NOT A FAILED EXPERIMENT: *WILSON-SAUCIER* SEQUENCING AND THE ARTICULATION OF CONSTITUTIONAL RIGHTS

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This Article considers the two-part sequencing doctrine used in evaluating the qualified immunity defense to claims that government officials have violated federal constitutional rights. This doctrine—often called Wilson-Saucier *sequencing—directs courts to first consider whether a plaintiff has properly alleged a constitutional violation before considering whether the defendant is entitled to qualified immunity. The Supreme Court established this rule to ensure that constitutional and statutory rights are fully articulated and refined.*

This Article provides a unique, empirical evaluation of the rationale underlying Wilson-Saucier *sequencing. By comparing judicial decisions before and after* Wilson-Saucier *sequencing, it offers evidence that mandatory sequencing is necessary for the robust articulation of constitutional rights by the lower courts. Without such sequencing, courts are likely to return to constitutional stagnation. The Article concludes by arguing that constitutional articulation should be favored because it enhances predictability in the legal system, benefiting both plaintiffs and defendants.*

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INTRODUCTION: THE QUALIFIED IMMUNITY DILEMMA

Individuals may sue both local[1] and federal[2] government officials for violations of federal constitutional and statutory rights. But the liability of government officials is far from unbridled. Executives,[3] legislators,[4] judges,[5] probation officers,[6] and prosecutors[7] enjoy absolute immunity for activity within their official capacities. All other public officials are entitled to qualified immunity. Such qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[8] This immunity is designed to protect public officials from "undue interference with their duties" and prevents threats of liability from disabling important government functions.[9]

This doctrine of qualified immunity, however, presents a dilemma. For constitutional rights articulated solely—or even primarily—through § 1983[10] and *Bivens*[11] litigation, qualified immunity risks constitutional stagnation. If a defendant prevails in a lawsuit because a certain constitutional right is not

1. 42 U.S.C. § 1983 (2000) provides jurisdiction and a cause of action for plaintiffs to bring federal civil rights suits against state and local officials. *See* Monroe v. Pape, 365 U.S. 167 (1961).

2. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–97 (1971) (holding that there is an implied right of action against federal officials analogous to liability imposed by § 1983).

3. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (holding that the President is absolutely immune from liability for official acts); Bogan v. Scott-Harris, 523 U.S. 44 (1998) (holding that mayors are immune when performing legislative acts).

4. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975) (holding that federal legislators are absolutely immune from federal suit for legislative activities); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators); Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979) (regional legislators); *Bogan*, 523 U.S. 44 (local legislators).

5. *See* Stump v. Sparkman, 435 U.S. 349 (1978) (holding that judges acting in a judicial capacity are absolutely immune).

6. *See, e.g.*, Demoran v. Witt, 781 F.2d 155, 157–58 (9th Cir. 1986) (holding that probation officers are absolutely immune when preparing pre-sentencing reports).

7. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (holding that prosecutors acting within the scope of their duties are absolutely immune from federal suit).

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

9. *Id.* at 806.

10. *See* 42 U.S.C. § 1983 (2000); Monroe v. Pape, 365 U.S. 167 (1961).

11. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–97 (1971).

"clearly established," courts may never have the opportunity to determine whether that alleged right actually exists and, if so, the contours of that right. At the very least, qualified immunity hinders resolution of such constitutional questions, and both government officials and the public will lack clarity regarding constitutional rights.

The Supreme Court sought to resolve this problem in *Wilson v. Layne*[12] and *Saucier v. Katz*[13] by mandating that the lower courts apply a two-step approach when confronted with a qualified immunity defense. In those situations, a court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all."[14] If a court determines that the alleged facts do amount to a constitutional or statutory violation, it then must decide whether that right was clearly established at the time of the challenged conduct.[15] In *Wilson*, Chief Justice Rehnquist explained that this two-step approach "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."[16] In *Saucier*, Justice Kennedy similarly stated that this process allows "for the law's elaboration from case to case."[17]

Despite this functional purpose, the two-step approach—termed "*Wilson-Saucier* sequencing"—has been questioned by the Supreme Court, the lower courts, and commentators.[18] In the October 2006 Term, Justice Breyer found two opportunities to call for overturning *Wilson-Saucier*. In *Scott v. Harris*,[19] Justice Breyer concluded that he would "accept [the] invitation" presented by commentators, lower courts, and the states to "reconsider *Saucier's* requirement[s]."[20] Later, Justice Breyer stated that he "would end the failed *Saucier* experiment now."[21] In *Los Angeles County v. Rettele*,[22] Justice Stevens

12. 526 U.S. 603 (1999).

13. 533 U.S. 194 (2001).

14. *Wilson*, 526 U.S. at 609 (quoting Conn v. Gabbert, 526 U.S. 286, 290 (1999)). *See also Saucier*, 533 U.S. at 201.

15. *Wilson*, 526 U.S. at 609; *Saucier*, 533 U.S. at 201.

16. *Wilson*, 526 U.S. at 609.

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

18. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275–81 (2006).

19. 127 S. Ct. 1769 (2007).

20. *Id.* at 1780–81 (Breyer, J., concurring). Addressing *stare decisis*, Justice Breyer suggested that "[t]he order-of-battle rule is relatively novel, it primarily affects judges, and there has been little reliance upon it." *Id.* at 1781.

21. Morse v. Frederick, 127 S. Ct. 2618, 2642 (2007) (Breyer, J., concurring in judgment and dissenting in part).

22. 127 S. Ct. 1989 (2007).

noted that he would "disavow the unwise practice of deciding constitutional questions in advance of the necessity for doing so."[23] In March, 2008, the Supreme Court granted certiorari in a § 1983 claim and specifically added the question of whether *Saucier* should be reversed.[24]

Criticisms of *Wilson-Saucier* sequencing fail to address the role that it plays in constitutional articulation. This Article seeks to vindicate the arguments advanced by Chief Justice Rehnquist, Justice Kennedy, and Justice Souter: *Wilson-Saucier* sequencing is necessary to refine the scope of constitutional rights, providing notice to both public officials and private individuals. This Article demonstrates the importance of *Wilson-Saucier* by evaluating the relative levels of constitutional articulation and constitutional stagnation that occurred when courts were confronted with a qualified immunity defense. Three relevant periods are examined: (1) the period prior to the Supreme Court's development of the sequencing doctrine, (2) the period when sequencing was advisable but not considered mandatory, and (3) the present, post-*Wilson-Saucier* period where sequencing is mandatory. This Article argues that the proof of the pudding is in the eating; levels of constitutional articulation increased dramatically following the Court's development of the *Wilson-Saucier* sequencing doctrine. The Article concludes that sequencing is critical to the articulation of constitutional rights. Either abandoning or relaxing *Wilson-Saucier* would lead to significant constitutional stagnation.

Part I of this Article traces the history of the sequencing doctrine in constitutional litigation. It also examines criticisms of the doctrine that have led to its reexamination by the Supreme Court. In Part II, the Article conducts an empirical survey of cases where a qualified immunity defense is raised. Examining cases from the three periods of the sequencing doctrine, this Article demonstrates that sequencing has created a substantial increase in the rate of constitutional articulation. This Article concludes that a retreat from *Wilson-Saucier* sequencing would signal a return to constitutional stagnation—a detriment for both plaintiffs and defendants in constitutional rights litigation.

23. *Id.* at 1994 (Stevens, J., concurring in judgment).
24. Pearson v. Callahan, 128 S. Ct. 1702 (Mar. 24, 2008) (granting certiorari).

