Fordham Law Review

Volume 80 | Issue 2 Article 9

November 2011

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AVOIDING PERMANENT LIMBO: QUALIFIED IMMUNITY AND THE ELABORATION OF CONSTITUTIONAL RIGHTS FROM *SAUCIER* TO *CAMRETA* (AND BEYOND)

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> [A] "longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." . . . But we have long recognized that this day may never come—that our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo.[1]

INTRODUCTION

Articles contending that the U.S. Supreme Court has reached a fundamentally correct and defensible formulation of controversial doctrine are few and far between. Even as calls for dramatic departures, new constitutional rights, and the abandonment of precedent echo across law reviews, self-styled defenses of the status quo remain noticeably less common. Yet that is what we undertake in this Article: a survey and defense of the Court's qualified immunity jurisprudence from *Saucier v. Katz*[2] to *Camreta v. Greene* that proposes only minor reforms to an otherwise well-functioning procedural framework. Our view is born of the conviction that recent cases have achieved a desirable balance amongst competing considerations of fairness, efficiency, and the need to refine constitutional law. It is also born of fear that some of the Court's more conservative members may soon imperil this compromise. Refinement, not redesign, is the best path forward for the Court's qualified immunity jurisprudence. In this Article, we defend that claim, offer a reform proposal focused on structuring discretion, and criticize a recent push by several members of the Court to chart a more radical course.

Qualified immunity doctrine has undergone a series of marked transformations over the past few decades. One of the most important

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1. Camreta v. Greene, 131 S. Ct. 2020, 2024 (2011) (internal citation omitted).
2. 533 U.S. 194 (2001).

developments has involved the law governing judicial discretion to determine the merits of a constitutional claim even where the defendant enjoys qualified immunity. Encouraged by *Siegert v. Gilley*[3] and then mandated by *Saucier*, this procedure ensures that the constitutional regulations governing public officials remain fine-tuned through ongoing elaboration—thereby averting the stagnation that might occur if findings of qualified immunity prevented constitutional rulings. However, a judicial and scholarly backlash against *Saucier*'s mandatory "order of battle" prompted the Court to unanimously reverse itself just eight years later in *Pearson v. Callahan*.[4] *Pearson* announced a grant of total discretion to lower courts in deciding whether to reach the constitutional merits after finding qualified immunity.[5] Then, just two years later, the Court suggested in *Camreta* that *Pearson* had actually imposed a set of limits on lower court discretion to reach the merits grounded in its criticism of *Saucier*.[6] More dramatically, *Camreta* announced an exception to the Court's practice of not considering appeals by prevailing parties, thus allowing officials to appeal adverse constitutional rulings issued alongside judgment in their favor on qualified immunity grounds.[7] However, in that same case, three Justices announced serious discontent with the current procedural regime and indicated their willingness to consider removing *Pearson* discretion altogether.[8] Thus, there is no end in sight to the debates that have kept qualified immunity doctrine in a state of flux.

Emphasizing the need to balance a complex set of policy objectives in crafting qualified immunity jurisprudence, we survey recent developments, assess critiques leveled against the status quo, and offer a reform proposal aimed at resolving the problem of strategic judging, which we consider the most significant outstanding concern in this area of law. Because *Camreta* successfully addresses several forceful criticisms of post-*Pearson* doctrine, it plays a particularly important role in our discussion. *Camreta* is also significant because Justice Scalia's concurrence and Justice Kennedy's dissenting opinion augur trouble for the future of constitutional tort law. Linking their call for removal of *Pearson* discretion to larger trends in recent conservative jurisprudence, we criticize the restrictions contemplated in their opinions and explain why alleged alternative vehicles for the elaboration of constitutional rights are ultimately inadequate to the task.

This Article unfolds in three Parts. Part I begins by tracing the development of qualified immunity doctrine from *Harlow* to *Pearson*, pivoting around the Court's creation of a mandatory scheme in *Saucier* and subsequent retreat in *Pearson*. It then surveys criticisms of post-*Pearson* doctrine. Whereas we find objections grounded in the avoidance canon, anti-advisory opinion norms, and the creation of bad law unpersuasive, we

3. 500 U.S. 226 (1991).
4. 555 U.S. 223 (2009).
5. *Id.* at 236.
6. *Camreta*, 131 S. Ct. at 2032.
7. *Id.* at 2028–29.
8. *Id.* at 2036 (Scalia, J., concurring); *id.* at 2043–45 (Kennedy, J., dissenting).

see merit in critiques emphasizing confusion of the dicta/precedent boundary, the need to permit appellate review of constitutional determinations ("reviewability"), and the dangers of strategic behavior by parties and judges. Part I concludes in 2009, pointing to the need for reforms that address these three issues.

Part II opens with *Camreta*, briefly explaining its facts and holdings before evaluating its success as a cure for the problem of reviewability. Although we recognize that *Camreta*'s authorization of prevailing party review in qualified immunity cases is no silver bullet, we conclude that it effectively resolves the problem of reviewability, and propose an extension to en banc procedures that might further effectuate its remedial potential. Part II then delivers mixed news, noting that the Court has brought welcome clarity to the dicta/precedent boundary in qualified immunity cases, but that the serious problem of strategic behavior survives *Camreta*. We conclude this part by discussing a potential new problem created by *Camreta* involving the financial incentives for plaintiffs' lawyers, ultimately dismissing this concern as trivial in practice and concurring with Professor Nancy Leong's more radical suggestion regarding *Camreta*'s implications for the future of fee-shifting in qualified immunity cases.

Part III opens on a darker note. Identifying cause for concern in *Camreta*, especially when contrasted with *Pearson*, we show that several Justices are contemplating the radical step of eliminating *Pearson*'s grant of discretion to reach the merits of the constitutional question after finding qualified immunity. Linking this possibility to a larger conservative desire to constrict constitutional rights and disable private attorneys general, we conclude that *Pearson* does not stand on sufficiently secure ground. Opposed to such a break from precedent, we explain that the alternative vehicles for elaborating constitutional law identified in Justice Kennedy's dissent—municipal liability, suppression hearings, and declaratory and injunctive relief—would fail to achieve the crucial goal of refining constitutional law. Turning back to our own reform project, we then conclude by suggesting that the problem of strategic behavior is best addressed through a standard that structures discretion and permits review (under an abuse of discretion standard) of the choice to make a constitutional determination after finding qualified immunity.

The Court's efforts to avoid permanent limbo have proven largely successful. A few minor reforms to current procedure would go a long way toward securing the legitimacy and practical workability of qualified immunity doctrine. This approach is better than one that places the refinement of constitutional rights in jeopardy by trusting deceptively inadequate alternative dynamics. The difference is not merely academic. When rules governing official behavior are trapped in limbo, the vulnerable and defenseless amongst us bear the terrible costs of failure to manifest our constitutional ideals in rules that thwart petty tyrants.

I. QUALIFIED IMMUNITY FROM *HARLOW* TO *PEARSON*

The doctrine of qualified immunity, and in particular the appropriate structure for analyzing immunity claims, developed in a series of Supreme Court decisions over the last two decades. In this part, we quickly summarize the development of this doctrine from *Harlow* to *Saucier*, and describe the criticisms of *Saucier* that drove the Court's decision in *Pearson.* We then evaluate numerous criticisms of qualified immunity doctrine, dismissing those that are unpersuasive in light of *Pearson*, and explaining in greater detail the three most serious challenges that remained after that ruling was handed down in 2009.

A. Harlow *to* Saucier

Qualified immunity protects government officials from liability for civil damages unless an official's conduct violates a "clearly established" constitutional right.[9] This potent doctrine, which is regularly invoked by officials accused of a constitutional tort, confers "immunity from suit rather than a mere defense to liability."[10] Historically, the doctrine of qualified, or good-faith, immunity developed from an attempt to balance the need for a damages remedy to discourage unconstitutional conduct against the need to protect public officials from liability in situations where the law is not clear and the threat of liability might otherwise inhibit lawful action.[11] Thus, in *Harlow v. Fitzgerald*, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[12] *Harlow* took a major step toward developing the basic framework of modern qualified immunity doctrine by elaborating an objective test that dispensed with a requirement of subjective "good faith."[13] However, for almost a full decade after *Harlow*, the Court declined to specify a precise test for finding qualified immunity.

In *Siegert v. Gilley*, the Court took up this task and sought "to clarify the analytical structure under which a claim of qualified immunity should be addressed."[14] It held that the first inquiry is "whether the plaintiff has asserted a violation of a constitutional right at all," reasoning that such a determination is "concomitant to the determination of whether the constitutional right asserted by a plaintiff [was] 'clearly established' at the time the defendant acted."[15] The Court suggested, with little explanation,

9. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Anderson v. Creighton, 483 U.S. 635, 640 (1987).

10. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

11. *Harlow*, 457 U.S. at 807, 815–16 (citing Butz v. Economou, 438 U.S. 478, 504–08 (1978)).

12. *Id.* at 818.

13. *See* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 671–72 (2009).

14. 500 U.S. 226, 231 (1991).

15. *Id.* at 232.

that it was desirable to address the merits of the constitutional claim before assessing whether the right was clearly established at the time of the challenged conduct.[16] Justice Kennedy concurred in the judgment, but noted his disagreement with the Court's suggestion that the constitutional question should have been decided, explaining that "[t]he 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 that "it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first."[17]

In *County of Sacramento v. Lewis*,[18] the Court explained in greater detail the rationale for its conclusion in *Siegert* that "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," and only then to consider whether the right "was clearly established at the time of the events in question."[19] Writing for the majority, Justice Souter explained that the "generally sound" rule of constitutional avoidance does not readily fit the qualified immunity context because the court must still make "some determination about the state of constitutional law at the time the officer acted."[20] More significant, according to the majority, is the potential that avoidance of rulings on the merits in favor of rulings on qualified immunity could impede the development of constitutional doctrine unless the issue arose in a context where qualified immunity is not available.[21] Justice Stevens concurred in the judgment, but expressed the view that it would be wiser to adhere to the policy of constitutional avoidance and leave the development of new constitutional doctrines to circumstances where qualified immunity does not apply.[22] Justice Breyer concurred in both the judgment and opinion, but wrote separately to agree with Justice Stevens that *Siegert* "should not be read to deny lower courts the flexibility, in appropriate cases, to decide 42 U.S.C. § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented."[23]

To the extent that there was any confusion about whether *Siegert* required, or merely suggested, a merits-first approach in qualified immunity cases, the issue was resolved in *Saucier v. Katz*. In *Saucier*, the Supreme Court held that in a suit against an officer for an alleged violation of a constitutional right, the two aspects of a qualified immunity defense must

16. *Id.* at 233.
17. *Id.* at 235 (Kennedy, J., concurring in the judgment).
18. 523 U.S. 833 (1998).
19. *Id.* at 841 n.5 (citing *Siegert*, 500 U.S. at 232).
20. *Id.*
21. *Id.* (citing Stephen J. Shapiro, *Public Officials' Qualified Immunity in Section 1983 Actions Under* Harlow v. Fitzgerald *and its Progeny*, 22 U. MICH. J.L. REFORM 249, 265 n.109 (1989)).
22. *Id.* at 859 (Stevens, J., concurring in the judgment).
23. *Id.* at 858–59 (Breyer, J., concurring).

be considered in a particular sequence.[24] First, the court must decide whether the facts alleged by the plaintiff show that the officer's conduct violated a constitutional right.[25] Second, if the plaintiff has satisfied the first step, the court must decide whether the right was clearly established, such that a reasonable officer would have known that the conduct was unlawful.[26]

The Court explained that it was mandating this order of inquiry to encourage the development and elaboration of constitutional law. "[W]ere a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case," explained Justice Kennedy, the law might be deprived of an explanation as to the existence or nonexistence of a constitutional right.[27]

Justice Ginsburg, joined by Justices Stevens and Breyer, concurred in the judgment, but not in the mandatory two-step inquiry imposed upon lower courts.[28] The Ginsburg concurrence warned that the mandatory two-part sequence had the "potential to confuse," and pointed out that the majority, by deciding *Saucier* on the clearly established prong without reaching the merits prong, had done what it was ordering the lower courts not to do.[29] This observation foreshadowed a turbulent future for *Saucier*'s mandatory order of battle in qualified immunity litigation.

