SAYING WHAT THE LAW IS: HOW CERTAIN LEGAL DOCTRINES IMPEDE THE DEVELOPMENT OF CONSTITUTIONAL LAW AND WHAT COURTS CAN DO ABOUT IT

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Abstract

It has long been the province of the judicial branch to say what the law is, particularly in the area of constitutional interpretation. However, over the past few decades Congress and the Supreme Court have adopted various legal doctrines, including the good faith exception to the exclusionary rule, the habeas corpus standard of review contained in the Antiterrorism and Effective Death Penalty Act (AEDPA), and the doctrine of qualified immunity applicable in civil rights actions, which impede courts' ability to fulfill their role of saying what the Constitution means.

This article discusses the manner in which these doctrines impede the development of constitutional law. It then offers suggestions on how courts might overcome the problem. In particular, it encourages courts to continue deciding the constitutional issues presented, even if the doctrines in question preclude courts from granting a remedy in the specific case before them. Failure to do so will result in the stagnation of constitutional law and cause harm to future litigants seeking the protections of the Constitution.

Table of Contents

I. GOOD FAITH 2
II. AEDPA 3
III. QUALIFIED IMMUNITY 6
IV. PRESERVING COURTS' LAW DEVELOPMENT FUNCTION 8

Since the days of John Marshall, it has been "the province and duty of the judicial department to say what the law is."[1] Particularly in the area of constitutional law, the federal courts have long claimed the authority—independent of the other branches of the federal government and of the state judiciary—to enforce the Constitution's requirements. Further, in interpreting the Constitution, courts have historically sought to define individual rights as clearly as possible so as "to place government officials on notice that they ignore such . . . rights at their peril."[2]

In recent years, however, the Supreme Court and Congress have promulgated a number of rules that have made it harder for courts to develop constitutional law or even to say what the

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

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

law is. Further, lower federal courts have done less than they might to overcome the problem. The doctrines in question include the good faith exception to the exclusionary rule; the habeas corpus standard of review contained in the Antiterrorism and Effective Death Penalty Act (AEDPA); and, to a lesser extent, the doctrine of qualified immunity applicable in civil rights actions. Our purpose in this article is not to debate the merits of these doctrines, which in any event are here to stay, but rather to explore how they impede the development of constitutional law and how federal courts might constructively address the problem.

I. GOOD FAITH

We begin with the good faith doctrine. Courts developed the doctrine in reaction to the exclusionary rule, which, generally speaking, bars the admission of evidence obtained in violation of the defendant's constitutional rights. In *Weeks v. United States*, the Supreme Court first applied the rule in federal criminal prosecutions.[3] The decision engendered much opposition, and some argued that the cost of depriving federal prosecutors of evidence outweighed the benefit of deterring unlawful police conduct. The grumbling increased when the Supreme Court extended the rule to state prosecutions.[4]

Some suggested that courts should create an exception to the rule allowing the admission of unlawfully obtained evidence if the police acted in "good faith" in acquiring it. In *United States v. Leon*, the Supreme Court adopted the good faith exception in the search warrant context, requiring courts to admit evidence obtained pursuant to a warrant subsequently determined to be invalid, as long as the officer reasonably relied on it.[5] The Court suggested that an officer's decision to seek a warrant was prima facie evidence that the officer had acted in good faith, and that the defendant could obtain suppression only if the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit, wholly abandoned her neutral, detached judicial role, or approved the warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.[6]

The *Leon* Court denied that its holding would "preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state,"[7] noting that "nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue."[8] Notwithstanding the Court's denial, the good faith doctrine has hindered the development of Fourth Amendment law. Knowing that it is unlikely that resolution of the probable cause issue will affect the admissibility of the evidence in question, courts commonly bypass probable cause and proceed directly to good faith.[9] Indeed, some courts have flipped the two concepts and address good faith first as a matter of course.[10]

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3 Weeks v. United States, 232 U.S. 383, 391-92 (1914).

4 *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

5 United States v. Leon, 468 U.S. 897, 913 (1984).

6 *Id.* at 923 (quoting Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring)).

7 *Id.* at 924.

8 *Id.* at 925.

