

READING *TAYLOR*'S TEA LEAVES: THE FUTURE OF QUALIFIED IMMUNITY

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ABSTRACT

Many observers of qualified immunity doctrine drew a sharp breath when the Supreme Court handed down Taylor v. Riojas in late 2020. The decision, reversing a grant of qualified immunity to prison officials sued under 42 U.S.C. § 1983, reflected a marked break in outcome and tone from the preceding decade of unwavering commitment by the Court to expanding the scope of qualified immunity's protection to sued officials: it was a nearly unheard-of victory for a plaintiff, and it was delivered in an opinion that cautioned against applying qualified immunity's "clearly-established-law" prong in a manner too protective of officials, rather than the opposite. The decision has prompted speculation among commentators as well as lower courts about the degree to and manner in which Taylor represents a shift in qualified immunity doctrine.

This Article considers that question, but does so through the lens of not only the Court's qualified immunity jurisprudence, but also the work of lower federal courts before and after Taylor. The Article posits that appreciating the full range of possibilities for qualified immunity's post-Taylor future requires engagement with the non-trivial degree of hybridity among circuits in the stringency of qualified immunity, mediated by not only the variety of approaches to analyzing the substantive merits of qualified immunity claims, but also an array of procedural rules that feature in qualified immunity litigation. Against that backdrop, the Article sketches three plausible futures that might emerge in Taylor's aftermath. In the least earth-shaking scenario, Taylor might be a one-off, an exceptional case that only serves to illustrate the

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muscularity of qualified immunity. A more far-reaching possibility is that Taylor signals a softening of the Court's clearly-established law test, which could be accomplished through a variety of mechanisms—from adjusting the level of particularity required by the clearly-established-law inquiry, to less obvious means like tinkering with the legal sources eligible to clearly establish the law. Finally, a more far-reaching though less-determinate prediction is that Taylor might prompt greater experimentation with procedural rules—such as restrictions on interlocutory appeals, or limitations on pre-discovery dismissals—that might diminish the qualified immunity's effects on constitutional litigation. To be sure, the Article does not offer odds on the accuracy of any one of those three possible predictions. Rather, the aim is to demonstrate the degree of hybridity that qualified immunity has featured and will continue to feature—perhaps to a greater degree—as the lower federal courts continue to be the primary interpreters and implementors of the doctrine. The analysis thus exposes qualified immunity as an important arena for considering the relationship between the Supreme Court and the lower federal courts, and, more practically, shines light on the array of doctrinal tools (often less visible in analyses that exclusively center the Court's work) that those wishing to reform qualified immunity might add to their toolboxes.

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INTRODUCTION

There are few contemporary legal doctrines on which the Supreme Court has lavished more attention than qualified immunity, the much-criticized judge-made limitation on the availability of causes of action against state and federal officials for violations of constitutional rights.¹ The doctrine debuted as a narrow defense of common law origin for local police officers sued for federal civil rights violations that were analogous to the tort of false arrest.² Before long, however, before qualified immunity ballooned into a general defense of good faith enjoyed by all officials sued under 42 U.S.C. § 1983 or the implied right of action known as *Bivens*, and then was expanded and reinvented, in *Harlow v. Fitzgerald*, as an objective assessment of whether an official's constitutional violation transgressed "clearly established" law.³ In the

1. For recent and influential academic criticism see, for example, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*]; Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015) [hereinafter Nielson & Walker, *New Qualified Immunity*]; Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) [hereinafter Schwartz, *Police Indemnification*]. Defenses of the doctrine can be found, but they are mostly tepid. See Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018) [hereinafter Nielson & Walker, *Qualified Defense*] (determining that characterization of qualified immunity as unlawful and ineffective does not settle doctrine as a policy matter but recognizing that improvements are needed); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013) (conceding that some form of immunity is sensible but criticizing scope of modern doctrine). But see Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547 (2020) (agreeing with critics that the doctrine's conventional justifications are unpersuasive but defending qualified immunity as preventing diversion of taxpayer resources to unmeritorious litigation). For statements of discontent from the bench, see, for example, *Baxter v. Bracey*, 140 S. Ct. 1862, 1852 (2020) (Thomas, J., dissenting from the denial of certiorari) ("I have previously expressed my doubts about our qualified immunity jurisprudence. . . . Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition [to reconsider qualified immunity]."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that decision "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."); *Zadeh v. Robinson*, 928 F.3d 457, 479–81 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (Willett, J., concurring in part and dissenting in part) ("restat[ing] . . . unease with the real-world functioning of modern immunity practice" and citing Baude and Schwartz, among others); *Spainhoward v. White Cnty.*, 421 F. Supp. 3d 524, 540 n.10 (M.D. Tenn. 2019) (granting qualified immunity but "acknowledg[ing] that qualified immunity is a controversial doctrine that can (1) lead to the head-scratching and frustrating outcome of a 'right' becoming 'clearly established' at the pleasure and indeterminate speed of various jurists, and (2) undercut some of the core purposes of 42 U.S.C. § 1983").

2. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (holding that "the defense of good faith and probable cause, . . . available to the officers in the common-law action for false arrest and imprisonment, is also available . . . in the action under § 1983").

3. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818 (1982) (announcing "adjustment" to good faith defense for *Bivens* and Section 1983 actions and holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar

decades since *Harlow*, the Court has regularly tinkered with all manner of the procedure and substance of litigating qualified immunity, but its most notable preoccupation has been with the stringency of that clearly-established-law test. The Court's decisions in recent years have emphasized that to clear the hurdle of a qualified immunity defense, plaintiffs must identify prior cases so factually analogous that "every reasonable official" would recognize the illegality of their conduct.⁴ Reliance on general principles of law proscribing official conduct, such as the rule that the Fourth Amendment bars police from using objectively unreasonable force, will not suffice to prevail in a lawsuit "outside an obvious case."⁵

Conspicuously, no such "obvious" case arose on the Court's docket for twenty-five years after it created the category in its 2002 decision in *Hope v. Pelzer*.⁶ Rather, the Court's decisions in this period seemed designed—in their volume, style, and outcome—to take back the suggestion that such a case might exist. The Court devoted an outsized proportion of its small docket to cases asking whether lower courts correctly applied the clearly-established-law test when denying qualified immunity, unfailingly reversing those denials for having applied prior precedent in insufficiently factually particularized fashion.⁷ Its opinions in those decisions frequently came in the form of unsigned, summary orders—the judicial equivalent of a backhanded slap—and took circuits to task (by name) for repeated intransigence.⁸ As William Baude has written, "lower courts that follow Supreme Court doctrine should get the message: think twice before allowing a

as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

4. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); see also Baude, *supra* note 1, at 81 (discussing Court's steady "tinker[ing]" with the doctrine); Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 327–28 (2020) [hereinafter Schwartz, *Qualified Immunity and Federalism*] (discussing subtle but important shift from "a reasonable official" to "every reasonable official" in Court's formulation of clearly-established-law test) (emphasis omitted).

5. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

6. 536 U.S. 730 (2002).

7. See Baude, *supra* note 1, at 82–85 (discussing directionality and volume of the Court's qualified immunity docket).

8. See *al-Kidd*, 563 U.S. at 742 ("We have repeatedly told courts—and the Ninth Circuit in particular, . . . not to define clearly established law at a high level of generality."); *Cole v. Carson*, 935 F.3d 444, 473 (5th Cir. 2019) (en banc) (Ho & Oldham, JJ., dissenting) ("The Supreme Court has not hesitated to redress . . . intransigence from our sister circuits—often through the 'extraordinary remedy of a summary reversal.'" (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting))).

government official to be sued for unconstitutional conduct.”⁹ Justice Sotomayor has been more pointed in her depiction of the Court’s work product, writing in dissent that the Court’s “one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers” and “tells officers that they can shoot first and think later, and . . . the public that palpably unreasonable conduct will go unpunished.”¹⁰

The upshot of the Court’s recent qualified immunity jurisprudence—and its clearly-established-law decisions in particular—is a body of opinions that broadcast that the open-textured standard of “clearly established law” is to be applied with maximal deference to officials; only the “plainly incompetent” or those who “knowingly violate the law” should escape the protection of immunity.¹¹ Judges have heard the message “loud and clear,” in the words of the oft-scolded Ninth Circuit.¹² Thus, the Court’s contemporary qualified immunity jurisprudence has been received not just as individual holdings and formal statements defining the doctrine’s contours, but collectively as a directive to lower courts about *how* the doctrine should be applied. In this sense, the Court’s clearly-established-law rulings of the past decade have been quintessential examples of what Professor Richard Re has called “signaling”—transmission via the Court’s adjudicatory work product of non-precedential directions to lower courts about how precedent is to be applied.¹³

Hence, in November of 2020 when the Court handed down *Taylor v. Riojas*, reversing the Fifth Circuit’s grant of qualified immunity to a prison official, it introduced a measure of jurisprudential noise.¹⁴ Issued as yet another unsigned summary order—but in a radically different register from the Court’s recent decisions—the opinion marked the first time in nearly twenty years that the Court rejected an official’s claim of immunity and found that the plaintiff had successfully

9. Baude, *supra* note 1, at 84.

10. *Kisela*, 138 S. Ct. at 1162.

11. *Id.* at 1152 (majority opinion).

12. *S.B. v. Cnty. of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017); *see also* *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019) (“The second question—whether the officer violated clearly established law—is a doozy. . . . The pages of the *United States Reports* teem with warnings about the difficulty of placing a question beyond debate. From them, we can distill four applicable commandments.”).

13. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 942 (2016) (discussing Supreme Court practice of using “signals” to guide lower courts in how precedents should be applied).

14. *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam).

demonstrated that prior law clearly established that the defendant's alleged conduct violated the Constitution. The Court's reasoning was even more noteworthy. Citing none of the rulings of recent years that emphasized courts' obligation to identify factually analogous cases, the Court instead cited its long-neglected decision in *Hope v. Pelzer*.¹⁵ In that case, the Court cautioned against an unduly restrictive conceptualization of clearly established law and stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."¹⁶ *Taylor* invoked *Hope* in concluding that "no reasonable correctional officer could have concluded" the defendant's conduct was "constitutionally permissible," quoting the case for the proposition that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question."¹⁷ The Court would go on later in the 2020 Term to again vacate and remand the Fifth Circuit's grant of qualified immunity in *McCoy v. Alamu*, ordering (in what is often termed a "GVR" for "grant, vacate, and remand") that it be given "further consideration in light of *Taylor v. Riojas*" —a move that some observers have taken to indicate that *Taylor* is no fluke, but rather the harbinger of some shift in the Court's approach to qualified immunity.¹⁸

As stark a departure as *Taylor*'s tone is from the qualified immunity decisions that preceded it, the case's significance is far from "loud and clear."¹⁹ That much is evident from the diversity of views already apparent among the lower federal courts seeking to faithfully apply the Court's teachings in *Taylor*'s aftermath. Some have characterized *Taylor* as a substantial course-correction by the Court, an invitation to lower courts to more freely consider whether general constitutional

15. *Id.* at 53-54.

16. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

17. *Taylor*, 141 S. Ct. at 53 (quoting *Hope*, 536 U.S. at 741).

18. *McCoy v. Alamu*, 141 S. Ct. 1364 (mem.) (2021); Colin Miller, *The End of Comparative Qualified Immunity*, 99 TEX. L. REV. ONLINE 217, 224 (2021) ("[C]omparative qualified immunity analysis might have met its end in the Supreme Court's summary disposition in *McCoy v. Alamu* . . . significantly shr[inking] the qualified immunity defense and expand[ing] the constellation of cases in which citizens can vindicate violations of their constitutional rights."); Schwartz, *Qualified Immunity and Federalism*, *supra* note 4, at 351 ("The Court's decision in *Taylor* sends the signal to lower courts that they can deny qualified immunity without a prior case on point—a very different message than the Court has sent in its recent qualified immunity decisions.").

19. *S.B. v. Cnty. of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017); As one district court has lamented in *Taylor*'s aftermath, "The Court does its best follow diligently and faithfully the unwritten signals of superior courts, but, here, the signals are not clear." *Ortiz v. New Mexico*, No. CIV 18-0028 JB/LF, 2021 WL 3115577, at *79 (D.N.M. Jul. 22, 2021).

principles can clearly establish the illegality of an official's conduct.²⁰ At the other end of the spectrum, some lower courts have read the unusual and extreme facts of *Taylor* as simply reinforcing the Court's old message that granting qualified immunity should be the rule rather than the exception.²¹ Others have offered that the truth about what the future holds for qualified immunity and clearly-established-law analysis is likely somewhere in between.²²

Focusing exclusively on the Supreme Court and the meaning of its revivification of *Hope*, however, fails to account for important (though often ignored) variations among lower courts' deployment of substantive and procedural rules that attend adjudication of qualified immunity—rules that will likely affect and be affected by their receipt of *Taylor*'s signal.²³ For example, the circuits vary on the sources that can be relied upon to “clearly establish” an official's legal obligations, with some taking a parsimonious view (e.g., only Supreme Court and in-circuit precedents) and others a more ecumenical one (e.g., examining state court and federal district court opinions, or even non-judicial sources such as training materials).²⁴ The circuits also vary in their

20. See *infra* Part II.B.

21. See *infra* Part II.A.

22. See Katherine Mims Crocker, The Supreme Court's Reticent Qualified Immunity Retreat 71 Duke L.J. Online 1, 7–12 (concluding there is “ample cause to doubt that *Taylor* and *McCoy* signify a sharp shift in the Court's overall attitude about constitutional enforcement” and also that *Taylor* likely signals more than merely a statement that “some space still exists between qualified and absolute immunity”).

