posivist bent of the Court's interpretation may not change appreciably. In such a situation, it is not clear that adding a presumption of some indeterminate weight gives voice to any concretely developed federalism concerns.[79] In contrast, recognizing that agencies are generally the "superior purposivists" as compared to courts, both in determining the purpose at issue and in choosing the appropriate policy to advance it,[80] the Court, when confronted with a properly promulgated agency decision, would then be forced to make federalism concerns and their underlying normative goals a more explicit part of the decision to displace the agency view.[81] By forcing a separation of the two elements of preemption analysis — the question of congressional preemptive intent and the desire to protect federalism concerns — the Court would better be able to assign each element to the institution best able to determine it. Agencies would resolve technical questions of preemptive intent and courts would be able to defend federalism concerns expressly, thereby balancing the two concerns more effectively than courts can alone through the placement of a thumb of varying weight on the scale of their own purposivist or textual analyses.

Thus, this case demonstrates that, while there are enduring concerns with respect to agency interpretation of preemption questions, the traditional *Chevron*/*Mead* deference framework can address these concerns, with no need for a singular approach for preemption questions. Bringing the doctrine in this area in line with the overall agency deference approach promises both to take advantage of agency interpretive strengths and to force the Court to articulate the federalism-inspired concerns that may be driving its enduring reluctance to defer.

C. Qualified Immunity

Order of Analysis. — The doctrine of qualified immunity sensibly allows courts to balance citizens' interests in having remedies for violations of constitutional rights with governmental actors' interests in fulfilling their duties without fear of legal challenge.[1] In *Saucier v. Katz*,[2] following disagreement among the federal circuits as to how to

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[79] Indeed, it is noteworthy that in a case adopting the presumption against preemption in the implied preemption context, the only sustained evocation of the benefits of the federal system came in Justice Thomas's opinion concurring in the judgment. *See Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring in the judgment).

[80] *See* Bressman, *supra* note 70, at 603.

[81] *See id.* at 616.

[1] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 807–08 (1982); Butz v. Economou, 438 U.S. 478, 505–08 (1978); Scheuer v. Rhodes, 416 U.S. 232, 243–50 (1974); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407–11 (1971) (Harlan, J., concurring in the judgment); Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 216–17 (1963).

[2] 533 U.S. 194 (2001).

apply the qualified immunity doctrine,[3] the Supreme Court set forth a mandatory procedure for judicial analysis of a governmental defendant's qualified immunity claim. A court was to decide first whether the facts alleged demonstrated a violation of a constitutional right;[4] if so, the court was to decide next whether the violated constitutional right was "clearly established" at the time of the alleged misconduct.[5]

Last Term, in *Pearson v. Callahan*,[6] the Supreme Court retreated from its decision in *Saucier*, holding that *Saucier*'s two-step procedure is not an "inflexible requirement"[7] and that federal judges are permitted to exercise discretion in determining which step of the qualified immunity analysis to apply first.[8] Though the Court's arguments in favor of revising *Saucier*'s rule are powerful, *Pearson* ultimately represents a missed opportunity for the Court to clarify *how* courts are to conduct the second step of the qualified immunity inquiry. The failure to do so is particularly problematic since, as the Court suggested, many judges — post-*Pearson* — are likely to dispose of cases by deciding whether an asserted right was clearly established.[9]

Pearson arose as the result of an investigation by the Central Utah Narcotics Task Force, which is responsible for investigating illegal drug use and sales in central Utah.[10] Made up of five officers and an intelligence official, the Task Force relies on confidential informants to aid its investigations.[11] On March 19, 2002, a confidential informant told Officer Jeff Whatcott that Afton Callahan would have methamphetamine to sell later that day.[12] That evening, the informant met with Callahan at Callahan's home to confirm that methamphetamine was available.[13] The informant then left Callahan's home, stating that he needed to obtain money to complete his purchase. The informant met with members of the Task Force shortly after leaving Callahan's home, at which time the informant was searched, furnished with a marked $100 bill to make the purchase, provided a concealed electronic transmitter to record the conversation, and given a signal to

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[3] *See* DiMeglio v. Haines, 45 F.3d 790, 795–97 (4th Cir. 1995) (Luttig, J.) (describing the varying approaches taken by the federal circuits to the qualified immunity inquiry); Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 407–12 (2009) (describing the state of the doctrine before the Supreme Court's decision in *Saucier*).