9 *See* United States v. Perez, 393 F.3d 457, 460 (4th Cir. 2004) ("Assuming without deciding that the district court correctly concluded the search warrant was invalid for lack of probable cause, we exercise our discretion to proceed directly to the question of good faith."); United States v. Carpenter, 341 F.3d 666, 668-69 (8th Cir. 2003) (assuming that the warrant was unsupported by probable cause and proceeding to analyze good faith).

By avoiding the probable cause issue, federal courts fail to satisfy their duty to say what the law is and fail to provide guidance to the police officers, court commissioners and magistrate judges whose job it is in the first instance to present and approve warrant applications. Although "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules,"[11] federal courts can nevertheless provide certain benchmarks. For instance, in resolving motions to suppress, courts can provide guidance on the specificity of information about the alleged law-breaking, the reliability of any informants who provided information, and the timeliness of the information needed to pass muster.

A related problem with the doctrine is that in determining good faith, courts often fail to employ an objective standard. In fact, it is not uncommon for courts determining good faith to ask how a police officer who relies on the probable cause determination of a judicial officer trained in the law can ever act unreasonably.[12] Courts that apply the doctrine in this fashion ignore the fact that even people with law degrees can reach unreasonable legal conclusions.[13] Thus, courts that only apply *Leon* tell us nothing about the requirements of the Fourth Amendment and often very little about the requirements of the good faith doctrine, and constitutional law stagnates accordingly.

II. AEDPA

The AEDPA standard under which federal courts review state court decisions in habeas corpus actions causes the same problem; it also discourages courts from saying what the law is and thus thwarts the development of constitutional law. As is pertinent here, AEDPA authorizes federal courts to grant a writ of habeas corpus only if the state court decision "involved an unreasonable application[] of clearly established Federal law."[14]

In *Williams v. Taylor*, a sharply divided Supreme Court held "that an *unreasonable* application of federal law is different from an *incorrect* application."[15] The Court went on to say that "[u]nder § 2254(d)(1)'s 'unreasonable application' clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant

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See also United States v. Capozzi, 347 F.3d 327, 331-32 (1st Cir. 2003) ("Because we regard the district court's *Leon* ruling as sound but its probable cause ruling as more controversial, we proceed directly to the district court's ruling that evidence of the gun was admissible because [the officer] obtained the warrant in good faith.").

10 United States v. Cherna, 184 F.3d 403, 407 (5th Cir. 1999).

11 Illinois v. Gates, 462 U.S. 213, 232 (1983).

12 *See, e.g.*, United States v. Simpkins, 914 F.2d 1054, 1058 (8th Cir. 1990); United States v. Martin, 833 F.2d 752, 756 (8th Cir. 1987) ("When judges look at the same affidavit and come to differing conclusions, a police officer's reliance on that affidavit must, therefore, be reasonable.").

13 *See* Williams v. Taylor, 529 U.S. 362, 409-10 (2000) (stating, in the habeas context, that the fact that a judge somewhere in the United States applied federal law as did the state court does not necessarily make the state court's decision reasonable); *id.* at 378 (opinion of Stevens, J.) (stating that virtually all judges occasionally "make decisions that in retrospect may be characterized as 'unreasonable'"). *See also* United States v. Paisley, 957 F.2d 1161, 1167 (4th Cir. 1992) (stating, under the Equal Access to Justice Act, that the fact that "one or more presumably reasonable Article III judges who at some stage of the litigation found merit in" the government's position does not necessarily make that position reasonable).

14 28 U.S.C. § 2254(d)(1) (2000).

15 Williams v. Taylor, 529 U.S. 362, 410 (2000).

state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[16]

Since *Williams*, the lower federal courts have applied their own gloss to the AEDPA standard, suggesting that a state court's decision is unreasonable only if it falls "well outside the boundaries of permissible differences of opinion."[17] Thus, in order to grant habeas relief under AEDPA, the federal court must find the state court decision under consideration not only wrong, but unsupportable. The standard thus requires prisoners who have been convicted in violation of the Constitution to remain in prison. In addition, it does not require federal courts to determine whether state court decisions are correct or incorrect, or even to say what the law is.[18]

The Supreme Court's recent decision in *Carey v. Musladin* provides a good example.[19] In that case, the circuit court of appeals granted habeas relief, concluding that the defendant, charged with murder, was denied a fair trial when the victim's family came to court wearing buttons displaying the victim's image.[20] The Supreme Court noted that it had previously ruled that certain courtroom practices could deprive a defendant of a fair trial.[21] However, it noted that none of those decisions specifically dealt with the conduct of private persons in the courtroom, as opposed to state actors.[22] It further noted that the lower federal courts had split on the issue.[23] The Court thus reversed in a terse opinion, stating:

> Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). No holding of this Court required the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.[24]

The Court did not condone the practice of allowing spectators to wear buttons containing the victim's photo. Nor did it state that such practice was constitutionally permissible. In fact, it said nothing at all about the legality of the practice.[25] Thus, despite the fact that the Supreme

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16 *Id.* at 411.

