus, harmless error, and Fourth Amendment good faith cases violate the ban on advisory opinions. Before drawing any firm conclusions, however, several objections need to be considered. First, some scholars have argued that the State Grounds doctrine is not required by the ban on advisory opinions. If correct, this argument might undermine the claim that unnecessary constitutional rulings in other areas violate the ban on advisory opinions. Second, the analysis above raises questions about dicta and alternative holdings. Courts often make statements that are unnecessary to the resolution of a case and occasionally rely on alternative holdings to support their judgment. These rulings rarely have any effect on the outcome of a dispute, yet they are prevalent and generally accepted. So if these rulings are not cause for great concern, one might question whether we should worry about unnecessary constitutional rulings in other

313. *See* DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

314. Although the Court does not follow that approach now, it did at one time. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 634–36 (1874) (holding that a court should first decide the federal issue before determining whether state law grounds are sufficient to support the state court judgment).

contexts.[315]

1. The State Grounds Doctrine and the Ban on Advisory Opinions

The claim that the State Grounds doctrine is not required by the ban on advisory opinions has been made most forcefully by Richard Matasar and Gregory Bruch. They argue that the ban serves two main purposes: (1) to ensure that issues are presented in an adversarial context that will facilitate judicial review; and (2) to promote the finality of judicial action "essential to the maintenance of separation of powers within the national government."[316] Matasar and Bruch then argue that neither purpose is undermined when the Supreme Court reviews a state court judgment supported by adequate and independent state grounds. Because the parties are engaged in an actual controversy, they argue, the federal issue is presented as part of a concrete dispute, not a hypothetical question.[317] They also maintain that there is little threat to the finality of the Court's ruling on the federal issue. Unlike *Hayburn's Case*,[318] where other branches of the government retained authority to review federal court decisions, no branch of the federal government has authority to review the Supreme Court's ruling on the federal issue. Matasar and Bruch acknowledge that a state court can render a Supreme Court ruling ineffectual by issuing the same judgment on the basis of state law. But as they point out, this raises federalism concerns, not separation of powers concerns.[319] And in any event,

315. A third possible objection is that there is a difference between deciding an *issue* that will not have any effect on the outcome of a dispute and deciding a *case* in which the court's judgment can have no effect. Under this theory, the ban on advisory opinions would prohibit a court from resolving a case in which the plaintiff lacked standing entirely, but would not prohibit a court from resolving a particular issue as to which the plaintiff lacked standing if some other aspect of the case were justiciable. But the Court has rejected this theory, holding that a plaintiff must demonstrate standing for each claim and form of relief sought. *See* Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) (stating that "a plaintiff must demonstrate standing separately for each form of relief sought"); Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."); City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (holding that plaintiff lacks standing to bring claim for injunctive relief even though he has standing to bring claim for damages). Moreover, the concerns underlying the ban on advisory opinions—preserving the separation of powers and ensuring informed judicial decision-making—would seem to be equally implicated in both situations. If a court decides an issue that is not capable of judicial resolution or that was not presented in an adversarial context, it is hard to see why that should be permissible simply because the court also decides an issue that is justiciable.

316. *See* Matasar & Bruch, *supra* note 44, at 1302.

317. *See id.* at 1302–03.

318. 2 U.S. (2 Dall.) 409, 412–13 (1792).

319. *See* Matasar & Bruch, *supra* note 44, at 1304–05.

they argue, the State Grounds doctrine does not entirely eliminate this concern. Even where the state court judgment is not initially supported by an adequate and independent state ground—so that there is no bar to deciding the federal issue—the state court can always render the Supreme Court's ruling ineffectual by subsequently finding a state law ground to support its initial judgment.[320]

If the State Grounds doctrine is not required by the ban on advisory opinions, one might question whether unnecessary constitutional rulings in qualified immunity, habeas corpus, harmless error and Fourth Amendment good faith cases violate Article III. In these cases, as in cases involving the State Grounds doctrine, the issues are framed by a concrete dispute between adverse parties; the courts are not asked to decide hypothetical or abstract questions. In addition, rulings on the constitutional issues in these cases are not subject to review by the other branches of government. It is true that if a constitutional ruling is not dispositive (for example, if a court rules that the constitutional right exists, but was not clearly established), the other branches can ignore that ruling and still comply with the Court's judgment. But because courts generally apply stare decisis to these rulings,[321] they will serve as precedent in later cases, and the other branches will then be obligated to comply with them.

One problem with this line of reasoning is that, according to the Court, the State Grounds doctrine *is* required by the ban on advisory opinions. Although Matasar and Bruch argue that the Court has only "suggested" as much,[322] the Court has been much more explicit. In

320. *See id.* at 1306. Matasar and Bruch cite several cases in which state courts rendered Supreme Court rulings on a federal law ineffectual "on the basis of new state law issues, unclearly resolved state issues, or even state issues that previously had been determined differently." *Id.* at 1306 & nn.58–60. In most cases, however, one would expect that the doctrine of waiver and the law of the case would foreclose such efforts.

321. The Court has never explicitly stated that unnecessary constitutional rulings in qualified immunity and habeas cases are binding precedent, but it seems safe to assume that they are intended to be. The primary reason for deciding the constitutional issue is so that rights can become clearly established for purposes of later cases. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001). Yet if a ruling on the constitutional issue were not binding, that purpose would be defeated since dicta cannot be the basis for a holding that a right is clearly established. *See* Williams v. Taylor, 529 U.S. 362, 412 (2000) (noting that the phrase "clearly established Federal law," as that term appears in AEDPA, "refers to the holdings, as opposed to the dicta, of this Court's decisions"); Hamilton v. Cannon, 80 F.3d 1525, 1530 (11th Cir. 1995) ("The law cannot be established by dicta. Dicta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law."). In any event, nearly all courts treat these rulings as binding precedent, which means that, for all practical purposes, they are.

322. *See* Matasar & Bruch, *supra* note 44, at 1301 ("The Court has suggested a second

Fox Film Corp. v. Muller,[323] the Court held that "where the judgment of the state court rests upon two grounds, one of which is federal and the other non-federal in character, *our jurisdiction fails* if the non-federal ground is independent of the federal ground and adequate to support the judgment."[324] Likewise, in *Herb v. Pitcairn*,[325] the Court stated that its "power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."[326]

The Court weakened the State Grounds doctrine in *Michigan v. Long*,[327] holding that it will presume a state court judgment does not rest upon adequate and independent state grounds unless the state court opinion clearly says so.[328] But although *Long* narrowed the scope of the doctrine, the Court continued to insist that the "avoidance of rendering advisory opinions" is one of the "cornerstones" of the State Grounds doctrine.[329] The Court also stated that the doctrine "is based, in part, on 'the limitations of our own jurisdiction,' " and it repeated the language from *Herb v. Pitcairn* quoted above.[330]

A more fundamental problem with the Matasar and Bruch analysis is that the existence of a concrete dispute by itself does not necessarily satisfy the requirements of justiciability. One of the goals behind the ban on advisory opinions—as well as the related doctrines of standing, ripeness, and mootness—is to ensure that courts decide legal issues only under circumstances that are likely to lead to well-informed, thoughtful decisions.[331] The existence of a concrete dispute is thought to further this goal because it helps to focus the court's

possible anchor for the adequate and independent state grounds doctrine—the constitutional ban against advisory opinions.").

323. 296 U.S. 207 (1935).

324. *Id.* at 210 (emphasis added).

325. 324 U.S. 117 (1945).

326. *Id.* at 126; *see* Lambrix v. Singletary, 520 U.S. 518, 522–24 (1997) (noting that application of the State Grounds doctrine to federal habeas cases is "based upon equitable considerations of federalism and comity"); Coleman v. Thompson, 501 U.S. 722, 729–31 (1991).

327. 463 U.S. 1032 (1983).

328. *Id.* at 1040–42.

329. *See id.* at 1040.

330. *See id.* at 1041–42.

331. *See* Dorf, *supra* note 257, at 2001 n.17; Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 453–57 (1994).

deliberation and provide real-world context for abstract legal questions.[332] But another reason for insisting upon a concrete dispute is that it ensures the vigorous presentation of opposing viewpoints by adverse parties.[333] In other words, we want parties on each side with a stake in the outcome of the dispute presenting their strongest arguments to the court. This not only leads to more informed decision-making by the courts, but also promotes fairness by ensuring that the outcome of a legal question that will affect many parties is not in the hands of a party lacking a stake in the outcome.[334]

A critical question, therefore, is whether the existence of a concrete dispute in a particular context will provide the parties with adequate incentives to argue vigorously the constitutional issue. In harmless error and Fourth Amendment good faith cases, as in cases under the State Grounds doctrine, the answer would seem to be yes. The reason is that the parties do not know in advance which issue will be dispositive. Although a court might decide that the alleged error was harmless (or that the officer acted in good faith), it might decide otherwise, making the constitutional issue dispositive. Therefore, in order to protect themselves, the parties must argue both issues vigorously.

But the same is not true in qualified immunity and habeas cases. As demonstrated above, a ruling on the constitutional issue in these cases can never change the outcome. In qualified immunity cases, if the court rules that the constitutional right is clearly established, a decision that the right exists is superfluous. And if the court rules that the right is not clearly established, the case must be dismissed regardless of whether the right exists.[335] This suggests that the parties in these cases lack incentives to argue vigorously the constitutional issue.[336] After all, if the constitutional issue cannot independently

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332. *See* CHEMERINSKY, *supra* note 40, § 2.1, at 46.

333. *See* Flast v. Cohen, 392 U.S. 83, 96–97 (1968) (explaining the need for "a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests"); Baker v. Carr, 369 U.S. 186, 204 (1962) (noting that standing requires "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

334. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 298 (1979).

335. The same analysis applies to habeas cases. If the court decides that the state court decision was contrary to clearly established law, a decision that the state court decision was wrong is superfluous. And if the court decides that the state court decision was *not* contrary to clearly established law, the habeas petitioner loses regardless of whether the state court decision was wrong.

336. *See* Horne v. Coughlin, 191 F.3d 244, 247 (2d Cir. 1999) (stating that "parties may

affect the outcome of the case, why would the parties waste their time on it?

For governmental litigants, the answer is fairly obvious. Although a ruling on the constitutional issue may not affect the outcome of the case at hand, it can affect the government's interests in future cases. In qualified immunity cases, for instance, a ruling today that a constitutional right exists means that tomorrow the right will be clearly established such that qualified immunity will no longer be a viable defense. As a repeat player, therefore, the government has a strong incentive to oppose the recognition of constitutional rights in most qualified immunity cases even though its immediate liability turns solely on whether the right is clearly established.[337] The government has less at stake in habeas cases, since a ruling that the state court incorrectly interpreted the Constitution can never form the basis for a future habeas challenge unless issued by the Supreme Court. But the government still has an incentive to contest the constitutional issue vigorously, both because the ruling may be viewed as persuasive authority in state courts and because the ruling will be binding in federal courts, where state governments must still litigate § 1983 cases.