B. Pearson *and the Retreat from* Saucier*'s Mandatory Order of Battle*

The sequential qualified immunity inquiry mandated by *Saucier* was roundly criticized. The courts of appeals crafted broad exceptions to *Saucier*'s mandate and occasionally engaged in outright defiance of its required sequencing.[30] Prominent circuit judges sharply criticized *Saucier* in public lectures and published opinions,[31] and several Justices expressed serious reservations in concurring opinions and dissents from denial of certiorari.[32] Thus, it was no surprise when the Supreme Court's grant of

24. 533 U.S. 194, 200 (2001).
25. *Id.* at 201.
26. *Id.* at 201–02.
27. *Id.* at 201.
28. *Id.* at 210 (Ginsburg, J., concurring in the judgment).
29. *Id.* at 210–13.
30. *See* Pearson v. Callahan, 555 U.S. 223, 234–35 (2009) (collecting cases).
31. *See, e.g.*, Purtell v. Mason, 527 F.3d 615, 622 (7th Cir. 2008) ("This 'rigid order of battle' has been criticized on practical, procedural, and substantive grounds."); Lyons v. City of Xenia, 417 F.3d 565, 580–85 (6th Cir. 2005) (Sutton, J., concurring) ("I cannot resist adding still another separate writing in this case that questions the rigidity of this requirement. While I see the virtue in telling lower courts that they should generally answer the constitutional question before the clearly established question, I wonder whether it makes sense to mandate that they do so in all cases, no matter the costs, no matter the ease with which the second question might be answered."); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006).
32. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 430 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) ("The relative ease with which we could decide this case on the qualified immunity ground, and thereby avoid deciding a far more difficult constitutional question, underscores the need to lift the rigid 'order of battle' decision-making requirement that this Court imposed upon lower courts in *Saucier v. Katz*."); Los

certiorari in *Pearson v. Callahan* was accompanied by directions to address the question whether *Saucier* should be overruled.

In *Pearson*, Justice Alito's unanimous opinion acknowledged many of the criticisms that had been leveled at *Saucier*'s mandatory order of battle. For example, the Court recognized the burden on judicial resources occasioned by requiring the resolution of "difficult questions that have no effect on the outcome of the case."[33] Relatedly, it noted that "[a]dherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance."[34] Further, the Court agreed that "[u]nnecessary litigation of constitutional issues also wastes the parties' resources."[35] Indeed, as the Court explained, strict adherence to *Saucier* often fails to establish meaningful constitutional precedent because the decisions are too fact-bound to provide meaningful guidance, the issue is already pending before a higher court, or the constitutional decision rests on an interpretation of state law.[36] Similarly, the Court observed that when a court is called upon to determine qualified immunity at the pleading stage, the facts may be too undeveloped to provide an adequate basis for resolving the constitutional question.[37] The Court also recognized that "the first step of the *Saucier* procedure may create a risk of bad decision making,"[38] whether because of poor briefing of the constitutional issues or because of a judicial tendency to provide less attention to issues that will not affect the final judgment in a case.[39]

Justice Alito further emphasized that, in light of the general rule that a party may not appeal from a favorable judgment, a decision adverse to the defendant on the constitutional question might be insulated from review where the defendant is granted qualified immunity because the law was not clearly established at the time of the violation.[40] A defendant in this scenario, as the prevailing party, might not be entitled to appeal the adverse

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Angeles Cnty. v. Rettele, 550 U.S. 609, 616–17 (2007) (Stevens, J., concurring in the judgment) ("I would . . . disavow the unwise practice of deciding constitutional questions in advance of the necessity for doing so."); Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring); Scott v. Harris, 550 U.S. 372, 387–88 (2007) (Breyer, J., concurring) (describing the "highly fact-dependent nature of this constitutional determination," arguing that this "fact dependency supports the argument that we should overrule the [*Saucier*'s order of battle] requirement," and noting that "commentators, judges, and, in this case, 28 States in an *amicus* brief have invited us to reconsider *Saucier*'s requirement"); Bunting v. Mellen, 541 U.S. 1019, 1019 (2004) (Stevens, J., denying certiorari) (criticizing this "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity").

33. 555 U.S. at 224.

34. *Id.* at 241.

35. *Id.* at 237.

36. *Id.*

37. *Id.* at 238–39.

38. *Id.* at 239.

39. *Id.* at 225.

40. *Id.* at 240 *(*"Rigid adherence to the *Saucier* rule may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations.").

holding on the constitutional question, even though that holding may have a prospective effect on the defendant.[41]

Having established a formidable case against *Saucier*'s mandatory sequencing, the Court reversed its earlier opinion and held that "[b]ecause the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking [that] will best facilitate the fair and efficient disposition of each case."[42]

The Court was careful to acknowledge arguments for maintaining *Saucier*'s required sequence, and struck a balance by observing that, although it was withdrawing the mandate, *Saucier*'s procedure remains available as a matter of judicial discretion.[43] Indeed, Justice Alito emphasized that the *Saucier* protocol is often beneficial, especially where a discussion of the merits of the constitutional claim is useful to a determination of whether the right was clearly established.[44] He then added that "the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[45] In such situations, he explained, the *Saucier* procedure may be the only effective way to prevent repeated unconstitutional conduct from evading judicial review.[46]

By abandoning the *Saucier* mandate while maintaining its availability as a matter of discretion, *Pearson* struck an important balance. However, *Pearson* did not end the debate or resolve all the potential complications attendant to the Court's qualified immunity doctrine. As we explain below, scholarly battles persisted over the legitimacy and practical desirability of constitutional rulings issued despite a finding of immunity, as well as the new dangers posed by unstructured, unreviewable *Pearson* discretion.

In the next section, we summarize concerns grounded in legitimacy and pragmatics, ultimately dismissing many of the most common criticisms of post-*Saucier* qualified immunity doctrine as unpersuasive in light of the Court's reasoning in *Pearson*. In the section following that, we argue that the most potent criticisms of qualified immunity doctrine after *Pearson* centered on the potential unreviewability of constitutional determinations, a hazy dicta/precedent boundary, and the related issue of a lack of clear standards governing decisions whether to reach the constitutional question in a particular case. After *Pearson*, these features of qualified immunity doctrine invited—or at least permitted—strategic behavior by courts interested in developing constitutional doctrine in one direction or another.

41. *Id.*
42. *Id.* at 242.
43. *Id.*
44. *Id.* at 236.
45. *Id.*
46. *Id.*

C. Red Herrings: Avoidance, Advisory Opinions, and Bad Law

In this section, we summarize and evaluate some of the most common criticisms of recent qualified immunity doctrine. These critiques, familiar from Justice Alito's opinion in *Pearson*, include alleged violation of constitutional avoidance norms, impermissible issuance of advisory opinions, and judging under conditions highly conducive to the creation of "bad" constitutional law. Upon close inspection, we find that these challenges are largely unpersuasive—particularly post-*Pearson*—and therefore dismiss them as unimportant to the remainder of our evaluation of the Court's recent jurisprudence.

1. Constitutional Avoidance

The argument from constitutional avoidance, as articulated by Justice Breyer in *Scott v. Harris* to criticize *Saucier*, invokes "that older, wiser judicial counsel 'not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'"[47] The basic intuition here is that judges ought not reach difficult constitutional questions when doing so is not necessary to the disposition of a case. If applied in a principled and consistent manner by the Court, this objection might carry great force. However, as Lisa Kloppenberg has demonstrated, the Court's invocations of avoidance doctrine hardly represent a model of consistency.[48] More importantly, avoidance is not a per se good. Rather, it reflects policy goals that are "especially weak in constitutional tort law."[49] Substantial analysis of the constitutional merits is often necessary for the immunity determination anyway,[50] and the targets of actions brought under § 1983 and *Bivens* are typically street-level bureaucrats whose "policy choices" do not forcefully implicate the separation of powers, friction-reduction, or deference to democratic outcome concerns that are commonly invoked in support of constitutional avoidance.[51]

2. Advisory Opinions

A related criticism, leveled most forcefully by Professor Thomas Healy, characterizes post-immunity merits rulings as illegitimate advisory opinions whose issuance is inconsistent with norms of proper adjudication.[52] This objection is lacking on two grounds. First, unlike classic advisory opinions, merits rulings in qualified immunity cases are grounded in real facts

47. Scott v. Harris, 550 U.S. 372, 388 (2007) (Breyer, J., concurring) (omission in original) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)).

48. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1028–35 (1994).

49. Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539, 1543, 1547–58 (2007).

50. *Id.* at 1556–57.

51. *Id.* at 1557–58.

52. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 853, 910–15 (2005) ("The rise of unnecessary constitutional rulings is in significant tension with the long-established premises of federal court jurisdiction.").

supporting an allegation of injury and request for damages.[53] Far removed from the unwelcome specter of a judge sitting in chambers, opining on a string of hypotheticals without facts to provide substance to abstraction, qualified immunity adjudications bear little resemblance to the paradigm cases of impermissible advisory opinions.[54] Second, as Professor Jack Beermann explains, strict application of the advisory opinion objection "would call into question such well-established practices as the inclusion in opinions of alternative holdings, the resolution of the merits in harmless error cases, and the flexible mootness doctrine which allows courts to decide moot cases that are 'capable of repetition yet evading review.'"[55] Given that such a dramatic and across-the-board departure from norms of judicial practice would be unwise, there is little reason to suddenly apply a strict anti-advisory norm here, particularly in light of how far qualified immunity cases rest from the core of undesirable advisory adjudication.