17 Hardaway v. Young, 302 F.3d 757, 762 (7th Cir. 2002).

18 To the extent that AEDPA was designed to require greater respect for state courts, as one commentator has noted, "I think it is doubtful that state judges really prefer that federal courts spend their time asking not whether state court judgments are wrong, but whether they are *unreasonably* wrong." Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1756 (2000).

19 Carey v. Musladin, 127 S. Ct. 649 (2006).

20 *Id.* at 651-52.

21 *Id.* at 653 (citing Estelle v. Williams, 425 U.S. 501, 503-506 (1976); Holbrook v. Flynn, 475 U.S. 560, 568 (1986)).

22 *Id*. at 653.

23 *Id.* at 654.

24 *Id.*

25 In separate concurring opinions, Justices Kennedy and Souter discussed the merits. Justice Kennedy opined that the conduct of spectators could deprive a defendant of a fair trial but did not do so in the instant case. *Carey*, 127 S. Ct. at 656-67 (Kennedy, J., concurring). Justice Souter seemed less certain. *Id.* at 657-58 (Souter, J., concurring). Helpful as these opinions may be, none provide any clear guidance for the future. Justice Stevens concurred separately to lament the Court's AEDPA jurisprudence, which allows state courts to ignore the

Court of the United States, whose primary purpose is to develop the law and provide guidance to the lower courts, took the time to address an issue, they left the law pretty much where it was before they granted certiorari.

Jackson v. Litscher provides another example.[26] In *Litscher* the defendant, during custodial interrogation, said that he wanted a lawyer "right now."[27] The interrogating officer responded that "he could not obtain an attorney for him and that a public defender would be assigned when charges were issued."[28] This statement was false because, under Wisconsin law, the officer could have obtained a public defender for the defendant at that time.[29] After some additional back and forth, the defendant waived his *Miranda* rights and incriminated himself. Relying on *Miranda*'s admonition that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege,"[30] the district court found the waiver invalid and granted habeas relief. The district court distinguished *Duckworth v. Eagan* because, in that case, although the Supreme Court noted that the Constitution does not require that lawyers be producible on call, the Court also remarked that the officer had "accurately described the procedure for the appointment of counsel in Indiana," and thus had not misled the suspect into a waiver.[31] In *Litscher*, conversely, the officer provided false information about the procedures for obtaining counsel.[32]

The Seventh Circuit reversed, stating that "[a]lthough we share many of the district court's concerns about Jackson's waiver of his *Miranda* rights, we find that the district court exceeded the limits imposed on federal habeas review, and we therefore reverse its grant of Jackson's petition."[33] The court noted that the Fifth Circuit had recently held that "a misstatement of law does not, in and of itself, make a *Miranda* [waiver] involuntary,"[34] and concluded:

> We do not adopt the conclusions of the Fifth Circuit here, nor do we determine whether, in our view, the detective's statements violated the Fifth Amendment. Instead, our opinion is limited to the only question that matters under § 2254(d)(1)—whether [the] state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law. Given the similarities between this case and the Supreme Court's decision in *Duckworth*, and the lack of clarity regarding the effect of an officer's misstatement on the voluntariness of a *Miranda* waiver, we cannot find that the conclusion of the Wisconsin Court of Appeals lies well outside the boundaries of permissible differences of opinion.[35]

Court's reasoning so long as they do not contravene the Court's holdings. *Id.* at 654-56 (Steven, J., concurring).

[26] Jackson v. Litscher, 194 F. Supp. 2d 849, 852 (E.D. Wis. 2002) (Adelman, J.), *rev'd*, 348 F.3d 658 (7th Cir. 2003).

[27] *Id*. at 852.

[28] *Id.*

[29] *Id.*

[30] Miranda v. Arizona, 384 U.S. 436, 476 (1966).