For individual litigants, the incentives are less obvious. Unlike the government, these litigants are not likely to find themselves back in court in a case involving similar issues. And although they could help future litigants by pressing constitutional issues vigorously, qualified immunity plaintiffs and habeas petitioners are unlikely to devise a litigation strategy with future litigants in mind. Even their lawyers, who may take a broader view, have limited incentives to argue the constitutional issue, since many of them work for a contingency fee that is realized only if they defeat the qualified immunity defense.[338] What about the individual's interest in securing

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do an inadequate job briefing and presenting an issue that predictably will have no effect on the outcome of the case").

337. I say "most" cases because there may be some instances in which the conduct complained of by the plaintiff is so unlikely to recur that the government has little reason to argue against recognition of the constitutional right. *See Coughlin*, 191 F.3d at 247 (arguing that governmental defendants might not have adequate incentives to argue the constitutional issue "where the challenged conduct occurs in a nonrecurring fact pattern, so that the claimed right is not likely to be asserted again against the same defendant").

338. Ethical considerations may also limit the incentive of lawyers to litigate with future cases in mind. The codes of ethical conduct direct lawyers to advocate zealously on behalf of their clients, not on behalf of future clients. *See* MODEL RULES OF PROF'L CONDUCT Preamble (1983) (providing that "[a]s [an] advocate, a lawyer zealously asserts the client's position under the rules of the adversary system"); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983) (providing that "[a] lawyer shall act with reasonable

a judgment that his constitutional rights were violated? For the habeas petitioner trying to get out of prison, such abstract vindication seems like a small reward. For the qualified immunity plaintiff, even this slight incentive is lacking. Because the issue of qualified immunity is decided at the outset of a lawsuit,[339] a ruling that the constitutional right exists does not vindicate the plaintiff's claim. It only establishes that his claim would be successful *if* he were able to prove the facts alleged in his complaint.

A more intriguing argument is that individual litigants have an incentive to argue the constitutional issue because demonstrating that the right exists is a necessary step in proving that the right is clearly established. This argument has intuitive appeal. Lawyers and judges often confront legal questions incrementally, starting with basic propositions and working up to more complicated questions. Moreover, a plaintiff who can satisfy the court that he is asserting the violation of a constitutional right would seem to have a better chance of demonstrating that the right is clearly established.

But the validity of this argument turns on how closely connected the two questions are. In other words, does a court need to decide whether the right exists in order to determine whether the right is clearly established? As noted in Part I.B.1, the Court has suggested that the answer is yes.[340] In *Siegert v. Gilley*,[341] Chief Justice Rehnquist wrote that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."[342] The Court did not explain why the latter determination is a necessary concomitant to the former, however, and a closer analysis strongly suggests that it is not.

Deciding whether a constitutional right is clearly established is entirely a matter of analyzing precedent. A court identifies the date on which the challenged action occurred and then searches case law prior to that date to determine if the action violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[343] Courts sometimes disagree about which decisions to look to in determining whether a right is clearly

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diligence . . . in representing a client").

339. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

340. *See supra* Part I.B.1.

341. 500 U.S. 226 (1991).

342. *Id.* at 232 (internal quotations omitted).

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

established.[344] But there is no dispute that what counts for purposes of determining whether a constitutional right is clearly established is *case law*.[345] The same is true for habeas. Under AEDPA, the Court has held that a constitutional right is "clearly established" for purposes of habeas relief only if it is "dictated by precedent."[346]

Deciding whether a constitutional right exists also involves an analysis of case law. Under the common law tradition, which has heavily influenced constitutional adjudication, legal principles develop slowly, case by case, and courts typically look to prior cases to determine whether a particular right exists.[347] But although this is a large part of constitutional adjudication, it is not the whole of it. Courts interpreting the Constitution also look to other sources, such as the text and structure of the document, the original understanding of the framers, and the ethos of American democracy.[348] Indeed,

344. For instance, courts debate whether they should look to decisions only within the circuit or should also consider opinions from other circuits. *See* Hobson v. Wilson, 737 F.2d 1, 25–26 (D.C. Cir. 1984) ("It is not clear, for example, how a court should determine well-established rights: should our reference point be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts, or all of the foregoing?"); Williamson v. City of Virginia Beach, 786 F. Supp. 1238, 1261–62 (E.D. Va. 1992) ("In the absence of controlling precedent in a jurisdiction establishing and defining the breadth of a right, however, there are currently conflicting views as to whether 'non-controlling precedents' (i.e. precedents from other jurisdictions), can 'clearly establish' a right for qualified immunity purposes.").

345. *See, e.g.*, Robinson v. Solano County, 278 F.3d 1007, 1015 (9th Cir. 2002) (stating "[t]he conduct occurred in 1995, and the law at that time must be our guide" and then looking only at case law); Wright v. Smith, 21 F.3d 496, 500 (2d Cir. 1994) (evaluating "whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question"); *see also* Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621, 622 (1993) (noting the difficulties of determining whether the legal principles upon which the plaintiff's cause of action rests were clearly established at the time the cause of action arose); R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What Do Justice and Efficiency Require?*, 49 SYRACUSE L. REV. 1, 18 (1998) (discussing the puzzling question of "which courts count" in establishing the relevant law).

346. Williams v. Taylor, 529 U.S. 362, 381 (2000); *see also* Lambrix v. Singletary, 520 U.S. 518, 528 (1997) (stating that because the rule was not "dictated by precedent" it was not clearly established for habeas purposes); Teague v. Lane, 489 U.S. 288, 301 (1989) (stating, prior to AEDPA, that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").

347. *See* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1719 (2003) ("Much of American constitutional law consists of precedents that have evolved in a common-law like way, with a life and logic of their own."); *see also* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 232 (1999) ("In its consistent practice since [*Marbury*], the Court has asserted, too, that this final say is rooted in a common law framework. The Court does not come to the interpretive question afresh each time it arises; its reading acquires the force of precedent that itself binds future courts and actors until overruled.").

348. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 806 (1995) (relying

Philip Bobbitt identifies six types of arguments that lawyers and judges have traditionally relied upon to support constitutional claims.[349] So although there is some overlap between deciding whether a right exists and whether a right is clearly established, the two determinations are not identical. Many factors that must be considered in answering the former question are irrelevant in answering the latter question.[350] Moreover, a court does not need to decide whether the right exists before deciding whether the right is clearly established. It can make the latter determination without engaging in the complex inquiry necessary for the former.

This analysis suggests that individual litigants in qualified immunity and habeas cases may not have adequate incentives to vigorously argue the constitutional issue. Although they will certainly make doctrinal arguments that may bear on both the constitutional issue and the clearly established issue, there is little reason for them to make arguments based on constitutional text, structure, history or other factors. As a result, the court's resolution of the constitutional issue may not be adequately informed, which is what the ban on advisory opinions is, in part, intended to assure.

One might respond that although this argument would have been persuasive in the past, it no longer is. More than 210 years after the founding, courts rarely find new constitutional rights based on constitutional text, structure, or history. To do so would risk being labeled activist. Instead, courts usually portray the recognition of new rights as an inevitable outgrowth of prior decisions.[351] And to the extent that they are simply relying on precedent, the analysis of

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upon "the text and structure of the Constitution, the relevant historical materials, and, most importantly, the 'basic principles of our democratic system' "); Altman v. City of High Point, 330 F.3d 194, 200–04 (4th Cir. 2003) (relying upon the text and early drafts of the Fourth Amendment, as well as historical materials, to determine whether the right asserted by the plaintiff exists); S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 179 (2001) ("The history, the text, and the structure of the Constitution confirm that under its Article I powers, Congress cannot authorize private parties to hail unconsenting states before the adjudicative apparatus of federal agencies and commissions.").

349. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7, 93 (1982) (asserting that lawyers and judges make textual, structural, historical, prudential, doctrinal, and ethical arguments to support constitutional claims).

350. At least one lower court seems to have recognized this. *See* Spivey v. Elliott, 41 F.3d 1497, 1499 (11th Cir. 1995) (noting that "a determination of whether a right is clearly established will always require no more, and will often require less, analysis than is required to decide whether the allegedly violated constitutional right actually exists in the first place").

351. *See* Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1, 26–27 (1992).

whether a right exists may not differ much from an analysis of whether a right is clearly established.

There is some truth to this argument. Modern constitutional adjudication is quite removed from the Constitution itself, and it is not unusual to read a Supreme Court opinion that focuses almost exclusively on precedent. But to acknowledge this development is not necessarily to embrace it. As Akhil Amar has argued recently, a method of constitutional interpretation that focuses only on precedent is often arid and sterile.[352] There are many instances in which attention to the Constitution itself—to its "specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document"[353]—offers insights and meaning that a narrow focus on case law cannot. Thus, even if courts are likely to rely only on precedent in determining whether a constitutional right exists, one can object that this method of constitutional interpretation is misguided and inadequate. Furthermore, to the extent that litigants lack incentives to rely on anything other than precedent, allowing courts to reach the underlying constitutional question in qualified immunity and habeas cases seems certain to exacerbate the problem.

Finally, one might object that my analysis places too much emphasis on the need for an adversarial presentation of constitutional issues. After all, courts in civil law countries function perfectly well without an adversarial system. In addition, many supporters of public interest litigation have questioned the requirement of a plaintiff with a personal stake, arguing that organizations with ideological agendas can be equally effective as advocates.[354] But even supporters of public interest litigation do not question the need for an adversarial presentation of the issues.[355] They question only the Court's insistence that the presentation be made by parties with a personal stake in the dispute. And although the civil law has survived without an adversary system, we might still think decisions will be better informed and more accurate if courts hear the best arguments from parties on both sides of issues. Especially in constitutional

352. *See* Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27 (2000).

353. *Id.* at 26.

354. *See* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 375 n.13 (1974) ("The notion that a personal stake in the controversy is a good guide to a litigant's capacity as an adversary has been persuasively criticized.").

355. *See* HART & WECHSLER, *supra* note 37, at 71 (noting the importance of an adversarial presentation of issues for a public rights approach to justiciability).

adjudication, where the stakes are high and the decisions usually final, an adversarial presentation of the issues seems essential.

2. Dicta and Alternative Holdings

If unnecessary constitutional rulings violate the ban on advisory opinions because they have no effect on a dispute between the parties, what should one conclude about dicta? These statements are not necessary to support a court's decision and have no effect on the outcome of a dispute,[356] yet they are prevalent and generally accepted. Do they also violate the ban on advisory opinions?

In answering this question, it is important to recognize that there are several types of dicta. First, there are what Michael Dorf has called "asides"—throwaway statements that judges know will not have precedential weight, but that they hope will be persuasive.[357] For instance, a court might question a ruling made by a lower court even though neither party has challenged the ruling on appeal. Such statements do not have an effect on the outcome of the dispute and therefore, under my analysis, would appear to violate the ban on advisory opinions.[358] Yet there is a key difference between these statements and unnecessary constitutional rulings in the areas discussed above, which is that the former are not intended to be (and are not treated as) binding precedent. Judges make many statements both on and off the bench that are not necessary to resolving cases or controversies. But the mere expression of an opinion by a judge does not implicate Article III. Article III is implicated only when a judge makes a statement that, by virtue of being treated as precedent, has the force of law.[359] For it is the lawmaking function of the courts that the case or controversy requirement is intended to restrict.[360] Non-

356. *See* Dorf, *supra* note 257, at 2000 (defining dicta as "statements in a judicial opinion that are not necessary to support the decision reached by the court").

