
*Fourth Amendment — Search and Seizure —
Reasonable Mistake of Law — Heien v. North Carolina*

The Supreme Court has long held that a police officer’s reasonable mistake of fact may give rise to a lawful search or seizure under the Fourth Amendment.¹ But where an officer acts upon a reasonable mistake of law, lower courts have differed on whether the corresponding search or seizure encroaches upon constitutional rights.² Last Term, in *Heien v. North Carolina*,³ the Supreme Court held that a police officer’s reasonable mistake of law may give rise to the reasonable suspicion needed to justify a traffic stop under the Fourth Amendment.⁴ Mindful that an open-ended “reasonableness” test might sow confusion — or worse, abuse — both the majority and concurrence sought to cabin the reasonable-mistake-of-law test with additional qualifiers. Such qualifiers allay some but not all concerns over what the *Heien* test means for judicial administrability and police discretion.

Heien arose out of a routine traffic stop. In April 2009, Sergeant Matt Darisse of the Surry County Sheriff’s Department was patrolling traffic when a Ford Escort passed by.⁵ The driver’s “stiff and nervous” demeanor aroused the officer’s suspicions, prompting him to follow.⁶ After a few miles, Darisse noticed that the Escort’s right rear brake light didn’t illuminate when triggered.⁷ On the belief that state law required two functioning brake lights, he stopped the car with its two passengers: the driver, Maynor Javier Vasquez, and the owner, Nicholas Brady Heien.⁸ Once Darisse confirmed that Vasquez possessed valid license and registration, he issued a warning ticket.⁹ But Darisse did not leave. Dubious after the men reported inconsistent destinations,¹⁰ he asked for and obtained permission to search the car.¹¹ His search turned up a sandwich bag of cocaine.¹²

¹ See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990) (“[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.”); *Hill v. California*, 401 U.S. 797, 804–05 (1971); *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

² Compare, e.g., *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005) (search or seizure may be lawful if mistake of law reasonable), with *United States v. Chanthasouvat*, 342 F.3d 1271, 1279 (11th Cir. 2003) (traffic stop based on mistake of law never lawful).

³ 135 S. Ct. 530 (2014).

⁴ *Id.* at 534.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See *id.*

⁹ *Id.*

¹⁰ Vasquez said they were driving to West Virginia, while Heien averred that their destination was Kentucky. *State v. Heien*, 737 S.E.2d 351, 352 (N.C. 2012).

¹¹ *Heien*, 135 S. Ct. at 534.

¹² *Id.*

Charged with attempted trafficking in cocaine, Heien moved to suppress the evidence obtained from the search, arguing that it flowed from an illegal stop.¹³ The trial court refused on the grounds that Darisse had reasonable suspicion to effectuate his seizure under the Fourth Amendment.¹⁴

The North Carolina Court of Appeals reversed.¹⁵ In its view, a stop is not objectively reasonable when predicated upon an error of law.¹⁶ Because the state vehicle code referred several times to a “stop lamp” in the singular, the court interpreted the law as requiring only one working brake light.¹⁷ On that reading, Darisse lacked reasonable suspicion for stopping Heien.¹⁸

The North Carolina Supreme Court reversed.¹⁹ Though the state did not seek review of the lower court’s interpretation of the vehicle code,²⁰ the court nonetheless upheld Darisse’s stop.²¹ It framed its analysis as a choice between one federal circuit’s position that a mistake of law could never give rise to reasonable suspicion²² and another circuit’s requirement that police mistakes of law simply be reasonable.²³ The court embraced the latter view, believing that it would promote safer roadways²⁴ and better comport “with the primary command of the Fourth Amendment — that law enforcement agents act reasonably.”²⁵

The Supreme Court affirmed.²⁶ Writing for the Court, Chief Justice Roberts²⁷ opened with the oft-cited proposition that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”²⁸ But “[t]o be reasonable is not to be perfect.”²⁹ Just as the Court has “recognized

¹³ *Id.* at 535. Heien pled guilty, but reserved the right to appeal the denial of his motion to suppress. *Id.*

¹⁴ *Heien*, 737 S.E.2d at 353.