23. Professor Joanna Schwartz has made a similar point in her work examining how “civil rights ecosystems” shape the impact of qualified immunity, although her focus is far broader than simply doctrinal variation among circuits. See generally Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020) [hereinafter, Schwartz, *Civil Rights Ecosystems*]. While the light this Article shines is far narrower, it is also for that reason more granular and adds to a literature on lower court qualified immunity jurisprudence that has been nearly exclusively focused on the stringency of clearly-established-law tests and variability in excessive force doctrine. See *id.* at 1551 n.44 (citing “scholarship examining variation in courts' interpretations of constitutional rights, qualified immunity, and municipal liability”). An exception to that rule is the work of Professors Chris Walker and Aaron Nielson, whose empirical study revealed important variation in lower courts' tendencies to decide, or skip, consideration of whether a constitutional violation was committed before considering whether the law was clearly established—discretion which lower courts have enjoyed since the Supreme Court's decision in *Pearson v. Callahan*. See Nielson & Walker, *New Qualified Immunity*, *supra* note 1, at 39 (finding “substantial variation in the rate at which the circuits decide to exercise their *Pearson* discretion to reach constitutional questions, with the Fifth Circuit leading the way in exercising discretion 57.6% of the time, compared with 47.7% for the Sixth Circuit and 36.0% for the Ninth Circuit.”).

24. Compare *Frasier v. Evans*, 992 F.3d 1003, 1015 (10th Cir. 2021) (“[J]udicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of Mr. Frasier's First Amendment rights was irrelevant to the clearly-established-law inquiry.”), and *Carollo v. Boria*, 833 F.3d 1322, 1333 (11th Cir. 2016) (case on point from Supreme Court, circuit, or state's highest court is

willingness to grant qualified immunity prior to discovery, and in their solicitude toward interlocutory appeals of qualified immunity denials.²⁵ These variations, in turn, can significantly alter the power of qualified immunity, affecting the odds that a plaintiff can overcome the defense, or at least endure the course of civil litigation for sufficient time to have a chance at favorable settlement. Given this array of levers for enhancing or mitigating qualified immunity's curtailment of litigation, a downward shift in the Court's general solicitude toward qualified immunity might trigger not only changes in lower courts' analyses of clearly established law, but also broader adoption of other rules that diminish qualified immunity's bite.

This Article will sketch three plausible futures that might emerge in *Taylor*'s aftermath, all of which find some support in lower courts' interpretations of *Taylor* and the Supreme Court's own post-*Taylor* rulings. In the least earth-shaking scenario, *Taylor* might be a one-off, an exceptional case that only serves to illustrate the muscularity of qualified immunity. A viable prediction with more far-reaching effects would be that *Taylor* signals a softening of the Court's clearly-established law test, though perhaps only in the context of particular rights claims (portending a less trans-substantive future for the doctrine). Notably, however, I argue that a number of under-examined mechanisms exist for lower courts to accomplish that softening, from tinkering with the legal sources eligible to clearly establish the law, to shifting rules about how circuit splits are treated in the analysis. Indeed, *Taylor* may finally tee up the Supreme Court's opportunity to provide guidance concerning some of these less-visible, but important details of the clearly established law inquiry. Finally, a prediction at once far-reaching and indeterminate is that the Supreme Court is signaling that it will tolerate experimentation in the interstices of the Court's qualified immunity jurisprudence beyond mere application of the

required to clearly establish law), with *Peroza-Benitez v. Smith*, 994 F.3d 157, 165–66 (3d Cir. 2021) (stating that clearly-established inquiry looks to Supreme Court precedent, circuit precedent, out-of-circuit cases, and “district court cases, from within the Third Circuit or elsewhere”), and *Irish v. Maine*, 849 F.3d 521, 527–28 (1st Cir. 2017) (discussing relevance of training in evaluating qualified immunity).

25. See, e.g., *Estate of Anderson v. Marsh*, 985 F.3d 726, 737 (9th Cir. 2021) (Fletcher, J., dissenting) (noting variation in how circuits have applied Court's collateral order doctrine with respect to qualified immunity); *Estate of Chamberlain v. City of White Plains*, 960 F.3d 100, 111 (2d Cir. 2020) (stating presumption against 12(b)(6) dismissal on qualified immunity grounds and concluding that “advancing qualified immunity as grounds for a motion to dismiss is almost always a procedural mismatch”); *Wesley v. Campbell*, 779 F.3d 421, 433 (6th Cir. 2015) (“[I]t is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity.”).

clearly-established law test, in ways that might diminish the doctrine's effects on constitutional litigation.

The aim here is not to take and defend a conclusive position on *Taylor*'s holding. This Article takes as a given that the opinion in *Taylor* is susceptible of a range of plausible interpretations; this is particularly so when *Taylor* is read together with *McCoy* and against the backdrop of the doctrinal arc of Supreme Court and, critically, lower federal court cases that precede it.²⁶ It may even be that *Taylor*'s brevity and *McCoy*'s substantive silence reflect that the Court itself is undecided as to where the doctrine is headed.²⁷ Nor does this Article seek to predict which one of several futures for qualified immunity will materialize. To the contrary, part of the upshot of parsing a range of potential futures for qualified immunity is to demonstrate that, at least in the short- to medium-run, qualified immunity doctrine across the many federal courts will have a non-trivial degree of hybridity. At the same time, the analysis makes clear that this is nothing new. Thus, a second contribution of this Article is to shine a light on the perhaps underappreciated variegation of qualified immunity doctrine, visible only once oft-ignored dynamics of lower court interpretation are illuminated.²⁸

Recognizing qualified immunity's hybridity has purchase beyond the confines of predicting the trajectory of doctrine. Longstanding criticism of qualified immunity has recently coalesced in concerted campaigns for judicial and legislative reform, particularly with the groundswell of policing and racial justice protests in the summer of 2020, but these efforts have yielded uneven results.²⁹ A broad coalition of advocates has steered cases to the Court to invite judicial

26. Cf. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54, 124–25 (1997) (noting “that a broad ambit frequently exists for reasonable disagreement about how precedents are best interpreted and tests best applied”).

27. See Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 Colum. L. Rev. 1555, 1589 & n.203 (2021) (observing that “the Justices may decline review or opt for narrow or open-ended doctrines for any number of reasons, including the difficulty of reaching agreement on a multimember Court”).

28. For other work taking interest in lower federal court jurisprudence and the complex dynamics of its interaction with (as opposed to mechanical deference to) the Supreme Court, see generally *id.*; Re, *supra* note 13; Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994).

29. See Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (Jun. 23, 2020), <https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html> (noting that “qualified immunity has emerged as a flash point in the protests spurred by [George] Floyd’s killing and galvanized calls for police reform,” and detailing reform proposals as well as opposition).

reconsideration of the doctrine—an invitation that the Court has pointedly refused.³⁰ Congressional legislation to amend § 1983 to bar the defense for law enforcement defendants remains pending, though prospects for its passage now appear dim.³¹ States and localities considered and in some instances passed legislation representing various approaches to allow plaintiffs to bypass the doctrine, but the vast majority of state-level efforts to legislatively eliminate immunity were defeated.³² In a moment when we are seeing significant reform energy but also substantial resistance to outright abolition of qualified immunity, this Article’s illumination of the variety of tools that effectively cabin the doctrine’s effects can offer something of a reform menu to scholars, jurists, and advocates who wish to see official immunity diminished.³³

Part I of this Article briefly traces the contemporary evolution of qualified immunity doctrine with a focus on the clearly-established-law test, and then turns to the Court’s decisions in *Taylor* and *McCoy* to demonstrate the magnitude of tonal shift that the *Taylor* decision reflects. Part II takes up the task of sketching possible post-*Taylor* futures, attending to the groundwork that the lower federal courts have done to enable any of the possible scenarios to take root. The Article concludes by reflecting on the implications of *Taylor* and its aftermath for current debates over the future of qualified immunity.

I. A BRIEF HISTORY OF QUALIFIED IMMUNITY AND CLEARLY ESTABLISHED LAW

This Part briefly sketches the story of the clearly-established-law

30. See Jay Schweikert, *The Supreme Court’s Dereliction of Duty on Qualified Immunity*, CATO AT LIBERTY BLOG (Jun. 15, 2020, 11:27 AM), <https://www.cato.org/blog/supreme-courts-dereliction-duty-qualified-immunity> (discussing multiple petitions for certiorari filed inviting Court action).

31. See Kiara Alfonseca, *More Than a Year After George Floyd’s Killing, Congress Can’t Agree on Police Reform*, ABC NEWS (Sept. 23, 2021, 3:59 PM), <https://abcnews.go.com/Politics/year-george-floyds-killing-congress-agree-police-reform/story?id=80188065> (reporting that bipartisan discussions over George Floyd Justice in Policing Act are “officially over”).

32. See Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html (“At least 35 state qualified-immunity bills have died in the past 18 months . . . The efforts failed amid multifaceted lobbying campaigns by police officers and their unions targeting legislators, many of whom feared public backlash if the dire predictions by police came true.”).

test's creation and evolution. It describes a period, marked by the Court's decision in *Hope v. Pelzer*, when the Court's decisions cautioned *against* an overly stringent conception of how clear prior law must be to place officers on notice of the illegality of their conduct for purposes of overcoming qualified immunity. It then describes the Court's pivot away from *Hope* to a conception of qualified immunity that appeared to free officials entirely of the burden of extrapolating from prior court decisions to the facts before them, reflected in the Court's last decade of qualified immunity jurisprudence. Against this backdrop, the Part details the Court's analysis in *Taylor* to demonstrate the degree of departure the case appears to signal.

A. *The Clearly-Established-Law Test's Trajectory*

The basic framework for contemporary qualified immunity doctrine was announced by the Supreme Court in *Harlow v. Fitzgerald*, a *Bivens* action brought against aides to President Nixon who allegedly conspired to illegally terminate the plaintiff's employment.³⁴ While rejecting the defendants' claim that as presidential aides they shared the president's absolute immunity from suit for conduct undertaken in the course of their duties, the Court nevertheless held that they, like the mine run of executive officials, possessed "qualified immunity" from suit.³⁵ The notion that government officials might be shielded from liability even if their conduct did indeed violate the Constitution was not newly introduced in *Harlow*. Fifteen years previously, in *Pierson v. Ray*, the Court first announced that police officers were not civilly liable for unconstitutional arrests that were carried out in "good faith"

34. To be sure, there is an important debate about whether the Supreme Court is the appropriate or optimal branch of government to end or reform qualified immunity, if that is the goal. Congress is, of course, the primary rival, or additional, candidate. Compare Scott Michelman, *The Best Branch Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2013 (2018) (arguing that the Supreme Court need not defer to Congressional authority to abolish qualified immunity), and Baude, *supra* note 1, at 80–81 (making the case that the Court can and should eliminate qualified immunity), with Nielson & Walker, *Qualified Defense*, *supra* note 1, at 1856–63 (arguing that stare decisis prevents Court from abolishing qualified immunity and that it is for Congress to act). Aaron Nielson and Chris Walker have recently argued that states are best-suited to craft legal regimes adapted to—and perhaps mitigating the litigation-suppressive effects of—the Court's qualified immunity doctrine. Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229 (2020) [hereinafter, Nielson & Walker, *Qualified Immunity and Federalism*]. This Article takes no position in this debate. The variety in the details of the circuits' qualified immunity regimes could influence other courts, Congress, or the states.

34. See generally *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

35. *Id.* at 808–12.

and with “probable cause.”³⁶ In subsequent decisions, the Court expanded the category of officials eligible to assert the defense of what became known as “qualified immunity” to all executive officials whose conduct, however unconstitutional, was undertaken with a “reasonable” and “good faith” belief in its legality.³⁷ *Harlow*, however, made a course correction. The Court announced that adjudication of the factually nuanced condition of “good faith” struck a suboptimal balance of competing values, identified as “the importance of a damages remedy to protect the rights of citizens, . . . but also ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’”³⁸ Hoping to better protect the latter value by facilitating early dismissal of insubstantial lawsuits and minimizing the burdens of litigation on official defendants, the Court fashioned an “objective” qualified immunity test to replace the subjective “good faith” inquiry: “[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³⁹ Thus, the “clearly-established-law” test was born.

Harlow was silent, however, on the details of just what it meant for law to be “clearly established” to a reasonable person—on how specifically a previously rendered judicial statement of law must speak to a situation that confronts an official. The Court’s early post-*Harlow* decisions provided little elaboration. In *Davis v. Scherer*, the Court’s first post-*Harlow* case to apply the clearly-established-law test, the Court ruled that a state official who dismissed a state highway patrolman without formal termination proceedings was entitled to qualified immunity because at the time of the conduct giving rise to the suit neither the Court nor the Fifth Circuit (in which the case was filed) had declared a “federal constitutional right to a pre-termination or a prompt post-termination hearing.”⁴⁰ The Court had no occasion to examine the degree of legal clarity required, given that existing precedent denied the requirement of a hearing under *any* circumstances.