[31] Duckworth v. Eagan, 492 U.S. 195, 204 (1989).

[32] *Litscher*, 194 F. Supp. 2d at 852.

[33] Jackson v. Frank, 348 F.3d 658, 659 (7th Cir. 2003).

[34] *Id.* at 665 (discussing Soffar v. Cockrell, 300 F.3d 588 (5th Cir. 2002)).

[35] *Frank*, 348 F.3d at 665 (internal citations and quotation marks omitted).

Can a police officer in the Seventh Circuit now mislead a suspect in order to induce a waiver of *Miranda* rights? The answer is that we do not know, because under AEDPA, the court did not have to say.[36]

Carey and *Frank* also illustrate a related AEDPA problem—that federal courts will be less likely to challenge decisions of other federal courts that are unfriendly to constitutional rights, and as a result, the content of our constitutional rights will tend to be reduced to the lowest common denominator. Because the AEDPA standard enabled the *Frank* court to avoid saying what the law is, the court did not discuss the Fifth Circuit's decision in any depth or even state clearly whether it agreed or disagreed with it. Why criticize the decision of a sister circuit when you don't have to? Similarly, the *Carey* Court relied on the split among lower federal courts to support its AEDPA ruling, notwithstanding the fact that resolving such splits is one of the reasons the Supreme Court exists. The uncertainty of the law, rather than presenting an opportunity for the Court to provide clarity, represented an easy out under AEDPA.

If courts refrain from criticizing decisions hostile to constitutional rights, the result will be a decline in the level of our constitutional protections (as well as fewer conflicts for the Supreme Court to resolve, should the Court choose to resolve them). Although in *Williams* the Supreme Court cautioned that, "[t]he federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case,"[37] its admonition is likely to have little effect. Courts have already defined reasonableness broadly and, as they have in the good faith context, are likely to factor the views of even one judge into the reasonableness calculus.

III. Qualified Immunity

The doctrine of qualified immunity also represents a potential threat to the law development function of the federal courts. The doctrine developed in a manner similar to the exclusionary rule. In *Monroe v. Pape*, the Supreme Court expanded the scope of civil rights actions under § 1983, holding that the phrase "under color of state law" was intended to include actions taken by state officials without state approval or authorization.[38] The decision invigorated § 1983 as a means of obtaining relief for official misconduct. As a result, the Court became concerned that state officials might become fearful of lawsuits and perform their duties less effectively. Thus, in *Pierson v. Ray*, it authorized § 1983 defendants to invoke the defense that they acted in good faith.[39] In subsequent cases such as *Scheuer v. Rhodes* and *Wood v. Strickland*, the Court clarified that the defense had two prongs: (1) the official must have had reasonable grounds to believe that his actions were constitutional, and (2) he must have acted in good faith.[40] In *Harlow v. Fitzgerald*, the Court modified the test to discard the subjective good

[36] Similar grudging denials of habeas relief will not be uncommon under AEDPA. *See, e.g.*, Locke v. Cattell, 476 F.3d 46, 54 (1st Cir. 2007) ("If this case were before us on de novo review, we might well reach a different result. . . . Reluctantly, however, we conclude that [the] holding by the state court is not an unreasonable application of clearly established federal law.").

[37] *Williams*, 529 U.S. at 409-10.

[38] Monroe v. Pape, 365 U.S. 167, 184-87 (1961).

[39] Pierson v. Ray, 386 U.S. 547, 555-57 (1967).

[40] Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974); Wood v. Strickland, 420 U.S. 308, 322 (1975).

faith prong and established a rule that protected governmental officials from liability for money damages so long as the challenged conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware.[41]

In subsequent decisions, the Court held that for a constitutional right to be clearly established, its contours had to be sufficiently clear so that a reasonable official would understand that what he is doing violates that right. The qualified immunity inquiry was to be undertaken in light of the specific context of the case, not as a broad general proposition.[42] This did not mean that an official was protected unless the very action in question had previously been held unlawful. In light of preexisting law, the illegality had to be apparent.[43]

However, in *Brosseau v. Haugen*, the Court clarified that unless the violation was "obvious" the plaintiff must show that the right was clearly and particularly established in light of prior cases.[44] In *Brosseau*, the plaintiff (Haugen) was shot in the back while fleeing a police officer in his vehicle. He claimed that *Tennessee v. Garner*,[45] which involved the shooting in the back of a fleeing burglary suspect, clearly established his right to be free from the use of deadly force. The Court disagreed, holding that because Haugen was "disturbed[,] set on avoiding capture through vehicular flight, [and other] persons in the immediate area [were] at risk from that flight," *Garner* did not control.[46] *Garner* was different, the Court said, because the suspect in that case fled on foot and was likely unarmed. Thus, *Brosseau* illustrates how important it is for a § 1983 plaintiff facing a qualified immunity defense to find case law on point.

