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ARTICLE

"WE DO NOT WANT TO BE HUNTED": THE RIGHT TO BE SECURE AND OUR CONSTITUTIONAL STORY OF RACE AND POLICING

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Both Supreme Court doctrine and the scholarly literature on the constitutional constraints on policing generally begin and end with the Fourth Amendment, ignoring the Fourteenth Amendment's transformative guarantees designed to curtail police abuses and safeguard liberty, personal security, and equality for all, regardless of race. This Article corrects this omission by providing a comprehensive account of the text, history, and original meaning of the Fourteenth Amendment's limitations on policing. It establishes how the Fourteenth Amendment revitalized the constitutional guarantee of the right to be secure from unreasonable searches and seizures, struck out at centuries of history that led Black people to be subjected to indiscriminate searches and seizures, and sought to prohibit racialized policing practices. In these ways, the Fourteenth Amendment puts race at the center of our constitutional story of policing. The Article demonstrates that addressing police abuse, including indiscriminate searches and seizures, arbitrary arrests, police violence and killing, is at

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> *the core of the Fourteenth Amendment's guarantees and history. Our understanding of the constitutional law of policing—and the Supreme Court's responses to police abuses—will remain inadequate unless we recover this history.*

I. INTRODUCTION

The killing of George Floyd, a forty-six-year-old Black man who was choked to death by Minneapolis police officer Derek Chauvin on May 25, 2020, serves as a testament to the Supreme Court's betrayal of our Constitution's text, history, and values. The constitutional law of policing is in shambles today because the Supreme Court has concentrated more and more power in the police. It has sanctioned discriminatory policing and racial profiling. It has allowed police violence to fester. It has gutted virtually every remedy available to hold the police accountable. And the problems go even deeper. The Supreme Court's jurisprudence is rooted in an incomplete understanding of the relevant constitutional history. When the Supreme Court talks about the constitutional limits on policing, it begins and ends with the Founding era. This erases a key part of our constitutional story of policing. Police abuse, including indiscriminate searches and seizures, arbitrary arrests, police violence and killing, lies at the core of the Fourteenth Amendment's history, a fact that has long been ignored by both the Supreme Court and most of the scholarly literature.[1] Our understanding of the constitutional law of policing—and the Supreme Court's responses to police abuses—will remain inadequate unless we recover this history.

This Article corrects this omission. It details our whole constitutional story of race and policing, focusing on the Fourteenth Amendment's transformative guarantees designed to curtail police abuses and safeguard liberty, personal security, and equality for all, regardless of race. It provides a

[1] For notable exceptions, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 267–68 (1998) [hereinafter AMAR, BILL OF RIGHTS]; ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 242–57 (2006); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 99–128 (2011) [hereinafter STUNTZ, AMERICAN CRIMINAL JUSTICE]. But these authors tell only a part of the Fourteenth Amendment story. Amar primarily focuses on the Fourteenth Amendment's incorporation of the Bill of Rights, and only addresses policing in passing. Taslitz tells more of the story, but he never really develops how police abuses shaped the Fourteenth Amendment's original meaning. TASLITZ, *supra*, at 258 (looking to history "to ask new questions about the Fourth Amendment's meaning or to see old questions in a new light"). Stuntz focuses only on the constitutional guarantee of equal protection and does not delve into how the Fourteenth Amendment reshaped the meaning of the Fourth Amendment.

comprehensive account of the text, history, and original meaning of the Fourteenth Amendment's limitations on policing. Uncovering this history sheds new light on the meaning of the Fourth and Fourteenth Amendments and offers a new perspective on the Supreme Court's policing jurisprudence.

The Fourteenth Amendment established new constitutional protections for personal security and equality, while building off what had come before. In order to understand the changes wrought by the Fourteenth Amendment, this Article begins with the Fourth Amendment—the founding generation's response to the abusive search and seizure practices they had experienced under British rule. The Constitution's Framers included the Fourth Amendment in the Bill of Rights, refusing to permit the federal government to search and seize at will. The Fourth Amendment's guarantee of "the right to be secure against unreasonable searches and seizures" established personal security as a core constitutional value.[2] It introduced the idea that giving law enforcement excessive discretion to search and seize, in the words of James Otis, "places the liberty of every man in the hands of every petty officer."[3] Broad, discretionary powers to search and seize are at war with the right to be secure promised by the Fourth Amendment.[4] The right to be secure from unreasonable searches and seizures meant that individuals could no longer be "searched and ransacked by the strong hand of

[2] U.S. CONST. amend. IV.

[3] THE WORKS OF JOHN ADAMS app. A, at 524–25 (Charles Francis Adams ed., 1850).

[4] *See, e.g.*, Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) [hereinafter Maclin, *Central Meaning*] ("[T]he central meaning of the Fourth Amendment is distrust of police power and discretion."); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 582 (1999) (discussing Framers' "deep-rooted distrust and even disdain for the judgment of ordinary officers"); M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 921–22 (2010) ("The Fourth Amendment was . . . adopted for the purpose of checking discretionary police authority."); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1194 (2016) ("The Founders' primary concern was that the government not be allowed free rein to search for potential evidence of criminal wrongdoing.").

power" in the "most arbitrary manner, without any evidence or reason."[5]

In most judicial and scholarly accounts of our constitutional law of policing, the story ends there. But our constitutional development did not. Roughly eighty years after the adoption of our national charter, in the wake of a bloody civil war fought over slavery, the Fourteenth Amendment demanded that states respect Fourth Amendment rights,[6] and ensure equal protection of the laws for all persons, vindicating the demands of those freed from enslavement that "now we are free[,] we do not want to be hunted," we want to be "treated like human[] beings."[7] Against the backdrop of mass arrests of Black people under vagrancy laws, often for pretextual reasons, and police and mob violence directed against them, the Fourteenth Amendment sought to curb police abuses that were aimed at keeping Black Americans in a subordinate status. The Framers of the Fourteenth Amendment understood that open-ended police power to search and seize offended not only liberty and personal security, but equality as well. In all these ways, criminal justice abuses lie at the very core of the Fourteenth Amendment's protections. Yet, this Fourteenth Amendment history has never been given its due. As a result of this erasure, key Fourteenth Amendment concerns—such as discriminatory and pretextual searches and seizures and police brutality—are effectively excluded from our constitutional story.[8] These should be at the center of the story we tell, not relegated to the margins.

And because this part of our constitutional story has long been ignored, the Supreme Court's jurisprudence has suffered.

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[5] 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 588 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES].

[6] CONG. GLOBE, 39th Cong., 1st Sess., 2765 (1866) (observing that the Fourteenth Amendment protected all of "the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution").

[7] Letter from Mississippi Freedpeople to the Governor of Mississippi (Dec. 3, 1865), *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, SER. 3, VOL. 1: LAND AND LABOR, 1865, at 857 (Steven Hahn et al. eds., 2017).

[8] *Cf.* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995) [hereinafter Stuntz, *Privacy's Problem*] (arguing that the Fourth Amendment's protection of privacy "tends to obscure more serious harms that attend police misconduct, harms that flow not from information disclosure but from the police use of force").

By disregarding the Fourteenth Amendment and its history, the Supreme Court has allowed the police to treat people of color as second-class citizens, sanctioning racial targeting, racial profiling, and racial violence by law enforcement.[9] As study after study has shown, men and women of color are "over-stopped, over-frisked, over-searched, and over-arrested."[10] They are also more likely to be beaten or killed by the police.[11] As the police killings of George Floyd, Breonna Taylor, Walter Scott, Laquan McDonald, Philando Castile, Eric Garner and many others attest, the deadly combination of racial profiling and racial police violence remains endemic.[12] The Court's refusal to take the

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[9] *See, e.g.*, Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) [hereinafter Maclin, *Fourth Amendment*]; David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 [hereinafter Sklansky, *Traffic Stops*]; Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508 (2017) [hereinafter Carbado, *Stop and Frisk*]; Tracey Maclin & Maria Savarese, *Martin Luther King, Jr. and Pretext Stops (and Arrests): Reflections on How Far We Have Not Come Fifty Years Later*, 49 U. MEM. L. REV. 43 (2018).

[10] IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT 27 (2008), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf [https://perma.cc/8CPR-Z45B]. *See* CHARLES R. EPP, ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 26 (2014) ("Police stop and search racial minorities at disproportionately high rates, and these disparities have grown wider in recent years . . . ."); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 212–13 (2017) (observing that when the police "are carrying out investigatory or pretext stops, they are *much more likely* to stop [B]lack and other minority drivers: [Black people] are about two and a half more times likely to be pulled over for pretext stops"); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 820 (2017) ("A large body of research finds that, for similar offenses, members of the African American and Hispanic communities are more likely to be stopped, searched, arrested, convicted, and sentenced to harsher penalties."); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854–59 (2011) (reviewing data and studies from across the country that show that people of color are "overstopped, oversearched, and overfrisked in comparison to whites").

[11] Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 961 (2020) (finding that "Black suspects are more than twice as likely to be killed by police than are suspects from other racial or ethnic groups, including shootings where there are no obvious reasonable circumstances").

[12] Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017) [hereinafter Carbado, *From Stopping to Killing*] ("Every

Fourteenth Amendment seriously has produced deeply flawed Fourth and Fourteenth Amendment doctrines.

Modern Fourth Amendment doctrine turns a blind eye to race even as it systematically pervades policing. Rather than reading the Fourth Amendment in light of the Fourteenth Amendment, the Supreme Court's Fourth Amendment doctrine has repeatedly employed open-ended balancing tests to permit racialized policing practices to flourish. Decades ago, Anthony Amsterdam predicted that "[i]f there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable."[13] That is exactly what has happened. In case after case, the Court has insisted that the touchstone of the Fourth Amendment is reasonableness, not a warrant or probable cause. In this view, all the Fourth Amendment requires is ad hoc balancing of government and individual interests. This has made the Fourth Amendment into little more than a rational basis test—the most forgiving test in constitutional law—and has facilitated a massive expansion in discretionary police power to search and seize. In the hands of the modern Supreme Court, balancing of public and private interests almost always favors the police. The reasonableness test is supposed to consider all circumstances, but it refuses to consider race, a consequence of the erasure of the Fourteenth Amendment.

The Supreme Court has also given a crabbed reading to Fourteenth Amendment's Equal Protection Clause, effectively erasing the equal protection guarantee as a constraint on policing. Equal protection, in the policing context, no longer provides the protection it was supposed to. The Framers of the Fourteenth Amendment wrote the equal protection guarantee with policing in mind, seeking to undo discriminatory state laws and policies that subjected newly freed Black people to arbitrary arrests and harsh punishments—including re-enslavement—while turning a blind eye to violent offenses against them.[14] The Supreme Court's earliest equal protection rulings gave the

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encounter police officers have with African Americans is a potential killing field.").

[13] Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974).

[14] *See infra* text accompanying notes 126–141 (discussing Black Codes passed in the wake of the Civil War to deny Black people their newly-won freedom).

greenlight to Klan violence, writing out of the Fourteenth Amendment the states' constitutional obligation to protect individuals from private violence.[15] Recent decisions have only made things worse, erecting a stringent requirement of discriminatory purpose that makes it nearly impossible to redress discriminatory policing.[16] This has enabled the police to target men and women of color for arbitrary invasions, while ignoring crimes committed against them.[17] As Rev. William Barber has observed, today, as in the aftermath of the Civil War, "[t]he [B]lack community gets cuts by both edges of the sword."[18] The Court's failure to take the Fourteenth Amendment's text and history seriously has licensed both brutal and neglectful policing in communities of color.[19]

The turn to race-blind rational-basis style reasonableness review and the erasure of equal protection is only half the story. The Supreme Court has also been cutting back sharply on remedies for police misconduct across the board. In most cases, there are simply no remedies available to individuals aggrieved by unreasonable searches and seizures. The result, as Leah Litman has observed, is the "collapse of what is supposed to be an overarching and integrated system of remedies that is adequate to deter constitutional violations."[20] Instead of a system of remedies, we have a system of police unaccountability. Here,

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[15] STUNTZ, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 101 (arguing that the Court "read the equal protection clause in a manner that protected the Klan from federal prosecutors rather than its victims from the Klan").

[16] *See infra* text accompanying notes 370–390.

[17] JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 7 (2015) (calling the "impunity for the murder of [B]lack men . . . America's great, though mostly invisible, race problem"); Wesley Lowery, et al., *An Unequal Justice*, WASH. POST (July 25, 2018), https://www.washingtonpost.com/graphics/2018/investigations/black-homicides-arrests/ [https://perma.cc/3QQY-LRUY] (reporting that "Black victims, who accounted for the majority of homicides, were the least likely . . . to have their killings result in an arrest").

[18] Lowery, *supra* note 17. *See also* LEOVY, *supra* note 17; Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2017) (arguing that policing jurisprudence "simultaneously leaves large swathes of American society to see themselves as anomic, subject to the brute force of the state while excluded from its protection").

[19] Bell, *supra* note 18, at 2057 (arguing that the "message conveyed in policing jurisprudence is not only one of oppression, but also one of profound estrangement").

[20] Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1528 (2018).

too, the Court's blindness to Fourteenth Amendment history has produced grossly flawed doctrine.

The increasing expansion of qualified immunity, a judge-made doctrine that requires a plaintiff to show that police officers violated clearly established law in order to sue for damages, exemplifies this dynamic. By creating an incredibly high threshold for finding the relevant law clearly established, the Supreme Court's qualified immunity jurisprudence has made it practically impossible for individuals victimized by abuse of power to obtain an award of damages. Rather than following the text and history of Section 1983, the Reconstruction-era federal law that provides a federal cause of action against state officers for violating federal constitutional rights, the Court has rewritten the law to shield police officers from suit for all but the most egregious constitutional violations.[21] This turns the Fourteenth Amendment on its head. In passing Section 1983, Congress wanted to vindicate fundamental rights, not immunize lawbreakers bent on stripping Black Americans of the freedom and personal security the Fourteenth Amendment promised. A proper understanding of Fourteenth Amendment history complements the burgeoning literature that demonstrates why the Supreme Court should eliminate qualified immunity.[22]

This Article proceeds as follows. Parts II through IV lay out our whole constitutional story of policing. Part II examines the text and history of the Fourth Amendment, showing that the Constitution's Framers established a constitutional right to be secure from unreasonable searches and seizures in order to check excessive discretion in law enforcement. Part III examines the constitutional transformation that culminated in the Fourteenth Amendment, detailing the police abuses at the core of Fourteenth Amendment's text and history and explaining the original meaning of the Amendment's limit on abuse of power. Turning

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[21] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) (urging reconsideration of the Court's qualified immunity precedents because they "substitute our own policy preferences for the mandates of Congress"); Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of certiorari) (arguing that there is "likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe").

[22] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF.. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

from rights to remedies, Part IV demonstrates that the Framers of the Fourth and Fourteenth Amendments viewed civil remedies as essential to safeguard constitutional rights. Part V examines the Court's caselaw regarding the Fourth Amendment, Fourteenth Amendment, and corresponding remedies and shows how the Court's erasure of the Fourteenth Amendment from the constitutional story of policing has led to a host of flawed constitutional doctrinal rules. A short conclusion briefly sketches how the Court might revitalize the Fourteenth Amendment's transformative guarantees.

II. THE TEXT AND HISTORY OF THE FOURTH AMENDMENT

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.[23]

The Fourth Amendment made three central innovations to check arbitrary invasions by law enforcement. First, it guaranteed to the people a right "to be secure" from unreasonable searches and seizures, language understood to deny the government excessive discretion to search and seize.[24] Second, it outlawed general warrants—namely—open-ended warrants that did not specify their targets, the reasons for suspicion, or what was to be searched and seized. Third, it required specific warrants supported by probable cause in order to prevent the federal government from engaging in indiscriminate searches and seizures.

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[23] U.S. CONST. amend IV.

[24] BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 23–24 (2017) [hereinafter FRIEDMAN, UNWARRANTED]; Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 344–66(1998); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 115–31 (2008); Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 732–50 (2014).

A. British Abuses: The King's Unbridled Power to Search and Seize

The Framers of the Fourth Amendment knew from experience that giving law enforcement sweeping grants of power to search and seize was incompatible with liberty. In the late seventeenth and eighteenth centuries, British law permitted royal authorities to invade the homes of colonists and seize their property as they saw fit. General warrants and sweeping powers of search and seizure were common features of colonial laws.[25]

Searches and seizures by British customs officers were particularly repugnant to the colonists. The Act of Frauds of 1662, which was applied to the colonies in 1696, authorized British officers to "enter, and go into any house, shop, cellar, warehouse or room or other place," and "to break open doors, chests, trunks and other package[s]," in order to seize any "prohibited and uncustomed" goods.[26] British law also gave customs officers, in the commissions they received from their superiors, authority to search all houses and other buildings without any warrant.[27]

The Act of Frauds also authorized writs of assistance, a particularly pernicious tool that allowed royal authorities to search and seize as they saw fit. Such writs gave customs officers an extraordinary power: they could commandeer anyone to assist in searching and seizing.[28] Once issued, a writ of assistance was

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[25] WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at 192–93 (2009); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 939 (1997) (explaining that "[p]rior to 1760, general, promiscuous intrusion by government officials provided the standard method of search and seizure in colonial America").

[26] *See* Act of Frauds of 1662, 12 Car. 2, cl. 11, § V(2), *reprinted in* 8 DANBY PICKERING, THE STATUTES AT LARGE OF ENGLAND AND GREAT-BRITAIN 78, 81 (1763); Act of Frauds of 1696, 5 W. & M. c. 22, § VI, *reprinted in* 9 DANBY PICKERING, THE STATUTES AT LARGE OF ENGLAND AND GREAT-BRITAIN 428, 430 (1764).

[27] 3 THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY 92 (1828) ("The collectors and inferior officers of the customs, merely by the authority derived from their commissions, had forcibly entered warehouses, and even dwelling houses, upon information that contraband goods were concealed in them."); M.H. SMITH, THE WRITS OF ASSISTANCE CASE 116–18 (1978).

[28] Donohue, *supra* note 4, at 1242.

a virtual blank check, in effect for the lifetime of the reigning King or Queen.[29]

Matters came to a head in the middle of the eighteenth century, when King George II, facing a war with France, sought to strengthen customs enforcement. Throughout the 1750s, customs officers had obtained writs of assistance from colonial courts. In 1760, King George II died, requiring customs officials to obtain new writs. This set the stage for *Paxton's Case*, in which James Otis, who represented a group of Boston merchants and citizens, delivered his famous condemnation of writs of assistance. Otis's arguments did not succeed, but they exerted a powerful influence on the Framers of the Fourth Amendment.[30] Indeed, the core of the Fourth Amendment—the right to be secure, the need for limits on excessive discretion to search and seize, and the specific warrant as a check on government overreaching—can all be traced to Otis.

Otis railed against the idea that the British could invade the colonists' security as they saw fit. He denounced the writ of assistance as "the worst instrument of arbitrary power," explaining that sanctioning indiscriminate searches and seizures "places the liberty of every man in the hands of every petty officer."[31] Otis charged that "every hous[e]holder in this province, will necessarily become *less secure* than he was before this writ had any existence among us"[32] because British officers could break into houses "when they please," and "whether they break through malice or revenge, no man, no court, can inquire."[33]

Otis not only attacked indiscriminate government search and seizure, he also insisted that a search warrant was only permissible on the basis of specific evidence of wrongdoing. Searches of the home should be permitted only "in cases of the most urgent necessity and importance; and this necessity and

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[29] SMITH, *supra* note 27, at 130.

[30] *Id.* at 7 (arguing that Otis's argument represented the first "articulate expression" of "the American tradition of hostility to general powers of search").

[31] THE WORKS OF JOHN ADAMS, *supra* note 3, app. A, at 523, 524 (abstract of Otis's argument written by Adams).

[32] JOSIAH QUINCY, JUNIOR, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 489 (1865) (1762 article in Boston Gazette attributed to Otis).

[33] THE WORKS OF JOHN ADAMS, *supra* note 3, at 494.

importance always is, and always ought to be determin'd by *adequate* and *proper* judges."[34] This, Otis insisted, required a particularized search warrant, permitting the government to "search certain houses" based on concrete suspicion concerning "those very places he desires to search."[35]

While Otis did not succeed in preventing new writs of assistance from being issued, English courts vindicated his arguments in a series of famous suits arising out of the King's use of general warrants to silence John Wilkes and other political enemies of King George III. These cases, which recognized that open-ended warrants threatened fundamental protections for liberty, loomed large for the Framers of the Fourth Amendment.[36]

These landmark British rulings grew out of the publication of *The North Briton No. 45*, an anonymous pamphlet critical of King George III published by John Wilkes. Three days after its publication, Lord Halifax, the King's Secretary of State, issued a general warrant directing the King's messengers to search for the author and publisher of the pamphlet, to apprehend them, and seize their papers.[37] That same year, in a similar case, Lord Halifax issued a broadly-worded warrant to search and seize the books and papers of John Entick, the publisher of *The Monitor*, another pamphlet that the King considered seditious.[38]

In a series of landmark opinions, English courts repeatedly denounced these warrants, emphasizing two key points. First, they noted the evil of permitting unchecked discretion to search and seize. The courts declared that general warrants were "illegal and void" because "[i]t is not fit that the receiving and judging should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer."[39] The basic idea was that law

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[34] QUINCY, *supra* note 32, app. I, at 490.

[35] THE WORKS OF JOHN ADAMS, *supra* note 3, app. A, at 524.

[36] *See, e.g.*, Wilkes v. Wood, 19 How. St. Tr. 1153 (C.P. 1763); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763); Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765); Leach v. Money, 19 How. St. Tr. 1001 (K.B. 1765).

[37] Donohue, *supra* note 4, at 1201.

[38] CUDDIHY, *supra* note 25, at 451.

[39] *Leach*, 19 How. St. Tr. at 1027.

enforcement should not have excessive discretion to search or seize.

Second, the courts stressed that the unchecked power claimed by the King's officers infringed on basic principles of liberty and personal security in a manner deeply "subversive of all the comforts of society."[40] Giving law enforcement a "discretionary power . . . to search wherever their suspicions may chance to fall," the courts declared, "may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[41] If such indiscriminate searches and seizures were permissible, every Englishman could find that "[h]is house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper."[42] Giving the government sweeping powers to search and seize where they wished threatened the individual's right to be secure in their person, papers, and home.

In the colonies, newspaper coverage of these cases was widespread, providing daily reminders that permitting the government indiscriminate powers to search and seize was intolerable.[43] But rather than respect the fundamental principles vindicated by *Wilkes*, the British government intensified its efforts to search and seize Americans.