36. *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

37. *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974).

38. *Harlow*, 457 U.S. at 807 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

39. *Id.* at 818.

40. *Davis v. Scherer*, 468 U.S. 183, 191–92 (1984).

But in *Anderson v. Creighton*, involving a suit for violation of Fourth Amendment rights against a police officer who executed a warrantless home search, the Court squarely addressed the issue of “the level of generality at which the relevant ‘legal rule’ is to be identified” for purposes of the clearly-established-law test, and emphasized that the inquiry must be undertaken with *some* degree of factual particularity.⁴¹ The Court explained as follows:

[T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of “clearly established law” were to be applied at this level of generality, it would bear no relationship to the “objective legal reasonableness” that is the touchstone of *Harlow*. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been “clearly established” in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.⁴²

For purposes of the claim in *Anderson*, this meant that locating legal support for the abstract “right to be free from warrantless searches of one’s home unless the searching officers have probable cause and there are exigent circumstances” was insufficient for purposes of defeating qualified immunity.⁴³ Instead, *Anderson* was entitled to qualified immunity if, given both the state of the law of the Fourth Amendment and the particular circumstances he faced, he reasonably could have believed that search of the plaintiffs’ home was lawful.⁴⁴ Thus, the era of “factual particularity” as a central feature of the clearly-established-law test was born.

Even so, *Anderson*’s requirement that the law be clearly established with sufficient factual particularity that an official could recognize the illegality of their conduct left room for interpretation about the point at which the unlawfulness of conduct is, in *Anderson*’s phrasing, reasonably “apparent.”⁴⁵ Must a court have adjudicated a nearly-

41. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

42. *Id.* at 639–40.

43. *Id.* at 40.

44. *Id.*

45. *Id.*

factually-identical claim? Or do officials bear some burden of predicting the application of existing law to new factual scenarios? It is with respect to this issue that the Supreme Court's qualified immunity jurisprudence of the last two decades has been most conflicted, and most criticized.

As late as 2002, in *Hope v. Pelzer*, the Court suggested that it would not allow qualified immunity to evolve into a "one-bite rule" for government officials.⁴⁶ *Hope* involved a claim that prison officials violated the Eighth Amendment prohibition on cruel and unusual punishment when they handcuffed the plaintiff to a hitching post for multiple hours in the Alabama heat and sun.⁴⁷ No court had ever adjudicated a claim involving precisely such facts; the closest the Eleventh Circuit had come was holding that handcuffing prisoners to cells or fences for prolonged periods amounted to cruel and unusual punishment.⁴⁸ Following the Eleventh Circuit's grant of qualified immunity on the ground that the plaintiff had failed to unearth prior cases involving "materially similar" facts, the Supreme Court reversed, and rejected the Eleventh Circuit's "rigid" demand that plaintiffs identify prior cases factually on all fours with their own claims in order to overcome assertions of immunity.⁴⁹ Observing that the touchstone of qualified immunity was a concern for fair notice, the Court emphasized that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," and that "earlier cases involving 'fundamentally similar' facts" are not necessary to support a finding that the law provided fair warning to an official.⁵⁰ Prior judicial condemnation of wanton corporal punishment and the denial of water to prisoners, paired with reports from the Department of Justice advising Alabama prison officials about the illegality of their hitching-post practices, sufficed to make clear the defendants' lack of entitlement to qualified immunity.⁵¹

For nearly two decades, however, *Hope* would not be cited by the Supreme Court in support of a determination that clearly established law supported a denial of qualified immunity. And although the Court paid lip service to the principle that "novel factual circumstances" do

46. *Hope v. Pelzer*, 536 U.S. 730 (2002).

47. *Id.* at 733–35.

48. *Id.* at 742.

49. *Id.* at 739.

50. *Id.* at 739–41.

51. *Id.*

not automatically foreclose civil liability for officials' constitutional transgressions, the substance and tone of the Court's qualified immunity decisions effectively suggested the opposite. Finding only once in that time period that a plaintiff had succeeded in overcoming the clearly-established-law hurdle—two years after *Hope*, in the 2004 case *Groh v. Ramirez*⁵²—the Court began a steady doctrinal march that moved the goal post for plaintiffs and disciplined intransigent lower courts.⁵³ *Ashcroft v. al-Kidd* was perhaps the watershed opinion in this regard.⁵⁴ The 2011 decision subtly rephrased the metric for assessing whether law was clearly established from examining whether “a reasonable official” would understand their conduct to be “illegal”⁵⁵ to requiring the greater showing that “every reasonable official” would share the belief.⁵⁶ The decision also revived language that first appeared in the Court's 1986 decision in *Malley v. Briggs*, describing qualified immunity as shielding “all but the plainly incompetent or those who knowingly violate the law.”⁵⁷ *Malley*, a decision rejecting police officers' claim to absolute immunity from suit for serving falsely sworn warrants, deployed that language in dicta for the purpose of reassuring that qualified immunity was sufficiently protective of police defendants.⁵⁸ In the hands of the *al-Kidd* majority, the language was transformed into a measure for determining whether qualified immunity was “properly applied”—a metric that audaciously equated a “reasonable” official with one just shy of “plain[] incompeten[ce].”⁵⁹

The Court's decisions following *al-Kidd* demonstrated the power of a shield from liability that required plaintiffs to find a prior case so factually on point that only a “plainly incompetent” officer could fail to see that it prohibited their precise actions.⁶⁰ In the decade following *al-Kidd*, the Court frequently filled its terms' dockets with multiple

52. See generally *Groh v. Ramirez*, 540 U.S. 551 (2004) (holding that there was no qualified immunity when the search warrant failed to adequately describe what is being looked for).

53. See Baude, *supra* note 1, at 82–83 (discussing the Court's asymmetrical qualified immunity dispositions).

54. *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

55. As formulated in *Anderson v. Creighton*, 483 U.S. 635, 637 (1987) (emphasis added).

56. *Al-Kidd*, 563 U.S. at 741 (emphasis added).

57. *Id.* at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

58. *Malley*, 475 U.S. at 341.

59. *Al-Kidd*, 563 U.S. at 743.

60. See 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, 1248 (2015) (discussing impact of *Al-Kidd*'s shift in focus toward factual specificity and a focus on the “plainly incompetent” officer).

grants of certiorari to reverse denials of qualified immunity.⁶¹ Fourteen cases in those years considered a lower court's application of the clearly-established-law test; in every one, the Court found the law *not* clearly established, consistently citing *al-Kidd* for the primary statement of qualified immunity's contours, and nearly always quoting the metric of "plain[] incompeten[ce]."⁶² Consistently as well, the Court upbraided lower courts for their reliance on overly general principles of law or factually dissimilar cases to conclude that the illegality of the defendants' conduct was clearly established.⁶³

61. See *Salazar-Limon v. City of Houston* 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting) (remarking on two reversals of qualified immunity denials in 2017, three in 2015, and one each in 2014 and 2013); Reinhardt, *supra* note 60, at 1248 (“[I]n October Term 2013 alone, the Court found that actions by state agents were protected by qualified immunity in four cases based on its assertion that the constitutional violation alleged was not beyond debate in the existing case law at the time of the actions.”); see also Baude, *supra* note 1, at 85 (describing Court’s qualified-immunity-laden docket in comparison to broader certiorari trends and concluding that it points to “special” and “unusual” treatment of the doctrine); *infra* note 62 (enumerating the Court’s post-*al-Kidd* decisions).

62. The “plainly incompetent” language appears in support of the Court’s reversals in ten of the fourteen cases in this time period. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017); *White v. Pauly*, 137 S. Ct. 548, 551 (2017); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam); *Taylor v. Barkes*, 575 U.S. 822, 825 (2015); *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 611 (2015); *Carroll v. Carman*, 574 U.S. 13, 17 (2014); *Stanton v. Sims*, 571 U.S. 3, 6 (2013); *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). Three additional qualified immunity grants cite *al-Kidd* but without specific invocation of a “plainly incompetent” test. See *Lane v. Franks*, 573 U.S. 228, 243 (2014) (noting that *al-Kidd* states that qualified immunity allows for breathing room for government officials); *Plumhoff v. Rickard*, 572 U.S. 765, 778–79 (2014) (citing *al-Kidd* for the proposition that the violation must be clearly established and that any reasonable officer would have understood the violation); *Wood v. Moss*, 572 U.S. 744, 757 (2014) (using *al-Kidd* for the idea that the officer must have violated a clearly established right for qualified immunity to not apply). One post-*al-Kidd* decision failed to cite *al-Kidd*, but instead elaborated the qualified immunity standard with citation to *Kisela*, omitting that case’s quotation to *al-Kidd*. *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019). There were two cases in this time period in which the Court reversed grants of qualified immunity. Neither involved the question of how clearly the law must speak to the defendant’s conduct in order to be clearly established. Rather, both concerned the question of what facts a court should consider in conducting the clearly-established-law test. In *Hernandez v. Mesa*, the Court held that the Fifth Circuit erroneously considered facts that were not known to the defendant officer—namely, the nationality of the individual the defendant Border Patrol officer shot—in evaluating qualified immunity. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017). And in *Tolan v. Cotton*, the Court held that the Fifth Circuit erroneously construed the summary judgment record in the defendant’s favor rather than the non-moving plaintiff, in describing the facts that governed its qualified immunity analysis. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014).

63. See *Kisela*, 138 S. Ct. at 1152 (“This Court has ‘repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.’” (quoting *Sheehan*, 575 U.S. at 613 (internal quotations omitted))); *Plumhoff v. Rickard*, 572 U.S. 765, 779, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014) (citing *Al-Kidd* for the proposition that “[w]e have repeatedly told courts . . . not to define clearly established law at a high level of generality”); Baude, *supra* note 1, at 83–84 (characterizing recent decisions as “regularly remind[ing] lower courts” about the factual particularity demanded of the clearly-established-

Kisela v. Hughes is representative of how the trajectory of these decisions raised the bar for plaintiffs trying to clear the clearly-established-law hurdle.⁶⁴ The suit was brought for a police officer's alleged violation of the plaintiff's Fourth Amendment right to be free of excessive force.⁶⁵ The officer had responded to a call stating that the plaintiff was behaving erratically and holding a knife.⁶⁶ When the officer located the plaintiff, she was holding a large kitchen knife in the yard of her home as she stood on the other side of a chain link fence, approximately six feet away from another individual.⁶⁷ The plaintiff was behaving calmly, but twice ignored the officer's command that she drop the knife; at that point the officer fired on her, inflicting non-fatal injuries.⁶⁸ The Ninth Circuit denied the defendant's motion for summary judgment on qualified immunity grounds, pointing to *Deorle v. Rutherford*, which had found the Fourth Amendment violated by a police officer who fired a bean bag at the face of a man who had brandished a hatchet, verbally threatened the police, and walked toward the defendant officer with a bottle of lighter fluid.⁶⁹

The Supreme Court reversed the Ninth Circuit in a per curiam, summary opinion that blasted the lower court, emphasizing that the Court had "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality."⁷⁰ Moreover, the Court emphasized (not for the first time) that Fourth Amendment excessive force cases pose special reasons to formulate the clearly established law with an especially high degree of factual particularity: "Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."⁷¹ The Court excoriated the Ninth Circuit's comparison between shooting an individual advancing with lighter fluid and shooting a person armed

law test, making "hard to find a roadmap to the denial of immunity that could give a lower court confidence in its conclusion").

64. See generally *Kisela*, 138 S. Ct. at 1148 (holding that it was reasonable for the officer to shoot a woman who was holding a knife and standing six feet from her roommate).

65. *Id.* at 1151.

66. *Id.* at 1150.

67. *Id.* at 1151.

68. *Id.*

69. *Hughes v. Kisela*, 862 F.3d 775, 784 (9th Cir. 2016), as amended (June 27, 2017), *rev'd*, 138 S. Ct. 1148 (2018) (discussing *Deorle v. Rutherford*, 272 F.3d 1272, 1282–83 (9th Cir. 2001)).

70. *Kisela*, 138 S. Ct. at 1152 (internal quotation marks omitted) (quoting *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 613 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011))).

71. *Id.* at 1152–53 (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (per curiam)).

with a knife and “within striking distance” of another, concluding that “[w]hatever the merits of . . . *Deorle*, the differences between that case and the case before us leap from the page.”⁷² As John Jeffries inimitably characterized the clearly-established-law test’s evolution, particularly in the context of Fourth Amendment claims, “[i]t is as if the one-bite rule for bad dogs started over with every change in weather conditions.”⁷³

While qualified immunity had long been a doctrine of ill repute among academics, as its scope expanded so too did the breadth and depth of negative attention it received. Fresh academic examination challenged empirical assumptions underlying qualified immunity—that it operates to prevent over-deterrence of socially beneficial activity by officials—and provided normative critiques from Originalist quarters.⁷⁴ This work in turn attracted even more attention from jurists discontent with the Court’s directions on the subject, including several of the justices themselves.⁷⁵ Then came the 2020 racial justice and policing protests, and suddenly a once-obscure legal doctrine was emblazoned on placards and shouted in chants calling for an end to qualified immunity.⁷⁶ In red and blue legislatures across the country, bills were introduced to abolish or otherwise counteract the effects of

72. *Id.* at 1154 (quoting *Sheehan*, 575 U.S. at 614).

73. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013).

74. See generally Baude, *supra* note 1 (arguing that the justifications of “good faith” defense, correcting earlier mistakes in statutes, and the rule of lenity are not adequate to justify qualified immunity); Schwartz, *How Qualified Immunity Fails*, *supra* note 1 (finding that “qualified immunity rarely served its intended role as a shield from discovery and trial” in an analysis of 1,183 cases); Schwartz, *Police Indemnification*, *supra* note 1 (finding that “police officers are virtually always indemnified” in cases alleging civil rights violations).

75. See, e.g., *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) (“I have previously expressed my doubts about our qualified immunity jurisprudence Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition [to reconsider qualified immunity].”); *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (arguing that decision “tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished”); *Zadeh v. Robinson*, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (“restat[ing] . . . unease with the real-world functioning of modern immunity practice,” and citing Baude and Schwartz, among others); *Spainhoward v. White Cnty.*, 421 F. Supp. 3d 524, 540 n.10 (M.D. Tenn. 2019) (granting qualified immunity but “acknowledg[ing] that qualified immunity is a controversial doctrine that can (1) lead to the head-scratching and frustrating outcome of a ‘right’ becoming ‘clearly established’ at the pleasure and indeterminate speed of various jurists, and (2) undercut some of the core purposes of 42 U.S.C. § 1983.”).

76. See Madeleine Carlisle, *The Debate Over Qualified Immunity Is at the Heart of Police Reform. Here’s What to Know*, TIME (Jun. 3, 2021, 6:35 PM), <https://time.com/6061624/what-is-qualified-immunity> (discussing qualified immunity reform and showing a photograph of anti-qualified-immunity protest signs).

qualified immunity doctrine.⁷⁷ Some even passed and were signed into law at the state and local levels.⁷⁸ Meanwhile, a politically diverse coalition of lawyers and advocates who had strategized to persuade the Court to reconsider its qualified immunity jurisprudence, had advanced several petitions for certiorari to the Court as vehicles for such a move. As the Court repeatedly relisted those petitions for conference at the very moment that outrage against qualified immunity was in the ether, those advocates perhaps enjoyed a sense of optimism.⁷⁹

B. Taylor's Tone Shift

In retrospect, any such optimism was misguided. In the waning days of its 2019 Term, the Court finally declined those invitations to take up the question of qualified immunity's future.⁸⁰ It is impossible to know why. Perhaps there simply were not enough justices prepared to coalesce around an alternative to existing doctrine. Perhaps, as one Court-watcher has speculated, at least some justices believed Congress was the preferable institutional actor.⁸¹ It may be that the answer is in any event irrelevant to understanding the significance of the decision in *Taylor v. Riojas* several months later. On the other hand, it is within the realm of possibility to suppose that *Taylor* presented itself to at least some of the justices as an appealing alternative to the sort of wholesale revisiting of qualified immunity that was urged in the rejected petitions, an opportunity to fine tune rather than fundamentally alter the doctrine.⁸² The next section turns to *Taylor*

77. See, e.g., George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020); Kindy, *supra* note 32 (reporting in October 2021 that “state legislators across the country tried to undo” qualified immunity and that “[a]t least 35 state qualified-immunity bills have died in the past 18 months”).

78. See, e.g., N.M. STAT. ANN. § 41-4A-4 (West 2021); COLO. REV. STAT. ANN. §§ 13-21-131(1)–(2)(b) (West 2021); 2020 Conn. Pub. Acts 20-1 (Spec. Sess.); N.Y.C. Local Law No. 2021/048.

79. See Joanna Schwartz, *The Supreme Court Is Giving Lower Courts a Subtle Hint to Rein In Police Misconduct*, ATLANTIC (Mar. 4, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193/> [hereinafter Schwartz, *Police Misconduct*] (“In its 2019–20 term, the Supreme Court took months to decide whether to hear one or more of the many qualified-immunity cases pending before it—a hesitation some took as a sign that the Court might finally act.”).

80. Schweikert, *supra* note 3030.

81. See *id.* (“But one possibility is that the Justices were looking closely at developments in Congress . . . and decided to duck the question, hoping to pressure Congress to fix the Court’s mess.”).

82. See Erwin Chemerinsky, *Chemerinsky: SCOTUS Hands Down a Rare Civil Rights Victory on Qualified Immunity*, ABA J. (Feb. 1, 2021 9:11 AM), <https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights->

and examines the degree to which it subtly parted company with the doctrinal trajectory traced above.

The case involved a suit for alleged violation of Taylor's Eighth Amendment rights by corrections officers who forced him to inhabit horrifically unsanitary cells in a prison psychiatric unit for a total of six days.⁸³ Taylor's first cell, in the Fifth Circuit's recounting of the summary judgment record, was covered on every surface—floor, walls, ceiling—with “‘massive amounts’ of feces that emitted a ‘strong fecal odor.’”⁸⁴ Taylor was required by rules of the psychiatric unit to be naked in the cell and was unable to drink water because the cell pipes contained feces.⁸⁵ The defendants were aware of the cell's condition, and mocked Taylor rather than cleaning it.⁸⁶ A day later Taylor (still naked) was moved to a second cell with equally disgusting conditions: no toilet, water fountain, or bunk, frigidly cold, and only a drain on the floor for urination, which was clogged and covering the floor with raw sewage.⁸⁷ The defendants refused to allow Taylor access to any other bathroom facilities.⁸⁸

In ruling on the defendants' motion for summary judgment, the Fifth Circuit first addressed the question of whether Taylor's evidence created a genuine dispute as to the existence of a constitutional violation, and concluded that it did. The court applied the applicable two-pronged test for evaluating prison conditions' compliance with the Eighth Amendment—assessing whether the conditions created an objective risk of harm, and whether officials were deliberately indifferent to that risk—and concluded that the conditions alleged by Taylor were on par with prior decisions finding that prisoners had been “‘exposed [] to a substantial risk of serious harm and denied [] the minimal civilized measure of life's necessities.’”⁸⁹ The court further determined that Taylor had created a sufficient record of the defendants' awareness of and deliberate indifference to those deprivations.⁹⁰ But the court dismissed on qualified immunity grounds

victory-on-qualified-immunity (hypothesizing that *Taylor* might be “a response to . . . criticism” of qualified immunity and the Court).

83. See *Taylor v. Stevens*, 946 F.3d 211, 218 (5th Cir. 2019), cert. granted, *vacated sub nom.* *Taylor v. Riojas*, 141 S. Ct. 52 (2020).

84. *Id.* at 218.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 218–19.

89. *Id.* at 220–21.

90. *Id.* at 221–22.

because, it determined, the illegality of the guards' actions at the time of Taylor's incarceration was not clearly established.⁹¹ Discussion of the point was brief: Taylor's tenure in the filthy cells was six days, and "[t]hough the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end, . . . [the court] hadn't previously held that a time period so short violated the Constitution"⁹² Indeed, the court suggested that the Supreme Court itself had created ambiguity when it noted in dicta in *Hutto v. Finney* that a "filthy, overcrowded cell . . . might be tolerable for a few days and intolerably cruel for weeks or months."⁹³

Taylor sought certiorari, asking that the Court review the Fifth Circuit's application of the clearly-established-law test, but also inviting the Court to narrow or abolish "the judge-made doctrine of qualified immunity"⁹⁴ The Court declined to take up the latter question, but granted certiorari, vacated the Fifth Circuit, and remanded the case.⁹⁵ The Court's brief, per curiam opinion (the merits discussion is a mere two paragraphs), rejected the Fifth Circuit's clearly-established-law analysis and concluded instead that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."⁹⁶ More noteworthy than this conclusion, however, were the authorities cited, and not cited, in support of it. Absent was any whiff of reference to *al-Kidd* or invocation of its language. In a first for the Court, the opinion relied on *Hope v. Pelzer* to supply the proposition that "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'"⁹⁷ In the absence of any record evidence that the conditions Taylor faced were "compelled by necessity or exigency[.]" or of "any

91. *Id.* at 222.

92. *Id.*

93. *Id.* (quoting *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978)).

94. Petition for a Writ of Certiorari at ii, *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (No. 19-1261).

95. *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020).

96. *Id.* The opinion garnered seven votes. Justice Thomas dissented without opinion, and Justice Barrett took no part in the decision. Justice Alito wrote a rather lengthy concurrence setting forth his disagreement with the decision to grant certiorari in a case that, in his judgment, addressed no circuit split, did not conclusively resolve the issue in the case (since the defense of qualified immunity could be renewed at a later stage), and in which the plaintiff had little stake because other non-dismissed claims remained for the district court to take up. *Id.* at 55–56 (Alito, J., concurring in the judgment). However, Justice Alito concurred in the conclusion that the Fifth Circuit had erred in its analysis. *Id.*

97. *Id.* at 53–54 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotes omitted)).

reason to suspect that the conditions of Taylor’s confinement could not have been mitigated, either in degree or duration[.]” the facts known to the defendants were “particularly egregious,” and qualified immunity was not warranted.⁹⁸

Several months later, the Court handed the Fifth Circuit another reversal in *McCoy v. Alamu*, in which the lower court had granted qualified immunity to a corrections officer sued for violating a prisoner’s Eighth Amendment rights.⁹⁹ The factual allegations, construed in the light most favorable to the plaintiff, were that defendant Alamu, while patrolling a cell block, sprayed McCoy in the face with his chemical spray “for no reason”—apparently against the backdrop of prior harassment of Alamu by entirely different prisoners.¹⁰⁰ Applying the test from *Hudson v. McMillian* to determine whether Alamu’s use of force against McCoy violated the Eighth Amendment, the Fifth Circuit concluded that McCoy’s facts did make out a violation.¹⁰¹ But, as in *Taylor*, the court went on to conclude that the illegality of Alamu’s actions was not clearly established.¹⁰² With a recitation of the governing caselaw on qualified immunity that included two gestures toward the fervor of the Supreme Court’s view “about the difficulty of showing that the law was clearly established,” the Fifth Circuit concluded that the claim must be dismissed because none of its prior published decisions had established that the type or amount of chemical spray deployed on McCoy amounted to more than *de minimis* force, a requirement for conduct to violate the Eighth Amendment.¹⁰³ The court reached this conclusion in the face of decisions that had held unconstitutional other forms of gratuitously inflicted less-than-lethal forms of force.¹⁰⁴

McCoy sought certiorari, and the Supreme Court granted the petition, vacating the judgment and remanding the case to the Fifth Circuit “for further consideration in light of *Taylor v. Riojas*. . . .”¹⁰⁵ The GVR supplied no reasoning, and so observers were left to speculate about the significance of McCoy’s suggestion that *Taylor* might have

98. *Id.* at 54.

99. See *McCoy v. Alamu*, 141 S. Ct. 1364, 1364 (2021); *McCoy v. Alamu*, 950 F.3d 226, 228 (5th Cir. 2020), cert. granted, *vacated*, 141 S. Ct. 1364, 209 L. Ed. 2d 114 (2021).

100. *McCoy*, 950 F.3d at 229.

101. *Id.* at 230–31 (citing *Hudson v. McMillian*, 503 U.S. 1, 7 (1992)).

102. *Id.* at 234.

103. *Id.* at 232–34 (internal citations omitted).

104. *Id.* at 235 (Costa, J., dissenting).

105. *McCoy v. Alamu*, 141 S. Ct. 1364, 1364 (2021).

some bearing on the Fifth Circuit's analysis in the case. Some, including the Fifth Circuit itself, have begun to do so.¹⁰⁶ As the next Section reveals, lower courts in particular have arrived at a perhaps surprising diversity of views about what, if anything, the Supreme Court's recent qualified immunity pronouncements portend for the doctrine's future trajectory.¹⁰⁷ But whatever the future holds, the Court's 2020 Term qualified immunity docket could hardly have sounded in a more diametrically different register than those of recent memory.

II. POST-*TAYLOR* FUTURES

Taylor was arresting for observers of the Court's qualified immunity doctrine, and *McCoy* only added to the appearance of the Court's adoption of a fundamentally different tone. Scholarly reactions to *Taylor* and *McCoy* seem to be converging around the view that the cases signal a shift toward the Court's embrace of a less stringent clearly-established-law test.¹⁰⁸ To be sure, as suggested in Part I,

106. See, e.g., *Ramirez v. Guadarrama*, 2 F.4th 506, 514–15 (5th Cir. 2021) (Oldham, J., concurring) (“It’s true that summary reversals can constitute sharp rebukes. . . . And these summary orders are particularly remarkable because they are the Court’s first- and second-ever invocations of the obvious-case exception to the clearly established law requirement.”); *id.* at 523 (Willett, J., dissenting) (“The Supreme Court’s reliance on *Taylor* [in *McCoy*] confirms that the Court does not consider that case an anomaly, but instead a course correction signaling lower courts to deny immunity for clear misconduct, even in cases with unique facts.”); *Ortiz v. New Mexico*, No. CIV 18-0028 JB/LF, 2021 WL 3115577, at *74–79 (D.N.M. July 22, 2021) (attributing proposition that courts must ask whether the conduct was “particularly egregious,” which is language from *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020), to *McCoy*); Miller, *supra* note 18, at 223–24 (discussing two possible interpretations of the Court’s summary disposition in *McCoy*); Schwartz, *Police Misconduct*, *supra* note 79 (discussing *McCoy* and possible interpretations); Anya Bidwell & Patrick Jaicomo, *Lower Courts Take Notice: The Supreme Court Is Rethinking Qualified Immunity*, USA TODAY (Mar. 2, 2021, 4:00 AM), <https://www.usatoday.com/story/opinion/2021/03/02/supreme-court-might-rethinking-qualified-immunity-column/4576549001> (discussing *McCoy*); Jay Schweikert, *The Supreme Court Won’t Save Us From Qualified Immunity*, CATO AT LIBERTY BLOG (Mar. 3, 2021, 4:58 PM), <https://www.cato.org/blog/supreme-court-wont-save-us-qualified-immunity> (discussing *McCoy*).