I. *WILSON-SAUCIER* SEQUENCING: A METHOD FOR CONSTITUTIONAL ARTICULATION

Wilson-Saucier sequencing is an outgrowth of the Supreme Court's constitutional litigation jurisprudence. Prior to 1961, 42 U.S.C. § 1983—originally enacted as a portion of the 1871 Civil Rights Act—remained relatively dormant.[25] But in *Monroe v. Pape*,[26] the Supreme Court breathed life into § 1983, permitting civil suits against local officials.[27] *Monroe's* interpretation of the statute provided private individuals both jurisdiction and a cause of action to bring constitutional claims—often considered "constitutional tort" actions—against government officials.[28]

In light of this new source of liability, the Court mitigated § 1983's impact through the development of the qualified immunity defense.[29] This defense exists where a reasonable official would be unaware that his or her conduct violated a consti-

25. For a history of § 1983's development from an obscure component of the 1871 Civil Rights Act to its extensive use today, as well as competing interpretations of § 1983, see Michael G. Collins, *'Economic Rights,' Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1497–99 (1989); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study,* 67 CORNELL L. REV. 482, 484–522 (1982).

26. Monroe v. Pape, 365 U.S. 167, 184–87 (1961).

27. *See* Collins, *supra* note 25, at 1497–99; Eisenberg, *supra* note 25, at 484–522.

28. *See* Carey v. Piphus, 435 U.S. 247, 253 (1978) (stating that § 1983 was designed to create "a species of tort liability"); Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441 (1989) (discussing § 1983 as developing "constitutional torts").

Plaintiffs are also empowered to bring lawsuits to enforce certain federal statutory rights. Section 1983 provides a remedy for any person who is subjected to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2000). In *Maine v. Thiboutot*, 448 U.S. 1, 5–6 (1980), the Court held that the "and laws" provision of § 1983 creates a private cause of action for certain rights secured by federal statutes. But this does not apply where a court determines that "Congress intended to foreclose such private enforcement." Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987). Such intent, for example, can be manifested through regulatory schemes built into a statute suggesting that Congress sought to preclude enforcement of a statutory right through § 1983. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981). For an example of a court conducting such an inquiry as to whether a federal statute creates an individual right enforceable through § 1983, *see* Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180, 183–92 (3d Cir. 2004).

29. For a historical perspective on the qualified immunity defense, see Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 10–28 (1997).

tutional or statutory right.[30] When initially formulated, the qualified immunity defense contained both objective and subjective elements.[31] For the objective element, the official needed to demonstrate that the challenged conduct was not a violation of clearly established law.[32] For the subjective element, the defendant needed to show that he or she acted with subjective good faith.[33] But in *Harlow v. Fitzgerald*,[34] the Supreme Court revisited qualified immunity and eliminated the subjective inquiry.[35] As a result, a defendant is entitled to a qualified immunity defense if a reasonable official would not have known at the time that his or her actions violated federal law.[36] In essence, this provides an officer immunity for what

30. Scheuer v. Rhodes, 416 U.S. 232, 241–42 (1973) ("Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.").

31. *Id.*

32. *See* Wood v. Strickland, 420 U.S. 308, 322 (1975). Although the lower courts uniformly agree that it is a plaintiff's burden to prove that his or her federal rights were actually violated, there is apparent (and seemingly unrecognized) disagreement among the circuits as to which party bears the burden on the "clearly established" prong of the qualified immunity inquiry. A number of circuits require the plaintiff prove that the challenged conduct violated then-"clearly established" law. *See, e.g.*, Purtell v. Mason, 527 F.3d 615, 621 (7th Cir. 2008); Williams v. Berney, 519 F.3d 1216, 1220 (10th Cir. 2008); Al-Amin v. Smith, 511 F.3d 1317, 1324 (11th Cir. 2008); See v. City of Elyria, 502 F.3d 484, 491 (6th Cir. 2007); Monroe v. Ark. State Univ., 495 F.3d 591, 594 (8th Cir. 2007); Michalik v. Hermann, 422 F.3d 252, 257–58 (5th Cir. 2005); Hufford v. McEnaney, 249 F.3d 1142, 1148 (9th Cir. 2001). But perhaps the better view is adopted by other courts which have found that a defendant bears the burden of proving entitlement to the affirmative defense. *See, e.g.*, Henry v. Purnell, 501 F.3d 374, 377–78 (4th Cir. 2007); Beers-Capitol v. Whetzel, 256 F.3d 120, 142 n.15 (3d Cir. 2001); Tellier v. Fields, 280 F.3d 69, 84 (2d Cir. 2000). Although the Supreme Court does not appear to have resolved this particular issue, the Court has held that a defendant must prove entitlement to the affirmative defense of absolute immunity. *See* Dennis v. Sparks, 449 U.S. 24, 29 (1980) (stating that "the burden is on the official claiming immunity to demonstrate his entitlement"). Moreover, in *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982), the Court appears to suggest that a defendant bears this burden.

33. *See* Gomez v. Toledo, 446 U.S. 635, 640–42 (1980).

34. 457 U.S. 800 (1982).

35. *Id.* at 816–17. *See also* Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1173–74 (6th Cir. 1988) (discussing the evolution of qualified immunity doctrine).

36. *Harlow*, 457 U.S. at 816–17. The Court affirmed that qualified immunity turns solely on the objective test in *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). And in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the Court held that quali-

constitutes a reasonable mistake, ensuring officials are not chilled in the performance of their discretionary duties.[37]

The Court in *Harlow* did not, however, address whether courts could resolve a qualified immunity defense before deciding whether a plaintiff had actually asserted the violation of a right. As the qualified immunity doctrine evolved, concern grew that if claims were dismissed solely on the basis of the qualified immunity defense—that is, because the right in question was not "clearly established" at the time of the injury—courts may never have the opportunity to resolve the merits of the underlying federal issue. The Supreme Court responded to these concerns by developing the *Wilson-Saucier* sequencing doctrine, requiring courts to first articulate the alleged constitutional right. The Court's jurisprudence here may best be considered as three distinct periods: (1) prior to the development of any sequencing doctrine by the Court, (2) during the "better approach" framework of *Siegert v. Gilley*, and (3) the current, mandatory sequencing of *Wilson-Saucier*.

A. Initial Period: Prior to a Sequencing Regime

During the first period, which lasted from 1973 (when *Scheuer v. Rhodes*[38] established the qualified immunity framework) through 1991, the Supreme Court was silent with respect to sequencing. Scattered courts felt that *Harlow* itself established a sequencing analysis.[39] The logic of this approach

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fied immunity is available unless the constitutional right in dispute is "sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Although the Supreme Court has not expressly considered the application of qualified immunity to claims based on federal statutory rights, a number of courts have found that government officials do enjoy qualified immunity in these instances. *See, e.g.*, Blake v. Wright, 179 F.3d 1003 (6th Cir. 2003); Tapley v. Collins, 211 F.3d 1210, 1215 n.9 (11th Cir. 2000) (listing cases).

37. Indeed, qualified immunity "acknowledge[s] that reasonable mistakes can be made as to the legal constraints on particular police conduct." Saucier v. Katz, 533 U.S. 194, 205 (2001). Therefore, "[i]f the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense." *Id.*

38. 416 U.S. 232 (1974).

39. *See, e.g.*, Thompson v. City of Starkville, 901 F.2d 456, 468 n.12 (5th Cir. 1990); Brawner v. City of Richardson, 855 F.2d 187, 191 (5th Cir. 1988); Noyola v. Tex. Dep't of Human Res., 846 F.2d 1021, 1023 (5th Cir. 1988). Indeed, on its own initiative, the Fifth Circuit established a sequencing regime during this period. The court explained:

> In analyzing qualified immunity issues, this circuit normally requires a two step process: (1) "[t]he initial determination is whether the claim itself is viable, whether the actions of the plaintiff are constitutionally pro-

was plain: if the challenged conduct did not actually violate federal law, no claim could exist, so there would be no need to proceed to the immunity defense.[40] But such analysis was applied only by a small minority. Most courts felt free to choose either to address the substantive constitutional question at the outset, or to proceed first to the "clearly established" prong of the qualified immunity analysis.[41] In such cases, courts would typically survey Supreme Court and circuit case law to determine whether past precedent was sufficiently analogous to provide notice of a constitutional violation.[42] Absent such a finding, these cases were dismissed on the basis of qualified immunity.[43]

B. The Siegert Period: Sequencing Preferred

From 1991 through 1999, sequencing in qualified immunity cases appeared to be the preferred approach, but confusion persisted in the lower courts as to whether it was mandatory. In 1991, the Supreme Court decided *Siegert v. Gilley*,[44] a case where the plaintiff claimed he possessed a constitutionally protected liberty interest in his reputation. The court of appeals had dismissed the suit because it found any such right was not clearly established at the time of the challenged conduct.[45] The Supreme Court affirmed the disposition but on alternative

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> tected[ ]" and (2) if so, the next step is an evaluation of whether the "constitutional right asserted was 'clearly established' at the time of [the public official's] conduct so that a reasonable official would have understood that his conduct violated that right."

