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Mirabile Dictum! The Case for 'Unnecessary' Constitutional Rulings in Civil Rights Damages Actions

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MIRABILE DICTUM!: THE CASE FOR "UNNECESSARY" CONSTITUTIONAL RULINGS IN CIVIL RIGHTS DAMAGES ACTIONS

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As with most pledges, it is necessary to read the fine print accompanying Justice Marshall's famous guarantee of a remedy for every invasion of a constitutional right.[1] Professor Fallon's description of Justice Marshall's promise as more "a flexible normative principle than . . . an unbending rule of constitutional law"[2] seems, if anything, a bit generous when one considers that the Eleventh Amendment and various sovereign immunities often bar remedies for constitutional violations from governmental defendants;[3] that the personal immunities such as the qualified immunity recognized in *Harlow v. Fitzgerald*[4] often prevent the recovery of damages for such violations from indi-

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1 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162–63 (1803) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *23, *109). According to one commentator, Justice Marshall took the ancient maxim underlying his promise—*ubi jus, ibi remedium* ("where there is a law, there is a remedy")—as "a kind of self-evident matter." William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 2. *See also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1778 & n.243 (1991) (summarizing the establishment of the *ubi jus, ibi remedium* principle as a putative first principle of the American legal tradition).

2 Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 338 (summarizing an argument made in Fallon & Meltzer, *supra* note 1, at 1787–91).

3 *See* Fallon, *supra* note 2, at 337 n.165 (1993) (collecting cases and summarizing the various governmental immunities).

4 457 U.S. 800 (1982).

vidual state and federal actors;[5] that a police officer's good faith and reasonable reliance on a search warrant issued without probable cause precludes the suppression remedy[6]—a remedy that is, in any event, all but unavailable on federal habeas corpus;[7] that *Teague v. Lane*[8] ordinarily prohibits the provision of relief to any state prisoner who seeks the establishment of a "new rule" of constitutional criminal procedure in a petition for a writ of habeas corpus;[9] and that the harmless-error doctrines often prevent the grant of a new trial to remedy constitutional trial errors.[10]

Not surprisingly, these considerable inroads into the *Marbury* guarantee have met with less-than-universal acclaim. Although critics have tended to emphasize how these doctrines fail to honor the *ubi jus, ibi remedium* principle,[11] they also have decried how, in particular,

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5 *See infra* text accompanying notes 25–33; *see also* Fallon, *supra* note 2, at 338 n.166 (collecting cases and summarizing the various individual immunity doctrines).

6 *See* United States v. Leon, 468 U.S. 897, 908–13 (1984).

7 *See* Stone v. Powell, 428 U.S. 465, 489–95 (1976) (precluding federal habeas corpus relief for state prisoners deprived of their Fourth Amendment rights unless the state has not provided for full and fair litigation of the Fourth Amendment claim).

8 489 U.S. 288 (1989).

9 *See* Fallon & Meltzer, *supra* note 1, at 1746–49 (outlining the operation of *Teague* and its progeny and noting the extraordinarily broad reading the Supreme Court has given the phrase "new rule").

10 *See* John M.M. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. REV. 819, 822–30 (1994) (describing the evolution and operation of criminal harmless-error doctrines).

11 *See supra* note 1. Focusing on the personal immunities that have recently emerged, one commentator has (representatively) stated: "The Framers would have found the current remedial regime, in which a victim of a constitutional tort can in many cases recover from neither the officer nor the government, a shocking violation of first principles, trumpeted in *Marbury v. Madison*, that for every right there must be a remedy." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812 (1994) [hereinafter Amar, *Fourth Amendment First Principles*]. A sampling of the many other multi-contextual critiques arguing that current law is insufficiently sensitive to remedial interests includes Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) [hereinafter Amar, *Of Sovereignty and Federalism*]; Scott D. Danahy, Comment, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Businesses*, 25 FLA. ST. U. L. REV. 679 (1998); Fallon & Meltzer, *supra* note 1; Sheldon H. Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U. L.Q. 221 (1983); Hari M. Osofsky, *Foreign Sovereign Immunity from Severe Human Rights Violations: New Directions for Common Law Based Approaches*, 11 N.Y. INT'L L. REV. 35 (1998); Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447 (1997); David Rudovsky, *The Qualified Immunity Doctrine in the*

Harlow's qualified immunity doctrine, *Leon*'s good-faith exception to the valid warrant requirement, *Teague*'s "old rule" requirement, and the harmless-error rules tend to retard the natural development of new constitutional law by "freezing" current law into place.[12] Such law-freezing is made possible by the fact that, in situations where application of these doctrines precludes a remedy for a claim made under the Constitution, a federal court is theoretically free to bypass the claim without deciding its merits by merely assuming that the claim is meritorious but then dismissing it on the ground that the remedy sought is not available.[13] And the law-freezing is exacerbated by the fact that, under two of these remedy-precluding doctrines—the rules of *Teague* and *Harlow*—a constitutional claim of first impression is almost always ineligible for remediation *precisely because* of its novelty.[14] A jurisprudential Catch-22 thus has emerged: the 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.

Federal courts are busy places, so it should come as little surprise that, when presented with a novel constitutional claim for which the relief sought is unavailable, federal judges routinely bypass the merits of the claim, rejecting it on the straightforward premise that it cannot

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Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. PA. L. REV. 23 (1989).

12 *See, e.g.*, United States v. Leon, 468 U.S. 897, 956 n.15 (1984) (Brennan, J., dissenting) (predicting that the *Leon* majority's adoption of a good-faith exception would lead to a freezing of Fourth Amendment law); Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 80–83 (1997) (criticizing the qualified immunity doctrine for its law-freezing tendencies); Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 193–94 (1993) (similar); Nahmod, *supra* note 11, at 259 (similar); Rudovsky, *supra* note 11, at 53–56 (similar); *cf.* Fallon & Meltzer, *supra* note 1, at 1797–98, 1819 (acknowledging the potential for law-freezing posed by *Harlow*, *Teague*, and the harmless-error doctrines).

13 *See infra* text accompanying notes 25–37 (elaborating upon how the qualified immunity doctrine facilitates such merits bypasses). Two descriptions of the merits bypass in action can be found in my discussions of *Birmingham v. Schacher*, No. 94-35685, 1995 WL 655167 (9th Cir. Nov. 7, 1995), set forth *infra* in text accompanying notes 127–36, and *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997), set forth *infra* in text accompanying notes 145–56.

14 *Teague* is explicit on this point: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310 (plurality opinion). *Harlow* only has such an effect. *See infra* text accompanying notes 34–37.

be remedied.[15] On initial examination, this makes a great deal of sense. Not only can merits bypasses help clear crowded dockets expeditiously, but fundamental principles of judicial restraint counsel courts against reaching constitutional questions "in advance of the necessity of deciding them"[16] and in favor of deciding such questions on the narrowest possible grounds.[17] But these strictures are no more than guideposts, and departure from them is permitted when good cause exists.[18] And, at least in civil rights damage actions where the availability of a meritorious qualified immunity defense might tempt a court to bypass the merits of a pleaded constitutional claim of first impression,[19] courts—particularly appellate courts[20]—should, be-

15 *See infra* note 35.

16 Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 157 (1984); *see also* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

17 *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 526 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (citing *Ashwander*, 297 U.S. at 347 (Brandeis, J. concurring)).

18 *See id.* at 532–34 (Scalia, J., concurring in part and concurring in the judgment) (compiling a non-exhaustive list of nine instances in which the Supreme Court has decided a constitutional question on broader grounds than was strictly necessary).

19 Although a more generalized study of the costs and benefits of novel issue bypasses by courts, and a concomitant across-the-board normative proposal, would be a worthy enterprise, I confine my focus to civil rights damages actions because merits bypasses in this context pose a number of unique problems not presented in the *Leon*, *Teague*, and harmless-error settings. First, and most fundamentally, it is only in the context of a novel-issue bypass in a civil rights damages action that a claimant will not receive *any* adjudication of his or her claim by a judicial officer. When there has been a *Leon*, *Teague*, or harmless-error bypass, at least one judicial officer will have addressed the constitutionality of the challenged conduct, be it the magistrate judge or district judge who initially determines that there is probable cause for a warrant to issue (*Leon* bypass), the state court judges who have rejected a habeas petitioner's claim on direct review (*Teague* bypass), or the trial judge who, over a defendant's objection, commits the act that, if erroneous, was harmless (harmless-error bypass). Second, the actors whose conduct is challenged directly in civil rights damages actions tend to be non-lawyer executive officials, whereas the actors whose conduct is most directly at issue in the other three situations tend to be judicial officers trained in the methods of constitutional interpretation. Thus, the notice-giving that accompanies a novel constitutional ruling is properly regarded as more crucial in the context of civil rights damages actions than in the other three situations. *Cf. infra* text accompanying notes 123–39. Third, important issues of non-criminal constitutional law—for example, First Amendment law, the law of excessive force, Eighth Amendment law, and civil due process claims—arise and are decided almost exclusively in civil rights actions. It is therefore particularly important that novel issues not be routinely bypassed in such actions. *Cf.* Joseph D. McCann, *The Interrelationship of Immunity and the Prima Facie Case in Section 1983 and* Bivens *Actions*, 21 GONZ. L. REV. 117, 140 n.147 (1985/86) (asserting that a damages action raising an issue of first impression is the most

cause of the deleterious by-products of law-freezing, spurn temptation and address the pleaded claim.

In order to head off visceral skepticism, it is important for me to pause here and to emphasize the contours of my argument. I am *not* arguing that, in a general jurisprudential sense, merits bypasses in civil rights damages actions are preventing new constitutional law from developing. The expansion rate of the *United States Reports*, the *Federal Reporter (Third)*, and the *Federal Supplement* (all of which are chock full of constitutional rulings) itself would be sufficient to rebut any such claim. Rather, my primary point is that, because novel constitutional claims brought in civil rights damages actions often involve the use of new technologies and procedures by executive actors who are not constitutional experts and who therefore are not themselves well-equipped to judge the constitutionality of their conduct, the merits rulings I advocate have important notice-giving aspects that should not be overlooked.[21] Rulings on the merits of novel constitutional claims ensure that executive officials will not, for fear of being sued, refrain from engaging in lawful and beneficial conduct that already has been the subject of a lawsuit; such rulings also help ensure that executive officials prospectively refrain from repeating unconstitutional conduct. My secondary point is that executive officials whose unconstitutional conduct already has been challenged in court should not be permitted, indeed encouraged, to repeat their unlawful conduct without accountability.[22] Yet a merits bypass allows for, and can encourage, precisely such a repetition. In Part II, I develop these points, adding a few thoughts about the ramifications of merits bypasses in civil rights damages actions that involve novel Fourth Amendment claims. I conclude that, as a general matter, the uncertainty costs of merits bypasses in civil rights damages actions far out-

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common of the means by which constitutional civil rights can become clearly established).