107. See *infra* Parts II A & B.

108. See Miller, *supra* note 18, at 223–24 (concluding that the most plausible of two possible readings of *Taylor* and *McCoy* is that the Court is prohibiting “comparative qualified immunity analysis,” and that “unless there is a case directly on point in either direction, every qualified immunity case should stand or fall on its own merits, based on whether any reasonable officer should have realized that his behavior contravened the Constitution”); Schwartz, *Police Misconduct*, *supra* note 79 (“For years, the Supreme Court has sent a clear message to lower courts: Police officers can’t be sued for violating someone’s constitutional rights unless the specific actions at issue have previously been held unconstitutional. . . . But in the past few months . . . the Supreme Court seems to be quietly changing its message.”). Katherine Mims Crocker appears to endorse the view that *Taylor* signals some change, but perhaps a more modest one than what Professor Miller suggests. Crocker, *supra* note 22, at 7, 12 (characterizing Miller’s as the “idealist” view and suggesting embrace of a more modest “optimism”).

consideration of the political context in which the cases were decided enhances the plausibility of that view.¹⁰⁹ The Court began its 2020 Term on the heels of a groundswell of protest against police violence in general, and qualified immunity in particular. Particularly given Chief Justice Roberts' reputation for being influenced by the value of the Court's institutional legitimacy, an interpretation of *Taylor* as a means of communicating the Court's sensitivity to qualified immunity's potential excesses fits the moment.¹¹⁰ Nevertheless, analysis of *Taylor* and examination of the work of the lower federal courts tasked with faithfully applying the Court's directives reveals that the implications of the decisions for the future of qualified immunity doctrine are not so clear. Part II.A. argues that the future might plausibly hold no change or even a stronger qualified immunity defense, while Part II.B. makes the case that *Taylor* could portend a weakening of qualified immunity via the Court's blessing of a less restrictive clearly-established-law analysis. Part II.C. examines the possibility that *Taylor* signals that the Court is broadly open to reforming qualified immunity's excesses beyond the parameters of the clearly-established-law inquiry, and discusses various procedural rules that could thereby take broader hold in the lower courts. Methodologically, this Part suggests that appreciating the existing heterogeneity of lower court qualified immunity doctrine—a matter often ignored by examinations of qualified immunity centered around the Supreme Court's work—is necessary to appreciate the full range of *Taylor*'s potential significance.¹¹¹

A. “Meet the New Boss . . .”

Notwithstanding the marked contrast between *Taylor* and the recent qualified immunity decisions that preceded it, it is possible that lower courts will receive it as a one-off outlier rather than a harbinger

109. See *supra* text accompanying notes 74–79 (discussing the social and political environment when the cases were decided).

110. See Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, ATLANTIC (Jul. 14, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053>.

111. One exception to that rule is Schwartz, *Qualified Immunity and Federalism*, *supra* note 4 and accompanying text. Additionally, Aaron Nielson and Chris Walker have urged greater attention to state and local civil liability and immunity regimes that render qualified immunity on the ground “not a unitary concept.” Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 34 at 294.

of change. Some already have.¹¹² The brief opinion itself is modest, stating only that *Hope* remains good law and noting the “particularly egregious facts” of the case.¹¹³ Further, though the opinion does not cite *al-Kidd*, its stated conclusion that “no reasonable corrections officer” could have thought the defendant’s behavior constitutional¹¹⁴ could be understood as doubling down on *al-Kidd*’s “every reasonable official” formulation of the clearly-established-law test,¹¹⁵ with Mr. Taylor presenting the “rare” case in which *al-Kidd*’s metric could be met— a case of “plain[] incompeten[ce].”¹¹⁶ Perhaps rather than offering an invitation to scale back qualified immunity, *Taylor* simply demonstrates the outer bound of immunity that already existed in the law, or in the Ninth Circuit’s words, “highlights the level of blatantly unconstitutional conduct necessary to satisfy the obviousness principle.”¹¹⁷

Indeed, if the magnitude of egregiousness seen in *Taylor* is a necessary rather than only sufficient condition for *Hope*’s “obviousness” principle to apply, as the Ninth Circuit has suggested, the decision arguably narrows *Hope*. Several circuits had, prior to *Taylor*, applied *Hope* to deny qualified immunity in the absence of factually apposite prior cases in circumstances that would be hard to characterize as comparably egregious to those in *Hope*, but where applicable legal principles were deemed sufficiently clarified in the abstract.¹¹⁸ For example, in *Hernandez v. City of San Jose*, the Ninth

112. See *O’Doan v. Sanford*, 991 F.3d 1027, 1044 (9th Cir. 2021) (“*Taylor* only highlights the level of blatantly unconstitutional conduct necessary to satisfy the obviousness principle. Suffice to say, this case bears no reasonable comparison to *Taylor*.”); *Cope v. Cogdill*, 3 F.4th 198, 206 (5th Cir. 2021) (“It might seem that things changed with the recent opinion in [*Taylor*]. But, instead, that decision emphasizes the high standard.”).

113. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam).

114. *Id.* at 53.

115. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 635 (1987)).

116. *Id.* at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 335 (1986)).

117. *O’Doan*, 991 F.3d at 1044; see also Rosenthal, *supra* note 1, at 593 n.193 (“More recently, however, the Court has stressed that on egregious facts, qualified immunity should be denied regardless whether there are factually similar precedents.”).

118. Compare *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018) (focusing on clarity of legal principles in prior cases), with *Leiser v. Kloth*, 933 F.3d 696, 702, 704 (7th Cir. 2019) (holding that *Hope* did not apply to deny qualified immunity to officers who assigned “severely intoxicated” detainee to a top bunk because “[e]xamination of the specific context of the Officers’ conduct in this case shows that it was not ‘egregiously’ or ‘obviously unreasonable’” (quoting *Lovett v. Herbert*, 907 F.3d 986, 992 (7th Cir. 2018))), and *Guertin v. Michigan*, 924 F.3d 309, 314–15 (6th Cir. 2019) (Sutton, J., concurring) (describing *Hope* as presenting “unique” facts and concluding that “[w]hat permitted the U.S. Supreme Court to hold that the state officials violated clearly established norms turned not on any one precedent but on the egregiousness of the state officials’ state of mind”).

Circuit denied qualified immunity to police officers who, in managing crowd control at a protest, allegedly guided protestors into the path of violent counter-protestors and confined them to the area where violence was known by police to be occurring.¹¹⁹ The court found both that the plaintiffs' facts supported the finding of a violation of due process on a 'state-created-danger theory,' and that the law was clearly established.¹²⁰ Citing *Hope* for the premise that the law can apply with "obvious clarity" to a defendant's conduct in the absence of a controlling case on point, the court held that a prior decision, which *rejected* a state-created-danger claim stemming from police crowd control on the ground that the plaintiffs lacked evidence of affirmative action increasing the risk of harm to them, sufficiently established the illegality of the defendants' alleged risk-exacerbating actions.¹²¹ Significantly, however, the *Hernandez* defendants' crowd control plan was alleged to have been selected in order to avoid causing a "riot"—perhaps a "poorly conceived" choice, but one that is hard to characterize as approaching the egregiousness of the official conduct in *Taylor*.¹²²

By contrast, decisions out of the Seventh Circuit exemplify a much narrower reading of *Hope*'s measure of "obvious clarity," holding that "[i]f no existing precedent puts the conduct beyond debate," then an "obvious" violation under *Hope* arises only in the face of "egregious" official conduct.¹²³ In *Leiser v. Kloth*, for example, the court granted qualified immunity on the ground that the law had not clearly established that the Eighth Amendment barred a corrections officer from regularly standing directly behind a prisoner who reported that such conduct activated his post-traumatic stress disorder. Finding no prior case on point, the court then analyzed whether *Hope*'s "obvious clarity" exception applied by examining whether the defendant's "conduct was so outrageous that no reasonable correctional officer would have believed [it] was legal."¹²⁴ According to the court, it was

119. *Hernandez*, 897 F.3d at 1138.

120. *Id.* at 1133–39. As the court explained in *Hernandez*, a 'state-created-danger theory' for a due process claim provides that state actors have a limited duty to protect individuals from private violence where officials affirmatively act to expose individuals to dangers they would not otherwise face, and exhibit deliberate indifference to the dangerous risk they have created. *Id.* at 1133.

121. *Id.* (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

122. *Id.* at 1129–30.

123. *Leiser*, 933 F.3d at 702.

124. *Id.* at 704.

not.¹²⁵ The Seventh Circuit's understanding of *Hope*'s "obvious clarity" rule appears conceptually quite different from the Ninth Circuit's, seemingly viewing it as a limited exception for outrageous conduct rather than a direction to examine whether existing law gave adequate guidance to officials about how to conduct themselves. More practically, the Seventh Circuit's approach, as compared to the Ninth Circuit, narrows *Hope*. It is certainly arguable that the plaintiff in *Hernandez* would not overcome an assertion of qualified immunity in the Seventh Circuit, given that the defendants articulated at least some legitimate law enforcement purpose (crowd control) for their chosen conduct.¹²⁶ To the extent that courts in jurisdictions that previously followed the Ninth Circuit's broader view of *Hope* conclude (as some have) that *Taylor* endorsed the Seventh Circuit's narrower view, the effect will be to shift the law in those jurisdictions in favor of a more muscular qualified immunity.¹²⁷

The Supreme Court's subsequent decision in *McCoy* does not necessarily change the analysis. Taken at face value, *McCoy* offers no substantive guidance: the Court issued no opinion, as is typical in GVRs. If *McCoy* is nevertheless a signal, it is certainly susceptible of multiple plausible interpretations. Professor Colin Miller has argued that *McCoy* indicates a softening of the clearly-established-law test outside the narrow confines of "egregious" cases. Miller leans on the Court's stated standard for issuance of a GVR: "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a *reasonable probability* that the decision below rests upon a premise that the lower court would

125. *Id.* at 705.

126. *Hernandez v. City of San Jose*, 897 F.3d 1125, 1129–30 (9th Cir. 2018).

127. See *HIRA Educ. Servs. N. Am. v. Augustine*, 991 F.3d 180, 192 n.7 (3d Cir. 2021) ("The recent Supreme Court decision in [*Taylor v. Riojas*] does not change our analysis in this case. The Legislators' actions were not so outrageous that 'no reasonable . . . officer could have concluded' they were permissible under the Constitution" (quoting *Taylor*, 141 S. Ct. at 54)); *Frasier v. Evans*, 992 F.3d 1003, 1021–22 (10th Cir. 2021) ("*Hope*'s holding historically has been applied to only the 'rare obvious case' . . . involving 'extreme circumstances,' or 'particularly egregious' misconduct. . . . Even a cursory consideration of these facts—in the light of cases like *Taylor* and *Hope*—makes clear that this is not such a rare case." (citations omitted) (quoting *Taylor*, 141 S. Ct. at 53)); *Vaughn v. Acosta*, No. EP20CV00246KCATB, 2021 WL 232135, at *7 (W.D. Tex. Jan. 22, 2021) ("Absent prior judicial precedent, 'extreme circumstances' or 'particularly egregious facts' allow a court to find that 'any reasonable officer should [] realize[] that [a defendant's actions] offended the Constitution' Here, Acosta's actions are distinguishable from *Taylor*. No reasonable officer would equate a one-time throwing of water on a prisoner with confining a prisoner for days in feces and sewage." (alteration in original) (citation omitted) (quoting *Taylor*, 141 S. Ct. at 53–54)).

reject if given the opportunity for further consideration.”¹²⁸ He concludes that, because the Court must have believed there was a “reasonable probability” that *McCoy* would come out differently on remand, and because the facts in *McCoy* cannot plausibly be characterized as “egregious,” the Court’s decision to GVR means that egregiousness was not necessary to Mr. Taylor’s overcoming qualified immunity.¹²⁹ Perhaps. On the other hand, it is not altogether clear that there is no “reasonable probability” that unprovoked chemical spraying is not “egregious.” The dissenting Fifth Circuit judge in *McCoy* emphasized the “gratuitous” nature of the force and the serious injury that pepper spray can cause.¹³⁰ That the facts of *McCoy* are *less* egregious than those in *Taylor* does not necessarily resolve the question of whether they still qualify for the category.¹³¹

The point is not to conclusively establish what the Court meant in deciding *Taylor* and *McCoy* as it did. There is sufficient ambiguity in that meaning to cause lower courts to read the cases as maintaining the status quo of the clearly-established-law test, or even signaling that a previously under-specified category of “obvious” legal violation blessed in *Hope* is in fact a narrower category than some lower courts had previously concluded.