357. *See id.* at 2006.

358. *See id.* (noting that "in some sense a deliberate aside violates the rule against advisory opinions," but suggesting that asides might be justifiable under some circumstances).

359. By arguing that Article III is implicated only by statements that are treated as precedent, I am implicitly accepting the view that the law of precedent—in particular the distinction between holdings and dicta—is informed by, and perhaps required by, Article III. For an argument that Article III is relevant to distinguishing between holdings and dicta, see Dorf, *supra* note 257, at 2068 (stating that "a statute authorizing the federal courts to give advisory opinions, and then to give precedential weight to those opinions, would clearly violate the case-or-controversy requirement").

360. *See* Dorf, *supra* note 257, at 2001 ("The case-or-controversy requirement ensures that federal courts will make law only insofar as they are competent to do so and that in making law they do not usurp the proper role of another branch of government.").

precedential statements of an advisory nature may be inappropriate or imprudent. But they do not violate Article III.

Second, and closely related to the first type of dicta, are statements that are not part of the rule announced by the court but are made to support or explain the court's reasoning. For instance, a court will sometimes construct and answer a hypothetical to demonstrate the logical absurdity (or wisdom) of a particular line of reasoning.[361] When a court does this, it technically answers a question of law that is not before the court and has no effect on the dispute between the parties. But there are two reasons this type of dicta is not particularly troubling. First, because the hypothetical is usually designed to demonstrate the absurdity (or wisdom) of a particular line of reasoning, the answer is almost always beyond dispute. That's the point of the exercise: to identify a proposition everyone can agree on and then demonstrate how that proposition conflicts (or is consistent) with a particular line of reasoning. Second, like the first category of dicta, these statements are not usually treated as binding.[362] Thus, even if they are advisory in nature, they do not implicate Article III for the reasons given above.

The third category of dicta consists of those statements a court makes that announce a "legal principle broader than the narrowest proposition that can decide the case."[363] For instance, a court will sometimes frame its ruling it broad terms when a narrow ruling limited to the facts of the case would suffice. Chief Justice Rehnquist has argued that *Roe v. Wade*[364] contains this type of dicta. The Court in *Roe* announced the broad principle that a woman has a constitutional right to an abortion at least until viability.[365] Rehnquist

361. In *R.A.V. v. City of St. Paul*, for instance, Justice Scalia's majority opinion stated that the government could "prohibit only that obscenity which is the most patently offensive in its prurience," but could not prohibit "only that obscenity which includes offensive political messages." 505 U.S. 377, 388 (1992) (emphasis omitted). He also stated that "the Federal Government can criminalize only those threats of violence that are directed against the President," but "may not criminalize only those threats against the President that mention his policy on aid to inner cities." *Id.* Although none of these scenarios were before the Court, Scalia mentioned them to demonstrate the soundness of his distinction between content discrimination generally and content discrimination based on the very reasons that an entire class of speech is proscribable.

362. *See* Dorf, *supra* note 257, at 2057–58 & n.223 ("[S]ometimes a court will include particular examples to illustrate a general point. If the particular examples are merely illustrative, then when the same court faces a case in which a litigant seeks a result that is consistent with the general principle but inconsistent with the specific examples, a decision for that litigant would not be properly characterized as overruling the first case.").

363. *See id.* at 2007.

364. 410 U.S. 113 (1973).

365. *Id.* at 164–65.

claims that this announcement was not necessary to decide the case; instead the Court only needed to rule that the Texas statute at issue unconstitutionally infringed the right to an abortion derived from the Due Process Clause.[366] Therefore, Rehnquist argues, the Court's announcement of a broad right to abortion was merely dicta.[367]

This category of dicta is more troubling than the first two categories. When a court announces a broad rule of law to decide a particular case, it effectively decides many cases at the same time. For instance, in the abortion example, a ruling that women have a constitutional right to abortion at least until viability not only invalidated the Texas statute before the Court, but also invalidated many other statutes across the country that differed in fundamental ways from the Texas statute.[368] Yet the Court did not consider each of these statutes individually; instead it announced a broad rule of law that swept them all away at the same time.

Although potentially troubling, there are several reasons why this type of dicta may not violate the ban on advisory opinions. First, unless a court simply repeats the facts of a case and announces a judgment, its decision will almost always resolve other cases not before the court. Any articulation of a general principle or rationale will have implications beyond the case at hand; that is what it means for a principle to be general.[369] Yet most of us do not object to the articulation of general principles by courts. To the contrary, we believe that reliance on general principles promotes the rule of law and prevents judges from deciding cases based on personal bias.[370] So to a certain extent, the announcement of legal principles broader than necessary to decide a case is an inherent aspect of our legal system.

Of course, some opinions are broader than others, and one might argue that even if all opinions inevitably have implications for cases not before the court, that does not justify opinions that are unnecessarily broad. Such opinions do not provide merely a rationale

366. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 521 (1989).

367. *See id.*

368. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992) (noting that *Roe* announced a principle on abortion "that displaced virtually every state law then in force").

369. *See* Dorf, *supra* note 257, at 1998 ("To say that the reasoning in a prior case supports or even requires the same or similar result in a later case is to recognize that the first case does not merely resolve a dispute between the parties but announces a general principle applicable in future cases as well.").

370. *See id.* at 1997–98 (stating that "the precept that like cases should be treated alike—rooted both in the rule of law and in Article III's invocation of the 'judicial Power'—rests upon the assumption that judicial decisions are necessarily abstract or general" (quoting U.S. CONST. art. III, § 1)).

for the decision that necessarily has broader application; instead they go beyond the statement of a general principle to establish what amounts to a legislative rule. *Roe*'s creation of the trimester framework has been criticized along these lines.[371] And when an opinion sweeps this broadly, one might argue, the ban on advisory opinions has certainly been violated.

I agree with this argument in general. Some opinions sweep so broadly that one is hard pressed to deny their advisory character. But I want to offer two caveats that may distinguish even these opinions from unnecessary constitutional rulings in the areas under consideration here. First, although we might all agree that opinions are sometimes unnecessarily broad, we will frequently disagree about whether a particular opinion is too broad. One person's advisory opinion is often another person's idea of judicial restraint. As a result, it is much harder to identify—and thus condemn—advisory opinions of this type than those I have described in this Article. Second, courts do not issue uniformly unnecessarily broad opinions. They do so only in isolated cases and thus can consider whether the unnecessary aspect of the opinion undermines the goals behind the ban on advisory opinions. For instance, a court may determine in a given case that the parties have argued an issue vigorously enough that it has sufficient information to decide the issue even though doing so is not strictly necessary. In qualified immunity cases, however, the courts have no such discretion. The Supreme Court has said they *must* decide the constitutional issue before deciding the qualified immunity issue. And this instruction applies regardless of whether there has been an adversarial presentation of the issue.

Finally, what are the implications of my analysis for alternative holdings? Courts occasionally provide alternative holdings to support their judgment, even though either holding on its own would be sufficient to resolve the case.[372] For instance, suppose a plaintiff

371. *See Webster*, 492 U.S. at 518 (arguing that *Roe*'s trimester framework has resulted in a "web of legal rules ... resembling a code of regulations rather than a body of constitutional doctrine"); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 99 (1976) (White, J., concurring in part and dissenting in part) (arguing that the trimester framework turned the Court into the nation's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States"); Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) ("The decision here to break pregnancy into three distinct terms ... partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.").

372. *See, e.g.*, SEC v. ETS Payphones, Inc., 300 F.3d 1281, 1284–85 (11th Cir. 2002) (holding that defendant's purchase and leaseback arrangement was not an "investment contract" under federal law because there was no common enterprise, and in the

challenges an agency regulation on grounds that it violates both the Constitution and the agency's authorizing statute. In deciding the case, a court might first rule that the regulation violates the authorizing statute. Then, it might rule that even if the regulation does not violate the statute, it violates the Constitution.[373] Because the latter holding is sufficient to resolve the case, the statutory ruling is technically unnecessary and has no effect on the outcome of the dispute. Yet alternative holdings are prevalent and widely accepted.[374] So what distinguishes these from unnecessary constitutional rulings in qualified immunity, habeas corpus, harmless error, and Fourth Amendment good faith cases?

In truth, there is no difference between alternative holdings and unnecessary constitutional rulings in harmless error and Fourth Amendment good faith cases. In both situations, the parties do not know ahead of time which issue the court will rely on to support its judgment. As a result, they must argue both issues fully in order to protect their interests. That is the main reason unnecessary constitutional rulings in harmless error and Fourth Amendment good faith cases do not violate the ban on advisory opinions—at least if one accepts the Matasar and Bruch analysis and ignores the State Grounds doctrine.[375] But parties in qualified immunity and habeas cases know that a ruling on the constitutional issue can never affect the outcome of the dispute and thus lack adequate incentive to argue fully the issue. For that reason, unnecessary constitutional rulings in these two areas are distinguishable from alternative holdings generally.

Before closing my discussion of advisory opinions, there is one other point I should consider. Perhaps I have approached the issue from the wrong direction. Instead of arguing that unnecessary constitutional rulings in some contexts violate the ban on advisory opinions, perhaps I should argue that these rulings should not be given precedential effect. After all, I maintain above that certain types of dictum do not violate Article III because they are not intended to carry precedential weight. Thus, if unnecessary constitutional rulings were stripped of precedential force, presumably they would not violate Article III either.

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alternative investors did not expect profits to be derived solely through the efforts of others).

373. This example is borrowed from Dorf, *supra* note 257, at 2006.

374. *See* HART & WECHSLER, *supra* note 37, at 81 (stating that "settled practice" suggests alternative holdings are constitutional).

375. *See supra* Part II.C.1.

The problem with this solution is that it would seem to defeat one of the main reasons for issuing unnecessary constitutional rulings. As explained in Part I.B.1, at least several members of the Court favor reaching the constitutional issues in qualified immunity cases because they hope to establish clearly rights that can be relied upon by later litigants. In addition, it seems likely that the Court's embrace of unnecessary constitutional rulings in habeas cases is motivated by a desire to establish rules of criminal procedure that will bind state courts. Yet if these rulings are stripped of precedential effect, neither of these goals will be met. The Court has interpreted the phrase "clearly established Federal Law" in AEDPA to refer to "the holdings, as opposed to the dicta," of the Supreme Court's decisions.[376] Thus, if the Court's rulings on the constitutional issues in habeas cases are treated as dicta, they cannot serve as a basis for habeas relief and will not bind state courts. The Court has not explicitly addressed whether dicta can clearly establish rights for purposes of qualified immunity, but, as lower court decisions acknowledge, it would seem odd to conclude that they can.[377] Qualified immunity is intended to prevent government officials from having to guess when they will be held liable. Yet if we allow qualified immunity to be defeated on the basis of judicial statements that courts are free to ignore in ruling on the merits of a plaintiff's claim, much of that guesswork will continue.

What this means, I think, is that we must evaluate unnecessary constitutional rulings in qualified immunity and habeas cases on the terms on which the Court has presented them—as judicial opinions intended to carry the force of precedent. And on those terms, I have tried to show, these rulings fail the test of Article III.