3. Creating Bad Law

Commentators have also expressed concern that merits rulings will tend to produce bad law due to lack of adverseness, poor briefing, or careless judging.[56] These claims, many of which originate from the *Saucier* regime, rest on dubious assumptions about litigation strategy and judicial practice. The "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"[57] is generated by parties who have every incentive to litigate all issues fully. After all, it is not as though a court first finds immunity and then calls for supplemental briefing to assist the constitutional determination—rather, the merits are reached alongside immunity in real cases involving alleged injuries and adverse parties, one of

53. *See* Note, *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, 124 HARV. L. REV. 2064, 2064–69 (2011) (discussing the origin of the Court's practice of avoiding advisory opinions).

54. *See, e.g.*, Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1004–05 (1924) ("The vice of the proposal, variously made, that opinions of the Supreme Court in advance of legislation would be 'constructive,' lies in the assumption, too often made by American political scientists, that constitutionality is a fixed quantity. . . . Concepts like 'liberty' and 'due process' are too vague in themselves to solve issues. They derive meaning only if referred to adequate human facts. Facts and facts again are decisive. They are either present-day facts, or ancient facts clothed by the universalizing instinct of man to look like principles. . . . The reports furnish too abundant illustrations of what Huxley called the tragedy of a fact killing a theory.").

55. *See* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 154.

56. *See, e.g.*, Healy, *supra* note 52, at 910–15 ("A critical question, therefore, is whether the existence of a concrete dispute in a particular context will provide the parties with adequate incentives to argue vigorously the constitutional issue. In harmless error and Fourth Amendment good faith cases, as in cases under the State Grounds doctrine, the answer would seem to be yes. . . . But the same is not true in qualified immunity and habeas cases."); Leval, *supra* note 31, at 1277–81 ("[T]he Supreme Court now requires that courts glibly announce new constitutional rights in dictum that will have no effect whatsoever on the case. The practice will inevitably produce bad constitutional law.").

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

whom *must* brief the constitutional merits to prevail and the other of whom would be taking an astonishing gamble in declining to respond. Indeed, as Dean John C. Jeffries, Jr., notes, "it would require otherworldly confidence for a defense attorney to duck an opportunity to contest the merits of a constitutional claim on the ground that her client was certain to win under qualified immunity, given that qualified immunity depends on the uncertainty of *those same merits*."[58] Such strategy would be especially nonsensical because defendants are often indemnified by the government and counseled by government attorneys whose role as repeat players provides a strong incentive to address the general development of constitutional tort law.[59] Similarly, whereas Judge Pierre Leval imagines judges "glibly" discovering (or denying) rights,[60] it is unclear why judges thoroughly briefed on the merits and aware of the functionally precedential effect of their decisions would be uniquely careless. In any event, this argument has lost much of its force following *Pearson* because a judge who has *chosen* to reach the merits has decided, for one reason or another, to accept the costs, burdens, and responsibilities of adjudicating a constitutional issue.

Although these considerations have been cited by numerous scholars and Justices as criticism of the *Saucier* protocol, we find them unpersuasive as criticism of *Pearson*. This does not mean that we see only perfection in the status quo. To the contrary, we believe that post-*Pearson* qualified immunity doctrine suffered from three major flaws. We explore these flaws in the next section, and then argue in Part II that the Court's opinion in *Camreta v. Greene* is best understood as a largely effective response to two of our concerns.

D. The Real Difficulties: Dicta, Reviewability, and Strategic Judging

Whereas the criticisms of qualified immunity doctrine in the previous section do not, in our opinion, carry great force, especially after *Pearson*, three other lines of argument raise more difficult challenges to the framework of post-*Pearson* qualified immunity doctrine. One argument emphasizes the unreviewability of merits determinations on appeal, another seeks to patrol the dicta/precedent boundary, and the third invokes fear of strategic judging. These problems, moreover, are related—the treatment of merits determinations as dicta partially explains their perceived

58. John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 130 (emphasis in original).

59. *See* George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1188–89 (1977) (discussing statutes requiring indemnification of officials and requiring government to provide officials with legal defense by government attorneys); David F. Hamilton, *The Importance and Overuse of Policy and Custom Claims: A View from One Trench*, 48 DEPAUL L. REV. 723, 730–31 (1999) (discussing indemnification of city employees in civil rights cases); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998) ("Very generally, a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment.").

60. Leval, *supra* note 31, at 1268.

unreviewability on appeal, which in turn incentivizes strategic behavior by allowing standardless discretion and prohibiting review of the resultant constitutional law. In this section, we further explain each of these concerns, sketching the outline of this tripartite challenge to qualified immunity doctrine as it stood in 2009.

1. The Dicta/Precedent Distinction

In 2006, Judge Pierre Leval delivered a high-profile lecture at New York University School of Law in which he asserted that courts confuse dicta with precedent in qualified immunity cases.[61] The thrust of his argument was that merits rulings are not necessary to judgment and must therefore be non-binding dicta, yet those same rulings are nevertheless treated as something closer to precedent when they are held to have provided sufficiently clear notice to forestall future invocation of qualified immunity.[62] Conceding that "dicta often serve extremely valuable purposes," Judge Leval insisted that "[w]hat is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum."[63] The result of such confusion is "the creation of bad constitutional law," since "courts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases."[64] Although we have already explained our skepticism of the claim that "bad law" is more likely in merits holdings secondary to findings of qualified immunity, we see the current force of Judge Leval's objection as residing in his observation that uncertainty about the boundary between precedent and dicta can create jurisprudential confusion—as witnessed, for example, in the problem of unreviewability.

2. Unreviewability

Perhaps the most serious problem with post-*Pearson* doctrine consisted of defendants' perceived inability to appeal adverse constitutional determinations if they won judgment on qualified immunity grounds. Such appeals were understood to be prohibited because it is well established that parties cannot appeal dicta, and merits rulings in qualified immunity cases—which occupied an ambiguous space between dicta and precedent—were thought to fall on the "dicta" side of this line for purposes of appellate review.[65] Such appeals were also perceived to conflict with the Supreme Court's norm of only granting certiorari petitions from parties who suffered

61. *See generally id.*
62. *See id.* at 1275–82.
63. *Id.* at 1253.
64. *Id.* at 1255.
65. *See id.* at 1279 ("A further problem lies in the fact, as we discussed before, that there is no appeal from the trial court's declaration in dictum that the officer's conduct violated the Constitution—nor from the appeals court's dictum.").

adverse judgment below. Justice Scalia recognized this dilemma in a dissent from the denial of certiorari in *Bunting v. Mellen*, arguing that "this general rule should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination."[66] This proposal was justified, he added, because "[t]hat constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases."[67] Commentators agreed that reviewability presented a major issue, noting that it unfairly denied defendants an opportunity to appeal adverse dicta that effectively functioned as precedent.[68] As we explain in Part II, the Court has recently adopted Justice Scalia's proposal and thereby solved this problem for the vast majority of cases in which it might arise.

3. Strategic Judging

The impossibility of appeal and absence of standards to guide *Pearson* discretion rendered some panel opinions effectively unreviewable, creating worrisome incentives for parties and judges to engage in strategic behavior aimed at influencing the decision whether to write a merits opinion. Professor Beermann has noted that *Pearson* creates opportunities for district and circuit judges, as well as defendants, to act strategically.[69] District judges can try to influence the likelihood of a merits decision on appeal by writing, or declining to write, a merits opinion below, thereby raising or lowering the cost of producing a merits opinion on appeal.[70] Defendants willing to engage in a high-risk litigation strategy may decide to press the merits "only when they perceive a strong likelihood of prevailing," since "a strategic choice [by the defendant] not to press the constitutional merits might influence the court's decision whether to decide them."[71] And circuit judges will face an even more complex choice—the inevitable result of pressures produced by different views amongst judges concerning judicial restraint, the importance of constitutional elaboration, and of advancing policy agendas through constitutional law.[72] As Professor Beermann

66. 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari).

67. *Id.* at 1023–24.

68. *See, e.g.*, Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1924 (2007) ("Yet if the plaintiff does not appeal—thereby enabling the defendant to argue the alternative ground of no constitutional violation in support of affirmance—the defendant may have achieved a pyrrhic victory. . . . [I]f the defendant wins at the court of appeals . . . his victory may be even more pyrrhic.").

69. *See* Beermann, *supra* note 55, at 143 ("This new regime invites strategic behavior by courts and litigants who, in each case, are left to determine whether it would be beneficial to reach the merits or to try to influence whether the merits are reached.").

70. *Id.* at 173.

71. *Id.* at 172–73.

72. *See id.* at 173 ("Judges may also find that *Pearson* puts them in a difficult bind. While many may be relieved that they no longer have to reach the merits, views on the wisdom of reaching the merits will vary. Some may be committed to principles of restraint

concludes, "It is not common for judges to have complete discretion over whether to decide unsettled constitutional issues, with no standard governing when the judges should reach the issue, and in circumstances in which the decision will not affect the outcome of the case before the court."[73] We agree and, as explained below, believe that this problem can be remedied through a simple reform that creates structured discretion.

E. Conclusion

The journey from *Harlow* to *Pearson* witnessed some dramatic shifts in the law of qualified immunity. Nevertheless, by 2009 the Court had reached a largely workable doctrine that balanced a complex array of competing demands. In spite of this accomplishment, a number of criticisms of its handiwork—some unpersuasive, some forceful—persisted. In the next part, we discuss *Camreta v. Greene*, the Court's most recent tweak to qualified immunity doctrine and a successful effort to address two of three criticisms that remained post-*Pearson*. Although we conclude that it is no panacea, we see *Camreta* as a promising step toward smoothly functioning doctrine and laud the Court's success in clarifying both the dicta/precedent boundary and the issue of reviewability.

II. *CAMRETA V. GREENE*—REFINING QUALIFIED IMMUNITY

In its 2010 Term, the Court held in *Camreta v. Greene* that it may review a lower court's constitutional ruling at the behest of government officials who won a final judgment on qualified immunity grounds.[74] This new rule, though only supported in *Camreta* by a bare majority of the fractured Court, substantially addresses the difficulties posed by doctrine that permits courts to issue otherwise-unreviewable constitutional proclamations. Henceforth, officials who win on qualified immunity in the courts of appeals but are found to have violated the Constitution can potentially alleviate their "undeniably awkward" situation through Supreme Court review, instead of being compelled to either comply with the law or "risk a meritorious damages action."[75]

Although Justice Kennedy rightly notes a number of potential limits on what we call "prevailing party review doctrine" (PPRD)—limits that we explore at some length to flesh out their full contours—he substantially overstates his case with respect to the significance of these limits. Moreover, whereas Justice Kennedy's dissent focuses mainly on PPRD's

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that disfavor reaching the merits, whereas others may place a higher value on ensuring that the law develops despite qualified immunity. Some judges may reach out to decide constitutional issues to further a policy agenda and decline to decide the constitutional merits when the law leads in a direction contrary to their preferences. Judges committed to the avoidance canon might then feel disadvantaged because they will be on the sidelines watching their colleagues create clearly established law with which they may disagree.").

73. *Id.* at 171.

74. Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011).

75. Jeffries, *supra* note 58, at 127.

boundaries, we note one desirable extension—the application of PPRD to en banc procedures in the circuit courts.

