DISQUALIFYING THE "CLEARLY ESTABLISHED" TEST: *LOPER BRIGHT*'S IMPLICATIONS FOR QUALIFIED IMMUNITY

*Blake Perry**

Judges, scholars, and policymakers have criticized the Supreme Court's qualified immunity jurisprudence on various legal, historical, and policy grounds. Drawing on the Court's seminal decision in Loper Bright Enterprises v. Raimondo*, this Note adds a new tool to the qualified immunity critic's arsenal. In* Loper Bright*, the Court eliminated* Chevron *deference—the judicial practice of deferring to an agency's interpretation of an ambiguous statute—because identifying statutory ambiguity, the "defining feature" of the* Chevron *doctrine, proved "unworkable." The Court should apply this reasoning to its qualified immunity doctrine, which relies similarly on a clarity test: If no "clearly established" law prohibited an officer's conduct, qualified immunity shields the officer from liability. This clarity test, too, has proved unworkable. Furthermore, the jurisprudential similarities between* Chevron *deference and qualified immunity—both are functional, common law doctrines that promote executive efficiency and temper statutes that protect rights from abuse—support applying* Loper Bright*'s reasoning regarding* Chevron*'s statutory ambiguity test to qualified immunity's "clearly established" test.*

INTRODUCTION

On July 10, 2017, several officers from the Arlington Police Department responded to a 911 call from Gabriel Anthony Olivas.[1] Anthony Olivas reported "that his father was threatening to kill himself and burn down their house."[2] After arriving at the house, the officers found the father, Gabriel Eduardo Olivas, "leaning against a wall and holding a red gas can."[3] Upon seeing the officers, Olivas doused himself with gasoline.[4] Olivas did not appear to have any weapons—

* J.D. Candidate, Notre Dame Law School, 2026. I would like to thank Professor Jeff Pojanowski, Tim Steininger, Simon Brake, Bennett Rogers, and Cecilia Honan for their guidance and feedback throughout the writing process. I would also like to thank my friends on the *Notre Dame Law Review* for their diligent edits. Finally, I would like to thank my family for their continued support of my legal education.

1 Ramirez v. Guadarrama, 3 F.4th 129, 132 (5th Cir. 2021) (mem.) (per curiam).

2 *Id.*

3 *Id.*

4 *Id.*

although he was holding a lighter—and an officer had already blinded Olivas with pepper spray.[5] One officer told the others: "If we tase him, he is going to light on fire."[6] Two officers nonetheless fired their tasers at Olivas, causing him—and the house—to burst into flames.[7] Tragically, Olivas was badly burned and died from his injuries.[8]

Olivas's family sued the officers and the City of Arlington under 42 U.S.C. § 1983, alleging that the officers violated Olivas's Fourth Amendment rights by using excessive force when they tased him.[9] But the officers argued that qualified immunity barred the suit.[10]

Qualified immunity is a common law doctrine that shields government officials from liability when performing their official duties, so long as the officials do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[11] The qualified immunity analysis thus has two prongs: first, whether the official violated a federal constitutional or statutory right, and, second, "whether the right in question was clearly established at the time of the alleged violation."[12] So to prevail on their claim, the plaintiffs here needed to show that the officers used "clearly unreasonable" force that violated the victim's Fourth Amendment rights, *and* that Fifth Circuit precedent "clearly established" that the officers used unreasonable force in these circumstances.[13]

The plaintiffs argued that Fifth Circuit precedent prohibited officers from using deadly force against an individual threatening only himself, especially when the victim does not possess any weapons or threaten the officers and the officers are aware of the potentially fatal consequences of their conduct.[14] So the plaintiffs contended that tasing the victim violated his "clearly established" right against excessive force in these circumstances.[15] But the court determined that relevant precedent did not "clearly establish" the victim's right not to be tased

5 *See id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* at 132, 134. 42 U.S.C. § 1983 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, [or] regulation . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." 42 U.S.C. § 1983 (2018); *see infra* note 38 and accompanying text.

10 *Ramirez*, 3 F.4th at 132.

11 *Id.* at 133 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

12 *Id.* (quoting Pearson v. Callahan, 555 U.S. 223, 232 (2009)); *see infra* Section I.A.

13 *Id.* at 133–34.

14 *See id.* at 134–36.

15 *Id.* at 134.

in these circumstances.[16] The court thus held that the officers were entitled to qualified immunity.[17]

The Fifth Circuit denied the plaintiffs' motion for rehearing en banc.[18] But Judge Willett, joined by Judge Graves and Judge Higginson, dissented.[19] Judge Willett argued that these "particularly egregious facts" established an "obvious" Fourth Amendment violation.[20] He emphasized that a constitutional right is "clearly established" where a "violation is obvious," even when the facts are "novel."[21]

The Supreme Court subsequently denied certiorari.[22] Yet Justice Sotomayor, joined by Justice Breyer and Justice Kagan, dissented, arguing that the victim had a "'clearly established' 'constitutional right not to be tased'" in these circumstances.[23] Justice Sotomayor reasoned that the officers were fully aware of the potentially fatal consequences of tasing the victim, and the officers' safety was not in danger, so the officers' actions violated "clearly established" Fourth Amendment precedent.[24]

This case shows that judges frequently disagree about whether a victim's rights were *clearly* established when analyzing a qualified immunity defense to a § 1983 claim.[25] But this issue—whether law is clear or ambiguous—is not new; it is a frequent source of disagreement among judges.[26] Some judges see ambiguity in all law, while other

---

16 *Id.* at 135–37. The court concluded that the victim "pose[d] a threat of serious physical harm" to the officer and others in the house. *Id.* at 136. The court cited "at least somewhat comparable" cases, *id.* at 135, including a case in which an officer shot an individual with suicidal tendencies who refused to drop the gun he was carrying, and two cases in which officers shot an individual with suicidal tendencies who charged the officers with a knife. *Id.* at 135–36. Yet the court concluded that because those cases did not involve a rights violation, the plaintiffs here could not show a "clearly established" rights violation. *Id.*

17 *Id.* at 137.

18 Ramirez v. Guadarrama, 2 F.4th 506, 507 (5th Cir. 2021) (mem.) (per curium) (denial of rehearing en banc).

19 *Id.* at 516 (Willett, J., dissenting from denial of rehearing en banc).

20 *Id.* at 523 (quoting Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam)); *id.*

21 *Id.*

22 *See* Ramirez v. Guadarrama, 142 S. Ct. 2571, 2571 (2022) (mem.) (denying certiorari).

23 *Id.* at 2572 (Sotomayor, J., dissenting from denial of certiorari) (quoting *Ramirez v. Guadarrama,* 3 F.4th 129, 134 (5th Cir. 2021) (per curiam)).

24 *Id.* (citing *Ramirez,* 2 F.4th at 519 (Willett, J., dissenting from denial of rehearing en banc)).

25 For three additional examples of cases in which judges disagreed about the clarity of relevant precedent, see *infra* Section III.A.

26 *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation,* 129 HARV. L. REV. 2118, 2134–44 (2016) (book review).

judges rarely see ambiguity in the law.[27] Perhaps legal education, which trains lawyers to seek and exploit ambiguity in the law, is to blame.[28] Indeed, lawyers have long faced criticism for their uncanny ability to find ambiguity in seemingly clear law.[29]

On occasion, judges must determine whether relevant law is clear or ambiguous. In some instances, the answer may inform statutory interpretation.[30] Additionally, in two contexts, the Court has incorporated a clarity test into an analytical framework. If precedent does not *clearly* establish a plaintiff's rights, the Court will shield a government official from liability for wronging the plaintiff.[31] And if a federal statute is *ambiguous*, the Court has in recent times deferred to the relevant agency's interpretation of that statute.[32] But the Court discarded that

---

27 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2287 (2024) (Gorsuch, J., concurring) (comparing Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 826 (1990), with Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017)).

28 *See* Kavanaugh, *supra* note 26, at 2139 ("[T]he clarity versus ambiguity question plays right into . . . our professional training. As lawyers, we are indoctrinated from the first days of law school to find ambiguity in even the clearest of pronouncements. It is no accident that the most popular law school exam preparation book is titled *Getting to Maybe*. When we practice law, we look for the ambiguity . . . . What may look clear to everyone else, lawyers argue, is actually not so clear.").

29 John Locke lamented that "a man of an ordinary capacity very well understands a text or a law that he reads, till he consults an expositor, or goes to counsel; who, by the time he [has] explain[ed] them, makes the words signify either nothing at all, or what he pleases." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 10 (2012) (alteration in original) (quoting JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 210 (Kenneth P. Winkler ed., Hackett Publ'g 1996) (1689)).