Thompson, 901 F.2d at 468 n.12 (quoting *Brawner*, 855 F.2d at 191). But to be sure, the Fifth Circuit did not consistently apply this sequencing regime during this period and instances of constitutional stagnation are apparent. *See, e.g.*, Matherne v. Wilson, 851 F.2d 752 (5th Cir. 1988).

40. *Noyola*, 846 F.2d at 1023 & n.1.

41. *See generally* Appendix C (on file with author).

42. *See, e.g.*, Estrada-Adorno v. Gonzales, 861 F.2d 304, 305–06 (1st Cir. 1988) (Breyer, J.) (granting qualified immunity where the court has "found no federal case holding" that the challenged conduct violated the Constitution); Walentas v. Lipper, 862 F.2d 414, 421–22 (2d Cir. 1988) (finding the district court opinion did not "clearly establish" the relevant law); Clark v. Brown, 861 F.2d 66, 68 (4th Cir. 1988) (noting the existence of precedent suggesting that the plaintiff failed to state a claim, but arguing that "[f]or the purpose of deciding the question of qualified immunity, we need not consider how persuasive these precedents are.").

43. *See, e.g.*, *Estrada-Adorno*, 861 F.2d at 305–06; *Walentas*, 862 F.2d at 421–22; *Clark*, 861 F.2d at 68.

44. 500 U.S. 226 (1991).

45. *Id.* at 230–31.

grounds.[46] Writing for the Court, Chief Justice Rehnquist stated that "We have on several occasions addressed the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity."[47] He continued:

> 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.[48]

Rather than resting on whether the constitutional right was clearly established at the time of the activity, the Court first sought to determine whether there in fact was a constitutional right at stake.[49] Concluding that the facts alleged by the plaintiff failed to establish a constitutional violation, the Court affirmed dismissal of the suit.[50]

After *Siegert*, there emerged disagreement among the circuit courts as to whether sequencing was required. Surveying the law, Judge Luttig noted:

> A large number of courts have read *Siegert* as requiring a determination, under current law, of whether the plaintiff has stated a claim upon which relief can be granted. Some of these courts seem to read *Siegert* to require this Rule 12(b)(6) or Rule 12(b)(6)-like determination as the first step of the qualified immunity analysis.[51]

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46. *Id.* at 234–35.
47. *Id.* at 231.
48. *Id.* at 232.
49. *Id.*
50. *Id.* at 233–35. Justice Kennedy specifically concurred in this adoption of sequencing. *Id.* at 235 (Kennedy, J., concurring) ("I agree with the Court 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.' " (quoting *id.* at 232 (majority opinion))).
51. DiMeglio v. Haines, 45 F.3d 790, 795 (4th Cir. 1995). Rule 12(b)(6) creates the procedure to dismiss a complaint for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

Many courts adopted such an analysis holding sequencing as mandatory, including panels in the First,[52] Second,[53] Third,[54] Fifth,[55] Sixth,[56] Seventh,[57] Eighth,[58] Tenth,[59] Eleventh,[60] and D.C. Circuits.[61] The Eighth Circuit, for instance, stated that "our court has consistently interpreted *Siegert* to mean that we must first address the question whether the plaintiff has asserted the violation of a constitutional right, and then consider whether the right was clearly established at the time of the alleged violation."[62]

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52. Watterson v. Page, 987 F.2d 1, 7 (1st Cir. 1993) ("[B]efore even reaching qualified immunity, a court of appeals must ascertain whether the appellants have asserted a violation of a constitutional right at all.").

53. Calhoun v. N.Y. State Div. of Parole Officers, 999 F.2d 647, 652 (2d Cir. 1993) (holding that *Siegert* established that "the merits of a constitutional claim are a preliminary inquiry required before passing on an issue of qualified immunity").

54. Acierno v. Cloutier, 40 F.3d 597, 606 (3d Cir. 1994) (en banc) ("The Supreme Court has instructed that the first step in reviewing a district court's qualified immunity decision is to determine whether the plaintiff has 'allege[d] the violation of a clearly established constitutional right' at all." (quoting *Siegert*, 500 U.S. at 231)).

55. Duckett v. City of Cedar Park, 950 F.2d 272, 279 (5th Cir. 1992) ("We find that Duckett . . . has *stated* a constitutional challenge . . . . We now turn to the issue of defendants' entitlement to qualified immunity . . . .").

56. Silver v. Franklin Twp. Bd. of Zoning Appeals, 966 F.2d 1031, 1035 (6th Cir. 1992) ("[B]efore reaching a qualified immunity issue a court should determine whether there has been a constitutional violation at all.").

57. Eversole v. Steele, 59 F.3d 710, 717 (7th Cir. 1995) ("When a defendant raises the defense of qualified immunity, this court engages in a two-part, objective inquiry: the court must determine (1) whether the plaintiff has asserted a violation of a federal constitutional right, and (2) whether the constitutional standards implicated were clearly established at the time in question.").

58. Brown v. Nix, 33 F.3d 951, 953–55 (8th Cir. 1994) ("As a necessary concomitant to determining whether the constitutional right asserted by an inmate is 'clearly established' at the time the official acted, we must determine whether the inmate has asserted a violation of a constitutional right at all." (citing *Siegert*, 500 U.S. at 232)).

59. Hinton v. City of Elwood, 997 F.2d 774, 779–80 (10th Cir. 1993) ("[A] court reviewing a qualified immunity claim [must] analyze the state of the law at two different times." It "must analyze the law at the time of trial to determine whether the plaintiff has alleged a violation of existing law," and then "analyze the law at the time of the alleged conduct in order to determine whether the plaintiff has established that the defendant's conduct, when perpetrated, violated clearly established law.").

60. Spivey v. Elliott, 29 F.3d 1522, 1524 (11th Cir. 1994) (concluding that *Siegert* requires a determination of whether the plaintiff has alleged a violation of a constitutional right under current law, before considering whether that law was clearly established at the time of the challenged conduct).

61. Hunter v. District of Columbia, 943 F.2d 69, 76 (D.C. Cir. 1991) (concluding that *Siegert* "mandat[ed]" a two-part qualified immunity analysis).

62. Manzano v. S.D. Dep't of Soc. Servs., 60 F.3d 505, 510 n.2 (8th Cir. 1995).

Judge Luttig, though, disagreed with the approach taken by these courts. *Siegert*, he argued, "did not mandate that courts determine, as a part of the qualified immunity analysis, whether the plaintiff has stated a claim upon which relief can be granted in a Rule 12(b)(6) sense."[63] In a later opinion, Judge Luttig employed this same analysis.[64] Other courts, including panels in the First,[65] Fourth,[66] and Eleventh[67] Circuits, concurred in this reading of *Siegert* and expressly allowed resolution of qualified immunity determinations without a resolution of whether there was in fact a constitutional violation.

As made clear by the uneven application in at least the First and Eleventh Circuits, practice within a circuit was far from consistent. The Eighth Circuit acknowledged that the Supreme Court's decision in *Siegert* "has caused considerable disagreement among the circuits with regard to the proper analytical framework for qualified immunity questions."[68] In light of this confusion in the lower courts, it is unsurprising that in practice courts frequently failed to employ sequencing when making qualified immunity determinations. This period perhaps typifies the approach courts take when sequencing is suggested but is not mandatory.

