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### The Supreme Court's Reticent Qualified Immunity Retreat

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## THE SUPREME COURT'S RETICENT QUALIFIED IMMUNITY RETREAT

KATHERINE MIMS CROCKER<sup>†</sup>

### ABSTRACT

*The recent outcry against qualified immunity, a doctrine that disallows damages actions against government officials for a wide swath of constitutional claims, has been deafening. But when the Supreme Court in November 2020 and February 2021 invalidated grants of qualified immunity based on reasoning at the heart of the doctrine for the first time since John Roberts became Chief Justice, the response was muted. With initial evaluations and competing understandings coming from legal commentators in the months since, this Essay explores what these cases appear to say about qualified immunity for today and tomorrow.*

*The Essay traces idealistic, pessimistic, and optimistic impressions of these cases' importance from the perspective of a qualified-immunity critic. The Essay argues that the optimistic view probably gets things right in that the Court is taking tentative steps forward by precluding some of the doctrine's most extreme consequences. The Essay then contends that this modest move nevertheless demonstrates why those concerned about qualified immunity should focus not only on the courts, but also on the other branches of government—and not only on one doctrine, but also on constitutional-tort law as a whole. In and beyond the recent reform-minded moment, we should think big about how to improve constitutional enforcement: bigger than the judiciary and bigger than qualified immunity.*

### INTRODUCTION

If you missed a recent Supreme Court case rejecting a claim of qualified immunity (yes, *rejecting* a claim of qualified immunity) without merits briefing or oral argument, you are not alone. With the decision issued November 2, 2020, it was bound to get lost in the

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shuffle. November 2, after all, was the day before Election Day, and legal commentators, like much of the American public, were focused on the protracted ballot count and contentious presidential transition for months afterward.

What is clear is that the summary reversal in *Taylor v. Riojas*<sup>1</sup> and a follow-up order in *McCoy v. Alamu*<sup>2</sup> deserve more attention than they have received. To call qualified immunity a hot topic would risk understatement. As part of the movement for police reform and racial justice amplified by George Floyd's murder last year, reconsidering qualified immunity has become a cause célèbre.<sup>3</sup> A large reason, as the ensuing discussion describes, is because of the way the Roberts Court has coddled qualified immunity, which in extensive circumstances blocks lawsuits seeking money damages against government officials for federal constitutional violations. *Taylor* and *McCoy* deviate from that theme.

Less clear are to what doctrinal end these cases may lead and, therefore, to what extent the legal community, and especially those who criticize the Court's overaggressive and undertheorized qualified-immunity case law, should consider them significant. This Essay explores what *Taylor* and *McCoy* appear to say about qualified immunity for today and tomorrow—that is, about where the doctrine stands now and where it could go from here.

To help set the stage: qualified immunity's canonical formulation comes from the 1982 case *Harlow v. Fitzgerald*.<sup>4</sup> Concerned about “subject[ing] government officials . . . to the costs of trial” and “the burdens of broad-reaching discovery,” the Court in *Harlow* declared that “government 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.”<sup>5</sup> *Harlow* itself was a case against White House officials.<sup>6</sup> But the Court quickly expanded the doctrine to cover essentially all executive officials in the local, state, and federal systems—including

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

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

3. See Madeleine Carlisle, *The Debate over Qualified Immunity Is at the Heart of Police Reform. Here's What to Know*, TIME (June 3, 2021, 6:35 PM), <https://time.com/6061624/what-is-qualified-immunity/?s=09> [https://perma.cc/R9Y8-WJ46].

4. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

5. *Id.* at 817–18.

6. *Id.* at 802 (identifying the defendants as “senior White House aides to former President Richard M. Nixon”).

line-level law-enforcement and corrections officers.<sup>7</sup> Over time, the Court likewise expanded the doctrine to cover more and more conduct by narrowing the notion of clearly established rights, such as through limiting which sources of law count in the analysis.<sup>8</sup> Increasingly for nearly forty years, therefore, qualified immunity had caused plaintiffs alleging constitutional violations to face difficulties securing judgments for monetary relief. Enter *Taylor* and *McCoy*.

This Essay proceeds in four short parts. Part I outlines the background of and decision in *Taylor*, and Part II does the same thing for *McCoy*. Part III asks what these cases mean for qualified immunity today. This Part employs the perspective of a qualified-immunity critic to identify and assess idealistic, pessimistic, and optimistic understandings of the opinions, arguing that the optimistic outlook is probably the most accurate. Part IV asks what *Taylor* and *McCoy* mean for qualified immunity tomorrow. This Part contends that while these cases move courts closer to a sensible constitutional-enforcement scheme, much remains to be done beyond both the judicial system and qualified immunity itself.

### I. TAYLOR

Trent Michael Taylor, a Texas state prisoner, sued prison officials under 42 U.S.C. § 1983 for violating the Eighth Amendment by allegedly placing him in conditions the Supreme Court called “shockingly unsanitary.”<sup>9</sup> Taylor claimed that over six days, officials housed him first in a cell “covered” with ““massive amounts” of feces”: all over the floor, the ceiling, the window, the walls, and even ‘packed inside the water faucet.’”<sup>10</sup> Officials then purportedly moved him to a “frigidly cold cell,” where he was “left to sleep naked in sewage” because the room “was equipped with only a clogged drain in the floor to dispose of bodily wastes.”<sup>11</sup>

The defendants asserted qualified immunity, and the Fifth Circuit affirmed the district court’s decision granting it.<sup>12</sup> While the Fifth Circuit said that Taylor “showed genuine disputes about a constitutional violation,” it concluded that the defendants did not have

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7. See Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1432–33 (2019).