30 A canon of construction may affect a court's interpretation of an ambiguous statute. *See* Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1507 (2019). For example, if a criminal statute is unclear, courts will invoke the principle of lenity to side with the defendant. *See id.* at 1547*; see also generally* David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523 (2018). Indeed, the Supreme Court has long recognized the common law principle that penal statutes should be construed strictly against the government. *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94 (1820); United States v. Sheldon, 15 U.S. (2 Wheat.) 119, 121–22 (1817); Intisar A. Rabb, *The Appellate Review of Lenity*, 131 HARV. L. REV. F. 179, 180 (2018) (describing how Justice Scalia's textual method of statutory interpretation helped revive the rule of lenity). Or, if a statute raises constitutional concerns, courts will exercise constitutional avoidance to reject interpretations that would render the statute unconstitutional. Re, *supra*, at 1547.

31 *See supra* notes 11–12 and accompanying text.

32 *See, e.g.*, EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 495–96 (2014) (deferring to the Environmental Protection Agency's interpretation of a Clean Air Act provision); Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 47, 60 (2011) (deferring to the Treasury Department's interpretation of a Federal Insurance Contributions Act provision); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 973–74 (2005) (deferring to the Federal Communications Commission's

practice—known as *Chevron* deference—in *Loper Bright Enterprises v. Raimondo*.[33] The Court admitted that "ambiguity" evades identification and application, because it is "impressionistic and malleable."[34] So the Court concluded that the "defining feature of [the *Chevron* doctrine's] framework," the "identification of statutory ambiguity," was "unworkable."[35]

This Note applies the Court's reasoning in *Loper Bright* to qualified immunity. The Court's qualified immunity analysis features a clarity test that is similar to the now-defunct *Chevron* doctrine's statutory ambiguity test. And qualified immunity's clarity test—whether precedent clearly establishes the unlawfulness of an official's conduct—has also proved unworkable. Additionally, there are numerous parallels between the doctrines of *Chevron* deference and qualified immunity. For example, both are judge-made doctrines that seek to balance redress for rights violations with efficient executive functioning. These similarities support the application of *Loper Bright*'s reasoning to qualified immunity.

This Note proceeds as follows. Part I discusses qualified immunity's history and precedent, focusing on the development of the "clearly established" test, and observes various critiques of the Court's qualified immunity jurisprudence. Part II identifies parallels between the Administrative Procedure Act and 42 U.S.C. § 1983, and the doctrines of *Chevron* deference and qualified immunity that developed under these respective statutes, to support Part III's argument that the Court's reasoning in *Loper Bright* discredits qualified immunity's "clearly established" test. Finally, Part IV acknowledges several distinctions between the contexts of *Chevron* deference and qualified immunity that might inform the Court's thinking if it reconsiders qualified immunity's "clearly established" test.

---

interpretation of a Communications Act provision). *But see Loper Bright*, 144 S. Ct. at 2273 (discarding the principle of deference to an agency interpretation of an ambiguous statute).

33 *See Loper Bright*, 144 S. Ct. at 2273.

34 *Id.* at 2270 (citing Swift & Co., Inc. v. Wickham, 382 U.S. 111, 125 (1965)).

35 *Id.*

I. QUALIFIED IMMUNITY: DOCTRINE AND CRITICISM

A. *Qualified Immunity Doctrine*

1. The History and Development of Qualified Immunity

Section 1983 was enacted following the Civil War to provide an enforcement mechanism for the Reconstruction Amendments.[36] Concerned that recently freed slaves, particularly in the South, would still be deprived of their federal constitutional and statutory rights, Congress passed the Act of 1871 (now codified, in part, at 42 U.S.C. § 1983) to provide freed men and women with a cause of action to enforce their rights.[37] This statutory provision, titled "Civil action for deprivation of rights," provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other in any proper proceeding for redress . . . .[38]

Section 1983 does not mention defenses or immunities. But the Court has read into the statute certain immunities that "were so well established in 1871" that the Court "presume[s] that Congress would have specifically so provided had it wished to abolish them."[39] One of these immunities is government officials' "immunity from suits for damages."[40] This immunity emerged at common law to shield public officers "from undue interference with their duties and from potentially disabling threats of liability."[41]

In shaping its § 1983 jurisprudence around this common law principle, the Court has recognized two kinds of immunity for government

36 *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1149–50 (1977).

37 *Id.*

38 42 U.S.C. § 1983 (2018).

39 Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in judgment) (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993)); *see also* Malley v. Briggs, 475 U.S. 335, 339 (1986) ("Although the statute on its face admits of no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976))).

40 Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *159–60 (discussing the "privileges" that public officials enjoy).

41 *Harlow*, 457 U.S. at 806.

officials. Some officials have "absolute immunity"—their "special functions or constitutional status requires complete protection from suit."[42] Legislators acting in their lawmaking capacity, judges acting in their judicial capacity, and certain executive officials—including prosecutors and the President—enjoy absolute immunity.[43] But most executive officials, including law enforcement officers, have only "qualified" (or "good-faith") immunity.[44] As the name suggests, qualified immunity is not absolute. An official will face damages liability for violating a plaintiff's statutory or constitutional rights if the plaintiff's rights were "clearly established" at the time of the officer's conduct—stated differently, if it would have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[45]

Qualified immunity balances competing values: providing citizens with an avenue for redress of rights violations while "protect[ing] officials who are required to exercise their discretion" and "encouraging the vigorous exercise of official authority."[46] When an official abuses his office, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."[47] So law enforcement officials do not receive absolute immunity from suit.[48] But "claims frequently run against the innocent as well as the guilty," and these claims cost both the defendant official and society as a whole.[49] Costs include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[50]

---

42 *Id.* at 807.

43 *Id.*

44 *Id.*

45 *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 11 (2015) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

46 *Harlow*, 457 U.S. at 807 (citing Butz v. Economou, 438 U.S. 478, 504–06 (1978)). Qualified immunity "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009).

47 *Harlow*, 457 U.S. at 814 (citing *Butz*, 438 U.S. at 506); *cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U. S. 388, 410 (1971) (Harlan, J., concurring in judgment) ("For people in Bivens' shoes, it is damages or nothing.").

48 *See Harlow*, 457 U.S. at 814.

49 *Id.*

50 *Id.* (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

So the Court has determined that qualified immunity represents "the best attainable accommodation of competing values."[51]

2. The Mechanics of the "Clearly Established" Test

Qualified immunity analysis works as follows. When a party sues an official under § 1983 for violating the party's rights, the official asserts qualified immunity as an affirmative defense.[52] The court then asks two questions. The first is whether the official violated a federal statutory or constitutional right.[53] The second is "whether the right at issue was 'clearly established' at the time of [the official's] alleged misconduct."[54] If the right at issue was not clearly established, qualified immunity shields the official from liability.[55]

A constitutional or statutory right is "clearly established" when "at the time of the officer's conduct, the law was '"sufficiently clear" that every "reasonable official would understand that what he is doing"' is unlawful."[56] Precedent "must have placed the constitutionality of the officer's conduct 'beyond debate.'"[57] As the Court has explained:

> It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.
>
> The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'' This requires a high "degree of specificity." . . . [C]ourts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." A rule is too general if

51 *Id.* Because qualified immunity seeks to avoid burdening executive activity with litigation, the Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation," certainly before trial. *Pearson*, 555 U.S. at 232 (quoting Hunter v. Bryant, 502 U. S. 224, 227 (1991) (per curiam)). Indeed, "the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that '"insubstantial claims" against government officials [will] be resolved prior to discovery.'" *Id.* at 231–32 (alteration in original) (quoting Anderson v. Creighton, 483 U. S. 635, 640 n.2 (1987)).

52 *See Harlow*, 457 U.S. at 815.

53 *Pearson*, 555 U.S. at 232 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)); *see also* District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018).

54 *Pearson*, 555 U.S. at 232 (quoting *Saucier*, 533 U.S. at 201).