20 I direct my remarks primarily to appellate judges because the prevailing view is that, absent unusual circumstances, it takes either a Supreme Court opinion or an in-circuit federal appellate opinion to "clearly establish" the law for qualified immunity purposes. *See generally* Karen M. Blum, *Section 1983: Qualified Immunity*, 576 PRACT. L. INST. LITIG. 513, 595–649 (1997) (collecting cases). *See also infra* text accompanying notes 25–33 (elaborating the qualified immunity concept). I emphasize, however, that a merits bypass in civil rights damages action tends to generate the costs discussed below whenever it is indulged by *any* jurist.

21 *See infra* text accompanying notes 123–39.

22 *See infra* text accompanying notes 140–56.

weigh their benefits. This conclusion leads me to argue for a judicial presumption against merits bypasses in this context.[23]

But first, there is a need to clear away some underbrush. After outlining how the qualified immunity defense, as developed by the Supreme Court, presents real concerns about law-freezing, I seek in Part I to decipher a puzzling Supreme Court opinion, *Siegert v. Gilley*,[24] which some courts and commentators have read to forbid merits bypasses in civil rights damages actions. Although I quite agree that courts ordinarily should not engage in such merits bypasses, I do not agree that *Siegert* forbids them. Rather, after *Siegert*, a court still has unreviewable discretion to engage in a merits bypass. I therefore find myself in the strange position of arguing that the judges who misread *Siegert* to require the merits rulings I advocate are doing the right thing, but for the wrong reason.

Yet, Part I is devoted to far more than criticizing courts that do what I propose because their reasoning is unsound; it also responds to the argument that, whenever the presence of a viable qualified immunity defense dooms a pleaded civil rights damages claim from the outset, a threshold merits ruling is a nonbinding dictum beyond the warrant of Article III. Although this argument requires serious attention and a serious response, it does not withstand serious scrutiny. I thus conclude that the threshold merits rulings advocated in Part II would not be dicta; they would be legitimate and binding legal holdings.

I. PRELIMINARIES

A. *The Law-Freezing Potential of the Merits Bypass*

Under the implied cause of action recognized in *Bivens v. Six Unknown Federal Bureau of Narcotics Agents*[25] and 42 U.S.C. § 1983,[26] a per-

23 Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 1, 32 (1996) (arguing generally for a "minimalist" approach to constitutional adjudication, but acknowledging the need for "maximalist" lawmaking where the uncertainty costs of a minimalist approach are too high).

24 500 U.S. 226 (1991).

25 403 U.S. 388 (1971).

26 In relevant part, the statute reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

son may sue federal, state, or municipal officials acting in their individual capacities for damages caused by constitutional violations.[27] These officials are, however, entitled to assert a powerful personal defense—the qualified immunity defense—which shields them from damages awards to the extent that "their conduct does not violate clearly established . . . rights of which a reasonable person would have known."[28] This judge-made doctrine developed from a belief that, without some sort of immunity cloak, "executive officials would hesitate to exercise their discretion in a way injuriously affect[ing] the claims of particular individuals even when the public interest require[s] bold and unhesitating action."[29] The qualified immunity defense thus serves a judicial bias in favor of official action, and against inaction, in constitutionally marginal situations.[30]

The Supreme Court has provided the following gloss as to whether an asserted right is "clearly established" at the time of the challenged conduct:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.[31]

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42 U.S.C. § 1983 (1994).

27 *Bivens* authorizes damages suits against federal officials; § 1983 authorizes damages suits against state and municipal officials.

28 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (describing the qualified immunity defense); *see* Johnson v. Fankell, 117 S. Ct. 1800, 1803 (1997) (observing that both state officials sued under § 1983 and federal officials sued under *Bivens* enjoy qualified immunity).

29 Nixon v. Fitzgerald, 457 U.S. 731, 744–45 (1982) (citation and internal quotation marks omitted) (alteration in original).

Recognizing that the burden of defending against lawsuits can prompt a hesitation to act in the same way as the threat of a damages award, the Supreme Court has made clear that qualified immunity is an entitlement to "*immunity from suit* rather than a mere defense to liability" because "like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Accordingly, the Court has stated that "[i]mmunity ordinarily should be decided . . . long before trial," Hunter v. Bryant, 502 U.S. 224, 228 (1991), and preferably even before discovery, *see Mitchell*, 472 U.S. at 526. It also has reaffirmed that government defendants may take purely law-based appeals from denials of pretrial motions asserting the qualified immunity defense, *see* Johnson v. Jones, 515 U.S. 304, 311–12 (1995), and that they may do so more than once in the same case, *see* Behrens v. Pelletier, 516 U.S. 299, 305–11 (1996).

30 *See* Malley v. Briggs, 475 U.S. 335, 343 (1986) (emphasizing that the qualified immunity standard leaves "ample room for mistaken judgments").

31 Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The First Circuit's elaboration of this principle is typical: "[I]t is not enough for the constitutional right to be 'clearly established' at a highly abstract level; what matters is whether in the circumstances faced by the official, he should reasonably have understood that his conduct violated clearly established law."[32]

The upshot is that qualified immunity protects individual government officials from damages judgments so long as "their actions could reasonably have been thought consistent with the rights they are alleged to have violated" when viewed through an objective lens and against the backdrop of contemporaneous and controlling legal precedent.[33] It is irrelevant to the qualified immunity inquiry whether the defendant's conduct actually violated the Constitution; all that matters is whether law in existence *at the time of the conduct* would have informed an objectively reasonable official that he or she was violating the Constitution.

The requirement that the allegedly violated right be clearly established at the time of the action in question tends, if not to "freeze" constitutional law, then at least to retard its growth through civil rights damages actions.[34] The corpus of constitutional law grows only when courts address novel constitutional questions, yet a novel claim, by definition, seeks to establish a right that is not already "clearly established." Thus, a civil rights damages action asserting a novel constitutional claim against an individual public official is foreordained to end in a judgment for the defendant, provided the defendant pleads qualified immunity as an affirmative defense. For even if the plaintiff's allegations are sufficient to state a valid constitutional claim, they are not sufficient to state a valid claim under law that was clearly established at the time of the events giving rise to the claim. It therefore should not be surprising that the cases are legion where courts, in their decision-making discretion, have bypassed pleaded constitutional claims of first impression by assuming arguendo that the claims are viable and then dismissing them on qualified immunity grounds.[35] Not only is such a rationale logically unassailable, but it also honors venerable principles that favor avoidance of constitutional

32 Ringuette v. City of Fall River, 146 F.3d 1 (1st Cir. 1998).

33 *Anderson*, 483 U.S. at 638.

34 *Cf.* Owen v. City of Independence, 445 U.S. 622, 651 n.33 (1980) (noting law-freezing concerns in prohibiting a municipality from asserting the good faith of its officers as a defense to a § 1983 action).

35 In his most recent compilation detailing recent developments in civil rights litigation, Leon Friedman lists 79 representative appellate cases where public officials were awarded qualified immunity because no direct precedent generally prohibited the conduct at issue. *See* Leon Friedman, *New Developments in Civil Rights Litigation and*

questions and resolution of such questions on the narrowest possible grounds.[36] The qualified immunity defense, because it encourages merits bypasses, is thus a substantial impediment to the development of new constitutional law in civil rights damages actions.[37]

B. Has the Supreme Court Repudiated the Merits Bypass?

The merits bypass is common in civil rights actions damages actions presenting constitutional questions of first impression, but it is hardly inevitable.[38] A few courts have addressed the merits of the pleaded claim so as to avoid law-freezing.[39] Yet many more have done so, and continue to do so, because they believe the Supreme Court so mandated in *Siegert v. Gilley*.[40] These courts read too much into *Siegert*, and read it far too uncritically.

Siegert arose out of a *Bivens* action brought by Frederick A. Siegert, a clinical psychologist, against H. Melvyn Gilley, a supervisor at the federal hospital where Siegert had been employed. The complaint alleged that certain job performance information sent by Gilley to an army hospital where Siegert was seeking credentials contained intentional falsehoods which deprived Siegert of his due process rights.[41] Gilley asserted a qualified immunity defense in a motion to dismiss or, in the alternative, for summary judgment. Without conclusively deciding the qualified immunity question, the district court denied the motion and ordered that discovery proceed.[42] Gilley took a law-based interlocutory appeal of this ruling and prevailed. A divided panel of the D.C. Circuit engaged in a merits bypass, holding that, even if an intentional defamation of the type alleged could constitute a constitutional violation, Siegert had not adequately pleaded specific and direct evidence of the requisite illicit intent.[43] Significantly, this meant that the appeals court decided *neither* whether the complaint stated a constitutional claim *nor* whether it stated a constitutional claim under

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Trends in Section 1983 Actions, 576 PRACT. L. INST. LITIG. 7, 304–08 (1997). By my count, courts engaged in a merits bypass in 51 of these 79 representative cases. *See id.*

36 *See supra* notes 16–17 and accompanying text.

37 *See* Blum, *supra* note 12, at 193–94; Freiman, *supra* note 12, at 80–83; Nahmod, *supra* note 11, at 259; Rudovsky, *supra* note 11, at 53–56; *cf.* McCann, *supra* note 19, at 140 n.147.

38 *See supra* note 35.

39 *See, e.g.*, Garcia by Garcia v. Miera, 817 F.2d 650, 656, n.8 (10th Cir. 1987); Coleman v. Frantz, 754 F.2d 719, 722–23 (7th Cir. 1985).

40 500 U.S. 226 (1991).