D. Summary

Unnecessary constitutional rulings in qualified immunity and habeas cases violate the ban on advisory opinions because a decision on the constitutional issue has no effect on the outcome of the dispute. This lack of effect is troubling by itself: a court might not give proper consideration to the constitutional issue if it knows that neither party will be affected by its decision. But even if we presume that courts will take seriously their responsibility to decide the issue,

376. *See* Williams v. Taylor, 529 U.S. 362, 412 (2000). AEDPA is discussed *supra* Part II.B.2.

377. *See, e.g.*, Hamilton v. Cannon, 80 F.3d 1525, 1530 (11th Cir. 1996) ("The law cannot be established by dicta. Dicta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law.").

the individual litigants in these cases lack adequate incentive to argue the issue vigorously. Because they know that a decision on the constitutional issue can never have any effect—and because deciding the constitutional issue is not a necessary step to deciding the clearly established issue—these litigants have little reason to make non-precedent-based arguments that are vital to resolution of the constitutional question.

Unnecessary constitutional rulings in harmless error and Fourth Amendment good faith cases are less problematic because even though these rulings often have no effect, the parties will not know which issue is dispositive until after the decision is released.[378] As a result, the parties must vigorously argue both the constitutional issue and the non-constitutional issue in order to protect themselves. In this way, these two areas resemble the State Grounds doctrine, where the parties do not know whether the federal issue will be decided until after the Court determines whether there is an adequate and independent state ground. It is true that the Court has described the State Grounds doctrine as required by Article III, which would suggest that unnecessary constitutional rulings in harmless error and Fourth Amendment good faith cases violate the ban on advisory opinions. But as Matasar and Bruch have shown, deciding the federal issue in State Grounds cases does not undermine the goals served by the ban on advisory opinions. Unnecessary constitutional rulings in harmless error and Fourth Amendment good faith cases do not undermine those goals either. Therefore, one can make a strong argument that they do not violate the ban on advisory opinions.

III. UNNECESSARY CONSTITUTIONAL RULINGS AND THE EVOLUTION OF NEW RIGHTS

Even if the Court's approach to unnecessary constitutional rulings is permissible under Article III, we might still question whether it is good policy. The principle of avoiding constitutional questions has a long and distinguished pedigree and serves many valuable functions. In this Part, I explore the foundations of that principle and the ways it has manifested itself over the past two centuries. I then consider whether, in light of this tradition, the Court's willingness to issue unnecessary constitutional rulings can be justified. The most intriguing justification is that the Court's approach ensures the continued evolution of constitutional rights.[379]

378. *See supra* notes 310–11 and accompanying text.
379. *See* Greabe, *supra* note 36, at 433–34.

By reaching constitutional issues even in cases where a non-constitutional issue is dispositive, courts are able to articulate new constitutional rights that will benefit later litigants. Although I agree that this is a powerful justification, it overlooks an important consideration. When a court reaches out to decide the constitutional issue in qualified immunity, habeas, harmless error, or Fourth Amendment good faith cases, it will not necessarily rule that the right exists. As I show below, more often than not courts decide that the constitutional right does not exist. One might argue that this is irrelevant in qualified immunity and habeas cases because a ruling that a right does not exist leaves future litigants no worse off than a ruling that the right is not clearly established; either way, they will be denied relief. But such rulings do have collateral effects that might make one question whether unnecessary constitutional rulings in these areas are desirable.

A. The Passive Virtues

The principle of avoiding constitutional questions is nearly as old as the ban on advisory opinions. As early as 1833, John Marshall wrote that "the constitutionality of a legislative act" should only be determined if doing so is "indispensably necessary to the case ... [B]ut if the case may be determined on other points, a just respect for the legislature requires[] that the obligation of its laws should not be unnecessarily and wantonly assailed."[380] The Supreme Court reiterated this principle in various cases over the next century,[381] but it was not until the 1936 case of *Ashwander v. Tennessee Valley Authority*[382] that the principle was fully elaborated. In a concurring opinion in *Ashwander*, Justice Brandeis objected to the majority's resolution of a constitutional question concerning the Wilson Dam.[383] Citing "the practice in constitutional cases," Brandeis listed a series of rules under which the Court "has avoided passing upon a large part of

380. Ex Parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 441 (1821) (stating that if the Court disposes of the case on statutory grounds, "it will be unnecessary, and consequently improper" to decide the constitutional issue).

381. *See* Matthew Addy Co. v. United States., 264 U.S. 239, 245 (1924); Howat v. State of Kansas, 258 U.S. 181, 184 (1922); Blair v. United States, 250 U.S. 273, 279 (1919); United States ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909); Liverpool, N.Y. & Phila. S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885) ("[N]ever ... anticipate a question of constitutional law in advance of the necessity of deciding it ....").

382. 297 U.S. 288 (1936).

383. *Id.* at 341 (Brandeis, J., concurring).

all the constitutional questions pressed upon it for decision:"[384]

> (1) "The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding . . . ."
>
> (2) "The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it."
>
> (3) "The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."
>
> (4) "The Court will not pass upon a constitutional question although properly presented by the record, if there is . . . some other ground upon which the case may be disposed of."
>
> (5) "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation."
>
> (6) "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."
>
> (7) "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[385]

Some of these rules have been incorporated into the Court's jurisdictional doctrines.[386] For instance, the first rule, which prevents collusive suits, is reflected in the ban on advisory opinions and also in standing doctrine, which requires a concrete dispute between adverse litigants.[387] The second rule, which prevents courts from deciding constitutional questions prematurely, is reflected in the doctrine of ripeness.[388] And the fifth rule, which requires plaintiffs to show an

384. *Id.* at 345–46.

385. *Id.* at 346–48.

386. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1018–23 (1994) (discussing the application of Brandeis's "rules" to Article III court jurisdictional requirements).

387. *See id.* at 1018.

388. *Id.* at 1019 ("The second rule of the avoidance doctrine mirrors the ripeness

injury, finds expression in the first prong of standing doctrine.[389] Other rules, such as the mandate to formulate constitutional rules narrowly and to construe statutes so as to avoid constitutional questions, are not so much formal doctrines as prudential considerations that courts rely upon at their discretion.[390]

Brandeis and subsequent writers have offered several justifications to support the avoidance principle.[391] First, they have pointed to the "great gravity and delicacy" of judicial review.[392] Because federal judges are appointed and can only be removed through impeachment, their review of legislative and executive actions undermines the democratic process. As a result of this "countermajoritarian difficulty,"[393] some argue, courts should avoid striking down laws and executive actions under the Constitution whenever possible. At the same time, because judicial decisions upholding governmental conduct may lend unwarranted legitimacy to that conduct, courts should also refrain from unnecessarily declaring the constitutionality of legislative and executive actions.[394]

Second, and closely related to the first justification, is the preservation of the courts' credibility and legitimacy.[395] Because

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requirement in that it obliges federal courts to refrain from deciding a dispute prematurely.").

389. *See* Allen v. Wright, 468 U.S. 737, 751 (1984) (articulating the first prong of the standing doctrine: that the plaintiff's injury be concrete). The other two prongs of jurisdictional standing are causation and redressability. *See id.*

390. *See* Pushaw, *supra* note 331, at 451 n.23.

391. *See* Kloppenberg, *supra* note 386, at 1012–23 (summarizing the arguments in support of the avoidance principle).

392. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring); *see also* Rust v. Sullivan, 500 U.S. 173, 224 (1991) (O'Connor, J., dissenting) ("In recognition of our place in the constitutional scheme, we must act with 'great gravity and delicacy' when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment." (citation omitted)); Baker v. Carr, 369 U.S. 186, 211 (1962) (noting the delicacy of constitutional interpretation in the context of determining what powers the constitution committed to the separate branches of government); Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 544 (1923) ("The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy.").

393. *See* BICKEL, LEAST DANGEROUS BRANCH, *supra* note 50, at 16.

394. *See* Bickel, *supra* note 9, at 48 ("To declare that a statute is not intolerable because it is not inconsistent with principle amounts to a significant intervention in the political process, different in degree only from a declaration of unconstitutionality."); *see also* Korematsu v. United States, 323 U.S. 214, 243–48 (1944) (Jackson, J., dissenting) (arguing that the Court's acceptance of the Japanese internment was more dangerous than the actual internment because the principle announced by the Court will survive, while the internment would end after the war).

395. *See* CHEMERINSKY, *supra* note 40, § 2.1, at 46 (noting some commentators' argument that "federal courts generally depend on the other branches to voluntarily comply with judicial orders and that such acquiescence depends on the judiciary's

federal judges are not elected, they derive their legitimacy from the people's acceptance of their decisions. One way to encourage this acceptance is by issuing well-reasoned decisions based on principle, not politics. But even then, courts still risk losing their credibility, especially when they clash with elected officials. Therefore, in order to maintain their legitimacy and credibility, courts should exercise judicial review only when absolutely necessary.[396]

Third, constitutional interpretation is an imprecise and difficult task. The Constitution contains only the "great outlines" and "important objects" of our government.[397] The details must be deduced from those outlines and objects, and there is widespread disagreement about how that deduction should take place.[398] Should courts look only to the words of the Constitution or also to the intent behind the words? If the latter, whose intent should count? The intent of the framers? Those who ratified the Constitution? Or should courts look beyond original intent and consider what the words of the Constitution mean today, in view of our experience and contemporary values? These are difficult questions, and even those who agree on the proper method of constitutional interpretation often disagree on the answers to particular constitutional questions. In light of this disagreement and given the "fallibility of the human judgment," courts should "shrink from exercising [judicial review] in any case where [they] can conscientiously and with due regard to duty and official oath decline the responsibility."[399]

Finally, constitutional rulings are final in a way that other rulings are not. When the courts misinterpret a statute or administrative regulation, Congress or the executive branch can correct the error by passing a new law or regulation. But when the courts issue a constitutional ruling that the other branches disagree with, their only

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credibility"); Kloppenberg, *supra* note 386, at 1042 ("Proponents of avoidance techniques . . . believe that the federal judiciary must exercise its powers cautiously to conserve the fragile credibility of the least dangerous branch.").

396. *See* Rescue Army v. Mun. Court, 331 U.S. 549, 572 n.38 (1947) ("It is not without significance for the [avoidance] policy's validity that the periods when the power [of judicial review] has been exercised most readily and broadly have been the ones in which this Court and the institution of judicial review have had their stormiest experiences.").

397. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

398. For a general sense of this disagreement, compare ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (arguing for an originalist, strict construction approach), with LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991) (arguing for a broader, more interpretive approach).

399. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

recourse is to introduce a constitutional amendment, which must be approved by three fourths of the states.[400] The amendment process is notoriously difficult; in the 213 years since the Bill of Rights was added to the Constitution, only seventeen amendments have been ratified. Thus, given the likelihood that constitutional rulings will be permanent, courts should avoid those rulings whenever possible.