¹⁵ *State v. Heien*, 714 S.E.2d 827, 831 (N.C. Ct. App. 2011).

¹⁶ *Id.* at 829.

¹⁷ *Id.* The court found other sections of the state code equally unavailing for the officer. *See id.* at 830–31.

¹⁸ *Id.* at 831.

¹⁹ *Heien*, 737 S.E.2d at 359. Three of the seven justices dissented.

²⁰ *Id.* at 354.

²¹ *Id.* at 352.

²² *Id.* at 355–56 (discussing *United States v. Chanthasouvat*, 342 F.3d 1271 (11th Cir. 2003)).

²³ *Id.* (discussing *United States v. Martin*, 411 F.3d 998 (8th Cir. 2005)).

²⁴ *Id.* at 357.

²⁵ *Id.* at 356. The North Carolina Supreme Court then remanded to the state’s Court of Appeals to deal with Heien’s other arguments. The lower court rejected those arguments and affirmed the trial court’s denial of Heien’s motion to suppress, and the North Carolina Supreme Court did the same. *Heien*, 135 S. Ct. at 535.

²⁶ *Heien*, 135 S. Ct. at 534.

²⁷ Chief Justice Roberts was joined by every member of the Court save Justice Sotomayor.

²⁸ *Heien*, 135 S. Ct. at 536 (quoting *Riley v. California*, 134 S. Ct. 2473, 2482 (2014)).

²⁹ *Id.*

that searches and seizures based on mistakes of fact can be reasonable,”³⁰ the Chief Justice reasoned, it should do the same for mistakes of law.³¹

For support, the Court looked first to cases arising out of an early statute indemnifying customs officers against unlawful-seizure suits.³² In *United States v. Riddle*,³³ Chief Justice Marshall affirmed the issuance of a probable cause certificate for an officer who had seized English goods based on a reasonable but mistaken reading of the statute.³⁴ “A doubt as to the true construction of the *law* is as reasonable a cause for seizure as a doubt respecting the fact,” he pronounced.³⁵

The Court turned next to *Michigan v. DeFillippo*,³⁶ a decision that both parties’ briefs discussed at some length.³⁷ In that case, an officer found drugs on DeFillippo while arresting him for violating a city ordinance that was later held unconstitutional.³⁸ In the Court’s retelling, the *DeFillippo* Court held that the search was nevertheless lawful because at the time of arrest, the ordinance was “presumptively valid”;³⁹ the officer’s mistake was in that sense understandable, providing “abundant probable cause” for an arrest.⁴⁰ Though Heien “struggle[d] to recast *DeFillippo* as a case solely about the exclusionary rule,”⁴¹ the case clearly went to the heart of the Fourth Amendment itself.⁴²

The Court then considered three of Heien’s other claims. Responding first to the contention that unlike with legal judgments “[o]fficers

³⁰ *Id.* In *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court sanctioned a home search even though the source of the consent was a nonresident. *Id.* at 179. Because the officer’s mistake of identity was reasonable, the corresponding search was too. *Id.* at 186–89.

³¹ *Heien*, 135 S. Ct. at 536 (“Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law.”).

³² *Id.* at 536–37.

³³ 9 U.S. (5 Cranch) 311 (1809).

³⁴ *Id.* at 313.

³⁵ *Heien*, 135 S. Ct. at 537 (quoting *Riddle*, 9 U.S. (5 Cranch) at 313). The Chief Justice acknowledged that *Riddle* and later cases were not Fourth Amendment cases and so not “directly on point.” *Id.* But he maintained that they were relevant because probable cause has always had a “fixed and well known meaning,” *id.* (quoting *Locke v. United States*, 11 (7 Cranch) 339, 348 (1813)), that has always “encompassed suspicion based on reasonable mistakes of both fact and law,” *id.*

³⁶ 443 U.S. 31 (1979).