On the basis of these evaluations, we argue that *Camreta* has largely solved the problem of reviewability in qualified immunity doctrine. We then conclude this part by returning to the other serious flaws identified in Part I. Although we report that the precedent/dicta boundary has been helpfully clarified, we also find that problems of strategic judging rendered possible by *Pearson* survive *Camreta* and should be addressed through further reform if *Pearson* discretion is to survive as a valuable tool for the development of constitutional doctrine.

A. Camreta v. Greene

In late February 2003, Bob Camreta and James Alford arrived at an elementary school in Deschutes County, California to ask a young girl (S.G.) some questions about her father, Nimrod.[76] Nimrod Greene had been arrested several weeks earlier for suspected sexual abuse of a seventeen-year-old boy, but was soon released and was therefore free in late February to spend unsupervised time with his daughters.[77] When the Oregon Department of Human Services (DHS) learned about this situation, Camreta, a child protective services worker, was tasked with assessing S.G.'s safety.[78] Based on his training and experience, Camreta was "concerned about the safety and well-being of Nimrod Greene's own small children" because he was "aware that child sex offenders often act on impulse and often direct those impulses again their own children, among others."[79] Accompanied by Alford, a deputy sheriff, Camreta interviewed S.G. at school because he considered it best "to conduct the interview away from the potential influence of suspects, including parents."[80] Such school-based interviews, Camreta reported, "are a regular part of [child protective services] practice and are consistent with DHS rules and training."[81] However, S.G.'s mother neither learned of this interview in advance nor consented to it, and Camreta did not obtain a warrant beforehand.[82]

S.G.'s mother filed an action on behalf of herself and S.G. alleging that Camreta and Alford's in-school seizure of S.G. without a warrant, parental consent, probable cause, or exigent circumstances violated the Fourth Amendment.[83] The district court granted summary judgment for the defendants, holding that the in-school seizure of S.G. was "objectively reasonable under the facts and circumstances of this case" and, further, that the defendants were entitled to qualified immunity because "no reasonable school official, caseworker, or police officer would have believed [their]

76. Greene v. Camreta, 588 F.3d 1011, 1016 (9th Cir. 2009).
77. *Id.* at 1016.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* (alteration in original).
82. *Id.* at 1016–17.
83. *Id.* at 1020.

actions violated the Fourth Amendment."[84] The Ninth Circuit, in an opinion by Judge Marsha Berzon, affirmed the district court's grant of summary judgment on qualified immunity grounds.[85] However, citing *Pearson* for its authority to engage in such analysis and observing that "the constitutional standards governing the in-school seizure of a student who may have been abused by her parents are of great importance," the panel also held that "the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional."[86] The Ninth Circuit thus reversed the district court "to the extent that it held that Alford and Camreta had not violated S.G.'s right to be free from an unconstitutional seizure."[87] Camreta and Alford, notwithstanding the judgment in their favor, appealed the decision, alleging in their petition for certiorari that the Ninth Circuit had erred in its constitutional analysis.[88]

The Supreme Court vacated in part and remanded in part. Writing for the Court, Justice Kagan first addressed the Court's ability to act on a petition brought by government officials in this procedural posture.[89] Noting that 28 U.S.C. § 1254(1) confers "unqualified power on this Court to grant certiorari 'upon the petition of *any* party,'" she concluded that neither Article III standing requirements nor prudential considerations barred the Court from hearing the case.[90]

Article III is no bar, she explained, because "[t]he critical question under Article III is whether the litigant retains the necessary personal stake in the appeal."[91] Since the judgment "may have prospective effect on the parties," especially "if the official regularly engages in that conduct as part of his job" and must therefore "either change the way he performs his duties or risk a meritorious damages action," Article III requirements of injury, causation, and redressability "often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution."[92] The Court added that the plaintiff in such cases will also have "a stake in preserving the court's holding," since "only if the ruling remains good law will she have ongoing protection from the practice."[93]

The majority similarly rejected prudential objections. Although the Court's resources typically "are not well spent superintending each word a lower court utters en route to a final judgment in the petitioning party's favor," the Court noted that it has deviated from this rule when provided

84. Greene v. Camreta, 2006 WL 758547, at *4–5 (D. Or. Mar. 23, 2006).
85. *Greene*, 588 F.3d at 1033.
86. *Id.* at 1021, 1030.
87. *Id.* at 1030.
88. *See* Camreta v. Greene, 131 S. Ct. 2020, 2027 (2011).
89. Justice Kagan was joined by Chief Justice Roberts and Justices Scalia, Ginsburg, and Alito. *Id.* at 2025–26.
90. *Id.* at 2028.
91. *Id.* at 2029.
92. *Id.*
93. *Id.*

with sufficiently important policy reasons.[94] The Court explained that this test was satisfied here, since the otherwise unreviewable constitutional rulings in qualified immunity cases have been designated by the Court as more than mere dicta in order to achieve clarity and observance of constitutional law through ongoing elaboration.[95] Fearful of leaving these rules "permanently in limbo," the Court has allowed "lower courts to avoid avoidance"—an option that requires judges to "think hard, and then think hard again" before reaching constitutional merits, and that creates a need for some method of review other than defiance by officials of "practices that have been declared illegal."[96]

The Court limited this procedural holding in two respects. First, it reserved judgment on the question whether appellate courts can review cases in this posture arising from district court decisions.[97] Second, the Court emphasized that it retains discretionary authority to hear cases and will not automatically grant similar petitions in the future.[98]

Having established its authority to hear the case, the Court proceeded to find the case moot. Noting that S.G. would soon turn eighteen and had moved to a different state, the Court found that "she faces not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction as part of a child abuse investigation."[99] As a result, applying ordinary principles of justiciability, the Court dismissed the case and vacated the portion of the Ninth Circuit opinion addressing the merits issue.[100]

Justice Scalia wrote a concurring opinion indicating his willingness to consider in the future an "end to the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity."[101] Justice Sotomayor, joined by Justice Breyer, concurred in the judgment and wrote separately to register her view that the Court ought not reach difficult questions about prevailing party review in a moot case that merits only vacatur.[102]

Justice Kennedy, joined by Justice Thomas, dissented from the majority's decision to "override jurisdictional rules that are basic to the functioning of the Court and to the necessity of avoiding advisory opinions."[103] Objecting to the Court's embrace of prevailing party review, he criticized the majority's interpretation of precedent, worried that this exception would quickly become common practice, and noted that the Fourth Amendment question at issue could readily be addressed through ordinary review.[104]

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94. *Id.* at 2030.
95. *Id.*
96. *Id.* at 2031–32.
97. *Id.* at 2033.
98. *Id.*
99. *Id.* at 2034.
100. *Id.* at 2034–36.
101. *Id.* at 2036 (Scalia, J., concurring).
102. *Id.* at 2036 (Sotomayor, J., concurring in the judgment).
103. *Id.* at 2037 (Kennedy, J., dissenting).
104. *Id.* at 2037–40.

Justice Kennedy also argued that qualified immunity doctrine stands "in tension with conventional principles of case-or-controversy adjudication."[105] Noting that the Court's exaltation of mere obiter dicta into appealable precedent functionally equates dicta with declaratory judgments and injunctions—and that S.G. lacked Article III standing to obtain such relief—Justice Kennedy remarked that the "Court appears to approve the issuance of such judgments outside the bounds of Article III jurisdiction."[106] This exception is not worth its price of departure from ordinary procedure, he added, because the Court's newfound power of merits review in these cases depends on the availability of defendants with standing—which, he prophesied, will be hard to find.[107] Indeed, in this very case the Court lost jurisdiction over Alford because he retired from the Sheriff's Department.[108] And in the future, Justice Kennedy explained, few officers will present a cognizable interest in litigating the merits on appeal since "there is little possibility that a constitutional decision on the merits will again influence [any given] officer's conduct."[109] Thus, even after *Camreta*, plaintiffs may be able to obtain binding constitutional determinations beyond the Court's reach.[110]

Justice Kennedy continued his criticism in two final sections. First, noting that "[a]n inert rule of law does not cause particular, concrete injury," and that Camreta lacks an "adverse judgment from which to appeal," Justice Kennedy characterized Camreta's suit as "a new declaratory judgment action in this Court against the Court of Appeals."[111] This result, he warned, is inconsistent with Article III.[112] Second, invoking the availability of other methods by which to elaborate constitutional doctrine, he suggested that the Court consider "refinements to our qualified immunity jurisprudence" should the Court's "puzzling misadventure in constitutional dictum" continue in future cases.[113]

B. Camreta *and Reviewability: A Successful Intervention*

Camreta represents a refinement of the procedural system created by *Harlow*, *Siegert*, and *Pearson*. Although it does not address all of the objections leveled against that regime, it does respond to a powerful and frequent criticism—namely, the unavailability of Supreme Court review for constitutional decisions that exert a near-precedential power over public officials. Indeed, *Camreta* expressly recognizes this anomaly in the Court's certiorari practice, which it characterizes as sufficiently serious to justify "bending our usual rule to permit consideration of immunized officials'

105. *Id.* at 2040.
106. *Id.* at 2041.
107. *Id.* at 2041–42.
108. *Id.* at 2041.
109. *Id.* at 2042.
110. *Id.*
111. *Id.* at 2043.
112. *Id.*
113. *Id.* at 2045 (quoting Leval, *supra* note 31, at 1275).

petitions."[114] It thus appears as if the Court has solved the problem of reviewability. Justice Kennedy, however, charges in his dissent that "the Court . . . fails to solve the problem it identifies." To explain why, he examines some of the difficulties attendant to finding PPRD plaintiffs and defendants with cognizable Article III standing on appeal.[115]

In this section, we first follow Justice Kennedy's lead to explore limits on PPRD. Notwithstanding our ability to imagine numerous circumstances under which PPRD is rendered problematic or inapplicable, we respectfully disagree with Justice Kennedy's view that the Court has failed to solve the problem of reviewability. Rather, we conclude that the Court successfully reached an appropriate compromise in light of the need to weigh PPRD's virtues against other weighty considerations, many of them grounded in Article III. Guided by *Camreta*'s reasoning, we then propose an extension of PPRD to the en banc procedures of the courts of appeals—a development that would help serve justice to individual parties and that may also increase the overall quality of merits opinions issued under *Pearson* discretion. After discussing the virtues of such a reform, we explore two familiar concerns (dicta/precedent and strategic judging) and identify a new one (incentives for plaintiffs' attorneys), and conclude that the single most important challenge post-*Camreta* involves unstructured judicial discretion that creative incentives for strategic behavior.

1. *Camreta*'s Limits: Defendants, Injuries, and Plaintiffs

One source of limitations on PPRD may be the named defendant. As Justice Kennedy notes, in at least some cases public officials could follow Deputy Sheriff Alford and retire before a case can be appealed (or while it is on appeal).[116] In a similar vein, *Camreta* makes merits appealability contingent upon the defendant not moving, dying, resigning, being fired, changing jobs, renouncing past practices, being incapacitated, or otherwise finding herself in a position that renders claims of Article III standing implausible. On a more practical level, it also renders appealability contingent upon the fortuity of identifying a defendant who is willing to endure the potential hassles and frustrations of litigation to vindicate a general principle after already prevailing on qualified immunity grounds.