In 1998, the Supreme Court again considered sequencing in *County of Sacramento v. Lewis*.[69] Justice Souter, writing for the Court, affirmed the sequencing method for resolving constitutional claims: "[T]he *better approach* to resolving [qualified immunity] cases" is "to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the

63. DiMeglio v. Haines, 45 F.3d 790, 797 (4th Cir. 1995).

64. Torcasio v. Murray, 57 F.3d 1340, 1352 (4th Cir. 1995) ("In a recent decision of this court, we reminded district courts that they are to consider *as a threshold matter* whether officials in a given case are entitled to qualified immunity, and move on to other issues only after concluding that the officials are not.").

65. Aversa v. United States, 99 F.3d 1200, 1214 (1st Cir. 1996) ("Some courts have read this language as requiring a resolution of the merits under current law before beginning the analysis of the law as it stood at the time of the alleged violation. But we think that these statements, read in context, simply mean that the plaintiff must assert a clearly established federal constitutional (or statutory) right, and not merely a state law tort claim." (citation omitted)).

66. Pinder v. Johnson, 54 F.3d 1169, 1179 (4th Cir. 1995) (en banc).

67. Spivey v. Elliott, 41 F.3d 1497, 1498 (11th Cir. 1995) ("[W]e now think it enough to decide that there was no clearly established constitutional right allegedly violated by the defendants.").

68. Manzano v. S.D. Dep't of Soc. Servs., 60 F.3d 505, 510 n.2 (8th Cir. 1995).

69. 523 U.S. 833 (1998).

events in question."[70] Like Chief Justice Rehnquist in *Siegert*, Justice Souter justified the doctrine through a desire to avoid constitutional stagnation:

> What is more significant is that if 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. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law. But these avenues would not necessarily be open, and therefore the *better approach* is to determine the right before determining whether it was previously established with clarity.[71]

Following *Lewis*, sequencing was the "better approach" to adjudicating qualified immunity defenses, but the Supreme Court had not yet resolved the disagreement in the lower courts as to whether it was mandatory. Rather, confusion persisted. The circuits remained in disagreement and failed to consistently articulate constitutional rights in the face of qualified immunity defenses.

C. The Wilson-Saucier *Period: Sequencing Mandatory*

The next year, 1999, the Court conclusively resolved that sequencing is the required method of analysis in adjudicating qualified immunity. This ushered in the current sequencing period. In *Conn v. Gabbert*,[72] Chief Justice Rehnquist succinctly stated that when addressing a qualified immunity defense, "a court *must* first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation."[73] Gone was the permissive language of the "better approach"; sequencing

70. *Id.* at 841 n.5 (emphasis added).
71. *Id.* at 841–42 (internal citation omitted) (emphasis added).
72. 526 U.S. 286 (1999).
73. *Id.* at 290 (emphasis added).

was now the requisite procedure. That same Term, in *Wilson v. Layne*,[74] Chief Justice Rehnquist again stated the sequencing requirement, explaining that this requirement "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."[75]

Two Terms later in *Saucier v. Katz*,[76] Justice Kennedy invoked the sequencing doctrine. In the context of a Fourth Amendment *Bivens* claim, Justice Kennedy held that "[i]n a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence."[77] First, "[a] court required to rule upon the qualified immunity issue must consider . . . 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."[78] He explained:

> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.[79]

In *Saucier*, the Court reaffirmed its holdings in *Gabbert* and *Wilson* to make clear that sequencing is the requisite procedure when assessing a qualified immunity defense.

Justice Kennedy echoed Chief Justice Rehnquist's rationale for this sequencing doctrine, explaining that it "advance[s] understanding of the law."[80] This was the same justification Justice Souter offered in *County of Sacramento*. Chief Justice Rehnquist, Justice Kennedy, and Justice Souter all have maintained that the sequencing doctrine is necessary to ensure articulation of constitutional rights.

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74. 526 U.S. 603 (1999).
75. *Id.* at 609.
76. 533 U.S. 194 (2001).
77. *Id.* at 200.
78. *Id.* at 201.
79. *Id.*
80. *Id.*

D. The Debate Over Wilson-Saucier

Despite this oft-repeated rationale for sequencing, some Justices have harbored discontent with the doctrine. Disagreement first appeared in *County of Sacramento v. Lewis*.[81] While the majority recounted the sequencing analysis of *Siegert*, Justice Stevens concurred in the judgment arguing that sequencing was inappropriate. While he admitted that the *Siegert* sequencing analysis "is sound advice when the answer to the constitutional question is clear," he stated that "[w]hen . . . the question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions."[82]

In 2004, *Wilson-Saucier* came directly under fire in a case that never reached the Court on the merits, *Bunting v. Mellen*.[83] In that matter, cadets sued the Virginia Military Institute ("VMI"), alleging that VMI's supper prayer violated the Establishment Clause.[84] The Fourth Circuit found claims for injunctive relief moot because the plaintiffs had graduated.[85] Turning to damages, the Fourth Circuit concluded that the VMI policy did violate the Establishment Clause.[86] However, the court found that the defendants were entitled to qualified immunity because the constitutional violation was not clearly established at the time.[87] Plaintiffs did not pursue the case further, but the defendants—even though they had prevailed on qualified immunity—sought certiorari to vindicate their view that VMI's supper prayer was in fact constitutional.[88] Af-

81. 523 U.S. 833 (1998). To be sure, the issue of sequencing arises with frequency at the Court not because the Supreme Court consciously sought to settle unresolved issues, or because there was disagreement among the lower courts. Rather, whenever the Court addresses a civil suit where a defendant raises a qualified immunity defense, the Court will tangentially endorse or discuss the sequencing doctrine.

82. *Id.* at 859 (Stevens, J., concurring in the judgment). Justice Breyer also wrote separately to "point out [his] agreement with Justice Stevens, that *Siegert v. Gilley* should not be read to deny lower courts the flexibility, in appropriate cases, to decide 42 U.S.C. § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented." *Id.* at 858–59 (Breyer, J., concurring) (citation omitted).

83. 541 U.S. 1019 (2004) (Stevens, J., respecting denial of certiorari).

84. Mellen v. Bunting, 327 F.3d 355, 362 (4th Cir. 2003).

85. *Id.* at 365.

86. *Id.* at 375.

87. *Id.*

88. The defendants made clear in their petition that they sought to continue the practice of continuing the prayer, and therefore considered the Fourth Circuit's ruling a defeat. *See* Petition for a Writ of Certiorari at 10–11 & n.15, Bun-

ter relisting the petition eight times, a fractured Court denied certiorari.[89] Concurring in the denial of certiorari, Justice Stevens suggested that "relaxing" the *Wilson-Saucier* rule would preclude the problem of unreviewable constitutional holdings.[90] Justice Scalia dissented, noting that "the *Saucier* procedure gives rise to—*and is designed to give rise to*—constitutional rulings (such as this one) with precedential effect."[91] He noted that this procedure is "mandatory," despite pushback from the lower courts.[92] In light of this posture, Justice Scalia concluded: "This situation should not be prolonged. We should either make clear that constitutional determinations are *not* insulated from our review (for which purpose this case would be an appropriate vehicle), or else drop any pretense at requiring the ordering in every case."[93]

In the October 2004 Term, Justices Breyer, Scalia, and Ginsburg once again concurred in an opinion to urge reconsideration of *Wilson-Saucier* sequencing.[94] And in the October 2007 Term, Justice Breyer found two opportunities to call for overturning *Wilson-Saucier*. In *Scott v. Harris*, the Court found that the police officer-defendant did not violate the Fourth Amendment when using deadly force to terminate an automobile chase.[95] Rather than definitively deciding the constitutional question, Justice Breyer would have preferred to resolve the case by simply holding there was no violation of a clearly established right, thus, barring the suit based on qualified immunity.[96] He would have accepted the "invitation" pre-

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ting v. Mellen, 541 U.S. 1019 (2004) (No. 03-863). And in their reply brief supporting the petition, Petitioners make clear that they viewed the case as "involv[ing] the question of whether VMI may read a prayer before supper without violating the Constitution." Reply Brief for the Petitioners, Bunting v. Mellen, 541 U.S. 1019 (2004) (No. 03-863), *available at* 2004 WL 198336, at *4.