[4] *Saucier*, 533 U.S. at 201.

[5] *Id.*

[6] 129 S. Ct. 808 (2009).

[7] *Id.* at 813.

[8] *Id.* at 818.

[9] *See id.*

[10] State v. Callahan, 93 P.3d 103, 104 (Utah Ct. App. 2004).

[11] *Id.*

[12] *Id.*

[13] *Id.* at 105.

alert the officers after making the purchase.[14] The officers drove the informant back to Callahan's home.[15] The informant, after receiving the methamphetamine, signaled the officers.[16] Without consent, officers entered Callahan's home through a door leading to an enclosed porch, where they found the informant, Callahan, two other persons, and a bag that they later determined contained methamphetamine.[17] The police then conducted a protective sweep of the home with Callahan's consent, finding syringes but no additional drugs.[18]

Callahan was charged with the unlawful possession and distribution of methamphetamine.[19] The trial court concluded "that the warrantless arrest and search were supported by exigent circumstances."[20] On appeal, the State conceded that the trial court erred in finding that the entry was justified by exigent circumstances,[21] but argued that the inevitable discovery doctrine[22] justified the introduction of the evidence gleaned from the warrantless search.[23] The Utah Court of Appeals unanimously disagreed, reversed the conviction, and remanded with instructions to suppress the illegally obtained evidence.[24]

Callahan subsequently brought a § 1983[25] action against the arresting officers, arguing that they had violated his Fourth Amendment rights. The U.S. District Court for the District of Utah disagreed and granted summary judgment for the officers.[26] Assuming that Callahan had established a violation of his Fourth Amendment rights,[27] Judge Cassell concluded that the consent-once-removed doctrine,[28] "which permits a warrantless entry . . . into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view,"[29] was in tension with the Supreme

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14 *Id.*

15 *Id.*

16 *Id.*

17 *Pearson,* 129 S. Ct. at 813.

18 *Id.*

19 *Id.* at 814.

20 *Id.*

21 *Id.*

22 *See, e.g.*, Nix v. Williams, 467 U.S. 431, 444 (1984) ("If the prosecution can establish by a preponderance of the evidence that the information . . . inevitably would have been discovered by lawful means . . . then . . . the evidence should be received.").

23 *See Pearson*, 129 S. Ct. at 814.

24 State v. Callahan, 93 P.3d 103, 107 (Utah Ct. App. 2004).

25 42 U.S.C. § 1983 (2006).

26 Callahan v. Millard County, No. 2:04-CV-00952, 2006 WL 1409130, at *10 (D. Utah May 18, 2006).

27 *Id.* at *6.

28 *See, e.g.*, United States v. Pollard, 215 F.3d 643, 648–49 (6th Cir. 2000).

29 *Pearson*, 129 S. Ct. at 814.

Court's decision in *Georgia v. Randolph*.[30] The "simplest approach," therefore, was to assume that the Court would ultimately reject the doctrine.[31] Nonetheless, Judge Cassell held that the officers were entitled to qualified immunity because they could reasonably have believed that the consent-once-removed doctrine justified their actions.[32]