55 *Id.*

56 *Wesby*, 138 S. Ct. at 589 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

57 *Id.* (quoting *Ashcroft*, 563 U.S. at 741).

the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established."[58]

In short, qualified immunity "protects government officials '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.'"[59] "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'"[60] Reflecting the broader theory of qualified immunity, the "clearly established" test aims to balance the "vindication of . . . rights" with "government officials' effective performance of their duties."[61]

3. *Pearson*'s Modification of the Qualified Immunity Analysis

Pearson v. Callahan made the "clearly established" test the linchpin of the Court's qualified immunity analysis. Prior to 2008, the Supreme Court required federal courts to treat the qualified immunity analysis as a two-step test.[62] A court first determined whether the official violated the plaintiff's rights.[63] If so, the court then decided whether the rights were clearly established.[64] In *Pearson*, however, a unanimous Court held that this "rigid order of battle," while "often appropriate," was "no longer . . . mandatory."[65] The Court acknowledged various substantive, procedural, and practical criticisms of the two-step sequence.[66] The Court emphasized that, if a right was not clearly established, the required sequence forced courts to address constitutional questions unnecessary to resolve the case—representing a "puzzling misadventure in constitutional dictum" that contravened judicial restraint.[67] Relatedly, the mandatory two-step procedure

58 *Id.* at 590 (citations omitted) (first quoting *Saucier*, 533 U.S. at 202; then quoting Mullenix v. Luna, 577 U.S. 7, 13 (2015) (per curiam); then quoting Plumhoff v. Rickard, 572 U.S. 765, 779 (2014); and then quoting Anderson v. Creighton, 483 U.S. 635, 641 (1987)).

59 *Pearson*, 555 U.S. at 231 (quoting Harlow v. Fitzgerald, 457 U. S. 800, 818 (1982)).

60 *Wesby*, 138 S. Ct. at 589 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

61 Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in judgment) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)).

62 *Pearson*, 555 U.S. at 232.

63 *Id.*

64 *Id.*

65 *Id.* at 235–36 (quoting Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring)).

66 *Id.* at 234.

67 *See id.* (quoting Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275 (2006)). "Adherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the 'older, wiser judicial counsel "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."'" *Id.* at 241 (quoting Scott v. Harris, 550 U.S. 372, 388 (2007) (Breyer, J.,

undermined a core purpose of qualified immunity—freeing public officials from the burdens of litigation—by forcing officials to bear the additional burdens of "litigating constitutional questions and delays attributable to resolving them."[68]

So the *Pearson* Court held that judges could instead "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[69] The Court nonetheless noted that resolving both steps "is often beneficial," because it is "difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be."[70] But since *Pearson*, most courts—including the Supreme Court—have tended to grant qualified immunity after determining that precedent did not clearly establish the plaintiff's rights, without addressing whether the relevant official violated the plaintiff's rights.[71] In this regard, the "clearly established" test has effectively become a threshold question in qualified immunity cases.[72]

B. *Criticisms of Qualified Immunity*

Judges, scholars, policymakers, and civil rights advocates have criticized qualified immunity—and particularly the "clearly established" test—on several grounds.

---

concurring)). "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Judicial restraint "caution[s] us to avoid reaching constitutional questions when they are unnecessary to the disposition of a case." *Pearson*, 555 U.S. at 234 (quoting Higazy v. Templeton, 505 F.3d 161, 179 n.19 (2d Cir. 2007)). Furthermore, the two-step test undermined judicial efficiency, as it required "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Id.* at 236–37.

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

69 *Id.* at 236.

70 *Id.* (quoting Lyons v. City of Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)). Furthermore, resolving both questions "promotes the development of constitutional precedent." *Id.*

71 *See* Zadeh v. Robinson, 902 F.3d 483, 498–99 (5th Cir. 2018) (Willett, J., concurring dubitante), *withdrawn*, 928 F.3d 457 (5th Cir. 2019). From 2012 to 2018, the Supreme Court resolved eleven cases on the second prong of the analysis—granting officers qualified immunity because the relevant law was not "clearly established"—without addressing the first prong—whether the officers violated the plaintiff's rights. Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1888 (2018).

72 *See infra* Section I.A.2.

First, many argue that § 1983's text does not support the "clearly established" test.[73] Indeed, § 1983 "promises a federal remedy for the violation of 'any' right—not just 'clearly established' ones."[74] And considering that Congress enacted § 1983 to prevent civil rights violations in the South following the Civil War and Emancipation, Congress likely intended for the statute to provide a robust mechanism to remedy rights violations—whether the violations were clearly established in precedent or not.[75]

While most judges and scholars acknowledge that the text, history, and purpose of § 1983 do not support qualified immunity's "clearly established" test, many nonetheless conclude that qualified immunity is justified on common law grounds.[76] But some, like Justice Thomas, are concerned that the Court's current jurisprudence—particularly the "clearly established" test—no longer comports with qualified immunity's common law foundation.[77]

At common law, officials were only immune from suit if immunity had been "'historically accorded [to] the relevant official' in an analogous situation."[78] So Justice Thomas thinks the Court should "ask[] whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983," instead of "grant[ing] immunity to any officer whose conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[79] Justice Thomas fears that the Court's qualified immunity jurisprudence has strayed from this common law framework and now invites "freewheeling policy choice[s]" that judges should not make.[80]

Additionally, some judges and scholars have criticized *Pearson*'s modification of the qualified immunity analysis for creating

73 *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 48–49 (2018).

74 Ramirez v. Guadarrama, 2 F.4th 506, 524 (5th Cir. 2021) (mem.) (per curium) (Willett, J., dissenting from denial of rehearing en banc).

75 *See* Baude, *supra* note 73, at 48–49.

76 *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1864–65 (2018).

77 *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in judgment).

78 *Id.* at 1870 (quoting Imbler v. Pachtman, 424 U.S. 409, 421 (1976) (per curiam)).

79 *Id.* at 1871 (quoting Mullenix v. Luna, 577 U.S. 7, 11 (1976) (per curiam)).

80 *Id.* (alteration in original) (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)); *see also* Tower v. Glover, 467 U.S. 914, 922–23 (1984) ("We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."). Justice Thomas argues that the kind of balancing employed by courts in qualified immunity cases should be left to Congress. *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and concurring in judgment). He fears that the Court is "substitut[ing] [its] policy preferences for the mandates of Congress." *Id.*

"constitutional stagnation" by preventing courts from establishing rights.[81] Courts no longer must decide whether an official violated a plaintiff's rights if precedent does not clearly establish a rights violation.[82] But if courts routinely avoid addressing whether an official violated a plaintiff's rights, these rights will never be clearly established.[83] While the *Pearson* Court sought to provide judges with discretion "to consider case-specific factors . . . before resolving a constitutional question," this discretion has a "dark side"—it allows judges to strategically avoid hard questions.[84] This discretion is especially worrisome when redress for an alleged rights violation is at stake.

Finally, some judges argue that robust protection for law enforcement officials often wrongly deprives injured individuals of redress for rights violations. Justice Sotomayor, for example, fears that qualified immunity has become "an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment."[85] She worries that this broad protection allows "palpably unreasonable conduct" to "go unpunished."[86] Similarly, Judge Clay has argued that qualified immunity "create[s] a nearly impenetrable barrier for plaintiffs seeking to vindicate their rights against governmental officials."[87] And Judge Willett thinks qualified immunity "smacks of unqualified impunity" because it "let[s] public officials duck consequences for bad

81 Zadeh v. Robinson, 902 F.3d 483, 498–99 & n.6 (5th Cir. 2018) (Willett, J., concurring dubitante) (quoting Nielson & Walker, *supra* note 45, at 12), *withdrawn*, 928 F.3d 457 (5th Cir. 2019).

82 *See* Blum, *supra* note 71, at 1888 & n.11.

83 Judge Willett colorfully argues:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose.

Zadeh, 902 F.3d at 499 (Willett, J., concurring dubitante). Similarly, Judge Browning has observed that *Pearson*'s modification "effectively eliminate[s] § 1983 claims by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong." Blum, *supra* note 71, at 1889 (quoting Nelson v. City of Albuquerque, 283 F. Supp. 3d 1048, 1108 n.44 (D.N.M. 2017), *rev'd*, 921 F.3d 925 (10th Cir. 2019)).

84 Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 58 (2016).

85 Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

86 *Id.*

87 Latits v. Phillips, 878 F.3d 541, 554 (6th Cir. 2017) (Clay, J., concurring in part and dissenting in part). Judge Weinstein echoes this critique: "The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress . . . ." Thompson v. Clark, No. 14-cv-7349, 2018 WL 3128975, at *11 (E.D.N.Y. June 26, 2018).

behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."[88]

These critiques have sounded beyond the bench. In 2020, Congressman Justin Amash introduced the "Ending Qualified Immunity Act," arguing that "[q]ualified immunity protects police and other officials from consequences even for horrific rights abuses, . . . prevents accountability for the 'bad apples[,]' and undermines the public's faith in law enforcement."[89] More than 1,400 professional athletes, coaches, and executives have petitioned Congress to eliminate qualified immunity.[90] The Cato Institute has "launched a full blown assault" on qualified immunity.[91] The NAACP Legal Defense Fund has called on civil rights colleagues to "re-examin[e] the legal standards governing . . . qualified immunity."[92] And the ACLU has charged courts to "tear down" qualified immunity.[93]

Despite these persistent criticisms, however, the Supreme Court has continued to consistently grant qualified immunity to officials in § 1983 suits.[94]

II. PARALLELS BETWEEN THE CONTEXTS OF *CHEVRON* DEFERENCE AND QUALIFIED IMMUNITY

The following Sections identify several jurisprudential similarities between *Chevron* deference and qualified immunity.