In 1767, Parliament enacted the Townshend Revenue Act, which was designed to make it easier to obtain writs of assistance in the colonies.[44] Following the passage of the Act, colonial judges rebelled against the writs of assistance, refusing to give such open-ended authority to search and seize.[45]

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[40] *Id.* at 1066.

[41] *Wilkes*, 19 How. St. Tr. at 498.

[42] Entick v. Carrington, 19 How. St. Tr. 1029, 1064 (C.P. 1765)

[43] CUDDIHY, *supra* note 25, at 538; Davies, *supra* note 4, at 563.

[44] CUDDIHY, *supra* note 25, at 503–08.

[45] *Id.* at 518 ("In the period 1769–1772, no colonial court beyond New Hampshire or Massachusetts granted the general writ that the customs authorities wanted, and most included constitutional or legal exegeses in their grounds of refusal."); O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, *in* THE ERA OF THE AMERICAN REVOLUTION 74 (Richard B. Morris ed., 1939) (noting that "the judiciary from Connecticut to Florida . . . stood firm in opposing the legality of the particular form of writ demanded of them and continued in their judicial obstinacy through six years of nearly constant efforts to force them to yield").

Throughout the colonies, courts insisted that they would not grant customs officers the power to engage in indiscriminate searches and seizures. As one court declared, "arming officers of the Customs with so extensive a power to be exercised, totally at their own discretion would be of dangerous consequences and was not warranted by Law."[46] Courts across the country refused "to issue general writs . . . to be lodged in the hands and to be used discretionally (perhaps without proper foundation) at the will of subordinate officers, to the injury of the rights of His Majesty's other loyal subjects."[47] This experience demonstrated that courts could provide a valuable check on indiscriminate searches and seizures.

Hostility to indiscriminate powers of search and seizure spread like wildfire in the years before the American Revolution. Americans loudly pronounced their opposition to abusive search and seizure practices that gave the British free reign to search and seize.[48]

Arthur Lee, writing as Junius Americanus, charged that writs of assistance left the colonists "laid open to something worse than a General Warrant, namely, to the will and pleasure of every officer and servant in the Customs."[49] William Drayton stressed that writs of assistance were pernicious invasions on personal security—even "*without any crime charged and without any suspicion*, a petty officer *has power* to cause the doors and locks of any Man to be broke open, to enter his most private cabinet; and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods."[50]

Colonists also objected to the fact that the Commissioners of Customs were authorized by their commissions to search and

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[46] Dickerson, *supra* note 45, at 60–61 (quoting Letter of Customs Officers at Philadelphia to the Custom Commissioners (July 3, 1773) (Treasury I, Bundle 501)).

[47] *Id.* at 63, 64 (internal citation omitted).

[48] CUDDIHY, *supra* note 25, at 541 (discussing opposition to British search and seizure practices from "town meetings, the Continental Congress, quasi-governmental agencies, pamphleteers, essayists, and the man-on-the-street").

[49] Letter from Junius Americanus to the People of England (Mar. 13, 1770), *in* ARTHUR LEE, THE POLITICAL DETECTION: OR THE TREACHERY AND TYRANNY OF ADMINISTRATION, BOTH AT HOME AND ABROAD 99 (1770).

[50] WILLIAM HENRY DRAYTON, A LETTER FROM FREEMAN OF SOUTH CAROLINA, TO THE DEPUTIES OF NORTH AMERICA 10 (1774).

seize without a warrant. At a 1772 Boston town meeting, which was attended by James Otis, Samuel Adams, and others, colonists insisted that "[t]hese Officers are by their Commissions invested with Powers altogether unconstitutional, and entirely destructive to that Security which we have a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives."[51] Those at the meeting argued that these commissions vested a "Power more absolute and arbitrary than ought to be lodged in the hands of any Man or Body of Men whatsoever."[52] As a result, the attendees concluded:

> our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests broke open, ravaged and plundered by Wretches . . . whenever they are pleased to say they *suspect* there are in the House, Wares, [etc.] for which the Duties have not been paid . . . . By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable.[53]

In 1774, the Continental Congress included in its list of grievances that "[t]he commissioners of the customs are [e]mpowered to break open and enter houses without the authority of any civil magistrate founded on legal information."[54] The colonists firmly opposed indiscriminate searches and seizures, whether authorized by a warrant or not.

B. The Drafting and Ratification of the Fourth Amendment

Many of the Revolutionary-era state constitutions limited search and seizure by the government. Some banned general warrants; others, like the Massachusetts Constitution of 1780, were broader, recognizing that "[e]very subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions."[55] The failure of the proposed federal Constitution to provide any

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[51] TOWN OF BOSTON, THE VOTES AND PROCEEDINGS OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON, IN TOWN MEETING ASSEMBLED, ACCORDING TO LAW 15 (1772).

[52] *Id.*

[53] *Id.* at 16–17.

[54] 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 96–97 (Worthington C. Ford et al. eds., 1904).

[55] MASS. CONST. art. 14 (1780).

protection for personal security produced a groundswell of criticism.

In Pennsylvania, Samuel Bryan, writing as Centinel, observed that "[y]our present frame of government, secures to you a right to hold yourselves, houses, papers and possessions free from search and seizure," and asked "[h]ow long those rights will appertain to you, . . . whether your *houses* shall continue to be your *castles*; whether your *papers*, your *persons*, and your *property*, are to be held sacred and free from *general warrants*."[56] A Maryland Antifederalist, writing as "A Farmer and Planter," objected that "excise-officers have power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretence of searching for exciseable goods, . . . break open your doors, chests, trunks, desks, [and] boxes, and rummage your houses from bottom to top." [57] He pointedly asked whether "Congress excise-officers will be any better."[58]

In the Virginia ratifying convention, Patrick Henry warned that, under the Constitution, "any man may be seized, any property may be taken, in the most arbitrary manner, without evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power."[59] Henry feared that "[e]xcisemen . . . may, unless the general government be restrained by a bill of rights, . . . go into your cellars and rooms, and search, ransack and measure, everything you eat, drink, and wear. They ought to be restrained within proper bounds."[60] The Virginia convention recommended adding to the Constitution a right to be secure from unreasonable searches and seizures.[61]

The push for a constitutional guarantee of security succeeded. On June 8, 1789, James Madison introduced the Bill of Rights, including a guarantee that "the rights of the people to be secured in their persons" from "all unreasonable searches and

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[56] Letters of Centinel (1) (Oct. 5, 1787), *reprinted in* THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 65–66 (David Wootton ed., 2003). *See* PA. CONST. of 1776, art. X.

[57] *Essay by a Farmer and Planter*, MD. J., Apr. 1, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 74–75 (Herbert J. Storing ed., 1981).

[58] *Id.* at 76.

[59] 3 ELLIOT'S DEBATES, *supra* note 5, at 588.

[60] *Id.* at 448–49.

[61] *Id.* at 657–58; 2 *id.* at 551 (proposal made by the Maryland ratifying convention for a "constitutional check" on government searches and seizures).

seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."[62]

Madison's draft recognized a right to be secure from unreasonable searches and seizures, using language similar to the Massachusetts Constitution of 1780, but only prohibited violations of the right that were caused by general warrants. Ultimately, the First Congress broadened the Amendment's scope. The Framers made the two core concepts in Madison's draft into two independent guarantees: the first safeguarding a right to be secure against unreasonable search and seizures; and the second requiring all warrants to be specific, demanding both probable cause and particularity. Unlike Madison's draft, the Fourth Amendment proscribes all unreasonable searches and seizures.

C. The Original Meaning of the Fourth Amendment

The opening words of the Fourth Amendment safeguard the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[63] The Amendment then provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[64] The original meaning of the text provides three important lessons and clarifies how its two clauses fit together.

First, the text guarantees a broad right of personal security. While the driving impetus for inclusion of the Amendment was the fear that the federal government might reinstitute general warrants, the Amendment sweeps broadly. It constrains all searches or seizures, reflecting that British abuses included not only general warrants and writs of assistance, but also warrantless searches occurring "without the authority of any civil magistrate founded on legal information."[65] Indeed,

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[62] 1 ANNALS OF CONG. 452 (1789) (Joseph Gale ed., 1834).

[63] U.S. CONST. amend IV.

[64] *Id.*

[65] 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774 TO 1789, *supra* note 54, at 97; Amsterdam, *supra* note 13, at 411 (observing that "even when there is sufficient cause to intrude upon an individual by a search, the framers

Antifederalists had insisted that a constitutional check on all government searches and seizures was necessary to protect personal security.[66] Rather than simply outlaw general warrants, the Fourth Amendment established a right to be secure from all unreasonable searches and seizures.[67]

The original meaning of the Fourth Amendment forbids general searches.[68] A statute that allowed the federal government the power to search and seize at will was no more permissible than a general warrant that permitted such arbitrary invasions.[69] As George Thomas observes, it would have made "little sense to bar searches conducted under general warrants and then to permit general searches to be made *without warrants*."[70]

Second, and relatedly, the Fourth Amendment denies the federal government the power to give law enforcement officials the discretion to search and seize whomever they wish.[71] The Framers wrote the right to be secure from unreasonable searches and seizures into the Fourth Amendment precisely because they feared giving the federal government excessive discretion to search and seize. As David Gray argues, "eighteenth-century

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decreed that it was unreasonable and should be unconstitutional to subject his premises or possessions to indiscriminate seizure").

[66] CUDDIHY, *supra* note 25, at 690 ("[R]atifying conventions and pamphleteers increasingly spoke in the plural, of unreasonable searches and seizures. General excise searches and search warrants issued groundlessly were condemned almost as much as the general warrant.").

[67] *Id.* at 691 (arguing that the Fourth Amendment "transcended the mere denunciation of general warrants that their state constitutions provided").

[68] *Id.* at 742 (arguing that the Amendment "extinguish[ed] general searches categorically"); Donohue, *supra* note 4, at 1193 (observing that the "proper way to understand the Fourth Amendment is as a prohibition on general search and seizure authorities" and that the "first clause outlaws promiscuous search and seizure"); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1467 (2005) ("'[U]nreasonable searches and seizures' included any type of general search, whether by warrant or not.").

[69] Amsterdam, *supra* note 13, at 411; Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1729 (1996) [hereinafter Cloud, *Searching*] (reviewing CUDDIHY, *supra* note 25, at 376); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Basis"*, 16 CREIGHTON L. REV. 565, 575 (1983).

[70] Thomas, *supra* note 68, at 1466.

[71] Rubenfeld, *supra* note 24, at 125 ("[T]he core meaning of the Fourth Amendment's right of security is to deny government the power to effect generalized arrests or searches of homes without probable cause.").

readers would have regarded grants of broad and unfettered discretion as hallmarks of unreasonable searches and seizures."[72] Such discretionary grants of power permit officials to rummage through an individual's belongings without good reason and open the door to arbitrary enforcement, allowing the government to target disfavored persons.[73] As one early court reasoned, such sweeping authority "would open a door for the gratification of the most malign passions."[74] Personal security would be a nullity if the government could, at will, break into homes, arrest residents, and ransack their possessions. The Framers thought it "better that the guilty should sometimes escape, than that every individual should be subject to vexation and oppression."[75]

Third, most searches required specific warrants.[76] In contrast to the general warrants the Framers abhorred, the Fourth Amendment required a specific warrant that was based on probable cause to believe a crime had been committed and that recited the place to be searched and the things to be seized. This transformation—which was at the heart of Otis's arguments against the writs of assistance—is fundamental to understanding the Fourth Amendment.[77] Specific warrants were

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[72] DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE 162 (2017); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 632–33 (1995) ("[P]articularly described persons, places, or things, based on individualized suspicion were considered inherent characteristics of reasonable searches and seizures by the framers. Individualized suspicion was considered an element of reasonableness.").

[73] Amsterdam, *supra* note 13, at 411 (observing that "indiscriminate searches or seizures . . . expose people and their possessions to interferences by government when there is no good reason to do so," and "are conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize").

[74] Grummon v. Raymond, 1 Conn. 40, 44 (1814).

[75] Conner v. Commonwealth, 3 Binn. 38, 44 (Pa. 1810).

[76] While the common law permitted some warrantless arrests, such as arrests pursuant to hue and cry, a common law form of hot pursuit, as well as warrantless searches incident to arrests, warrants were "the salient mode of arrest and search authority." Davies, *supra* note 4, at 641. *See id.* at 627–34; Thomas, *supra* note 68, at 1467–72,

[77] FRIEDMAN, UNWARRANTED, *supra* note 24, at 134–37; Cloud, *Searching*, *supra* note 69, at 1730—31; Donohue, *supra* note 4, at 1193. In a provocative article, Akhil Amar argues that the Fourth Amendment does not require warrants or probable cause, but simply requires that searches be reasonable—a question Amar would leave to juries. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [Amar, *First Principles*]. Amar's argument turns the Fourth Amendment on its head, ignores

constitutionally reasonable. Allowing the government broad discretionary powers to search and seize was not. This ensured the judicial check on search and seizure the Framers demanded.[78]

The basic idea behind the Fourth Amendment's insistence on a specific warrant as a check on law enforcement abuse of power was spelled out by James Madison in his famous 1800 report on the Virginia Resolutions. Madison wrote that "[i]n the administration of preventive justice," it was a "sacred" rule that "some probable ground of suspicion be exhibited before some judicial authority" and "that it be supported by oath or affirmation."[79] As Madison explained, the "ground of suspicion" had to be "judged" by "judicial authority" and could not be left to the "executive magistrate alone."[80] In short, judges had a responsibility to ensure compliance with the Fourth Amendment in order to rein in abuses. By requiring the government to provide reasons before conducting searches and seizures, the Fourth Amendment ensures that the judiciary has the opportunity to determine whether the police have probable cause for intruding on an individual's security before they do so.

St. George Tucker, a well-known and respected Virginia lawyer, drew on Madison's argument in his discussion of the meaning of the Fourth Amendment in the 1803 edition of Blackstone's Commentaries.[81] Tucker's lecture notes of the 1790s were clear regarding the meaning of the right to be secure against unreasonable searches and seizures:

> What shall be deemed unreasonable searches and seizures[?] The same article informs us, by declaring, that no warrant shall issue, but first

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the judicial check the specific warrant serves, and would reintroduce the kinds of excessive discretion the Framers sought to eliminate. For critiques, see, for example, Maclin, *Central Meaning*, *supra* note 4; Donohue, *supra* note 4; and Cloud, *Searching*, *supra* note 69.

[78] GRAY, *supra* note 72, at 162–63 (arguing the "general warrants were regarded as unreasonable . . . because they forgave any obligation to justify a search or seizure before the fact through a process of reason-giving before a neutral arbiter").

[79] 4 ELLIOT'S DEBATES, *supra* note 5, at 555.

[80] *Id.*

[81] 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA, app. at 302 (1803).

> upon probable cause—which cause secondly, must be supplied by oath or affirmation; thirdly the warrant must particularly describe[] the place to be searched; and fourthly—the persons, or things to be seized. All other searches and seizures, except such as are thus authorized, are therefore unreasonable and unconstitutional.[82]

While Tucker accepted that some arrests did not require a warrant, he viewed warrantless searches as presumptively unreasonable.[83] Madison and Tucker were not alone. In an 1829 treatise, William Rawle wrote that "[t]he term *unreasonable*" in the Fourth Amendment "is used to indicate that the sanction of a legal warrant is to be obtained, before such searches or seizures are made."[84]

III. THE FOURTEENTH AMENDMENT, RACE, AND POLICING

The Fourth Amendment represented the culmination of a long struggle to guarantee personal security and eliminate excessive discretion in law enforcement. But, it did not ensure personal security and true freedom for all without regard to race. The Fourteenth Amendment, which puts race at the center of our constitutional story of policing, was necessary to make the Constitution's promise of personal security a reality for all.

A. The Long Road to the Fourteenth Amendment: Slavery, Search, and Seizure

The Fourth Amendment's promise of the right to be secure from unreasonable searches and seizures proved illusory for Black Americans in the new nation. Whether they were free or enslaved, whether they lived in the North or the South, Black people were subjected to indiscriminate searches and seizures. Racialized search and seizure practices left Black Americans without any security.

Slave patrols that had essentially unfettered power to search and seize—and to terrorize Black people—were a basic

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[82] David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. COLLOQUY 272, 280 (2008) (quoting from Tucker's lecture notes dating from approximately 1791–1792).

[83] *Id.*

[84] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION 127 (2d ed. 1829).

feature of slavery that predated the Constitution and continued long after its ratification.[85] As Sally Hadden describes, "[p]atrols rummaged through slave dwellings," broke up "slave gatherings of any kind," and "questioned and detained slaves who were away from their plantation" to examine whether they had a valid pass allowing them to do so.[86] Armed with guns, whips, and ropes, the patrols often savagely whipped and brutalized enslaved people.[87] As one formerly enslaved person remembered, patrollers would "keep close watch" so that we "have no chance to do anything or go anywhere. They 'jes like policemen, only worser . . . . If you wasn't in your proper place when the paddyrollers come they lash you til' you was black and blue."[88] Enslaved women were constantly threatened by rape and other forms of sexual abuse.[89] Slave patrols were not confined to the countryside. Patrols operated in cities, where slaveowners insisted on an even "more energetic and scrutinizing system" to keep Black people subordinate.[90] So did police forces, who regularly arrested Black people who did not have their papers, could not prove they were free, or were simply "out of place."[91]

Laws subjected Black Americans to arrest simply for being Black. Throughout the South, state legislatures enacted "Negro Seamen" laws that provided that any free Black person who arrived on board a ship would be detained and imprisoned until the ship departed. If the ship's captain refused to pay the

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[85] CUDDIHY, *supra* note 25, at 218 (noting that "South Carolina created the first slave patrol in 1704, followed by Virginia in 1726 and 1738, North Carolina in 1753, and Georgia in 1757"); Maclin, *Fourth Amendment*, *supra* note 9, at 334–36 (detailing colonial enactments).

[86] SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 106, 108–09 (2001); PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 275 (1974) (discussing a 1734 law that permitted slave patrol to "question or search any travelling Negro," "administer up to twenty lashes to any slave stopped outside his plantation without a ticket," and "to search the homes of Negroes arbitrarily and to confiscate firearms or other weapons and any goods suspected of being stolen").

[87] HADDEN, *supra* note 86, at 106, 108, 117.

[88] *Id.* at 71.

[89] *Id.* at 117.

[90] RICHARD C. WADE, SLAVERY IN THE CITIES, THE SOUTH 1820–1860, at 80 (1964); HADDEN, *supra* note 86, at 51–61.

[91] WADE, *supra* note 90, at 104, 219.

costs of confinement, the seaman could be sold into slavery.[92] These seamen laws led to an infamous incident, the memories of which were still fresh during the drafting of the Fourteenth Amendment. In 1844, the Massachusetts legislature sent two delegates to South Carolina to gather information about the detention of Black citizens of Massachusetts.[93] When Samuel Hoar, one of the delegates, arrived in Charleston, the legislature expelled him from the state. Hoar barely escaped lynching at the hands of an angry mob.[94] This incident provoked outrage in the North and demonstrated the lengths to which slave states would go to violate fundamental rights. It showed that anyone who questioned the authority of slave states to arrest, imprison, and sell Black people into slavery would be treated as a pariah.[95]

In the South, pamphlets and other writings that contained anti-slavery speech, including mainstream Northern newspapers, were subject to seizure and even burning.[96] For example, an 1836 Virginia law required the postmaster to notify the justice of the peace if abolitionist material appeared in the mail and required the justice of the peace to burn any book or other abolitionist writing.[97] Southern courts issued general warrants permitting sweeping searches of books.[98] Although the Bill of Rights did not apply to acts of state governments, laws

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[92] *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 81 (1997); Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 ALA. L. REV. 111, 140–44 (2010).

[93] Boyden, *supra* note 92, at 142.

[94] AMAR, BILL OF RIGHTS, *supra* note 1, at 236 (describing how Hoar was "ridden out of town on a rail by an enraged populace after the South Carolina legislature passed an act of attainder and banishment").

[95] TASLITZ, *supra* note 1, at 246 (arguing that Hoar's expulsion is "best understood as fusing concerns about search and seizure, free speech, and judicial access").

[96] AMAR, BILL OF RIGHTS, *supra* note 1, at 235, 267; Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book,* The Impending Crisis*: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1130–38, 1158–62 (1993) [hereinafter Curtis, *The 1859 Crisis*]. Bills requiring seizure of abolitionist materials failed to pass Congress, but pro-slavery executive interpretation gave the post office leeway to refuse to distribute abolitionist materials that violated state law. *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 155–75 (2000).

[97] Curtis, *The 1859 Crisis*, *supra* note 96, at 1133–34.

[98] *Id.* at 1162.

such as these produced widespread fears that the "Slave Power"[99] was threatening American democracy and freedom. As Michigan congressman Henry Waldron observed, "postmasters rifle mails and violate the sanctity of private correspondence," and "[t]he newspaper which refuses to recount the blessings and sing the praises of slavery is committed to the flames."[100] Search and seizure was used to squelch dissent, recalling to mind British abuses that sought to silence King George III's political opposition.

Throughout the country, the Fugitive Slave Act exposed Black Americans to a virulent form of racial profiling and licensed widespread seizures and kidnapping. The Act—first passed in 1793 and overhauled in 1850—delegated sweeping powers to white people to stop, question, search, and seize possible fugitives on the basis of open-ended, racial descriptions.[101] Abolitionists repeatedly attacked the constitutionality of the Fugitive Slave Act on Fourth Amendment grounds, but to no avail.[102] In a series of cases, the Supreme Court upheld the Act and ignored Fourth Amendment objections to it.[103] The Court sanctioned indiscriminate seizures, and even

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[99] Garrett Epps, *Interpreting the Fourteenth Amendment: Two Don'ts and Three Dos*, 16 WM. & MARY BILL RTS. J. 433, 451 (2007) (explaining that the "Slave Power was a term" that "referred to a combination of Southern ruthlessness and constitutional flaws that had given the slave states effective control of the federal machine, both as an engine of domestic policy and as a dominant influence on matters of diplomacy, war, and peace").

[100] CONG. GLOBE, 36th Cong., 1st Sess. 1872 (1860).

[101] Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369, 371, 391–92 (2003) [hereinafter Cloud, *Quakers*] (noting that "[a]ll Negro men, women and children were potential suspects and potential victims of seizures by slave hunters" and describing "advertisement after advertisement containing descriptions that would permit slave catchers extraordinary discretion in their seizures of alleged runaways"); Vanessa Holden & Edward E. Baptist, Opinion, *Policing Black Americans Is a Long-Standing, and Ugly American Tradition*, WASH. POST (Mar. 6, 2019, 1:21 PM), https://www.washingtonpost.com/opinions/2019/03/06/policing-black-americans-is-long-standing-ugly-american-tradition/ [https://perma.cc/44S2-EJQF] ("Law and practice empowered white people to act as the police when it came to [B]lack people, including stopping, questioning and searching possible fugitives, which could mean any [B]lack person who vaguely fit the description.").