89. Bunting v. Mellen, 541 U.S. 1019 (2004) (Stevens, J., respecting denial of certiorari).

90. *Id.*

91. *Id.* at 1024 (Scalia, J., dissenting).

92. *Id.*

93. *Id.* at 1025.

94. Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring) ("[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review.").

95. 127 S. Ct. 1769 (2007).

96. *Id.* at 1780–81 (Breyer, J., concurring). Justice Ginsburg again suggested she would consider this approach. *Id.* at 1780 (Ginsburg, J., concurring). So too did Justice Scalia. *Id.* at 1774 n.4 (majority opinion). But for a discussion of the rights articulation that occurred as a result of *Wilson-Saucier* sequencing in *Scott*

sented by commentators, lower courts, and the states to "reconsider *Saucier's* requirements."[97] In *Morse v. Frederick*,[98] the Court concluded that a school did not violate a student's free speech rights when it punished him for holding a banner at an off-campus event that read "BONG HiTS 4 JESUS."[99] Again, Justice Breyer found it "unwise and unnecessary" to resolve the constitutional issue.[100] Rather, Justice Breyer stated that he "would end the failed *Saucier* experiment now."[101]

Criticism of *Wilson-Saucier* sequencing is not limited to the Supreme Court; lower courts and commentators have likewise voiced discontent with the doctrine. Select courts have declined to apply the sequencing framework in limited contexts.[102] Some judges have suggested that *Wilson-Saucier* sequencing encourages the creation of dicta and should be abandoned due to efficiency concerns.[103] Scattered commentators have echoed these criticisms.[104] Other jurists[105] and schol-

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v. Harris, see Michael J. Hooi, Comment, *Qualified Immunity: When Is a Loss Ultimately a Win?*, 60 FLA. L. REV. 979, 987 (2008).

97. *Id.* at 1780–81 (Breyer, J., concurring).

98. 127 S. Ct. 2618 (2007).

99. *Id.* at 2622.

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

101. *Id.* at 2642.

102. *See, e.g.*, Vives v. City of New York, 405 F.3d 115, 118 n.7 (2d Cir. 2004) ("We do not reach the constitutional question because we are reluctant to pass on the issue in *dicta* and because the parties did not genuinely dispute the [constitutional question] either in the District Court or on appeal."). In some cases, courts have found it unnecessary to apply *Wilson-Saucier* sequencing where the constitutional right turns on the resolution of an uncertain principle of state law. *See, e.g.*, Egolf v. Witmer, 526 F.3d 104, 110 (3d Cir. 2008) ("[T]he underlying principle of law elaboration is not meaningfully advanced in situations, such as this, when the definition of constitutional rights depends on a federal court's uncertain assumptions about state law."); Ehrlich v. Town of Glastonbury, 348 F.3d 48, 57 (2d Cir. 2003) ("[I]n appropriate, discrete cases, we may move directly to the second step of the *Saucier* test and refrain from determining whether a constitutional right has been violated.").

103. *See, e.g.*, Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1111–13 (9th Cir. 2008) (en banc) (Hawkins, J., concurring) (urging reversal of *Wilson-Saucier*); Clement v. City of Glendale, 518 F.3d 1090, 1093 n.4 (9th Cir. 2008) (Kozinski, J.) ("[T]he *Saucier* rule may lead to the publication of a lot of bad constitutional law that is, effectively, cert-proof.); Lyons v. City of Xenia, 417 F.3d 565, 583 (6th Cir. 2005) (Sutton, J., concurring) (stating that "while the risk of stagnating constitutional doctrines is a legitimate one, it is not self-evident that the problem has impeded the growth of American constitutional law"); Hudson v. Hall, 231 F.3d 1289, 1296 n.5 (11th Cir. 2000) (arguing that exceptions to rigid sequencing exist); Leval, *supra* note 18, 1280–81.

104. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1034 (2005).

105. *See, e.g.*, Wilkinson *ex rel.* Wilkinson v. Russell, 182 F.3d 89, 112–13 (2d Cir. 1999) (Calabresi, J., concurring).

ars,[106] however, have vigorously defended *Wilson-Saucier* sequencing. This Article will not engage in that ongoing debate. Rather, this Article presents original evidence not previously considered by these scholars or courts—empirical research as to whether the sequencing doctrine achieves its fundamental purpose of articulating constitutional rights.[107]

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106. For example, Sam Kamin has recently and thoroughly examined the criticism that *Wilson-Saucier* sequencing violates the Article III ban on advisory opinions. Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53 (2008). He proposed that "a federal court ought simply to determine at the outset whether the plaintiff is making the sort of claim for which a federal court *might* be able to grant relief." *Id.* at 95. If a claim survives this initial "laugh test," then the *Wilson-Saucier* sequence is appropriate. *Id.* That is, "the court ought to proceed to the merits of that claim. If those merits are resolved in the plaintiff's favor, the court should then proceed to an in-depth examination of the entitlement to a remedy." *Id.* Kamin suggests that this approach to *Wilson-Saucier* sequencing would satiate any issue relating to a constitutional ban on advisory opinions. *Id.*

Others have likewise defended *Wilson-Saucier* sequencing and found that it withstands the theoretical and practical objections raised by detractors. For a sampling of these defenses, see Lynn Adelman & Jon Deitrich, *Saying What the Law Is: How Certain Legal Doctrines Impede the Development of Constitutional Law and What Courts Can Do About It*, 2 FED. CTS. L. REV. 87, 95–96 (2007); John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403 (1999); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1922 (2007); Elizabeth J. Norman & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1517–18 (2002); Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539, 1568 (2007).

Beyond defending *Wilson-Saucier* sequencing, one commentator has suggested its adoption into criminal law as a means of providing prior warning of criminal sanctions to defendants. Ted Sampsell-Jones, *Reviving* Saucier: *Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725 (2007).

107. It appears that no prior study has examined the empirical articulation rates on a systematic basis. The closest such survey was offered by Thomas Healy. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005). He cataloged cases from the circuit courts that cited the *Saucier* opinion for two years following the ruling. *Id.* at 937. Healy did not, however, determine the effective rates of articulation, or compare such rates across time. More importantly, by only studying cases that cited *Saucier*, the survey does not consider cases which cite only circuit precedent, or fail to cite any sequencing doctrine. In short, the survey provides a series of cases where constitutional articulation did occur, but it does not provide data by which to see the effects of *Wilson-Saucier* sequencing.

Indeed, one scholar recently noted that while "[s]ome claim that qualified immunity hinders the development of constitutional law because plaintiffs may be denied recovery in cases such as *Wilson* in which they press a novel constitutional claim[,] . . . the empirical case that qualified immunity has stunted the development of constitutional law has yet to be made." Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 859 n.241 (2007) (citation omitted). This paper intends to provide precisely that empirical analysis.

II. THE VIRTUE OF *WILSON-SAUCIER*: EMPIRICAL EVIDENCE OF CONSTITUTIONAL ARTICULATION

This Article presents definitive evidence that Chief Justice Rehnquist, Justice Kennedy, and Justice Souter were correct in arguing that sequencing is a necessary component of constitutional articulation. This empirical study proves that *Wilson-Saucier* sequencing has caused a substantial increase in rates of constitutional refinement. Without such sequencing, when presented with a qualified immunity defense, courts are not likely to refine the contours of constitutional rights and provide the accordant notice to government officials and individual citizens. Rather, history teaches that if *Wilson-Saucier* sequencing is abandoned or relaxed, courts will resolve the substantive constitutional questions with significantly less frequency. The methodology of this study is first presented, followed by the data.