41 *See id.* at 227–29.

42 *See id.* at 229–30.

43 *See id.* at 230–31.

law that was clearly established at the time of the challenged conduct. Instead, the court relied upon the D.C. Circuit's "heightened pleading standard," applicable whenever improper purpose is an element of a constitutional tort action.[44]

Although the questions on which the Supreme Court granted Siegert's petition for a writ of certiorari presaged an opinion addressing whether there should be a heightened pleading requirement in cases of this sort and the types of federal conduct to which the qualified immunity defense might apply,[45] the *Siegert* majority took a different tack. Writing for four other Justices, Chief Justice Rehnquist stated that the Court had, in fact, taken the case "in order to clarify the analytical structure under which a claim of qualified immunity should be addressed."[46] The Court then went on to hold that the appeals court had reached the correct result, but that it had done so in the incorrect manner.[47] As we shall see, however, the Court's prescription of the correct manner in which to conduct the inquiry is unclear and, in light of the Court's rationale, ultimately incoherent.

Immediately after asserting that it had taken the case in order to clarify the qualified immunity inquiry, the *Siegert* Court indicated that the threshold qualified immunity question—the one that the D.C. Circuit erred in failing to answer—is simply whether there has been a violation of a clearly established right: "We hold that the petitioner in this case failed to satisfy the first inquiry in the examination of such a claim; he failed to allege the violation of a clearly established constitutional right."[48] Subsequently, however, the Court used language that would seem to prohibit merits bypasses in civil rights damages actions: "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."[49] And to confuse

44 *See id.* at 231.

45 *See id.* at 237 (Marshall, J., dissenting) (noting that the Court had granted certiorari to decide (1) the legality of the heightened pleading standard, and (2) whether a federal official can be qualifiedly immune from suit "without regard to whether the challenged conduct was discretionary in nature").

46 *Id.* at 231.

47 *See id.* at 231–35.

48 *Id.* at 231.

49 *Id.* at 232 (emphasis added). The Court also made three other statements that can be taken to support the no-merits-bypasses reading of *Siegert*: (1) "[Siegert's] allegations, even if accepted as true, did not state a claim for a violation of any rights secured to him under the United States Constitution," *id.* at 227; (2) "Siegert failed not only to allege a violation of the constitutional right that was clearly established at the time of Gilley's actions, but also to establish the violation of any constitutional

matters further, the Court never explained *why* the approach employed by the D.C. Circuit was impermissible.[50] The unsurprising result has been a split among the circuits as to the meaning and requirements of *Siegert*.

One court of appeals explicitly relied upon the first of the just-quoted statements, construing it to permit a merits bypass.[51] Two others have stated generally, without much in the way of elaboration, that the merits bypass survives *Siegert*.[52] But several circuits have given controlling effect to the language in *Siegert* that can be taken to mandate resolution of the pleaded constitutional claim.[53] Even within circuits, there is confusion over exactly what *Siegert* demands. In fact, a number of courts of appeals have stated that they read *Siegert* as commanding resolution of the pleaded issue, but then subsequently conducted a merits bypass without reference to prior circuit case law.[54]

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right at all," *id.* at 233; and (3) "'[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred . . . . Until this threshold immunity question is resolved, discovery should not be allowed.'" *id.* at 231 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

50 To be sure, in mandating *some* threshold legal inquiry, the Court did state:

> 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. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.

Id. at 232. Mandating a particular inquiry does not, however, promote a more expeditious resolution of qualified immunity claims. *See infra* note 56 and accompanying text. Thus, the quoted passage does not explain the undesirability of the D.C. Circuit's approach.

51 *See* DiMeglio v. Haines, 45 F.3d 790, 797–98 (4th Cir. 1995).

52 *See* Spivey v. Elliott, 41 F.3d 1497, 1498–99 (11th Cir. 1995) (withdrawing panel opinion with a contrary reading of *Siegert*); Acierno v. Cloutier, 40 F.3d 597, 606 n.7 (3d Cir. 1994).

53 *See, e.g.*, Pino v. Higgs, 75 F.3d 1461, 1467 (10th Cir. 1996); Brown v. Hot, Sexy & Safer Productions, Inc., 68 F.3d 525, 531 (1st Cir. 1995); Wilson v. Formigoni, 42 F.3d 1060, 1064–65 (7th Cir. 1994); Brown v. Nix, 33 F.3d 951, 953 (8th Cir. 1994); Calhoun v. New York State Div. of Parole Officers, 999 F.2d 647, 652 (2d Cir. 1993); Grady v. El Paso Community College, 979 F.2d 1111, 1113 (5th Cir. 1992); Silver v. Franklin Township Bd. of Zoning Appeals, 966 F.2d 1031, 1035–36 (6th Cir. 1992); Hunter v. District of Columbia, 943 F.2d 69, 76 (D.C. Cir. 1991).

54 *Compare, e.g., Hot, Sexy & Safer Productions., Inc.*, 68 F.3d at 531 (construing *Siegert* as mandating inquiry into whether a constitutional claim has been stated) *and Nix*, 33 F.3d at 953 (same) *with* St. Hilaire v. City of Laconia, 71 F.3d 20, 27–28 (1st Cir. 1995) (utilizing merits bypass) *and* Good v. Olk-Long, 71 F.3d 314, 318 (8th Cir.

The majority opinion in *Siegert* is so lacking in convincing explanatory reasoning that a definitive construction is elusive, at best. The Court sought to explain its holding in terms of expediency and the need not to burden government defendants with discovery, repeating the oft-stated maxim that qualified immunity is an immunity from suit as well as damages.[55] But this makes no sense. Resolving a case for failure to meet a heightened pleading requirement, as the D.C. Circuit did, is no less expeditious and no more onerous to a defendant than is resolving the same case for failing to state a claim. This is so whether the analysis looks to current law or law that was clearly established at the time of the challenged action. In either event, the court need do no more than read the pleadings and look up the law. No discovery is necessary.

Moreover, the regime in place prior to *Siegert*—where courts chose for themselves how to resolve pretrial motions raising qualified immunity defenses—seems preferable if expediency and the convenience of official defendants are to be the key considerations. As I already have observed, federal courts are busy places, and experienced trial and appellate judges rarely fail to discern the most direct route to resolution of doomed cases if left to their own devices.[56]

Regardless of what led to the majority opinion in *Siegert* and what the true intentions of the *Siegert* majority might have been,[57] there is

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1995) (same). *See also* Blum, *supra* note 20, at 527–48 (setting forth other examples of variations within particular circuits).

55 *See supra* note 50.

56 Justice Kennedy made this very point in his separate opinion in *Siegert*:

> 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." I do not, however, agree that the Court of Appeals "should not have assumed, without deciding," this issue. The Court of Appeals adopted the altogether normal procedure of deciding the case before it on the ground that appeared to offer the most direct and appropriate resolution, and one argued by the parties. If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first.

Siegert, 500 U.S. at 235 (Kennedy, J., concurring in the judgment) (citations omitted).

57 Perhaps, after taking the case, the *Siegert* majority concluded that it was more important to emphasize that courts should rule on law-based qualified immunity motions as soon as they are raised, *see id.* at 229–30 (highlighting that the district court erroneously ordered "a limited amount of discovery" rather than ruling on the qualified immunity defense at the time it was raised by motion), and to clarify that the Constitution does not protect a person's reputation, *see id.* at 233–34 (explaining *Paul*

little reason for a court interpreting the case to infer from it a mandate that courts decide whether a civil rights complaint states a constitutional claim prior to deciding whether the complaint states a claim under law that was clearly established at the time of the challenged conduct.[58] For one thing, the Court has never disavowed two previous, explicit endorsements it gave to the merits bypass in civil rights damages actions.[59] For another, the distinction between stating a claim and stating a claim under clearly established law was of no practical moment in *Siegert*; the D.C. Circuit disposed of the case on grounds of inadequate pleading.[60] Thus, the *Siegert* Court was faced with an atypical situation in which the appeals court had declined to decide not only the constitutional issue presented in the complaint, but also the usually dispositive question under the traditional merits bypass—whether plaintiff's allegations were sufficient when viewed in the context of law that was clearly established at the time of the underlying incident. For these reasons alone, it would be a mistake to read *Siegert* as imposing, out of whole cloth, a mandate that the pleaded claim be resolved first.

Indeed, if an interpreting court were to divine the meaning of *Siegert* through the lens of those policy factors—expediency and convenience to official defendants—recited in support of the holding, the court would likely conclude that the traditional merits bypass not only survives *Siegert*, but that it is the preferable jurisprudential approach. To require a court to rule on the pleaded constitutional

v. Davis, 424 U.S. 693 (1976)), than to pass on the issues as to which the petition for a writ of certiorari was granted, *see supra* note 45. Or perhaps no majority view emerged on the issues as to which certiorari was granted, but a majority view did emerge concurring in the analysis set forth in the majority opinion.

58 I recognize that several scholarly commentators have read *Siegert* to require threshold merits rulings on the pleaded claim. *See* Blum, *supra* note 12, at 190–94; Freiman, *supra* note 12, at 83–84; Martin A. Schwartz, *Section 1983 in the Second Circuit*, 59 BROOK. L. REV. 285, 326–27 & nn.243–47 (1993). For the reasons that follow, I disagree with these commentators' conclusions.

59 *See* Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) (noting that appellate courts addressing interlocutory appeals of qualified immunity rulings "need not . . . determine whether the plaintiff's allegations actually state a claim. All [they] need determine is . . . whether the legal norms allegedly violated by the defendant were clearly established at the times of the challenged actions"); United States v. Leon, 468 U.S. 897, 924–25 (1984) (noting, in response to a law-freezing argument, that in "cases addressing questions of good-faith immunity under 42 U.S.C. § 1983, . . . courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases"); *see also* Procunier v. Navarette, 434 U.S. 555, 566 n.14 (1978) (bypassing the merits of certain pleaded civil rights claims on immunity grounds).