Not all judges and scholars accept these justifications. Some argue that countermajoritarian rulings do not pose a difficulty at all, but are instead a necessary means of protecting minority rights in a democracy.[401] Others argue that the courts' concern with their credibility is not a sufficient reason for avoiding constitutional questions, and that this concern is overstated in any event.[402] Even after *Bush v. Gore*,[403] a highly controversial decision with strong political overtones, a large majority of Americans still have a favorable impression of the Supreme Court.[404] Finally, some argue that constitutional rulings are not truly final because the political branches are often able to circumvent court rulings.[405] For instance, after the Court ruled that the Gun Free School Zones Act exceeded Congress's power under the commerce clause,[406] Congress simply amended the law prohibiting possession of firearms near school campuses to apply only to the possession of firearms that have moved in or otherwise affect interstate commerce.[407] Congress could also sidestep other recent Court decisions by repackaging Commerce

400. *See* U.S. CONST. art. V (describing the amendment process).

401. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L REV. 297, 310 (1979) ("One reason ... for allowing courts to review legislation is that minority groups and unpopular points of view may not be adequately represented in the processes of democratic decisionmaking.").

402. *See* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 134–39 (1987) (arguing that the Court's credibility is not fragile and that the Court's legitimacy should not be a primary concern when interpreting the Constitution).

403. 531 U.S. 98 (2000) (per curiam).

404. *See* Jeffrey M. Jones, *Opinion of the U.S. Supreme Court Has Become More Politicized*, Gallup News Service, *at* http://www.gallup.com/poll/releases/pr010103b.asp (Jan. 3, 2001) (indicating that after the 2000 election, overall perception of the Court had not changed, although opinion among Democrats and Republicans had become more politicized) (on file with the North Carolina Law Review); *see also* Herbert M. Kritzer, *The Impact of* Bush v. Gore *on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 35 (2001) (same); Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. 1279, 1296 n.70 (2001) (book review) (citing Gallup poll data).

405. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 644–52 (1993) (offering as an example the legislative response to *Roe v. Wade*).

406. *See* United States v. Lopez, 514 U.S. 549, 551 (1995).

407. *See* 18 U.S.C. § 922(q)(2)(A) (2000).

Clause legislation as an exercise of its spending power.[408]

These are valid criticisms of the avoidance principle. But although they call into question the foundations of that principle, they do not undermine those foundations altogether. The exercise of judicial review may be necessary to protect minority rights in a democracy, but that does not make it any less objectionable to the majority. Likewise, although the courts' legitimacy may not have suffered from *Bush v. Gore*, there is little doubt that a court actively bent on thwarting the will of the political branches would soon find itself under fire.[409] And while the political branches sometimes are able to circumvent judicial decisions, constitutional rulings often foreclose political resolution of the country's most difficult problems.[410] Thus, even if absolute adherence to the avoidance principle cannot be justified, there are good reasons to apply a presumption against unnecessary constitutional rulings.[411] Moreover, any departure from the avoidance principle should be supported by equally good reasons. In the next Section, I consider what reasons might support a departure from the avoidance principle in the four areas under discussion.

B. The Active Virtues

As noted in Part I.B, the Court has not attempted to justify its approval of unnecessary constitutional rulings in harmless constitutional error and habeas cases. Even in those areas in which the Court has offered justifications, its reasoning has been flawed. For instance, Justice Rehnquist's claim that courts must decide the constitutional issue in qualified immunity cases to "expeditiously

408. *See* Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 499–503 (2003) (explaining how Congress can use its conditional spending power to "effectively overturn Supreme Court decisions that have restricted congressional power."); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 33 (2003) ("Congress's essentially unquestioned power to spend money, with regulatory strings attached, continues to provide practically limitless opportunities for the national government indirectly to shape policy at the state and local levels of society and government.").

409. *See* WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940, 231–38 (1963); Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994) (detailing the story of Roosevelt's Court-packing controversy).

410. *See* BICKEL, LEAST DANGEROUS BRANCH, *supra* note 50, at 147 ("[T]he 'tendency of a common and easy resort to this great function [of judicial review] . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.' " (quoting J.B. THAYER, JOHN MARSHALL 106–07 (1901))).

411. Even critics of the avoidance principle support a less rigid version of it, not its complete elimination. *See* Kloppenberg, *supra* note 386, at 1065.

weed out" meritless suits makes no sense given that qualified immunity already serves that function. Justice Rehnquist is also mistaken to claim that deciding the constitutional issue is a "necessary concomitant" to deciding the qualified immunity question. As explained in Part II.C.1, a court does not need to address the former question to answer the latter.[412]

But some scholars have offered a justification for the Court's approach in qualified immunity cases that is worth taking seriously. They argue that reaching the constitutional issue in these cases helps to ensure the continued development of constitutional rights. If courts avoid constitutional issues whenever a case can be resolved on non-constitutional grounds, they argue, the body of recognized constitutional rights will stagnate.[413] Moreover, in an area such as qualified immunity, where relief can only be granted for the violation of clearly established rights, avoiding the constitutional issue creates a Catch-22 for plaintiffs.[414] They are denied relief because the constitutional rights they assert are not clearly established. But it is difficult for the constitutional rights to become clearly established because the courts always skip the constitutional issues.[415] Allowing the courts to reach constitutional questions helps break this cycle and ensures that constitutional rights continue to evolve.

Scholars who make this argument are appealing primarily to those who support the expansion of constitutional rights. For those who think constitutional meaning is fixed and that the recognition of new rights is illegitimate, this argument will likely be unpersuasive. But even if one accepts the premise that constitutional evolution is a good thing, one might still question the wisdom of allowing courts to issue unnecessary constitutional rulings. The reason is that when courts reach out to decide constitutional questions unnecessarily, they do not always reach decisions that expand the universe of recognized rights. Just as often, they use the opportunity to contain the body of recognized rights and to deny the existence of new rights.

The Rehnquist Court is a good example. In each of the three qualified immunity cases in which the Court has decided the

412. *See supra* notes 340–50 and accompanying text.

413. *See* Greabe, *supra* note 36, at 410 ("The requirement that the allegedly violated right be clearly established at the time of the action in question tends, if not to 'freeze' constitutional law, then at least to retard its growth . . . .").

414. *See* Greabe, *supra* note 36, at 405 ("[T]he corpus of constitutional law grows only when courts address and resolve novel constitutional claims, but courts often cannot order a remedy for such claims because of their novelty.").

415. It is difficult, but not impossible, because the constitutional rights can become established in criminal cases and in civil rights suits for injunctive relief.

constitutional issue, it has denied the existence of the constitutional right asserted by the plaintiff.[416] The Court has also reached out to deny the existence of constitutional rights in other areas. In *Michigan v. Long*, for instance, the Court modified the State Grounds doctrine, holding that it will presume a state court decision does not rest upon adequate and independent state grounds unless the state court decision clearly says so.[417] The result of this decision is to expand the Supreme Court's review of state court decisions on issues of federal law—presumably a positive development for the protection of constitutional rights. But the Court has used its expanded jurisdiction not to reverse state court decisions denying constitutional claims, but to reverse those decisions *accepting* constitutional claims.[418] In other words, the Supreme Court has used its valuable resources to reverse state court judges who have been overly protective of federal rights. As Justice Stevens has pointed out, this is a bizarre turn of events.[419] The framers favored federal court review of state court decisions out of fear that state judges would be biased against federal rights, not out of concern that they would be too protective of federal rights.[420]

The track record of the Rehnquist Court highlights an interesting and often overlooked point about judicial activism. People who came of age during or after the Warren Court era tend to associate judicial activism with liberal causes. Indeed, political rhetoric has firmly linked the two ideas, so that whenever a politician uses the term "activist judge," the word liberal is sure to follow.[421] But there is

416. *See* Saucier v. Katz, 533 U.S. 194, 207–09 (2001); County of Sacramento v. Lewis, 523 U.S. 833, 853–55 (1998); Siegert v. Gilley, 500 U.S. 226, 233–34 (1991).

417. 463 U.S. 1032, 1040–42 (1983).

418. *See* Pennsylvania v. Finley, 481 U.S. 551, 553–54 (1987); *see also* Colorado v. Nunez, 465 U.S. 324 (1984) (White, J., concurring) (agreeing that the Court lacked jurisdiction under the State Grounds doctrine, but proceeding to argue that the state court wrongly decided the federal issue); Michigan v. Long, 463 U.S. 1032, 1042–43 (1983) (reversing state court's decision that search of the passenger compartment of defendant's car violated the Fourth Amendment); South Dakota v. Neville, 459 U.S. 553, 562–64 (1983) (reversing a state court decision holding that admitting a defendant's refusal to take a blood-alcohol test into evidence violated the Fifth Amendment).

419. *See Michigan*, 463 U.S. at 1067–68 (Stevens, J., dissenting) (arguing that the Court should not depart from the avoidance principle in cases "in which a state court has upheld a citizen's assertion of a right").

420. Indeed, the Judiciary Act of 1789 gave federal courts jurisdiction to review only those state court judgments denying federal claims. It was not until 1914 that Congress gave the courts jurisdiction to review state court decisions upholding federal claims. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (codified as amended at 28 U.S.C. § 1257 (2000)).

421. *See The 2000 Campaign: A Presidential Debate: Transcript of Debate Between Vice President Gore and Governor Bush*, N.Y. TIMES, Oct. 4, 2000, at A30 (Bush: "I'll tell you what kind of judges he'll put on there. He'll put liberal, activist judges who will use their bench to subvert the legislature, that's what he'll do."); Edward Walsh, *DNC's TV*

nothing uniquely liberal about judicial activism, as the history of the Lochner Court attests.[422] Judicial activism can be used to achieve whatever ends are desired by those who engage in it. Thus, liberals who support the continued evolution of constitutional rights should think twice before endorsing a policy of judicial activism initiated by a very non-liberal Court.

Even in the lower courts, there is reason to worry about the consequences of the Court's new activism. I reviewed all circuit court cases in the two years after *Saucier v. Katz* that cited that opinion's instructions on the proper order of decision-making in qualified immunity cases. As the Appendix shows, of ninety-two asserted rights that were not clearly established, the courts held that seventy were not protected by the Constitution at all. To put the point another way, in seventy-six percent of the cases in which the appellate courts reached out to decide the constitutional issue even though the defendant had qualified immunity, they ruled against the plaintiff asserting the existence of the constitutional right. Only in seventeen percent of cases did the appellate courts rule that the asserted right, even though not clearly established, was nonetheless protected by the Constitution.[423]

These findings raise serious questions about the extent to which the Court's departure from the avoidance principle actually promotes the evolution of constitutional rights. Not only is it unusual for courts to establish the existence of a new right, but more often than not they rule that the asserted right does not exist. One might argue that this is irrelevant to civil rights plaintiffs. After all, if a court concludes that a right does not exist, it necessarily believes that the right is not clearly established. And because plaintiffs cannot defeat qualified immunity unless the asserted right is clearly established, what do they lose when a court goes one step further and declares that the right does not exist? Their complaints would have failed in any event.

The answer is that although the rejection of a constitutional right makes no difference for civil rights plaintiffs seeking money damages,

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Ad Targets Bush Record in Texas, WASH. POST, Sept. 6, 2000, at A8 (quoting Dan Bartlett, a Bush campaign spokesman, calling a Democratic ad a "distortion" of Bush's record based on the opinion of a "liberal, activist judge").