A. The Methodology

To study this question, circuit court opinions deciding qualified immunity defenses in the context of constitutional litigation were analyzed. Three one-year samples were studied: every circuit court case addressing a qualified immunity defense raised to a constitutional claim decided in 1988,[108] 1995, and 2005.[109] These three periods correspond to the three

108. 1988 was chosen in lieu of 1985 because of the Supreme Court's 1985 decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), permitting interlocutory appeals of qualified immunity rulings. The landscape of cases that reached the circuit courts was fundamentally altered following this decision. By 1988, the impacts of *Mitchell* appear to have fully percolated.

109. The analysis was limited to opinions in the courts of appeals because this paper sought to determine rates of constitutional articulation. Courts generally find that a right has only been "clearly established" if there is circuit court precedent. Because district court cases are not binding on peer judges, such opinions generally are not considered sufficient for constitutional articulation purposes. *See*, *e.g.,* Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) (Posner, J.) ("District court decisions have no weight as precedents, no authority. They are evidence of the state of the law. Taken together with other evidence, they might show that the law had been clearly established. But by themselves they cannot clearly establish the law because, while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of nonparties." (citations omitted)).

Rather, the courts of appeals have generally held that rights are clearly established when there are Supreme Court or circuit court opinions addressing the contours of the constitutional right. *See, e.g.*, Price-Cornelison v. Brooks, 524 F.3d 1103, 1108 (10th Cir. 2008) ("We have held that, for a right to be clearly es-

periods identified with the development of the sequencing doctrine: (1) no sequencing, (2) sequencing suggested, and (3) sequencing mandatory. For each one-year sample, a search was run in the Westlaw Court of Appeals database with the search term "qualified w/3 immunity."[110] Many of the cases returned by the search were false hits not relevant to the study and were therefore excluded.[111] Further, unpublished cases were likewise excluded from the survey because they are generally not examples of constitutional articulation.[112] Ultimately, in 1988, 109 cases were identified, 146 in 1995, and 159 in 2005.

The cases were then coded to create datasets that included basic information such as case caption, federal reporter citation, date, circuit court, subject matter of alleged constitutional

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tablished, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."); Thomas v. Whalen, 51 F.3d 1285, 1290 n.9 (6th Cir. 1995) ("In determining whether a constitutional right is clearly established, we must look first to decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits." (quotation omitted)). No clear standard, however, exists among the circuits and courts have taken different approaches. *See* Michael S. Catlett, Note, *Clearly Not Established: Decision Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1045–50 (2005).

Additionally, this survey did not include qualified immunity defenses raised to federal statutory claims. Because these cases were quite rare, there was insufficient data to draw broad conclusions.

110. In other words, the search yielded every decision by the courts of appeals for each year where the word "qualified" appeared within three words of the word "immunity."

111. A false hit could occur in a large variety of contexts. For example, when discussing the holding of a prior case, a court may mention that it arose in the context of a qualified immunity doctrine. Other false hits occurred when the procedural history of a case involved qualified immunity, but the court of appeals was not addressing that issue. Or, if a case was dismissed on procedural grounds, it may have appeared as a false hit.

112. Unpublished court of appeals opinions, like district court opinions, generally are not considered sufficient to clearly establish constitutional rights for purposes of qualified immunity. Prior to recent amendments to the Federal Rules of Appellate Procedure, unpublished circuit court opinions could not be cited under the local rules of most courts of appeals. For example, the Fifth Circuit Local Rule 47.5.1 provided that "[t]he publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Because an unpublished opinion by its very nature as non-binding cannot articulate a constitutional right, no such opinions, regardless of whether sequencing is employed, were examples of constitutional articulation. It may, however, be an interesting exploration as to whether the existence of *Wilson-Saucier* sequencing either encourages or discourages circuit courts to issue published, binding opinions in these sorts of constitutional cases.

violation,[113] and whether the case was dismissed due to qualified immunity.[114] An examination of the dataset reveals whether a court of appeals actually resolved the constitutional question, and if it did, whether it found that the facts alleged amounted to a constitutional violation. Likewise, whether a court of appeals resolved the qualified immunity question was coded. When cases were dismissed, the dataset tracked the basis for the court's dismissal. In cases following the announcement of sequencing doctrines by the Supreme Court, the data also shows whether the court cited either Supreme Court sequencing cases or circuit precedents incorporating these holdings. From this data, one can extract the common methodologies employed by the circuit courts faced with qualified immunity defenses.

B. The Data: Sequencing Matters

The empirical data proves that mandatory *Wilson-Saucier* sequencing is necessary to ensure robust articulation of constitutional rights. It does so by revealing the frequency of constitutional articulation as compared with constitutional stagnation. When a court dismissed a claim—on either step one or step two of *Wilson-Saucier*—but had nonetheless resolved the constitutional question, that court engaged in constitutional articulation as predicted by Chief Justice Rehnquist, Justice Ken-

113. Appendix D (on file with author) reproduces the numerical code used in the dataset to indicate which substantive constitutional right was at issue in the litigation.

114. *See* Appendices A through C (on file with other). To code the data, binary "1"s and "0"s were employed over a series of questions. In cases where multiple claims or defendants were presented, ".5"s were used to show a split resolution of particular questions. That is, if a court decided that one claim presented a constitutional violation, but the other did not, ".5"s were employed to show how that court addressed the coded questions for a variety of data. This ensures that the results of the data analysis accurately reflect judicial decision processes in complex cases.

While most of the coding involved a straightforward analysis of the judicial decision-making process, some cases presented judgment calls. For example, in many cases regarding the Fourth Amendment's restrictions on searches and seizures, it was often unclear whether a court was resolving the substantive issue of whether a search was "reasonable" or whether it was addressing whether the right was "clearly established." In these cases that lacked clarity, a presumption was applied that a court was deciding the substantive constitutional question. This decision was made primarily because subsequent courts frequently cite these cases as holding on the constitutional ground. Further, this presumption ensured that the data was recorded in a manner conservative to the thesis that sequencing enhances articulation.

nedy, and Justice Souter. In contrast, when a court dismissed a claim on qualified immunity grounds without having first determined whether the alleged facts amounted to a constitutional violation, constitutional stagnation occurred. Ultimately, the results show that *Wilson-Saucier* sequencing has significantly increased the rate of constitutional articulation.

When a plaintiff sues an official for a constitutional violation and the defendant asserts a qualified immunity defense, there are four possible resolutions to the immunity defense. First, if the court engages in the *Wilson-Saucier* sequencing, it must initially determine whether the right exists. If it finds that the alleged facts do not amount to a constitutional violation, the suit is dismissed. Second, if the court finds that there is a constitutional violation, but the right was not clearly established at the time, the court will dismiss the claim under the second step of *Wilson-Saucier*. Third, the court may reject the qualified immunity defense and the suit will continue to the merits. Fourth, the court may not employ *Wilson-Saucier*. Rather, the court may dismiss the suit finding that the challenged conduct was not clearly established at the time of the activity, regardless of its underlying constitutionality.[115] These four resolutions are represented as follows:

> **Resolution 1—Immunity Granted/Suit Dismissed:** Court employs *Wilson-Saucier* sequencing and finds that plaintiffs failed to allege a constitutional violation.
>
> *Negative Constitutional Articulation.*

> **Resolution 2—Immunity Granted/Suit Dismissed:** Court employs *Wilson-Saucier* sequencing and finds that plaintiffs did allege a constitutional violation. But the court then determines that the right was not clearly established at the time of violation.
>
> *Positive Constitutional Articulation.*

115. When a court does not engage in *Wilson-Saucier* sequencing, but nonetheless rejects a qualified immunity defense, it has decided the case in a manner indistinguishable from Resolution 3 and therefore need not be addressed separately.

Resolution 3—Immunity Denied/Suit Proceeds: Court employs *Wilson-Saucier* sequencing and finds that plaintiffs did allege a constitutional violation. The court also determines that the right was clearly established at the time of violation.

Positive Constitutional Articulation.