[102] TASLITZ, *supra* note 1, at 164–68.

[103] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847).

kidnapping, of Black people without even addressing the Fourth Amendment arguments levelled against the Act.

Emboldened by these decisions, Southerners pushed through Congress a tougher Fugitive Slave Act, which Eric Foner has called "the most robust expansion of federal authority over the states, and over individual Americans, of the antebellum era."[104] The 1850 Act permitted seizures without a warrant,[105] authorized the use of summary procedures to return people to slavery, including proof by affidavit, and created a financial incentive for federal commissioners to accept claims made by slave owners.[106] If the commissioner found the individual in question should be returned to slavery, he was paid ten dollars, but if he determined that the individual should remain free, he only received five dollars—effectively a bribe to induce commissioners to rule on behalf of slaveholders.[107] The Act commanded individuals to assist in sending people to slavery, dragooning people in a manner reminiscent of the despised writs of assistance of the revolutionary era.[108] In all these ways, as historian R.J.M. Blackett writes, "the law would give a free hand to kidnappers."[109] Black Americans in the North—like never before—lived in fear of being seized, kidnapped, and forced into slavery. The Act, Frederick Douglass thundered, made the

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[104] ERIC FONER, GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD 125 (2015).

[105] Cloud, *Quakers*, *supra* note 101, at 414 (explaining that "no warrant was necessary in most cases").

[106] R.J.M. BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY 7–13 (2018); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 80 (1988).

[107] *See* CONG. GLOBE, 32d Cong., 1st Sess. 1107 (1852) ("Adding meanness to the violation of the Constitution, it bribes the commissioner by a double fee to pronounce against freedom. If he dooms a man to slavery, the reward is $10; but, saving him to freedom, his dole is $5."); CONG. GLOBE, 36th Cong., 1st Sess. 1839 (1860) (decrying the fugitive slave law of 1850 as "a law which, in direct violation of the Constitution, transfers the judicial power . . . to irresponsible commissioners . . . tendering them a bribe of five dollars if . . . he shall adjudge a man brought before him on his warrant a fugitive slave").

[108] Cloud, *Quakers*, *supra* note 101, at 417.

[109] BLACKETT, *supra* note 106, at 8; *id.* at 293 (noting that "because the law denied accused fugitive slaves the right to a trial by jury, it increased the chances that African Americans, who were born free, and so had no need for free papers, would fall victim to kidnappers"); *id.* at 305 (describing "depredations of kidnapping gangs").

United States "one vast hunting ground for men."[110] It was designed, as Charles Langston put it in an 1859 speech, "to crush the colored man" and make him into "an outlaw of the United States," never free, wherever he was in the country.[111] In short, the law put in danger every free Black person who at any moment could be stripped of their freedom and forced into enslavement.[112] The Act provided a dramatic illustration of the abuse of power inherent in a regime of indiscriminate search and seizure.

Throughout the nation, Black Americans and their allies resisted the Act, using every tool in their arsenal to help their comrades evade capture and secure their freedom, even if it meant starting a new life in Canada. Opposition took many forms, including hiding fugitive slaves out of sight, helping them escape to the North, and, in some cases, even rescuing them from custody, including by armed resistance.[113]

Black Americans repeatedly invoked deeply rooted Fourth Amendment ideals in their campaign to prevent their communities from being torn asunder. Many rallied around the principle of defending one's home. At an abolitionist meeting in Pittsburgh, Martin Delany insisted:

> My house is my castle; in that castle are none but my wife and my children, . . . whose liberty is as sacred as the pillars of God. If any man approaches that house in search of a slave . . . if he crosses the threshold of my door, and I do not lay him a lifeless corpse at my feet, I hope the grave may refuse my body a resting place.[114]

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[110] DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 176 (2018); *id.* at 234 (describing how the Fugitive Slave Act transformed "your broad republican domain" into a "hunting ground for men").

[111] BLACKETT, *supra* note 106, at 260; Charles Langston, Speech at the Cuyahoga County Courthouse (May 12, 1859) (available at http://www2.oberlin.edu/external/EOG/Oberlin-Wellington_Rescue/c._langston_speech.htm [https://perma.cc/PBU7-ENLY]).

[112] BLACKETT, *supra* note 106, at 177 (observing that "free [Black people]" were "in constant danger of being taken into slavery"); KENNEDY, *supra* note 92, at 84 (explaining that the law "profoundly undermined [B]lacks' sense of security . . . by making any African-American an accusation away" from being enslaved).

[113] BLACKETT, *supra* note 106, at xiv (summarizing forms of opposition).

[114] *Id.* at 32.

Others stressed the importance of warrants as a guarantee of personal security. Rev. J.W.C. Pennington warned Black people about warrantless stops by the police. "It is certainly not safe in these times," he wrote, for "a colored man to be led into a place surrounded by so many grates and bars without the protection of a legal warrant."[115] Black communities throughout the North were continually over-policed,[116] leading abolitionists to warn Black Americans that if "you value your LIBERTY," you should steer clear of police officers who were nothing but "HOUNDS on the track of the most unfortunate of your race."[117] This activism in defense of freedom and personal security succeeded to a considerable extent, as "many more fugitives escaped the clutches of the law than were apprehended and returned."[118] By contesting every effort to enforce the law, Black communities and their abolitionist allies highlighted the abuse of power the Fugitive Slave Act posed.[119]

On the eve of the Civil War, Americans knew from experience the many ways in which indiscriminate search and seizure could be employed to perpetuate discrimination, subordination, and inequality. In the wake of the war's bloody conclusion, the American people changed the Constitution, ratifying the Fourteenth Amendment to forbid such discriminatory policing practices.

B. The Text and History of the Fourteenth Amendment

When the Founders wrote the Fourth Amendment, there was no such thing as the police.[120] At the Founding, criminal laws were enforced by private citizens, who took turns serving as constables.[121] Founding-era law enforcement was skeletal and largely ineffective. But more than eighty years later, by the time the Fourteenth Amendment was added to the Constitution, local

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[115] *Id.* at 390.

[116] JONATHAN DANIEL WELLS, THE KIDNAPPING CLUB: WALL STREET, SLAVERY AND RESISTANCE ON THE EVE OF THE CIVIL WAR 98 (2020) (describing how New York City's Black community "chafed under constant police surveillance and harassment" and that "[e]very street inhabited by people of color was heavily policed").

[117] KENNEDY, *supra* note 92, at 84.

[118] BLACKETT, *supra* note 106, at 459.

[119] *Id.* at 460.

[120] Davies, *supra* note 4, at 620; Thomas, *supra* note 68, at 1468.

[121] Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830–31 (1994).

police were responsible for law enforcement in communities across the nation, primarily in cities.[122] And police abuse lies at the core of the Fourteenth Amendment's history. The Fourteenth Amendment was added to the Constitution against the backdrop of a host of systematic violations of fundamental rights by state governments, including by the police.

The Fourteenth Amendment changed the constitutional limits on policing in two major ways. First, it required state and local governments to respect the guarantees contained in the Fourth Amendment, deepening the Founding's commitment to personal security as a core constitutional value. In the process, it reconstructed what those guarantees were, taking account of new threats to personal security.[123] It generated a new set of paradigm cases. At the Founding, the Fourth Amendment was framed against the backdrop of writs of assistance and general warrants that allowed customs officers unlimited power to break into homes. The Fourteenth Amendment was framed against the backdrop of a host of abusive police practices used to subjugate Black Americans newly freed from enslavement. This included vagrancy laws that gave white police officers sweeping power to seize and arrest Black Americans for failing to sign a work contract, refusing to obey an employer's order, or leaving a plantation; warrantless home invasions to seize weapons belonging to Black persons; and police killings and other forms of state-sponsored violence. In applying the Fourth Amendment to the states, the Fourteenth Amendment denied police officers the power to indiscriminately search and seize Black people. The Fourteenth Amendment was a response to the fact that

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[122] EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH, 82–83 (1984) ("Between 1845 and the Civil War virtually all of the largest cities in the country established uniformed police forces, and included in this group were Southern cities of Baltimore, New Orleans, Charleston, Richmond, and Savannah."); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY, 67 (1993) ("One of the major social innovations of the first half of the nineteenth century was the creation of police forces: full time, night-and-day agencies whose job was to prevent crime, to keep the peace, and capture criminals.").

[123] AMAR, BILL OF RIGHTS, *supra* note 1, at 268 (urging us to "ponder the ways in which the Reconstruction experience refracted the Founders' words, and perhaps deepened and extended their meaning"); TASLITZ, *supra* note 1, at 12 (arguing that the Fourteenth Amendment "mutated the meaning of the constitutional rules governing search and seizure").

open-ended grants of discretionary police power were a tool of racial oppression.

Second, the Fourteenth Amendment added to the Constitution the guarantee of equal protection of law, requiring the police to enforce the law in a nondiscriminatory fashion. It embodied the simple, yet radical, notion that "the law which operates upon one man shall operate *equally* upon all."[124] The Fourteenth Amendment mandates "one measure of justice" for all regardless of race.[125] It forbids discriminatory policing practices that subject marginalized persons to excessive searches and seizures, just as it also forbids practices that turn a blind eye to private wrongs and violence against those persons. It sought to put an end to all forms of discriminatory policing.

Understanding these profound changes to our constitutional order requires us to examine the abuses that led to the Fourteenth Amendment and the Framers' efforts to eradicate them.

1. The Police Abuses that Led to the Fourteenth Amendment

a. Vagrancy Laws

The Fourteenth Amendment's revolutionary mandates were added to the Constitution against the backdrop of the Black Codes, the South's effort to reimpose slavery, strip Black people of their fundamental rights, and keep them in a subordinate status. The Black Codes sought to deny Black people practically every aspect of freedom enjoyed by white people.

The centerpiece of the Codes were new vaguely-worded vagrancy laws that gave Southern police sweeping powers to seize and arrest Black people for failing to sign new labor contracts, disobeying an employer's orders, or otherwise acting in ways white people deemed idle.[126] As one Southern newspaper

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[124] CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). *See* Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 70–71 (2019) (stressing the "Reconstruction Amendments' constitutional imperatives to end enslaving systems, provide equal protection against state and private violence, and install full citizenship").

[125] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

[126] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 199–202 (1988) [hereinafter FONER,

urged, "[t]he magistrates and municipal officers everywhere should be permitted to hold a rod *in terrorem* over these wandering, idle, creatures. Nothing short of the most efficient police system will prevent strolling, vagrancy, theft, and the utter destruction of or serious injury to our industrial system."[127] By requiring Black people to be under contract at all times, these new vagrancy laws enforced a form of "practical slavery"[128] and gave police the power to seize and arrest Black people as they saw fit. Some, such as a vagrancy law enacted by the town of Opelousas, Louisiana, went even further, "investing every white man with the power and authority of a police officer as against every [B]lack man."[129] Through laws like these, Southern lawmakers sought to transform slave patrols into postwar police forces armed with sweeping power to "place the freedmen under a sort of permanent martial law."[130]

The vagrancy laws contained in the Black Codes were astounding in their sweep and in the discretion they afforded. For example, Mississippi's vagrancy statute made it a criminal offense for all "freedmen, free negroes, and mulattoes" to be found, on the second Monday of January 1866 "without lawful employment or business" or "unlawfully assembling themselves together, either in the day or night time."[131] A separate provision condemned as vagrants "persons who neglect their calling or employment, misspend what they earn," "do not provide for the support of themselves or their families," and "all other idle and disorderly persons."[132] These vagrancy laws allowed the police to stop, arrest and harass whomever they pleased. If convicted by the all-white legal system, Black Americans could be subjected to onerous fines, whipped, forced to work on a chain gang, or sold to white employers to pay off their fines. The "obnoxious features of

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RECONSTRUCTION]; LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 366–71 (1979); FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, SER. 3, VOL. 2: LAND AND LABOR, 1866–1867, at 10–12, 500–01 (René Hayden et al. eds. 2013).

[127] HADDEN, *supra* note 86, at 200.

[128] Letter from Major Gen. O.O. Howard to Sec'y of War E.M. Stanton (Dec. 21, 1866), *reprinted in* S. EXEC. DOC. NO. 39-6, at 3 (1867).

[129] REPORT OF MAJ. GEN. CARL SCHURZ ON CONDITIONS OF THE SOUTH, S. EXEC. DOC. NO. 39-2, at 24 (1865).

[130] *Id.*

[131] An Act to Amend the Vagrant Laws of the State, § 2 (Nov. 24, 1865), *reprinted in* S. EXEC. DOC. 39-6, at 192 (1867).

[132] *Id.* § 1.

these singular laws," O.O. Howard, Commissioner of the Freedmen's Bureau explained, included "[t]he arrest of unemployed persons as vagrants upon information given by any party; his trial by a justice of the peace; the sale of his services at public outcry for payment of the fine and costs, without limit as to time, and whipping and working in chain-gangs."[133] What began with an arrest often ended with re-enslavement.

Vagrancy laws were a critical part of the Black Codes' effort to re-institutionalize slavery and force Black people into conditions replicating the pre-war plantation system. Through vagrancy laws designed to criminalize Black freedom, Southern state legislatures sought to create a new form of slavery. As one observer put it, "the South is determined to have slavery—the thing, if not the name."[134] The re-establishment of slavery was made possible by the fact that the Thirteenth Amendment abolished chattel slavery, while sanctioning slavery or involuntary servitude "as a punishment for crime."[135] The Thirteenth Amendment permitted Black people to be held in slavery as part of a criminal punishment. The failure of the Thirteenth Amendment's Punishment Clause to completely eliminate slavery opened the door to the Black Code's repressive regime.[136]

The first Black Codes, including Mississippi's, were set aside by the Freedmen's Bureau and Union military commanders

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[133] Letter from Major Gen. O.O. Howard to Sec'y of War E.M. Stanton, *reprinted* in S. EXEC. DOC. 39-6, at 3.

[134] CONG. GLOBE, 39th Cong., 1st Sess. 94 (1865).

[135] U.S. CONST. amend XIII, § 1.

[136] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 47–51 (2019) [hereinafter FONER, SECOND FOUNDING]; Michelle Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism and Mass Incarceration*, 104 CORNELL L. REV. 899, 933 (2019) (discussing how Thirteenth Amendment's Punishment Clause "functionally preserved slavery as a means of persistent racial subjugation"); Roberts, *supra* note 124, at 67 (arguing that "the Punishment Clause facilitated the expansion of prisons as a form of state subordination of [B]lack people and forced exploitation of [B]lack labor"); *cf.* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1492 (2019) (arguing that Amendment's Framers "read the Punishment Clause narrowly to cover only those features of slavery or involuntary servitude that fell within what they conceived as the 'ordinary' or 'usual' operation of a penal system").

as racially discriminatory,[137] but were soon replaced by functionally identical, race-neutral measures that, like their predecessors, forced Black people to work for white people and gave white police officers nearly unlimited power to arrest those who did not. However they were written, as historian Leon Litwack observes:

> Enforcement of the vagrancy laws revealed an all too familiar double standard. If a white man was out of work, as many were in 1865, that was simply unemployment, but if a [B]lack man had no job, that was vagrancy. If a planter refused to till the fields himself, that was understandable, but if a former slave declined to work for him, that was idleness if not insolence.[138]

As a Freedmen's Bureau official observed of Alabama's vagrancy law, "[n]o reference to color was expressed in terms, but in practice the distinction is invariable."[139] Across the South, white police officers and others seized and arrested Black people en masse for vagrancy and other trivial offenses, often for pretextual reasons.[140] In some communities, police demanded

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[137] FONER, RECONSTRUCTION, *supra* note 126, at 208–09; FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, SER. 3, VOL. 2: LAND AND LABOR, 1866–1867, at 11.

[138] LITWACK, *supra* note 126, at 321; FONER, RECONSTRUCTION, *supra* note 126, at 200 ("[Black people] who broke labor contracts could be whipped, placed in the pillory, and sold for up to one's year's labor, while whites who violated contracts faced only the threat of civil suits."); REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. 39-30, pt. II, at 86 (1866) ("There is nothing said about a white man being a vagrant if he stands around and begs for drinks; but for a [B]lack man there is a great deal of legislation necessary.").

[139] WAR DEP'T, BUREAU OF REFUGEES, FREEDMEN, & ABANDONED LANDS, REPORT OF ASST. COMM'RS, ALA. (Oct. 31, 1866), *reprinted in* S. EXEC. DOC. 39-6, at 7.

[140] WAR DEP'T, BUREAU OF REFUGEES, FREEDMEN, & ABANDONED LANDS, REPORT ASST. COMM'R, TENN. (Nov. 1, 1866), *reprinted in* S. EXEC. DOC. 39-6, at 129 ("About three weeks since the police of [Nashville] arrested some forty or fifty young men and boys (colored) on various pretexts, mostly for vagrancy, and they were thrown into the work-house to work out fines of from $10 to $60 each."); Letter from Mississippi Blacks to Commander of the Department of the Gulf (Jan. 20, 1867), *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, SER. 2: THE BLACK MILITARY EXPERIENCE 821 (Ira Berlin et al. eds., 1982) ("His De[p]uty is taking people all the time[,] men that is trave[l]ling is stop[p]ed and put in jail or Forced to contract"); REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 138, pt. III, at 8 (observing that "there were a large number of negroes in jail,

that Black people who were on public streets present a pass from their employer and arrested those who could not present documentation to the satisfaction of the police.[141]

Black Americans bitterly protested these injustices, objecting to the renewal of the "mounted patrol, with their sabers drawn, whose business is the hunting of colored people."[142] As a group of Black people in Mississippi wrote:

> we are to[o] well acquainted with the yelping of bloodhounds and t[e]aring of our fellow serv[a]nts To pi[e]ces when we were slaves and now we are free we do not want to be hunted by negro-runners and th[e]ir hounds unless we are guilty of a . . . crime . . . . [A]ll we ask is justice and to be treated like human[] beings.[143]

The singling out Black people for arrest for suspected minor offenses drove a Black teacher in Alabama to complain, "[t]he police of this place make the law to suit themselves."[144]

Reports of these oppressive measures flooded the halls of the 39th Congress. As one member of Congress observed, "[e]very mail brings to us the records of injustice and outrage."[145] Speaker after speaker denounced the vagrancy laws in the Black Codes, arguing that these new criminal offenses "are calculated and intended to reduce [Black people] to slavery again" and "provide for selling these men into slavery in punishment of crimes of the

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the most of them for the most trivial of offenses," including "breaking a plate" and "throwing a stone and a sheep"); LITWACK, *supra* note 126, at 284, 287–88, 318–19, 370 (describing mass arrests and arrests for trivial offenses); AYERS, *supra* note 122, at 165 (noting that, in Greene County, Georgia, "twenty-one [B]lacks came before the County Court for vagrancy in 1866; most of them received a whipping of thirty-nine lashes"); VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI, 1865–1890, at 91 (1947) (discussing vagrancy roundups in Mississippi); FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, SER. 3, VOL. 2: LAND AND LABOR, 1866–1867, at 125–27, 153, 527, 530–32, 536–37, 928–29 (detailing vagrancy arrests).

[141] LITWACK, *supra* note 126, at 319 (describing "mass arrests of [Black people] found on the city streets after a certain hour without the permission of their employers").

[142] FONER, RECONSTRUCTION, *supra* note 126, at 155; HADDEN, *supra* note 86, at 193.

[143] Letter from Mississippi Freedpeople to the Governor of Mississippi, *supra* note 7.

[144] LITWACK, *supra* note 126, at 288.

[145] CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866).

slightest magnitude."[146] These laws "reduce the negro to vagrancy and then seize and sell him as a vagrant . . . . They are denied a home in which to shelter their families, prohibited from carrying on any independent business, and then arrested and sold as vagrants because they have no homes and no business."[147] This made a mockery of their newly won freedom the Thirteenth Amendment had promised and led the 39th Congress to push for a new constitutional amendment that would make real our constitutional ideals of liberty, equality, and equal citizenship. A crucial part of the new Amendment sought to end the racialized policing practices that were being used to reinstitute slavery and to guarantee personal security and equal protection of the laws for all regardless of race.

In 1866, Congress formed the Joint Committee on Reconstruction to investigate conditions in the South.[148] Some of the leading figures of the 39th Congress, including Senator Jacob Howard and Representatives John Bingham and Thaddeus Stevens, served on the 15-person bipartisan committee. The committee took testimony from white southerners, Black Americans seeking to enjoy freedom for the first time, and Union officers working in the South, learning firsthand of the gruesome violence and systemic violation of fundamental rights. The committee drafted the Fourteenth Amendment, and its findings and the testimony it heard bore directly on the amendment it wrote.[149]

The Joint Committee on Reconstruction heard extensive evidence of abuses in the South and documented how police officers used vagrancy laws to make baseless arrests of Black people in order to re-establish slavery. As one witness described,

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[146] *Id.* at 1123. *See id.* at 588 ("The adult negro is compelled to enter into contract with a master, and the district judge, not the laborer, is to fix the value of the labor. If he thinks the compensation is too small and will not work, he is a vagrant, and can be hired out for a term of service at a rate again to be fixed by the judge."); *id.* at 589 ("[T]he vagrant negro may be sold to the highest bidder to pay his jail fees."); *id.* at 783 ("[T]heir courts have sold the freedmen into slavery the next day under some pretense of punishing him for vagrancy or something else equally absurd."); *id.* at 1833 (quoting press report stating that the "barbarous vagrant law recently passed by the rebel State Legislature is rigidly enforced" and "freed slaves are rapidly being reenslaved").

[147] *Id.* at 1160.

[148] CONG. GLOBE, 39th Cong., 1st Sess. 6, 30 (1865).

[149] FONER, RECONSTRUCTION, *supra* note 126, at 239, 246–47; AMAR, BILL OF RIGHTS, *supra* note 1, at 187.