Of course, there is something slightly absurd about the application of such individualized standing concerns to cases where the government typically pays for attorneys and indemnifies the official.[117] This is especially true in the large number of cases where the defendant is effectively standing in for a class of similarly situated public officials, each of whom is equally "injured" with respect to their future behavior by the allegedly erroneous constitutional ruling. But this does not mean that those standing rules should not apply—they most certainly should, particularly

114. *Id.* at 2030 (majority opinion).
115. *Id.* at 2042 (Kennedy, J., dissenting).
116. *Id.* at 2041.
117. *See supra* note 59 and accompanying text.

given that § 1983 and *Bivens* liability targets defendants in their official capacity and not as mere stand-ins for the entity for which they work. Thus, absurdity aside, ordinary standing principles potentially limit the reach of *Camreta*'s new doctrine.

A second source of limits on PPRD may be the nature of different constitutional wrongs. Simply put, certain kinds of alleged constitutional violations are more likely to sustain standing than others. Social workers who regularly interview children in particular settings or police officers who regularly stop cars under a particular legal theory will provide ideal candidates for post-*Camreta* standing, whereas there are few jurisdictions where individual police officers can seriously argue that they (rather than the general class of "officers in the police department") are likely to *again* use excessive force during a high-speed car chase and therefore suffer from a ruling that limits their options.[118] As a result, *Camreta* may not solve the appealability issue uniformly across the domain of constitutional decisions. Rather, it may create certain classes of rulings that readily benefit from PPRD, and others that are less likely to survive standing analysis.

This may prove problematic if some classes of rulings that typically escape *Camreta*'s compass involve violations rarely adjudicated elsewhere. For example, the constitutional issues attendant to a § 1983 suit alleging excessive force by the police are unlikely to be resolved through defensive assertions of rights in criminal trials, municipal liability, or requests for declaratory relief.[119] Such issues are therefore prime candidates for constitutional adjudication secondary to a finding of qualified immunity because such rulings may be crucial to the refinement and elaboration of constitutional law. But if those sorts of cases also present particularly forceful Article III standing concerns, as Justice Kennedy argues in his dissent,[120] then *Camreta*'s limits might be most apparent in situations where its doctrine is most needed.

A final source of limits on PPRD may be constitutional tort plaintiffs. Although the *Camreta* Court determined that mootness wrought by a change in the plaintiff's status leads to vacatur of the lower court's merits ruling—thereby cutting off one source of constitutional rulings that might escape review post-*Camreta*—one further plaintiff-related concern remains: in some cases the plaintiff may lack PPRD standing because the plaintiff cannot show a reasonable likelihood of once again encountering the alleged violation.[121] In such cases, unless the Court departs from ordinary standing principles to accommodate the policy objective of securing appellate review, the defendant will not be able to appeal adverse constitutional rulings to the Supreme Court. Further, unlike cases where a change in status causes mootness, vacatur of the merits decision will not ordinarily be an appropriate remedy because there is no appeal as of right to the Supreme Court. Those opinions will therefore stand as good, unreviewable law.

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118. *See Camreta*, 131 S. Ct. at 2042 (Kennedy, J., dissenting).
119. *See* Jeffries, *supra* note 58, at 136.
120. *See Camreta*, 131 S. Ct. at 2042 (Kennedy, J., dissenting).
121. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101, 111 (1983).

2. Beyond Limits: Why *Camreta* Succeeds

Notwithstanding these potential limits, PPRD can still be expected to function as a fine substitute for ordinary appellate procedures involving the Supreme Court. First, our ability to proliferate hypotheticals in which PPRD is inappropriate will likely have a larger effect on law school final exams than on the overall development of constitutional law in § 1983 and *Bivens* cases. The vast majority of cases will likely involve defendants who are still doing the same job and plaintiffs whose status is basically similar in all key respects, thereby satisfying the standing concerns identified above. Second, given the striking rarity of Supreme Court review of panel opinions for which certiorari is requested, it is hardly as though any more than the slightest fraction of such cases ever enjoyed a realistic probability of review even before *Camreta* was decided. In that sense, *Camreta* addresses a problem that might be less serious than it initially seems, a point that Professor Beermann makes by emphasizing that "the likelihood that any particular case will be accepted for review by the Supreme Court is so low that as a practical matter this procedural quirk does not significantly change the situation."[122]

Finally, it is no damning criticism to say that PPRD will not cover each and every case. PPRD represents a policy choice by the Court to bend minor rules governing the availability of certiorari in order to achieve fairness for litigants within a doctrinal structure that effectively balances a wide range of considerations, including the need for constitutional elaboration. The harm that flows from the occasional impossibility of appeal—which seems quite small, given the infrequency of such cases and the preexisting unlikelihood of successful certiorari—is hardly a major price to pay for workable doctrine that has taken decades to produce. Moreover, as we discuss in Part IV, Justice Kennedy's "refinements" would serve only to remove this minor harm from defendants by transforming it into a major harm inflicted upon an otherwise unprotected public. In those crucial respects, the Court did not "fail" when it reached a reasonable compromise that, though not perfect, secures and improves a well-functioning scheme of constitutional regulation.

Attention to *Camreta*'s limitations, though merited, must therefore not divert our focus from the fact that the opinion goes a long way toward fixing an important flaw. It does so by allowing the vast majority of defendants who have won on qualified immunity grounds at the expense of an adverse merits holding to appeal that part of the decision, thereby addressing criticisms emphasizing the illegitimacy of procedures that permit unreviewable constitutional determinations.

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122. Beermann, *supra* note 55, at 161.

3. Extending *Camreta* to En Banc Review

The Supreme Court hears very few cases and grants only approximately 1 percent of all certiorari petitions each year.[123] The vast majority of defendants keen to appeal constitutional rulings under PPRD will therefore receive little benefit from *Camreta*, other than the joy of reading a likely futile certiorari petition written by their government-funded attorney. However, although the Court is uniquely capable of achieving uniformity in the law by resolving circuit splits, it is not the only court capable of bringing close attention and the power of appellate review to bear on controversial panel decisions. Whereas the last two sections discussed limits of PPRD, this section argues that the courts of appeals should consider themselves authorized by *Camreta*'s reasoning to hear en banc appeals from merits decisions reached by panels in qualified immunity cases.

Camreta formally reserved the question of PPRD's applicability to appellate review of district court decisions,[124] but in fact forecasted its disapproval of such a practice by observing that "district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity."[125] This proposed basis for distinguishing certiorari review from ordinary appellate review does not apply to en banc procedures. Panel decisions *do* settle constitutional standards, *are* intended to prevent repeated claims of immunity, and *are* regularly treated as precedent for that purpose. Given that en banc review is ordinarily available for decisions with these characteristics, *Camreta* provides no reason to exclude them here. With respect to the considerations identified as potentially relevant by *Camreta*, en banc review is thus unproblematic.

There are several other virtues of en banc review that make it particularly appropriate to qualified immunity cases. First, and most importantly, en banc procedures would increase the overall *amount* of review available for merits rulings and thus further palliate the unreviewability concern that animates *Camreta*. Second, just like certiorari procedures, en banc review is discretionary and thus does not pose a major threat of adding significantly to the docket of already-overworked appellate judges.[126] Third, this procedure would increase the odds that defendants are able to obtain review focused primarily on *legal* error in a panel's constitutional reasoning; as Justice Breyer has made clear, the Supreme Court is not a "court of error" and exercises its docket discretion with an eye to deep circuit splits, overall importance, clean factual presentation, and many other

123. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 228–29 (2010).

124. *See Camreta*, 131 S. Ct. at 2033 n.7 ("We note, however, that the considerations persuading us to permit review of petitions in this posture may not have the same force as applied to a district court decision.").

125. *Id.*

126. *See* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 216–17 (1999).

issues.[127] Fourth, awareness of the possibility that an opinion will be carefully scrutinized by all of the judges in a circuit might have a salutary effect on the quality of panel reasoning.[128] Finally, en banc review would increase the availability of review for decisions produced by panels that stand at an ideological extreme or are ideologically idiosyncratic with respect to their home circuit—and thus might pose a greater risk of strategic judging post-*Pearson* because of their ideological commitments to shaping constitutional law.[129]

The main limit of en banc review as a "fix" for the unreviewability problem is that the courts of appeals rarely hear cases through that procedure.[130] The Second Circuit hears cases en banc less often than the Supreme Court grants certiorari, and even the famously robust Ninth Circuit en banc docket comprises a small proportion of total Ninth Circuit panel decisions.[131] Nevertheless, insofar as *Camreta*'s goal was to create a vehicle whereby the Court can police outliers and achieve the general benefits of review for a previously unreviewable class of decisions, en banc procedures can help achieve those ends in a broader range of cases without consuming the Court's carefully guarded resources. More importantly, the combined availability of en banc and Supreme Court review will make

127. *See* BREYER, *supra* note 123, at 228–29.

128. *See* RICHARD POSNER, HOW JUDGES THINK 32–34 (2008).

129. *See* Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1617 (2000) (arguing for more dramatic reform of en banc procedures, but acknowledging that concerns about ideological divergence might be addressed in part by en banc review procedures). Scholars have recently emphasized the relationships among judicial decision making, ideology, and panel composition. *See, e.g.*, Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 226–34 (1999).

130. *See* George, *supra* note 126, at 214 ("Circuit courts rarely invoke the en banc procedure; courts of appeals resolve fewer than one percent of their cases en banc."); *id.* at 213 (noting that circuits "effectively have become the courts of last resort for most litigants and the source of doctrinal development for most legal issues").

131. *See* Ricci v. Destefano, 530 F.3d 88, 92–93 (2d Cir. 2008) (Jacobs, C.J., dissenting from denial of rehearing en banc) ("I do not think it is enough for [the Second Circuit] to dilate on exceptionally important issues in a sheaf of concurrences and dissents arguing over the denial of *in banc* review. If issues are important enough to warrant Supreme Court review, they are important enough for our full Court to consider and decide on the merits. . . . [T]o rely on tradition to deny rehearing *in banc* starts to look very much like abuse of discretion."). In a series of studies in the late 1980s and early 1990s, Judge Newman of the Second Circuit described and praised his circuit's tradition of avoiding en banc practice. *See* Jon O. Newman, Foreword, *In Banc Practice in the Second Circuit: The Virtue of Restraint*, 50 BROOK. L. REV. 365 (1984); *see also* Jon O. Newman, *In Banc Practice in the Second Circuit, 1989–1993*, 60 BROOK. L. REV. 491 (1994). The voluminous literature on the Ninth Circuit's distinctive use of en banc procedures has focused mainly on whether the circuit has grown too big and whether it ought to be divided. *See, e.g.*, Arthur D. Hellman, *Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425 (2000); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 548–50 (1989) (evaluating Ninth Circuit papers from 1981–86 and concluding that "en banc ballots were rarely requested and even more rarely successful. . . . [and] contributed only minimally to the preservation of uniformity in the law of the Ninth Circuit"). *But see* Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 928–45 (1990).

merits determinations in qualified immunity cases just as appealable as any other panel opinion (barring the Article III limitations discussed above). In that light, criticism regarding the rarity of review dissolves into little more than a background frustration with our legal system's limited resources and the accompanying rarity of review above the panel level.