A. *Clarity-Ambiguity Tests*

First, a clarity-ambiguity test is central to both doctrines—*Chevron* deference and qualified immunity. Determining whether a statute is

88 *Zadeh*, 902 F.3d at 498 (Willett, J., concurring dubitante).

89 Damon Root, *These Judges Defend Qualified Immunity as a Deferential Rule that Protects the Police*, REASON (June 11, 2020), https://reason.com/2020/06/11/these-judges-defend-qualified-immunity-as-a-deferential-rule-that-protects-the-police/ [https://perma.cc/UM7T-YBHP].

90 *Id.*

91 *See* Blum, *supra* note 71, at 1891 & n.24.

92 *See* Baude, *supra* note 73, at 48 (quoting *LDF Statement on the Non-Indictment of Cleveland Police Officers in the Shooting Death of Tamir Rice*, NAACP LEGAL DEF. FUND (Dec. 28, 2015), https://www.naacpldf.org/press-release/ldf-statement-on-the-non-indictment-of-cleveland-police-officers-in-the-shooting-death-of-tamir-rice/ [https://perma.cc/NTD4-6JZ4]).

93 *Id.* (quoting Matthew Segal, Opinion, *Beyond #BlackLivesMatter: Police Reform Must Be Bolstered by Legal Action*, GUARDIAN (July 27, 2016), https://www.theguardian.com/commentisfree/2016/jul/27/beyond-black-lives-matter-police-reform-legal-action [https://perma.cc/26JA-NXDX]).

94 *See* Blum, *supra* note 71, at 1887–89.

clear or ambiguous was the "defining feature" of *Chevron* deference.[95] Ambiguity triggered judicial deference to the agency's interpretation of the statute.[96] Likewise, whether an official is immune from suit for violating a party's rights turns on whether precedent clearly establishes that the official's conduct violated the party's rights. After *Pearson*, the "clearly established" test assumed an even more central role in the qualified immunity analysis.[97]

B. Functional Common Law Doctrines that Balance Judicial and Executive Interests

Second, both *Chevron* deference and qualified immunity are judge-made doctrines that balance similar interests.

The Administrative Procedure Act (APA) does not authorize *Chevron* deference. The Court nonetheless crafted the *Chevron* doctrine to respect executive officials' authority in carrying out the law. In the Court's view, the *Chevron* doctrine balanced the judicial interest in legal interpretation with the executive interest in efficient governance by preventing courts from overriding agency interpretations of ambiguous statutes.

Similarly, § 1983 does not authorize qualified immunity, but the Court has nonetheless read qualified immunity into the statute to respect executive officials' authority in enforcing the law. And the "clearly established" test is the Court's attempt to balance the judicial interest in redressing rights violations with the executive interest in avoiding the adverse effects of litigation and damages suits.

1. Lack of Statutory Authorization

Both *Chevron* deference and qualified immunity lack statutory authorization; indeed, both doctrines perhaps even conflict with the APA and § 1983, respectively.

Congress enacted the APA to address the growth of federal agencies—and concomitant rise of administrative law—following the New Deal and World Wars.[98] Congress sought to "provid[e] an effective method for regulating agency action"[99] and "check . . . administrators whose zeal might otherwise have carried them to excesses not

95 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270 (2024).

96 *Id.*

97 *See* Blum, *supra* note 71, at 1887–89; *supra* Section I.A.3.

98 Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV'T L. REV. 207, 207–08 (2016).

99 *Id.* at 207.

contemplated in legislation creating their offices."[100] Congress particularly wanted to protect individuals' rights from abuse by administrative action.[101]

So the APA implements "safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."[102] For example, the APA requires covered agencies to publish their rules and procedures in the Federal Register, and bars agencies from creating any reporting requirement or investigatory demand "in any manner or for any purpose except as authorized by law."[103] And the APA guarantees judicial review for parties wronged by certain agency actions.[104]

More specifically, the APA provides that courts will "hold unlawful and set aside agency action, findings, and conclusions" that are "contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "otherwise not in accordance with law."[105] To that end, the APA requires reviewing courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[106]

"[S]ubstantial judicial review of agency action" is thus "a crucial part" of the APA.[107] Congress sought to empower courts to police rights violations and ensure that agencies observe federal constitutional and statutory law.[108] In this respect, the APA's text, history, and

---

100 *Loper Bright*, 144 S. Ct. at 2261 (quoting United States v. Morton Salt Co., 338 U.S. 632, 644 (1950)).

101 *See* Elias, *supra* note 98, at 207–08.

102 *Morton Salt*, 338 U.S. at 644.

103 *Id.* (quoting Administrative Procedure Act, Pub. L. No. 79-404, § 6(b), 60 Stat. 237, 240 (1946)). The APA

> requires every agency to which it applies . . . to publish in the Federal Register certain statements of its rules, organization and procedure, "including the nature and requirements of all formal or informal procedures available," and adds that, "No person shall in any manner be required to resort to organization or procedure not so published." [The APA also] proscribes any requirement of a report or other investigative demand 'in any manner or for any purpose except as authorized by law."

Id. (quoting Administrative Procedure Act §§ 3(a), 6(b)).

104 Administrative Procedure Act § 10 (codified in relevant part at 5 U.S.C. § 706 (2018)); *see also* Elias, *supra* note 98, at 221.

105 5 U.S.C. § 706(2); *see also Loper Bright*, 144 S. Ct. at 2261.

106 5 U.S.C. § 706; *see also Loper Bright*, 144 S. Ct. at 2261.

107 Elias, *supra* note 98, at 221.

108 *See id.* at 221–23. Indeed, "[t]he original purpose of administrative law was to protect private autonomy—most important, private property—from unauthorized governmental intrusions." Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 277 (1986).

purpose manifest no legislative interest in simply deferring to some agency actions that cause injury.[109] When a party sues an agency for its actions under color of statute, the APA does not ask courts to apply a threshold clarity test and defer to the agency's interpretation of an ambiguous statute; rather, the APA contemplates that courts will independently interpret the governing statute to determine whether the agency acted appropriately.[110] The APA simply emphasizes the Court's role in judicial review—to decide what the law is.[111]

This brief background shows that *Chevron* deference lacks support in—and even conflicts with—the APA. Qualified immunity's relationship with § 1983 is similar. Section 1983 was enacted following major national events—the Civil War, Emancipation, and the Reconstruction Amendments—to guarantee judicial review of certain executive actions to redress rights violations, with no mention of immunity for executive officials.[112]

2. Pragmatic, Common Law Doctrines that Shield Executive Officials from Adverse Suits

Unauthorized by statute, both *Chevron* deference and qualified immunity are common law doctrines that reflect a similar balance of interests.

The *Chevron* doctrine was a pragmatic judicial choice: it balanced courts' interest in preserving the rule of law—and parties' interest in obtaining judicial review and redress for rights violations—with agencies' interest in avoiding the "chilling effect[s]" of judicial interference

109 *But see* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 914–19 (2017) (suggesting that the view that the APA leaves no room for deference simply because it provides for judicial review is "too simple," *id.* at 914).

110 *Loper Bright*, 144 S. Ct. at 2261. The APA codified *Marbury*'s fundamental proposition that "courts decide legal questions by applying their own judgment." *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). Furthermore, the APA requires courts to defer to agency policymaking and factfinding, which implies that "Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the . . . understanding that deciding such questions was 'exclusively a judicial function.'" *Id.* (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 544 (1940)). The APA requires courts to interpret constitutional and statutory provisions without differentiating between agency action and agency factfinding (which demand different standards of review under the APA), thereby "mak[ing] clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference." *Id.* In this respect, *Chevron* deference "converted [the APA] into something very different from what its drafters anticipated." Sunstein, *supra* note 108, at 271.

111 *See Loper Bright*, 144 S. Ct. at 2261 (citing Marbury, 5 U.S. (1 Cranch) 137).