³⁷ See Brief for Petitioner at 27–29, 35, *Heien*, 135 S. Ct. 530 (No. 13-604); Brief for the Respondent at 8, 18, 19, 30, *Heien*, 135 S. Ct. 530 (No. 13-604).

³⁸ *DeFillippo*, 443 U.S. at 33–34.

³⁹ *Heien*, 135 S. Ct. at 538 (quoting *DeFillippo*, 443 U.S. at 37).

⁴⁰ *Id.* (quoting *DeFillippo*, 443 U.S. at 37).

⁴¹ *Id.*

⁴² Because North Carolina does not recognize a good-faith exception to the exclusionary rule, see *State v. Carter*, 370 S.E.2d 553, 560–62 (N.C. 1988); see also *Heien*, 135 S. Ct. at 545 (Sotomayor, J., dissenting), a holding that Sergeant Darisse’s actions had violated Heien’s Fourth Amendment rights would have resulted in the cocaine being suppressed.

in the field must make factual assessments on the fly,” the majority argued that in many instances an officer would have to quickly resolve legal ambiguities in the field as well.⁴³ Second, the Court’s rule would “not discourage officers from learning the law,” for the “Fourth Amendment tolerates only . . . *objectively* reasonable” mistakes, an “inquiry . . . not as forgiving” as the one used in the qualified immunity context, and one that would not reward “sloppy study of the laws.”⁴⁴ Third, in response to the argument that it would be unjust to permit officers but not citizens to make errors of law, the Court countered that “just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop.”⁴⁵

Having decided that a reasonable mistake of law may justify a stop, the Chief Justice concluded with “little difficulty” that Sergeant Darisse’s mistake of law was objectively reasonable.⁴⁶ He relied on two provisions of the state statute: one providing that “[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps,”⁴⁷ which “suggests to the everyday reader of English that a ‘stop lamp’ is a type of ‘rear lamp,’”⁴⁸ and the other requiring vehicles to “have all originally equipped rear lamps or the equivalent in good working order.”⁴⁹ Read together, these provisions could reasonably appear to require two working brake lights.⁵⁰ Under the lodestar of “reasonableness,” Sergeant Darisse committed no Fourth Amendment violation.

Justice Kagan concurred⁵¹ to highlight two points: First, “an officer’s ‘subjective understanding’ is irrelevant” to the reasonableness inquiry, meaning that a lack of training or awareness of the law “cannot help to justify a seizure.”⁵² Second, the Court’s test “is more demanding” than what is required under qualified immunity.⁵³ The latter protects “all but the plainly incompetent or those who knowingly

⁴³ *Heien*, 135 S. Ct. at 538. Adding color to this point, the Chief Justice gave this example: “A law prohibiting ‘vehicles’ in the park either covers Segways or not, but an officer will nevertheless have to make a quick decision on the law the first time one whizzes by.” *Id.* (citation omitted) (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 36–38 (2012)).

⁴⁴ *Id.* at 539–40.

⁴⁵ *Id.* at 540. After all, Heien was charged for a drug crime, not a mistaken traffic violation. *See id.*

⁴⁶ *Id.*

⁴⁷ N.C. GEN. STAT. § 20-129(g) (2013) (emphasis added).

⁴⁸ *Heien*, 135 S. Ct. at 540.

⁴⁹ N.C. GEN. STAT. § 20-129(d).

⁵⁰ *Heien*, 135 S. Ct. at 540.

⁵¹ Justice Kagan was joined by Justice Ginsburg.

⁵² *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring).