"[t]he county police" enforced the vagrancy law "on a person who had employment" and "was earning her own living, who went out to get her own children. She was seized . . . ; her children refused to her, and under the vagrant act she was set to work on the old plantation without pay, simply for her board and clothes, as a slave."[150] Thomas Conway, who had served as an assistant commissioner of the Freedmen's Bureau in Louisiana, told the Joint Committee:

> [In New Orleans,] the police of that city conducted themselves towards the freedmen, in respect to violence and ill usage, in every way equal to the old days of slavery; arresting them on the streets as vagrants . . . simply because they did not have in their pockets certificates of employment from their former owners or other white citizens.[151]

He described how he had "gone to the jails and released large numbers of them, men who were industrious and who had regular employment; yet because they had not the certificates of white men in their pockets they were locked up in jail to be sent out to plantations."[152]

As the debate in Congress reflects, the vagrancy laws contained in the Black Codes were objectionable for two reasons. First, they were part and parcel of the South's effort to re-institute slavery. The vagrancy laws sought to establish a new labor system as close to slavery as possible and to force Black people to work for white people. Second, vagrancy laws accomplished this end by giving white police officers nearly unfettered discretion to seize and arrest Black Americans, using criminal punishment as a lever to strip Black people of freedom. Vagrancy laws subjected Black people to unreasonable seizures at the whim of the police and operated in tandem with a system of criminal justice in which it was "impossible" for the "freedmen . . . to receive anything like justice, protection, [or] equity."[153]

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[150] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 138, pt. II, at 177; *see id.* at 62 (describing "[s]everal instances" in Virginia "where officers of the State attempted to enforce the vagrant laws" and "sold colored people for the coming year—sold them to service").

[151] *Id.*, pt. IV, at 79.

[152] *Id.*

[153] CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866).

b. Warrantless Home Invasions to Disarm Black Americans

In the final months of 1865, white Southerners were consumed with the baseless fear that Black people newly freed from enslavement would mount an armed insurrection. They used this fear as a pretext to break into the homes of Black people, take their guns, and steal their property. As one Black former Union soldier put it, "[t]hey have been accusing the col[o]red pe[o]ple of an ins[ur]rection which is a lie, in order that they might get arms to carr[y] out their wicked designs."[154] Police, militia,[155] and armed vigilantes ransacked the homes of Black people and violated their most basic personal security to steal their arms, rob them, and leave them defenseless.[156] Sometimes, as historian Dan Carter explains:

> [Officers presented their] credentials (as militia members or local police officials) and carefully wr[ote] out receipts for the confiscated arms. More often than not, however, the raids degenerated into a mob-like attack in which freedmen were abused and threatened, furniture overturned, and locked chests smashed. On the assumption that [Black people] could not have acquired property

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[154] Letter from a Mississippi Black Soldier to the Freedmen's Bureau Commissioner (Dec. 16, 1865), *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION 1861–1867, SER. 2, THE BLACK MILITARY EXPERIENCE, at 755; REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 138, pt. III, at 185 (calling fears of insurrection a "mere subterfuge by which to justify the most foul and bloody murders known to any people, upon a race that is unarmed and unable to defend themselves, much less to assume the offensive").

[155] Southern militia, like the police, were charged with the responsibility "to apprehend criminals, suppress crime, and protect the inhabitants." OTIS A. SINGLETARY, NEGRO MILITIAS AND RECONSTRUCTION 5 (1957); FONER, RECONSTRUCTION, *supra* note 126, at 203 ("Whites staffed urban police forces as well as state militias, intended, as a Mississippi white put it in 1865, to 'keep good order and discipline amongst the negro population.'").

[156] CONG. GLOBE, 39th Cong., 1st Sess. 915 (1866) ("There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description."); *id.* at 40 ("In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country.").

> except by thievery, valuables were taken without justification or explanation.[157]

These home invasions left Black people asking "*[are] we free[?],*" while "holding broken locks and empty pocketbooks in their hand."[158]

> The Joint Committee heard evidence that:
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> [In North Carolina,] the local police have been guilty of great abuses by pretending to have authority to disarm the colored people. They go in squads and search houses and seize arms . . . . [A] tour of pretended duty is often turned into a spree. Houses of colored men have been broken open, beds torn apart and thrown about the floor, and even trunks opened and money taken.[159]

In Alabama, militia companies "were ordered to disarm the freedmen, and undertook to search in their houses for this purpose."[160] In Texas, patrols "passed about through the settlements where negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed them of money, household furniture, and anything that they could make of any use to themselves."[161] Elsewhere, as the Freedmen's Bureau documented, "civil law-officers disarm the colored man and hand him over to armed marauders."[162] In

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[157] Dan T. Carter, *The Anatomy of Fear: The Christmas Day Insurrection of 1865*, 42 J. S. HIST. 345, 361 (1976); WILLIAM MCKEE EVANS, BALLOTS AND FENCE RAILS: RECONSTRUCTION ON THE LOWER CAPE FEAR 71–72 (1967) (observing that "the county police began ransacking Negro homes in search of weapons" and taking their property on the assumption that "any property the[] [police] found in the possession of a freedman was stolen unless he could prove otherwise in court" or "to the satisfaction of the raiding officers").

[158] Letter from Freedmen's Bureau Subcommissioner at Columbus, Mississippi to the Headquarters of the Freedmen's Bureau Acting Commissioner for the Northern District of Mississippi (Dec. 30, 1865), *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, SER. 3, VOL. 1: LAND AND LABOR, 1865, at 898.

[159] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 138, pt. II, at 272.

[160] *Id.*, pt. III, at 140.

[161] *Id.*, pt. IV, at 49–50.

[162] H.R. EXEC. DOC. 39-70, at 239 (1866); *id.* at 238 ("The town marshal takes all arms from returned colored soldiers, and is very prompt in shooting [Black people] whenever an opportunity occurs."); *id.* at 297 (explaining the Freedmen's Bureau's "desire[] to convince the local militia that stealing clothing,

communities across the South, white people, acting "under alleged orders from the colonel of the county militia, went from place to place, broke open negro houses and searched their trunks, boxes, [etc.]," and seized "not only fire-arms, but whatever their fancy or avarice desired."[163] On a daily basis, the Freedmen's Bureau was flooded with complaints of "negroes robbed of guns, pistols, and ammunition, of houses broken into and searched at midnight, of negroes tied hand and foot and brutally whipped, of negroes shot at, and driven from their old homes by threats and violence."[164]

c. Police Killings and Brutality

In the wake of the end of the Civil War, police engaged in a campaign of brutal violence against Black Americans. The Joint Committee's report laid out, often in gruesome detail, how white police officers were engaged in a campaign of unending violence against Black Americans. Even these horrific instances were just a fraction of the violence committed against those seeking to enjoy freedom for the first time in their lives. As Leon Litwack writes, "[h]ow many [B]lack men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known."[165]

Witness after witness recounted gratuitous, violent seizures by police officers, who were a "terror to . . . all colored people or loyal men."[166] In North Carolina, the Joint Committee learned, the police "have taken negroes, tied them up by the thumbs, and whipped them unmercifully."[167] A Freedman's Bureau officer recounted an incident in which "[a] sergeant of the local police . . . brutally wounded a freedmen when in his custody, and while the man's arms were tied, by striking him on the head with his gun, coming up behind his back; the freedman having

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pistols, and money, under guise of 'disarming the negroes' or stealing pistols only, is *robbery*").

[163] *Id.* at 292.

[164] Letter from Former Freedmen's Bureau, Acting Subassistant Commissioner, at Athens, Georgia, to the Freedmen's Bureau Acting Assistant Commissioner for Georgia, *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, SER. 3, VOL. 1: LAND AND LABOR, 1865, at 906.

[165] LITWACK, *supra* note 126, at 276–77.

[166] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 138, pt. II, at 271.

[167] *Id.* at 185.

committed no offense whatever."[168] This beating was so bad that "[t]his freedman lay in the hospital . . . at the point of death, for several weeks."[169] The same sergeant, after a search of another freedman's house turned up no evidence of wrongdoing, "whipped him so that from his neck to his hips, his back was one mass of gashes."[170] Another witness told the Joint Committee about how a "policeman felled [a] woman senseless to the ground with his baton" and about another incident in which a "negro man was so beaten by . . . policemen that we had to take him to our hospital for treatment."[171] A Freedman's Bureau officer from New Orleans recounted:

> one of the police officers of the city, in front of the same block where my headquarters were, went up and down the street knocking in the head every negro man, woman, and child that he met, tumbling some of them into the gutter, and knocking others upon the sidewalks.[172]

The Joint Committee also learned that state militia organizations are "one of the greatest evils existing in the southern States for the freedmen. They give the color of law to their violent, unjust, and sometimes inhuman proceedings."[173] Southern white militia, like Southern police forces, "hunted, beat, and shot" people of color "so indiscriminately."[174] Freedmen's Bureau officials told the Joint Committee how the

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[168] *Id.* at 209.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 271.

[172] *Id.*, pt. IV, at 80. For additional documentation, see FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION 1861–1867, SER. 2, THE BLACK MILITARY EXPERIENCE, at 743 (statement of a Tennessee [B]lack sergeant that a policeman "struck me with his *club*, on the head" and then "another Policeman came up and he struck me several times[,] and they thru [sic] me down and stamped me in the back while lying on the ground"); HADDEN, *supra* note 86, at 217 (describing "white officers . . . beating [B]lack suspects for no reason"); HOWARD N. RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH 1865–1890, at 55 (1978) (discussing 1866 case of "Richmond policeman . . . charged with kicking a Negro down the station house steps," which was dismissed with "the admonition that he be less aggressive in the future"); LITWACK, *supra* note 126, at 290 (describing May 1866 incident in which "the chief of police shot and killed a young freedman while arresting him for a misdemeanor").

[173] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 138, pt. III, at 46.

[174] *Id.* at 185.

militia was "particularly adapted to hunting, flogging, and killing colored people,"[175] detailing instances in which Black people were "hung and skinned," "literally cut to pieces," "inhuman[ly] flogg[ed], ""shamefully beaten" and "shot."[176]

Police brutality and murder flared up in the spring and summer of 1866 as Congress completed its work on the Fourteenth Amendment and the American people considered whether to ratify the Amendment. These tragic events served as a reminder that state governments would not respect the fundamental rights of Black Americans and that racial violence and discriminatory policing would continue unchecked without new constitutional protections. These bloody events, as *Harper's Weekly* put it, accomplished "more than the abstract argument of a year to impress the country with the conviction that we cannot wisely hope for peace at the South so long as inequality of guarantees of personal and political liberty endure."[177]

In Memphis, Tennessee, on May 1, 1866, clashes between recently discharged Black soldiers and white police officers exploded in three days of racial violence.[178] The result was a killing spree led by the Memphis police force to exterminate Black people and destroy the community they had built. The conflict, as a subsequent congressional investigation concluded, "was seized upon as a pretext for an organized and bloody massacre of the colored people of Memphis" and was "led on by sworn officers of the law."[179] As the investigation found:

> The whole evidence discloses the killing of men, women, and children—the innocent, unarmed, and defenceless pleading for their lives and crying for mercy; the wounding, beating, and

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[175] *Id.*

[176] *Id.* at 142, 146, 185.

[177] *The New Orleans Report*, 10 HARPER'S WKLY. 658 (1866). *See* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1307 (2013) ("No single event in 1866 more clearly illustrated the states' continued failure to protect the constitutionally enumerated rights of American citizens than the New Orleans Riot of July 30, 1866.").

[178] For accounts of the Memphis massacre, see FONER, RECONSTRUCTION, *supra* note 126, at 261–62; GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 33–43 (1984); James Gilbert Ryan, *The Memphis Riots of 1866: Terror in a Black Community During Reconstruction*, 62 J. NEGRO HIST. 243 (1979).

[179] MEMPHIS RIOTS AND MASSACRES, H.R. REP. NO. 39-101, at 5 (1866).

> maltreating of a still greater number; burning, pillaging, and robbing; the consuming of dead bodies in the flames, the burning of dwellings, the attempts to burn up whole families in their houses, and the brutal and revolting ravishings of defenceless and terror-stricken women.[180]

The congressional investigation highlighted the gruesome attacks perpetrated by the Memphis police, an all-white police force that had long abused Black people.[181] As the House report explained, "[t]he fact that the chosen guardians of the public peace . . . were found the foremost in the work of murder and pillage, gives a character of infamy to the whole proceeding which is almost without a parallel in all the annals of history."[182] It detailed one unspeakable act after another: "policemen firing and shooting every negro they met," "policemen shooting" at Black people and "beating [them] with their pistols and clubs," high-ranking police officers exhorting the mob that all Black people "ought to be all killed," and policemen "firing into a hospital."[183] Under the pretext of effectuating arrests or searching for weapons, police officers brutally raped Black women.[184] The police ransacked houses, broke open doors and

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[180] *Id.* at 5; REPORT OF COLONEL CHARLES F. JOHNSON AND MAJOR F.W. GILBRAITH ON MEMPHIS RIOT (May 22, 1866) ("Negroes were hunted down by police, firemen, other white citizens, shot, assaulted, robbed, and in many instances their houses searched under the pretense of hunting for concealed arms, plundered, and then set on fire.") (available at https://www.freedmensbureau.com/tennessee/outrages/memphisriot.htm) [https://perma.cc/HM37-V3XN].

[181] MEMPHIS RIOTS AND MASSACRES, H.R. REP. NO. 39-101, at 6 ("[W]henever a colored man was arrested for any cause, even the most frivolous, and sometimes with cause, by the police, the arrest was made in a harsh and brutal manner, it being usual to knock down and beat the arrested party."); *id.* at 30 (describing a case in which "a negro was most brutally and inhumanly murdered publicly in the streets by a policeman"); *id.* at 156 (testimony that "[w]hen the police arrested a colored man they were generally very brutal towards him. I have seen one or two arrested for the slightest offence, and instead of taking the man quietly to the lock-up, as officers should, I have seen them beat him senseless and throw him into a cart."); RABLE, *supra* note 178, at 36 ("[T]he predominantly Irish police went out of their way to harass [Black people]; they often beat and sometimes shot [B]lack prisoners while hauling them off to jail or fired at drunken Negroes who fled from them or made even a token resistance to arrest.").

[182] MEMPHIS RIOTS AND MASSACRES, H.R. REP. NO. 39-101, at 34.

[183] *Id.* at 8, 9, 10.

[184] *Id.* at 13–15.

trunks, robbed people of hard-earned money, and burnt down schoolhouses and churches.[185] In all these ways "the Memphis massacre had the sanction of official authority; and it is no wonder that the mob, finding itself led by officers of the law, butchered miserably and without resistance every negro it could find."[186]

Twelve weeks later, in New Orleans, local police led another massacre of Black Americans, this one growing out of an attempt to reconvene the Louisiana constitutional convention of 1864 in order to guarantee voting rights to Black Louisianans and establish a new state government.[187] On July 30, 1866, a small cadre of delegates gathered at the Mechanics Institute, joined by a group of Black supporters. Under the pretext of quashing what they viewed as an illegal assembly, the police, joined by a white mob, went on a killing spree. Maj. Gen. Phillip H. Sheridan called the event "an absolute massacre by the police."[188] By the time federal troops arrived, more than one hundred and fifty Black persons and twenty of their white allies had been killed or wounded.

A congressional investigation of the massacre found that, on the morning of the convention, "the combined police, headed by officers and firemen, . . . rushed with one will from the different parts of the city toward the Institute, and the work of butchery commenced."[189] Police officers, who had been armed that morning, were instructed to shoot to kill[190] and "the slaughter was permitted until the end was gained."[191] As the report laid out in sickening detail, "for several hours, the police and mob, in mutual and bloody emulation, continued the butchery in the hall and on the street, until nearly two hundred

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[185] *Id.* at 10, 25.

[186] *Id.* at 34.

[187] See FONER, RECONSTRUCTION, *supra* note 126, at 262–63; RABLE, *supra* note 178, at 43–58.

[188] NEW ORLEANS RIOTS, H.R. EXEC. DOC. 39-68, at 11 (1867).

[189] NEW ORLEANS RIOTS, H.R. REP. NO. 39-16, at 17 (1867).

[190] *Id.* at 143 ("[W]e were ordered to march double-quick, and everybody commenced firing at the Institute, and at the negroes in the street, no matter whether they were innocent or not; and when a negro ran, they followed him till they killed him.").

[191] *Id.* at 17.

people were killed and wounded."[192] The report graphically continued:

> [M]en who were in the hall, terrified by the merciless attacks of the armed police, sought safety by jumping from the windows, . . . and as they jumped were shot by police or citizens. Some, disfigured by wounds, fought their way down stairs to the street, to be shot or beaten to death on the pavement. Colored persons, at distant points in the city, peaceably pursuing their lawful business, were attacked by the police, shot and cruelly beaten."[193]

The scale of the cruelty and terror inflicted is hard to fathom. "[M]en were shot while waving handkerchiefs in token of surrender and submission; white men and [B]lack, with arms uplifted praying for life, were answered by shot and blow from knife and club."[194] Without federal intervention, the report concluded, "the whole body of colored men" would continue to be "hunted like wild beasts, and slaughtered without mercy and with entire impunity from punishment."[195]

d. Police Failure to Protect Black People and White Unionists from Violence

In addition to these brutal acts, the police turned a blind eye to crimes committed by roving bands of white terrorists. No matter how heinous the offense, the police refused to enforce the criminal laws to protect Black Americans or white Unionists from murder, assault, rape, and other offenses.

The report of the Joint Committee detailed this systematic failure of legal protection, observing that "deep-seated prejudice against color . . . leads to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish."[196] Without the presence of federal troops, Black people "could hardly live in safety" and Unionists "would

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[192] *Id.* at 11.

[193] *Id.* at 10.

[194] *Id.*

[195] *Id.* at 35.

[196] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 138, at xvii.

be obliged to abandon their homes."[197] The Committee collected reams of evidence highlighting the police's failure to enforce criminal laws on a nondiscriminatory basis.[198]

Reports flooded in that "the freedmen are exposed to untold hardships and atrocities" and that "combinations of returned rebel soldiers have been formed for the express purpose of persecuting, beating most cruelly, and in some cases actually murdering the returned colored soldiers of the republic," yet because of the willful blindness of law enforcement, "the civil law affords no remedy at all."[199] Witness after witness told the Joint Committee of "beatings and woundings, burnings and killings, as well as deprivations of property and earnings and interference with family relations—and the impossibility of redress or protection except through the United States Army and Freedmen's Bureau."[200] As one Freedmen's Bureau agent explained:

> Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, and of the very many cases of similar treatment of Union citizens in North Carolina, I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons.[201]

Across the South, the Joint Committee heard, "citizens will not take any steps to arrest the murderers of negroes" and "you cannot trust even the police organized under military orders to do that work."[202] In short, "all law that protects the freedman . . .

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[197] *Id.*

[198] Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1847 (2010) ("[T]he Joint Committee's Report focused particularly on the lack of legal protection for [Black people] in the South. The majority of the injustices reported were examples of private violence and the failure of states to protect [Black people] and white unionists from this violence.").

[199] CONG. GLOBE, 39th Cong., 1st Sess. 95, 339 (1866).

[200] JACOBUS TENBROEK, EQUAL UNDER LAW 203–04 (1965).

[201] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 138, pt. II, at 209.

[202] *Id.* at 185; *id.* pt. III, at 141 ("I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung or sent to the penitentiary for crime against a negro, while many cases of crime warranting such punishment have been reported to me."); *id.* at 143 ("Not a single instance of the outrages we investigated was ever

has been withheld from them. *They are absolutely without law*."[203]

2. The Fourteenth Amendment's Limits on Police Abuse of Power

To correct these abuses, the Fourteenth Amendment commanded that no state shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," "deprive any person of life, liberty, or property, without due process of law," or "deny to any person within its jurisdiction the equal protection of the laws."[204] This sweeping guarantee of fundamental rights and equality effected a fundamental transformation in the constitutional law governing policing in two respects.

First, the Fourteenth Amendment required states to respect the Fourth Amendment's guarantee of personal security. At the Founding, the Fourth Amendment constrained the acts of the federal government but did not apply to the actions of state governments. The Fourteenth Amendment fundamentally changed the federal-state balance by requiring states to respect the Fourth Amendment's right to be secure from unreasonable searches and seizures. The overlapping guarantees contained in Section 1 of the Fourteenth Amendment were written to "forever disable" the states "from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within

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investigated or prosecuted by the civil authorities."); *id.* at 149 ("[W]henever a wrong was done to a freedman it seldom, if ever, occurred that any of the white people would interpose to bring the wrong-doer to justice."); *id.* at 184 ("Since my arrival more than fifty well-authenticated complaints have been made by the freedmen, . . . all of which have been referred to the civil authority; but, with one single exception, no action has been taken in any instance."); *id.* pt. IV, at 48 (testimony that "it was impossible" for state authorities "to arrest anybody or hold anybody accountable for acts committed against the negroes"); *id.* at 75 ("[I]t is of weekly, if not of daily, occurrence that freedmen are murdered. Their bodies are found in different parts of the country, and sometimes it is not known who the perpetrators are; but when that is known no action is taken against them."); *id.* at 125 ("[W]here [Black people] were killed, no white resident interposed to bring the offender to justice."); *id.* at 153 ("[T]he prevailing sentiment is so adverse to the negro that acts of monstrous crime against him are winked at.").

[203] *Id.* pt. III, at 184.

[204] U.S. CONST., amend. XIV, § 1.

their jurisdiction."[205] "The great object of the first section of th[e] amendment," Senator Jacob Howard explained, is "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[206] The Fourteenth Amendment reflected that "there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws," including the "right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property."[207] All governments had to respect the Fourth Amendment's guarantee against unreasonable searches and seizures.

Introducing the Fourteenth Amendment in the Senate, Senator Howard stressed that the Amendment would require states to respect the "personal rights guarantied and secured by the first eight amendments of the Constitution," including "the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit."[208] Fourth Amendment rights were basic and inherent rights that could no longer be abridged by state and local governments.[209] Supporters of the Amendment demanded "the Constitutional rights of the citizen; those rights specified and enumerated in the great charter of American liberty" including those that guarantee "*Security to Life, Person*

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[205] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

[206] *Id.*

[207] *Id.* at 1832, 1833.

[208] *Id.* at 2765; *id.* at 1629 (arguing that the very definition of republican government required respect for "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"). *See also* CONG. GLOBE, 42nd Cong., 1st Sess. 475 (1871) (urging legislation "to render the American citizen more safe in the enjoyment of [his] rights, privileges, and immunities" including the protection of "his house, his papers, and his effects . . . against unreasonable seizure"); *id.* app. at 84 (arguing that "the privileges and immunities of citizens of the United States . . . are chiefly defined in the first eight amendments to the Constitution of the United States").