B. A “Clear” Shift—But to What?

The foregoing analysis notwithstanding, it is at least plausible to

128. *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (emphasis added).

129. Miller, *supra* note 18, at 223–24.

130. *McCoy v. Alamu*, 950 F.3d 226, 235–36 (5th Cir. 2020) (Costa, J., dissenting), *vacated*, 141 S. Ct. 1364 (2021).

131. In any event, a GVR is a noisy signal. Scholars have long lamented the actual practice of the Court’s GVR procedure. See F. Andrew Hessick, *The Cost of Remands*, 44 ARIZ. ST. L.J. 1025, 1034 (2012) (describing the standard produced by the Court’s GVR procedure as “low” and “overinclusive”); Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages’ Cases*, 36 ARIZ. ST. L.J. 513, 514 (2004) (criticizing the Court’s penchant for “reflexively” deploying GVR orders without carefully reviewing the record). In the instance of *McCoy*, the case was twice relisted for conference by the justices two months after *Taylor* was handed down, suggesting that the Court likely did have a good understanding of the record, but also perhaps suggesting that there was dissension over proper disposition of the case. See John Elwood, *Disputes Over Church Property and ACCA Ambiguity*, SCOTUSBLOG (Feb. 18, 2021, 4:39 PM), <https://www.scotusblog.com/2021/02/disputes-over-church-property-and-acca-ambiguity> (noting double relisting of *McCoy*); John Elwood et al., *The Statistics of Relists, OT 2016 Edition: Has the Relist Lost its Mojo? Not Quite*, SCOTUSBLOG (Sep. 27, 2017, 3:37 PM), <https://www.scotusblog.com/2017/09/statistics-relists-ot-2016-edition-relist-lost-mojo-not-quite> (“Relists appear to be a mechanism for avoiding improvident grants by allowing the justices and their clerks to double-check for procedural or other obstacles to the resolution of a case on the merits, known as vehicle problems, before granting.”).

think that the Court is open to a less defense-protective recalibration of the clearly-established-law inquiry.¹³² To be sure, *Taylor* does not expressly announce any such shift; it does not overrule or express doubt about any of the Court's prior clearly-established-law decisions. But as scholars of the Court have noted, express statements of holding are not the only means by which the Court communicates its intentions to lower courts. Sometimes the Court is more subtle. An example is when, as Richard Re has explained, the Court "signals" —broadcasts a direction about how lower courts should apply its rulings through actions taken within "the traditional adjudicatory process" (such as summary orders or dicta in majority opinions) that "without establishing conventional precedent . . . nonetheless indicate some aspect of how lower courts should decide cases."¹³³ *Taylor*'s surprising citation to the moribund *Hope* opinion and general shift in tone from recent qualified immunity decisions—a shift perhaps amplified by *McCoy*—could be a signal that the Court is shifting its views on the stringency of clearly-established-law analysis. Identifying this possibility, however, begs the question: what will be the mechanisms of such a recalibration, and how powerful might they be? Once again, analysis of *Taylor* and *McCoy* and close examination of the variation among lower courts in approaching the clearly-established-law inquiry yields multiple possible scenarios.

Consider first a fairly minimalist prediction: that the decisions in *Taylor* and *McCoy* might lead to further erosion of the trans-substantive nature of the qualified immunity defense, easing plaintiffs' paths to demonstrating clearly established law only in the context of some, but not all, rights claims. This would arguably be a marked change in qualified immunity, a doctrine that the Supreme Court has repeatedly stated applies "across the board" to all constitutional claims.¹³⁴ And yet Supreme Court and lower court decisions provide a foothold for this possibility. In multiple decisions the Court has singled out Fourth Amendment claims as requiring an especially high level of factual specificity in order to find the law clearly established.¹³⁵ "Factual

132. For other commentators advancing this view, see *supra* note 108.

133. Re, *supra* note 13, at 942.

134. See *Saucier v. Katz*, 533 U.S. 194, 203 (2001) (rejecting argument that Fourth Amendment claims might be treated differently from other constitutional claims for qualified immunity purposes because "qualified immunity applied in the Fourth Amendment context just as it would for any other claim of official misconduct"); *Anderson v. Creighton*, 483 U.S. 635, 644 (1986) ("*Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'").

135. *Mullen v. Luna*, 577 U.S. 7, 12 (2015).

specificity is especially important” in that context, the Court has repeatedly stated, because “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.”¹³⁶ Lower courts have echoed and amplified this sentiment, suggesting that the need for greater factual specificity applies to any rights that are defined by reference to a balancing of interests, including not only the Fourth Amendment but also some First Amendment claims.¹³⁷ Conversely, some circuits have stated that particular rights might be clearly established with a *lower* standard of factual particularity than what other claims might require, especially where the test to establish a constitutional violation includes an element of intention, as is the case for many (though not all) Eighth Amendment claims.¹³⁸

136. *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)); see also *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (citing *Mullenix* to reiterate the Court’s position); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (reiterating the Court’s position in *Mullenix*).

137. See, e.g., *Howse v. Hodous*, 953 F.3d 402, 407 (6th Cir. 2020) (“[W]e must ask whether every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed. Importantly, this question asks about the lawfulness of conduct under the Fourth Amendment. And in that context, the Supreme Court has stressed ‘the need to identify a case where an officer acting under similar circumstances’ was found ‘to have violated the Fourth Amendment.’ Without such a case, the plaintiff will almost always lose.” (internal citations omitted)); *Comsys, Inc. v. Pacetti*, 893 F.3d 468, 472–73 (7th Cir. 2018) (stating that “when case-specific balancing of interests is essential, the law often is not clear enough to permit awards of damages against public officials, in the absence of authoritative case law addressing a comparable situation,” and granting qualified immunity for First and Fourth Amendment claims); *Kemp v. Liebel*, 877 F.3d 346, 352–53 (7th Cir. 2017) (“Just as *Garner* and *Graham* create a generalized excessive force standard, *Turner* creates a generalized framework to analyze prisoners’ constitutional claims. Both describe a multi-factor reasonableness test used to determine whether a defendant’s actions violated the Constitution. Thus, like the *Garner* and *Graham* standard, the *Turner* test cannot create clearly established law outside an obvious case.”); *Gaines v. Wardynski*, 871 F.3d 1203, 1210 (11th Cir. 2017) (“it is particularly difficult to overcome the qualified immunity defense in the First Amendment context.”).

138. *Dean v. Jones*, 984 F.3d 295, 310 (4th Cir. 2021) (holding in case alleging intentional retaliation against prisoner in violation of Eighth Amendment, “liability turns not on the particular factual circumstances under which the officer acted—which may change from case to case as the precedent develops—but on whether the officer acts with a culpable state of mind” and hence “because an officer necessarily will be familiar with his own mental state, he ‘reasonably should know’ that he is violating the law” (internal citation omitted)); *Lipman v. Budish*, 974 F.3d 726, 750 (6th Cir. 2020) (suggesting that higher level of generality is appropriate where violation of rights entail the defendant’s deliberate indifference); *Castro v. County of Los Angeles*, 797 F.3d 654, 664 (9th Cir. 2015), *on reh’g en banc*, 833 F.3d 1060 (9th Cir. 2016) (considering Eighth Amendment claim stemming from inmate-on-inmate attack and observing that in the context of such claims “[t]he similarity of the facts—or the lack thereof—to other . . . cases has rarely entered the discussion”). The Ninth Circuit has been fickle on this point. See *Hamby v. Hammond*, 821 F.3d 1085, 1091 (9th Cir. 2016) (rejecting any suggest[ion] that the qualified-immunity inquiry in Eighth Amendment cases differs from the inquiry in other types of cases,

Both *Taylor* and *McCoy* involved claimed violations of the Eighth Amendment prohibition on cruel and unusual punishment. So too did *Hope v. Pelzer*. While the precise claims and governing precedents were different,¹³⁹ all required demonstrating that the defendants acted with a blameworthy state of mind—precisely the type of evidence that some lower courts have suggested obviates the need for a factually particularized clearly-established-law inquiry.¹⁴⁰ Although the Court did not state in *Taylor* that the particular constitutional context mattered to the outcome, its prior consistent statements urging specially strict application of qualified immunity in the Fourth Amendment context could be understood as unchanged by its approach in these Eighth Amendment cases. Indeed, this Term the Court provided additional fodder for this understanding in two qualified immunity decisions handed down on the same day, which together shared more in common with the Court's pre-*Taylor* decisional trajectory than with *Taylor*: Both were per curiam summary orders, both reversed lower court denials of qualified immunity, both involved Fourth Amendment excessive force claims, and both repeated the admonishment that such claims require special attention to factual specificity in determining whether the law was clearly established.¹⁴¹ Given the fertile ground in lower courts for understanding qualified immunity to be right-specific in practice if not in theory, these decisions—and especially the contrast between *Taylor* and the Fourth Amendment decisions that followed it—might further entrench disparities in how clearly-established-law analysis is conducted in

such as those involving excessive force, where analogies to prior cases supposedly play a stronger role”).

139. *Taylor* and *Hope* both involved conditions-of-confinement claims requiring proof of officials' "deliberate indifference" to serious harms, while *McCoy* concerned an Eighth Amendment excessive force claim requiring a showing that force was used "maliciously and sadistically." *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam) (citing *Taylor v. Stevens*, 946 F.3d 211, 218 (5th Cir. 2019), *vacated sub nom. Taylor*, 141 S. Ct. at 54); *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (quoting *Hudson v. McMillian*, 503, U.S. 1, 8 (1992)); *McCoy v. Alamu*, 950 F.3d 226, 230 (5th Cir. 2020) (quoting *Hudson*, 503 U.S. at 7), *vacated*, 141 S. Ct. 1364 (2021).

140. *See McCoy*, 950 F.3d at 230 (stating that core inquiry for McCoy's claim was "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm") (quoting *Hudson*, 503 U.S. at 7); *Taylor v. Stevens*, 946 F.3d at 217 (stating that for conditions-of-confinement claim "the prisoner must show 'that the official possessed a subjectively culpable state of mind in that he exhibited deliberate indifference' to the risk of harm" (quoting *Arenas v. Calhoun*, 922 F.3d 616, 620 (5th Cir. 2019))); *see also Dean*, 984 F.3d at 310 (stating that when an "officer acts with a culpable state of mind . . . 'he 'reasonably should know' that he is violating the law" (internal citation omitted)).

141. *See City of Tahlequah v. Bond*, 142 S. Ct. 9, 11–12 (2021) (per curiam); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7–8 (2021) (per curiam); *see also* text accompanying notes 52–79 (describing post-*Hope* trajectory of Supreme Court's qualified immunity caselaw).

Fourth Amendment claims as compared to Eighth Amendment claims and other contexts (such as Equal Protection and Substantive Due Process) in which a defendant's state of mind is relevant.¹⁴²

A shift of this sort would be a mixed bag for critics of qualified immunity. On the one hand, little change would be seen in qualified immunity's most controversial applications, particularly its impact on the viability of Fourth Amendment excessive force claims and the concomitant insulation of police from civil liability for use of excessive force.¹⁴³ On the other hand, loosening the clearly-established-law shackles on courts evaluating Eighth Amendment claims, for example, could meaningfully address what some have characterized as "unqualified impunity" for abuse of and poor living conditions for prisoners.¹⁴⁴

It is possible, however, that entrenchment of Fourth Amendment exceptionalism in qualified immunity is an unduly constrained view of what the Court meant to convey in *Taylor* or how lower courts will read it. At least some lower courts appear to have taken *Taylor* as blessing clearly-established-law analysis done at a higher level of generality than its prior precedents had suggested, regardless of the right at issue.¹⁴⁵ If this view takes hold, more decisions on qualified immunity might sound like the district court opinion in *Ortiz v. New Mexico*, a case involving alleged violation of the Eighth Amendment by prison guard supervisors who did not intervene to prevent ongoing rape of a prisoner.¹⁴⁶ The court rejected the defendants' factually laden attempt

142. See, e.g., *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (requiring proof of intent to harm to make out Substantive Due Process violation stemming from police high speed chase); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that proof of Equal Protection violation requires proof of discriminatory purpose).

143. See Andrew Chung et al., *Shielded: For Cops Who Kill, Special Supreme Court Protections*, REUTERS (May 8, 2020), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus> (summarizing an analysis of 252 appellate cases between 2015 and 2019 that demonstrated federal courts are increasingly ruling in favor of officers in excessive force cases and arguing that it is a result of recent Court decisions regarding qualified immunity).

144. David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2023 (2018) (identifying qualified immunity as part of the constellation of factors creating "practical immunity" and "unqualified impunity" for prison officials).