8. See *id.* at 1414.

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

10. *Id.* (quoting *Taylor v. Stevens*, 946 F.3d 211, 218 (5th Cir. 2019)).

11. *Id.*

12. See *id.*; *id.* at 54 (Alito, J., concurring in the judgment).

“‘fair warning’ that their specific acts” infringed his rights.<sup>13</sup> The Supreme Court disagreed with the Fifth Circuit, vacating the judgment and remanding the matter in an exercise known as a summary reversal.<sup>14</sup> The case was on summary judgment, so the Court’s disposition had the effect of sending it back for additional proceedings (and perhaps settlement).

The Fifth Circuit’s ruling in favor of the defendants on qualified-immunity grounds was foreseeable even given the egregious allegations because of the arc of Supreme Court precedent. Prior to *Taylor*, the Court had not rejected an assertion of qualified immunity on the substance of the defense since *Groh v. Ramirez*<sup>15</sup> in 2004, a year before Chief Justice Roberts joined the Court. Over and over again, the Court instead instructed tribunals they should grant qualified immunity to “all but the plainly incompetent or those who knowingly violate the law.”<sup>16</sup> Cases from this timeframe showed what a low bar the Court was using. In *Safford Unified School District v. Redding*,<sup>17</sup> for instance, the Court granted qualified immunity to school officials who strip-searched a thirteen-year-old girl for pills after finding “common pain relievers equivalent to two Advil” she had allegedly distributed.<sup>18</sup> And in *Kisela v. Hughes*,<sup>19</sup> the Court granted qualified immunity to a police officer who without warning repeatedly shot a woman holding a kitchen knife at her side.<sup>20</sup>

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13. *Taylor*, 946 F.3d at 222 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

14. See *Taylor*, 141 S. Ct. at 54; STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* 5-36 (11th ed. 2019) (“This kind of reversal order usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time.”); *id.* at 5-37 (characterizing some summary vacatur in the same manner as summary reversals).

15. See *Groh v. Ramirez*, 540 U.S. 551, 564 (2004).

16. *E.g.*, *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (per curiam) (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011)).

17. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009).

18. *Id.* at 368–69, 375–76. The Court explained that two school officials told the girl “to remove her clothes down to her underwear, and then ‘pull out’ her bra and the elastic band on her underpants.” *Id.* at 374. The Court said that while “[t]he exact label for this” conduct was “not important,” a “strip search” was “a fair way to speak of it.” *Id.*

19. *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam).

20. *Id.* at 1150–52. The officer had “arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife.” *Id.* at 1150. At the time the officer fired, the woman “had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so.” *Id.* The dissent argued, however, that “[t]he record, properly construed at this stage,” indicated that “at the time of the shooting,” the woman “stood stationary about six feet away” from the other woman and “appeared ‘composed and content.’” *Id.* at 1155 (Sotomayor, J., dissenting) (quoting the record).

To be fair, the Court during this period occasionally ruled against officials claiming qualified immunity. In *Tolan v. Cotton*,<sup>21</sup> for instance, the Justices in 2014 vacated and remanded a judgment for proper application of the summary-judgment standard.<sup>22</sup> And in *Sause v. Bauer*,<sup>23</sup> the Justices in 2018 did the same thing for proper application of the motion-to-dismiss standard.<sup>24</sup>

Never until *Taylor*, however, did the Roberts Court deny a claim of qualified immunity on grounds going to the heart of the defense—that the alleged conduct “violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known,” to quote the *Harlow* test.<sup>25</sup> The Court in *Taylor* stated that “[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.”<sup>26</sup> But the Court ruled 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.”<sup>27</sup>

## II. MCCOY

Like Taylor, Prince McCoy was a Texas state prisoner at the time of the allegations underlying his case. McCoy claimed that a guard sprayed him “directly in the face with mace for no reason,” causing “burning skin and eyes, congested lungs, difficulty breathing, stomach pain, vision impairment, anxiety, nightmares, depression, and other

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21. *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam).

22. *Id.* at 651. The plaintiff, Robbie Tolan, has done remarkable work recounting his story about surviving a police shooting set in motion by a botched license-plate lookup. See Barry Svrluga, *The Black Baseball Prospect, the Police Shooting and the Club He Never Wanted To Join*, WASH. POST. (Dec. 31, 2020, 4:00 AM), <https://www.washingtonpost.com/sports/2020/12/31/robbie-tolan-police-shooting> [<https://perma.cc/CN7Z-JWBJ>].

23. *Sause v. Bauer*, 138 S. Ct. 2561 (2018) (per curiam).

24. *Id.* at 2563.

25. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

26. *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

27. *Id.*

emotional distress.”<sup>28</sup> McCoy sued the guard for excessive force under the Eighth Amendment.<sup>29</sup>

While the Fifth Circuit said a reasonable jury could have concluded that McCoy suffered a constitutional wrong, the court nevertheless granted the guard qualified immunity.<sup>30</sup> Partly because an administrative report found that the guard “used less than the full can of spray,” the Fifth Circuit said “it was not *beyond* debate that” McCoy’s allegations “crossed the line dividing a *de minimis* use of force from a cognizable one.”<sup>31</sup>

McCoy sought review, and the Supreme Court responded in a two-sentence order: “The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Taylor v. Riojas*,”<sup>32</sup> which had not yet come down when the lower court considered McCoy’s case. That articulation is customary for a “GVR” (grant, vacate, and remand)—a maneuver the Court often makes where it has issued a decision with the potential to affect the outcome of a case on the certiorari docket since the case was decided below.<sup>33</sup>

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28. Petition for Writ of Certiorari at 4–5, *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.) (No. 20-31) (quoting *McCoy v. Alamu*, 950 F.3d 226, 229 (5th Cir. 2020)), [https://www.supremecourt.gov/DocketPDF/20/20-31/147498/20200710160817184\\_McCoy%20Cert%20Petition%20to%20File.pdf](https://www.supremecourt.gov/DocketPDF/20/20-31/147498/20200710160817184_McCoy%20Cert%20Petition%20to%20File.pdf) [<https://perma.cc/28QM-M3US>]. More specifically, McCoy suggested that the guard was upset with another prisoner who threw water and that the guard took his anger out on McCoy after the other prisoner blocked his own cell from the spray. *Id.* at 4.

29. *Id.* at 5.

30. *McCoy*, 950 F.3d at 232–33.

31. *Id.* at 233.

32. *McCoy*, 141 S. Ct. at 1364.

33. See SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, at 4-21 (explaining that a GVR may be used where “[a] court of appeals decision predates [a] conflicting Supreme Court decision” to allow the lower court to reconsider the matter “in the light of the recent decision”); *see also* Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam) (explaining that a GVR may be used “[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation”); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam) (explaining that a GVR “indicate[s] that [the Court] found [its intervening decision] sufficiently analogous and, perhaps, decisive to compel re-examination of the case”).

## III. TODAY

*Taylor* and *McCoy* are significant simply for softening the decade-plus streak of extreme deference to defendants on qualified immunity's central issue of whether the relevant right was sufficiently clear. But what do these decisions mean for the doctrine today? As with so many Supreme Court actions, the answer lies in the eye of the beholder. But contextual clues lend support to a middle-of-the-road understanding.

At one pole, an idealist might think *Taylor* and *McCoy* represent a major upheaval in qualified-immunity law. Professor Colin Miller, for instance, has argued that these cases may have “significantly shrunk the qualified immunity defense and expanded the constellation of cases in which citizens can vindicate violations of their constitutional rights.”<sup>34</sup> After all, *Taylor* not only stopped the sixteen-year run of the Court refusing to reject the substance of a qualified-immunity assertion; *McCoy* also appeared to confirm that *Taylor* reinvigorated a relatively plaintiff-friendly theory that many analysts had assumed the Court abandoned long ago.<sup>35</sup> This was the notion from the 2002 case *Hope v. Pelzer*<sup>36</sup> that “officials can still be on notice that their conduct

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34. Colin Miller, Essay, *The End of Comparative Qualified Immunity*, 99 TEX. L. REV. ONLINE 217, 224 (2021) [hereinafter Miller, *Comparative Qualified Immunity*] (contending in particular that “comparative qualified immunity”—through which “government officials who violated plaintiffs’ constitutional rights immunized themselves from liability by citing to cases in which similar, less egregious conduct was deemed constitutional”—“might have met its end”); see also Anya Bidwell & Patrick Jaicomo, Opinion, *Lower Courts Take Notice: The Supreme Court Is Rethinking Qualified Immunity*, USA TODAY (Mar. 2, 2021, 8:59 AM), <https://www.usatoday.com/story/opinion/2021/03/02/supreme-court-might-rethinking-qualified-immunity-column/4576549001> [<https://perma.cc/H3HK-DSEW>] (stating that “[t]hese are still early days in the reconsideration—if not ultimate rejection—of the court-created doctrine” but that “the Supreme Court may now be entering a new dawn on qualified immunity”); Colin Miller, *The Supreme Court Issues a (Possibly) Landmark Ruling on Qualified Immunity*, EVIDENCEPROF BLOG (Feb. 23, 2021), <https://lawprofessors.typepad.com/evidenceprof/2021/02/yesterday-the-united-states-supreme-court-issued-a-summary-disposition-inmccoy-v-alamu-that-could-end-up-being-a-landmark-r.html> [<https://perma.cc/W5GQ-ER25>] (suggesting that *Taylor* and *McCoy* amount to “a seismic shift in qualified immunity law that will great [sic] constrict the availability of the qualified immunity test”).

35. See, e.g., Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 946–47 (2015); Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 654, 657 (2013); 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, 1247 (2015).

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

violates established law even in novel factual circumstances”<sup>37</sup>—in essence, where no factually on-point precedent exists.