112 *See supra* Part I; Baude, *supra* note 73, at 50.

with their responsibilities.[113] Indeed, the Court developed the *Chevron* doctrine to preserve "a robust yet impersonal rule of law above administrative fiat" while promoting "effective and politically responsive administrative governance in a complex world."[114] Despite the APA's mandate that courts "decide all relevant questions of law,"[115] the Court incorporated the common law practice of "respect[ing]" executive interpretations of ambiguous federal statutes into a deferential framework that balanced the judicial powers of legal interpretation and granting remedies with efficient agency functioning.[116]

Qualified immunity reflects a similar judicial balance. The Court has crafted a qualified immunity analysis that preserves officials' common law immunity from suit for conduct within the scope of their professional duties.[117] The Court's analysis seeks to balance citizens' interest in obtaining a remedy when officials violate their rights with officials' interest in avoiding litigation's "chilling effects" and interference with their professional responsibilities.[118]

In short, both *Chevron* deference and qualified immunity are functional, judge-made doctrines that shield certain executive actions from judicial interference.

3. Tension with Fundamental Principles of Judicial Review

Among its many contributions to constitutional law and the federal courts, *Marbury v. Madison* delineated two foundational principles: Courts interpret the laws and provide remedies—when authorized—to wronged parties.[119]

---

113 *Cf.* Trump v. United States, 144 S. Ct. 2312, 2325 (2024) ("[T]he President is immune from damages liability in civil cases, to protect against the chilling effect such exposure might have on the carrying out of his responsibilities." (citing Nixon v. Fitzgerald, 457 U.S. 731, 749–56 (1982))); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 34 n.119 ("[T]he new and more aggressive [major questions doctrine] is very likely to have a substantial chilling effect on agency action . . . ."); *see* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 852–58 (2020); Sunstein, *supra* note 108, at 277–78.

114 Pojanowski, *supra* note 113, at 855.

115 5 U.S.C. § 706 (2018); *see also Loper Bright*, 144 S. Ct. at 2261.

116 Sunstein, *supra* note 108, at 271, 277–78 ("Much of administrative law is common law." *Id.* at 271.); *Loper Bright*, 144 S. Ct. at 2257. Deference to agencies seemed necessary to account for "the diversity of administrative functions and the rapidity of changes in regulatory policy." Sunstein, *supra* note 108, at 271.

117 *See supra* Section I.A.

118 *See supra* Section I.A; *cf.* Trump, 144 S. Ct. at 2325 (citing Nixon, 457 U.S. at 749–56 (1982)).

119 *See Loper Bright*, 144 S. Ct. at 2271; Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 787–89 (2004).

The Court abandoned *Chevron* deference because it conflicted with these principles.[120] The Court faulted *Chevron* deference because the weight that it accorded to agency interpretations of ambiguous laws encroached on "the judicial role" of "interpret[ing] the [law]."[121] Additionally, *Chevron* deference departed from the principle that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[122] The APA expressly authorizes independent judicial review to remedy rights violations, regardless of whether the relevant statute is clear or ambiguous,[123] but *Chevron* cabined the Court's ability to grant remedies when the governing statute was ambiguous.[124] So *Chevron* was inconsistent with *Marbury*'s foundational principles regarding rights and remedies.

Qualified immunity's "clearly established" test raises similar concerns. When a party brings a § 1983 claim, the Court's role is to interpret relevant precedent to determine whether an official violated the party's rights. The "clearly established" test constrains the judicial functions of interpreting the law and redressing rights violations, because the test prevents courts from awarding authorized remedies in certain cases—specifically, when governing precedent does not clearly establish a rights violation.[125]

---

120 *See Loper Bright*, 144 S. Ct. at 2271.

121 *Id.* at 2257 (quoting Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840)). "It is emphatically the province and duty of the judicial department to say what the law is," Chief Justice Marshall wrote in *Marbury*. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

122 *Marbury*, 5 U.S. (1 Cranch) at 163 (quoting 3 BLACKSTONE *supra* note 40, at *23). "[F]rom the beginning of the Republic, the American people have rightly expected our courts to resolve disputes about their rights and duties under law without fear or favor to any party—the Executive Branch included." Buffington v. McDonough, 143 S. Ct. 14, 16 (2022) (mem.) (Gorsuch, J., dissenting from denial of certiorari) (citing Bamzai, supra note 109, at 987). Courts have never been bound by administrative constructions of the law; rather, "those constructions may 'be taken into account only to the extent that [they are] supported by valid reasons.'" *Id.* (alteration in original) (quoting Burnet v. Chi. Portrait Co., 285 U.S. 1, 16 (1932)).

123 Administrative Procedure Act, ch. 324, § 10, 60 Stat. 237, 243 (1946).

124 *Cf.* Bellia, *supra* note 119, at 787 (describing how *Marbury* recognized courts' authority to grant certain remedies for certain causes of action).

125 Zadeh v. Robinson, 902 F.3d 483, 498–99 (5th Cir. 2018) (Willett, J., concurring dubitante), *withdrawn*, 928 F.3d 457 (2019). "It is indeed curious how qualified immunity excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations." *Id.* at 499.

> Count me with Chief Justice Marshall: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." The current "yes harm, no foul" imbalance leaves victims violated but not vindicated; wrongs are not righted, wrongdoers are not reproached, and those wronged are not redressed.

Id. (quoting *Marbury*, 5 U.S. (1 Cranch) at 163) (footnote omitted).

III. APPLYING *LOPER BRIGHT*'S REASONING TO QUALIFIED IMMUNITY'S "CLEARLY ESTABLISHED" TEST

A. *Clarity Tests are "Unworkable"*

Writing for the Court in *Loper Bright*, Chief Justice Roberts declared:

> Experience has . . . shown that Chevron is unworkable. The defining feature of its framework is the identification of statutory ambiguity, which requires deference at the doctrine's second step. But the concept of ambiguity has always evaded meaningful definition. As Justice Scalia put the dilemma just five years after Chevron was decided: "How clear is clear?"[126]

Chief Justice Roberts admitted that, after four decades, the Court was "no closer to an answer" to Justice Scalia's question.[127] Chief Justice Roberts observed that "ambiguity" means different things for different judges; some judges constantly see ambiguity, while some rarely see ambiguity.[128] So Chief Justice Roberts concluded that because ambiguity is an "impressionistic and malleable concept," it cannot stand as the "test for allocating interpretive authority between courts and agencies."[129] Justice Gorsuch, in his concurring opinion, similarly excoriated the workability of *Chevron*'s clarity-ambiguity test, describing "the search for ambiguity" as a "sort of Snark hunt."[130]

Because *Chevron* deference and qualified immunity both rely on a clarity test, and serve similar functions,[131] the Court's reasoning in *Loper Bright* should also apply to qualified immunity's "clearly established" test. The Court should acknowledge that the "clearly

126 *Loper Bright*, 144 S. Ct. at 2270 (quoting Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520).

127 *Id.*

128 *Id.*

129 *Id.* at 2270–71 (internal quotation marks omitted) (quoting Swift & Co. v. Wickham, 382 U.S. 111, 125 (1965), *superseded by statute*, Act of Nov. 8, 1984, Pub. L. No. 98-620, tit. IV, § 402, 98 Stat. 3347, 3359).

130 *See id.* at 2287 (Gorsuch, J., concurring) (comparing Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 826 (1990), with Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017)) ("Some judges claim to spot [ambiguity] almost everywhere, while other equally fine judges claim never to have seen it."). Indeed, circuit judges disagreed on whether the statute at issue in *Loper Bright* was ambiguous. *Id.* The majority panel of the D.C. Circuit found that the law was ambiguous, while Judge Walker, in dissent, argued that the law was not ambiguous. *Id.* And the First Circuit seemed to avoid deciding whether the law was ambiguous. *Id.* Justice Gorsuch thus ridiculed *Chevron*'s ambiguity test for "turn[ing] statutory interpretation into a game of bingo under blindfold." *Id.*

131 *See supra* Part II.

established" test, which requires judges to determine whether precedent *clearly* establishes a plaintiff's rights, is "unworkable."[132] The "impressionistic and malleable concept" of ambiguity should not be the test that determines whether wronged parties receive proper redress under § 1983.[133] Three recent cases—in addition to *Ramirez v. Guadarrama*[134]—demonstrate the unworkability of qualified immunity's "clearly established" test.