60 *See supra* text accompanying notes 43–44.

claim in a damages action where the law was not sufficiently established at the relevant point in time has the effect of imposing an additional, sometimes complicated, step in the decisional calculus. Of course, this can prolong a lawsuit. Thus, by tending both to be inexpedient and to inconvenience government actors,[61] the putative requirement of a merits ruling undermines those policy considerations favored by the *Siegert* majority.[62]

Moreover, it is highly improbable that the Supreme Court would discard its usual rules of adjudicatory restraint[63] and require "unnecessary"[64] lawmaking with nary a word of explanation to the busy courts charged with carrying out the Court's mandate. Although there are compelling reasons for courts to engage in such lawmaking,[65] the lack of even a hint that the *Siegert* majority was motivated by such reasons counsels against inferring a mandate from the opinion.

Finally, a majority of the Court has quite recently distanced itself from *Siegert*'s absolutist language. In *County of Sacramento v. Lewis*,[66] the Court held that the estate of a decedent killed by a police officer in a high-speed automobile chase could not recover against the officer under the Fourteenth Amendment's guarantee of substantive due process because the facts pleaded were insufficient to demonstrate a purpose to cause harm unrelated to the legitimate object of arrest.[67] The district court had also concluded that dismissal of the action against the officer was warranted, but had done so by engaging in a merits bypass, reasoning that there is "no 'state or federal opinion published before May, 1990, when the alleged misconduct took place, that supports [the] view that the decedent had a Fourteenth Amendment substantive due process right in the context of high speed police

61 Note, though, that the "inconvenience" is almost invariably limited to the angst caused by being a named defendant in a pending lawsuit, as courts routinely decline to allow discovery until they have resolved pleadings-based motions asserting qualified immunity defenses. *See Mitchell*, 472 U.S. at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.").

62 Although I have suggested that interests other than expediency and lessening litigation burdens on governmental defendants may have motivated the *Siegert* majority, *see supra* note 57, there is little doubt that these interests were of paramount concern.

63 *See supra* notes 16–17 and accompanying text.

64 I use quotation marks to emphasize that the contemplated lawmaking is unnecessary only in a narrow, case-specific, and *post hoc* sense. *See infra* Parts I.C & II.

65 *See infra* Part II.

66 118 S. Ct. 1708 (1998).

67 *See id.* at 1720–21.

pursuits.'"[68] Justice Souter, writing for six members of the Court and citing *Siegert*, criticized the district court's decision to conduct a merits bypass. But in doing so, he described *Siegert*'s holding in terms more hortatory than mandatory:

> We do not [engage in a merits bypass] because, as we have held, the *better* approach to resolving cases in which the defense of qualified immunity is raised 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 events in question.[69]

Happily, the *Lewis* majority did more than just interpret *Siegert* in a nonabsolutist manner. In rejecting Justice Stevens' call to follow the district court's lead and dispose of the case by means of a merits bypass,[70] the *Lewis* majority also evinced an appreciation of some of the detrimental effects of merits bypasses outlined in Part II. Specifically, the Court noted that merits bypasses tend to increase, rather than abate, uncertainty over constitutional standards, and that the alternative means for law creation under 42 U.S.C. § 1983—suits to enjoin future conduct, suits claiming municipal liability, and rulings on suppression motions—are not always available.[71]

Although this first, tentative step towards a coherent disapproval of merits bypasses is most welcome, *Lewis* provides no basis for a revisionist inference that concern about any of the effects of merits bypasses noted in Part II prompted the majority opinion in *Siegert*.[72] Nor, unfortunately, should courts take the view that *Lewis* has put the matter to rest. The Court's two previous, never-repudiated endorsements of the qualified immunity bypass in *Mitchell v. Forsyth*[73] and *United States v. Leon*[74] still stand in stark contrast to its contrary pronouncements in *Siegert* and *Lewis*. Moreover, two Justices (Stevens and Breyer) explicitly departed from the *Lewis* majority on the question of merits bypasses;[75] two other Justices not in the *Lewis* majority

68 *Id.* at 1712 (quoting the district court opinion).

69 *Id.* at 1714 n.5 (emphasis added) (citing *Siegert*, 500 U.S. at 232).

70 *See id.* at 1723 (Stevens, J., concurring in the judgment); *cf. id.* at 1722–23 (Breyer, J., concurring in the majority opinion but writing separately to underscore his agreement with Justice Stevens "that *Siegert* . . . should not be read to deny lower courts the flexibility, in appropriate cases, to decide § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented").

71 *See id.* at 1714 n.5; *cf. infra* text accompanying notes 123–39 and note 125.

72 *See supra* text accompanying notes 55–65.

73 472 U.S. 511, 528 (1985); *see also supra* note 59.

74 468 U.S. 897, 924–25 (1984); *see also supra* note 59.

75 *See supra* note 70 and accompanying text.

(Scalia and Thomas) made no mention of the issue; and one Justice who joined the *Lewis* majority (Kennedy) wrote separately in *Siegert* to emphasize that courts should have the discretion to engage in merits bypasses in civil rights damages actions.[76] Thus, the appropriateness of the merits bypass in civil rights damages actions remains very much an open question in the U.S. Supreme Court.

In sum, the Supreme Court has not definitively resolved the appropriateness of the traditional, discretionary merits bypass in civil rights damages actions. Although *Siegert* would seem to encourage courts to resolve pleaded constitutional issues before leaping to rulings on asserted claims of qualified immunity, the policy factors recited in support of the holding actually tend to militate in favor of merits bypasses. This internal incoherence renders the case of little value to courts attempting to determine whether they should engage in merits bypasses—especially those courts aware of the presumption against "unnecessarily" deciding constitutional issues and sensitive to the Article III concerns underlying the presumption. I turn now to those concerns.

C. Is the Merits Bypass Required by Article III?

Having criticized those who, in uncritical reliance on *Siegert*, actually do what I propose in Part II, I turn now to more conventional and expected adversaries: judges and scholarly commentators who have suggested that Article III's case or controversy requirement[77] mandates merits bypasses in civil rights damages actions wherever such bypasses are available. Because merits rulings announcing new constitutional rights are, when viewed *post hoc*, not strictly "necessary" to any opinion that eventually dismisses on qualified immunity grounds, some have argued that such rulings are nonbinding dicta simply because resolution of the underlying case or controversy is possible without them.[78] Others, making the same underlying point, have asserted that such rulings are impermissibly "legislative"[79] or "ad-

76 *See Siegert* 500 U.S. at 235–36 (Kennedy, J., concurring in the judgment); *see also supra* note 56.

77 *See* U.S. CONST. art. III, § 2.

78 *See, e.g.*, Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988); Benson v. Allphin, 786 F.2d 268, 279 n.26 (7th Cir. 1986); Egger v. Phillips, 710 F.2d 292, 324 n.1 (7th Cir. 1983) (Cudahy, J., concurring); *cf.* Joyce v. Town of Tewksbury, 112 F.3d 19, 23 (1st Cir. 1997) (en banc) (acknowledging, at the conclusion of a merits bypass, that "there is some cost in not deciding the [pleaded] Fourth Amendment issue on the merits, even in the form of dictum").

79 *See* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 930–33 (1962).

visory."[80] Although "[t]he central assumptions of this . . . argument resonate with a powerful theme in the lore of Article III,"[81] the argument is, in the end, unsustainable.

In their impressive call for a harmonization of the various "new law" and "nonretroactivity" doctrines by reference to the law of constitutional remedies,[82] Professors Fallon and Meltzer counter the argument that Article III prohibits the recognition of new rights without giving them retroactive effect—as they are obliged to do because they advocate the issuance of some new law decisions without retroactive application[83]—primarily by appealing to historical practice. As Fallon and Meltzer note, this "strict necessity" argument draws on but one strand of a complex Article III tradition.[84] The argument cannot be reconciled with, for example, the Supreme Court's indication in *United States v. Leon*[85] that courts need not "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."[86] Nor does the argument jibe with the Court's willingness to say, as it did in *Pope v. Illinois*,[87] that a constitutional trial error occurred even where the error may have been harmless.[88] Indeed, *Marbury v. Madison*[89] itself undermines the argument, for "the Court used William Marbury's case to resolve a number of important constitutional questions, but ultimately awarded no remedy."[90]

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80 *See* Teague v. Lane, 489 U.S. 288, 316 (1989) (plurality opinion); *Seiter*, 858 F.2d at 1177.

81 Fallon & Meltzer, *supra* note 1, at 1799. For examples of landmark Court decisions and influential scholarly commentary sounding this theme, see, for example, *Teague*, 489 U.S. at 316 (plurality opinion); Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987); Mackey v. United States, 401 U.S. 667, 678–79 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J. dissenting); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring); *see also* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the Case or Controversy Requirement*, 93 HARV. L. REV. 297, 303 (1979); Note, *supra* note 79, at 930–33.

82 *See generally* Fallon & Meltzer, *supra* note 1.

83 *See id.* at 1806.

84 *See id.* at 1799.

85 468 U.S. 897 (1984) (holding that evidence obtained in an unconstitutional search should not be suppressed if the officer reasonably relied on a search warrant later found invalid).

86 *Id.* at 924.

87 481 U.S. 497 (1987).

88 *See id.* at 501–04.

89 5 U.S. (1 Cranch) 137 (1803).

90 Fallon & Meltzer, *supra* note 1, at 1801.

Professors Fallon and Meltzer also assert a policy-based rejoinder to the "strict necessity" argument: while the "lore of Article III" appropriately emphasizes judicial restraint, it also recognizes, particularly with respect to constitutional adjudication, that the norm declaration function of the federal courts is more important than their dispute resolution function.[91] Moreover, it is inaccurate to describe as "legislative" or strictly "advisory" the declaration of a new norm when such declaration is not compelled as a matter of strict necessity.[92] As Fallon and Meltzer put it:

> Even when its primary emphasis is on norm declaration, a court is presented with a dispute defined by the request for judicial relief, not with a general question of public policy; the matter is framed by the party structure, and evidence and arguments are supplied by adversary presentation rather than official investigation, lobbying, or hearings; decisions are constrained by precedent and resolved by reasoned argument rather than interest group dealmaking or raw power.[93]

Thus, a merits ruling where a remedy is unavailable is sometimes both historically approved and appropriate.