The Fifth Circuit in *Taylor* wrote that while “the law was clear that prisoners couldn’t be housed in cells teeming with human waste for months on end,” the fact that the court “hadn’t previously held that a time period so short [as six days] violated the Constitution” meant Taylor’s claim was “doom[ed].”<sup>38</sup> Not so, the Justices said, relying on *Hope* 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.”<sup>39</sup> Similarly, the Fifth Circuit in *McCoy* reasoned that “[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established.”<sup>40</sup> Satisfying this standard, the court continued, “‘is especially difficult in excessive-force cases’ such as McCoy’s, because ‘the result depends very much on the facts of each case.’”<sup>41</sup> By invoking *Taylor* in vacating this judgment, the Justices suggested that the *McCoy* panel parsed the precedent too finely.<sup>42</sup>

At the other pole, a pessimist might think *Taylor* and *McCoy* mean (at most) that qualified immunity is not quite absolute immunity, a doctrinal cousin that generally forbids damages actions for federal constitutional claims challenging legislative, judicial, and limited other functions regardless of how outrageously unlawful the defendant’s

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37. *Id.* at 741.

38. *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019).

39. *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam) (quoting *Hope*, 536 U.S. at 741); see Erwin 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-victory-on-qualified-immunity> [<https://perma.cc/FYU2-UH7L>] (“*Taylor v. Riojas* is especially important because it reaffirms *Hope v. Pelzer* and that there does not need to be a case on point for a plaintiff to prevail and overcome qualified immunity.”).

40. *McCoy v. Alamu*, 950 F.3d 226, 232 (5th Cir. 2020) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam)).

41. *Id.* at 233 (quoting *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019)).

42. In *Taylor*, the Court rejected the Fifth Circuit’s reliance on “‘ambiguity in the caselaw’ regarding whether ‘a time period so short [as six days] violated the Constitution.’” 141 S. Ct. at 54 n.2 (quoting *Taylor*, 946 F.3d at 222). The decision to which the Fifth Circuit pointed, the Court said, “is too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor’s right.” *Id.* (citing *Davis v. Scott*, 157 F.3d 1003, 1004 (5th Cir. 1998)). By ordering reconsideration in light of *Taylor*, the Court indicated that the Fifth Circuit’s reliance on prior caselaw in *McCoy* may have likewise been insufficient to support qualified immunity there. See *McCoy*, 950 F.3d at 233 (stating that “[i]n somewhat related circumstances, we held that spraying a prisoner with a fire extinguisher ‘was a *de minimis* use of physical force and was not repugnant to the conscience of mankind’” (quoting *Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993) (per curiam))).

conduct may have been.<sup>43</sup> One commentator, for instance, has argued even in light of *Taylor* that “[t]he Supreme Court’s interpretation of qualified immunity has effectively granted absolute immunity to government officials.”<sup>44</sup>

As it turns out, recent actions had made the contrast between qualified and absolute immunity seem far from tautological. For just one example, consider *Jessop v. City of Fresno*,<sup>45</sup> where the plaintiffs alleged that police officers stole property valued at hundreds of thousands of dollars after seizing it while executing a search warrant.<sup>46</sup> The Ninth Circuit granted the defendants qualified immunity on the ground that no clearly established law declared this conduct unconstitutional.<sup>47</sup> By denying certiorari in a case presenting such extreme allegations,<sup>48</sup> the Court arguably suggested that qualified immunity provided protection as strong as absolute immunity would have.

An optimist—less and more hopeful than the idealist and the pessimist, respectively—might think *Taylor* and *McCoy* represent some progress in the right direction while recognizing that they probably do not fundamentally transform qualified-immunity doctrine. Cato Institute Research Fellow Jay Schweikert, for instance, has written that while *Taylor* and *McCoy* “suggest the Justices want to curb the worst excesses of the doctrine,” these cases “also suggest the

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43. For an overview of absolute-immunity doctrine and how it differs from qualified-immunity doctrine, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1038–39, 1043–47 (7th ed. 2015); and see generally Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 TOURO L. REV. 473 (2008).

44. Nathaniel Rubin, *Taylor v. Riojas: Qualified Immunity in 2020*, ARIZ. ST. L.J. BLOG (Feb. 1, 2021), <https://arizonastatelawjournal.org/2021/02/01/taylor-v-riojas-qualified-immunity-in-2020/> [<https://perma.cc/D3KQ-BW9K>]. Relatedly, in an opinion recognizing *Taylor*, the Seventh Circuit stated that “[d]etermining whether an officer violates clearly established law requires a look at past cases with specificity” but that the “assessment does not require a case with identical factual circumstances, lest qualified immunity become absolute immunity.” *Lopez v. Sheriff of Cook Cnty.*, 993 F.3d 981, 988, 991 (7th Cir. 2021).

45. *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020) (mem).

46. Petition for Writ of Certiorari at 5–7, *Jessop v. City of Fresno*, 140 S. Ct. 2793 (2020) (mem.) (No. 19-1021), [https://www.supremecourt.gov/DocketPDF/19/19-1021/133072/20200214133249205\\_19-\\_\\_%20Jessop%20Petition%202.14.2020%20Final.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1021/133072/20200214133249205_19-__%20Jessop%20Petition%202.14.2020%20Final.pdf) [<https://perma.cc/9PWH-YSGL>].

47. *Jessop*, 936 F.3d at 939.