145. See *Moderwell v. Cuyahoga Cnty.*, 997 F.3d 653, 660 (6th Cir. 2021) (noting *Taylor* and citing Professor Joanna Schwartz for the proposition that "[t]he Court's decision in *Taylor* sends the signal to lower courts that they can deny qualified immunity without a prior case on point." (quoting Schwartz, *Qualified Immunity and Federalism*, *supra* note 4, at 351)); *Ortiz v. State of New Mexico*, No. CIV 18-0028 JB/LF, 2021 WL 3115577, at *75 (D.N.M. Jul. 22, 2021) ("*Taylor* clarifies that it is no longer the case that an almost-identical case must exist.").

146. *Ortiz*, 2021 WL 3115577, at *100.

to distinguish prior decisions as not involving their precise conduct: “listening to telephone conversations and reading letters,” and “mistakenly believ[ing] a relationship between an inmate and prison guard is consensual, yet prohibited by prison policy and state law, and, as a result, fail[ing] to intervene immediately because they are waiting to intercept a drug drop.”¹⁴⁷ Rather, it was sufficient to deny qualified immunity that, generally speaking, “[t]he Tenth Circuit long has held that it is clearly established that sexual abuse of prisoners by prison guards violates the Eighth Amendment.”¹⁴⁸

Notably, the Court’s post-*Taylor* qualified immunity grants, while more resonant with pre-*Taylor* solicitude toward immunity than with *Taylor*’s more critical tone, do not clearly foreclose the possibility that the Court is signaling a relaxing of its demands for factual particularity in clearly-established-law analysis “across the board.”¹⁴⁹ While the decisions quoted the Court’s stringent pre-*Taylor* characterizations of the clearly-established-law inquiry, both reversed lower courts for relying on precedents that involved arguably materially different facts. In *Bond*, the decedent was shot and killed by police in a residential garage when he wielded a hammer in a manner that made it appear that he might throw it at the officers.¹⁵⁰ The Tenth Circuit determined that it was clearly established that officers could not recklessly or deliberately create a need to use force, and that a jury could find that the officers did so here by cornering the decedent in the garage. The Supreme Court reversed, rejecting the court’s reliance on a case in which police ran toward, screamed at, and attempted to disarm a suicidal man; in *Bond*, by contrast, the officers “engaged in a conversation with [the decedent], followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer.”¹⁵¹ In *Rivas-Villegas*, the plaintiff alleged that the police had used excessive force when they kneeled on his back for eight seconds while removing a knife from his possession.¹⁵² The police did so in the course of responding to a 911 call from the daughter of the plaintiff’s girlfriend, reporting that the plaintiff was drunk, attempting to hurt her and her mother, and was armed with a chainsaw.¹⁵³ The Supreme Court

147. *Id.*

148. *Id.*

149. *Anderson v. Creighton*, 483 U.S. 635, 644 (1986).

150. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 10–11 (2021) (per curiam).

151. *Id.* at 11.

152. *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 6 (2021) (per curiam).

153. *Id.* at 6–7.

held that the Ninth Circuit erred in relying on a case in which police, responding to a noise complaint, knelt on a man who had possessed only a sandwich in attempting to restrain and arrest him.¹⁵⁴ The absence of any knowledge by the police that violence had been threatened and the lack of any weapon involved made the prior case “materially distinguishable.”¹⁵⁵ In short, neither *Bond* nor *Rivas-Villegas* obviously stand for the proposition that a plaintiff must identify a nearly-factually-identical case in order to overcome an immunity assertion.

If *Taylor* is in fact a signal of the Court’s openness to relaxing the demands of the clearly-established-law analysis, it is worth observing that lowering the threshold for factual particularity in prior precedents is only one of several mechanisms at lower courts’ disposal for taking that signal on board. This is because, although the Supreme Court has been assiduous in its attention to how generally or specifically the contours of a right are described for clearly-established-law analysis, it has devoted almost no attention to other details of how the analysis should be conducted—and thereby allowed substantial variation to develop among the circuits. One such detail is the question of what legal sources “count” for purposes of deciding whether a right is clearly established.¹⁵⁶ Lower courts have differed, for example, in their answer to the question of whether the decisions of state courts or federal district courts factor in the clearly established law analysis.¹⁵⁷ Also a matter of debate among the circuits is whether non-legal sources, such as departmental training or policies, can properly be consulted as a source of what makes an official’s legal obligations “clear.”¹⁵⁸ So too

154. *Id.* at 8–9.

155. *Id.* at 8.

156. The Court has gestured at this issue but never squarely addressed it. In several recent cases the Court has indicated that it might favor the strict view that *only* Supreme Court decisions “count” for purposes of clearly established law, when it has stated that it “[a]ssum[ed] for the sake of argument that a controlling circuit precedent could constitute clearly established federal law.” *Carroll v. Carman*, 574 U.S. 13, 17 (2014) (emphasis added). In *Hope*, the majority pointed to non-judicial sources in conducting the clearly-established-law analysis, but the Court has never expressly blessed such a practice (and language like that quoted in *Carman* suggests it might not). *See Hope v. Pelzer*, 536 U.S. 730, 741–42 (2002) (holding law clearly established “in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post”).

157. *Compare* *Carollo v. Boria*, 833 F.3d 1322, 1333 (11th Cir. 2016) (holding that a case on point from Supreme Court, circuit, or state’s highest court is required to clearly establish law), *with* *Peroza-Benitez v. Smith*, 994 F.3d 157, 165–66 (3d Cir. 2021) (stating that clearly-established inquiry looks to Supreme Court precedent, circuit precedent, out-of-circuit cases, and “district court cases, from within the Third Circuit or elsewhere”).

158. *See id.* *Compare* *Vazquez v. Cnty. of Kern*, 949 F.3d 1153, 1165 (9th Cir. 2020) (considering internal policies, training, and PREA standards as part of the totality of sources establishing

are lower courts divided over whether a circuit split on a legal question can *unclarify* otherwise clear in-circuit law on the matter.¹⁵⁹ These open questions have tremendous significance for qualified immunity's effects. The range of sources available to plaintiffs and the possibility for one circuit to move out of step with others to clearly establish law has direct bearing on the ease with which plaintiffs may overcome the defense. If *Taylor* is taken as a nudge to replace the hunt for factual identity with re-centering fair notice, lower courts might be prompted to be more ecumenical in their consideration of sources of clearly established law, or less quick to accept defense claims of uncertainty based on out-of-circuit cases. Perhaps *Taylor* even reflects a willingness by the Court to bless such approaches, or at least to provide clearer guidance on these matters. Only time will tell.

C. Beyond Clearly Established Law

There is a final possibility for a changed doctrinal landscape post-

that plaintiff's Fourteenth Amendment protection against sexual voyeurism by detention facility staff was clearly established), *J W ex rel. Williams v. Birmingham Board of Educ.*, 904 F.3d 1248, 1263 (11th Cir. 2018) (holding that it was not clearly established that SROs who sprayed students with pepper spray and then took virtually no steps to decontaminate them violated the Fourth Amendment and that "[f]or purposes of qualified immunity, it is not insignificant that the methods used by the SROs—passage of time, exposure to fresh air, and evaluation by paramedics—were at least partially consistent with their training and, at least to some degree, with the instructions provided by . . . the manufacturer of [the pepper spray]"), *Maye v. Klee*, 915 F.3d 1076, 1087 (6th Cir. 2019) (holding that the combination of prison policy and a court order put defendants on notice that preventing a Muslim prisoner from attending Eid violated First and Fourteenth Amendments), and *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 546 (4th Cir. 2017) (holding that the court's conclusion that law was clearly established was "'buttressed by' the South Carolina Department of Correction's internal policies" (quoting *Hope*, 536 U.S. at 744))), *with Frasier v. Evans*, 992 F.3d 1003, 1015 (10th Cir. 2021) ("[J]udicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of Mr. Frasier's First Amendment rights was irrelevant to the clearly-established-law inquiry."), and *Latits v. Phillips*, 878 F.3d 541, 553 (6th Cir. 2017) (stating that departmental policies could not render constitutional violation clear because "[i]t must have been clearly established that the conduct at issue violates the Constitution, not internal policies").

159. *Compare* *Rivero v. City and Cnty. of S.F.*, 316 F.3d 857, 865 (9th Cir. 2002) (holding that circuit split does not mean law was not clear in Ninth Circuit), *with* *T.S. v. Doe*, 742 F.3d 632, 639–40 (6th Cir. 2014) ("By June 2009, a reasonable official could have consulted the numerous Supreme Court opinions cited above, or the more recent opinions of our sister circuits, and, in objective good faith, concluded that [Sixth Circuit precedent] was no longer good law."), and *Burgess v. Lowery*, 201 F.3d 942, 944 (7th Cir. 2000) ("Even if our court had decided that strip searches of prison visitors were unconstitutional in the absence of reasonable suspicion, there might be enough doubt about the soundness of the decision, whether in light of decisions by other circuits before or after our decision or of intimations in Supreme Court decisions not squarely on point that our view might be erroneous, to justify the state in believing that the plaintiff's right was not yet 'clearly established' within the meaning of the cases on immunity." (quoting *Santamarena v. Ga. Mil. Coll.*, 147 F.3d 1337, 1339 (11th Cir. 1998))).

Taylor, one that takes a broader view of the magnitude and impact the signal that the Court's recent actions may be sending.¹⁶⁰ Particularly when viewed alongside *McCoy* and against the backdrop of its earlier refusal to revisit qualified immunity wholesale, the Court may be broadcasting a more general openness to rolling back qualified immunity's excesses through various means of doctrinal and procedural fine-tuning rather than (or in addition to) simply recalibrating the clearly-established-law test. Though often flying below the radar of qualified immunity commentary, rules governing the timing of pre-discovery motions, collateral order doctrine, and the sequencing of qualified immunity analysis, among others, can significantly influence the impact qualified immunity has on civil rights litigation.¹⁶¹ Moreover, in large part because the Supreme Court's supervision of qualified immunity doctrine has focused so heavily on the clearly-established-law test, these rules exhibit significant variation among the circuits. Lower federal courts receptive to a signal to reign in qualified immunity (or practitioners inviting them to be so) might accomplish some mitigation of qualified immunity's bite by attending to these rules. Increased percolation on these procedural questions might even prompt the Supreme Court to step in to resolve existing circuit splits—maybe even in a manner that blesses rules that are less solicitous toward immunity claims.¹⁶²

One important example of this procedural heterogeneity is lower courts' diverging degrees of openness to 12(b)(6) dismissals on qualified immunity grounds. The Supreme Court has, since announcing contemporary qualified immunity doctrine in *Harlow*, directed that an immunity defense should be resolved "at the earliest possible stage of

160. The view sketched here is broad in the sense that it suggests *Taylor* may have implications beyond the specific doctrinal confines of clearly-established-law analysis, but it is nevertheless consistent with the view that the Court tends toward incrementalism, that, in the words of Katherine Mims Crocker, it "frequently moves forward with the smallest of steps." Crocker, *supra* note 22, at 13; see also Schwartz, *Police Misconduct*, *supra* note 79 ("This may be how the Supreme Court finally takes action on qualified immunity—not with a sweeping, landmark decision, but with a subtle message, heard by civil-rights lawyers and judges who are listening, that it is stepping back from its most robust depictions of qualified immunity's power.").

161. Aaron Nielson and Chris Walker have examined the last of these at length. See generally Nielson & Walker, *New Qualified Immunity*, *supra* note 1. The Supreme Court itself has recognized the potential for general procedural tools to be pressed into service for the opposite goal—a shoring up of immunity's protections. *Crawford-El v. Britton*, 523 U.S. 574, 597–601 (1998) (discussing "existing procedures available to federal trial judges" enabling them to "exercise . . . discretion in a way that protects the substance of the qualified immunity defense").

162. See Nielson & Walker, *Qualified Defense*, *supra* note 1, at 1884–85 (calling on Supreme Court to "continue to refine its procedural approach to qualified immunity," in particular reexamining procedures governing the ordering of qualified immunity analysis).

litigation.”¹⁶³ This would suggest that dismissal on the pleadings is frequently warranted. Paired with the increasingly factually particularized showing that is required to demonstrate that a constitutional right was clearly established, however, the prospect of pre-discovery dismissal is perilous for civil rights plaintiffs, who frequently lack relevant, particularized information that is in the control of defendants.¹⁶⁴ There is good reason, then, to suspect that solicitude to qualified-immunity-based dismissals on the pleadings would operate to end or deter suits.¹⁶⁵ The Second and Sixth Circuits mitigate this effect by expressly adopting a presumption against dismissal on qualified immunity grounds on a Rule 12(b)(6) motion to dismiss.¹⁶⁶ The Second Circuit has explained that such a presumption is necessary to guard against qualified immunity effecting a “heightened pleading standard” for civil rights plaintiffs who would otherwise be required to anticipate a defense in their complaint.¹⁶⁷ By contrast, the Fifth Circuit has repeatedly held that § 1983 plaintiffs must plead “facts sufficient to overcome a potential qualified immunity defense” in the complaint, and are entitled to discovery only if their initial pleadings allege both constitutional violations and that the defendants’ conduct

163. See *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (“[W]e have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation.”).

164. See Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 498 (1989) (observing that civil rights claimants “rarely will possess or be able to obtain information pertinent to their cases” and that “in numerous civil rights suits, considerable information important to the factual preparation of complaints that appear specific will be in the records or minds of government or corporate defendants and cannot be secured before these pleadings must be filed, becoming available only during discovery”).