The Tenth Circuit affirmed in part, reversed in part, and remanded.[33] Writing for the panel, Judge Murguia[34] concluded first that the actions of the Central Utah Task Force violated Callahan's Fourth Amendment rights. Warrantless searches of homes are presumptively unreasonable, Judge Murguia stated, although she noted that this presumption could be overcome in certain circumstances.[35] The court then turned to the consent-once-removed doctrine. While the panel accepted the proposition that the doctrine applied with respect to undercover officers,[36] it declined to extend the consent-once-removed doctrine to informants.[37] The court further held that the Fourth Amendment right it recognized — "the right to be free in one's home from unreasonable searches and arrests" — was clearly established at the time of Callahan's arrest.[38] Supreme Court and Tenth Circuit precedent, the court held, clearly established that the only two exceptions to the Fourth Amendment's warrant requirement are consent and exigent circumstances.[39] The court concluded that under Tenth Circuit law, the officers could not have reasonably concluded that the consent-once-removed doctrine applied to a civilian informant.[40]

Judge Kelly dissented. Accepting the proposition that at the highest level of abstraction the right at issue was the general Fourth Amendment right to be free from unreasonable searches and seizures, he disagreed about whether the unavailability of the consent-once-removed exception was clearly established in the Tenth Circuit.[41] Callahan's expectation of privacy, Judge Kelly argued, was no greater when he invited the confidential informant into his home than it

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[30] 126 S. Ct. 1515 (2006) (holding that the warrantless search of a house over the objection of one physically present occupant, with the consent of the other occupant, violated the Fourth Amendment rights of the objector).

[31] *Callahan*, 2006 WL 1409130, at *8.

[32] *Id.* at *9. Judge Cassell noted that the Sixth, Seventh, and Ninth Circuits have accepted the consent-once-removed doctrine. *Id.* at *7; *see, e.g.*, *Pollard*, 215 F.3d at 649; United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996); United States v. Akinsanya, 53 F.3d 852 (7th Cir. 1995).

[33] Callahan v. Millard County, 494 F.3d 891, 893 (10th Cir. 2007).

[34] Judge Murguia was joined by Judge Ebel.

[35] *See Callahan*, 494 F.3d at 895–96.

[36] *Id.* at 896.

[37] *Id.* at 896–98.

[38] *Id.* at 898.

[39] *Id.* at 899.

[40] *Id.*

[41] *See id.* at 900–03 (Kelly, J., dissenting).

would have been had he invited in an undercover officer.[42] Therefore, he stated, the consent-once-removed doctrine should clearly be extended to confidential informants. Regardless, he concluded, the properly characterized right in the case — "the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause"[43] — was not clearly established; he therefore would have granted the officers qualified immunity.[44]

The Supreme Court, after ordering briefing and argument of the question of whether *Saucier v. Katz* should be overruled,[45] unanimously reversed.[46] Writing for the Court, Justice Alito began by describing the history of modern qualified immunity doctrine through *Saucier*.[47] In determining whether to retain *Saucier*'s two-step procedure, he stated that the Court had to begin with stare decisis considerations.[48] Justice Alito noted that stare decisis generally "promotes the . . . consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[49] However, he concluded that revisiting precedent was "particularly appropriate"[50] when changing the rule "would not upset expectations, [when] the precedent consists of a judge-made rule recently adopted to improve the operation of the courts," and when experience had demonstrated the rule's problems.[51] In his view, these considerations counseled in favor of revisiting *Saucier*: the mandatory procedure did not affect the way in which parties ordered their affairs, was judicially created to deal with problems exclusive to the judiciary, and had been undermined by experience.[52]

Saucier's procedure, Justice Alito concluded, "should no longer be regarded as mandatory."[53] Instead, he stated, the judges of the district courts and courts of appeals should be permitted to exercise discretion in deciding which step of the qualified immunity analysis to apply first.[54] He explained that although *Saucier*'s mandatory two-step

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42 *Id.* at 901.

43 *Id.* at 903.

44 *Id.* at 903–04.

45 Pearson v. Callahan, 128 S. Ct. 1702, 1702–03 (2008) (mem.).

46 *Pearson*, 129 S. Ct. at 813.

47 *See id.* at 815–16.

48 *Id.* at 816.

49 *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)) (internal quotation marks omitted).

50 *Id.*

51 *Id.*

52 *Id.* at 816–18.

53 *Id.* at 818.