422. *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44–49, 168–89 (1990) (describing *Lochner* as conservative judicial activism); Peter M. Shane, *Federalism's 'Old Deal': What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 206 (2000).

423. In the remaining seven percent of cases, the courts departed from *Saucier*'s instructions and did not explicitly decide whether the right asserted by the plaintiff is protected by the Constitution.

it does disadvantage civil rights plaintiffs seeking equitable relief. Qualified immunity is only a defense to monetary liability; it does not protect government officials from actions seeking an injunction or a declaratory judgment.[424] Therefore, when a court rules that an asserted right does not exist, it precludes future plaintiffs from asserting that right as a basis for equitable relief. It also precludes criminal defendants from relying on the right. In areas such as the Fourth Amendment, criminal defendants assert many of the same rights as civil rights plaintiffs.[425] And like plaintiffs seeking equitable relief, criminal defendants are entitled to relief as long as the right exists, even if it is not clearly established. So when a court hearing a qualified immunity case reaches out to deny the existence of a constitutional right, it prevents future criminal defendants from asserting that right in courts within the same jurisdiction. Even in courts outside the jurisdiction, the ruling may be relied upon as persuasive authority to reject similar rights asserted by criminal defendants.

Of course, it is possible that later courts would agree that the constitutional right does not exist, in which case the criminal defendant and the plaintiff seeking equitable relief would lose in any event. Formalists might even argue that later courts would inevitably agree with the earlier determination since under a formalist perspective rights are not contingent. But even a stubborn formalist would be hard pressed to deny that whether a particular right is deemed to exist—as opposed to whether it actually exists—depends in large part on which court or judge makes the decision. The battles waged over judicial nominations would seem to prove this point, as would a comparison of rulings from the Ninth and Fourth Circuits. So while it is possible that all courts would reach the same conclusion about whether a particular right exists, legal realism teaches us not to

424. *See* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 736 (1980); Keenan v. Hall, 83 F.3d 1083, 1093 (9th Cir. 1996); Allen v. Coughlin, 64 F.3d 77, 81 (2d Cir. 1995).

425. For instance, a person arrested pursuant to an unconstitutional state statute can challenge that arrest both as part of his criminal defense and as part of a civil rights suit. *See* Pierson v. Ray, 386 U.S. 547, 551–52 (1967). Criminal defendants and civil rights plaintiffs also make similar claims regarding unreasonable searches, arrests without probable cause, and infringements on free speech. For instance, in *Ealum v. Schirard*, 46 Fed. Appx. 587, 590 (10th Cir. 2002), the plaintiffs filed a § 1983 suit alleging that officers had conducted an unlawful search of their home after criminal charges against them had been dismissed based on the same claim. Likewise, in *Orin v. Barclay*, 272 F.3d 1207, 1211 (9th Cir. 2001), a demonstrator who had been arrested during an abortion protest filed a civil rights suit alleging a First Amendment violation that could also have been a defense to his arrest for trespassing.

bet on this outcome.

Still, it remains to be shown that delaying decisions on constitutional issues will benefit criminal defendants and plaintiffs seeking equitable relief. Many scholars argue that courts are more likely to recognize constitutional rights when the costs of doing so are minimized or delayed.[426] For instance, it has long been thought that the Warren Court's criminal procedure revolution was made possible largely by its embrace of non-retroactivity, which ensured that a decision such as *Miranda* only applied prospectively and did not open the prison gates.[427] Building on these insights, John Jeffries argues that courts are more likely to recognize new constitutional rights in cases in which the defendant has qualified immunity—i.e. in cases where the right is not clearly established—because the cost of doing so is low.[428] If this is correct, criminal defendants and plaintiffs seeking equitable relief may not lose anything when a court reaches out to deny the existence of a constitutional right in a qualified immunity case. If the right is rejected in a case where the cost of innovation is low, chances are slim that it would be accepted in a later case where the cost of innovation is higher.

There are two objections to this argument, and it is worthwhile to work through each one carefully. First, the cost of innovation in a civil rights claim for equitable relief is no higher than in a money damages action in which the defendant has qualified immunity. In both situations, recognition of a new right will require government officials only to alter their conduct in the future and will not penalize them for past violations. The cost of recognizing new rights in criminal cases may indeed be higher, since a guilty defendant could possibly go free as a result. But the cost of rejecting the right is also higher. When a court determines that the right asserted by a civil rights plaintiff is not clearly established, there are no consequences to a decision that the right does not exist. The plaintiff has already lost because the defendant has qualified immunity. In a criminal case,

426. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) ("Put simply, limiting money damages for constitutional violations fosters the development of constitutional law."); Kamin, *supra* note 36, at 9–55, 34 (arguing that the doctrines of harmless error, non-retroactivity, and qualified immunity have "the capacity to either stifle the development of constitutional law—by allowing courts to avoid difficult questions of constitutional law—or to further it—by allowing courts to make broad changes in the law at a relatively low social cost").

427. *See* Fallon & Meltzer, *supra* note 8, at 1739.

428. *See* Jeffries, *supra* note 426, at 99–100 (arguing that qualified immunity "allows courts to embrace innovation without the potentially paralyzing cost of full remediation for past practice").

however, the court's rejection of an asserted right has real consequences for the defendant and may even result in a miscarriage of justice. Thus, it may be wrong to assume that courts are more likely to recognize constitutional rights in qualified immunity cases than in criminal cases. For although the costs of innovation are higher in the latter context, the costs of not innovating are also higher.

Second, and more importantly, civil rights plaintiffs seeking money damages may not have adequate incentives to argue that the asserted right exists even if it is not clearly established. As I explained in Part II.B, a decision on the constitutional issue in a qualified immunity case can never affect the outcome of the case. If the right is clearly established, it necessarily exists. And if the right is not clearly established, the defendant has qualified immunity regardless of whether the right exists. This means that a civil rights plaintiff seeking money damages can never benefit from a separate ruling that the asserted right exists. Criminal defendants and equitable plaintiffs, by contrast, have much to gain from a ruling that the right exists, since qualified immunity is not a defense in criminal cases or equitable actions. Therefore, they are likely to be more effective advocates for the recognition of new constitutional rights.

Aside from the consequences for criminal defendants and equitable plaintiffs, there are other reasons to be concerned about courts reaching out to deny the existence of constitutional rights. For one thing, a ruling that a constitutional right does not exist may have a domino effect. Courts interpreting the Constitution typically follow the common law approach, building on principles laid down by earlier decisions and other courts. Thus, when one court rejects a constitutional right asserted by a plaintiff, others are likely to reject similar rights in analogous cases. Considering that seventy asserted rights were rejected by the circuit courts in a two-year span, this domino effect could be significant.[429]

In addition, a ruling that a constitutional right does not exist authorizes government officials to engage in conduct they otherwise might have avoided. Although officials cannot be held liable in money damages for infringing unestablished rights, even a novel right can be the basis for excluding evidence in a criminal trial. Thus, as long as it is unclear whether a particular right exists, officials have an incentive to avoid conduct that might infringe on that right. Once a court reaches out to rule that a right does not exist, however, the

429. *See* Appendix.

government has no incentive to curb its conduct. It can infringe the asserted right with impunity.

Some might welcome this development, believing that police and other government officials have been unnecessarily shackled by uncertainty about the scope of constitutional rights. But for those who support the Court's approval of unnecessary constitutional rulings out of a desire to promote civil liberties, this possibility should be troubling. Government officials have long taken advantage of uncertainty in the law to avoid liability in civil rights cases. But legal uncertainty can also benefit the targets of police activity by deterring conduct that, although technically legal, skirts the edge of the law.

My point is not to deny that civil rights plaintiffs might benefit from allowing courts to decide constitutional questions in qualified immunity and other cases. Clearly, plaintiffs in these cases are caught in a Catch-22 that makes it difficult to ever overcome the obstacle of qualified immunity. But like many solutions to difficult problems, requiring courts to decide the constitutional questions in these cases has unintended consequences that may outweigh any benefits gained by civil rights plaintiffs. Especially in light of evidence that courts are far more likely to deny the existence of new rights than to recognize new rights, one might conclude that the benefits are not worth the costs.

So what is the solution to the problem? If my analysis in Part II is correct and deciding the constitutional issues in these cases violates the ban on advisory opinions, there may be no solution. Plaintiffs may simply have to hope that new rights will become clearly established in criminal cases and in civil rights suits seeking injunctive relief. But if I am wrong in Part II—or if I am right, but the Court ignores the ban on advisory opinions—there is a relatively simple solution. Instead of *requiring* lower courts to decide the constitutional issues in all qualified immunity cases, the Supreme Court should instead *permit* lower courts to decide constitutional issues at their discretion. The lower courts should then exercise this discretion only in those cases in which the constitutional issue is adequately briefed and presented for decision. If the plaintiff is pro se or fails to advocate vigorously for the existence of the constitutional right, a court should decline to resolve the issue. But if the court concludes that the parties have vigorously contested the issue and that it has sufficient information to reach a thoughtful decision, it can choose to decide whether the constitutional right exists. This way, courts will continue to establish new rights, but will not resolve constitutional issues without "that concrete adverseness

which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[430]

CONCLUSION

The rise of unnecessary constitutional rulings is a troubling development. The federal courts have long maintained that they will avoid constitutional questions whenever possible. And although the courts have not adhered to this promise in every case, they have repeatedly invoked it as a guiding principle. But with its embrace of unnecessary constitutional rulings in the four areas discussed above, the Court has systematically departed from the avoidance principle. Moreover, it has failed to acknowledge the extent of this departure or its implications under Article III.

As I have argued above, the Court's authorization of unnecessary constitutional rulings can be understood as part of larger trend in which the Court has asserted its supremacy over the other branches of government and has come to see its primary role as the declaration of constitutional norms rather than the resolution of ordinary disputes. But the Court's departure from avoidance is also the result of specific pressures and developments in each of the areas in which it has authorized unnecessary constitutional rulings. In particular, this departure might be seen as an effort by the Court to preserve opportunities for the federal courts to engage in constitutional interpretation.

Whatever the explanation, unnecessary constitutional rulings raise serious questions under Article III. Because these rulings have no effect on the outcome of a dispute between adverse litigants, they violate one of the principles underlying the ban on advisory opinions. Moreover, courts deciding constitutional questions unnecessarily may not have adequate information to reach thoughtful decisions. This is especially true in qualified immunity and habeas corpus cases, where a decision on the constitutional issue can never affect the outcome, and individual litigants therefore lack incentives to argue the constitutional issue vigorously. For this reason, I conclude that unnecessary constitutional issues in these cases violate the ban on advisory opinions.

Even apart from Article III, there are reasons to be concerned about the Court's embrace of unnecessary constitutional rulings.