Resolution 4—Immunity Granted/Suit Dismissed: Court does not employ *Wilson-Saucier* sequencing and finds that the right was not clearly established at the time of the alleged violation. The court does not adjudicate whether the right presently exists or whether the facts amount to a constitutional violation.

Constitutional Stagnation.

In each of the first three postures, resolution of the constitutional question ensures articulation of the underlying rights at stake. Accordingly, Resolutions 1, 2, and 3 may be considered examples of constitutional articulation. In Resolution 1, the court determines that the facts do not allege a constitutional violation. These cases are examples of "negative constitutional articulation." In contrast, a court that has adjudicated a qualified immunity defense with either Resolution 2 or Resolution 3 has found that the alleged facts present a constitutional violation. "Positive constitutional articulation" has occurred. In Resolution 4, there is no adjudication of whether the alleged facts present a constitutional violation. Such a posture may be considered "constitutional stagnation" and currently violates *Wilson-Saucier*.

Table One demonstrates the total number and percentage of cases decided in each of the years studied as they fall into the four possible resolutions.[116]

116. In cases where different claims were resolved with different postures, the claims are listed separately. Therefore, each year there were more claims studied than cases.

		1988		1995		2005	
Negative Constitutional Articulation	**Resolution 1 Dismissed:** *Wilson-Saucier* Step One	23	20.72%	69	45.70%	70	42.17%
Positive Constitutional Articulation	**Resolution 2 Dismissed:** *Wilson-Saucier* Step Two	3	2.70%	4	2.65%	17	10.24%
	Resolution 3 Proceeds: Immunity Rejected	47	42.34%	39	25.83%	77	46.39%
Constitutional Stagnation	**Resolution 4 Dismissed:** No Articulation	38	34.23%	39	25.83%	2	1.20%
	Total Claims Resolved	111		151		166	
	Total Cases	108		146		158	

Table 1: *Resolution of Qualified Immunity Defenses by the Circuit Courts*

In 1988, prior to the development of any sequencing doctrine by the Supreme Court, thirty-four percent of claims fell into the constitutional stagnation category of Resolution 4 (that is, they were dismissed on qualified immunity grounds without an underlying articulation of the constitutional right at issue). In less than three percent of cases did a court employ the Resolution 2 analysis (hold that a constitutional right existed, but had not been clearly established at the time). In total, approximately sixty-six percent of cases engaged in constitutional articulation (the sum of Resolutions 1, 2, and 3).

In 1995, after the court decided *Siegert*, which made sequencing the "better approach," there was a noticeable decline in constitutional stagnation—from thirty-four percent to twenty-six percent. As a result, constitutional articulation increased to seventy-four percent.

Furthermore, in 2005, after the Supreme Court held that sequencing is mandatory, the percentage of cases avoiding constitutional articulation significantly declined. Only two cases were identified where the appellate court avoided resolution of the substantive constitutional question. This reflects slightly over one percent of the claims adjudicated by the courts in this period as resulting in constitutional stagnation.[117] In total, constitutional articulation jumped to nearly ninety-nine percent—a remarkable increase from the pre-sequencing era.

To further highlight the change that occurred in these samples, Table 2 is a comparison of only the three outcomes of cases where the court dismissed the constitutional claim. By removing the cases where qualified immunity is rejected—cases where the outcome is the same in terms of constitutional articulation regardless of whether the court follows *Wilson-Saucier* or not[118]—the impact of *Wilson-Saucier* becomes yet more apparent. Indeed, this evidence is particularly compelling as the dismissal rate of claims (the sum of Resolutions 1, 2, and 4) remained relatively static. The dismissal rate was approximately fifty-eight percent in 1988, seventy-four percent in 1995, and fifty-four percent in 2005. Sequencing does not appear to change the rate at which cases are dismissed, but merely implicates whether a court articulates the alleged right when deciding to grant qualified immunity to a defendant.

117. Both of those courts acknowledged a departure from *Wilson-Saucier*. The Ninth Circuit specifically declined to resolve the constitutional question out of recognition that the Supreme Court had granted certiorari in a different case to resolve the constitutional question, and as a result, there was no need to refine the right in that matter. Motley v. Parks, 432 F.3d 1072 (9th Cir. 2005). In the other case, the Second Circuit likewise acknowledged its departure from *Wilson-Saucier*. Vives v. City of N.Y., 405 F.3d 115, 118 n.7 (2d Cir. 2005).

118. When denying qualified immunity, a court must determine that the right was "clearly established" at the time of the conduct. This determination necessarily includes the holding that the right presently exists.

		1988		1995		2005	
Negative Constitutional Articulation	**Resolution 1 Dismissed:** *Wilson-Saucier* Step One	23	35.94%	69	61.61%	70	78.65%
Positive Constitutional Articulation	**Resolution 2 Dismissed:** *Wilson-Saucier* Step Two	3	4.69%	4	3.57%	17	19.10%
Constitutional Stagnation	**Resolution 4 Dismissed**: No Articulation	38	59.38%	39	34.82%	2	2.25%
	Total Claims Resolved	64		112		89	

Table 2: Posture of Claims that Are Dismissed Based on Qualified Immunity in the District Courts

In 1988, when dismissing a constitutional claim, most courts failed to articulate whether the alleged facts actually stated a constitutional violation. Indeed, in less than forty-one percent of dismissed cases did the court decide whether the facts amounted to a valid constitutional claim. Over fifty-nine percent of the dismissed cases were examples of constitutional stagnation. In 1995, constitutional stagnation had fallen to under thirty-five percent, while constitutional articulation exceeded sixty-five percent of dismissed claims. In 2005, the rate of constitutional stagnation dwindled to approximately two percent. In cases that were ultimately dismissed on qualified immunity grounds, the courts nonetheless reached the constitutional question in nearly ninety-eight percent of the total cases. It is beyond dispute that following the establishment of *Wilson-Saucier*, courts began articulating the bounds of constitutional rights with a frequency that had not previously been evident.

A review of the cases further illustrates the different implications of *Wilson-Saucier*. The data also indicates whether the court expressly cited to circuit or Supreme Court authority requiring sequencing. Table 3 incorporates this data as an elaboration on Table 1. The percentages in bold indicate the portion of each of those particular resolutions in which the court did expressly cite a sequencing doctrine as the procedure for review. In 1988, only two cases derived such an express

standard.[119] In 1995, sequencing authority was typically either *Siegert* itself or its progeny from the circuit courts. In the 2005 sample, the sequencing doctrine was generally a citation to *Saucier*, *Wilson*, or circuit precedent reflecting these cases.

		1988		1995		2005	
Negative Constitutional Articulation	**Resolution 1 Dismissed:** *Wilson-Saucier* Step One	23	20.71%	69	45.41%	70	41.56%
		8.70%		**23.19%**		**74.29%**	
Positive Constitutional Articulation	**Resolution 2 Dismissed:** *Wilson-Saucier* Step Two	3	2.70%	4	2.63%	17	10.09%
		0.00%		**50.00%**		**88.24%**	
	Resolution 3 Proceeds: Immunity Rejected	47	42.33%	39	25.66%	77	45.71%
		0.00%		**23.08%**		**81.82%**	
Constitutional Stagnation	**Resolution 4 Dismissed:** No Articulation	38	34.22%	39	25.66%	2	1.19%
		0.00%		**7.69%**		**100.00%**	
	Total Claims Resolved	111		151		166	
	Total Cases	108		146		158	
	Total Cases Citing Sequencing	2	1.85%	30	20.55%	127	80.38%

Table 3: Percentage of Resolutions (in Bold) Where Court Expressly Cites Sequencing

This table demonstrates the impact of the Supreme Court's instruction that sequencing is mandatory in all cases of qualified immunity. In the thirty-nine situations in 1995 where there was constitutional stagnation (Resolution 4), less than eight percent of these cases cited sequencing. In contrast, the

119. Brawner v. City of Richardson, 855 F.2d 187, 191 (5th Cir. 1988); Noyola v. Tex. Dep't of Human Res., 846 F.2d 1021, 1023 (5th Cir. 1988).

two constitutional stagnation cases of 2005 both cited to sequencing. The lower courts are cognizant of the Supreme Court's sequencing requirement, and the data shows that these courts operationalize this approach, resulting in greatly enhanced constitutional articulation. Removing the sequencing requirement would return courts to constitutional stagnation, for many courts would resolve claims solely on the basis of whether a right was clearly established at the time of the conduct.