48. *Jessop*, 140 S. Ct. at 2793.

Supreme Court is *not* going to take up the larger question of whether qualified immunity itself should be reconsidered.”<sup>49</sup>

The optimist knows there are several factors pushing against an idealistic interpretation. *Taylor*’s principal opinion is only about two pages long, avoiding more questions than it answers. The Justices decided both *Taylor* and *McCoy* as part of their much-maligned “shadow docket” without merits briefing or oral argument,<sup>50</sup> both of which could have put more fundamental issues on the table. And the majority in *Taylor* called the allegations “particularly egregious,”<sup>51</sup> meaning (perhaps depending on one’s perception of the facts underlying *McCoy*)<sup>52</sup> the case may reveal relatively little about the Court’s posture toward more run-of-the-mill government misconduct. What is more, during the previous summer, the Court passed over multiple qualified-immunity cases teeing up the doctrine for revision or repudiation.<sup>53</sup> Had the Court wanted to reconsider the doctrine in a broader way, those cases presented a prime opportunity.<sup>54</sup>

While suggesting that *Taylor* has some teeth, *McCoy* is even more ambiguous in certain ways. A GVR (unlike a summary reversal) means not necessarily that the lower court’s judgment was incorrect,

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49. Jay Schweikert, *The Supreme Court Won’t Save Us from Qualified Immunity*, CATO INST.: CATO AT LIBERTY (Mar. 3, 2021, 4:58 PM), <https://www.cato.org/blog/supreme-court-wont-save-us-qualified-immunity> [<https://perma.cc/2899-4J2U>]; see also Adam Liptak, *Cracks in a Legal Shield for Officers’ Misconduct*, N.Y. TIMES: SIDEBAR (Mar. 25, 2021), <https://www.nytimes.com/2021/03/08/us/supreme-court-qualified-immunity.html> [<https://perma.cc/5TGX-3KJ8>] (quoting Professor Alex Reinert as stating that “[t]he Supreme Court remains very committed to qualified immunity being a forceful defense in civil rights cases and certainly in police excessive force cases”).

50. See, e.g., William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015) (coining the term “shadow docket” to describe “a range of orders and summary decisions that defy [the Court’s] normal procedural regularity”); *id.* at 18 (observing that “the Court could do more to reassure us that” the products of the shadow docket are not “thoughtless or the result of unjustified inconsistency”); Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 156–58 (2019) (discussing the shadow docket’s “[m]essiness,” especially in the context of the federal government seeking stays of injunctions).

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

52. See Miller, *Comparative Qualified Immunity*, *supra* note 34, at 223 (stating that while the conduct alleged in *McCoy* “was unconstitutional, it would be difficult to characterize it as ‘particularly egregious’ without making a similar finding about most other unconstitutional behavior by government officers who seek qualified immunity”).

53. Josh Gerstein, *Supreme Court Turns Down Cases on ‘Qualified Immunity’ for Police*, POLITICO (June 15, 2020, 3:08 PM), <https://politi.co/2BcpYwm> [<https://perma.cc/7SW3-F5G3>].

54. The Court has also denied other petitions seeking to overturn grants of qualified immunity since then. See *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (mem.), *denying cert. to 973 F.3d 868* (8th Cir. 2020); *Howse v. Hodous*, 141 S. Ct. 1515 (2021) (mem.), *denying cert. to 953 F.3d 402* (6th Cir. 2020).

but rather that the lower court's logic was incomplete in light of subsequent events.<sup>55</sup> So in *McCoy*, the Fifth Circuit—which in the normal course sent the case back to the district court “in accordance with the judgment of the Supreme Court” while “express[ing] no view” about what should happen on remand<sup>56</sup>—could potentially hold that the guard deserves qualified immunity again.<sup>57</sup> For these reasons and others, there is ample cause to doubt that *Taylor* and *McCoy* signify a sharp shift in the Court's overall attitude about constitutional enforcement.

The pessimistic perspective may seem more accurate than the idealistic view. But the pessimistic perspective still probably misses the mark. Had the Court *affirmed* the Fifth Circuit's approval of qualified immunity in *Taylor* and *McCoy*, one could argue that qualified immunity had become functionally indistinguishable from absolute immunity (as others have argued before<sup>58</sup>). But the Court could have simply declined to take any action on these cases in the first place. As a formal matter, a “cert” denial does not signify support for the underlying decision.<sup>59</sup> And as a functional matter, several of last

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55. See SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, at 5-42 (stating that “the summary reconsideration order” does not seem to be “the functional equivalent of a summary reversal order” but instead seems to instruct the lower court “to reconsider the entire case in light of the intervening precedent—which may or may not compel a different result”); see also *id.* at 4-21 through -22 & nn.36-37 (collecting cases).

56. *McCoy v. Alamu*, 842 F. App'x 933, 933 (5th Cir. 2021) (per curiam).