This proposal is meant to supplement *Camreta*'s already adequate solution to the problem of reviewability discussed in Part I. We do not believe that en banc review is necessary to the success of PPRD as a remedy for non-reviewability, but we maintain that the availability of such review follows directly from *Camreta*'s reasoning and would be a beneficial development. As we explain in the next section, *Camreta*'s success also extended to clarification of the vexing dicta/precedent issue. However, the *Camreta* Court made only partial progress toward limiting incentives for strategic judging.

C. Old Concerns Revisited: Dicta and Strategic Judging

Camreta shed welcome light on the location of merits holdings along the dicta/precedent spectrum. More plainly than ever before, the Court explained that "these constitutional determinations . . . are not mere dicta."[132] It went on to explain:

> They are rulings that have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong. And more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity—and observance—of constitutional rules.[133]

The Court thus invokes the significant purposes of elaborating constitutional law and fine-tuning constitutional regulations as a trump to default dicta norms.[134] Although such a departure from default rules is unusual, the norm that courts should only address issues necessary to the resolution of a case is not absolute and has been abrogated when doing so "makes sense in light of the need for rational development in the law."[135] Qualified immunity, as the Court rightly observes, is a paradigm case of doctrine that demands special treatment to ensure such development. *Camreta* thus constitutes a performative act whereby the Court exercises its power to formalize the already widespread understanding that merits rulings have "a significant future effect" by treating them as appealable precedent

132. *See* Camreta v. Greene, 131 S. Ct. 2020, 2030 (2011).

133. *Id.*

134. *Id.* Professor Michael Dorf identifies one such norm as the non-precedential character of dicta, a norm that *Camreta* expressly declined to employ when deciding how to characterize merits rulings issued under *Pearson* discretion. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994).

135. *See* Beermann, *supra* note 55, at 156; *see also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 961 (2005).

rather than as quasi-dicta.[136] Lower courts should therefore follow this example and treat merits rulings as functionally precedential in nature.

The Court's success in addressing reviewability and the dicta/precedent boundary was not matched by similar achievement in cabining strategic judging. Although the Court does suggest that *Pearson* discretion is henceforth unavailable for certain classes of cases, it does not articulate more general standards regarding the appropriateness of hearing a merits claim after finding qualified immunity. Lower courts must still exercise unstructured discretion in making those determinations and do not face the threat of reversal for whichever choice they ultimately reach in each case. Parties must guess which arguments might move a court to reach the constitutional merits even after finding immunity, and have no right to an explanation of the court's reasoning if they guess incorrectly. Although *Camreta*'s creation of PPRD will help limit the seriousness of this issue by permitting reversal of strategically-motivated decisions that depart too far from the judicial mainstream, the rarity of post-panel appellate review renders *Camreta*'s solution inevitably incomplete. Strategic judging is therefore the primary challenge that awaits the Court's attention when it revisits qualified immunity doctrine in future cases.

D. A New Concern?: Incentives for Plaintiffs' Attorneys

Efforts to reform doctrine always raise the possibility that a court is simply trading one problem for another. In this section, we raise and reject one version of this claim that might be leveled against *Camreta*, identifying a potential perversity in the incentives it creates for plaintiffs' attorneys and then noting two solutions (one mundane, one dramatic).

Unless the Court's grant of certiorari in future cases also includes a grant on the plaintiff's cross-petition for reconsideration of the qualified immunity determination, plaintiffs will ordinarily have lost any possibility of judgment or recovery before briefing even begins. In such situations, the plaintiff's original attorney may be inadequately incentivized to pursue the case on appeal if he or she originally accepted it partly with an eye on potential fee shifting.[137] In some cases, the attorney might decline to litigate an appeal. The plaintiff, in turn, might find it burdensome to retain expensive private counsel to litigate the constitutional merits on an appeal to the Supreme Court or an en banc circuit court. Whereas fee-shifting statutes do not ordinarily present this problem—either the plaintiff wins and

136. *See Camreta*, 131 S. Ct. at 2030.

137. *Cf.* Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 768 (1988) ("[O]ne theme in the literature that our data confirm is that most civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity."). *But see id.* at 780 ("There is also modest evidence that the 1976 fee award statute led to a decline in success rates, and an increase in litigation rates, relative to other civil actions. Surprisingly, there is little evidence that the fees statute led to significantly increased filings or to increased access for prisoners to the private attorney market. These last findings suggest that attorney fees statutes may have less of an effect on filing rates than is commonly believed.").

is defending an award, or the plaintiff loses and has retained willing counsel to challenge that judgment—qualified immunity creates an unusual incentive structure whereby a plaintiff's attorney can be guaranteed no recovery yet still face a request from the client to handle a costly appeal.

Although such situations are not cognizable as a bar to Article III standing, they may disturb the adverseness that the Court demands of its cases, and thereby reduce the quality of both representation and decision making in PPRD appeals. Moreover, these pressures might put future constitutional tort plaintiffs in an awkward position if fee-oriented lawyers abandon their case on appeal to the Supreme Court. Unable to afford expensive representation, these plaintiffs may be forced to seek pro bono representation to pursue a constitutional tort claim for which they have no chance of recovering monetary damages.

However, in practice this concern will likely prove trivial. As compared to ordinary civil litigation, a disproportionate number of § 1983 and *Bivens* plaintiffs are represented by public interest lawyers or civil rights attorneys who "may be less motivated by the prospects of monetary reward than the traditional tort lawyer."[138] Further, high-powered appellate practices might offer free representation that plaintiffs would be happy to accept, inadequate counsel may not matter because *amici* with an interest in the relevant law will provide adequate briefing, fee-oriented attorneys might agree to litigate the appeal for the opportunity to argue a Supreme Court or en banc circuit case, and the court can always appoint an *amicus* to share argument time.

It is also possible that this concern may disappear due to a more dramatic shift in the rules governing fee-shifting. Professor Nancy Leong has identified a tension between *Camreta* and the rule from *Farrar v. Hobby*[139] that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the relationship between the prevailing parties by modifying the defendant's behavior in a way [that] directly benefits the plaintiff."[140] She argues that a merits ruling that has the effect of modifying future official conduct, and giving the plaintiff a sufficient stake for standing should also be found to "materially alter[] the relationship between the parties"—thereby rendering the plaintiff a "prevailing party" for purposes of recovering attorneys' fees under 42 U.S.C. § 1988.[141] Granting that *Camreta* itself does not expressly contemplate such an interpretation of the fee-shifting provisions, she insightfully observes that "the tension could well infuse litigation."[142]

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138. *See id.* at 744.

139. 506 U.S. 103 (1992).

140. Nancy Leong, *Commentary: Allowing Appeals by Winners*, SCOTUSBLOG (June 2, 2011, 8:41AM), http://www.scotusblog.com/?p=121018 (quoting *Farrar*, 506 U.S. at 111–12).

141. *Id.*

142. *Id.* ("On the one hand, the Court now readily acknowledges that harm to the government can serve as a justification for allowing judicial review of the constitutional question. On the other hand, for purposes of awarding attorneys' fees, it historically has refused to acknowledge that the plaintiff's suit has caused the very ruling resulting in that

Although it is possible that *Camreta* will create difficult situations for plaintiffs who lose fee-oriented counsel on appeal to the Supreme Court, we thus do not believe this will be a serious problem. Regardless, Professor Leong's intriguing suggestion may independently point the way toward a solution that has much larger and much more exciting implications for civil rights litigation under § 1983 and *Bivens*.

E. Conclusion

Camreta constitutes a largely successful effort by the Court to substantially take the wind out of the sails of a recurrent criticism targeting its qualified immunity doctrine. Although PPRD is limited in numerous respects, it will usually function as an adequate fix to the problem of unreviewability. To further achieve this goal, the circuit courts should hold that en banc review is available for constitutional tort defendants who lose on the merits secondary to a finding of qualified immunity.

Camreta also brought badly needed clarity to the dicta/precedent boundary, tipping merits decisions issued alongside a finding of qualified immunity decisively toward the realm of "precedent." The single most important issue that remains is therefore strategic judging. However, before turning to possible reforms, we first suggest that such reform proposals may face a more significant and global challenge in the near future from the Court's more conservative members. After explaining why *Camreta* provides cause to worry, we argue that the status quo is vastly preferable to an alternative formulation of qualified immunity doctrine mentioned by Justices Kennedy and Scalia. We also speculate on the strategic and jurisprudential motivations that might undergird the *Camreta* majority's retreat toward a limited view of the scope of *Pearson* discretion.

III. STRUCTURE DISCRETION, DON'T ELIMINATE IT

A. Worrisome Signs: The Precipice of Limbo

Camreta suggests the worrisome possibility that several Justices are losing faith in the basic framework of qualified immunity doctrine. Justice Kagan's approach is decidedly reformist, but articulates key premises of the status quo in terms that waffle between clear support and pronounced hesitation. More disturbingly, Justices Scalia and Kennedy authored opinions suggesting deep unease with the direction of recent jurisprudence. This section explores these concerns, links them to larger trends in conservative jurisprudence on the Court, and argues that supporters of the status quo may soon face a serious challenge that threatens *Pearson*'s grant of judicial discretion.

Although Justice Kagan's opinion in *Camreta* aligned itself with a reformist agenda, it displayed noticeably less enthusiasm than *Pearson* did for merits holdings in qualified immunity cases. In *Pearson*, Justice Alito

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judicial review. Perhaps future litigation will press the Court on this apparent inconsistency.").

identified a broad array of circumstances under which it would be unwise to reach the constitutional merits after finding qualified immunity—a list born of hostility to *Saucier*.[143] However, after enumerating these considerations, he emphasized the importance of constitutional elaboration and added that the "two-step *Saucier* procedure is *often*, but not always, advantageous."[144] In *Camreta*, Justice Kagan strikes a more ambivalent note. Acknowledging that "we have permitted lower courts to avoid avoidance," she cautioned that "courts should think hard, and then think hard again, before turning small cases into large ones."[145] Characterizing *Pearson*'s list of concerns as a "detailed . . . range of circumstances in which courts should address *only* the immunity question," she concluded that "following the two-step procedure . . . is *sometimes* beneficial to clarify the legal standards governing public officials."[146]

The shift from *Pearson* to *Camreta* thus signals disfavor toward merits rulings and a broad new range of circumstances under which the merits cannot be reached. This evolution in the Court's views might be interpreted in several ways: (1) diminished enthusiasm for merits rulings; (2) an effort to formally structure *Pearson* discretion; or (3) an attempt at saving *Pearson* discretion by narrowing it. Whereas the second and third of these projects would be laudable, the first would be deeply troubling—particularly in light of concerns expressed by some of the Justices who wrote separately in *Camreta*.