54 *Id.*

analysis was often beneficial, it generally imposed unacceptably high costs. Deciding whether there was a constitutional right when it was obvious that such a right was not clearly established resulted in substantial expenditure of judicial and private resources, and the constitutional precedent developed in such litigation was often of little value.[55] Furthermore, *Saucier*'s two-step procedure departed from the principle of constitutional avoidance[56] and often served to limit governmental actors' right to appeal, if those actors lost on the constitutional question but won on the question of whether the contested right was clearly established.[57] "[R]elax[ing] *Saucier*'s mandate,"[58] Justice Alito noted, would provide the federal courts with flexibility in handling qualified immunity cases, and would not have harmful consequences.[59]

Justice Alito then briefly addressed whether the right at stake was clearly established and concluded that it was not: three federal circuits and two state supreme courts had accepted the consent-once-removed doctrine,[60] and "[t]he officers . . . were entitled to rely on [those] cases, even though" the Tenth Circuit had not yet ruled on the substantive Fourth Amendment issue.[61] Having considered and rejected *Saucier*'s procedure, the Court thus reversed the Tenth Circuit.[62]

Though the Court offered strong arguments in favor of overruling *Saucier*, the Court's decision in *Pearson* represents a missed opportunity to clarify what it means for a right to be "clearly established." Indeed, given the practical effects of its decision — that is, that courts will focus on whether the right at issue was clearly established under the second step of the *Saucier* inquiry, rather than the constitutional question[63] — the Court's lack of clarity is even more unfortunate.

While the Court has consistently framed modern qualified immunity analysis in terms of the two-part procedure[64] made mandatory in *Saucier*, the Court has done little to clarify the meaning of the second step of the *Saucier* inquiry: what it means for an asserted right to be clearly established.[65] The Court provided the most clarity it has to

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[55] *See id.* at 818–20.

[56] *Id.* at 821.

[57] *Id.* at 820.

[58] *Id.* at 822.

[59] *See id.* at 821–22.

[60] *See id.* at 822.

[61] *Id.* at 823.

[62] *Id.*

[63] *See id.* at 818 ("There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.").

[64] *See, e.g.*, Conn v. Gabbert, 526 U.S. 286, 290 (1999); Siegert v. Gilley, 500 U.S. 226, 233 (1991); *see also* County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

[65] *See, e.g.*, Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1041–42 (2005) (arguing that the Supreme Court has taken a "hands-off" approach to enunciating what it means for a right to be clearly estab-

this point in *Wilson v. Layne*.[66] In *Wilson*, the Court held that law enforcement officers who had brought members of the media into a private home to record and observe the execution of an arrest warrant on the homeowners' son had violated the Fourth Amendment, but were entitled to qualified immunity under the second step of the qualified immunity analysis.[67] In so holding, the Court concluded that, in addition to controlling authority from the jurisdiction, "a consensus of cases of persuasive authority"[68] would be sufficient to put a government actor on notice that his conduct was unlawful.[69] Additionally, the Court's decision in *Brosseau v. Haugen*[70] indicates that under *Wilson*, courts can consider the decisions of other circuits in determining whether a right was clearly established.[71] However, as a general matter, the state of the doctrine with respect to the second stage of the qualified immunity inquiry remains fundamentally unclear.[72] While the Court has proven its ability to provide meaning in another context requiring the determination of whether federal law was clearly established,[73] with respect to qualified immunity, the Court simply has not articulated a definitive standard for the lower courts to apply.[74]

As a result of the Court's unwillingness to clarify this step of the analysis, the various circuits have devised their own tests. The varying approaches taken by the federal circuits reflect the problems inherent in modern qualified immunity doctrine for rule-of-law values. The Third and Fourth Circuits, for example, have not definitively articulated standards for determining whether a putative right was clearly established. The Fourth Circuit ordinarily looks to "decisions of the

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lished, and noting that the Court came as close as it ever has to articulating a standard for deciding that question in Wilson v. Layne, 526 U.S. 603 (1999)).