I agree with Professors Fallon and Meltzer—who, I should add, specifically contend that, in civil rights damages actions where a merits bypass is available, courts "should have discretion to reach the merits or simply to dismiss"[94]—but I wish to press a bit beyond their explicit views. First, I do not believe it is enough to say that courts "should have discretion to reach the merits or simply dismiss" in civil rights damages actions that present novel constitutional questions. Far too many courts faced with such questions exercise their discretion in favor of a merits bypass without any consideration of the costs entailed.[95] I elaborate upon this argument in Part II. Second, it is quite important to rebut more directly and emphatically the central premise of the "strict necessity" position: that legal "holdings" are properly regarded as encompassing only those legal pronouncements which, when viewed *post hoc*, are strictly necessary to resolution of the

91 *See id.* at 1800. Of course, Fallon and Meltzer are not the only prominent commentators who argue for the primacy of the norm declaration function. *See id.* at 1800–01 n.377 (summarizing the literature).

92 *See id.* at 1800–02.

93 *Id.* at 1802 (footnotes omitted).

94 *Id.* at 1824.

95 *Cf. supra* note 35.

case at hand.[96] Such a conception of holdings is restrained in appearance only. If it actually were embraced, the judiciary would be largely unrestrained by precedent.[97]

In order to understand this proposition, it is helpful to retrace foundational terrain. Generally speaking, the term "holding" is used to describe the legal rules or principles that dispose of a given case.[98] "Dicta," by contrast, are usually regarded as those statements of legal rules and principles, if any, that do not form an essential part of an opinion's holding.[99] It is well established that holdings bind more firmly than dicta, "which may be followed if sufficiently persuasive but which are not controlling."[100]

There are two basic reasons why dicta are regarded as carrying less precedential weight than holdings. First, they are commonly seen as less accurate:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.[101]

Second, as suggested above, dicta raise legitimacy concerns.[102] Article III's case or controversy requirement is generally understood to require that federal judges only make law when faced with actual factual disputes, and leave to the political branches the task of lawmaking in the abstract.[103] Dicta which speak to issues not fairly

96 While calling this conception of holdings "not wholly implausible," Professors Fallon and Meltzer reject it because, in fact, a broader conception "clearly prevails" in the federal courts. Fallon & Meltzer, *supra* note 1, at 1818 n.485.

97 *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024–40 (1994); *see also infra* text accompanying notes 106–12.

98 Dorf, *supra* note 97, at 2000.

99 *Id.* (citing Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935) (a court's "general expressions" should not control in subsequent lawsuits)).

100 *Humphrey's Executor*, 295 U.S. at 627.

101 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (Marshall, C.J.).

102 *See* Dorf, *supra* note 97, at 2000–01.

103 *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 95 (1968) (stating that the case-or-controversy requirement confines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government").

presented by the underlying factual dispute, though hardly rare, are therefore commonly regarded as illegitimate exercises of the "judicial Power"[104] that Article III confers. In Part II, I respond to the argument that not-strictly-necessary merits rulings in civil rights damages actions might raise accuracy concerns.[105] Here, I confine myself to the question of legitimacy.

Although there is no consensus about where the line between holding and dictum ought to be drawn,[106] there is little to commend the view that any judicial statement not strictly necessary to the decision of a case (when viewed *post hoc*) is illegitimate, and therefore need not be honored in subsequent cases. As a number of theorists have demonstrated, such a jurisprudential view—which effectively gives only the facts and outcomes of prior cases binding precedential effect—breaks down "because every material fact in a case can be stated at different levels of generality, each level of generality will yield a different rule, and no mechanical rules can be devised to determine the level of generality intended by the precedent court."[107]

To illustrate, consider the following example. Suppose that Smith's unleashed dog bites Jones on a public sidewalk after Jones "poked at the dog with a stick." No further information is given regarding the poking. If the precedent court, Appellate Panel A in Jurisdiction Z, believes that, regardless of the underlying circumstances, Smith should be liable for injuries caused by her unleashed dog, it might state its holding—Holding A—as follows: "Persons generally are liable for injuries caused by their unleashed dogs without regard to whether the victim provoked the dog."

Suppose further that Appellate Panel B in Jurisdiction Z is presented with a situation identical in all respects except that the evidence shows that Jones viciously beat the dog. Panel B believes that Jones' actions should reduce or preclude his recovery. In addressing the effect of Holding A, Panel B might find it inapplicable by constru-

104 U.S. CONST. art. III, § 1.

105 *See infra* text accompanying notes 163–69.

106 Professor Dorf convincingly demonstrates that federal judges often manipulate the holding/dictum distinction in order to evade prior cases that they do not wish to overrule explicitly. *See generally* Dorf, *supra* note 97, *passim* (arguing for a holding/dictum distinction which turns on whether the principle of law at issue is essential to the rationale of a case). The unsurprising result, in Dorf's view, is general confusion about where, in fact, the boundary between holding and dictum lies. *See id.* at 2000–05.

107 MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 53 (1988). *See also* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 28–34 (1989); Dorf, *supra* note 97, at 2035–37; Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 5–6 (1979).

ing the general phrase "poked at the dog with a stick" as implying a lack of physical contact with the dog. It might then state its own holding—Holding B—as follows: "Although dog owners are usually liable for injuries caused by unleashed dogs regardless of victim provocation, this general rule gives way when the provocation involves the application of physical force to the animal." Panel B has avoided the application of Holding A by describing one material fact—the nature of the victim's provocation—at a greater level of specificity than did Panel A.

Finally, suppose that Appellate Panel C in Jurisdiction Z is faced with a situation where the evidence shows that Jones—who is fearful of dogs because he has previously been bitten—panicked, grabbed a stick, and lightly poked Smith's unleashed dog, thereby prompting the dog to bite him. Panel C believes that the case should be governed by Holding A despite what would appear to be the on-point nature of Holding B. It might state its holding—Holding C—as follows: "The 'physical provocation' exception to the usual rule that dog owners are liable for injuries caused by unleashed dogs regardless of victim provocation does not apply when such provocation constitutes a *de minimis* application of force precipitated by a justifiable fear of the animal." Again here, Panel C has avoided Holding B by describing the nature of the victim's provocation more specifically than did Panel B.

Generally speaking, the jurisprudential approaches of Panels B and C are unobjectionable. Indeed, close analysis and adjudication of the sort just described lie at the heart of intelligent, nuanced judging. But it *would* be objectionable if, in announcing their decisions, Panels B and C were to ignore the *reasoning* of the prior panels and to focus only on who won the earlier cases and on the slightly different facts before those panels. If, for example, Panel C states that it is free to decide the case as it sees fit simply because there has been no case in Jurisdiction Y involving a dog bite following a *de minimis* application of force by the victim, the rationales employed by Panels A and B have no effective precedential value. Clearly, then, such a "facts-plus-outcome"[108] conception of holdings would render almost every case amenable to resolution without precedential restraint. This, in turn, would undermine the predictability and accountability supposedly fostered by stare decisis.[109]

108 I borrow this phrase from Professor Dorf. *See* Dorf, *supra* note 97, at 2037 n.144.

109 *See id.* at 2040.

By contrast, the "essential-to-the-rationale"[110] conception of holdings most recently articulated by Professor Dorf[111] compels judges either to harmonize their rulings with what is the heart of the common law—the body of legitimate and principled legal reasoning which bears directly on the cases before them—or to overrule binding, relevant authority. This, of course, enhances the legitimacy of the common law system by giving force to the principle of stare decisis and meaning to the concept of a limited judicial power. To illustrate again by reference to our specific examples, Holdings A, B, and C take on the appearance of a legal evolution (as opposed to three somewhat related cases) if seen as points on a continuum harmonized by means of the legal rationale that informs Holding C and is not inconsistent with Holdings A and B: dog owners should be liable for injuries caused by their unleashed dogs in the absence of unjustifiable and significant provocation by the victim. A superficially broad, essential-to-the-rationale conception of holdings thus actually acts to bind judges to precedent more tightly. This, in turn, fosters a *more* circumscribed notion of the judicial power.[112]

What bearing does all this have on merits rulings in civil rights damages actions raising questions of first impression? After all, even if there is broad and well-founded agreement that whatever is "essential to the rationale" of a case constitutes its holding,[113] there is no such agreement as to *what* is essential to a case's rationale.[114] Whatever marginal ambiguities may persist, there is, in fact, broad and well-founded agreement that legal rulings that form an essential part of the natural *process* by which a court reaches a dispositive ruling are essential to its rationale, even if not strictly necessary to the case's result when viewed *post hoc*.[115]

Recall that, in *United States v. Leon*,[116] the Supreme Court explicitly endorsed the practice of deciding the underlying Fourth Amendment question even when the officer's objective good faith precludes the suppression remedy.[117] Similarly, in *Pope v. Illinois*,[118] the Court

110 Again, the phrase comes from Professor Dorf. *See id.* at 2049.

111 *See id.* at 2029–30.

112 For a scholarly exegesis of the argument I have summarized in the preceding two paragraphs, see *id.* at 2029–40.

113 *See id.* at 2037; Fallon & Meltzer, *supra* note 1, at 1818 n.485.

114 *Cf.* Dorf, *supra* note 97, at 2040–49.

115 *See* EDMUND M. MORGAN, INTRODUCTION TO THE STUDY OF LAW 109–10 (1926); Dorf, *supra* note 97, at 2045; Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL. EDUC. 431, 435–37 (1989); *see also* EISENBERG, *supra* note 107, at 55; Fallon & Meltzer, *supra* note 1, at 1818 n.485.

116 468 U.S. 897 (1984).

117 *See id.* at 924; *see also supra* notes 85–86 and accompanying text.

was willing to say that constitutional trial error had occurred, even while allowing for the possibility that the error was harmless.[119] In both examples, the "unnecessary" ruling was not an unconsidered aside; it was an integral and *theoretically necessary* part of the process by which the dispositive (or, in the case of *Pope*, potentially dispositive) issue was reached. The fact that a court conducting a sequential inquiry such as that typified by *Leon* and *Pope* can assume *arguendo* the threshold ruling necessary to its continuing down the decisional chain does not mean that the court *has* to indulge such an assumption. Nor, quite obviously, does it mean that a failure to so assume is an illegitimate exercise of the judicial power. Indeed, given that the dispositive ruling in, for example, the posited *Leon* scenario (i.e., that the officer acted in objective good faith) *itself* would have been unnecessary had the antecedent ruling (i.e., that there was a Fourth Amendment violation) been resolved differently, a legal construct that would require courts to assume *arguendo* positive answers to all antecedent questions would perversely give binding effect only to final, dependent rulings—rulings that might themselves have been truly unnecessary had the court actually proceeded in sequence.