[209] AMAR, BILL OF RIGHTS, *supra* note 1, at 267. After the Fourteenth Amendment's ratification, even congressional opponents of civil rights recognized that the Amendment prohibited states from violating the Fourth Amendment's prohibition on unreasonable searches and seizures. 43 CONG. REC. 384–85 (1874) (arguing that among the privileges and immunities guaranteed by the Fourteenth Amendment was "immunity of one's person, house, and papers against unlawful search or seizure").

and Property."[210] They insisted on securing to all "the rights that belong under the federal Constitution to persons who are free," including the right "to be free from unreasonable searches and seizures."[211] The Fourteenth Amendment sought to make "the security of life, person and property, a reality and not a mere sham, all over the land."[212] This was necessary because of systematic violations of personal security by the states detailed in congressional debates and in the report of the Joint Committee.

During the debates in the 39th Congress, members of Congress denounced Southern abuses that denied Black Americans personal security and freedom of movement, subjected them to being stopped or arrested by the police, and, all too often, being sold back into slavery. "What kind of freedom," Senator Lyman Trumbull asked, "is that which the Constitution of the United States guaranties to a man that does not protect him from the lash if he is caught away from home without a pass?"[213] Others described how vagrancy laws gave the police sweeping powers of arrest, licensed unreasonable seizures of Black people, and made a mockery of the Constitution's promise of freedom and personal security. Senator Henry Wilson argued that "[t]hese freedmen are as free as I am, to work when they please, to play when they please, to go where they please . . . and to use the product of their labor."[214] They had to be treated with "the conscious dignity of a free man."[215] When Black people "are subject to a system of vagrant laws which sells them into slavery or involuntary servitude, which operates upon them as upon no other part of the community, they are not secured in the rights of

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[210] *The Southern Loyalists Convention*, TRIB. TRACTS No. 2, July 10, 1866, at 25 (letter submitted by the Convention of Southern Unionists to the People of the United States).

[211] MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 140 (1986) (quoting remarks of Judge Noah Dawes at Republican Union State Convention held in Syracuse, New York on Sept. 5, 1866) [hereinafter CURTIS, NO STATE SHALL ABRIDGE].

[212] Lash, *supra* note 177, at 1322 (quoting *Secretary Browning's Letter*, EVENING POST, Oct. 24, 1866).

[213] CONG. GLOBE, 39th Cong., 1st Sess. 941–42 (1866).

[214] *Id.* at 41; *id.* at 111 ("[W]e must see to it that the man made free by the Constitution of the United States . . . is a freeman indeed; that he can go where he pleases; work when and for whom he pleases.").

[215] *Id.*

freedom."[216] Many speakers invoked the well-known case of Samuel Hoar, who was expelled from South Carolina in the 1840s when he sought to challenge how the state had "manacled colored seamen on the decks of Massachusetts ships" simply because they were Black.[217] These systematic violations of the right to be secure made it necessary to ensure that all governments—whether federal or state—respected the right to be free from unreasonable searches and seizures.

In requiring states to respect the Fourth Amendment's right to be secure against unreasonable searches and seizures, the Framers of the Fourteenth Amendment rebelled against the broad, discretionary search and seizure powers that Southern governments were using to subject Black people to intrusive searches, pretextual arrests, and violent seizures. For example, the Framers of the Fourteenth Amendment abhorred vagrancy laws that subjected Black Americans to being stopped and seized at the whim of a white police officer. Laws such as these sanctioned unreasonable searches and seizures, allowing a police officer to stop and arrest Black persons on almost any pretense.[218] As at the Founding, the Framers of the Fourteenth Amendment viewed indiscriminate searches and seizures as categorically unreasonable. Like the Founders, the Framers of the Fourteenth Amendment understood that true freedom and personal security could not exist if the police had excessive discretion to search and seize. The Fourteenth Amendment revitalized the fundamental principle that police may not have open-ended power to search and seize persons and applied it to eliminate Southern abuses used to subordinate and subjugate Black Americans.

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[216] *Id.* at 1124. *See id.* at 111 (rejecting "that kind of freedom that turns the emancipated working man out into the highway, then takes him up as a vagrant and makes a slave of him because he cannot get a home"); *id.* at 1839 (denouncing vagrancy laws "calculated to virtually make serfs of the persons that the constitutional amendment made free").

[217] *Id.* app. at 142; *id.* at 41 (1865) (describing the "celebrated case of Mr. Hoar, who went to South Carolina" and "was driven out, although he went there to exercise a plain constitutional right"); AMAR, BILL OF RIGHTS, *supra* note 1, at 236 (noting that "Hoar's case still burned bright in the memories of members of Congress, who repeatedly cited the incident").

[218] AMAR, BILL OF RIGHTS, *supra* note 1, at 268 (arguing that the Fourteenth Amendment "meant to stamp out" provisions of the "Black Codes that had designated [Black people] as special targets for various searches and seizures").

To that end, the Framers of the Fourteenth Amendment viewed the requirement of a valid warrant supported by probable cause as crucial. Virtually all of the police abuses that led to the Fourteenth Amendment involved warrantless searches and seizures, illustrating the dangers of allowing the police to search and seize without any judicial check. As Senator Jacob Howard insisted, states would have to respect the Fourth Amendment's "right to be exempt" from "any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit."[219] Howard's formulation was perhaps too broad. Some searches—such as searches incident to arrest—did not require a warrant. But, Senator Howard's description captured the basic idea that warrants were understood as a critical check on police overreaching and abuse and thus were generally required.

In applying the Fourth Amendment to the states, the Framers of the Fourteenth Amendment generated new insights as well. Most significantly, the reconstructed Fourth Amendment was intimately tied to principles of equality. By requiring states to respect the Fourth Amendment's right to be secure from unreasonable searches and seizures, the Fourteenth Amendment sought to eliminate oppressive practices that subjected Black Americans to searches and seizures at the whim of the police. The Framers of the Fourteenth Amendment understood that giving the police excessive discretion licensed discrimination and subordination. Thus, open-ended police power offended not only liberty and personal security, but also equality. The promise of equal citizenship at the core of the Fourteenth Amendment demanded limits on police discretion to search and seize.

Just as important, the Fourteenth Amendment was centrally concerned, in a way the original Fourth Amendment was not, with police violence. The Fourteenth Amendment struck at centuries of history that permitted Black bodies to be violated indiscriminately, and instead promised personal security to all. The Fourteenth Amendment repudiated what Reconstruction Congressman Carl Schurz called rule by "the terrorism of the mob," "the policeman's club," and "the knife of the assassin,"[220] ensuring a remedy against the police "driving away and

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[219] CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

[220] CARL SCHURZ, *The Logical Results of the War*, *in* 4 SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 377, 413 (Frederic Bancroft ed., 1913).

murdering like outlaws the most faithful friends of the Union of liberty" and "repeating the horrors of Fort Pillow," a gruesome Civil War massacre of Black soldiers, "on the streets of Memphis and New Orleans."[221] The Amendment would prevent individuals from "being beaten, maimed, murdered or driven away for exercising the freedom of speech," as had occurred in New Orleans.[222] It would "fetter forever" state sanctioned "cruelty and carnage and murder."[223] The American people ratified the Fourteenth Amendment against the backdrop of horrific instances of police beatings and murder, recognizing that new constitutional protections were necessary to ensure the right to life, basic dignity, and personal security for all regardless of race.

Second, the Fourteenth Amendment added to the Constitution the guarantee of the equal protection of the laws. Both the constitutional command of equality and duty of protection loomed large to the Framers of the Fourteenth Amendment. During the debates over the Fourteenth Amendment, members of Congress explained that the equal protection guarantee "establishes equality before the law," and "does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a [B]lack man for a crime for which the white man is not to be hanged."[224] It requires "one measure of justice" for all persons regardless of race.[225] It demands that "[w]hatever law punishes a white man for a crime shall punish the [B]lack man precisely in the same way and to the same degree."[226] Against the backdrop of a long list of police abuses, the Fourteenth Amendment's simple but far-reaching command of equality prohibited all forms of discrimination in the criminal justice system, including all forms of discriminatory policing.

The Fourteenth Amendment's use of the term "equal protection" was consciously chosen. As Eric Foner observes, "[i]n the context of the violence sweeping the postwar South, the word

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[221] *Id.* at 390.

[222] CURTIS, NO STATE SHALL ABDRIDGE, *supra* note 211, at 144 (citations omitted).

[223] John A. Bingham, A Noble and Eloquent Plea for the Country (Sept. 4, 1866), *in Mr. Bingham's Speech*, WHEELING DAILY INTELLIGENCER, Sept. 5, 1866, at 2.

[224] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

[225] *Id.*

[226] *Id.* at 2459.

'protection'; in the Fourteenth Amendment conjured up not simply unequal laws but personal safety."[227] The Framers understood the right to protection as a basic fundamental right,[228] and in the text of the Equal Protection Clause, they imposed a constitutional obligation on the states to protect all persons equally. States could not turn a blind eye to criminal acts or private violations of rights committed against people of color or other disfavored groups. The Fourteenth Amendment "h[e]ld over every American citizen, without regard to color, the protecting shield of law" and gave to "the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[229] In sum, as Framer Samuel Shellabarger later observed, the Fourteenth Amendment mandates "equal laws and protection for all."[230] The Fourteenth Amendment's guarantee of equal protection meant that Southern police could not continue to ignore white terroristic violence aimed at people of color. The government had to enforce its criminal and civil laws to protect Black Americans and their allies from murder, rape, robbery, and other wrongs.[231]

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[227] FONER, SECOND FOUNDING, *supra* note 136, at 79.

[228] Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546–61 (1991); Balkin, *supra* note 198, at 1847 (describing "right of protection" as "one of the most basic rights of citizens"). The Supreme Court has suggested that nothing in the Fourteenth Amendment "itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," but this reflects a failure to take account of the text and history of the Fourteenth Amendment, which obligated states to provide the equal protection of the laws in response to the fact that Southern government were systematically refusing to enforce the laws to protect Black Americans and their white allies. DeShaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 195 (1989). *See* Heyman, *supra*, at 509 (critiquing *DeShaney* as inconsistent with "the original understanding of the Fourteenth Amendment"); Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. (forthcoming 2021) (arguing that *Deshaney* cannot be squared with the original meaning of the Fourteenth Amendment's equal protection guarantee).

[229] CONG. GLOBE, 39th Cong., 1st Sess. at 2462, 2766 (1866).

[230] CONG. GLOBE, 42nd Cong., 1st Sess. app. at 71 (1871).

[231] *See* STUNTZ, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 291 ("[T]he Fourteenth Amendment's guarantee of 'equal protection of the laws' meant roughly what it said: all citizens had the same right to the law's protection. Ex-slaves terrorized by Klan members were entitled to a government that did its best to stop the terrorism."); Balkin, *supra* note 198, at 1847 (arguing that "the protection of [Black people] and their white allies from private violence" was "a central and immediate purpose of the new amendment"); Akhil Reed

The efforts of our Constitution's Framers to guarantee personal security and check abuse of power by law enforcement is only part of the story. Both at the Founding and in the wake of the Civil War, our Constitution's Framers were dedicated to ensuring a system of remedies to individuals harmed by abuse of power. The next Section turns to examine that system.

IV. MAINTAINING CONSTITUTIONAL ACCOUNTABILITY

Courts are at the center of our Constitution's system of accountability. The Framers designed "the judicial department" to be a "constitutional check,"[232] reflecting their understanding that "no other body . . . can afford such a protection" against "infringement on the Constitution."[233] They did not trust the other branches to police themselves and they therefore empowered the courts to play the essential role of maintaining constitutional accountability. Steeped in the writings of William Blackstone, the Framers understood that rights and remedies must go hand in hand if courts were to play their role of expounding the law and vindicating individual rights. In other words, "a right implies a remedy."[234]

The text of the Fourth Amendment does not address remedies for violations of the right to be secure from unreasonable searches and seizures. But, the historical record is clear that the Framers viewed civil suits against law enforcement officers as a critical check on abusive searches and seizures by the government. This was one of the central lessons of *Wilkes* and other cases of the 1760s, in which juries awarded substantial tort damages to individuals whose homes were invaded or whose papers were searched by the Crown.[235] These cases highlighted

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Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 102 (2000) (explaining that the equal protection guarantee "at its core affirms the rights of victims to be equally protected by government from criminals"); Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L REV. 983, 1001 (2020) ("Forefront in the framers' minds was to provide redress to Black victims of crimes, and to end the legal discrepancies that had long existed in Southern states.").

[232] 2 ELLIOT'S DEBATES, *supra* note 5, at 196.

[233] 3 *id.* at 554.

[234] THE FEDERALIST NO. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961).

[235] CUDDIHY, *supra* note 25, at 760 ("To Americans, one lesson of the Wilkes Cases was that juries could avert outrageous searches by subjecting those responsible to exemplary, financial damage."); George C. Thomas III,

the role of the jury in awarding damages and limiting abuse of power by the government. They taught the Founding generation a powerful lesson: juries could help prevent unreasonable searches and seizures by making officers pay when they abused their authority.

The Framers did not forget these lessons when they debated adding a search-and-seizure guarantee to the Constitution. Those urging new protections consistently emphasized the importance of civil damage remedies to curb the unbridled discretion of federal officers. It was common ground among the Framing generation that civil damage remedies were necessary to prevent abuse of government power.

For example, a Maryland Anti-Federalist essayist, writing under the name of "*A Farmer*," insisted on the constitutional checking function performed by civil suits.

> [N]o remedy has been yet found equal to the task of deterring and curbing the insolence of office, but a jury—It has become an invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression.[236]

During debates in Pennsylvania in 1787, one Anti-Federalist wrote:

> [If] a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift . . . a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from committing the same.[237]

Likewise, in Massachusetts, the essayist Hampden insisted that "without [a jury], in civil actions, no relief can be had against the

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Stumbling Toward History: The Framers' Search and Seizure World, 43 TEX. TECH L. REV. 199, 215 (2010) ("[T]ort law brought the king, his ministers, and his secretary of state to their knees.").

[236] *Essays by a Farmer (I)*, BALT. MD. GAZETTE, Feb. 15, 1788, *reprinted in* 5 THE COMPLETE ANTIFEDERALIST, *supra* note 57, at 14.

[237] *Essay of A Democratic Federalist*, PENN. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 61.

High Officers of State, for abuse of private citizens."[238] In short, the Fourth Amendment was added against the backdrop of a system that allowed individuals to bring civil suits to redress unlawful searches and seizures by the government.

Eight decades later, in the wake of the Fourteenth Amendment's ratification, the Framers of the Fourteenth Amendment built on this same system of remedies. In 1871, Congress enacted 42 U.S.C. § 1983 to enforce the Fourteenth Amendment. To this day, this remains one of the most important federal statutes ensuring that individuals have their day in court when state actors violate federal rights. Against the backdrop of systematic discrimination in the criminal justice system,[239] Congress provided that an "injured party should have an original action in our federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights."[240] This would "carry into execution the guarantees of the Constitution in favor of personal security and personal rights."[241]

The Reconstruction Congress also empowered the federal government to bring criminal charges against officials who violated constitutional rights under color of law,[242] but the criminal remedy was not designed to be exclusive. Section 1983 explicitly created a federal civil remedy that allowed those victimized by governmental abuse of power to go to court to seek redress. As Senator Henry Wilson observed, "[w]hat legislation could be more appropriate than to give a person injured by another under color of such unconstitutional state laws a remedy by civil action?"[243] In enacting Section 1983, Congress concluded that it was necessary to "throw[] open the doors of the United States courts to those whose rights under the Constitution are

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[238] *Essays by Hampden*, MASS. CENTINEL, Feb. 2, 1788, *in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 200.

[239] Donald H. Ziegler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 1013 (1983) (discussing the Reconstruction Congress's "repeated familiar complaints concerning the widespread, systemic breakdown in the administration of southern justice").

[240] CONG. GLOBE, 42nd Cong., 1st Sess. 501 (1871).

[241] *Id.* at 374.

[242] *See* 18 U.S.C. § 242; Screws v. United States, 325 U.S. 91, 98–100 (1945) (describing history of the federal criminal law designed "to enforce the Fourteenth Amendment").

[243] CONG. GLOBE, 42nd Cong., 1st Sess. 482 (1871).

denied or impaired," and ensure the power of the judiciary to "hear with impartial attention the complaints of those who are denied redress elsewhere."[244] In this respect, Section 1983 reflected the Framers' vision that "judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free Government."[245]

V. THE DOCUMENT V. THE DOCTRINE: THE SUPREME COURT'S FAILURE TO HONOR OUR WHOLE CONSTITUTIONAL STORY OF RACE AND POLICING

The text and history of the Fourth and Fourteenth Amendments, laid out in the prior sections, provides a benchmark to assess the Supreme Court's policing jurisprudence. As this Part demonstrates, the doctrine falls woefully short. The Supreme Court has repeatedly betrayed the Fourth Amendment's promise of personal security for all regardless of race and the Fourteenth Amendment's promise of equal protection for all persons. First, rather than reading the Fourth Amendment in light of the Fourteenth Amendment, the Supreme Court's Fourth Amendment doctrine has repeatedly employed open-ended balancing tests to erode constitutional rights, sanction racialized policing practices, and concentrate power in the police. The Court's doctrine ignores race, even as race continues to determine systematically who is policed and who is not. Second, the Court's Fourteenth Amendment jurisprudence has effectively eliminated equal protection as a constraint on policing. As a result, when it comes to policing, equal protection no longer protects. Third, the Court has systematically gutted remedies for police abuse of power, closing the courthouse doors on those seeking to hold the police accountable for violating constitutional rights. In all these ways, the Court has crafted constitutional doctrine that disrespects, rather than honors, our Constitution's text, history, and values. The Court's failure to give Fourteenth Amendment history its due has produced a set of deeply flawed doctrines.

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[244] *Id.* at 376, 459.
[245] *Id.* at 578.

A. The New Police Discretion: Fourth Amendment Reasonableness and the Rebirth of Discretionary Police Power

The Court's modern Fourth Amendment jurisprudence is organized around the idea that "the ultimate measure" of the constitutionality of a government search or seizure is "reasonableness."[246] The Court's governing doctrinal test requires "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[247] This ad hoc balancing test "eschew[s] the Fourth Amendment's foundational principles, instead using social needs, wants, and goals as reasons for decision."[248] And as a result, fundamental constitutional safeguards—such as the need to check excessive discretion and prevent arbitrary and discriminatory policing—often play virtually no role in the

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[246] *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995); Maryland v. King, 569 U.S. 435, 447 (2013). There is a huge scholarly literature on the development of the Court's Fourth Amendment reasonableness doctrine, much of it critical. *See, e.g.*, Maclin, *Central Meaning*, *supra* note 4, at 201 (questioning the Court's current framework because the "constitutional lodestar for understanding the Fourth Amendment is not an ad hoc reasonableness standard; rather, the central meaning of the Fourth Amendment is distrust of police power and discretion"); Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L REV. 281, 297 (2016) (observing that "the Court is well on its way to turning the question of what is 'reasonable' under the Fourth Amendment into a generalized and uncabined balancing test" and that this balancing test is "pernicious" because "the Court's idea of 'balancing' is illusory—the test is rigged such that the government almost always wins"); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1028 (urging that "[a]ny measure of reasonableness must be premised on [constitutional] values; otherwise, reasonableness analysis is subject to deprecation by interpretation favoring governmental needs"); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 385 (1988) (arguing that "reasonableness is a slippery concept that, without definitional restraints, can allow the range of acceptable government intrusions to expand and overwhelm the privacy interests at stake"). For a defense of the turn to reasonableness, see Amar, *First Principles*, *supra* note 77, at 804 (arguing that "[o]nly by keeping our eyes fixed on reasonableness as the polestar of the Fourth Amendment can we steer our way to a world where serious, sustained, and sensible Fourth Amendment discourse can occur").

[247] *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654 (1979). *See also* Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

[248] Morgan Cloud, *The Fourth Amendment During the* Lochner *Era*: *Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 617 (1996). .

Court's conception of Fourth Amendment reasonableness. Instead, reasonableness review is simply a matter of comparing costs and benefits. This subjective, easily manipulable balancing test has swelled police power.

Rather than serving as a check on the police, the Supreme Court has repeatedly balanced away the Fourth Amendment's core safeguard against excessive police discretion to search and seize, often making Fourth Amendment reasonableness review into a toothless inquiry, akin to the rational basis test.[249] By giving the police new discretionary powers, the Court has sanctioned discriminatory policing, racial profiling, and police violence. It has turned a blind eye to the Fourteenth Amendment's transformative guarantees designed to put a stop to such practices and erased the Fourteenth Amendment from the constitutional narrative of policing.

This Section examines how the Court has failed to protect our right to be secure in three critical settings: in the streets, on the road, and at school.

1. *Terry v. Ohio* and the Withering of the Right to Be Secure in the Streets

The Fourteenth Amendment promised freedom of movement and personal security in the streets to all without regard to race. The Amendment sought to prevent white police officers from enforcing vagrancy laws to stop, seize, and arrest

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[249] Under the Supreme Court's equal protection doctrine, "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 319–20 (1993). This test, perhaps the least protective used in constitutional law, is highly deferential and gives the government very wide leeway to enact legislation that favors some persons and disfavors others. As Fourth Amendment scrutiny has become more deferential to the police, upholding searches and seizures as reasonable if based on a legitimate law enforcement objective, it begins to approximate the rational basis test, as a number of scholars have observed. *See* Steiker, *supra* note 121, at 855 ("[J]udgments couched in terms of 'reasonableness' slide very easily into the familiar constitutional rubric of 'rational basis' review—a level of scrutiny that has proven to be effectively no scrutiny at all."); Maclin, *Central Meaning*, *supra* note 4, at 199–200 (arguing that Fourth Amendment reasonableness review "approximates the rational basis standard" because "[i]f the Court can identify any plausible goal or reason that promotes law enforcement interests, the challenged police intrusion is considered reasonable and the constitutional inquiry is over").

Black people en masse. For a very brief moment during Reconstruction, newly established Southern governments, in which Black Americans served as enforcers of the law in ways previously unimaginable, respected the promises contained in the Fourteenth Amendment.[250] But, "[w]hen whites after Reconstruction moved on every front to solidify their supremacy, nowhere was the reassertion of power over [B]lack lives more evident than in the machinery of the police and the criminal justice system."[251] In the late nineteenth and early twentieth centuries, vagrancy laws were a key piece of the legal apparatus designed to "criminalize Black life" and subject Black Americans to a new form of slavery, in which those convicted of crimes were effectively sold to white persons willing to pay the fees assessed as part of their criminal punishment.[252] Well into the mid-1960s, police continued to use vagrancy laws to subordinate and subjugate Black Americans.[253] White police officers employed vagrancy charges to arrest anyone who bucked Jim Crow. Vagrancy laws would eventually be declared unconstitutionally vague because of the "unfettered discretion" they gave the police.[254] But they would soon be replaced by stop-and-frisk.[255]

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[250] *See* FONER, RECONSTRUCTION, *supra* note 126, at 362–63 (discussing transformations that occurred during Reconstruction when "the machinery of Southern law enforcement . . . fell into Republican hands").