First, consider *Latits v. Phillips.*[135] An officer stopped a driver for a traffic violation.[136] As the officer retrieved the driver's vehicle registration and insurance documentation, the officer saw bags and a bottle of pills inside the driver's glove box—signs of potential illegal drug activity.[137] The officer unholstered his gun and told the driver to exit the car.[138] The driver then sped away.[139] A chase ensued, with two other officers joining in their respective vehicles.[140] When the officers finally trapped the driver's vehicle, one officer exited his vehicle and walked toward the driver's vehicle.[141] As the officer approached, the driver tried to reverse his vehicle.[142] The officer responded by firing gunshots that killed the driver.[143]

The decedent's family brought a § 1983 suit against the officer, alleging that the officer violated the decedent's Fourth Amendment rights by using excessive, deadly force to end the chase.[144] The court concluded that the officer's "use of deadly force was objectively unreasonable," and thus violated the decedent's Fourth Amendment rights, but held that qualified immunity shielded the officer from liability because precedent has not "clearly established" the decedent's rights in these particular circumstances.[145]

In two prior cases, the Sixth Circuit had held that an officer violated a driver's Fourth Amendment rights by shooting the driver

---

132 *Loper Bright*, 144 S. Ct. at 2270.
133 *Id.* at 2270–71.
134 *See supra* Introduction.
135 Latits v. Phillips, 878 F.3d 541 (6th Cir. 2017).
136 *Id.* at 544.
137 *Id.*
138 *Id.* at 544–45.
139 *Id.*
140 *Id.* at 544, 546.
141 *Id.* at 546.
142 *Id.*
143 The officer was subsequently released by his police department for violating various policies, including: "engag[ing] in vehicular pursuit as the third police car without permission, pass[ing] the secondary and primary vehicles in the pursuit, us[ing] a PIT maneuver in violation of a direct order, and r[unning] up to [the driver's] car instead of taking a tactical position using his vehicle as cover." *Id.*
144 *Id.*
145 *Id.* at 552–53, 547.

"when the officer was to the side of the moving car or the car had already passed by him—taking the officer out of harm's way."[146] But the court determined that those cases did not clearly establish the decedent's Fourth Amendment rights in the present case, because in the previous cases the respective drivers were only initiating flight when they were shot, whereas here the decedent was already in flight when he was shot.[147]

Judge Clay, however, argued that governing precedent "clearly establishes that an officer may not shoot a fleeing suspect who poses no danger to others."[148] Judge Clay thought the two cases that the majority distinguished were "materially similar . . . to the case at hand and held that the use of deadly force under the circumstances violated the Fourth Amendment."[149] So Judge Clay would not have granted qualified immunity to the officer.[150]

Next, consider *Taylor v. Stevens.*[151] A Texas inmate sued prison officials under § 1983, alleging that the prison's conditions violated his Eighth Amendment rights.[152] The inmate said that for several days he lived in a cell "covered with 'massive amounts' of feces that emitted a 'strong fecal odor.'"[153] Fearing contamination, he did not eat or even drink water, because "feces were 'packed inside the water faucet.'"[154] After several days, he moved to another cell, but this cell had no toilet, water fountain, or bunk, and the floor was covered with raw sewage.[155]

The Fifth Circuit concluded that these arrangements violated the plaintiff's Eighth Amendment rights, because the Eighth Amendment precludes housing inmates in "truly filthy, unsanitary cells."[156] But the court determined that the plaintiff's rights were not "clearly established" in precedent, because the plaintiff stayed in these cells "for only six days" and the court "hadn't previously held that a time period so short violated the Constitution."[157] So the court held that qualified

146 *Id.* at 549 (first citing Sigley v. City of Parma Heights, 437 F.3d 527, 531, 537 (6th Cir. 2006); and then citing Smith v. Cupp, 430 F.3d 766, 774–75 (6th Cir. 2005)).

147 *Id.* at 553 (first citing *Sigley*, 437 F.3d at 530–31; and then citing *Cupp*, 430 F.3d at 769–70). Given these factual differences, the court concluded that "[t]he Plaintiff has not identified any caselaw where an officer under sufficiently similar circumstances was held to have violated the Fourth Amendment, and neither have we." *Id.* at 552.

148 *Id.* at 554 (Clay, J., concurring in part and dissenting in part).

149 *Id.* at 557.

150 *Id.* at 554.

151 Taylor v. Stevens, 946 F.3d 211 (5th Cir. 2019), *vacated and remanded sub nom.* Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curium).

152 *Id.* at 216.

153 *Id.* at 218.

154 *Id.*

155 *Id.*

156 *Id.* at 220.

157 *Id.* at 222.

immunity applied to the prison officials.[158] The Supreme Court, however, vacated the Fifth Circuit's decision, citing the "obvious clarity" of Eighth Amendment precedent that precluded the plaintiff's prison housing conditions.[159]

Finally, consider *Corbitt v. Vickers*.[160] Officers were pursuing a criminal suspect through a residential neighborhood when they came across an adult and several children in a yard.[161] The officers commanded the subjects to "get down on the ground," and the subjects complied.[162] But for reasons that are unclear, an officer fired his gun at a pet dog.[163] The shot missed the dog and struck a "readily viewable" child.[164]

The child's parents sued the officer under § 1983, alleging that the officer violated the child's Fourth Amendment right to be free from excessive force.[165] The court concluded, however, that the officer's actions "did not violate any clearly established Fourth Amendment rights" because no precedent "speak[s] with 'obvious clarity' to the unique and unfortunate circumstances" here.[166] In dissent, Judge Wilson argued that the child's Fourth Amendment right to be free from excessive force was "clearly established" because "[w]e have consistently denied qualified immunity when the defendant-officer exhibited excessive force in the face of no apparent threat."[167]

In summary, these examples show that judges often disagree on whether precedent clearly establishes a rights violation—just like judges long disagreed on whether a statute was clear or ambiguous under the *Chevron* framework. In this respect, qualified immunity's "clearly established" test presents the same workability problems that caused the Court to discard the *Chevron* doctrine.

B. Additional Applications of Loper Bright*'s Reasoning to Qualified Immunity's "Clearly Established" Test*

In addition to discrediting the workability of *Chevron*'s threshold ambiguity test, several other aspects of the Court's reasoning in *Loper Bright* apply to qualified immunity's "clearly established" test.

158 *Id.*
159 Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (per curiam) (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).
160 Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019).
161 *Id.* at 1308.
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.* at 1315–17.
167 *Id.* at 1324–25 (Wilson, J., dissenting).

1. Doctrinal Instability and Inconsistency

In surveying the history of the *Chevron* doctrine, Chief Justice Roberts observed:

> Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. . . . And the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. . . .
>
> . . . .
>
> . . . Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case. . . . To plan on *Chevron* yielding a particular result is to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the stability that comes with them. History has proved neither bet to be a winning proposition.[168]

Chief Justice Roberts admitted that the *Chevron* doctrine produced inconsistency and instability, and the Court's repeated clarifications scarcely helped.[169] The Court's qualified immunity jurisprudence raises similar concerns. Despite the Court's repeated clarifications regarding what constitutes "clearly established" law, outcomes in federal district and appellate courts have been far from uniform or stable.[170] Indeed, judges still disagree—often—on whether precedent clearly establishes a rights violation.[171]

2. Licensing Executive Officials to Abuse their Authority

In *Loper Bright*, the Court reasoned that *Chevron* made statutory ambiguity "a license authorizing an agency to change positions as much as it likes."[172] *Chevron* deference undermined the "rule of law"—and "foster[ed] unwarranted instability"—because it essentially allowed agencies to make law under the pretext of ambiguity.[173]

Similarly, under the Court's qualified immunity doctrine, precedential ambiguity provides officials with a license for abuse in

168 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2271–72 (2024) (citations omitted).

169 *Id.*

170 *See* Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante), *withdrawn*, 928 F.3d 457 (2019).

171 *See supra* Section III.A; *see also supra* Introduction.

172 *Loper Bright*, 144 S. Ct. at 2272.

173 *Id.* (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)); *id.*; *see supra* Section III.B.2.

enforcing the law, as officers can violate parties' rights if relevant precedent does not clearly establish those rights.[174]

3. Violating the Separation of Powers

Finally, *Chevron* deference undermined the constitutional separation of powers in several ways.[175] First, *Chevron* deference required judges to abdicate their "judicial power"—the exercise of "independent judgment in interpreting and expounding upon the laws."[176] The Framers knew that legal texts were often ambiguous, so they empowered courts to resolve ambiguities.[177] *Chevron* deference deprived courts of this power by compelling courts to credit agency interpretations of ambiguous statutes without independent judicial review.[178]

The Court's qualified immunity analysis similarly undermines the separation of powers by abridging the judicial power to interpret the law.[179] Asking whether precedent *clearly* establishes a rights violation is

---

174 *See Zadeh*, 902 F.3d at 498 (Willett, J., concurring dubitante) ("To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."); *see supra* notes 86–89 and accompanying text.