To its credit, the Court has attempted to ensure that its qualified immunity jurisprudence does not stymie the development of the law. It has done this by directing courts confronted with a qualified immunity defense to first ask whether the officer's conduct violated a constitutional right. Only if they answer this question affirmatively should they proceed to the second question: whether at the time of the challenged conduct the right was clearly established.[47] The Court explained:

> This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.[48]

Although in rare situations courts "bypass *Saucier*'s first step and decide only whether [the alleged right] was clearly established at the time,"[49] lower federal courts generally follow *Saucier*'s sequential process.

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[41] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[42] Saucier v. Katz, 533 U.S. 194, 201 (2001).
[43] Hope v. Pelzer, 536 U.S. 730, 739 (2002).
[44] Brosseau v. Haugen, 543 U.S. 194, 199-200 (2004).
[45] Tennessee. v. Garner, 471 U.S. 1 (1985).
[46] *Brosseau,* 543 U.S. at 200.
[47] *Saucier*, 533 U.S. at 201.
[48] *Id.*
[49] Motley v. Parks, 432 F.3d 1072, 1078 (9th Cir. 2005) (doing so where the Supreme Court had the right under consideration at the time); *see also* Ehrlich v. Town of Glastonbury, 348 F.3d 48, 60 (2d Cir. 2003); Tremblay

Nevertheless, some judges have called for greater freedom to bypass the first question when it presents a difficult issue of constitutional law and resolution of the second question will dispose of the case.[50] While allowing courts to decide the "easy" question and avoid the hard one might make sense from a judicial economy standpoint, it would impede the development of constitutional law. If courts regularly decided the question of immunity before determining whether the defendant had violated a constitutional right, they would establish few such rights. And *Brosseau* makes clear how important it is to clearly establish constitutional rights.

IV. PRESERVING COURTS' LAW DEVELOPMENT FUNCTION

As we have seen, several legal doctrines—particularly the good faith doctrine and the AEDPA standard of review—impede the development of constitutional law. However, lower federal courts can overcome the problem, and it is important that they do so.

The rules we have discussed are limits on a federal court's power to grant a certain remedy—suppression of evidence, monetary damages, release from state custody—not on its power to say what the law is. A court can decide constitutional issues and ensure the development of constitutional law, even if its ruling does not immediately ensure the benefit to the litigant claiming a violation of his rights. By doing so, courts do not do an end run around the rule against advisory opinions or the doctrine discouraging courts from deciding constitutional issues if other grounds for decision are apparent. Rather, courts appropriately may rule on constitutional issues presented by litigants with standing to raise them, which are analytically anterior to questions relating to remedy.[51]

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v. McClellan, 350 F.3d 195, 200 (1st Cir. 2003) (both concerning issues of state law).

[50] *See, e.g.*, Lyons v. City of Xenia, 417 F.3d 565, 580-84 (6th Cir. 2005) (Sutton, J., concurring); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275-81 (2006); *see also Brosseau*, 543 U.S. at 201-02. (Breyer, J., concurring) ("I am concerned that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision ([e.g.], qualified immunity) that will satisfactorily resolve the case before the court."); County of Sacramento v. Lewis, 523 U.S. 833, 859 (1998) (Stevens, J., concurring) (stating that when the constitutional "question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions"). Indeed, a majority of the Justices have, at one time or another, suggested that lower courts should not have to answer the questions in order. *Lyons*, 417 F.3d at 581 (Sutton, J., concurring) (collecting opinions). In *Brosseau*, the Court itself declined to address the constitutional question, instead deciding the case solely on qualified immunity grounds. The Court nevertheless stated that it had "no occasion . . . to reconsider our instruction in *Saucier* . . . that lower courts decide the constitutional question prior to deciding the qualified immunity question." *Brosseau*, 543 U.S. at 198 n. 3. The Court recently declined once again to revisit the *Saucier* approach, Scott v. Harris, No. 05-1631, 2007 U.S. LEXIS 4748, at *10 n.4 (U.S. Apr. 30, 2007), despite Justice Breyer's suggestion that it do so. *Id.* at *26-7 (Breyer, J., concurring).