Table 4 shows only those cases in which a sequencing analysis is expressly employed in order to further demonstrate the effect that sequencing has on the resolution of constitutional claims.

		1988		1995		2005	
Negative Constitutional Articulation	**Resolution 1 Dismissed:** *Wilson-Saucier* Step One	2	100.00%	16	53.33%	52	39.39 %
Positive Constitutional Articulation	**Resolution 2 Dismissed:** *Wilson-Saucier* Step Two	0	0.00%	2	6.67%	15	11.36 %
	Resolution 3 Proceeds: Immunity Rejected	0	0.00%	9	30.00%	63	47.73 %
Constitutional Stagnation	**Resolution 4 Dismissed:** No Articulation	0	0.00%	3	10.00%	2	1.52%
	Total Claims Resolved Citing Sequencing	2		30		132	

Table 4: Resolution of Claims Where Court Cited Sequencing Doctrine

When courts were conscious of sequencing in 1995, the total rate of constitutional articulation increased to ninety percent. This is a significant increase from the seventy-four per-

cent rate of constitutional articulation for all cases in the same period, as presented in Table 1. When the lower courts believed sequencing was mandatory, they regularly articulated the underlying constitutional right at issue.[120] But without a mandatory sequencing regime, the data indicates that the lower courts are significantly more likely to avoid resolution of the constitutional question, leading to constitutional stagnation.[121] Although this will allow courts to avoid the resolution of difficult questions, litigants on both sides of cases will be disadvantaged.

In sum, the data demonstrates that the rate of constitutional articulation has grown enormously as a result of *Wilson-Saucier* sequencing.[122] Prior to sequencing, constitutional ar-

120. *See supra* notes 51–62 and accompanying text for discussion of the fact that many courts—primarily those that cited to a sequencing doctrine—considered sequencing binding during the 1995 sample. Because of confusion in the lower courts, this belief was not uniform across the circuits.

121. Indeed, during the oral argument in *Pearson v. Callahan*, Justice Breyer characterized the immunity inquiry as the "easier path" and noted that "[a]s a judge I like to take what is the easier path." Transcript of Oral Argument at 23, Pearson v. Callahan (2008) (No. 07-751), *available at* 2008 WL 4565749. The data here proves that Justice Breyer's preference is widely shared by the federal judiciary. Although a relaxation of *Wilson-Saucier* sequencing may ease the adjudication of certain cases, it will promote constitutional stagnation. This constitutional stagnation may make resolution of later claims more difficult, for rights articulation supports judicial efficiency.

122. Approximately contemporaneous with this publication, Nancy Leong is publishing a similar study examining the effects of *Wilson-Saucier* sequencing on qualified immunity decisions. *See* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. (forthcoming 2009) (manuscript *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1282683). Leong agrees with the analysis presented here: that *Wilson-Saucier* sequencing leads to enhanced constitutional articulation. But this Article disagrees with Leong in two significant respects.

Leong contends that courts are uncomfortable with finding that a plaintiff's rights have been violated while also denying a remedy. But as a factual matter, this occurs with sufficient frequency to prove that this form of constitutional articulation has true implications. Indeed, in 2005, in seventeen cases, or approximately ten percent of the total constitutional litigation claims resolved by the appellate courts, circuit courts applied just this analysis. *See supra* p. 421 tbl.1 and accompanying text. Regardless of how uncomfortable a court may be with this kind of resolution, empirically it happens with great frequency. Similarly, my study indicates that in 1988, approximately forty-five percent of all such cases resulted in positive constitutional articulation. In 2005, following the firm establishment of *Wilson-Saucier* sequencing, that number grew to nearly fifty-seven percent. *Id.* Therefore, to the extent that one places positive constitutional articulation as a goal, *Wilson-Saucier* sequencing is wholly supportive of this objective. In short, Leong's conclusion that "the new constitutional law—law that would not have been made before *Siegert* and *Saucier*—almost uniformly denies the existence of plaintiffs' constitutional rights," *Leong*, *supra*, manuscript at 20, is not born out by this empirical study.

ticulation was sixty-six percent in all cases and only forty-one percent in cases where the qualified immunity defenses prevailed. In 1995, the articulation rate grew to seventy-four percent generally, and sixty-five percent in dismissed cases. By 2005, however, articulation rates rose to ninety-nine percent generally and ninety-eight percent in cases dismissed due to qualified immunity. Sequencing has fulfilled the predictions: it ensures that there is robust articulation—both positive and negative—of constitutional rights. Without mandatory sequencing, courts are likely to return to constitutional stagnation. The public and government officials alike would be deprived the benefit of further refined constitutional norms.

CONCLUSION

Wilson-Saucier sequencing is necessary to ensure full articulation of constitutional rights. Absent the doctrine, when dismissing cases in which qualified immunity is a defense, courts are likely to return to the pre-sequencing mode of decision-making. As was evident in 1988 and 1995, courts frequently dismissed constitutional claims solely on the ground that the right was not clearly established. If *Wilson-Saucier* sequencing were overturned or were no longer mandatory, courts would fail to resolve many lingering constitutional questions.

A return to such constitutional stagnation should be resisted. When a court fails to articulate constitutional rights, future litigants are deprived the benefit of knowing the content and scope of their rights. Constitutional stagnation would harm future plaintiffs because they would continue to be frustrated by a qualified immunity defense. Until a court clearly establishes a constitutional right, a plaintiff is generally unable

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Likewise, Leong's implicit assumption that there is only value in positive constitutional articulation overlooks certain benefits of negative constitutional articulation. For one, negative constitutional articulation does not limit the scope of remedies available to a plaintiff asserting constitutional-tort injuries. If the right has not been articulated, the suit will be dismissed on qualified immunity grounds regardless. Articulation that results from sequencing can only expand available remedies. Rather, when compared with constitutional stagnation where plaintiffs are similarly foreclosed from judicial remedies, negative constitutional remedies enhance the possibility that Congress may choose to enact a statutory right. *Cf.* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Finally, negative constitutional articulation heightens judicial efficiency and creates predictability in the legal system by settling constitutional rights. Thus, all forms of constitutional articulation should be favored over constitutional stagnation.

to prevail in a suit alleging a violation of that right. Unless *Wilson-Saucier* sequencing is employed, the opportunity for certain rights to become clearly established may never exist.

Future defendants would also be hampered by constitutional stagnation. For instance, negative constitutional articulation is a plain benefit to defendants. When a court determines that an alleged constitutional right does not exist, future litigation over a similar question will either be abandoned by the plaintiff or will be quickly dismissed by the court. The data proves that *Wilson-Saucier* leads to negative articulation as well as positive articulation. Moreover, positive constitutional articulation is similarly beneficial to defendants as it allows government officials to conform their behavior to settled constitutional norms without the need for prolonged litigation. Government officials generally do not intend to engage in unconstitutional conduct cloaked by qualified immunity; rather, officials seek to diligently perform their duties without accruing liability for reasonable constitutional mistakes made in the course of their employment. *Wilson-Saucier* allows constitutional rights to be articulated without depriving officials of immunity for reasonable mistakes.

Wilson-Saucier sequencing, therefore, benefits all parties to constitutional litigation by settling the scope of constitutional norms. Settled rights promote both predictability and efficiency in the legal system. Accordingly, *Wilson-Saucier* plays an important role in the continued refinement of constitutional rights. The data proves that Chief Justice Rehnquist, Justice Kennedy, and Justice Souter were correct to believe that sequencing is needed for constitutional articulation. Abandoning sequencing would severely diminish the role of the courts "to say what the law is."[123]

123. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).