175 *Loper Bright*, 144 S. Ct. at 2274 (Thomas, J., concurring).

176 *Id.* (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in judgment)). "In disputes between individuals and the government about the meaning of a federal law, federal courts have traditionally sought to offer independent judgments about 'what the law is' without favor to either side." *Id.* at 2275 (Gorsuch, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). The Founders "considered '[t]he interpretation of the laws' . . . 'the proper and peculiar province of the courts.' . . . [J]udges 'have neither FORCE nor WILL but merely judgment'—and an obligation to exercise that judgment independently. . . . This duty of independent judgment is perhaps 'the defining characteristi[c] of Article III judges.'" *Id.* at 2283 (first and third alterations in original) (citations omitted) (first quoting THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961); then quoting *id.* at 465; and then quoting Stern v. Marshall, 564 U.S. 462, 483 (2011)).

177 *Id.* at 2274 (Thomas, J., concurring).

178 *Id.* ("Because the judicial power requires judges to exercise their independent judgment, the deference that Chevron requires contravenes Article III's mandate.").

179 While the Court has recognized that "separation-of-powers principles" are "central" to its qualified immunity jurisprudence, Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017), the Court has only discussed these principles in relation to remedies for violations of § 1983, *see* Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . 'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" (quoting Lampf v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment), *superseded by statute on other grounds*, 28 U.S.C. § 1658 (2018), *as recognized in* Merck & Co. v. Reynolds, 559 U.S. 633 (2010))). But the separation of powers also seems relevant to qualified immunity more broadly, as qualified immunity reflects a functional judicial delegation of power to the executive branch without explicit congressional authorization.

different from asking whether precedent establishes a rights violation. The former constrains the judicial power to interpret the law by imposing a clarity test. This test effectively displaces a judicial interpretation of precedent that establishes a rights violation when the relevant precedent was previously unclear. In other words, a court's interpretation of the law must yield to officials' authority when the law is unclear. In this respect, this clarity test infringes the judicial power to interpret the law—like *Chevron*'s statutory ambiguity test.

Second, as a corollary point, *Chevron* deference inflated agencies' power "to dictate the outcome of cases through erroneous interpretations."[180] *Chevron* deference effectively allocated some judicial power to executive agencies. In his concurring opinion in *Loper Bright*, Justice Gorsuch declared:

> [T]he Constitution's promise of due process of law means that "no man can be a judge in his own case." That principle . . . trac[es] far back into the common law where it was known by the Latin maxim *nemo iudex in causa sua*. Yet, under the *Chevron* regime, all that means little, for executive agencies may effectively judge the scope of their own lawful powers.
>
> Traditionally, as well, courts have sought to construe statutes as a reasonable reader would "when the law was made." . . . [I]t's a very old idea, one that constrains judges to a lawfinding rather than lawmaking role by focusing their work on the statutory text, its linguistic context, and various canons of construction. . . . Were the rules otherwise, Blackstone warned, the people would be rendered "slaves to their magistrates."[181]

Justice Gorsuch expressed concern that *Chevron* deference transformed agencies into "magistrates" capable of both making and interpreting the law.[182] But the executive branch lacks this power.[183]

This same concern—improper enlargement of the executive power—also arises in the qualified immunity context. In a way, qualified immunity allows law enforcement officials to make law by preventing damages from attaching to rights violations that were not clearly established in precedent.

---

180 *Loper Bright*, 144 S. Ct. at 2274 (Thomas, J., concurring) (quoting Baldwin v. United States, 140 S. Ct. 690, 692 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari)).

181 *Id.* at 2285 (Gorsuch, J., concurring) (citations omitted) (first citing U.S. CONST. amends. V, XIV; then quoting Williams v. Pennsylvania, 579 U.S. 1, 9 (2016); then citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798); then citing 1 EDWARD COKE, INSTITUTES *141; then citing City of Arlington v. FCC, 569 U.S. 290, 296–97 (2013); then quoting 1 BLACKSTONE, *supra* note 40, at *59; then citing United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805); and then quoting 4 BLACKSTONE *supra*, note 40, at *371).

182 *Id.*

183 Rather, judges should "resolve [ambiguity in the law] impartially according to the best evidence of the law's original meaning." *Id.*

Additionally, both *Chevron* deference and qualified immunity intrude on the legislative function to make law. Judicial creation of a doctrine despite congressional indication to the contrary intrudes on the legislative function.[184] The APA did not authorize *Chevron* deference, yet the Court created the doctrine anyway.[185] Similarly, the text, history, and purpose of § 1983 indicate that Congress sought to provide a cause of action to redress all rights deprivations, whether clearly established in precedent or not, yet the Court has nonetheless imposed the "clearly established" test as an obstacle to relief. Whether § 1983 should include this test is a matter for Congress, not the Court, to decide.[186]

One final, general note: Only the legislature, executive, and judiciary can perform its respective powers—legislating, executing, and judging, respectively.[187] This formal separation of powers is critical to safeguarding individual liberty.[188] *Chevron* deference violated this fundamental proposition.[189] So too does qualified immunity, in a particularly acute way—by preventing redress for many violations of individual rights.

C. *Reforming Qualified Immunity Jurisprudence*

In short, *Loper Bright* taught that threshold ambiguity tests are "unworkable."[190] And because workability is a fundamental stare decisis consideration, the Court eliminated the *Chevron* doctrine.[191] Yet in discarding *Chevron*, the Court emphasized that it was simply modifying a methodology and not necessarily questioning any results reached

184 *See supra* note 80 and accompanying text.

185 *See* Loper Bright, 144 S. Ct. at 2261–62; *see also supra* Section II.B.1.

186 *But see* Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2019 (2018).

187 *See, e.g.*, *Loper Bright*, 144 S. Ct. at 2274 (Thomas, J., concurring) (quoting Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 68 (2015) (Thomas, J., concurring in judgment) ("When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.")); *see generally* THE FEDERALIST NOS. 47–48 (James Madision), *supra* note 176.

188 *E.g.*, THE FEDERALIST NO. 47 (James Madison), *supra* note 176, at 301 ("[T]he preservation of liberty requires that the three great departments of power should be separate and distinct."); *Loper Bright*, 144 S. Ct. at 2275 (Thomas, J., concurring) (citing Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418 (2008)).

189 *See Loper Bright*, 144 S. Ct. at 2274 (Thomas, J., concurring).

190 *Id.* at 2270 (majority opinion).

191 *See supra* Section III.A.

under that methodology.[192] In subsequent cases, the Court may well reach the same result it would have reached in applying *Chevron*.

Like *Chevron* deference, qualified immunity hinges on a threshold ambiguity test.[193] So if the Court chooses to revisit its qualified immunity jurisprudence, it should strongly consider striking the "clearly established" test for the same reasons it discarded *Chevron* deference. And the Court could eliminate the "clearly established" test—which is simply a methodology—without abrogating previously decided qualified immunity cases.[194]

The Court, though, may not be content to simply eliminate qualified immunity's "clearly established" test, given the discrepancies between the *Chevron* context and qualified immunity context.[195] So the Court may seek to fill the gap left by the "clearly established" test with some other test that accords due respect to law enforcement officials in carrying out their duties. As the Court increasingly looks to history and tradition to inform and recalibrate its precedents,[196] perhaps returning to qualified immunity's historical roots—shielding officials from damages liability when officials have traditionally been protected for analogous conduct—offers a workable alternative.[197]

IV. DISTINCTIONS BETWEEN THE SETTINGS OF *CHEVRON* DEFERENCE AND QUALIFIED IMMUNITY

Importing reasoning from one legal doctrine into another necessarily poses challenges, as distinct substantive, procedural, practical, and normative considerations inform each doctrine. This final Part identifies several differences between the contexts of qualified immunity and *Chevron* deference.

---

192 *Loper Bright*, 144 S. Ct. at 2273; *see also* John F. Duffy, Chevron*, De Novo: Delegation, Not Deference*, 31 GEO. MASON L. REV. 541, 542 (2024) (arguing that the *Chevron* doctrine was not entitled to respect as a function of stare decisis because the doctrine was a method, not a decision).

193 Loper Bright, 144 S. Ct. at 2273.

194 *Cf.* Duffy, *supra* note 192, at 542.

195 *See infra* Part IV.

196 *See, e.g.*, Vidal v. Elster, 144 S. Ct. 1507, 1519 (2024) ("[H]istory and tradition is sufficient to conclude that the [trademark restriction at issue] is compatible with the First Amendment."); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022) ("[T]he government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) ("[T]he Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" (first quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014); and then citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019))).