[251] LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 247–48 (1998).

[252] DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 53–54, 99 (2008); Roberts, *supra* note 124, at 34 ("[F]or more than a century, vague vagrancy and antiloitering ordinances have given police officers license to arrest [B]lack people standing in the public streets—with no attention to whether or not their presence caused any harm to anyone."). For discussion of the use of vagrancy charges to sell Black people into slavery, see BLACKMON, *supra*, at 1–2, 79–80, 333, 366, 375.

[253] RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 112–27 (2016).

[254] Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972).

[255] Stop-and-frisk is a form of investigative detention by the police that falls short of a full custodial arrest. *See* Wayne R. LaFave, *"Street Enconters" and the Constitution:* Terry*,* Sibron*,* Peters*, and Beyond*, 67 MICH. L. REV. 39, 42 (1968) (describing stop and frisk as a "police procedure for officers to stop suspicious persons for questioning and, occasionally, to search these persons for dangerous weapons"). On the relationship between vagrancy laws and stop-and-frisk, see GOLUBOFF, *supra* note 253, at 198–208; Tracey Meares, *This Land Is My Land?*, 130 HARV. L. REV. 1877, 1893 (2017) (reviewing GOLUBOFF, *supra* note 253) (observing that "the stories told by usually [B]lack and [B]rown youth being policed programmatically in cities across the country echo the accounts of

Just as vagrancy laws replaced slave patrols, stop-and-frisk replaced vagrancy laws as a means of controlling Black people and enforcing their subordinate status.[256]

Terry v. Ohio[257] sanctioned stop-and-frisk. *Terry* involved a stop-and-frisk of a Black man who, according to the police officer, was walking back and forth and peering into a jewelry store window. Thinking that he appeared out of place, the officer approached Terry, asked for identification, spun him around, and patted him down, finding a pistol.[258] In one of the Court's most important Fourth Amendment rulings, *Terry* upheld the constitutionality of stop-and-frisk and dispensed entirely with the Amendment's foundational requirements of a warrant and probable cause. This key move contained the seeds for a massive expansion in the power of the police to invade the personal security of people—particularly people of color—in the streets and elsewhere.

The linchpin of Chief Justice Earl Warren's opinion was that stop-and-frisk "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."[259] The Chief Justice's majority opinion recognized that

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vagrancy policing Goluboff offers in her book"); Pope, *supra* note 136, at 1528–29 ("No sooner had the Supreme Court at long last struck down traditional vagrancy laws, than they were replaced with a host of new statutory crimes, harsh sentences, and enforcement policies targeted at behaviors, conditions, and locations associated with poverty and racial disadvantage.").

[256] This is a textbook example of the dynamic that Reva Siegel calls preservation-through-transformation. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997).

[257] 392 U.S. 1 (1968) (holding that stop-and-frisk policies are constitutional under a "reasonableness" standard even without a warrant or probable cause).

[258] *Id.* at 5–7.

[259] *Id.* at 20. *Terry* was by no means the first Supreme Court decision to frame the relevant Fourth Amendment inquiry in terms of reasonableness. Decades earlier, in *Carroll v. United States*, 267 U.S. 132 (1925), the Supreme Court had stressed that "[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." *Id.* at 147. In doing so, the Court upheld warrantless searches of automobiles in which the officer possessed "reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." *Id.* at 154. *Carroll*, which established special rules for automobile searches, helped set the stage for the fundamental changes to Fourth Amendment doctrine *Terry* introduced. *See* Tracey Maclin, *Cops and Cars: How*

stop-and-frisk triggered the protection of the Fourth Amendment, but insisted that the key question was whether the police had acted reasonably. In a sense, this marked an advance in the law. Police had long been making street stops, often in ways that targeted Black people for arbitrary searches and seizures.[260] *Terry* insisted that police did not have *carte blanche*, but were subject to judicial review.[261]

But what *Terry* gave with one hand it took away with the other. Rather than hewing to the requirement of probable cause, Chief Justice Warren's majority opinion employed a balancing test that gave sweeping powers to the police with no clear limits. While the Court recognized that stop-and-frisk "is a serious intrusion upon the sanctity of the person" and could give rise to "wholesale harassment" of people of color, it upheld the practice under a very forgiving standard.[262] A police officer only had to "point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant th[e] intrusion."[263] *Terry* permitted police to frisk suspects for weapons "for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime," a standard that invited stops based on pernicious racial stereotypes that Black people are dangerous.[264] By dispensing with probable cause in favor of an

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the Automobile Drove Fourth Amendment Law, 99 B.U. L. REV. 2317, 2339–42 (2019) (describing how *Carroll* helped shape *Terry*).

[260] SIMON BALTO, OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER 129 (2019) (discussing stops made by the Chicago police department in the 1940s in which officers "targeted people they found to be suspicious, routinely subjected them to searches for weapons and other contraband, and generally engaged in newly aggressive forms of racially specific harassment"); *Terry*, 392 U.S at 14 n.11 ("The President's Commission on Law Enforcement and Administration of Justice found that '[i]n many communities, field interrogations are a major source of friction between the police and minority groups.") (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967)); Gregory Brazeal, *Mass Seizure and Mass Search*, 22 U. PA. J. CONST. L. 1001, 1025 (2020) (observing that "the history of programmatic stop-and-frisk preceded *Terry* and was not created by it").

[261] *Terry*, 392 U.S. at 13–14 (recognizing that "some police 'field interrogation' conduct violates the Fourth Amendment").

[262] *Id.* at 17, 14.

[263] *Id.* at 21.

[264] *Id.* at 27; L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2062–63 (2011) (arguing that "[b]y allowing

easily met reasonable suspicion standard, *Terry* sanctioned a wide swathe of police intrusion on freedom of movement on the streets. As Justice William O. Douglas observed in a prescient dissent, "if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime."[265]

Terry employed its balancing approach without any sensitivity to the Constitution's text, history, and values. Chief Justice Warren assumed that the Court could balance individual and governmental interests on a clean slate. It gave no consideration at all to the text and history of the Fourteenth Amendment, including the Framers' concerns about vagrancy laws that gave police indiscriminate power to stop and seize Black Americans. Had the Court taken the Fourteenth Amendment's text and history seriously, it would not have approved stop-and-frisk on the basis of a loose constitutional standard that invites racial discrimination and enables police to act on the basis of racial stereotypes. It would not have accepted a constitutional rule that permits the police to target people of color for arbitrary, degrading, and humiliating intrusions on a regular basis.[266]

In *Terry,* Chief Justice Warren described the officer's stop-and-frisk as simply good police practice, insisting that "the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do."[267] But, the Court did not sufficiently consider

officers to act on their own interpretation of ambiguous behaviors, the reasonable suspicion test actually permits . . . actions based on racial hunches"); Carbado & Harris, *supra* note 9, at 1573 (arguing that because "reasonable suspicion is an easy evidentiary standard to meet, police officers can base their decision to stop and frisk suspects on stereotypes about criminality and dangerousness and offer race-neutral justification after the fact").

[265] *Terry*, 392 U.S. at 39 (Douglas, J., dissenting).

[266] Carbado, *Stop and Frisk*, *supra* note 9, at 1537 (describing how *Terry* "facilitates the 'wholesale harassment' of African Americans through 'prophylactic racial profiling'"); Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1278 (1998) (explaining how "*Terry* provided a springboard for modern police methods that target [B]lack men and others for arbitrary and discretionary intrusions").

[267] *Terry*, 392 U.S. at 28 (majority opinion).

the system-wide costs of permitting police stops on a lax, forgiving standard. By jettisoning probable cause, *Terry* made it easy for the police to stop and frisk people with virtually no evidentiary foundation. By permitting such searches on such a lenient standard, the Court sanctioned lots of intrusions—mostly on people of color—that are unlikely to lead to evidence of a crime.[268]

Terry gave police a permission slip with extremely broad consequences. Over time, in cases decided by the Burger and Rehnquist Courts, *Terry*'s standard, forgiving from the start, became even more so. In a trio of cases decided by then-Justice and Chief Justice William Rehnquist, the Court moved the law sharply in the direction of increasing police authority. The original justification for stop-and-frisk—protecting officer safety—gave way to a more general interest in crime control.[269] Rather than constrain *Terry* and treat it as a narrow exception to the requirement of probable cause, the Court gave police a wide berth to employ *Terry* broadly, paying short shrift to concerns that an expansive reading of *Terry* would license humiliating, degrading searches and seizures predominantly in communities of color.

In 1972, in *Adams v. Williams*,[270] the Court upheld a frisk of a suspect based on an anonymous tip, who had told the police that Robert Williams had drugs and a gun in his waist. Although it was legal to possess a gun, the majority held that the frisk that led to the seizure of the gun was reasonable because "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known

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[268] FRIEDMAN, UNWARRANTED, *supra* note 24, at 150 ("With probable cause out the window, lots of people get stopped and frisked by the police, and comparatively little evidence or contraband is found . . . . [T]he whole point of probable cause is to indicate when a search for evidence might prove fruitful.").

[269] Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 56 (describing the "doctrinal shift over time from the original officer safety rationale to permitting reasonable suspicion stops in the interest of crime control"); David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 22–23 (1994) (describing expansion of *Terry* in the lower courts to "allow frisks automatically—categorically—in many situations in which the offense suspected does not require a weapon, and the suspect shows no outward sign he might be armed and dangerous").

[270] 407 U.S. 143 (1972).

to the officer at the time."[271] In dissent, Justice Thurgood Marshall argued that the majority "betray[ed] the careful balance that *Terry* sought to strike between a citizen's right to privacy and his government's responsibility for effective law enforcement" by permitting "innocent citizens" to be "stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct."[272]

In 1989, in *United States v. Sokolow*,[273] the Court approved a *Terry* stop of a suspect in an airport based on a drug courier profile. It did not matter that the evidence on which the officer relied to justify the stop "[wa]s quite consistent with innocent travel."[274] All the officer needed was "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause."[275] The match with a drug courier profile sufficed, even though, as Justice Marshall observed in dissent, such profiles could be easily manipulated to allow the police to stop whomever they wanted.[276] The majority, Justice Marshall lamented, failed to recognize that the Fourth Amendment "protects innocent persons from being subjected to 'overbearing or harassing' police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race."[277]

And, in 2000, in *Illinois v. Wardlow*,[278] the Court, by a 5-4 vote, approved a stop-and-frisk based on a suspect's "unprovoked flight" in a high crime area. Even if "the conduct justifying the stop was ambiguous and susceptible of an innocent explanation," police officers could "detain the individuals to resolve the

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[271] *Id.* at 146.

[272] *Id.* at 154, 162 (Marshall, J., dissenting).

[273] 490 U.S. 1 (1989).

[274] *Id.* at 9.

[275] *Id.* at 7.

[276] *Id.* at 13–14 (Marshall, J., dissenting) (observing past cases in which stops were justified by the fact that suspect was "first to deplane," "deplaned from middle," "last to deplane," bought "one-way tickets," "round-trip tickets," was "travelling alone," or "travelling with companion," was "act[ing] nervously" or "too calmly"). *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 47 (1999) (describing the drug courier profile as "a scattershot hodge-podge of traits and characteristics so expansive that it potentially justifies stopping anybody and everybody").

[277] *Sokolow*, 490 U.S. at 12 (Marshall, J., dissenting).

[278] 528 U.S. 119 (2000).

ambiguity."[279] As Chief Justice Rehnquist wrote, "*Terry* accepts the risk that officers may stop innocent people."[280] Wardlow's presence in an "area of heavy narcotics trafficking" together with his "unprovoked flight upon noticing the police" permitted the police to stop and frisk him for weapons.[281] *Wardlow* gives the police more power to stop and frisk individuals in a high-crime neighborhood, brushing aside the dissent's argument that "some citizens, particularly minorities" might flee from the police out of concern that "contact with the police can itself be dangerous."[282] As *Wardlow* illustrates, the toxic role of race in policing plays no role in *Terry*'s construction of Fourth Amendment reasonableness.[283]

The Court has reviewed stop-and-frisk in the context of individual encounters, but, as Tracey Meares argues, "in reality stop-and-frisk is typically carried out by a police force en masse as a program" by "proactively policing people that they suspect could be offenders."[284] That is what happened in New York City from 2004–2012, when the New York Police Department (NYPD) conducted more than four million stops and two million frisks, which were almost all on Black or Brown people, and which turned up, at best, paltry evidence of criminality.[285] No weapon

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[279] *Id.* at 125.

[280] *Id.* at 126.

[281] *Id.* at 124–25.

[282] *Id.* at 132 (Stevens, J., concurring in part and dissenting in part).

[283] Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 249 (2010) (describing how the Court "pay[s] short shrift to race—even when race seemed an integral element"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962 (1999) (criticizing "the Court's conception of a raceless world of Fourth Amendment jurisprudence"). *See also* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 841 (2020) (observing that "our constitutional rules" often "set up a system that facilitates policing practices that target certain neighborhoods and populations, creating collective racialized harms in the process of everyday policing").

[284] Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162, 164 (2015) (emphasis omitted). *See also* FRIEDMAN, UNWARRANTED, *supra* note 24, at 154 ("[R]ather than stopping on cause and frisking for protection, over time, the search became the goal and the stop merely a means to that end."); Carbado, *Stop and Frisk*, *supra* note 9, at 1540 (describing use of stop-and-frisk as an "order-maintenance strategy and a prophylactic device to deter [Black people] from carrying weapons or otherwise engaging in criminal conduct").

[285] Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013). *See* FRIEDMAN, UNWARRANTED, *supra* note 24, at 140–42, 155–56;

was found in 98.5% of the frisks; nearly 90% of people stopped were released without further police action.[286] The police targeted Black and Brown people, in the words of NYPD Commissioner Ray Kelly, "to instill fear in them, every time they leave their home, they could be stopped by the police."[287] This is what stop-and-frisk has become today as the result of the Supreme Court's abandonment of fundamental Fourth and Fourteenth Amendment principles. Stop-and-frisk, employed in this manner, bears a startling resemblance to the vagrancy laws that the Fourteenth Amendment aimed to stop.

The Supreme Court's stop-and-frisk jurisprudence beginning with *Terry* has sanctioned intrusive searches and seizures that do not amount to a full arrest. The Supreme Court has also given the police sweeping powers to arrest individuals without a warrant, even for very minor crimes that do not carry any jail time.

In 2001, in *Atwater v. City of Lago Vista*,[288] the Supreme Court held, by a 5-4 vote, that the Fourth Amendment permitted the police to make warrantless arrests for minor offenses only punishable by a fine. The police arrested Gail Atwater for driving without her seatbelt fastened, an offense that was punishable by a fine of $25–50 dollars. The Court called the arrest a "pointless indignity," but nevertheless upheld it, concluding that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[289]

Atwater exemplifies the modern Supreme Court's tendency to treat eighteenth-century common law and practice as dispositive of what constitutes a reasonable search or seizure.[290] The Court emphasized that, "[d]uring the period

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Carbado, *Stop and Frisk*, *supra* note 9, at 1537–51; Meares, *supra* note 284, at 164–65.

[286] *Floyd*, 959 F. Supp. 2d at 558–59.

[287] *Id.* at 606.

[288] 532 U.S. 318 (2001).

[289] *Id.* at 347, 354.

[290] The Court has even made common law analysis a mandatory part of the test it used to assess Fourth Amendment reasonableness, asking "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." Wyoming v. Houghton, 526 U.S. 295, 299 (1999). *See* California v. Hodari D., 499 U.S. 621, 624–25 (1991); Florida v.

leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures, like Parliament before them, regularly authorized peace officers to make warrantless misdemeanor arrests."[291] Based on this practice, the Court concluded that "the Fourth Amendment, as originally understood," did not forbid "local peace officers [from] arrest[ing] without a warrant for misdemeanors not amounting to or involving breach of the peace."[292]

Atwater's account of Framing-era history is, at best, questionable. As Thomas Davies argues, "[i]f one asks whether there were any framing-era sources that supported unlimited discretionary warrantless arrest authority for even the most minor nonbreach offenses . . . the answer is plainly negative. *All* the framing-era authorities limited arrest authority to something less—a good deal less—than all nonbreach misdemeanors."[293]

Atwater's more significant error was making eighteenth-century practice the touchstone of constitutional meaning.[294] By focusing on the practice in 1791, the majority brushed aside the Fourth Amendment's dictate to curb excessive law enforcement discretion. In so doing, the Court blessed a truly sweeping power to arrest, even for the most minor offenses. It licensed what the majority called "gratuitous humiliations" and "pointless indignity" and, as the dissent observed, "cloak[ed]" them in the "mantle of reasonableness."[295]

White, 526 U.S. 559, 563 (1999); *Atwater*, 532 U.S. at 326–27; Nieves v. Bartlett, 139 S. Ct. 1715, 1726 (2019). For critical commentary on the doctrine, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1776–93 (2000) [hereinafter Sklansky, *Fourth Amendment*]; Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 955–57 (2002) [hereinafter Maclin, *Sleeping Dogs*].

[291] *Atwater*, 532 U.S. at 337.

[292] *Id.* at 340.

[293] Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 318 (2002) (emphasis added).

[294] Maclin, *Sleeping Dogs*, *supra* note 290, at 968 (stressing the need to "distinguish between what the Framing generation *meant* when the Fourth Amendment was adopted and what the *expectations* of other legal actors regarding the permissibility of different search and seizure practices were at the time") (emphasis added).

[295] *Atwater*, 532 U.S. at 346, 347; *id.* at 373 (O'Connor, J., dissenting).

By beginning and ending its analysis in 1791, *Atwater* gave no consideration to the Fourteenth Amendment. The Framers of the Fourteenth Amendment were concerned that white police officers were arresting Black people for a host of trivial crimes.[296] This history weighs heavily against giving police the unfettered authority to arrest for very minor offenses. But, none of that history is discussed or accounted for in the *Atwater* ruling, even though the case involved a warrantless arrest made by a municipal police officer. *Atwater*'s holding would permit arrests for a wide range of extremely minor offenses, giving police officers virtually unbridled discretion to use "a relatively minor traffic infraction" to "serve as an excuse for stopping and harassing" people of color.[297]

Indeed, many aspects of eighteenth-century common law and practice are particularly difficult to square with the Fourteenth Amendment's text, history, and values. For example, as David Sklansky notes, eighteenth-century search-and-seizure rules on both sides of the Atlantic "systematically codified class privilege,"[298] such as by allowing general searches to enforce vagrancy laws against poor people,[299] who were often dismissed as "pests of society."[300] Such rules, of course, did not survive the Fourteenth Amendment, which promised personal security for all against the backdrop of vagrancy laws that were being employed to stop and seize Black people on an officer's whim. The Fourteenth Amendment guaranteed "the absolute equality of

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[296] *See* REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 138, pt. III at 8; Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 173 (2020) ("The Fourteenth Amendment became law in 1868, just as post-bellum Southern states were beginning to convert their low-level misdemeanor systems into a massive apparatus aimed at effectively enslaving African Americans.").

[297] *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1489 (2016) (observing that, because of "mass criminalization," police officers have "mostly unbridled" discretion "to target African-Africans, particularly young African-Americans in public places"); Natapoff, *supra* note 296, at 164 (explaining that "low-level arrests are a powerful engine of racial discrimination and stratification").

[298] Sklansky, *Fourth Amendment*, *supra* note 290, at 1773.

[299] *Id.* at 1805 ("Peers and members of Parliament received special protections against search and seizure, while the homes of the poor were freely inspected for vagrants, poached game and morals violations."); Cloud, *Searching*, *supra* note 69, at 1719 ("Warrantless general searches to round up vagrants and other social 'undesirables' were a common social control device in England.").

[300] CUDDIHY, *supra* note 25, at 482 (citations omitted).

rights of the whole people, high and low, rich and poor, white and [B]lack."[301]

The *Atwater* majority justified creating a sweeping warrantless arrest power by insisting that "a responsible Fourth Amendment balance" requires "readily administrable rules," putting the thumb on the scales in favor of increased police authority.[302] The Court elevated the desire for clear rules over the Fourth Amendment's fundamental concerns of ensuring personal security for all. *Atwater* rigged the Fourth Amendment balancing inquiry in favor of the police. The police officer's need for clear rules trumped the individual's right to avoid a pointless seizure that resulted in jail time which could not have been imposed on conviction. As Alexandra Natapoff observes, "[t]he importance of preserving the carceral police power outweighed everything."[303] *Atwater*'s one-sided version of reasonableness vastly overinflated the government's interest, slighted a serious deprivation of liberty, and enabled racialized policing.

Every *Terry* stop-and-frisk or arrest creates the potential for a tragic violent encounter between the police and the populace. As Devon Carbado writes, this "'front-end' police conduct—which Fourth Amendment law enables—is often the predicate to 'back end' police violence—which Fourth Amendment law should help to prevent."[304] But Fourth Amendment law has not been preventing it. Instead, in the hands of the Supreme Court, the Fourth Amendment has done little to check police violence. The Court has erased police violence from our whole constitutional story of policing. The Court's cases have never recognized that ending brutal police violence was at the heart of the Fourteenth Amendment's limits on abuse of power by the states.[305]

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[301] CONG. GLOBE, 39th Cong. 1st Sess. 1159 (1866); *id.* at 343 ("[T]he poorest man, be he [B]lack or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land[.]").

[302] *Atwater*, 532 U.S. at 347.

[303] Natapoff, *supra* note 296, at 159.

[304] Carbado, *From Stopping to Killing*, *supra* note 12, at 127.

[305] The Court's failure to recognize that ending police violence is a critical part of our Constitution's text and history distorts how the Court reasons about police violence. Consider, for example the Supreme Court's recent decision in *Torres v. Madrid*, 141 S. Ct. 989 (2021), in which a divided Court held that a police shooting of an individual triggers Fourth Amendment

Police violence should run afoul of the Constitution, but it rarely does because the Court's open-ended test is vague and deferential to the police. In 1989, in *Graham v. Connor*,[306] the Supreme Court, in an opinion by Chief Justice Rehnquist, held that "all claims that law enforcement officers have used excessive force" must be "analyzed under the Fourth Amendment and its 'reasonableness' standard."[307] This requires "careful balancing" and recognition that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[308] Further, according to the Court, "[t]he 'reasonableness' must be judged from the perspective of a reasonable officer on the scene," and "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[309]

So much for the need for clear rules. The law that governs police violence is a vague and indeterminate mess, requiring courts to "slosh [their] way through the fact bound morass of 'reasonableness.'"[310] In *Tennessee v. Garner*, the Court's first

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scrutiny even if the individual is not subdued by the shots fired. The majority and dissent disagreed vehemently over how to apply the common law of arrest to a police shooting that the Framers of the Fourth Amendment could have scarcely envisioned. *Id.* at 998 (refusing to "carve out this greater intrusion on personal security" simply because "founding-era courts did not confront apprehension by firearm"). In the dissent's view, there was no Fourth Amendment seizure unless the shots fired, in fact, subdue the individual. *Id.* at 1015 (Gorsuch, J., dissenting). *Torres* would be an easier case had the Court considered that ending unjustified police violence lies at the core of the Fourteenth Amendment's protections. The Court missed the opportunity to make clear that limits on police violence are deeply rooted in the Constitution's text and history and do not depend on what Justice Gorsuch called "penumbras of 'privacy' and 'personal security.'" *Id.* at 1016 (Gorsuch, J., dissenting).