⁵³ *Id.*

violate the law,”⁵⁴ whereas a court applying *Heien* “faces a straightforward question of statutory construction” — “[i]f the statute is genuinely ambiguous, such that overturning the officer’s judgment requires hard interpretive work, then the officer has made a reasonable mistake.”⁵⁵ The statute must pose a “very hard question of statutory interpretation,”⁵⁶ and such cases would be “exceedingly rare.”⁵⁷

Justice Sotomayor, the lone dissenter, would have adopted a rule “evaluating an officer’s understanding of the facts against the actual state of the law.”⁵⁸ In canvassing the Court’s major probable-cause precedents, she found “scarcely a peep” on anything other than mistakes of fact.⁵⁹ This silence was unsurprising, the Justice explained, as officers must make “quick decisions” in the field, enjoying relative expertise as factfinders.⁶⁰ But legal meanings are not “probabilistic” like factual determinations, and courts — not officers — enjoy comparative expertise in “legal exegesis.”⁶¹

Heien’s holding, the dissent warned, “further erod[es] the Fourth Amendment’s protection of civil liberties.”⁶² When the Court permitted pretextual searches in *Whren v. United States*,⁶³ it assumed that “[the] pretext would be the violation of an actual law.”⁶⁴ But if the police have “license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation),”⁶⁵ innocent citizens will face great difficulty in trying “to avoid . . . invasive, frightening, and humiliating encounters.”⁶⁶

Turning to the majority’s reasoning, the dissent questioned the relevance of founding-era customs statutes⁶⁷ and criticized the Chief Justice’s treatment of *DeFillippo* for “imagin[ing] a holding . . . not rooted in the logic of the opinion.”⁶⁸ On the dissent’s reading, *DeFillippo* “did

⁵⁴ *Id.* (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)).

⁵⁵ *Id.*

⁵⁶ *Id.* (quoting Transcript of Oral Argument at 50, *Heien*, 135 S. Ct. 530 (No. 13-604)).

⁵⁷ *Id.* (quoting Brief for the Respondent, *supra* note 37, at 17; Transcript of Oral Argument, *supra* note 56, at 48).

⁵⁸ *Id.* at 542 (Sotomayor, J., dissenting). Though the “ultimate touchstone of the Fourth Amendment is ‘reasonableness,’” she wrote, *id.* (quoting *Riley v. California*, 134 S. Ct. 2473, 2482 (2014)), that broad principle “does not define the categories of inputs that courts are to consider when assessing the reasonableness of a search or seizure, each of which must be independently justified,” *id.*

⁵⁹ *Id.* at 543.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 517 U.S. 806 (1996).

⁶⁴ *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting).

⁶⁵ *Id.*

⁶⁶ *Id.* at 544.

⁶⁷ *Id.* at 545.

⁶⁸ *Id.* at 546.

not involve any police ‘mistake’ at all,” and so could not be said to control.⁶⁹ Finally, while acknowledging the concurrence’s efforts to “set some bounds” on the scope of the Court’s test, Justice Sotomayor predicted that it would “prove murky in application.”⁷⁰

Taken together, the majority and concurrence’s “reasonableness” guidance can be reduced to three points: (1) the inquiry is objective;⁷¹ (2) it is “not as forgiving” as the qualified immunity standard;⁷² and (3) a mistake is reasonable when the statute is “genuinely ambiguous”⁷³ or, in other words, “‘so doubtful in construction’ that a reasonable judge could agree with the officer’s view.”⁷⁴ Though cabined in these ways, the *Heien* test is less restrictive than first meets the eye. The leeway afforded to officer mistakes of law may ultimately prove quite broad.

First, the Court failed to appreciate the dangers of abandoning a subjective inquiry. In defending the Court’s holding, Chief Justice Roberts pointed out that an objective standard would ensure that “an officer can gain no Fourth Amendment advantage through a sloppy study of the laws.”⁷⁵ But the objective approach cuts both ways. While it does not condone ignorance of the laws, it also does not prevent officers from leveraging legal uncertainty in ways that can be equally perverse. Consider a traffic code with an ambiguous provision susceptible to several reasonable interpretations. Under the *Heien* test, an enterprising officer might conduct searches and seizures based on violations under any of those interpretations, even if they conflict. In *United States v. McDonald*,⁷⁶ Illinois traffic law did not indicate whether turning on a ninety-degree curve on a road that changed names required use of a turn signal, or whether using a signal was even legal.⁷⁷ But because one might reasonably interpret statutory silence as either requiring or forbidding a turn signal, an officer confronting a similar statute might simply wait and see which course a driver followed before apprehending her on the reasonable belief that she had violated the law.⁷⁸

⁶⁹ *Id.*

⁷⁰ *Id.* at 547.