57. Indeed, in a recent skirmish over yet another Fifth Circuit case holding that qualified immunity was warranted, Judge Willett argued that the court was not taking *Taylor* and *McCoy* seriously enough. See *Ramirez v. Guadarrama*, 2 F.4th 506, 522-23 (5th Cir. 2021) (Willett, J., dissenting from the denial of reh'g en banc) (arguing that “while these quiet, ‘shadow docket’ actions may not portend a fundamental rethinking of qualified immunity, the Court seems determined to dial back the doctrine's harshest excesses” and that “the Court is warning us to tread more carefully when reviewing obviously violative conduct”). In *Ramirez*, police officers allegedly tased Gabriel Eduardo Olivas “[w]hile responding to a 911 call reporting that Olivas was threatening to kill himself and burn down his family's house” despite the officers knowing that Olivas had doused himself in gasoline and despite another officer's warning that tasing Olivas would set him on fire. *Ramirez v. Guadarrama*, 844 F. App'x 710, 711-12 (5th Cir. 2021) (per curiam). The panel explained what happened next: “Olivas was engulfed in flames. The house burned down. Olivas died of his injuries several days later.” *Id.* at 711. The district court denied the defendants' motion to dismiss on qualified-immunity grounds; the panel reversed; and the full Fifth Circuit denied rehearing en banc, prompting Judge Willett's dissent. See *Ramirez*, 2 F.4th at 516-17 (Willett, J., dissenting from the denial of reh'g en banc).

58. See David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2023 (2018) (claiming that “the present liability regime” for prison officials “borders on de facto absolute immunity”).

59. See *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399, 1400 (2017) (mem.) (Roberts, C.J., respecting the denial of cert.) (“[I]t is important to recall our frequent admonition that “[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.” (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923))).

summer's rejected petitions—including in *Jessop*—could have easily exposed the Court to the same objection that failing to intervene amounted to tacitly approving a transformation of qualified immunity into absolute immunity,<sup>60</sup> but the Court still chose to remain silent. In short, there are good reasons to read more into the Court's intervention in *Taylor* and *McCoy* than that the Justices felt obliged to indicate that some space still exists between qualified and absolute immunity.

Optimism seems to strike a better balance than idealism or pessimism does here. Consider the Court's composition, which suggests a fair amount of cross-ideological support for restraining qualified immunity in both *Taylor* and *McCoy*. While the complete vote lineups are unclear, for *Taylor*, it seems safe to assume that every member of the so-called liberal wing (meaning Justices Breyer, Sotomayor, and Kagan) joined the principal opinion, which was unsigned.<sup>61</sup> So to make a majority, at least two of the so-called conservative Justices must have agreed with the Court's course of action. Justice Barrett, who had just been confirmed, did not participate.<sup>62</sup> Justice Thomas (who has expressed skepticism about qualified immunity on several occasions<sup>63</sup>) dissented without explaining why.<sup>64</sup> And Justice Alito concurred in the judgment, saying the case was uncertworthy—but that if a conclusion was necessary, the outcome was correct.<sup>65</sup> The votes of Chief Justice Roberts and Justices Gorsuch and Kavanaugh are unknown, but all three may have agreed with both the cert grant and the ultimate decision. For *McCoy*, there were no noted dissents.<sup>66</sup> So the full Court may well have thought *Taylor* supported vacating the Fifth Circuit's judgment.

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60. See George F. Will, Opinion, *This Doctrine Has Nullified Accountability for Police. The Supreme Court Can Rethink It.*, WASH. POST (May 13, 2020), [https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad\\_story.html](https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad_story.html) [<https://perma.cc/T6AK-YE5C>] (discussing these cases).

61. See Alexander A. Reinert, *Qualified Immunity on Appeal: An Empirical Assessment* 48–50 (Mar. 4, 2021) (unpublished manuscript), <https://papers.ssrn.com/abstract=3798024> [<https://perma.cc/4SZS-WNMK>] (discussing ideology-related implications of an empirical study of appellate decisions about qualified immunity).

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

63. See *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421–22 (2021) (mem.) (Thomas, J., respecting the denial of cert.); *Baxter v. Bracey*, 140 S. Ct. 1862, 1862–65 (2020) (mem.) (Thomas, J., dissenting from the denial of cert.); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869–72 (2017) (Thomas, J., concurring in part and concurring in the judgment).

64. *Taylor*, 141 S. Ct. at 54 (Thomas, J., dissenting).

65. *Id.* at 54–56 (Alito, J., concurring in the judgment).

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

In light of all this, one could surmise that *Taylor* and *McCoy* supply a limited response to the recent revolt against qualified immunity. One could draw some assurance from the fact that a wide-ranging coalition on the Court came together around this issue at this time. And one could hope these cases presage more legitimacy-enhancing consensus at this particular point in the nation's history.

*Taylor* and *McCoy*, though, also demonstrate how the Court frequently moves forward with the smallest of steps (when it moves forward at all). Even in praising these decisions, qualified-immunity critics have observed that the Court's message is "quiet[]" and "subtle," a call audible only to "civil-rights lawyers and judges who are listening."<sup>67</sup> The judiciary's adherence to precedent and other procedural values often makes its tendency toward incrementalism more right than wrong. But while larger—and louder—judge-made alterations would be well justified in the qualified-immunity area,<sup>68</sup> there is little reason to expect to see them from One First Street any time soon.