165. See Joanna C. Schwartz, *Qualified Immunity’s Selection Effects*, 114 NW. L. REV. 1101, 1130–31 (2020) [hereinafter Schwartz, *Qualified Immunity’s Selection Effects*] (stating that civil rights attorneys report that qualified immunity plays a role in their decision about whether to take a case).

166. See *Moderwell v. Cuyahoga Cnty.*, 997 F.3d 653, 660 (6th Cir. 2021) (discussing rule followed in circuit that “[a]lthough a defendant’s entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12” (internal quotation marks omitted)); *Marvaso v. Sanchez*, 971 F.3d 599, 605 (6th Cir. 2020) (“[G]ranted qualified immunity at the motion to dismiss stage is usually disfavored.”); *Chamberlain v. City of White Plains*, 960 F.3d 100, 111 (2d Cir. 2020) (stating presumption against 12(b)(6) dismissal on qualified immunity grounds because “[o]therwise, plaintiffs alleging a violation of their constitutional rights would face a heightened pleading standard under which they must plead not only facts sufficient to make out their claim but also additional facts to defeat an assertion of qualified immunity. . . . Put another way, advancing qualified immunity as grounds for a motion to dismiss is almost always a procedural mismatch”).

167. *Chamberlain*, 960 F.3d at 111.

violated clearly established law.¹⁶⁸

Though this circuit split involves a “purely” procedural rule about whether dismissal on the pleadings is favored or disfavored, it likely affects the degree of influence that qualified immunity doctrine exerts over the availability of civil remedies. Moreover, on the present challenge of discerning *Taylor*’s influence over qualified immunity rules, it bears emphasizing that the stage of litigation at which a qualified immunity defense may be asserted has direct bearing on the height of the clearly-established-law hurdle, even holding constant the degree of particularity required in defining the right at issue. That is to say, two courts applying identical clearly-established-law tests—one that could lead to dismissal prior to discovery and the other that permits dismissal only after access to discovery—present plaintiffs with different odds of success. Thus, if *Taylor* is taken as a signal that the Court is open to softening the clearly-established-law test, it might well endorse a new rule: the “earliest possible stage of litigation” at which qualified immunity may be decided *is* subsequent to discovery.

The circuits also part company in their comparative solicitude toward interlocutory appeals of qualified immunity denials. The Supreme Court has held that denials of qualified immunity fall within the exceptional category of “collateral orders” that can be immediately appealed despite the absence of a final order in the case.¹⁶⁹ In *Behrens v. Pelletier*, the Court rejected restrictions that lower courts had placed on the number and timing of such interlocutory appeals by defendants asserting qualified immunity at successive stages of litigation—say, in a motion to dismiss and again on a motion for summary judgment.¹⁷⁰ As a consequence, defendants enjoy multiple bites at the appellate apple,

168. See *Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014) (reversing district court grant of discovery on qualified immunity absent determination that complaint pleaded specific facts that overcame defense); *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (reversing district court that ruled “that it was ‘premature to address the defendant’s assertions of qualified immunity before discovery has taken place,’” because “that is precisely the point of qualified immunity: to protect public officials from expensive, intrusive discovery until and unless the requisite showing overcoming immunity is made.”); *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989) (announcing requirement that complaint overcome immunity defense); see also *Westfall v. Luna*, 903 F.3d 534, 542 (5th Cir. 2018) (citing *Brown* and dismissing on qualified immunity grounds at 12(b)(6)).

169. See *Mitchell v. Forsyth*, 472 U.S. 511, 524–30 (1985). For discussion and critique of the Court’s doctrine in this area, see generally Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. 169 (2019).

170. See *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (holding improper an order dismissing a defendant’s interlocutory appeal asserting qualified immunity, which was filed after the defendant unsuccessfully appealed following an earlier stage in the litigation).

litigation is more protracted and expensive, plaintiffs' lawyers must be able to handle both trial and appellate work, and, cumulatively, civil rights cases become less attractive to plaintiffs'-side lawyers in the first place.¹⁷¹

In *Johnson v. Jones*, the Supreme Court aimed to limit the impact of immediate appealability by instructing the circuits that their jurisdiction to hear immediate appeals of qualified immunity is limited to "abstract questions of law," and does not extend to appeals of district court determinations that genuine disputes of fact preclude dismissal.¹⁷² In *Johnson's* aftermath, however, the lower federal courts have continued to differ in their approaches to the scope of appellate jurisdiction over appeals of qualified immunity denials. Some treat *Johnson* as confined to its facts and exercise jurisdiction over appeals in any case *except* the rare instance where the defendants' appeal is premised on disputed evidence that they had no involvement in the alleged constitutional violation.¹⁷³ Others, like the Tenth Circuit, restrict appellate courts from exercising jurisdiction over any redetermination of what facts a reasonable jury could accept, and permit only appellate reassessment of whether the facts credited by the district court overcome qualified immunity.¹⁷⁴ Finally, a small number of circuits have implemented specific procedural mechanisms to discourage inappropriate interlocutory appeal. For example, courts in the Sixth Circuit have sanctioned lawyers for frivolous invocations of appellate jurisdiction, and others have implemented procedures for trial courts to certify appeals as frivolous.¹⁷⁵ Such procedures operate on the

171. See Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 165 at 1121–23 (relaying attorney perspectives on how defense counsel strategically use qualified immunity to significantly burden plaintiff's attorneys' time and resources, so as to "'beat down the plaintiff's counsel,' and make their lives 'somewhat miserable.'"); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 100 (1997) (discussing anecdotal evidence that interlocutory appeals generate substantial delay in civil rights cases and "that defendants use the qualified immunity interlocutory appeal process to protract litigation 'that would otherwise be tried or settled relatively quickly.'" (quoting Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1191 (1990))).

172. *Johnson v. Jones*, 515 U.S. 304, 317 (1995).

173. See, e.g., *Amons v. Tindall*, No. 20-16351, 2021 WL 3015107, at *3 (9th Cir. July 15, 2021) (holding that the court had jurisdiction to hear the defendant's qualified immunity appeal as it was a "legal issue"); see also *Estate of Anderson v. Marsh*, 985 F.3d 726, 741 (9th Cir. 2021) (Fletcher, J., dissenting) (expressing view that this interpretation is consistent with the Supreme Court's post-*Johnson* cases).

174. *Walton v. Powell*, 821 F.3d 1204, 1208 (10th Cir. 2016).

175. See, e.g., *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992) (holding that "[s]hould the district court find that the defendants' claim of qualified immunity is frivolous or has been waived, the district court may certify . . . that defendants have forfeited their right to pretrial

margins to discourage lawyers from filing interlocutory appeals when the legal justification for doing so is a close call, and thereby provide some assurance to plaintiffs that the value of a strong case on the merits will not be diminished by the resource-depleting effects of protracted appellate litigation.¹⁷⁶

If *Taylor* is taken as a signal that the Court is broadly open to recalibrating the balance of protections for plaintiffs and defendants in civil rights claims, it could prompt embrace of a more restrictive approach to interlocutory appeals of qualified immunity denials. We may then have the opportunity to see whether the Court is inclined to settle the diversity of interlocutory appeal approaches among the circuits; *Taylor* could predict that it would do so in a manner that restricts defensive interlocutory appellate usage.¹⁷⁷

A final example of qualified immunity procedural variation that could be leveraged to mitigate distortions created by the defense involves the sequencing of the clearly-established-law inquiry—or, more precisely, whether courts adjudicating motions to dismiss or for summary judgment on qualified immunity grounds reach the merits of the constitutional claim *before* determining whether the law governing it was clearly established when the defendants acted. The consequence of not doing so is perhaps obvious: consistently declining to reach the constitutional merits, and instead resolving qualified immunity assertions simply by concluding that (whatever the law means currently) it was not previously clearly established perpetuates the lack of clarity in the law. The effect is potentially deleterious from the standpoint of law development, and presents a Catch-22 for plaintiffs

appeal, and may proceed with trial.”); *Stewart v. Donges*, 915 F.2d 572, 574 (10th Cir. 1990) (analyzing a process by which district courts may retain jurisdiction of cases in which a defendant frivolously filed a notice of appeal asserting qualified immunity); *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989) (adopting a certification process for baseless notices of interlocutory appeals of qualified immunity rulings, whereby “a district court may certify to the court of appeals that the appeal is frivolous and get on with the trial”). *But see* *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 95, 96 (1st Cir. 2003) (“We have never adopted the *Apostol* certification procedure in this circuit. Although appellants urge us to do so here in the hopes of adding fuel to their trial nullity argument, we decline their invitation.”).

176. *See* *Chen*, *supra* note 171, at 100 (noting that forcing defendants to bear the costs of qualified immunity defenses in pre-trial litigation would encourage them to do so only when the benefits outweigh the costs; i.e., when the defense is strong).

177. At least one circuit court judge has recently issued a “plea” to the Supreme Court to “tell us clearly, in an appropriate case, whether and in what circumstances an interlocutory appeal may be taken when the district court, viewing disputed evidence in the light most favorable to plaintiff, has denied a motion for summary judgment based on qualified immunity”). *Est. of Anderson v. Marsh*, 985 F.3d 726, 742 (9th Cir. 2021) (Fletcher, J., dissenting).

who remain, by dint of the manner in which qualified immunity is analyzed, bereft of the legal precedent required for overcoming the defense. Indeed, there was a brief period of time when the Supreme Court required lower courts to analyze qualified immunity in a particular order: constitutional merits first, clearly-established-law (if necessary) second.¹⁷⁸ Less than a decade after mandating that approach, the Court reversed course. Since *Pearson v. Calahan*, lower courts have been free to skip the merits of the constitutional claim, and are encouraged to do so by language in *Pearson*. Interestingly, empirical work by Aaron Nielson and Chris Walker has revealed variations among the circuits in their tendencies to reach, or not reach, the constitutional merits, creating the perhaps concerning potential for asymmetrical law development across circuits.¹⁷⁹ Nielson and Walker, among others, have called for lower courts and the Supreme Court to ameliorate these concerns, including by, for example, adopting a requirement that courts “give reasons for exercising (or not) their *Pearson* discretion to reach constitutional questions,” and to “speak critically of using discretion in strategic ways.”¹⁸⁰ *Taylor* could signal that the Supreme Court is prepared to act upon, or bless lower courts’ acting upon, such calls.

The lessons of this subpart are descriptive, predictive, and tactical. Descriptively, the preceding account highlights the procedural landscape in which qualified immunity is litigated, and the degree to which that landscape calibrates the stringency of qualified immunity.¹⁸¹ Without carefully examining the work of lower federal courts, and without attending to questions beyond application of the clearly-established-law standard itself, observers will miss the diversity of that terrain, and mischaracterize qualified immunity doctrine as more homogenous in content and effect than it is in reality. Sharpening the lens to see this procedural diversity then suggests, as a matter of prediction, that *Taylor* could kick off procedural recalibration that extends beyond simply the contours of clearly established law. Of course, law reform does not occur spontaneously. Thus, a final strategic

178. *Saucier v. Katz*, 533 U.S. 194, 201.

179. Nielson & Walker, *New Qualified Immunity*, *supra* note 1, at 39–42.

180. Aaron L. Nielson & Christopher J. Walker, Strategic Immunity, 66 EMORY L. REV. 55, 119–21 (2016).

181. Cf. Schwartz, *Civil Rights Ecosystems*, *supra* note 23, at 1554 (stating that including variation among courts regarding “rules governing pleadings, discovery, summary judgment practice, interlocutory appeals, and the like” affects the overall “ecosystem” in which litigation occurs).

point is that advocates hoping to persuade courts to lessen qualified immunity's sting should urge courts to adopt procedures to that end. Even for advocates pushing for reform of the doctrine in other arenas (e.g., legislative), it is well to recall that procedural tinkering short of abolition or even piecemeal substantive reform can play a useful (and perhaps less politically fraught) role.

CONCLUSION

Despite increasingly broad-based discontent with the Supreme Court's qualified immunity doctrine, the Court has, for the present moment, declined to announce a dramatic reversal of course from the highly protective qualified immunity regime it has erected. But the Court's recent decision in *Taylor v. Riojas* was a tonal reversal if nothing else. In breathing new life into a seemingly moribund conception of clearly established law as existing in the absence of factually analogous precedent, the decision raises the possibility that judicial reform of qualified immunity might yet be afoot. This Article has argued that the plausibility and particularity of that possibility remains far from clear. Indeed, the Court's two more recent qualified immunity pronouncements might to put to rest any speculation that *Taylor* portends radical reconfiguring of the clearly-established-law test. But equally importantly, this Article has argued that the likely meaning and strength of the Court's jurisprudential signaling can only be assessed against the backdrop of the diverse qualified immunity jurisprudence of the lower federal courts that will apply the Court's decision. Doing so yields no easy or certain predictions about the future of qualified immunity, but it does illuminate the doctrine's hybridity, and elevates qualified immunity as an important space for scholars interested in the jurisprudential interaction of the Supreme Court and lower federal courts. In the meantime, and as long as neither the Court nor Congress acts to eliminate or fundamentally reshape qualified immunity, lawyers and jurists with an eye toward mitigating qualified immunity's harshest effects might capitalize on and further push forward this doctrinal variation.