Thus, the legitimacy and binding effect of "unnecessary" merits rulings in civil rights damages actions that founder on qualified immunity grounds are beyond question. There is, of course, a "natural order"[120] to the process by which qualified immunity issues are addressed.[121] Clearly, the first question in this process is whether the complaint states a viable constitutional claim—i.e., whether it states a claim on which relief can be granted. Only if a court answers this question affirmatively does the qualified immunity issue even arise. Qualified immunity is an affirmative defense, and courts need not and (theoretically) do not reach affirmative defenses unless and until the plaintiff has stated a cognizable legal claim. Put another way, the qualified immunity inquiry is meaningful only in the presence of a viable constitutional claim, thus making the existence *vel non* of such a claim "an essential ingredient in the *process* by which the court de-

118 481 U.S. 497 (1987).

119 *See id.* at 501–04; *see also supra* notes 87–88 and accompanying text.

120 *See* Greenawalt, *supra* note 115, at 435–37 (stating that a decision forming an essential ingredient in the process by which a ruling is made is considered binding so long as the court made it while considering all presented questions in their "natural order").

121 *See* Siegert v. Gilley, 500 U.S. 226, 227 (1991) (acknowledging that there exist sequential analytical stages to the qualified immunity inquiry).

cides" whether a defendant is protected by qualified immunity.[122] A ruling on the pleaded, threshold issue is therefore not dictum.

II. An Argument for "Unnecessary" Merits Rulings

Having endeavored to establish that the merits bypass in a civil rights damages action is neither precluded by Supreme Court precedent nor dictated by Article III, I turn now to whether such a merits bypass is sound as a matter of jurisprudential practice. Ordinarily, it is not. In fact, to curb its overuse, courts should presume its invalidity as a jurisprudential tool, and whenever it is deemed appropriate, explain why the merits of the pleaded constitutional claim have been circumvented.

I already have explained how the merits bypass stunts the development of constitutional law in civil rights damages actions.[123] Although there is little reason to suppose that, in an overall sense, the body of federal constitutional law is growing too slowly,[124] the merits bypass undeniably impedes the development of new constitutional law outside the criminal context—i.e., in the far broader civil arena.[125]

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122 Dorf, *supra* note 97, at 2045.

123 *See supra* text accompanying notes 34–37.

124 *See supra* text accompanying notes 21–23; *cf.* Owen v. City of Independence, 445 U.S. 622, 669–70 n.10 (1980) (Powell, J., dissenting) (ridiculing the majority's partial reliance on law-freezing concerns in rejecting a municipal good faith defense as "the first time that the period between 1961. . . and 1978 . . . has been described as one of static constitutional standards"); Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1178 (6th Cir. 1988) (asserting that, despite the merits bypass in civil rights damages actions, "ample room yet remains for the establishment of new principles of constitutional law" through civil rights actions for "declaratory and injunctive relief, motions to suppress, actions against municipalities not clothed with qualified immunity, and the like"); *see also* Fallon & Meltzer, *supra* note 1, at 1804–05.

125 One commentator has taken the position that the damages action is the most common means by which constitutional civil rights can become clearly established. *See* McCann, *supra* note 19, at 140 n.147. And another has correctly observed that the alternative channels for the establishment of constitutional rights mentioned in *Seiter*, 858 F.2d at 1178, are themselves quite restricted. *See* Rudovsky, *supra* note 11, at 52–56. For example, the already much-discussed objective good faith doctrine of *United States v. Leon*, 468 U.S. 897, 908–13 (1984), tends to stunt the growth of Fourth Amendment law in criminal cases in much the same way as the merits bypass does in civil rights damages actions. The reviewing court can and often does avoid the constitutional challenge to the warrant by deciding that the implementing officer relied upon it in good faith. *See* Rudovsky, *supra* note 11, at 52–53. Furthermore, there are significant hurdles in the paths of litigants bringing other civil rights actions raising constitutional claims. For example, suits against municipalities require a demanding showing that a governmental "policy or custom" caused the constitutional violation. *See id.* at 56 (citing City of Canton v. Harris, 489 U.S. 378 (1989)). And finally, by generally restricting the availability of habeas corpus relief, *see, e.g.*, Teague v. Lane,

On a practical level, this impediment has the undesirable consequence of creating a smaller corpus of controlling, "clearly established" constitutional law to help guide through novel constitutional terrain police officers, prison guards, and other executive officials, who are not constitutional experts and who often are called upon to use new technologies or to implement new procedures. As a result, officials in jurisdictions that liberally employ the merits bypass are less likely to know whether their conduct falls within the boundaries set by the Constitution in questionable, cutting-edge situations. This, in turn, can needlessly dissuade lawsuit-wary government actors from engaging in conduct that is legal and that might, in certain circumstances, be warranted. In other words, merits bypasses can lead to the very same undesirable hesitation to act that the qualified immunity defense was designed to eliminate in the first place.[126]

For purposes of illustration, consider *Birmingham v. Schacher*.[127] Ben Hicks, a federal customs agent, intercepted and recorded without court authorization a telephone conversation between Pat Birmingham, who was using a standard hard-wired telephone, and another individual, who, apparently without Birmingham's knowledge, was using a cordless telephone.[128] Hicks subsequently gave the recording to state law enforcement agents.[129] Birmingham filed a damages action against Hicks and the state agents under *Bivens* and 42 U.S.C. § 1983, alleging in relevant part that the defendants' conduct violated his Fourth Amendment right to be free from unreasonable searches and seizures.[130] The district court granted defendants' motion for summary judgment on this claim, and Birmingham appealed.[131]

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489 U.S. 288, 310 (1989) (plurality opinion) (prohibiting generally the establishment of "new" rules of constitutional criminal procedure on collateral review), and by specifically barring habeas challenges to Fourth Amendment violations, *see* Stone v. Powell, 428 U.S. 465, 489–95 (1976) (stating that Fourth Amendment claims ordinarily are not cognizable on collateral review), the Supreme Court has diminished the opportunity for constitutional lawmaking on collateral review. *See* Rudovsky, *supra* note 11, at 56.

126 *See supra* text accompanying notes 25–30. Central to this argument is the view that the putative availability of the qualified immunity defense in lawsuits arising out of novel, constitutionally marginal circumstances is insufficient to dispel completely the wariness with which a constitutionally conscientious executive actor would approach such circumstances.

127 No. 94-35685, 1995 WL 655167 (9th Cir. Nov. 7, 1995).

128 *See id.* at *1.

129 *See id.*

130 *See id.*

131 *See id.*

The appeals court began its analysis by observing that, while users of hard-wired telephones generally have a reasonable expectation of privacy in their conversations,[132] users of cordless telephones generally do not because of the ease of intercepting wireless transmissions.[133] The court then noted a split of authority with respect to the rights of users of hard-wired telephones who speak to persons on cordless telephones without knowing that the other person is using a cordless telephone: several courts have suggested that the Fourth Amendment is implicated in such a situation,[134] but others have held that so long as one party is using a cordless telephone, neither party has a reasonable expectation of privacy.[135] Relying on this split of authority, the court bypassed the merits of the pleaded claim and affirmed the lower court's ruling on grounds of qualified immunity:

> Without deciding the issue, even if the interception of Birmingham's conversation violated the Fourth Amendment, the federal and state agents were protected by qualified immunity. Officials are immune from liability under Section 1983 when the constitutional right they violated is not clearly established such that a reasonable officer would understand that his actions were prohibited by law. . . . As recent decisions suggest a shift away from recognizing a privacy right in any conversation involving a cordless phone, the interception of Birmingham's conversation did not violate any clearly established law. . . . A reasonable officer would likely have concluded that Birmingham's conversation was unprotected and thus the defendants are protected by qualified immunity.[136]

Although the appeals court's timidity honored principles that counsel against "unnecessary" constitutional rulings,[137] it failed to establish whether law enforcement officials can, consistent with the Constitution, intercept without a warrant conversations between persons on hard-wired telephones and cordless telephones. Obviously, there is a cost to this failure. It certainly is not difficult to conceive of similar situations arising in the future. Therefore, if the conduct challenged here was constitutional under the circumstances, the defend-

132 *See id.* (citing Katz v. United States, 389 U.S. 347, 352 (1967)).

133 *See id.* (citing Tyler v. Berodt, 877 F.2d 705, 706–07 (8th Cir. 1989); State v. Smith, 438 N.W.2d 571, 577 (Wis. 1989); People v. Fata, 529 N.Y.S.2d 683, 686 (Rockland County Ct. 1988); State v. Delaurier, 488 A.2d 688, 694 (R.I. 1985); State v. Howard, 679 P.2d 197, 206 (Kan. 1984)).

134 *See id.* (citing *Tyler*, 877 F.2d at 706–07 n.2; *Delaurier*, 488 A.2d at 694 n.4; *Howard*, 679 P.2d at 206).

135 *See id.* (citing McKamey v. Roach, 55 F.3d 1236, 1240 (6th Cir. 1995); *In re* Askin, 47 F.3d 100, 104–06 (4th Cir. 1995)).

136 *Id.* (citations omitted).

137 *See supra* notes 16–17 and accompanying text.

ants, along with others similarly situated, ought to have been notified so that, in the next case, they will not prudently "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals' even when the public interest require[s] bold and unhesitating action."[138] Conversely, if the conduct was unconstitutional under the circumstances, the defendants, along with others similarly situated, should have been notified so as to help ensure that an unconstitutional event will not be repeated.[139]

The latter of these two points leads to a second important reason for courts to avoid merits bypasses: merits bypasses exacerbate the qualified immunity doctrine's tendency to undermine the *ubi jus, ibi remedium* principle.[140] As I have explained, a constitutional wrong committed by a municipal police officer, for example, goes unremedied whenever controlling precedent, extant at the time of the underlying incident, does not clearly establish the undermined right,[141] at

138 Nixon v. Fitzgerald, 457 U.S. 731, 744–45 (1982) (describing the rationale behind the qualified immunity defense) (citation omitted) (alteration in original).