430. Baker v. Carr, 369 U.S. 186, 204 (1962).

Although some scholars have welcomed these rulings in qualified immunity cases as a way to ensure that new constitutional rights are established, the Rehnquist Court has frequently used unnecessary constitutional rulings to restrict, rather than expand, constitutional rights. In addition, my review of qualified immunity cases in the lower courts shows that courts are far more likely to deny the existence of asserted rights than they are to accept them. The denial of an asserted right may not leave a qualified immunity plaintiff or habeas petitioner worse off. But it does disadvantage criminal defendants and civil rights plaintiffs seeking injunctive relief, since they are entitled to relief as long as the right exists, even if it is not clearly established. The denial of asserted rights could also have a domino effect and give police free rein to engage in conduct they otherwise might have avoided.

The avoidance principle has served the federal courts well for more than 200 years. It has helped to preserve their legitimacy and to minimize conflicts between the unelected judiciary and the will of the majority. Avoidance is not an absolute principle. There are times when it makes sense for the courts to confront constitutional questions head-on rather than dodge them indefinitely. But in the absence of some compelling justification, federal courts should only decide constitutional questions when doing so is necessary to fulfill their duty of resolving cases.

APPENDIX

The following table lists all circuit court cases decided in the two years after *Saucier v. Katz* that cited that opinion's instructions on the proper order of decision-making in qualified immunity cases.[431] For each case, the table shows the nature of the constitutional right asserted, the court's decision as to whether the asserted right exists, and the court's decision as to whether the asserted right was clearly established at the time of the events giving rise to the lawsuit. Where a court held that the asserted right does not exist, I have indicated that the right is not clearly established—even if the court did not actually reach that question, since a right cannot be clearly established if it does not exist. For cases in which the plaintiff asserted multiple rights or the same right against multiple defendants, I have listed each right, and the court's decision as to each right, separately.

The table shows that of 167 rights asserted by plaintiffs, sixty were clearly established and ninety-two were not clearly established. (There was no decision on the other fifteen asserted rights.) Of the ninety-two asserted rights not clearly established, 70—or seventy-six percent—were held not to be protected by the Constitution at all, while sixteen—or seventeen percent—were held to be constitutionally protected. In the remaining seven percent of cases, the courts did not explicitly decide whether the asserted right is constitutionally protected.

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Alkire v. Irving, 305 F.3d 456, 468 (6th Cir. 2002)	Unreasonable seizure	Yes	Yes
Altman v. City of High Point, 330 F.3d 194, 200–07 (4th Cir. 2003)	Unreasonable seizure	No	No

431. The list was compiled by conducting a Westlaw "citation reference" search on *Saucier v. Katz* on Nov. 15, 2004. The search was limited to all circuit court cases decided before June 19, 2003 that cited Westlaw headnote 5, which states that "a court required to rule upon qualified immunity of a government official in a civil rights action must consider, as its initial inquiry, whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right." Although it is possible that some courts have followed *Saucier*'s instructions without citing headnote 5, I believe this list is sufficiently complete for my purpose, which is to determine roughly how often courts recognize the existence of an alleged constitutional right.

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Atkinson v. Taylor, 316 F.3d 257, 264, 266–70 (3d Cir. 2003)	(1) Cruel and unusual punishment (2) Deliberate indifference to medical needs/health (3) Free speech	(1) Yes (2) Yes (3) Yes	(1) Yes (2) Yes (3) Yes
Austin v. Johnson, 328 F.3d 204, 207 (5th Cir. 2003)	(1) Cruel and unusual punishment (2) Deliberate indifference to medical needs	(1) No (2) Yes	(1) No (2) Yes
Barney v. City of Eugene, 20 Fed. Appx. 683, 685 (9th Cir. 2001) (mem.)	Free speech and assembly	No	No
Baskin v. Smith, 50 Fed. Appx. 731, 734–36 (6th Cir. 2002)	(1) Arrest without probable cause (2) Excessive force	(1) Yes (2) Yes	(1) Yes (2) Yes
Batten v. Gomez, 324 F.3d 288, 293 (4th Cir. 2003)	(1) Illegal extradition (2) Due process	(1) No (2) Yes	(1) No (2) No
Beauchamp v. City of Noblesville, 320 F.3d 733, 742 (7th Cir. 2003)	Arrest without probable cause	No	No
Bell v. Manspeaker, 34 Fed. Appx. 637, 642 (10th Cir. 2002)	Arrest without probable cause	No	No
Bennett v. Murphy, 274 F.3d 133, 137 (3d Cir. 2002)	Excessive force	Yes	Does not decide
Billings v. Madison Metropolitan School District, 259 F.3d 807, 815–17 (7th Cir. 2001)	(1) Equal protection (2) Equal protection	(1) No (2) Yes	(1) No (2) Yes
Billington v. Smith, 292 F.3d 1177, 1191 (9th Cir. 2002)	Fourth Amendment excessive force	No	No
Bingham v. City of Manhattan Beach, 329 F.3d 723, 729 (9th Cir. 2003)	(1) Unreasonable seizure (2) Wrongful arrest	(1) Yes (2) Yes	(1) Yes (2) Yes
Bleavins v. Bartels, 326 F.3d 887, 891–92 (7th Cir. 2003)	Unreasonable seizure	Does not decide	Does not decide
Branton v. City of Dallas, 272 F.3d 730, 744 (5th Cir. 2001)	Free speech	Yes	Yes

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Brees v. Courtesy Ford, Inc., 45 Fed. Appx. 711, 714–17 (9th Cir. 2002) (mem.)	(1) Deliberate indifference to medical needs (2) Unreasonable seizure (3) Due process	(1) No (2) Yes (3) Yes	(1) No (2) Yes (3) Yes
Brewster v. Shasta County, 27 Fed. Appx. 908, 911–14 (9th Cir. 2001) (mem.)	(1) Due process (2) Arrest without probable cause	(1) Yes (2) Yes	(1) Yes (2) Yes
Briscoe-King v. Terhune, 43 Fed. Appx. 45, 47 (9th Cir. 2002) (mem.)	Free speech	Yes	Yes
Butler v. Bayer, 63 Fed. Appx. 298, 299 (9th Cir. 2003) (mem.)	Deliberate indifference to medical needs/safety	No	No
Caldarola v. Calabrese, 298 F.3d 156, 160–68 (2d Cir. 2002)	Unreasonable search and seizure	Does not decide	No
Campbell v. Peters, 256 F.3d 695, 700 (7th Cir. 2001)	Cruel and unusual punishment	Yes	No
Carey v. Nevada Gaming Control Board, 279 F.3d 873, 879–81 (9th Cir. 2002)	(1) Wrongful arrest (2) Unreasonable search	(1) Yes (2) Yes	(1) Yes (2) Yes
Caricofe v. Mayor and City Council of Ocean City, 32 Fed. Appx. 62, 66 (4th Cir. 2002) (per curiam)	Excessive force	No	No
Cavalieri v. Shepard, 321 F.3d 616, 622–23 (7th Cir. 2003)	Deliberate indifference to suicide risk	Yes	Yes
Clem v. Corbeau, 284 F.3d 543, 553–54 (4th Cir. 2002)	Excessive force	Yes	Yes
Clement v. Gomez, 298 F.3d 898, 903–06 (9th Cir. 2002)	(1) Excessive force (2) Deliberate indifference to serious medical needs	(1) No (2) Yes	(1) No (2) Yes

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Comstock v. McCrary, 273 F.3d 693, 702–04, 711–13 (6th Cir. 2001)	(1) Deliberate indifference to medical needs 2 Deliberate indifference to medical needs (3) Deliberate indifference to medical needs	(1) Yes (2) No (3) No	(1) Yes (2) No (3) No
Crockett v. Cumberland College, 316 F.3d 571, 579 (6th Cir. 2003)	Arrest without probable cause	No	No
Cruz v. Kauai County, 279 F.3d 1064, 1068–69 (9th Cir. 2002)	Unreasonable seizure	Yes	No
Curley v. Klem, 298 F.3d 271, 279 (3d Cir. 2002)	Unreasonable seizure	Yes	Does not decide
Dahl v. Holley, 312 F.3d 1228, 1233 (11th Cir. 2002)	Unlawful arrest	No	No
Devereaux v. Abbey, 263 F.3d 1070, 1074–76 (9th Cir. 2001)	Due process	Does not decide	Does not decide
Dirrane v. Brookline Police Department, 315 F.3d 65, 69–70 (1st Cir. 2002)	Free speech	Yes	No
Doe v. Heck, 327 F.3d 492, 511, 516, 524–27 (7th Cir. 2003)	(1) Unreasonable seizure (2) Substantive due process (3) Procedural due process	(1) Yes (2) Yes (3) Yes	(1) No (2) No (3) No
Dreibel v. City of Milwaukee, 298 F.3d 622, 641–52 (7th Cir. 2002)	(1) Unreasonable seizure (2) Unreasonable seizure (3) Unreasonable seizure (4) Unreasonable seizure.	(1) No (2) No (3) No (4) Yes	(1) No (2) No (3) No (4) Yes

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Ealum v. Schirard, 46 Fed. Appx. 587, 592–95 (10th Cir. 2002)	(1) Excessive force (2) Unreasonable search (3) Excessive force	(1) Yes (2) Yes (3) No	(1) Yes (2) Yes (3) No
Estep v. Dallas County, 310 F.3d 353, 358–61 (5th Cir. 2002) (per curiam)	Unreasonable search	Yes	Yes
Farm Labor Organizing Committee v. Ohio State Highway Patrol, 308 F.3d 523, 532–49 (6th Cir. 2002)	(1) Equal protection (2) Unreasonable seizure	(1) Yes (2) Yes	(1) Yes (2) Yes
Federman v. County of Kern, 61 Fed. Appx. 438, 440–42 (9th Cir. 2003) (mem.)	(1) Excessive force (2) Excessive force	(1) Yes (2) Yes	(1) Yes (2) Yes
Fersner v. Prince George's County, Maryland, 22 Fed. Appx. 314, 315 (4th Cir. 2001) (per curiam)	Unreasonable seizure	Does not decide	Does not decide
Finsel v. Cruppenink, 326 F.3d 903, 906–07 (7th Cir. 2003)	Unreasonable search	Does not decide	Yes
Flores v. Morgan Hill Unified School District, 18 Fed. Appx. 646, 647–48 (9th Cir. 2001) (mem.)	Equal protection	Does not decide	Does not decide
Forbes v. Township of Lower Merion, 313 F.3d 144, 148–50 (3d Cir. 2002)	Excessive force	Does not decide	Does not decide
Franklin v. Fox, 312 F.3d 423, 437 (9th Cir. 2002)	Arrest without probable cause	Does not decide	No
Ganwich v. Knapp, 319 F.3d 1115, 1119–24 (9th Cir. 2003)	Unreasonable seizure	Yes	Yes
Gardner v. Williams, 56 Fed. Appx. 700, 704 (6th Cir. 2003) (per curiam)	Arrest without probable cause	Yes	Yes
Goad v. Mitchell, 297 F.3d 497, 505 (6th Cir. 2002) (per curiam)	Free speech	Does not decide	Does not decide
Gomez v. Atkins, 296 F.3d 253, 261–63 (4th Cir. 2002)	Arrest without probable cause	Does not decide	No
Gonzalez v. Reno, 325 F.3d 1228, 1234 (11th Cir. 2003)	Unreasonable seizure	No	No