Justice Kagan's opinion was accompanied by a concurrence and dissent that, viewed together, raise red flags about the future of *Pearson* discretion. Justice Scalia's concurrence announced his newfound willingness to consider adopting what one might call a "reverse-*Saucier*" approach that bars merits opinions after a finding of qualified immunity.[147] And Justice Kennedy's dissent, joined by Justice Thomas, praised alternative vehicles for elaborating constitutional law while calling for doctrinal "refinements" that avoid the standing issues he considered central to the case.[148] Suggesting that he too may favor reverse-*Saucier*, Justice Kennedy noted that "the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect."[149] This hint, however, received only partial elaboration in an opinion that pointed in several directions simultaneously—touching briefly on reverse-*Saucier*, but

143. Pearson v. Callahan, 555 U.S. 223, 237–40 (2009).
144. *Id.* at 242 (emphasis added).
145. Camreta v. Greene, 131 S. Ct. 2020, 2031–32 (2011).
146. *Id.* at 2032 (emphasis added).
147. *See id.* at 2036 (Scalia, J., concurring) ("I join the Court's opinion, which reasonably applies our precedents, strange as they may be. The alternative solution, as Justice Kennedy suggests, is to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity. The parties have not asked us to adopt that approach, but I would be willing to consider it in an appropriate case.").
148. *Id.* at 2044 (Kennedy, J., dissenting).
149. *Id.* at 2043.

also proposing modifications to damages and fee-shifting.[150] Oscillating between acknowledgement that "there will be instances where courts discuss the merits in qualified immunity cases" and an insistence that "the Court should provide no special permission to reach the merits," this opinion clearly suggests that Justice Kennedy's views are in flux.[151]

This development is especially striking because Justice Kennedy authored *Saucier* just over one decade ago. The evolution of his views has been accompanied by a great deal of doctrinal instability in qualified immunity, as the Court mandated merits determinations, reversed this position in response to withering criticism, and engaged in heated debates over the nature of merits determinations, their status as dicta or precedent, and the permissibility of appeal. Such dramatic change in recent years suggests that there is still much room for development in the Court's views, and that the Justices will remain open to new ideas when faced with cases presenting these issues. Although some commentators find comfort in the fact that Chief Justice Roberts and Justice Alito joined Justice Kagan's opinion, and assume that Justices Sotomayor and Breyer remain loyal to *Pearson* discretion,[152] the hint of defection by three Justices in a single opinion ought to be cause for greater alarm given the role that such signals in concurrences have played over the past decade in predicting future changes of heart.

Acceptance of the Scalia-Kennedy reverse-*Saucier* proposal is therefore a live possibility—and one that would accord with recent trends in the Court's jurisprudence. One such trend involves hostility to a broad conception of the role that private citizens should play in the enforcement of rights. Thus, in recent years, "the Court has launched a wholesale assault on one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general."[153] Since "virtually all modern civil rights statutes rely heavily on private attorneys general," this assault has "cut down both on the amount of civil rights enforcement and on the development of the law through the creation of binding precedent."[154] A related trend involves skepticism of creating new constitutional rights. As

150. *Id.* at 2044.

151. *Id.* at 2045.

152. *See, e.g.*, Steven D. Schwinn, *Civil Rights Appeals: The Court's Opinion in* Camreta v. Greene, CONST. L. PROF BLOG (May 27, 2011), http://lawprofessors.typepad.com/conlaw/2011/05/civil-rights-appeals-the-courts-opinion-in-camreta-v-greene.html ("The case likely leaves *Pearson* permission on solid ground, even if as many as three Justices may be willing to reconsider it, and even if it suggested that in some narrow class of cases (like this one) the constitutional question could become moot, thus undermining it.").

153. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186. As Professor Karlan explains,

> The idea behind the "private attorney general" can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit. . . . [T]he current reliance on private attorneys general . . . consists essentially of providing a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe, usually with the additional incentive of attorney's fees for a prevailing plaintiff.

Id.

154. *Id.* at 187–88.

Professor John Greabe explains, "[T]he Court's conservative members [are not] particularly supportive of the creation of new constitutional rights. . . . [T]hey generally object to the creation of new constitutional rights as a form of judicial activism."[155]

Modifications to qualified immunity that further limit opportunities for private plaintiffs to bring suits that create new rights might therefore prove appealing to some of the conservative Justices, especially if they believe that alternative and more legitimate methods for the elaboration of rights already exist. Justice Kennedy reveals some attraction to this belief in *Camreta*, noting that "[o]ther dynamics permit the law of the Constitution to be elaborated within the conventional framework of a case or controversy."[156] Notwithstanding the ultimate inadequacy of such alternative dynamics—the deficiencies of which we explore below—their presence may encourage some Justices to feel assured that elimination of *Pearson* discretion would not result in intolerable levels of stagnation. It would not be the first time that the alleged availability of alternative protections led the Court to eliminate important sources of rights-creation and rights-protection, even when those alternatives were demonstrably inadequate to the task of meaningfully securing the rights at issue.[157]

In the next two sections, we explain in greater detail why constitutional elaboration matters, show how it may be threatened by a retreat from the practice of ruling on the merits where the defendant official is immune, and argue that the alternative mechanisms of constitutional elaboration mentioned by Justice Kennedy in *Camreta* are highly imperfect substitutes for the post-*Pearson* status quo.

B. Back from the Brink: The Need for Constitutional Elaboration

As Professor Pamela Karlan has explained, "Much of constitutional law . . . involves the refinement of broad constitutional commands into essentially regulatory codes of conduct."[158] New cases in which courts make constitutional determinations provide opportunities to apply enduring principles to an evolving society, thus refining constitutional law and clarifying to officials the scope of permissible practices. Litigation under § 1983 and *Bivens* is one of numerous means by which courts translate constitutional norms into specific rules, thereby achieving the related goals of redressing individual violations and effectuating deeper values.[159] The rights thereby created, however, are defined and protected in significant part by the availability of remedies for their violation. Although the notion of a remedy for every right is more "a flexible normative principle than . . . an

155. Healy, *supra* note 52, at 881–82 (suggesting that conservatives on the Court have tolerated an expansion of rights thus far primarily because of a commitment to expanding federal judicial power).

156. *See Camreta*, 131 S. Ct. at 2043 (Kennedy, J., dissenting).

157. *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350, 1356 (2011).

158. Karlan, *supra* note 68, at 1915.

159. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1800 (1991).

unbending rule of constitutional law,"[160] there must nevertheless "be a generally effective remedial structure if constitutional law is to have functional meaning."[161]

Section 1983 and *Bivens* provide for such remedies against public officials, but only if the claimed right was "clearly established" when violated. This approach creates a right-remedy gap, resulting in a significant "societal loss in underenforced constitutional norms," in order to achieve such objectives as fairness to officials and government efficiency.[162] However, by separating immunity determinations from constitutional rulings, qualified immunity doctrine risks freezing the elaboration of constitutional law: "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."[163]

Such stagnation would not simply entail jurisprudential costs. As constitutional law ceased growing in response to new or unprecedented official action, executive officials would face few legal barriers to repeated abuses. Persistent uncertainty in the law would consistently disadvantage individuals alleging constitutional injuries—particularly those who have been wronged by a single official abusively exercising power—and impede the public interest in developing a well-functioning body of constitutional regulation.[164] As Dean Jeffries explains, "[T]he repeated invocation of qualified immunity will reduce the meaning of the Constitution to . . . the most grudging conception that an executive officer could reasonably entertain."[165] This is why the Supreme Court has continually authorized[166]—or even mandated[167]—constitutional rulings, even where a court finds that the defendant enjoys immunity from suit on "not clearly established" grounds.

C. False Lights: The Inadequacy of Alternatives

The need for *Pearson* discretion is not obviated by the possibility of constitutional elaboration elsewhere. The three most commonly mentioned alternatives—all specifically invoked by Justice Kennedy in *Camreta*—are municipal liability, suits for declaratory or injunctive relief, and suppression challenges in criminal cases. We discuss each in turn, focusing in particular on the criminal context because it raises the most difficult and subtle issues.

160. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 338 (1993).

161. *See* Jeffries, *supra* note 58, at 117.

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

163. John M.M. Greabe, Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 405 (1999).

164. *See* Wells, *supra* note 49, at 1561–62.

165. Jeffries, *supra* note 58, at 120.

166. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 245 (2009).

167. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

1. Municipal Liability

Plaintiffs alleging municipal liability for a constitutional injury face the daunting task of explaining how the violation at issue is an "official policy or custom" of the municipality,[168] a requirement rendered more stringent in recent years by a string of opinions narrowly construing those terms.[169] Further, *Monell* liability facially excludes whole categories of potential injuries—including those committed by individual officers acting in disregard of local policy—that still merit redress and deterrence. Because it cannot create law governing such individualized behavior, and because it is available only in rare circumstances even for practices that it arguably ought to cover,[170] municipal liability is incapable of performing the role currently occupied by § 1983 and *Bivens* litigation.

2. Declaratory Judgment and Injunctive Relief

These methods of constitutional elaboration have been widely and persuasively criticized as proposed substitutes for § 1983 and *Bivens* litigation. Although Justice Kennedy identifies *Citizens United v. FEC*[171] and *McDonald v. City of Chicago*[172] as cases exemplifying the possibility of such relief,[173] it is difficult to imagine how plaintiffs would achieve standing to request such remedies when dealing with the kinds of violations most commonly alleged in constitutional tort litigation (for example, police misconduct and harassment). Unlike political lobbying groups confronting a federal regulator, or a plaintiff carefully chosen to bring impact litigation against long-standing city policies, victims of police abuse are rarely forewarned about their pending constitutional injuries. And even when they enjoy such foreknowledge, the *Lyons* requirement that they show a reasonable probability of once again being subjected to the alleged harm frequently constitutes an insurmountable obstacle to standing.[174]

3. Suppression

The defensive assertion of constitutional rights at suppression hearings triggered by criminal prosecutions is deficient in two respects:

First, and most important, certain kinds of constitutional injuries infrequently result in the prosecution of victims and would therefore be inadequately addressed by suppression hearings. As Dean Jeffries explains,

168. *See* Monell v. Dep't. of Soc. Servs. of N.Y., 436 U.S. 694 (1978).

169. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 394–95 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988).

170. *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350 (2011); *see also The Supreme Court, 2010 Term—Leading Cases, Scope of Municipal Liability*, 125 HARV. L. REV. 331 (2011).

171. 130 S. Ct. 876 (2010).

172. 130 S. Ct. 3020 (2010).

173. *See* Camreta v. Greene, 131 S. Ct. 2020, 2044 (2011) (Kennedy, J., dissenting).