⁷¹ *Id.* at 539 (majority opinion); *see also id.* at 541 (Kagan, J., concurring).

⁷² *Id.* at 539 (majority opinion); *see also id.* at 541 (Kagan, J., concurring).

⁷³ *Id.* at 541 (Kagan, J., concurring).

⁷⁴ *Id.* (quoting *The Friendship*, 9 F. Cas. 825, 826 (C.C.D. Mass. 1812) (No. 5,125)). This third point did not command a majority of the Court.

⁷⁵ *Id.* at 539–40 (majority opinion). Justice Kagan concurred on this point, writing that the objective approach would not forgive “an officer’s mistaken legal interpretation on the ground that the officer was unaware of or untrained in the law.” *Id.* at 541 (Kagan, J., concurring).

⁷⁶ 453 F.3d 958 (7th Cir. 2006).

⁷⁷ *Id.* at 959–60; *see also* Brief for Petitioner, *supra* note 37, at 42.

⁷⁸ *See* Brief for Petitioner, *supra* note 37, at 42. In *McDonald*, the officer had stopped McDonald for using his turn signal when going around the ninety-degree bend. *McDonald*, 453

The Court's objective test is underrestrictive for another reason: by injecting knotty questions of statutory interpretation into Fourth Amendment analysis, the Court may also have imported divisive debates over interpretive theory that polarize even the most "reasonable" jurists and scholars.⁷⁹ The likely effect will be to bring a whole range of interpretations under the "reasonableness" umbrella. If intelligent readings of text, structure, and purpose can lead to multiple, contested outcomes when deciding the "correct" interpretation, an even larger range of readings will emerge when the standard is relaxed to admit mere "reasonable" interpretations.

Imperfect analogies from other contexts bear this point out. When courts are asked to carry out Step Two of the *Chevron* test, which mandates judicial deference to "reasonable" agency interpretations of ambiguous statutes,⁸⁰ such interpretations are accorded a "wide berth."⁸¹ Accordingly, courts have only rarely bucked the agency interpretation at Step Two, often sustaining it "in a perfunctory way."⁸² *Heien*, of course, is not a doctrine of deference, and it does not share *Chevron*'s background assumption that legislatures intend for agencies to resolve statutory ambiguities.⁸³ But having received minimal guidance as to what an objectively reasonable mistake of law entails, lower courts might be forgiven for mistakenly (if not reasonably) letting *Chevron*-grade deference seep into their *Heien*-rule decisionmaking.

Anticipating, perhaps, that lower courts might need more than the language of objective reasonableness, the Court clarified that its test would be more exacting than the one associated with qualified immunity — a doctrine that protects government officials from civil liability.⁸⁴ Qualified immunity, as stated succinctly in *Harlow v. Fitz-*

F.3d at 959. The Seventh Circuit held that the law did not prohibit such an action, and that the officer's mistake of law could not justify the stop. *Id.* at 961–62.

⁷⁹ For a flavor of one such debate, see ROBERT A. KATZMANN, JUDGING STATUTES 29–54 (2014) (summarizing the textualism versus purposivism divide); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

⁸⁰ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

⁸¹ Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC, 41 F.3d 721, 728 (D.C. Cir. 1994).

⁸² M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 86 (John F. Duffy & Michael Herz eds., 2005) (finding *Chevron* Step Two invalidations to be "extremely rare"); see also Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1261 (1997) ("[I]n the thirteen years since *Chevron*, the Court has never once struck down an agency's interpretation by relying squarely on the second *Chevron* step." (emphasis omitted)).

⁸³ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006) ("*Chevron* seemed to declare that in the face of ambiguity, it is emphatically the province and duty of the administrative department to say what the law is.").