[306] 490 U.S. 386 (1989).

[307] *Id.* at 395 (emphasis omitted).

[308] *Id.* at 396.

[309] *Id.* at 396–97.

[310] Scott v. Harris, 550 U.S. 372, 383 (2007). *See also* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1140 (2008) (arguing that Supreme Court doctrine provides "almost no direction at all about what constitutes reasonable force"); Stuntz, *Privacy's Problem*, *supra* note 8, at 1043 n.93 (lamenting the lack of "any body of case law that gives this standard some content"); Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 584 (2021) (arguing that current doctrine "provides little to no guidance to officers about whether and how to use force. The framework it establishes for evaluating officer actions is equally

major excessive force case, the Supreme Court held that a "police officer may not seize an unarmed, nondangerous suspect by shooting him dead."[311] But, since then, the Court's has essentially replaced *Garner*'s rule with open-ended, ad hoc balancing,[312] crafting doctrines specifically designed to give police officers more leeway to engage in wanton violence. The lack of clear rules makes it much more difficult to hold police officers accountable when they engage in violent, unjustified acts.[313] The Court's doctrine is a colossal failure, opening the door to systemic police violence, much of it directed against people of color.

2. The Rules of the Road: How the Supreme Court Sanctioned Discretionary and Discriminatory Policing on the Nation's Roadways

Driving on the open road is a potent symbol of freedom, but the very mobility that we celebrate also allows criminals to get away. Rather than striking a sensible accommodation between freedom of movement and crime prevention, the Supreme Court diluted the Fourth Amendment's promise of security on the road, making "driving, or even just being in a car" the "most policed aspect of everyday life."[314] The Court has given the police extremely broad power over motorists and their passengers, licensing arbitrary stops and systematic racial profiling of people of color. On the road, the individual's personal security exists at the whim of the police. Virtually anytime they want, the police can stop a car,[315] order the driver and passengers out of the car,[316] and pressure them into consenting to a further

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vacuous; the well-known *Graham* factors are of limited analytical value, are not well defined, and are woefully incomplete").

[311] Tennessee v. Garner, 471 U.S. 1, 11 (1985).

[312] *Scott*, 550 U.S. at 383 ("Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such 'preconditions' have scant applicability to this case, which has vastly different facts.").

[313] Harmon, *supra* note 310, at 1123 (arguing that "the indeterminate nature of the Court's doctrine leads many unconstitutional uses of force to go uncompensated and undeterred"); Stoughton, *supra* note 310, at 584 (arguing that the Court's Fourth Amendment doctrine offers "a profoundly flawed framework for regulating police violence").

[314] SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 12 (2019).

[315] Whren v. United States, 517 U.S. 806 (1996).

[316] Pennsylvania v. Mimms, 434 U.S. 106 (1977); Maryland v. Wilson, 519 U.S. 408 (1997).

search.[317] Tragically, these encounters all too often end in brutal police violence.[318] Because traffic laws are so extensive that practically everyone is violating them some of the time, traffic laws give virtually unfettered authority to the police.[319] Rather than checking police discretion, the Supreme Court has given the police a blank check to stop anyone who might have violated a traffic law, no matter how insignificant.

On the road, as in the streets, *Terry* looms large. The Supreme Court has held that, under *Terry*, police may stop a car "when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'"[320] In *Navarette v. California*,[321] a patrol officer stopped a pick-up truck on the basis of an anonymous 911 caller's report. The truck matched the description of a vehicle that, according to the caller, had run her off the road. That was enough, the majority held, to create a reasonable suspicion of drunken driving and justify a *Terry* stop.[322] It did not matter that, when police tailed the truck for five minutes, they saw no evidence of drunken driving.[323] This is an incredibly broad license

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[317] Ohio v. Robinette, 519 U.S. 33 (1996); Stuntz, *Privacy's Problem*, *supra* note 8, at 1064 (describing the Court's doctrine as a "kind of Jeopardy rule: if the officer puts his command in the form of the question, consent is deemed voluntary"); George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L. J. 525, 540 (2003) ("The consent search doctrine is the handmaiden of racial profiling. On the street, police can approach young men and ask for consent to search solely on the basis of race.").

[318] SEO, *supra* note 314, at 266 (observing that "nearly a third of police shootings in 2015 began with a traffic stop"); Maclin & Savarese, *supra* note 9, at 59 (noting a number of "[B]lack motorists stopped for trivial traffic violations and then killed by police").

[319] Sklansky, *Traffic Stops*, *supra* note 9, at 298–99 ("Because almost everyone violates traffic rules sometimes, this means that the police, if they are patient, can eventually pull over anyone they are interested in questioning."); Barbara C. Salken, *The General Warrant of the Twentieth Century?: A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 222 (1989) (likening traffic laws to general warrants because "police officers in most states may arrest and search virtually every adult almost at whim").

[320] Navarette v. California, 572 U.S. 393, 396 (2014) (quoting United States v. Cortez, 449 U.S. 411, 417–18 (1981)); Kansas v. Glover, 140 S. Ct. 1183, 1187 (2020); United States v. Arvizu, 534 U.S. 266, 273 (2002).

[321] 572 U.S. 393.

[322] *Id.* at 401–03; *id.* at 409 (Scalia, J., dissenting) (arguing that the 911 call "neither asserts that the driver was drunk nor even raises the *likelihood* that the driver was drunk").

[323] *Id.* at 403–04 (majority opinion).

to stop, that, as Justice Antonin Scalia argued in dissent, could not be squared with "the Framers' [concept]" of "a people secure from unreasonable searches and seizures."[324] All a 911 caller "need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police."[325] It is worth remembering that the original rationale for *Terry* was to protect officers from violence. *Navarette* shows how far we have come from that initial justification. Officer safety—once the linchpin of *Terry*—is irrelevant to the Court's analysis.

Terry stops are just one part of a broader story. In a number of cases, the Court has used *Terry*'s balancing approach to swell police power, sanction racial profiling, and approve additional departures from the bedrock requirement of probable cause. In 1975, in *United States v. Brignoni-Ponce*,[326] the Supreme Court held that federal officers may conduct roving patrols near the Mexican border to stop vehicles and question their occupants about their citizenship status without a warrant or probable cause. Viewing the stop as a "minimal intrusion" and stressing the "importance of the governmental interest" in stemming illegal immigration, the Court held that "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion."[327] Incredibly, the Court expressly approved race as a relevant factor, turning on its head our most basic constitutional rule of equality. It observed that the "likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor," but it refused to permit "stopping all Mexican-Americans" to ask for their immigration status.[328] A Court that took account of our whole constitutional story of race and policing would not allow the police to engage in blatant racial profiling.

In 1976, in *United States v. Martinez-Fuerte*,[329] in yet another expansion of *Terry*, the Court held that, at fixed

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[324] *Id.* at 405 (Scalia, J., dissenting).

[325] *Id.* at 413.

[326] 422 U.S. 873 (1975).

[327] *Id.* at 881.

[328] *Id.* at 886–87; Carbado & Harris, *supra* note 9, at 1575 (explaining that *Brignoni-Ponce* "authorizes the express utilization of race as a basis for suspicion").

[329] 428 U.S. 543 (1976).

checkpoints more than 50 miles from the U.S.-Mexico border, an officer may stop a vehicle "for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens."[330] *Martinez-Fuerte* reasoned that a stop even on something as slight as reasonable suspicion "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car."[331] In the majority's view, "the Fourth Amendment imposes no irreducible requirement of such suspicion."[332] Explicitly upholding race-based stops once again, the Court was untroubled that stops would be "made largely on the basis of apparent Mexican ancestry," insisting that "Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved."[333] Under *Terry*'s balancing regime, every Fourth and Fourteenth Amendment protection can be balanced away.

This extremely broad discretion results in systematic racial profiling on our nation's roads. Sadly, this is hardly a new phenomenon. Since the early 20th century, Black motorists have experienced "traffic stops for minor or fabricated charges that left them terrified" in some cases and "falsely arrested, beaten, or shot" in others.[334] In the 1940s, Thurgood Marshall was almost lynched following a pretextual traffic stop.[335] A decade later, in the midst of the Montgomery Bus Boycott, police officers arrested Dr. Martin Luther King for a minor traffic violation in order to intimidate him.[336] Discriminatory traffic stops remain an enduring problem: as study after study has shown, "racial disparities in traffic stops remain rampant."[337] But according to

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[330] *Id.* at 545.

[331] *Id.* at 557.

[332] *Id.* at 561.

[333] *Id.* at 563–64; Carbado & Harris, *supra* note 9, at 1583 (observing that "because no level of suspicion is required to justify checkpoint stops, and because race is relevant to immigration enforcement, Border Patrol agents can employ apparent Mexican ancestry as the basis for suspicion").

[334] SEO, *supra* note 314, at 183.

[335] *Id.*

[336] Maclin & Savarese, *supra* note 9, at 43–45.

[337] *Id.* at 66. *See also* DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 72 (2002) ("The data on stops are incontrovertible. The information comes from many cities and involves many different police departments and law enforcement contexts. . . . [A]ll of the data points in the same direction: minorities are stopped, questioned, and searched in numbers far out of proportion to their presence in the driving population. And

the Supreme Court, pretextual traffic stops pose no constitutional problem. In *Whren v. United States*,[338] the police were patrolling a high-crime area when a truck with temporary license plates aroused their suspicions. When the truck made a right turn without signaling, the officers stopped the truck and discovered crack cocaine in Whren's hands. Although the traffic stop was pretextual and violated the police department's own policy, the Court unanimously held that it was reasonable under the Fourth Amendment. The Court held that the "constitutional reasonableness of traffic stops" depends on "ordinary, probable-cause Fourth Amendment analysis," not the "actual motivations of the individual officers involved."[339] Across the board, "probable cause to believe the law has been broken 'outbalances' private interest in avoiding police conduct."[340] Far from constraining the police, probable cause in this context, as Tracey Maclin writes, operates as "a lever to initiate an arbitrary seizure" and "insulate[] the decision from judicial review."[341]

Justice Scalia's opinion in *Whren* recognized that, in other contexts, searches and seizures were so invasive of Fourth Amendment interests that probable cause alone did not make them reasonable. But he saw no constitutional problem in giving police close to unfettered power to stop individuals for traffic violations. *Whren* turned a blind eye to the constitutional imperative of checking police discretion. It ignored that such unchecked discretion inevitably breeds arbitrariness and discrimination. *Whren*'s version of Fourth Amendment reasonableness, which is supposed to consider all circumstances,

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it is not their driving behavior or vehicles that account for this."); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretext Stops and Racial Profiling*, 73 STAN. L. REV. 637, 697 (2021) (presenting empirical data demonstrating that "rules granting police discretion in traffic stops may lead to more traffic stops of drivers of color, with some likely escalating to more serious encounters"); John Eligon, *Stopped, Ticketed, and Fined: The Perils of Driving While Black in Ferguson*, N.Y. TIMES (Aug. 6, 2019), https://www.nytimes.com/2019/08/06/us/black-drivers-traffic-stops.html [https://perma.cc/78D6-PPZV]; John Sides, *What Data on 20 Million Traffic Stops Can Tell Us About "Driving While Black"*, WASH. POST (July 17, 2018, 6:30 PM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/17/what-data-on-20-million-traffic-stops-can-tell-us-about-driving-while-black [https://perma.cc/EA5P-J89G].

[338] 517 U.S. 806 (1996).

[339] *Id.* at 813.

[340] *Id.* at 818.

[341] Maclin, *Fourth Amendment*, *supra* note 9, at 377.

ignored race entirely.[342] *Whren* illustrates the Court's continuing blindness to race, even as it systematically determines who gets policed. Justice Scalia relegated claims of discriminatory policing to the Equal Protection Clause, even as he ignored the virtually insurmountable hurdles to a successful equal protection claim.[343]

3. Special Needs, School Searches and Seizures, and the School-to-Prison Pipeline

In the streets and on the road, the Supreme Court has swelled police discretion to search and seize, using a vague, open-ended balancing test to give the police new powers to enforce criminal laws. In another line of cases, the Court has expanded the powers of the government to pursue so-called "special needs"—those beyond the normal needs of law enforcement—without respecting the usual Fourth Amendment requirements of a warrant, probable cause, or even reasonable suspicion.[344] The "special needs" doctrine has transformed policing in school, giving school authorities broad powers to search and seize students, sometimes without any suspicion at all. This has fueled the school-to-prison pipeline and subjected students to a host of intrusive searches and seizures in the name of maintaining law and order.[345] Unsurprisingly, giving school officials sweeping power to search and seize without probable cause leads to racial profiling, racial disparities in discipline, and consequently, racial disparities in educational opportunities.[346]

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[342] *Id.* at 370–71, 375; Sklansky, *Traffic Stops*, *supra* note 9, at 329.

[343] *Whren*, 517 U.S. at 813; Sklansky, *Traffic Stops*, *supra* note 9, at 326 (observing that equal protection doctrine "has developed in ways that poorly equip it to address the problems of discriminatory police conduct").

[344] For discussion, see FRIEDMAN, UNWARRANTED, *supra* note 24, at 167–84; Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254 (2011).

[345] Barry C. Feld, T.L.O. *and* Redding*'s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 851 (2011); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 937–39 (2016); Alexis Karteron, *Arrested Development: Rethinking Fourth Amendment Standards for Seizures and Uses of Force in School*, 18 NEV. L.J. 863, 868–69 (2018).

[346] *See* James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 150, 152–55 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing racial profiling of students by police at schools in Washington, D.C.); Lia Epperson, Brown*'s Dream Deferred: Lessons on Democracy and Identity From* Cooper v. Aaron *to the "School-to-Prison Pipeline"*, 49 WAKE FOREST L. REV. 687, 698 (2014) (discussing

New Jersey v. T.L.O.[347] initiated this transformation. *T.L.O.* made the same move as *Terry*: it jettisoned basic Fourth Amendment concepts of a warrant and probable cause and replaced them with a malleable balancing test that allows judges to trade away the individual's right to be secure.

In *T.L.O.*, a high school assistant principal, who was investigating two girls for smoking in the girl's bathroom, searched a student's purse—first for cigarettes, and then for drugs. In upholding the search, the *T.L.O.* Court held that the warrant and probable cause requirements were "unsuited to the school environment," insisting that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."[348] As in *Terry*, *T.L.O.* held that rummaging through a person's belongings was a search, but that reasonable suspicion would suffice to justify it. School authorities would be spared "the necessity of schooling themselves in the niceties of probable cause" and permitted to search and seize "according to the dictates of reason and common sense."[349]

Next, the Court validated suspicionless searches of wide segments of the student body. In *Vernonia School District 47J v. Acton*,[350] decided in 1995 and *Board of Education v. Earls*,[351] decided in 2002, the Court held that it was constitutionally reasonable to require all student athletes and students engaged in other competitive extracurricular activities to be tested for drugs. Dissenting in *Vernonia*, Justice O'Connor looked to the Fourth Amendment's text and history and concluded that "mass,

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how "the criminalization of today's students of color" result in "leav[ing] students" in communities of color "powerless and ill prepared to be active members of a democracy"); *Evie* Blad & Alex Harwin, *Analysis Reveals Racial Disparities in School Arrests*, PBS NEWSHOUR (Feb. 27, 2017, 4:09 PM), https://www.pbs.org/newshour/education/analysis-reveals-racial-disparities-school-arrests [http://perma.cc/6RWT-V2Q2]; German Lopez, *Black Kids Are Way More Likely to be Punished in School than White Kids, Study Finds*, VOX (Apr. 5, 2018, 8:00 AM), https://www.vox.com/identities/2018/4/5/17199810/school-discipline-race-racism-gao [https://perma.cc/7FZP-9P2Q].

[347] 469 U.S. 325 (1985).

[348] *Id.* at 340–41.

[349] *Id.* at 343.

[350] 515 U.S. 646 (1995).

[351] 536 U.S. 822 (2002).

suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment."[352] But narrow majorities, including the Court's conservative originalists, dismissed the relevance of this history. As Justice Clarence Thomas observed in *Earls*, "we have long held that 'the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.'"[353] In reaching this result, the Court's majorities drew explicitly on past rulings that had permitted suspicionless car stops to enforce immigration laws at the border. One Fourth Amendment evasion bred another.

Under *T.L.O.*'s forgiving standard, students have been subjected to all manner of intrusive, humiliating searches and seizures. In one recent case, a federal court of appeals upheld an officer's handcuffing of a seven-year-old Black child for twenty minutes, insisting that the boy's unruly behavior justified the use of handcuffs.[354] In the court's view, there was nothing constitutionally unreasonable in treating a little boy as a common criminal simply because he had an emotional outburst at school.

Even strip searches may be permissible if school officials have a colorable basis for believing that students are hiding drugs in their underwear. In 2009, in *Safford Unified School District v. Redding*,[355] the Supreme Court held that school officials violated the Fourth Amendment by searching the bra and underpants of a thirteen-year-old girl for ibuprofen pills. The Court did not forbid the strip search of a student, but simply held that "the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts," and, in Redding's case, there was none.[356] Indeed, even affording a "high degree of deference" to school officials, there was no reason to think that she was "hiding common painkillers in her underwear."[357] And notwithstanding that, seven justices held that Redding's suit had to be dismissed under the doctrine of qualified immunity because it was not clear how *T.L.O.* applied

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[352] *Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting).

[353] *Earls*, 536 U.S. at 829 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)); *Vernonia*, 515 U.S. at 653.

[354] K.W.P. v. Kansas City Pub. Schs., 931 F.3d 813, 826–27 (8th Cir. 2019).

[355] 557 U.S. 364 (2009).

[356] *Id.* at 376.

[357] *Id.* at 376–77.

to strip searches.[358] *Redding* invalidated an obvious abuse of power, but left school officials with a troubling degree of authority.

School officials should have reasonable authority to maintain a healthy learning environment for students, but the Court's cases have failed to give due weight to the rights secured by our foundational charter. The Court has consistently exaggerated the strength of the governmental interests at stake and trivialized the individual's right to security, rigging the balancing test to favor the government. An unadorned subjective balancing test is a recipe for inflating the power of law enforcement to search and seize. Here, as elsewhere, we need rules that actually check official discretion, limit arbitrary and discriminatory searches and seizures, and ensure some real protection for our right to be secure.

B. The Erasure of Equal Protection

In *Whren*, Justice Scalia suggested that those objecting to discriminatory policing should look to the Fourteenth Amendment's Equal Protection Clause for relief.[359] But that suggestion is hard to accept. The Supreme Court has all but erased equal protection as a constraint on policing. Equal protection, when it comes to policing, no longer protects.

The first of the Fourteenth Amendment's safeguards to go was the root idea of equal protection: the Fourteenth Amendment's command that states equally protect all persons from private violence and other wrongs. In the waning days of Reconstruction, the Supreme Court wrote out of the Fourteenth Amendment the basic idea that police could not turn a blind eye to private violence directed at Black people.[360] These rulings left Black Americans in the South without any protection from Klan violence and helped white terrorists undo the gains won during Reconstruction.

In 1873, in Colfax, Louisiana, in what Eric Foner calls the "bloodiest single act of carnage in all of Reconstruction,"[361] a white mob slaughtered scores of Black people, seeking to retake political power by murdering their opposition. Three years later,

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[358] *Id.* at 377–79.

[359] Whren v. United States, 517 U.S. 806, 813 (1996).

[360] *See supra* text accompanying notes 227–231.

[361] FONER, RECONSTRUCTION, *supra* note 126, at 530.

in *United States v. Cruikshank*,[362] the Supreme Court overturned federal convictions of three members of the mob and held that the federal government lacked the power to protect Black Americans from white terrorists. *Cruikshank* gutted one of the key promises of the Fourteenth Amendment—the states' constitutional obligation to protect individuals from private violence—and gave the Klan and other white terror groups the greenlight to use terror and violence to bring down Reconstruction. In the wake of *Cruikshank*, thousands of Black people were killed–so was the constitutional concept that states had to protect Black and white Americans equally from private violence.[363]

Cruikshank held that the Fourteenth Amendment's guarantee of equal protection "does not . . . add any thing to the rights one citizen has under the Constitution against another."[364] Because the murderers were private individuals, the federal government could not intervene. The duty of protection, the Court said, "was originally assumed by the States; and it still remains there."[365] The Court did not even consider the argument that the federal government was enforcing the guarantee of equal protection by bringing charges in the face of the state's refusal to bring the killers to justice. In an 1883 sequel, *United States v. Harris*,[366] the Court dismissed federal charges against R.G. Harris and nineteen others for lynching four Black men in Tennessee. *Cruikshank* and *Harris* permitted unchecked terror, squashed Black Americans' hopes of freedom, equal citizenship, and equal participation in democracy, and turned a blind eye to the text and history of the Fourteenth Amendment. The Court gave police and prosecutors the power to choose to enforce the law in racially biased ways.

The post-Reconstruction Court eliminated the right to protection and prevented Congress from intervening when state governments turned a blind eye to terrorism against Black people. The modern Court has extended these cases in a series of decisions that have left women unprotected against sexual assault and domestic violence.[367] Today what is "deep[ly]-rooted"

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[362] 92 U.S. 542 (1875).

[363] STUNTZ, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 106–17.

[364] *Cruikshank*, 92 U.S. at 554–55.

[365] *Id.* at 555.

[366] 106 U.S. 629 (1883).