197 *See supra* notes 78–80 and accompanying text.

A. Different Institutional Settings

Despite the functional doctrinal similarities between *Chevron* deference and qualified immunity, their respective institutional settings largely differ. When an agency interprets law, it presumably gathers experts to deliberate and ultimately reach a consensus about what the law means. And when agencies regulate pursuant to statutes, they submit proposed rules for "notice and comment"; this process requires agencies to collect data and respond to "potentially significant" comments.[198]

But the EPA's determination of what qualifies as a "stationary source" of air pollution seems different from a police officer's decision to open fire on an approaching suspect clutching at a coat pocket.[199] Indeed, unlike an agency that is interpreting a statute, a law enforcement officer often lacks time for deliberation; immediate concern—perhaps for his life or the lives of others—compels him to act. Qualified immunity thus shields officers from liability for spur-of-the-moment judgments that seem wrong in hindsight but were perhaps rational in the moment. Judge Thapar emphasizes that qualified immunity's "deferen[ce]" exists "for good reason: officers often . . . must make split-second decisions in dangerous situations."[200] We would not expect—nor would we want—officers to "pull out law books and analyze the fine points of judicial precedent" when confronted with imminent danger.[201] So qualified immunity protects "all but plainly incompetent officers or those who knowingly violate the law."[202] In this way, qualified immunity addresses a different setting than *Chevron* deference.

B. Review for "Reasonable" Decisionmaking and Respect for Executive Officials

Relatedly, the two settings invite different judicial tasks. In suits involving agency actions under color of statute, judges interpret statutes—applying the judicial power to construct the laws that Congress

198 *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–95 (D.C. Cir. 1973); *see also* Pojanowski, *supra* note 113, at 871 n.102; 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5.4, at 592–93 (6th ed. 2019).

199 *Cf.* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839–40 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

200 Howse v. Hodous, 953 F.3d 402, 407 (6th Cir. 2020).

201 *Id.* (quoting Rudolph v. Babinec, 939 F.3d 742, 756 (6th Cir. 2019) (Thapar, J., concurring in part and dissenting in part)) (fearing "paralysis by analysis" without robust immunity for law enforcement officers when exercising their professional responsibilities).

202 *Id.*

has made.[203] But many qualified immunity cases do not involve statutes. Indeed, the Fourth Amendment context is almost entirely devoid of statutory law. Instead, Fourth Amendment jurisprudence involves analyzing precedent—and drawing analogies and distinctions—to determine whether an official acted reasonably in the circumstances.[204] In summary, qualified immunity cases often involve a different kind of law—precedent, rather than statutes—and method—common law analogizing, rather than statutory interpretation—than cases governed by the *Chevron* doctrine.

Additionally, while courts will no longer credit executive agencies' interpretations of ambiguous statutes without independent judicial review, the Court's holding in *Loper Bright* does not disturb other areas of judicial deference to executive action.[205] Indeed, despite rejecting the *Chevron* doctrine, the Court nonetheless emphasized the "great respect" that courts have traditionally granted to executive officials.[206] When constructing a "doubtful and ambiguous law," the early Supreme Court gave "very great respect" to "those who were called upon to act under the law, and were appointed to carry its provisions into effect."[207] Government practice informed the Court's "determination of 'what the law is'"[208] because the officials involved were "able men, and masters of the subject."[209]

Courts have also long respected Congress's delegation of discretionary authority to executive officers.[210] Early Congresses, for example, permitted commissioners to purchase or accept land along the Potomac River to create Washington, D.C., and authorized the President to implement an embargo "on all ships and vessels in the ports of the United States" when, in his view, "public safety shall so require."[211] Agencies often exercise delegated discretion and, when they do so, simply must "engage[] in 'reasoned decisionmaking' within those

---

203 *See generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

204 *See generally* Kit Kinports, *The Origins and Legacy of the Fourth Amendment Reasonableness-Balancing Model*, 71 CASE W. RSRV. L. REV. 157 (2020).

205 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

206 *Id.* at 2257 (quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)).

207 *Id.* (quoting *Edwards' Lessee*, 25 U.S. (12 Wheat.) at 210).

208 NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

209 *Loper Bright*, 144 S. Ct. at 2258 (quoting United States v. Moore, 95 U.S. 760, 763 (1878)).

210 *See* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 155–56 (2017).

211 *Id.* at 157, 156–57.

boundaries."[212] Courts frequently defer to these statutorily-authorized decisions.[213]

On a similar note, in some contexts, courts historically "distinguished between questions of 'law,' which were subject to generally de novo review, and questions of 'fact,' which were reviewed deferentially."[214] The APA crystallized this practice by distinguishing "questions of law, fact, and policy"—with questions of fact and policy largely left to agencies, rather than courts, to decide.[215] While these distinctions "collapsed over time," separating issues of law, fact, and policy—and adjusting judicial scrutiny in reviewing each issue—seems critical to a formal approach to administrative law, because fact and policy judgments seem more appropriate for officials, while legal judgments are the province of courts.[216] For example, in reviewing an agency action the court might appropriately defer to the agency's understanding of the facts, because "agencies are far better suited to gathering facts and 'undertak[ing] wide-ranging investigations'" than courts.[217]

Determining whether a law enforcement officer's conduct violated a party's rights raises mostly questions of fact and policy—rather than questions of law—because the court must complete a fact-intensive inquiry, examining the officer's conduct under the circumstances. So perhaps officers should receive more deferential judicial review than agencies interpreting law. In this regard, qualified immunity's "clearly established" test might appropriately represent the Court's attempt to accord "great respect" to law enforcement officials exercising their responsibilities.

CONCLUSION

The Supreme Court's qualified immunity doctrine—which broadly protects executive officials from liability for rights violations—has encountered fierce criticism as a matter of statutory authorization, common law development, and public policy. Lately, some Justices have joined forces with critics and expressed interest in reconsidering

---

212 *Loper Bright*, 144 S. Ct. at 2263 (quoting Michigan v. EPA, 576 U.S. 743, 750 (2015)).

213 *See generally* Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075 (2016) ("Deference . . . existed before *Chevron* . . . ." *Id.* at 1076.).

214 Bamzai, *supra* note 109, at 959; *see also* Pojanowski, *supra* note 113, at 897–98 ("[T]he Court addressed the distinction between law and fact, reviewing the latter with deference unless factfinding implicated jurisdictional or constitutional questions." *Id.* at 897.).

215 Pojanowski, *supra* note 113, at 898.

216 *Id.*; *see supra* note 121 and accompanying text.

217 Jeffrey A. Pojanowksi, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 837 (2010).

the Court's qualified immunity jurisprudence.[218] Given the growing appetite to reform qualified immunity, this Note has sought to add more food for thought. In *Loper Bright*, the Court discarded the *Chevron* doctrine, which required federal courts to defer to agency interpretations of ambiguous statutes. The Court determined that the doctrine's threshold question—whether a statute is clear or ambiguous—was "unworkable." The Court's qualified immunity doctrine relies on a similar test: whether the officer violated "clearly established" rights. *Loper Bright* indicates that the "clearly established" test is also unworkable—and frequent disagreement among judges regarding when precedent clearly establishes a rights violation further supports this conclusion. Moreover, qualified immunity and *Chevron* deference are strikingly similar—both are judicially-created, functional doctrines that balance judicial review of executive action with efficient executive functioning. These similarities support the application of *Loper Bright*'s reasoning to the Court's qualified immunity jurisprudence.

"How clear is clear?" judges, lawyers, and law students have asked for centuries.[219] In *Loper Bright*, the Court admitted that its decades-long adventure with *Chevron* deference failed to yield an answer. So the Court discredited as "unworkable" the doctrine's threshold test of determining whether a law is clear or ambiguous. Qualified immunity relies on a similar distinction—whether relevant precedent clearly establishes that an officer violated a party's rights—and also frequently fails to yield consistent outcomes. *Loper Bright*'s thus offers yet another reason for the Court to reconsider the "clearly established" test in its qualified immunity jurisprudence.

218 Justice Thomas has expressed "growing concern" with the Court's qualified immunity jurisprudence and is willing to "reconsider" the doctrine. Ziglar v. Abbasi, 137 S. Ct. 1843, 1870, 1872 (2017) (Thomas, J., concurring in part and concurring in judgment). Justice Sotomayor, too, has expressed concern with the Court's qualified immunity precedent. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

219 *See supra* notes 26–29 and accompanying text.