66 526 U.S. 603.

67 *See id.* at 609–18.

68 *Id.* at 617.

69 *See id.*

70 543 U.S. 194 (2004) (per curiam).

71 *See id.* at 199–201.

72 *See, e.g.*, Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 TOURO L. REV. 781, 787–88 (2009) (noting that "the Supreme Court has been very inconsistent, and certainly the lower courts are very inconsistent" with respect to the analysis of whether a right was clearly established, *id.* at 788).

73 *See* Carey v. Musladin, 127 S. Ct. 649, 653 (2006) (holding that the term "clearly established Federal law" in the Antiterrorism and Effective Death Penalty Act of 1996 means "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision" (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)) (internal quotation marks omitted)).

74 *See, e.g.*, Chemerinsky & Blum, *supra* note 72, at 787–88; R. George Wright, *Qualified and Civic Immunity in Section 1983 Actions: What Do Justice and Efficiency Require?*, 49 SYRACUSE L. REV. 1, 18–23 (1998); *cf.* Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155 (2005) (describing the interpretive problems that have plagued qualified immunity doctrine, and noting accompanying problems with the clearly established analysis).

Supreme Court, [its own decisions], and the highest court of the state in which the case arose to determine whether a right was clearly established";[75] however, absent a controlling decision of the Supreme Court, it will look to the decisions of other circuit courts of appeals.[76] The Third Circuit's approach is similar,[77] though, following *Wilson*, that court has noted that it "routinely consider[s] decisions by other Courts of Appeals as part of [the] 'clearly established' analysis."[78]

Those circuits that have definitively provided standards are at odds with one another. The Ninth Circuit has taken an expansive approach, looking first to binding authority from the Supreme Court or Ninth Circuit. In the absence of such authority, however, the Ninth Circuit will look to "whatever decisional law is available to ascertain whether the law is clearly established,"[79] "including decisions of state courts, other circuits, district courts,"[80] and even unpublished district court opinions.[81] The First, Fifth, Seventh, Eighth, and Tenth Circuits apply similar standards.[82] These expansive approaches are to be contrasted with the methods of the Sixth[83] and D.C. Circuits,[84] which take a narrower view of the relevant law, and the Second[85] and Eleventh[86] Circuits, which do not consider other circuits' decisions in the analysis.

Pearson thus represented an opportunity for the Court to clarify the second step of the analysis, especially since it appears likely to

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[75] Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998) (en banc); *see also* Owens *ex rel.* Owens v. Lott, 372 F.3d 267, 279 (4th Cir. 2004).

[76] *See, e.g.*, *Owens*, 372 F.3d at 280.

[77] *See* Catlett, *supra* note 65, at 1044–47 (concluding that the Third Circuit has "yet to adopt a clear standard" with respect to the clearly established analysis, *id.* at 1047).

[78] Williams v. Bitner, 455 F.3d 186, 192–93 (3d Cir. 2006). The Third Circuit has also concluded that a circuit split does not necessarily preclude a court from determining that a right was clearly established. *Id.* at 193 n.8.

[79] Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985).

[80] Drummond *ex rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003) (quoting Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995)) (internal quotation marks omitted); *see Capoeman*, 754 F.2d at 1514.

[81] *See* Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002).

[82] *See* Catlett, *supra* note 65, at 1048 n.138.

[83] *See* Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993) (noting that "it is only in extraordinary cases that [the Sixth Circuit] can look beyond Supreme Court and Sixth Circuit precedent to find 'clearly established law'").

[84] *See* Moore v. Hartman, 388 F.3d 871, 885 (D.C. Cir. 2004) (noting that "[t]he law of other circuits may be relevant to qualified immunity, but only in the event that no cases of 'controlling authority' exist in the jurisdiction where the challenged action occurred"), *rev'd on other grounds*, 547 U.S. 250 (2006).

[85] *See* Pabon v. Wright, 459 F.3d 241, 255 (2d Cir. 2006) ("When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit.").