⁸⁴ Qualified immunity may come into play in "*Bivens*" suits against federal actors, named after *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or suits against state actors under 42 U.S.C. § 1983. See Gary S. Gildin, *The Standard of Culpa-*

gerald,⁸⁵ shields “government officials performing discretionary functions . . . 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.”⁸⁶

The reference to qualified immunity does not meaningfully limit *Heien*. First, though both tests require objective analysis, the inquiries are distinct. In applying *Harlow*, courts have focused not on basic questions of statutory or constitutional interpretation, but instead on ascertaining whether a right was “clearly established.”⁸⁷ In the circuit courts, the “dominant method is simply to count — are there enough decisions to tell an official that his action is unconstitutional?”⁸⁸ Though this method is “objective” in that it asks what a hypothetical reasonable official should know, it has become a wholly separate kind of analysis from *Heien*’s question of statutory interpretation.

Second, qualified immunity doctrine can be so protective of official conduct that it does not mean much as a conceptual baseline. As Justice Scalia asserted in *Ashcroft v. al-Kidd*,⁸⁹ “[w]hen properly applied, [qualified immunity] protects ‘all but the plainly incompetent or those who knowingly violate the law.’”⁹⁰ Addressing *Heien*’s fear that this standard might come to govern police mistakes of law,⁹¹ Justice Kagan dismissed it as not part of the Court’s test.⁹² Though reassuring as an upper bound, it also adds very little. “Reasonable” interpretations of law do not tend to issue from officials of “plain incompetence,” and the *Heien* test does not penalize those who “knowingly violate the law” for gaining advantage from ambiguity, as explained above.

Though Justice Kagan’s concurrence sought to more clearly delineate the scope of the Court’s “reasonableness” inquiry, its impact may also be limited. First, and most importantly, Justices Kagan and Ginsburg did not speak for the Court — their two votes were not needed to sustain the majority’s position. Whether the other Justices thought the concurrence misguided or simply unnecessary, a lower court might justifiably question why its reasoning attracted only two votes.⁹³

in *Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 557–59 (1983).

⁸⁵ 457 U.S. 800 (1982).

⁸⁶ *Id.* at 818.

⁸⁷ *Id.*

⁸⁸ John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1323 (2012). The author calls this approach “wrongheaded.” *Id.*

⁸⁹ 131 S. Ct. 2074 (2011).

⁹⁰ *Id.* at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

⁹¹ See Brief for Petitioner, *supra* note 37, at 41–42.

⁹² See *Heien*, 135 S. Ct. at 540–41 (Kagan, J., concurring).

⁹³ This is not to suggest that concurrences can never be influential. See, e.g., *Katz v. United States*, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

Second, even if a lower court did give effect to Justice Kagan’s qualifiers, it is not clear what they would entail. Superficially, they recall *Chevron* deference,⁹⁴ asking that courts sustain reasonable interpretations in cases of ambiguity.⁹⁵ But because *Heien* does not share *Chevron*’s background delegation assumptions, closer analogies may be found in the rule of lenity or the canon of constitutional avoidance, both of which ask judges to adopt alternate plausible interpretations in the face of ambiguity.⁹⁶ Although not limited to laws involving a delegation to an agency, these other ambiguity canons seem to arise on more than the “exceedingly rare”⁹⁷ occasion.

But on top of familiar standards like “genuine ambiguity,” the concurrence affixed superlative terms like “really difficult” or “very hard question of statutory interpretation” to further cabin *Heien*’s scope.⁹⁸ Though reassuring on the surface, the concurrence offered little guidance as to what “very hard” or “really difficult” actually mean. In practice, the difficulty of resolving a question of statutory interpretation can often depend entirely on one’s preferred interpretive approach. To take an example from this Term, in *King v. Burwell*,⁹⁹ the Court found a short provision of the Patient Protection and Affordable Care Act¹⁰⁰ to be “properly viewed as ambiguous,”¹⁰¹ while the dissent thought the contrary reading “absurd”¹⁰² and a “defense of the inde-