139 For a representative sampling of other cases where courts engaged in merits bypasses and thereby failed to establish the legality *vel non* of executive conduct involving new technology or unprecedented procedures, see generally Berthiaume v. Caron, 142 F.3d 12 (1st Cir. 1998) (bypassing the merits of a claim that a state nursing board could not condition renewal of the license of a male nurse charged with importing child pornography upon the nurse's submitting to invasive "arousal" testing with a penile plethysmograph); Brown v. City of Oneonta, 106 F.3d 1125 (2d Cir. 1997) (bypassing the merits of a claim that the Family Educational Rights and Privacy Act prohibits release of student names in police investigations); Hamilton *ex rel.* Hamilton v. Cannon, 80 F.3d 1525 (11th Cir. 1996) (bypassing the merits of a claim involving a sheriff's interference with attempts to assist a drowning victim); Anderson v. Romero, 72 F.3d 518 (7th Cir. 1995) (bypassing the merits of a claim involving a prison administration's failure to protect private information relating to a prisoner's HIV-positive status); Good v. Olk-Long, 71 F.3d 314 (8th Cir. 1995) (bypassing the merits of a claim that forcing inmates to work in proximity to human waste without protective gear violated the Eighth Amendment); St. Hilaire v. City of Laconia, 71 F.3d 20 (1st Cir. 1995) (bypassing the merits of a claim that the police must identify themselves as such prior to seizing person from an automobile); Haney v. City of Cumming, 69 F.3d 1098 (11th Cir. 1995) (bypassing the merits of a claim involving the type of psychiatric screening required for possibly suicidal prisoners); Horta v. Sullivan, 4 F.3d 2 (1st Cir. 1995) (bypassing the merits of a claim involving the constitutionality of a partial roadblock erected to end a police chase); Hemphill v. Kincheloe, 987 F.2d 589 (9th Cir. 1993) (bypassing the merits of a claim challenging digital rectal searches of prisoners); Andrews v. Wilkins, 934 F.2d 1267 (D.C. Cir. 1991) (bypassing the merits of a claim challenging a police officer's decision not to permit a private party to attempt a rescue); Hilliard v. City & County of Denver, 930 F.2d 1516 (10th Cir. 1991) (bypassing the merits of a claim involving the duty of police to protect a passenger stranded by the impounding of an automobile).

140 *See supra* note 1 and accompanying text.

141 *See supra* text accompanying notes 25–33.

least so long as the complained-of action was not undertaken pursuant to municipal custom or policy.[142] The merits bypass makes matters worse. When a court bypasses the merits of the pleaded constitutional claim in the circumstances just described, it not only effectively awards the defendant officers one "liability-free" violation of the Constitution (as it must under the doctrine of qualified immunity), but it also, by declining to "clearly establish" the undermined right, paves the way for "multiple bites of a constitutionally forbidden fruit."[143] Put less floridly, the merits bypass allows for the possibility that government actors can repeatedly engage in unconstitutional conduct *previously challenged in court* without ever being subject to liability for their actions. This possibility alone ought to be sufficient to raise serious doubts about the jurisprudential wisdom of the merits bypass.[144]

Consider the tragic events recounted in *Soto v. Flores*.[145] In April 1991, Angel Rodriguez shot and killed his two young children, and then himself, after his wife, Flor Maria Soto, complained to the police about the ongoing physical and emotional abuse she suffered at Rodriguez's hands.[146] The police officers at the Palmer Station (a substation of Puerto Rico's Rio Grande precinct) knew that Rodriguez had threatened to kill Soto and her family if Soto ever went to the police about his behavior; nonetheless, the police officers violated their duty of confidentiality and informed Rodriguez of Soto's complaints.[147] Moreover, having done so, the police took no steps either to jail Rodriguez or to protect Soto and her family.[148]

Soto, on her own behalf and as her children's representative, brought a damages action against a number of the involved officers under 42 U.S.C. § 1983, alleging, among other things, that the police created or exacerbated the danger that led to the children's deaths, in violation of her own and their substantive due process rights.[149] The

142 *See* Rudovsky, *supra* note 11, at 52–56 (summarizing the import of *City of Canton v. Harris*, 489 U.S. 378 (1989)).

143 Garcia by Garcia v. Miera, 817 F.2d 650, 656–57 n.8 (10th Cir. 1987) (criticizing the merits bypass).

144 An analogy might be drawn here to the Supreme Court's "capable of repetition, yet evading review" jurisprudence. *See* Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (holding that an issue is not moot when there is reason to expect that it will arise again between the same parties). As in *Moore*, the need to settle the law and, in so doing, to avoid predictable and similar future controversies, militates in favor of addressing novel constitutional claims in civil rights damages actions.

145 103 F.3d 1056 (1st Cir. 1997).

146 *See id.* at 1058.

147 *See id.*

148 *See id.*

149 *See id.* at 1062–63.

district court rejected her claims on the merits, and Soto appealed.[150] The appeals court affirmed the dismissal of Soto's individual claim on the merits; however, it bypassed whether Soto's representative claim fell outside the familiar rule of *DeShaney v. Winnebago County*[151]—that a state's failure to protect an individual against private violence does not constitute a due process violation[152]—and affirmed the lower court's dismissal of this claim on qualified immunity grounds.[153] Thus, the appeals court failed to settle whether the defendant officers' conduct was sufficiently "active" to distinguish this case from the "inaction" challenged in *Deshaney*.

Why does this case exemplify concerns about "multiple bites of a constitutionally forbidden fruit"?[154] In considering whether the deplorable official conduct challenged in *Soto* could reoccur, one need only note the deposition testimony of Sergeant Orta—a supervisor at the Palmer Station where many of the events in question took place:

> Q: What is your opinion of Act 54?[155]
> A: I told you the first time, and I remit myself to the record, that I am in total disagreement with that Act. I believe that it is very unjust related to aggressions against women and I do not agree with that.
> Q: Why do you believe it is very unjust with relation to aggressions against women?
> A: Sometimes men, including myself of course, but sometimes one drinks on the outside or has a woman on the side or a friend on the side, and one has an argument with one's lady friend and goes home and takes it out on the wife. And I believe that is not just.
> . . . .
> Q: Then I ask you, again, what is your opinion with relation to the law?
> A: Well, the thing is that the law, in spite of it mentioning both parties as being able to complain, the woman is always the person who is injured. Credibility is given to the woman, where there are occasions when that doesn't happen that way.[156]

150 *See id.*

151 489 U.S. 189 (1989).

152 *See id.* at 197.

153 *See Soto*, 103 F.3d at 1064–65.

154 Garcia by Garcia v. Miera, 817 F.2d 650, 656–57 n.8 (10th Cir. 1987); *see also* text accompanying note 143.

155 The question refers to "Law 54," Puerto Rico's Domestic Abuse Prevention and Intervention Act, P.R. LAWS. ANN. tit. 8, §§ 631–35, 638 (Supp. 1995). Law 54 was the statute under which the police should have taken action against Rodriguez.

156 *Soto*, 103 F.3d at 1069–70.

While the precise meaning of Sergeant Orta's remarks is difficult to discern, it does not require much imagination to envision future noncompliance with the letter and spirit of Puerto Rico's Domestic Abuse Prevention and Intervention Act by this supervisor at the Palmer Station. And to the extent any such noncompliance might similarly invade another person's constitutional rights (assuming, of course, the conduct challenged in this case *did* violate the constitutional rights of Soto's children), it would be an unconscionable affront to justice if Orta were again to evade accountability for his conduct because the *Soto* court failed to establish the law "clearly."

There is yet another objection to the merits bypass in civil rights damages actions. One might reasonably take the view that merits bypasses are especially regrettable in civil actions involving novel Fourth Amendment claims. There is, of course, a widely held perception that the exclusionary rule undercuts the development of a principled Fourth Amendment jurisprudence. In recent years, Fourth Amendment champions have tended to believe that the rule pressures exclusion-wary judges into making bad law,[157] while law and order champions (and others) have historically regarded with disdain the rule by which some criminals go free "because the constable has blundered."[158] Although perceived governmental heavy-handedness in incidents such as the conflagration in Waco and the storming of the Weaver compound at Ruby Ridge has led to a reconfiguration of traditional alliances over the Fourth Amendment's reach and importance,[159] a widespread belief that this century's Fourth Amendment jurisprudence is unprincipled, pithily captured in the first seven words of Professor Amar's article,[160] is and has been pervasive across the political spectrum. And, of course, there is no greater threat to the

157 *See, e.g.*, Amar, *Fourth Amendment First Principles*, *supra* note 11, at 799 ("Judges do not like excluding bloody knives, so they distort doctrine, claiming that the Fourth Amendment was not really violated.").

158 People v. Defore, 242 N.Y. 13, 21 (1926) (Cardozo, J.).

159 *See, e.g.*, Roger Parloff, *How the Gun Lobby Is Rescuing the Bill of Rights*, AM. LAW., November 1995, at 70 (detailing a new lobbying alliance among the American Civil Liberties Union, the National Rifle Association, and eight other organizations from across the political spectrum, formed for the purpose of "expressing concerns about alleged [civil liberties] abuses by . . . federal law enforcement"); Tom Diemer, *ACLU, NRA Join Forces on the Fourth Amendment*, CLEVELAND PLAIN DEALER, Oct. 25, 1995, at 11A (similar); Ronald Brownstein, *Unlikely Alliances Emerge in Debate Over Terrorism and Civil Liberties*, L.A. TIMES, May 8, 1995, at 5 (describing agreement between the political left and right that the government ought not overreact to the Oklahoma City bombing by enacting overly-broad antiterrorism legislation).