[86] *See* Vinyard v. Wilson, 311 F.3d 1340, 1348 n.11 (11th Cir. 2002) ("Although we cite and examine other circuits' and district courts' decisions under the first prong of *Saucier*, we point out that these decisions are immaterial to whether the law was 'clearly established' in this circuit for the second prong of *Saucier*.").

dominate the qualified immunity inquiry now that *Saucier*'s approach is discretionary.[87] Nonetheless, the *Pearson* Court declined to clarify this step of the analysis, instead stating in a rather conclusory fashion that the right at stake was not clearly established.[88] While this determination seems generally consonant with the Court's decision in *Wilson* — although it seems to represent an expansive interpretation of that case's language[89] — the Court notably failed to address the circuit split over the meaning of the second step of the inquiry. It therefore remains unclear what authority the federal courts are required to consider in determining if an asserted right was clearly established.

The best argument in favor of this state of affairs with respect to the clearly established analysis — and indeed, for the discretion given by *Pearson*, as opposed to the mandatory procedure of *Saucier* — is the promotion of local control and flexibility. Modern qualified immunity doctrine, by allowing judges valuable discretion, allows for the tailoring of legal rules to fit the conditions of each federal circuit. Viewed in this light, *Pearson* might be seen as the continuation of the Rehnquist Court's furtherance of federalism and local freedom from congressional regulation.[90] Additionally, as one commentator has argued, a preoccupation with the uniformity of federal law may have distracted the Court from more pressing goals.[91]

In the context of qualified immunity, however, a federalism-based argument is untenable, from both liberal and conservative perspectives. Judicial liberals have consistently been unwilling to accept the premise that constitutional rights can or should vary based on geography,[92] though it seems inevitable in a federal system in which the Su-

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[87] *Cf.* RICHARD A. POSNER, HOW JUDGES THINK 35–38, 35 n.33 (2008). Judge Posner explains that judicial arguments for economy and "doctrines such as harmless error, waiver, and forfeiture" may be explicable by reference to judicial utility functions. *Id.* at 36. Similar analysis suggests increased judicial resolution of qualified immunity cases by way of the second, rather than first, step of the qualified immunity analysis.

[88] *See Pearson*, 129 S. Ct. at 822–23.

[89] *See id.* (stating that the officers were entitled to rely on decisions of the Sixth, Seventh, and Ninth Circuits in determining the constitutionality of the consent-once-removed doctrine).

[90] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

[91] *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1630–39 (2008).

[92] *See* Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1135–36 (1999) (noting that the premise that constitutional rights might vary on the basis of geography has traditionally "been summarily dismissed as repugnant to the very notion of constitutionalism," *id.* at 1136); *see also* Smith v. United States, 431 U.S. 291, 312 n.5 (1977) (Stevens, J., dissenting) (noting that while "[c]ommunities vary . . . in many respects . . . and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution . . . [i]t is, after all, a national Constitution we are expounding" (quoting Jacobellis v. Ohio, 378 U.S. 184, 194–95 (1964) (Brennan, J., plurality opinion))).

preme Court can only review a fraction of decided cases. As to judicial conservatives, who place a premium on clarity in the formulation of legal rules,[93] nebulous standards[94] for determining whether a state official is entitled to qualified immunity require constant supervision by the federal courts of the conduct of state actors, with perpetual second-guessing and federal judicial intervention.[95]

Furthermore, it makes little sense to appeal to local control when, as noted above, the *Pearson* Court accorded government actors the ability to rely on the decisions of three *other* circuits and two state supreme courts; for such a rationale to have been availing in *Pearson*, the task force officers would presumably have had to rely on the decisional law of the Utah courts or the Tenth Circuit, not those of California, Ohio, or Wisconsin. Taking such an argument to its logical conclusion would mean limiting judicial consideration of the decisional law of other jurisdictions, and the Court appears unwilling to do so; a principled localist approach to immunity would require the Court to restrict *Wilson*'s scope.