#### IV. TOMORROW

What, then, do *Taylor* and *McCoy* mean for qualified immunity tomorrow? The above analysis indicates that the movement to reform the doctrine has gathered so much steam that even the majority-conservative Supreme Court recognizes the need for restraint, at least at the margins. But the movement probably still faces a long road within the judicial system, such that reform proponents should continue focusing efforts on the more political branches of government as well.<sup>69</sup> While the Court has offered shifting justifications for

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67. 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> [<https://perma.cc/645G-V76V>]; see also Billy Binion, *A Prison Guard Who Pepper-Sprayed an Inmate Without Provocation Got Qualified Immunity. SCOTUS Disagreed.*, REASON (Feb. 23, 2021, 12:44 PM), <https://reason.com/2021/02/23/supreme-court-qualified-immunity-prison-guard-5th-circuit-mccoy-alamu> [<https://perma.cc/7M44-RK2X>] (stating that *McCoy* was "subtle and went unnoticed by just about every major news outlet").

68. See Crocker, *supra* note 7, at 1458–60 (arguing that "rejecting *Harlow*-style qualified immunity would seem well warranted," that stare decisis "'is not an inexorable command,' as the Court has made especially clear in the qualified-immunity context," and that "there are good reasons to think that completely eliminating qualified immunity would not cause the sky to fall" (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009))).

69. See Schweikert, *supra* note 49 ("At this point, the only realistic prospect of actual qualified immunity reform is from legislatures, not the Supreme Court."); Ilya Somin, *Supreme Court Rejects Qualified Immunity Defense for the First Time in Years*, VOLOKH CONSPIRACY (Nov. 2, 2021, 10:21 PM), <https://reason.com/volokh/2020/11/02/supreme-court-rejects-qualified->

qualified immunity, Justices have sometimes admitted that the doctrine rests on policy preferences.<sup>70</sup> Justice Kennedy once, for instance, said that the jurisprudence had “depart[ed] from history in the name of public policy, reshaping immunity doctrines in light of those policy considerations.”<sup>71</sup> Indeed, it is widely believed that qualified immunity is susceptible to legislative modification.<sup>72</sup>

Because the Court decides discrete issues in discrete cases, moreover, our elected representatives are often best equipped to recalibrate multiple legal lines in tandem. And reexamining qualified immunity requires reexamining related realms as well—a point I detail in a forthcoming article.<sup>73</sup> Qualified immunity did not grow up in a vacuum and does not operate in one now. The doctrine’s rise and role are intertwined with the Court’s commitment to yet another immunity principle: sovereign immunity, which shields state and federal entities from damages actions for constitutional claims.<sup>74</sup> Other areas of constitutional enforcement—like rigid limitations on suits against federal officers and onerous standards for holding municipalities liable—bear close connections to sovereign immunity too.<sup>75</sup> And employer indemnification of monetary costs supposedly carried by individual officers, while underappreciated in constitutional-tort law,

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immunity-defense-for-the-first-time-in-years [https://perma.cc/7DHH-J72Q] (“History shows that successful movements to strengthen protection for constitutional rights usually combine litigation with political action, as opposed to exclusively relying on one strategy to the exclusion of the other. Hopefully, the cross-ideological movement to end qualified immunity can continue to make progress in the same way.”).

70. Katherine Mims Crocker, *A Scapegoat Theory of Bivens*, 96 NOTRE DAME L. REV. 1943, 1963 (2021) (stating that “with respect to qualified immunity,” the Court “casts about for a dizzying array of constitutional, statutory, and other justifications” but that “Justices have occasionally been forthcoming about the subjective nature of their handiwork”).

71. *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring).

72. See, e.g., Roger Michalski & Stephen Rushin, Essay, *Federal (De)funding of Local Police*, 110 GEO. L.J. ONLINE 54, 63 (2021) (stating that “Congress could overrule the qualified immunity doctrine”); Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605, 677–78 (2021) (arguing that “[m]ounting evidence of qualified immunity’s failures offers ample justification for Congress or the Supreme Court to abolish qualified immunity” and that “[i]f Congress or the Supreme Court decides to amend qualified immunity instead of ending it, the definition of ‘clearly established law’ should be at the top of the list for adjustment”); see also William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 80–82 (2018) (exploring arguments for and against congressional authority to change qualified-immunity doctrine).

73. See Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. (forthcoming 2022) (manuscript at 5–7), <https://papers.ssrn.com/abstract=3796337> [https://perma.cc/G28U-HKZJ].

74. See *id.* at 16–25.

75. See *id.*

plays an overwhelming part in constitutional-tort practice.<sup>76</sup> As I explain in the forthcoming article, all this and more suggest that in important ways, qualified immunity is just part of a much larger set of challenges surrounding American constitutional accountability.<sup>77</sup>

In this reform-minded moment, Congress should make defined but decisive changes in this area of law. In doing so, however, Congress should account for the full complexity of the constitutional-tort system rather than becoming absorbed with the qualified-immunity component alone. My work therefore proposes that legislators should contemplate both eliminating qualified immunity and establishing entity liability under a respondeat superior standard now for Fourth Amendment excessive-force claims, which occupy the core of the public's recent concerns, and later (after learning from the initial experience) for other kinds of constitutional violations.<sup>78</sup>

Since the last presidential campaign, President Biden has signaled support for “rein[ing] in” qualified immunity, especially where “abuses of power” like police chokeholds are involved.<sup>79</sup> Democrats have been on board.<sup>80</sup> And while prospects in the Senate have been declared dead,<sup>81</sup> the George Floyd Justice in Policing Act of 2021 as passed by the House would have (among other initiatives) eliminated qualified immunity in the law-enforcement context.<sup>82</sup> Some behind-the-scenes proposals for bipartisan congressional compromise,

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76. See *id.* at 26–35; see generally James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561 (2020) (studying indemnification in the federal-officer context); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (studying indemnification in the state- and local-officer context).