160 *See* Amar, *Fourth Amendment First Principles*, *supra* note 11, at 757 ("The Fourth Amendment today is an embarrassment.").

judiciary's crown jewel—its perceived legitimacy—than widespread public opinion that judges are acting in an unprincipled and incoherent manner for political reasons.[161]

Needless to say, a reduction in the number of the merits bypasses in civil rights damages actions raising novel Fourth Amendment claims would not make this problem go away. It would, however, lead to more Fourth Amendment law developing in civil rights cases, where the exclusionary rule does not hang over the judge's head like the sword of Damocles. Such a reduction would thus facilitate the creation of a body of law that cannot be said to have been tainted by the threat of exclusion. Over time, this body of law, which (rightly or wrongly) would be regarded with less suspicion than Fourth Amendment rulings handed down in criminal cases, would make up an increasing percentage of Fourth Amendment jurisprudence. This increase, in turn, might elevate the perceived legitimacy of Fourth Amendment doctrine.[162]

It is thus fair to predict that a reduction in the number of merits bypasses in civil rights damages actions would have significant salutary effects. Although the qualified immunity doctrine would still preclude remediation of some violations of constitutional rights, critics could rest assured that this undesirable consequence of the doctrine would occur less frequently. By addressing the merits of a pleaded constitutional claim of first impression prior to addressing whether the right claimed was "clearly established" at the relevant point in time, courts would more quickly add to the overall body of constitutional law, thereby both notifying government actors whether untested conduct and procedures comply with the Constitution and deterring future constitutional violations. Courts also would "clearly establish" previously unrecognized constitutional rights for future cases. Establishing these rights would reduce the number of liability-

161 *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 865–66 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.").

162 Although Professor Amar did not make the specific argument set forth in this paragraph, he does extol the prospect of Fourth Amendment law developing in the civil arena, where society need not rely on the "self-serving" and sometimes "overcompensated" criminal defendant as "a kind of private attorney general" to serve "the larger public interest in restraining the government." Amar, *Fourth Amendment First Principles*, *supra* note 11, at 796–97.

free constitutional violations and help to eliminate the prospect of government actors repeating, without accountability, unconstitutional conduct previously challenged in court. Finally, by declining to indulge merits bypasses in Fourth Amendment cases, courts would add significantly to the body of Fourth Amendment doctrine that cannot be viewed as having been warped by the exclusionary rule. Over time, such additions could have important balancing and legitimacy-enhancing effects on the federal judiciary's Fourth Amendment jurisprudence.

Of course, elimination of the merits bypass would entail some costs. As previously noted, addressing the merits of a novel constitutional question, instead of proceeding directly to the qualified immunity issue, can turn a relatively straightforward ruling into a complicated one.[163] It is not difficult to dismiss a civil rights damage action because the right asserted has not previously been recognized, and therefore is not clearly established for qualified immunity purposes. The same absence of controlling law that makes the qualified immunity question so easy, however, can make the pleaded constitutional issue quite difficult, as it is often time-consuming and laborious to enter uncharted constitutional waters. By similar token, the absence of controlling law that defines a novel claim would surely lead to more nonunanimous appellate decisions on novel claims, as differently disposed appellate judges look inward, rather than outward, to fill the interstices of the Constitution. The merits rulings I advocate therefore not only would tend to delay the entry of judgment in favor of a defendant entitled to qualified immunity, but they also would add to the workload of already overburdened judges. Such rulings also probably would lead to some increase in the number of splintered, and therefore more fragile, appellate holdings.

One can legitimately question, moreover, whether merits rulings where remedies are unavailable would be as accurate as merits rulings that cannot be bypassed. Such an argument proceeds along two separate lines. First, it has been suggested that the creation of new law where a remedy is unavailable makes it too easy for courts to disregard precedent and change the law much like a legislature does.[164] Second, government defendants asserting a qualified immunity defense to a novel claim sometimes argue only that the right in question was not clearly established; they do not argue, or do not vigorously ar-

163 *See supra* text accompanying notes 61–62.

164 *See* Fallon & Meltzer, *supra* note 1, at 1802–03 & n.387.

gue,[165] that no such right exists at all. Courts issuing merits rulings in these circumstances therefore would be acting largely sua sponte—i.e., without the benefit of competent adverse argumentation.

With respect to the last of these three objections, I quite agree that the absence of competent adverse argument on the point in question should make a court pause.[166] Indeed, I would concede that the lack of adequate briefing of the pleaded issue (along with reasons counseling against a request for supplemental briefs, e.g., a perception that the supplemental briefing might be less than fully competent) can, especially in cases unlikely to repeat themselves, constitute cause for a court to exercise its discretion to engage in a merits bypass. But it is the relatively rare case where a government defendant does not brief and argue the nonviability of a novel constitutional claim when raising a qualified immunity defense. After all, the viability of the pleaded claim is a pure question of law which can independently ground a dismissal. More importantly, it usually is a matter of institutional concern to the government unit that employs the defendant.

The argument that courts creating new law where a remedy is unavailable tend to disregard precedent and act like legislatures has, to this point, never been supported with empirical data. In fact, a number of established doctrines presuppose the validity of law-stating without retroactive application, and there has been no serious criticism of the accuracy of these doctrines on this ground.[167] And as

165 *Cf.* County of Sacramento v. Lewis, 118 S. Ct. 1708, 1723 (1998) (Stevens, J., concurring in the judgment) ("Sound reasons exist for encouraging the development of new constitutional doctrines in adversarial suits against municipalities, which have a substantial stake in the outcome and a risk of exposure to damages liability even when individual officers are plainly protected by qualified immunity.").

166 *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527 (1993) (Souter, J., concurring in part and concurring in the judgment) ("Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute . . . and a . . . rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.") (citation omitted).

Justice Souter's views on this question are not universally shared. There are critics of the adversary system who question whether truth and justice are more likely to emerge after partisan presentations by parties with opposing interests. *See* Dorf, *supra* note 97, at 2002 & n.19 (noting the disagreement and summarizing the literature); *cf.* Greenawalt, *supra* note 115, at 435 ("[N]owadays, when appellate judges have extensive research help from law clerks, what probably matters most is whether the court that decides the . . . case evidences awareness of relevant authority and arguments. Ascertaining whether points have been argued by counsel is one inquiry that bears on that question; but a written opinion may show that law clerks have filled the gap left by counsel, and if counsel are inept, their having argued a point is not necessarily assurance that the court has had in mind all that is centrally important.").

167 *See* Fallon & Meltzer, *supra* note 1, at 1799–1803.

Professors Fallon and Meltzer point out, the premise underlying this argument—that there is a uniquely appropriate pace of constitutional change—is belied by history.[168] Frequently, there have been rapid and profound shifts in basic constitutional understandings, and many of these shifts—e.g., the equal protection revolution of the middle part of this century—have produced doctrines generally regarded to have withstood the test of time.[169]

Finally, while the delay and unanimity-related costs associated with merits rulings should not be underestimated, these factors are insufficient to justify the status quo. Although a significant reduction in the number of merits bypasses in civil rights damages actions surely would engender some delay-related burdens, it would neither alter the outcome of cases nor impose additional discovery or litigation burdens upon official defendants.[170] Such a reduction therefore would be extremely unlikely to undermine the principle behind the qualified immunity defense by causing public officials to hesitate to act while exercising their discretionary functions.[171] And while sensitivity to the need to diminish the judicial workload has become a pressing concern, and has led to once-unthinkable compromises of the appellate ideal,[172] judges surely cannot rely solely on this "housekeeping" interest to justify the uncertainty costs caused by bypassing novel constitutional questions raised in civil rights damages actions. So too with any increase in the number of nonunanimous appellate opinions; the Supreme Court rarely speaks unanimously on matters of constitutional law, and the public has come to understand that the application of the Constitution to modern circumstances is, at times, going to lead to profound differences of opinion within the judicial branch.

Justice Scalia, for one, has observed that the general rule counseling courts to speak no more broadly than necessary on constitutional questions is animated by a desire to "avoid[ ] throwing settled law into

168 *See id.* at 1803–04 & n.396.

169 *See id.*

170 *See supra* note 61.

171 *See supra* text accompanying notes 25–30.

172 For one example, burgeoning appellate caseloads have prompted each of the federal circuit courts of appeals to develop local rules authorizing the decision of cases without an opinion. This practice has been persuasively criticized as being at odds with "[t]he received tradition . . . that litigants are entitled, as a matter of policy, to some statement of reasons for a decision on appeal." *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 121–25 (West 1994).

confusion."[173] Yet he also has acknowledged the existence of situations where this rule is appropriately ignored.[174] In civil rights damages actions that present constitutional claims of first impression, application of this general rule, as embodied by the merits bypass, begets confusion and undermines law-settling, along with its attendant notice-giving. Courts therefore should presumptively disregard the rule and issue merits rulings in such cases. And in those rare situations where a merits bypass does appear to be the wiser jurisprudential course, courts should dispel any impression that they are taking the easy way out by explaining why a merits bypass is warranted.

III. CONCLUSION

The argument that federal courts should be making not-strictly-necessary constitutional rulings produces knee-jerk skepticism. There is, after all, no more fundamental jurisprudential rule than that the federal courts, constrained as they are by Article III's case or controversy requirement, have circumscribed authority. But when one sees that threshold merits rulings in civil rights damages actions are essential, antecedent ingredients in the process by which courts resolve assertions of the qualified immunity defense; that federal courts routinely regard rulings of this sort as binding; and that federal courts actually embrace a more limited notion of the judicial power by so regarding such rulings, the legitimacy and theoretical necessity of these threshold merits rulings become readily apparent.

Of course, the legitimacy and theoretical necessity of merits rulings do not suffice to establish their jurisprudential desirability. But in civil rights damages actions involving constitutional claims of first impression, merits rulings are highly desirable. Such rulings engender relatively little cost to litigants and to the federal court system, promote constitutional conduct, deter constitutional violations, and ameliorate the most objectionable aspect of the qualified immunity doctrine—that it causes some constitutional violations to go unremedied. Such rulings also eliminate the possibility of government actors, without accountability, repeating unconstitutional conduct previously challenged in court. Finally, such rulings facilitate the development of Fourth Amendment law in the civil arena, where the exclusionary rule has no application. For all these reasons, courts should presumptively eschew the merits bypass and decide the merits of civil rights damages actions advancing novel constitutional claims.

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173 Webster v. Reproductive Health Servs., 492 U.S. 490, 535 (1989) (Scalia, J., concurring in part and concurring in the judgment).

174 *See generally id.* at 532–35.