The Court's refusal to clarify the doctrine is particularly problematic because qualified immunity has traditionally been premised on the provision of notice to governmental[96] and private[97] actors. The Court's failure to elaborate on what it means for a right to be clearly established frustrates that goal. By allowing district and circuit court judges to bypass *Saucier*'s first step, *Pearson* encourages those judges to dispose of challenges to the conduct of government actors by concluding that, even if a constitutional right was violated, the putative right was not clearly established. At the same time it shifted the inquiry, however, the Court failed to clarify the relevant legal rule. While moving quickly to the analysis of whether a right was clearly established will likely conserve scarce resources,[98] confusion over whether an asserted right was clearly established will make it difficult for potential litigants to determine whether to sue or to settle.

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[93] *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[94] *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

[95] *Cf.* ANTHONY LEWIS, GIDEON'S TRUMPET 129 (Vintage Books 1989) (1964) (discussing a similar argument made by John Hart Ely to Abe Fortas in favor of overruling Betts v. Brady, 316 U.S. 455 (1942), a step the Supreme Court took in Gideon v. Wainwright, 372 U.S. 335 (1963)).

[96] *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 741 (2002); Saucier v. Katz, 533 U.S. 194, 202 (2001); Marsh v. Butler County, 268 F.3d 1014, 1031 (11th Cir. 2001) (en banc) (noting that "fair and clear notice to government officials is the cornerstone of qualified immunity"); *cf.* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205–06 (1985) (describing the value of notice in the construction of criminal statutes).

[97] *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

[98] *See Pearson*, 129 S. Ct. at 818.

Such a course of action is undesirable. The provision of legal clarity is welcome and necessary in a system based on rule-of-law values.[99] Dismissing challenges early in litigation[100] on the ground that a claimed right was not clearly established does little to help parties structure future conduct. Though the Court's concern with constitutional avoidance is admirable, it comes at the expense of the clarification of constitutional doctrine and the creation of legal certainty.

Should the Court not intend to expand immunity, as it briefly suggested in dicta,[101] it should take the next opportunity to clarify that point. Regardless of the Court's intentions with respect to the scope of § 1983, however, the Court can and should explain more fully the second step of modern qualified immunity doctrine.

III. FEDERAL STATUTES AND REGULATIONS

A. Civil Rights Act, Title VII

Compliance Efforts. — Equal protection theory has long been troubled by the conflict inherent in requiring unequal treatment in order to avoid or remedy unequal result. Until recently, it was believed that the Constitution forbade only disparate treatment, while Congress could legislate against disparate impact.[1] Last Term, in *Ricci v. DeStefano*,[2] the Supreme Court held that under Title VII of the Civil Rights Act of 1964,[3] before an employer can intentionally discriminate

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[99] *See generally* Scalia, *supra* note 93.

[100] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987) (noting that the "driving force" behind the creation of modern qualified immunity doctrine was the desire that "'insubstantial claims' against government officials be resolved prior to discovery and on summary judgment if possible" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))).

[101] *See Pearson*, 129 S. Ct. at 821–22 (suggesting that making the qualified immunity inquiry discretionary, rather than mandatory, will not result in substantial changes to the doctrine, and dismissing potential counterarguments). However, by allowing the officers the ability to rely on the decisions of three other circuits and two state supreme courts, the *Pearson* Court seemed to establish a lower threshold to support claims that an asserted constitutional right is in controversy. Such a move would be consistent with what some commentators understand as the Court's desire to reduce the ambit of § 1983 and expand the immunity of government officials. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 25–26 (1989); *see also* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 684–85, 688–94 (2009) (arguing, after a survey of federal district and appeals court cases, that plaintiffs have become steadily more unsuccessful in § 1983 litigation). Though the merits of such a position are surely debatable, few interests are served by expanding immunity silently. Such action is anathema to the judicial process and the values it seeks to embody. *See, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–72 (1978).

[1] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495–96 (2003).

[2] 129 S. Ct. 2658 (2009).

[3] 42 U.S.C. § 2000e (2006).