77. See generally Crocker, *supra* note 73.

78. See *id.* at 44–52; see also Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523, 585–88 (2021).

79. *The Reidout: Symone Sanders: Biden Believes 'Qualified Immunity Needs To Be Reined In,'* at 1:30–48 (MSNBC television broadcast Aug. 26, 2020), <https://www.msnbc.com/the-reidout/watch/symone-sanders-biden-believes-qualified-immunity-needs-to-be-reined-in-90698821998> [<https://perma.cc/BYT3-FNZ3>].

80. Scott Shackford, *Democratic Party Platform Calls for 'Reining In' Qualified Immunity. Why Not Eliminate It?*, REASON (Aug. 20, 2020, 2:05 PM), <https://reason.com/2020/08/20/democratic-party-platform-calls-for-reining-in-qualified-immunity-why-not-eliminate-it> [<https://perma.cc/L69C-B3SL>].

81. Marianne Levine & Nicholas Wu, *Bipartisan Police Reform Talks Crumble*, POLITICO (Sept. 22, 2021, 4:08 PM), <https://politi.co/3kv8mQE> [<https://perma.cc/ME3Z-LCCK>].

82. See George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021) (as passed by House, Mar. 3, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/1280> [<https://perma.cc/5ZMR-VGVF>].

moreover, contemplated entity liability instead of or in addition to individual liability for constitutional violations.<sup>83</sup>

Other possible reforms include increasing transparency about how constitutional-tort litigation actually works. The Cost of Police Misconduct Act of 2021, for example, seeks to require law-enforcement agencies “to report on an annual basis allegations of misconduct by [their] officers and judgments or settlements related to such misconduct, including settlements reached before a lawsuit has been filed,” along with (among other information) “the source of money used” to dispose of each judgment or settlement.<sup>84</sup> At least in the law-enforcement context, shining this kind of sunlight on payment realities should help illuminate faulty assumptions underlying much constitutional-tort doctrine—including that individual officials are often subject to substantial financial burdens and that formally shifting liability onto their employers’ shoulders would run high risks of crippling public fiscs.<sup>85</sup>

The point, in short, is that the American people and our elected representatives can and should think big when it comes to improving how constitutional enforcement works: bigger than the courts and bigger than qualified immunity. Regardless of what happens during the current legislative session, congresspeople can and should continue reconsidering this area of law. And they should do so from the ground up.

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83. See Seung Min Kim, Annie Linskey & Marianna Sotomayor, *Chauvin Verdict Injects a Fresh Jolt of Momentum into Police Overhaul Efforts*, WASH. POST (Apr. 21, 2021, 7:58 PM), [https://www.washingtonpost.com/politics/chauvin-verdict-police-overhaul/2021/04/21/fa47d65c-a2a0-11eb-85fc-06664ff4489d\\_story.html](https://www.washingtonpost.com/politics/chauvin-verdict-police-overhaul/2021/04/21/fa47d65c-a2a0-11eb-85fc-06664ff4489d_story.html) [https://perma.cc/9UPH-C5XF] (stating that Senator Tim Scott said “one potential compromise is holding liable police departments, rather than individual officers”); Anya Bidwell, Patrick Jaicomo & Nick Sibilla, Opinion, *Hope for Reforming Qualified Immunity? It May Lie in a Compromise Bill, a Leaked Draft Shows*, USA TODAY (July 27, 2021, 4:27 PM), <https://www.usatoday.com/story/opinion/2021/06/24/reform-qualified-immunity-hold-federal-officers-accountable/7705663002> [https://perma.cc/5BLL-BUQC] (describing and providing a link to draft legislation).

84. Press Release, Joint Economic Committee Democrats, Beyer, Kaine Introduce Legislation to Address the Cost of Police Misconduct to Municipal Governments (Mar. 2, 2021), <https://www.jec.senate.gov/public/index.cfm/democrats/2021/3/beyer-kaine-introduce-legislation-to-address-the-cost-of-police-misconduct-to-municipal-governments> [https://perma.cc/NAQ5-W3UR]; see Cost of Police Misconduct Act of 2021, S. 540, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/540> [https://perma.cc/79E8-42FJ]; Cost of Police Misconduct Act of 2021, H.R. 1481, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1481> [https://perma.cc/2A9K-DXJT].

85. See Crocker, *supra* note 73, at 53–55.

## CONCLUSION

For today, *Taylor* and *McCoy* mark a reticent qualified-immunity retreat, serving as modest but important moves toward holding government actors accountable for unconstitutional conduct. For tomorrow, qualified-immunity critics should keep endeavoring to make the political process expand on the Supreme Court's characteristically measured course correction by addressing constitutional-tort law's infirmities in far more comprehensive ways.