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Grant v. City of Long Beach, 315 F.3d 1081, 1089–90 (9th Cir. 2002)	Arrest without probable cause	Yes	Yes
Grauerholz v. Adcock, 51 Fed. Appx. 298, 300 (10th Cir. 2002)	Excessive force	No	No
Greene v. Barber, 310 F.3d 889, 897–99 (6th Cir. 2002)	(1) Arrest without probable cause (2) Excessive force	(1) Yes (2) Yes	(1) Yes (2) No
Hamilton v. Leavy, 322 F.3d 776, 786 (3d Cir. 2003)	Deliberate indifference to safety	Does not decide	Does not decide
Hamilton v. Jackson, 59 Fed. Appx. 222, 222 (9th Cir. 2003) (mem.)	Failure to provide medical treatment	Does not decide	Does not decide
Hart v. Myers, 50 Fed. Appx. 45, 47 (2d Cir. 2002)	Unreasonable seizure	Does not decide	No
Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125, 1129–31 (9th Cir. 2002)	Excessive force	Yes	Yes
Holmes v. Kucynda, 321 F.3d 1069, 1078–84 (11th Cir. 2003)	(1) Unreasonable search (2) Unlawful arrest (3) Unreasonable search (4) Unreasonable search	(1) No (2) Yes (3) Yes (4) Yes	(1) No (2) Yes (3) Yes (4) Yes
Humphrey v. Lane County, 35 Fed. Appx. 538, 539 (9th Cir. 2002) (mem.)	Unreasonable seizure	Yes	No
Jarrett v. Town of Yarmouth, 331 F.3d 140, 146–50 (1st Cir. 2003) (per curiam)	Excessive force	No	No
Jackson v. City of Bremerton, 268 F.3d 646, 653 (9th Cir. 2001)	Excessive force	No	No
Jeffers v. Gomez, 267 F.3d 895, 910–18 (9th Cir. 2001) (per curiam)	Excessive force	Does not decide	Does not decide
Johnson v. California, 321 F.3d 791, 807 (9th Cir. 2003)	Equal protection	No	No
Jones v. Buchanan, 325 F.3d 520, 531, 534–35 (4th Cir. 2003)	Excessive force	Yes	Yes

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Keenan v. Tejeda, 290 F.3d 252, 261–62 (5th Cir. 2002)	Free speech	Yes	Does not decide
Keller v. Faecher, 44 Fed. Appx. 828, 831–32 (9th Cir. 2002) (mem.)	(1) Interference with medical treatment (2) Deliberate indifference to medical needs (3) Deliberate indifference to medical needs (4) Deliberate indifference to medical needs	(1) No (2) Yes (3) No (4) No	(1) No (2) Yes (3) No (4) No
Khan v. Lucas, 33 Fed. Appx. 381, 384–85 (10th Cir. 2002)	Substantive due process	No	No
Kinney v. Weaver, 301 F.3d 253, 268–85 (5th Cir. 2002)	(1) Free speech (2) Due process	(1) Yes (2) No	(1) Yes (2) No
Klein v. Long, 275 F.3d 544, 552 (6th Cir. 2001)	Arrest without probable cause	No	No
Krug v. Lutz, 329 F.3d 692, 696–97, 699 (9th Cir. 2003)	Procedural due process	Yes	No
Kuha v. City of Minnetonka, 365 F.3d 590, 601–03 (8th Cir. 2003)	Excessive force	Yes	No
Lassonde v. Pleasanton Unified School Dist., 320 F.3d 979, 982–83 (9th Cir. 2003)	Free exercise	No	No
Lee v. Ferraro, 284 F.3d 1188, 1196–99 (11th Cir. 2002)	(1) Wrongful arrest (2) Excessive force	(1) No (2) Yes	(1) No (2) Yes
Lockridge v. Board of Trustees of the University of Arkansas, 294 F.3d 1010, 1017–18 (8th Cir. 2002)	Equal protection	Yes	Yes
Lockridge v. Board of Trustees of the University of Arkansas, 315 F.3d 1005, 1012 (8th Cir. 2003)	Discrimination	No	No

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Loria v. Gorman, 306 F.3d 1271, 1282–93 (2d Cir. 2002)	(1) Unreasonable seizure (2) Unreasonable seizure (3) Wrongful arrest (4) Arrest without probable cause	(1) Yes (2) No (3) No (4) Yes	(1) Yes (2) No (3) No (4) Yes
Mansoor v. Trank, 319 F.3d 133, 135–39 (4th Cir. 2003)	Free speech	Yes	Yes
Marshall v. Teske, 284 F.3d 765, 772 (7th Cir. 2002)	Arrest without probable cause	Yes	Yes
May v. Franklin County Board of Commissioners, 59 Fed. Appx. 786, 791–94 (6th Cir. 2003)	Substantive due process	No	No
McClendon v. City of Columbia, 305 F.3d 314, 323 (5th Cir. 2002) (per curiam)	Substantive due process	No	No
McKinney v. Peters, 58 Fed. Appx. 284, 285 (9th Cir. 2003) (mem.)	Deliberate indifference to safety	Yes	Yes
McNair v. Coffey, 279 F.3d 463, 467–68 (7th Cir. 2002)	Excessive force	No	No
McTaggert v. Taylor, 48 Fed. Appx. 237, 239 (9th Cir. 2002) (mem.)	Deliberate indifference to safety	No	No
Meloy v. Bachmeier, 302 F.3d 845, 848–49 (8th Cir. 2002)	Failure to provide medical treatment	Yes	No
Molina v. Cooper, 325 F.3d 963, 968–74 (7th Cir. 2003)	(1) Unreasonable search (2) Unreasonable search (3) Fourth Amendment excessive force	(1) No (2) No (3) No	(1) No (2) No (3) No
Morrell v. Mock, 270 F.3d 1090, 1094–1101 (7th Cir. 2001)	Substantive due process	Yes	No
Newsome v. McCabe, 319 F.3d 301, 303 (7th Cir. 2003)	Due process	Does not decide	Does not decide
Orin v. Barclay, 272 F.3d 1207, 1214 (9th Cir. 2001)	Free speech	Yes	Yes

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Pace v. Capobianco, 283 F.3d 1275, 1283 (11th Cir. 2002)	Excessive force	No	No
Peebles v. Yamhill County, 26 Fed. Appx. 643, 645 (9th Cir. 2001) (mem.)	Unlawful arrest	No	No
PETA v. Rasmussen, 298 F.3d 1198, 1207 (10th Cir. 2002)	Free speech	Yes	Yes
Phelps v. Coy, 286 F.3d 295, 302 (6th Cir. 2002)	Excessive force	Yes	Yes
Pike v. Osborne, 301 F.3d 182, 184–85 (4th Cir. 2002)	Free speech	Yes	No
Poe v. Leonard, 282 F.3d 123, 132–46 (2d Cir. 2002)	Substantive due process	Does not decide	No
Resnick v. Adams, 317 F.3d 1056, 1059–63 (9th Cir. 2003)	Free exercise	No	No
Rivera v. Washington, 57 Fed. Appx. 558, 561–63 (4th Cir. 2003) (per curiam)	(1) Unreasonable search (2) Excessive force	(1) No (2) No	(1) No (2) No
Rogers v. Clark County School District, 52 Fed. Appx. 911, 912 (9th Cir. 2002) (mem.)	Equal protection	Yes	Yes
Rucker v. Hampton, 49 Fed. Appx. 806, 807–11 (10th Cir. 2002)	Excessive force	No	No
Rudebusch v. Hughes, 313 F.3d 506, 513–19 (9th Cir. 2002)	Equal protection	Yes	No
Santos v. Gates, 287 F.3d 846, 851–56 (9th Cir. 2002)	Excessive force	Does not decide	Does not decide
Saumur v. Robles, 65 Fed. Appx. 132, 133–34 (9th Cir. 2003) (mem.)	Unreasonable search	No	No
Seiner v. Drenon, 304 F.3d 810, 812–13 (8th Cir. 2002)	Excessive force	No	No
Sinclair v. City of Des Moines, 268 F.3d 594, 596 (8th Cir. 2001) (per curiam)	Excessive force	No	No
Smith v. Stone, 40 Fed. Appx. 197, 199–200 (6th Cir. 2002)	Unreasonable search	Does not decide	No

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Sorrels v. McKee, 290 F.3d 965, 969–72 (9th Cir. 2002)	(1) Free speech (2) Due process	(1) Yes (2) No	(1) No (2) No
Spencer v. Sutterfield, 66 Fed. Appx. 569, 572–78 (6th Cir. 2003) (per curiam)	Unreasonable search	No	No
Stevens v. Rose, 298 F.3d 880, 883–85 (9th Cir. 2002)	Arrest without probable cause	Yes	Yes
Stuart v. Jackson, 24 Fed. Appx. 943, 952–56 (10th Cir. 2001)	(1) Excessive force (2) Failure to train	(1) No (2) No	(1) No (2) No
Suboh v. District Attorney's Office of Suffolk District, 298 F.3d 81, 90–98 (1st Cir. 2002)	Procedural due process	Yes	Yes
Valdez v. Rosenbaum, 302 F.3d 1039, 1043–49 (9th Cir. 2002)	(1) Procedural due process (2) Substantive due process (3) First amendment free speech	(1) No (2) No (3) No	(1) No (2) No (3) No
Vinyard v. Wilson, 311 F.3d 1340, 1346–56 (11th Cir. 2002)	(1) Excessive force (2) Substantive due process (3) Procedural due process	(1) Yes (2) No (3) No	(1) Yes (2) No (3) No
Von Herbert v. City of St. Clair Shores, 61 Fed. Appx. 133, 136–37 (6th Cir. 2003)	Unlawful arrest	Yes	Yes
Walker v. Disner, 50 Fed. Appx. 908, 910 (10th Cir. 2002)	Unreasonable search	No	No
Ware v. Morrison, 276 F.3d 385, 387 (8th Cir. 2002)	Due process	No	No
Washington v. Normandy Fire Protection District, 272 F.3d 522, 526–27 (8th Cir. 2001)	Free speech	Yes	Yes
Weddell v. County of Carson City, 60 Fed. Appx. 9, 10 (9th Cir. 2003) (mem.)	Wrongful arrest	No	No
White v. City of Markham, 310 F.3d 989, 993 (7th Cir. 2002)	Unreasonable seizure	No	No

Case Name	Nature of Right Asserted	Does the Right Exist?	Is the Right Clearly Established?
Wilson v. City of Des Moines, 293 F.3d 447, 450–54 (8th Cir. 2002)	Excessive force	Does not decide	Does not decide
Wilson v. Morgan, 54 Fed. Appx. 195, 197–98 (6th Cir. 2002)	Arrest without probable cause	Yes	Yes
Wolf v. Winlock, 34 Fed. Appx. 457, 461–63 (6th Cir. 2002)	Arrest without probable cause	No	No
Wood v. Kesler, 323 F.3d 872, 877–83 (11th Cir. 2003)	(1) Wrongful arrest. (2) Malicious prosecution (3) Free speech	(1) No (2) No (3) No	(1) No (2) No (3) No
Young v. Martin, 51 Fed. Appx. 509, 513–15 (6th Cir. 2002)	Deliberate indifference to serious medical needs	Yes	Yes