⁹⁴ Under Justice Stevens’s canonical formulation of the test, a court reviewing an agency’s interpretation of a statute the agency administers asks first whether the statutory language is clear. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). If, in “employing traditional tools of statutory construction, [the court] ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Id.* at 843 n.9. But “if the statute is silent or ambiguous,” the analysis proceeds to Step Two, which asks “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

⁹⁵ See *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring). Justice Kagan noted that this threshold step of gauging whether a statute is ambiguous would require answering “a straightforward question of statutory construction,” *id.*, presumably requiring the same “traditional tools of statutory construction” used in *Chevron*, 467 U.S. at 843 n.9. But if *Chevron* is any guide, courts are likely to find ambiguity far more often than the concurrence suggests. In a recent empirical analysis, Professor Richard Re examined all federal appellate court decisions in 2011 that cited *Chevron*, finding that the courts reached Step Two — that is, found the statute ambiguous — in 79 of 110 cases. Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 638–39 (2014).

⁹⁶ See Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 258 (2010).

⁹⁷ *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring) (quoting Brief for the Respondent, *supra* note 37, at 17; Transcript of Oral Argument, *supra* note 56, at 48).

⁹⁸ *Id.* (quoting Transcript of Oral Argument, *supra* note 56, at 50).

⁹⁹ 135 S. Ct. 2480 (2015); see also Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015).

¹⁰⁰ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

¹⁰¹ *King*, 135 S. Ct. at 2491.

¹⁰² *Id.* at 2496 (Scalia, J., dissenting).

fensible.”¹⁰³ The majority and dissent disagreed profoundly as to not only which reading was right, but also how hard it was to answer the underlying interpretive question.¹⁰⁴ Cases like *King* cast greater doubt on the prediction that very hard cases of interpretation will be “exceedingly rare.”

Justice Kagan added that “really difficult” questions would be ones “‘so doubtful in construction’ that a reasonable judge could agree with the officer’s view.”¹⁰⁵ But this may relax the test even more. A reviewing court may be even less likely to overrule a police officer’s mistaken legal interpretation after lower courts have accepted that reading of the law as “reasonable” — as they did in *Heien*.¹⁰⁶ Overruling officer interpretations under these circumstances would suggest that a fellow jurist was not only incorrect, but also “unreasonable,” implying a serious deficiency in the judge’s legal competence and character. Indeed, in other contexts, courts have shown a high level of comity to lower courts accused of making “unreasonable” legal interpretations.¹⁰⁷

The concurrence may have used words like “very hard” and “really difficult” to try and limit reasonable mistakes to those as forgivable as Sergeant Darisse’s misinterpretation of the vehicle code. Between the use of the plural and the juxtaposition of “stop lamp” and “rear lamp,” one might have easily arrived at two equally reasonable readings of the statute. In that sense, *Heien* was the perfect case for supporters of the majority’s approach, as it forced the Court to confront not just a reasonable, but an extremely reasonable — some would say even correct — interpretation of the law. The concurrence sought to cabin its rule to only those clear cases, but for the reasons highlighted above, its guidance may fall short of this goal. If that happens, the result will be more officer discretion, and in some cases, abuse.

¹⁰³ *Id.* at 2502.

¹⁰⁴ That disagreement depended in turn on how much each jurist valued text, structure, and purpose. For an overview of the interpretive debate, see sources cited *supra* note 79.

¹⁰⁵ *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring) (quoting *The Friendship*, 9 F. Cas. 825, 826 (C.C.D. Mass. 1812) (No. 5,125)).

¹⁰⁶ See *State v. Heien*, 737 S.E.2d 351, 353 (N.C. 2012).

¹⁰⁷ One provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code), lets federal courts issue relief when state court rulings are based on an “unreasonable application of] clearly established Federal law.” 28 U.S.C. § 2254(d)(1) (2012). But the Court has limited this power to cases where “there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.” *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). Under this standard, and out of comity, the Court has “consistently up[h]eld] erroneous state court decisions” in AEDPA proceedings. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 n.8 (2015); *id.* (listing cases).