174. *See* Jeffries, *supra* note 58, at 132–33 ("A plaintiff has to show not merely that the defendant is engaged in unconstitutional conduct likely to cause identifiable future harm, but rather that foreseeable future misconduct will injure *this* plaintiff individually.").

these cases "include what is arguably the greatest challenge in all the law of constitutional remedies—inhibiting the abusive and excessive use of force by law enforcement . . . [and] searches and arrest not aimed at successful prosecution, but rather at the assertion of police authority or (what may be perilously close to the same thing) police harassment."[175]

Second, constitutional law forged in the crucible of criminal trials will look very different than law crafted in civil litigation. Professor Greabe describes the exclusionary rule as a sword of Damocles in this context,[176] echoing another commentator's fear that "judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated."[177] Professor Daryl Levinson has captured this relationship between rights and remedies under the heading of remedial deterrence: "We should expect that raising the 'price' of a constitutional violation by enhancing the remedy will, all things being equal, result in fewer violations. The primary method available to courts for lowering the number of violations is to pare back the constitutional right."[178] Since exclusion in a criminal trial typically "costs" more than the articulation of a prospective rule in a § 1983 or *Bivens* suit, judges may think differently about finding new rights in light of each remedy, and thus take a narrower view while elaborating constitutional law in criminal cases.

This focus on the institutional context in which rights are elaborated suggests that the substitution of criminal law for civil litigation would powerfully affect the scope of constitutional rights. For example, on one hand, Professor Jennifer Laurin has persuasively shown that "nominally identical criminal procedure rights take on different contours in the criminal and civil realms," since judges dealing with *Miranda*, *Brady*, and suggestive identification claims regularly "limit[ ] the availability of civil relief for what would undoubtedly be deemed a constitutional violation in the criminal context."[179] On the other hand, Professor Leong has recently demonstrated that "civil plaintiffs are *more* likely to succeed in advocating an expansive view of the Fourth Amendment than are their criminal counterparts."[180] This civil/criminal divide suggests that criminal trials are not interchangeable with § 1983 with regard to rights-creation. It also raises the possibility that abandonment of civil-side elaboration will produce a corpus of regulation poisoned by the shadow of an exclusionary rule that has no rightful place in shaping civil liability.

The demonstrable inadequacy of these "alternative dynamics" as a source of constitutional elaboration may nevertheless fail to stop some members of

175. *Id.* at 135–36.

176. Greabe, *supra* note 163, at 433.

177. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994).

178. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889 (1999).

179. Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1006 (2010).

180. Nancy Leong, *Making Rights*, 91 B.U. L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719774 (emphasis added).

the Court from invoking them to justify abandonment of *Pearson* discretion. If that were to happen, the inevitable result would be a damaging cutback in the creation of new rights and a shift toward regulations disfigured by exposure to the exclusionary rule. The best path forward is therefore refinement of status quo doctrine, which represents a fundamentally reasonable, effective, and practical compromise between the need to elaborate new rights and the dangers of "bad" law. That said, as we explain in the next section, minor reform could go a long way toward addressing the most forceful criticism of qualified immunity doctrine that remains post-*Camreta*: strategic judging.

D. Structuring Discretion: The Best Path Forward

The status quo's superiority to a modification that would strip courts of discretion to issue constitutional determinations after finding qualified immunity does not render it immune to criticism. As we argued in Part I, *Pearson* discretion raises the troubling possibility that judges will feel free—or even incentivized—to act strategically when deciding whether to reach the merits. *Camreta* took an important step toward addressing this issue, but more work remains to be done to structure *Pearson* discretion and thereby secure its legitimacy. In this section, we suggest the outline of one possible reform to achieve this goal.

Camreta has at least partially resolved the issue of the reviewability of decisions to reach the constitutional merits after granting qualified immunity. It did so by glossing *Pearson* to limit discretion. In *Pearson*, Justice Alito provided a litany of criticisms of the *Saucier* mandate, but touched only briefly on the reasons why a lower court might opt to decide the constitutional question where there is a finding of qualified immunity.[181] Nevertheless, *Pearson* described the *Saucier* sequence as "often appropriate," "often beneficial," and, in the context of cases where qualified immunity is unavailable, "especially valuable."[182] *Camreta*, in contrast, suggests a presumption *against* following the *Saucier* protocol—which it describes as "advantageous" only in "select circumstances."[183] Conceding that the "regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo,"[184] the opinion nevertheless insists that the Court's "usual adjudicatory rules suggest that a court *should* forbear resolving . . . constitutional questions in advance of the necessity of deciding them."[185] *Camreta* then describes *Pearson*'s litany of criticisms of the *Saucier* mandate as not just reasons for allowing courts to skip to the immunity question, but as "a range of circumstances in which courts should

181. 555 U.S. at 234–36.
182. *Id.* at 236.
183. Camreta v. Greene, 131 S. Ct. 2020, 2031 (2011).
184. *Id.* at 2024 (citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998)).
185. *Id.* at 2031 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988)).

address *only* the immunity question."[186] Henceforth, courts may interpret this language as justifying review and reversal of the decision to reach *Saucier*'s second step under the circumstances listed in *Pearson*.

This new rule may prompt confusion because of *Camreta*'s lack of specificity in distinguishing between *Pearson*'s criticism of mandatory *Saucier* analysis and *Pearson*'s articulation of situations under which it is inappropriate to reach the merits after finding qualified immunity. Because the *Pearson* Court was describing the reasons for its retreat from *Saucier* rather than articulating a standard or rule for when a court should reach the merits where the defendant is immune, *Pearson* does not set forth a clear test. Indeed, upon closer scrutiny, several of the considerations mentioned in *Pearson* should not be incorporated into *Camreta*'s new limit on discretion—either because they would conflict with *Camreta*'s purpose of maintaining *Pearson* discretion or would exacerbate strategic behavior.

For example, concerns about "expenditure of scarce judicial resources" and "wast[ing] the parties' resources" are omnipresent in any litigation and, if applied as a mandatory bar to reaching the merits, would effectively end *Pearson* discretion.[187] These critiques are therefore best understood as focused solely on mandatory *Saucier* review, not the exercise of post-*Pearson* discretion. So too *Pearson*'s observations that "[t]he lower courts sometimes encounter cases in which the briefing of constitutional questions is woefully inadequate," giving rise to "a risk of bad decisionmaking."[188] If bad briefing were interpreted as a post-*Camreta* bar to reaching the merits, the risk of strategic behavior by parties aimed at preventing constitutional rulings would be significantly increased.

The new *Camreta* bar on reaching constitutional merits after finding immunity should therefore be understood to only incorporate *Pearson*'s discussion of four scenarios: (1) cases where "the constitutional question is so fact-bound that the decision provides little guidance for future cases"; (2) cases where "it appears that the question will soon be decided by a higher court"; (3) cases where the constitutional issue rests "on an uncertain interpretation of state law"; and (4) cases where "the precise factual basis for the plaintiff's claim or claims may be hard to identify."[189] The remainder of *Pearson*'s critique of *Saucier* is inapplicable either for the reasons stated above or because that critique provides little more than a general reason for courts to be reluctant to reach the merits after finding immunity.[190]

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186. *Id.* at 2032 (emphasis added). (describing *Pearson*'s criticisms of the *Saucier* mandate as "factors courts should consider" to determine whether to reach the merits question (citing *Pearson*, 555 U.S. 223, 236–42 (2009))).

187. *Pearson*, 555 U.S. at 237.

188. *Id.* at 239.

189. *Id.* at 238–39.

190. For example, *Pearson* also discusses the avoidance canon, concerns about reviewability, and scenarios in which the judge fears that he or she will not devote sufficient care to the constitutional determinations. *See id.* at 238–41. These considerations may inform the exercise of *Pearson* discretion, but it would be nonsensical to include them as an

Although *Camreta*'s new standard moves qualified immunity doctrine in the right direction by limiting opportunities for purely strategic use of *Saucier*, we favor a more formalized standard to structure the discretion of the lower courts. We believe that appellate courts ought to provide for review, under an abuse of discretion standard, of the decision to "reach[ ] beyond an immunity defense to decide a constitutional issue."[191] Under such a regime, courts would be required to set forth reasons supporting their exercise of discretion before using the *Saucier* protocol. This decision would then be upheld only upon a showing that the court had an adequate reason for doing so. This approach would operate within the significant post-*Camreta* remainder of judicial discretion to create a measure of regularity and uniformity. It would also help to cabin the potential for strategic behavior described and criticized in Part I.

The principal determinant of a decision to reach the merits after finding qualified immunity ought to be the availability of adequate opportunities for constitutional elaboration elsewhere. As we explained above, certain classes of § 1983 and *Bivens* constitutional injuries are particularly ill-suited to development through alternative dynamics. Moreover, requiring judges to explain why other vehicles of elaboration do not suffice will help to focus limited judicial resources on the class of claims most seriously in need of merits determinations. In addition to this main consideration, our proposed standard of review would include such factors as the importance of the constitutional issue, the frequency with which it has been invoked or will likely be invoked again, and the extent to which government officials lack adequate guidance from circuit law.

This approach borrows from Dean Jeffries's more radical proposal to disaggregate constitutional tort law by recognizing that the Court's "unified-field theory of qualified immunity" was partially broken by *Camreta* and would benefit from further disaggregation at the second step of discretionary *Saucier*.[192] Whereas Dean Jeffries champions the creation of different qualified immunity defenses for different kinds of violations,[193] we emphasize that different kinds of alleged violations merit different treatment with respect to *Pearson* discretion because allied doctrines of municipal liability, suppression, and injunctive relief vary in their success at securing constitutional elaboration. A standard of review that incorporates this insight could focus discretion toward achieving the underlying purposes of *Pearson* discretion while also limiting strategic behavior. A further advantage of this approach is that it would facilitate intelligent discussion between the judge and parties regarding the appropriateness of a constitutional ruling in the event that the defendant is found to enjoy qualified immunity. These benefits are worth the cost of requiring judges

absolute bar to reaching the constitutional merits because doing so would effectively end the discretion that *Camreta* clearly assumes it is preserving.

191. *Camreta*, 131 S. Ct. at 2032.

192. John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 264 (2000).

193. *See id.* at 279–86.

who decline to reach the merits to explain that decision, however briefly, in anticipation of potential appellate review—particularly in light of our legal system's norm disfavoring unaccountable discretion when dealing with important constitutional questions.

CONCLUSION

In a series of cases stretching across *Harlow*, *Saucier*, *Pearson*, and *Camreta*, the Court has fashioned a procedural framework that empowers courts to regulate public officials by deciding the merits of constitutional claims even as they extend qualified immunity to official conduct that does not violate a clearly established right. Many of the most serious criticisms of this regime that remained after *Pearson* have been resolved by *Camreta*. Nevertheless, potent forces have begun to align against allowing *any* merits determinations in cases where the defendant has qualified immunity. Thus, the survival of *Pearson* discretion—which is of vital importance to the development of constitutional law that protects individual rights and defines the limits of official power—may be in jeopardy unless the Court reaffirms its commitment to robust mechanisms of constitutional elaboration and refines the rules governing judicial discretion. Such refinements may help reassure critics and secure the fundamentally workable status quo against those who would abandon constitutional elaboration to a dangerously inadequate set of alternative procedures. As the Court stares into permanent limbo, and is urged by some of its members that all will be fine if it steps into that abyss, we hope that it chooses wisely.