[51] *See* Leval, *supra* note 50, at 1260-63. Judge Leval notes various concerns with such an approach: courts act more like lawmakers than arbiters of a dispute; the parties may not vigorously argue issues that do not affect the bottom line; and judges may not be as careful if their statements do not constitute the holding of the case. However, for the reasons stated in the text, we do not believe such concerns outweigh the benefits of courts fulfilling their constitutional role. Further, we believe these concerns to be overstated. Courts cannot address a constitutional issue absent a party with standing to raise it based on a concrete factual situation. Inadequate briefing occurs not infrequently on all sorts of issues, and it is not beyond the court's power to direct the parties to discuss an issue further. Finally, a court following the approach we suggest will, by definition, treat its discussion of the anterior constitutional issue just as seriously as it does the matter of remedy.

Thus, in addressing Fourth Amendment claims involving search warrants, courts should employ the same two-step analysis as in qualified immunity cases. First, they should decide whether the warrant was supported by probable cause. If so, they need not consider good faith. If they find an absence of probable cause, they must then consider whether the police officer could have reasonably relied on the warrant. Because the probable cause standard is itself essentially one of reasonableness, it is often difficult to identify some sub-constitutional standard of good faith, while avoiding the "any reasonable judge" pitfall discussed above. However, courts can avoid this problem by using the qualified immunity methodology. That is, if courts have previously found a certain quantum of information insufficient to support a finding of probable cause in a materially similar case, officers may not reasonably rely on similar or lesser information in securing and executing a warrant. This is so because courts have "clearly established" that such information is insufficient. Although under this approach the floor may be set lower than the Fourth Amendment requires, and law enforcement will still get one "free" violation, courts will at least supply some guidance and meaningful enforcement of the Constitution.

In habeas cases, federal courts should employ a similar approach, deciding first whether the state court conviction involved a violation of the petitioner's constitutional rights before turning to the question of whether they may grant relief under § 2254(d)(1) because the state court's decision was also unreasonable. In *Lockyer v. Andrade*, the Supreme Court stated that habeas courts need not adopt this or any other particular methodology under § 2254(d)(1), but it did not forbid this approach either.[52] As in *Leon*, the Court left lower federal courts free to develop the law.

Finally, courts should resist suggestions to relax the two-step procedure set forth in *Saucier* for determining qualified immunity. Courts must continue determining first whether the defendant violated a constitutional right. If they do not, they will fail to develop the law and clearly establish fewer constitutional rights.[53]

If we as a nation care about our Constitution, judges must continue to define and develop its guarantees, notwithstanding any rules limiting the available remedies. It is the province of the judicial branch to say what the law is today, and it must continue to do so if that document is to have meaning tomorrow.

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[52] Lockyer v. Andrade, 538 U.S. 63, 71 (2003).

[53] Judge Leval is particularly harsh in his criticism of the *Saucier* rule. Leval, *supra* note 50, at 1277-83. He notes that the rule requires litigants and judges to grapple with issues that have no bearing on the outcome, which he considers a "blueprint for the creation of bad constitutional law." *Id.* at 1279. However, his criticism is actually more of an indictment of the qualified immunity doctrine itself. To the extent that the doctrine requires a civil rights plaintiff to cite a prior case on point, the refusal of the federal courts to continue to develop the law will leave future plaintiffs out in the cold, even though the court believes them to be wronged. It is essential, if we as citizens want the full protections of the Constitution, that courts say what the law is. Judge Leval writes that the problem of illegal conduct repeatedly evading judicial review will likely occur only in a narrow range of cases. *Id.* at 1280. The point is debatable. In any event, even if only a handful of persons are affected, it seems worthy of judicial effort to ensure that the Constitution is enforced. Ultimately, a better solution might be to dispense with the qualified immunity doctrine altogether. That way, every decision would have significance, and litigants and judges would not have to go digging through the reporters to find older cases with interchangeable fact patterns. But that is an issue for another day.