[367] United States v. Morrison, 529 U.S. 598, 621–22 (2000); Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (finding no Fourteenth Amendment

is not the constitutional duty of protection, but "law-enforcement discretion."[368] The police have the power to pick and choose how they enforce the law. The result is a criminal justice system that has "long failed to place [B]lack injuries and the loss of [B]lack lives at the heart of its response when mobilizing the law."[369] The modern Supreme Court has made things much worse by essentially erasing the Equal Protection Clause as a constraint on policing. Even as the Supreme Court condemns the stigma and indignity inflicted by state-sponsored racial inequality, its doctrine condones policing practices that leave Black and Brown Americans subject to systematic stops, arrests, and brutal violence.[370] The basic problem lies in equal protection doctrine's requirement of a discriminatory animus or purpose—a standard that dooms virtually all challenges to discriminatory policing because it is so difficult to prove.[371] In a number of different contexts, the Court has set an incredibly high bar, repeatedly turning away constitutional challenges to discretionary decisions made by law enforcement.

In 1987, in *McCleskey v. Kemp*,[372] the Supreme Court, by a 5-4 vote, rejected a death row inmate's argument that Georgia's administration of the death penalty was racially biased. McCleskey's lawyers relied on a detailed statistical study, which, controlling for hundreds of variables, demonstrated that the race of the defendant and the race of the victim played a substantial role in determining who lived and who died.[373] Defendants who killed a white person were more likely to receive the death penalty than those who killed a Black person. Black persons

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violation in state police's refusal to enforce restraining order protecting a woman and her family from her abusive husband).

[368] *Castle Rock*, 545 U.S. at 761.

[369] LEOVY, *supra* note 17, at 308.

[370] Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2455 (2017) ("In glossing the Equal Protection Clause, the Court has invoked ideas of racial stigma, racial balkanization, and the dignitary interest in being judged on one's own merits. And then it has been largely silent about policing.").

[371] Sklansky, *Traffic Stops*, *supra* note 9, at 326 ("[C]hallenges to discriminatory police practices will fail without proof of conscious racial animus on the part of the police . . . . [T]his amounts to saying that they will almost always fail.").

[372] 481 U.S. 279 (1987).

[373] Hoag, *supra* note 231, at 991 (stressing that these disparities reflect systematic "undervaluation of Black lives" by multiple actors in the criminal justice system).

charged with the murder of a white person were most likely to get the ultimate punishment of death. But the majority brushed aside these findings, insisting that McCleskey needed to show that "racial considerations played a part in his sentence."[374] The fact that McCleskey challenged discretionary decisions, the majority said, demanded a particularly high burden of proof. The Court noted, "[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[375] In the tug of war between discretion and discrimination, discretion won. Equal protection gave way to prosecutors' and juries' broad discretion.

In 1996, in *United States v. Armstrong*,[376] the Court set a high bar for proving an equal protection claim once again. Armstrong, indicted on crack cocaine drug conspiracy charges, sought discovery to prove selective prosecution, stressing that every crack case filed by federal prosecutors in the district had been against a Black defendant. The Court held that Armstrong was not entitled to discovery. The "demanding" standard required a showing of discriminatory purpose and that "similarly situated individuals of a different race were not prosecuted."[377] Armstrong had to have "clear evidence" that similarly-situated white persons could have been prosecuted, but were not.[378] Failing that, he could not even obtain discovery. In other words, a criminal defendant cannot get the discovery he needs to prove that he has an equal protection claim unless he can make out a compelling equal protection claim without any discovery. This Catch-22 makes such claims a losing proposition.[379]

Whren held open the possibility of an equal protection claim, but, as these cases illustrate, equal protection doctrine is a dead-end under these stringent standards. The difficulty of proving either a racial classification, a discriminatory racial

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[374] *Id.* at 292–93.

[375] *Id.* at 297.

[376] 517 U.S. 456 (1996).

[377] *Id.* at 463, 465.

[378] *Id.* at 465 (citation omitted).

[379] STUNTZ, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 120; COLE, *supra* note 276, at 159; Pamela S. Karlan, *Race, Rights and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005 (1998) (describing how the Court has "strip[ped] the concept of selective prosecution of virtually any real-world effect").

purpose, or racial animus makes it incredibly difficult to mount any equal protection claim.[380] Modern equal protection law is blind to the reality that, due to explicit or implicit bias, police stop, search, beat, and kill people of color based on racial fears and stereotypes.[381] Current equal protection law offers no tools to eliminate such unconstitutional bias.[382] It permits policing based on racial profiling and stereotypes to fester.[383]

Contrast *McCleskey* and *Armstrong*—in which the Court's incredibly high threshold has allowed discrimination to flourish—with what the Court has done in its cases limiting

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[380] Maclin, *Fourth Amendment*, *supra* note 9, at 337 n.22 (calling *Whren*'s treatment of equal protection "hollow"); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 438 (1997) (detailing that it is often impossible, in the context of pretextual traffic stops, to show that similarly situated whites were not stopped since "[p]olice officers do not keep records of instances in which they could have stopped a motorist for a traffic violation, but did not"); Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1535–36 (2007) (arguing that "a motorist who was discriminated against would have little chance of proving it" because "the permissibility of pretexual stops and the presumption of good faith accorded police officers would almost always lead a court to credit any race-neutral explanation given for the stop").

[381] KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN AMERICA xiii (2019 ed.) ("For a century and a half, many of the best and brightest minds in America have produced volumes and volumes of research proving that, on average, white people should be suspicious (and downright fearful) of [B]lack people."); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERS. & SOC. PSYCH. 876, 876 (2004) ("[J]ust as Black faces and Black bodies can trigger thoughts of crime, thinking of crime can trigger thoughts of Black people . . . ."); Richardson, *supra* note 266, at 2039 (explaining that "[a]s a result of implicit biases, an officer might evaluate behaviors engaged in by individuals who appear [B]lack as suspicious even as identical behavior by those who appear white would go unnoticed"); Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1993 (2018) (reviewing JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017)) ("[I]mplicit biases are most likely to influence behaviors and judgments in situations where decisionmaking is highly discretionary, information is limited and ambiguous, and individuals are cognitively depleted. These are the conditions under which most police officers . . . operate on the street."); Steiker, *supra* note 121, at 840 (discussing "widespread use by police of race as a proxy for criminality").

[382] Huq, *supra* note 370, at 2456 (arguing that "Equal Protection doctrine . . . provides the *moral justifications* but not the *doctrinal tools* for dealing with" stop-and-frisk and other sorts of racialized policing).

[383] *See* Karlan, *supra* note 379, at 2025 (observing that there is no "single other area of current equal protection doctrine in which the Court is prepared to assume . . . that [Black people] and white [people] differ in a legally cognizable way").

racially discriminatory peremptory strikes in jury selection. In the jury context, the Court has had at least some measure of success in enforcing the equal protection guarantee and limiting the unfettered discretion of prosecutors.[384] Beginning with *Batson v. Kentucky*, the Court devised a burden-shifting framework that allows a criminal defendant to rely on statistical and other evidence to establish a prime facie case of racial discrimination, and gives them the opportunity to show that the reason offered by the prosecutor for using a peremptory strike was a pretext for discrimination. This framework, while not without its problems,[385] helps ensure meaningful enforcement of the equal protection command, responding to the "practical difficulty of ferreting out discrimination in [jury] selections discretionary by nature, and choices subject to myriad legitimate influences."[386] But there is no similar burden-shifting framework in the policing context. Under current doctrine, the Court has erased the equal protection guarantee as a real constraint on policing.

The 2000 case of *Brown v. City of Oneonta*[387] illustrates the sorry state of equal protection doctrine when it comes to policing. In *Brown*, the police attempted to apprehend a suspect by stopping and questioning every young Black man in a small New York town following a break-in and attack in the home of an elderly woman. The woman who had been attacked told the police that she believed that her assailant was a young Black man and that he had cut his hand as they struggled. Based on this information, police contacted the state university to obtain a list of its Black students and then, with the list in hand, conducted a sweep of the entire Black community of Oneonta, stopping and questioning more than two hundred Black persons, including at

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[384] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986); Miller-El v. Dretke, 545 U.S. 231 (2005); Foster v. Chatman, 136 S. Ct. 1737 (2016); Flowers v. Mississippi, 139 S. Ct. 2228 (2019). As David Cole observes, "[v]irtually all the attention the Court has paid to race discrimination in criminal justice has been focused on the jury." COLE, *supra* note 276, at 101.

[385] *See* Roberts, *supra* note 124, at 99 (arguing that *Batson* permits "the continued prosecutorial use of race-neutral pretexts for peremptory challenges in order to produce all-white juries"); Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1022–23 (1988) (arguing that *Batson* is "flawed by the assumption that merely allowing defendants to challenge the racially discriminatory use of peremptory challenges in individual cases will end the illegitimate use of the peremptory challenge").

[386] *Miller-El*, 545 U.S. at 238.

[387] 221 F.3d 329 (2d Cir. 2000).

least one woman, to examine their hands. The Second Circuit upheld the racial sweep, holding that the sweep was "race-neutral on its face" because it was based on a "physical description given by the victim of a crime."[388]

Brown allows the police to stop and harass every member of a town's Black community based on a crime victim's description. It is difficult to imagine a more vivid demonstration of how little purchase equal protection principles have when it comes to policing. Black Americans can be stopped en masse, as they have since the days of slavery, in a way that white people never have. This community-wide sweep should have been treated as a racial classification: the police elevated race above all else and subjected the town's Black community to intrusive, intimidating stops to examine their hands for a cut.[389] It is unfathomable that the police would have done the same if the suspect had been white. As Richard Banks observes, "[r]esearch has unearthed *not one* case anywhere in the United States in which law enforcement authorities conducted a search of comparable scope and intensity for a white perpetrator of a crime against a [B]lack victim."[390] Such racial sweeps are race-based state action, but under *Brown*, they warrant virtually no constitutional scrutiny.

Current doctrine has strayed far from the Fourteenth Amendment's text and history. As a result of the Court's cases, the police can stop Black suspects more often than they stop white ones, enforce criminal laws more harshly in Black neighborhoods than in white ones, and punish crimes that victimize white people more harshly than crimes that victimize Black people. The Court has blessed policies that reflect that

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[388] *Id.* at 337. *See also* Monroe v. City of Charlottesville, 579 F.3d 380, 382, 389 (4th Cir. 2009) (holding that the police did not violate equal protection when they stopped 190 [B]lack men and asked them for DNA samples because the stops "did not stem from an explicit government classification").

[389] *See* Brown v. City of Oneonta, 235 F.3d 769, 781 (2d Cir. 2000) (Calabresi, J., dissenting from the denial of rehearing en banc) (urging that sweep was a racial classification because "the police *created and acted upon a racial classification by setting aside all but the racial elements in the victim's description*" in order to "stop and question all members of that race they can get hold of"); FRIEDMAN, UNWARRANTED, *supra* note 24, at 193; Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 181–83; R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1108–15 (2001).

[390] Banks, *supra* note 389, at 1113 (emphasis added).

Black lives do not matter in the same way white lives do. The promises made in the Fourteenth Amendment, which was written to end discriminatory policing root and branch, have gone radically unfulfilled.

C. No Remedies, No Rights: The Gutting of Remedies for Police Abuse

For decades, one of the great debates in Fourth Amendment law was whether the exclusionary rule was a constitutionally necessary remedy to hold the police accountable or a travesty that let the guilty go free.[391] Today, the debate continues, but has been eclipsed by an even more important development: there are virtually no remedies for all but the most egregious forms of police abuse. The Supreme Court has cut down every available remedy. The Court has created the doctrine of qualified immunity to close the courthouse doors to individuals seeking damages to redress constitutional violations by the police, making the Framers' preferred remedy presumptively unavailable. The Court has invented so many exceptions to the exclusionary rule that there is little left of it. And the Court's Article III standing doctrine makes it extremely difficult to seek injunctive relief challenging an unconstitutional police policy.[392]

These trends, which began during the Burger Court, have accelerated more recently. Converging doctrinal rules have led to the collapse of a system of remedies capable of holding the police to account when they violate the Constitution.[393] While remedies

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[391] *Compare* Steiker, *supra* note 121, at 851 (defending the exclusionary rule because it "involves the courts in the ongoing project of developing a detailed body of Fourth Amendment law" and establishes rules that "the political branches of government would otherwise neglect"), *and* Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 508 (2009) (calling the exclusionary rule "one of the law's success stories" because it has "permitted the judicial articulation and reiteration of Fourth Amendment standards"), *with* Amar, *First Principles*, *supra* note 77, at 785, 799 (calling the exclusionary rule an "awkward and embarrassing remedy" that "renders the Fourth Amendment contemptible in the eyes of judges and citizens").

[392] *See, e.g.*, Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1 (1984); Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in* Clapper v. Amnesty International USA *and* City of Los Angeles v. Lyons, 23 WM. & MARY BILL RTS. J. 127, 167 (2014).

[393] Litman, *supra* note 20, at 1528; Orin Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2011 CATO SUP. CT. REV. 237, 254 (discussing the trend

still remain for victims of the most flagrant constitutional violations, for essentially everyone else, there is no remedy to which to turn. This is a system that breeds police unaccountability. Without a workable system of remedies, police abuse their authority and get away with it.

Here, too, the Court's blindness to Fourteenth Amendment history has produced badly flawed doctrine. By eliminating practically every possible remedy against police abuse of power, the Court has widened the power of the police to stop, search, and use violence against people of color. This has exacerbated the flaws in the Court's Fourth and Fourteenth Amendment doctrines.

1. The Invention of Qualified Immunity

Qualified immunity is not a constitutional rule. Rather, it is grounded in the Supreme Court's interpretation of Section 1983, a federal statute enacted during Reconstruction to enforce the Fourteenth Amendment, which provides a federal cause of action against state actors who violate federal constitutional rights. Section 1983, in relevant part, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress . . . in the several district or circuit courts of the United States.[394]

The statute does not provide state officials any legal immunity from suit. This reflects the judgment of the Reconstruction Congress that granting governmental officials immunity from suit improperly "places officials above the law."[395]

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toward "less law development, fewer remedies, or both . . . . [C]oming from all directions simultaneously").

[394] An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983).

[395] CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).

Rather than heeding the statute's unambiguous text, the Court has rewritten Section 1983 to make it easier for courts to dismiss suits brought against the police and other government officials. The resulting doctrine has eroded the enforcement of constitutional rights, undermined the rule of law, and denied justice to those victimized by the police.

The Supreme Court established the defense of qualified immunity based on the idea that the Congress that enacted Section 1983 gave "no clear indication" that it "meant to abolish wholesale all common-law immunities."[396] But even at its inception the contours of qualified immunity had nothing to do with the common law. And over time, it has only gotten worse. In 1982, in *Harlow v. Fitzgerald*,[397] the Court, by its own admission, "completely reformulated qualified immunity along principles not at all embodied in the common law" in order to protect public officials from being sued for damages.[398] Qualified immunity, as applied post-*Harlow*, requires a plaintiff to establish that the officer violated "clearly established . . . constitutional rights of which a reasonable person would have known."[399] In practice, this means that a police officer can only be sued for violating an individual's constitutional rights if there is a prior case closely on point.

The Court made up this standard to keep suits against the police and other state actors out of court. As William Baude has demonstrated, "there was no well-established good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment."[400] Such a defense is unnecessary because police

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[396] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[397] 457 U.S. 800 (1982).

[398] Anderson v. Creighton, 483 U.S. 635, 645 (1987). *See also* Wyatt v. Cole, 504 U.S. 158, 170–71 (1992) (Kennedy, J., concurring) (describing how qualified immunity "diverge[s] to a substantial degree from historical standards" based on the "special policy concerns arising from public officials' exposure to repeated suits").

[399] *Harlow*, 457 U.S. at 818.

[400] Baude, *supra* note 22, at 55. *See also* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 19 (1972) (discussing the "insistence of nineteenth century courts upon [a] strict rule of personal official liability" and noting that the fact that "an officer personally could be separately liable *where the wrong was equally a wrong by the state*, is what gave the principal of personal official liability its major importance"); Alschuler, *supra* note 391, at 501 (observing that at the time of the

officers are virtually always indemnified in cases in which they are sued.[401] In creating qualified immunity, the Court simply turned a blind eye to Congress's decision to create a federal cause of action to enable individuals victimized by state officers to obtain redress in the federal courts.

The Congress that wrote Section 1983 sought to enforce the Fourteenth Amendment by holding state actors, including the police, accountable for legal wrongs—not give them a free pass. It wanted to vindicate fundamental rights, not immunize officers seeking to deny Black Americans equal citizenship.[402] The Reconstruction Congress was well aware that throughout the South, state officials, often acting in concert with the Ku Klux Klan, were murdering and terrorizing Black people and depriving them of their fundamental rights. The Klan, Michigan Congressman Austin Blair observed, "are powerful enough to defy the state authorities. In many instances they are the State authorities."[403] Members of Congress described state officials issuing baseless warrants to arrest Black citizens,[404] as well as

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framing of the Fourth Amendment, "officers who conducted illegal searches and seizures were held strictly liable in damages" and "had no immunity from civil lawsuits"); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1924 (2010) (contrasting qualified immunity with the "antebellum system of government accountability" in which "the courts—state and federal—did not take responsibility for adjusting the incentives of officers or for protecting them from the burdens of litigation and personal liability").

[401] Schwartz, *supra* note 22, at 1804; Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (presenting empirical data demonstrating that "[p]olice officers are virtually always indemnified").

[402] *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 548 (1992) (criticizing *Harlow*'s "subordinating protection of individual rights" as "utterly inconsistent with the value structure of the 42nd Congress").

[403] CONG. GLOBE, 42nd Cong., 1st Sess. App. 72 (1871). *See also id.* app. at 271 ("In many cases the local officers are in sympathy with the marauders, and in others they are themselves members of the organization."); *id.* app. at 108 ("The sheriffs in Alamance and some other counties are in the order; the judges can do nothing; the juries are in the way; we can make no convictions."); *id.* app. at 182 ("State authorities are in complicity with the criminals, aiding and abetting their lawless violence and of course refusing to call for assistance from the General Government . . . ."); FONER, RECONSTRUCTION, *supra* note 126, at 434 ("Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it.").

[404] CONG. GLOBE, 42nd Cong., 1st Sess. App. 321 (1871) (describing how, following a "meeting of the citizens . . . to protest against the outrages,"

wanton violence by white police officers in which "men were shot down like dogs in the very portals of justice without provocation."[405] Representative James Platt described a gruesome police shooting at a political rally in Norfolk, Virginia in which "a policeman, or at least a man in the uniform of a policeman, drew a pistol and deliberately put a bullet through the body of a quiet and inoffensive colored man standing near him."[406] A white mob began indiscriminately shooting and the police force joined in. As Representative Platt recounted, "the police force was in full sympathy with the murderers, and were themselves emptying their revolvers into the terrified and struggling mass of human beings how were frantically striving to get beyond their range."[407]

The systematic denial of fundamental rights merited a remedy. Congress exercised its express constitutional power to enforce the Fourteenth Amendment to create a federal cause of action so that individuals could bring suit in federal court to obtain redress when state officials violated their constitutional rights. The sweeping grant of immunity created by the Supreme Court turns Section 1983 on its head, rewrites its text, and guts the congressional objective to make the Fourteenth Amendment's guarantees that safeguard the individual from oppression at the hands of state authorities a reality. The clearly established law requirement in qualified immunity doctrine ignores the context in which the statute was passed. In 1871, the Fourteenth Amendment was only a few years old and the Supreme Court had not yet interpreted its sweeping guarantees. The idea that victims of abuse of power would be required to show that those acting under color of law violated clearly established legal precedents would have strangled the statute at birth. The Court's invention of qualified immunity was made possible by its studious blindness to the Fourteenth Amendment and its history.

Despite these serious flaws, the Roberts Court has doubled-down on the doctrine, insisting that qualified immunity permits liability only when "existing precedent" is so clear that the "constitutional question" is "beyond debate."[408] Consider

"warrants were issued [at the Klan's instigation] for the arrest of peaceable and well-disposed negroes upon the charge of 'using seditious language'").

[405] *Id.* app. at 185.

[406] *Id.* app. at 184.

[407] *Id.* app. at 185.

[408] Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011).

Safford, discussed above, where the Court held that school officials had violated the Fourth Amendment by strip searching thirteen-year-old Savana Redding, believing that she had stashed common painkillers in her underwear. *Safford* did not break new ground but simply held that "the content of the suspicion failed to match the degree of intrusion."[409] Still the school officials got off scot-free because the Court claimed that there were "doubt[s] that we were sufficiently clear in the prior statement of law."[410] The upshot is that the discretion-laden standards that the Court chooses to employ throughout Fourth Amendment law simultaneously empower the police and guarantee them immunity when they violate an individual's right to be secure from unreasonable searches and seizures. Rulings such as *Safford* send a message that government officials can act with impunity, even when they engage in outrageous behavior, such as searching a girl's underwear in the hopes of finding ibuprofen.

This pattern has repeated itself again and again. Almost every qualified immunity ruling from the Roberts Court ends in the same way: the police get immunity and cannot be sued.[411] In rare instances, the Court has found that a constitutional violation is so egregious that no reasonable officer would have countenanced the conduct in question.[412] But, by and large, the Court has simply been unwilling to permit the police to be subject to liability. The last time the Supreme Court concluded that a police officer violated clearly established law was in 2004, before John Roberts became Chief Justice.[413] Indeed, in case after case, the Roberts Court has summarily reversed rulings denying

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[409] Safford Unified Sch. Dist. No.1 v. Redding, 557 U.S. 364, 375 (2009).

[410] *Id.* at 379.

[411] *See, e.g.*, Messerschmidt v. Millender, 565 U.S. 535, 539 (2012); Plumhoff v. Rickard, 134 S. Ct. 2012, 2017 (2014); City & Cnty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1769 (2015); District of Columbia v. Wesby, 138 S. Ct. 577, 582 (2018); Baude, *supra* note 22, at 82 ("[N]early all the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials.").

[412] Taylor v. Riojas, 141 S. Ct. 52 (2020); Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 351 (2020) (observing that "*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").

[413] Groh v. Ramirez, 540 U.S. 551, 563–66 (2004).

qualified immunity,[414] many in the context of police killings and other violence, by reaching out to decide cases that normally would not merit Supreme Court review.[415] These cases do not clarify the law at all, but just send the message that lower courts should grant qualified immunity across the board. As Justice Sonia Sotomayor has correctly recognized, "[s]uch a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers"[416] and "renders the protection of the Fourth Amendment hollow."[417]

2. The Hollowing Out of the Exclusionary Rule

The exclusionary rule provides that evidence seized by the police in the course of an unconstitutional search of seizure, should be excluded from trial.[418] The remedy was born out of the principle that the courts were responsible for holding police officers accountable when they violated constitutional rights in gathering evidence. At its inception, the Court viewed the exclusionary rule as "an essential part of both the Fourth and Fourteenth Amendments."[419] Over the last thirty years, however, the Court has discarded this view. Instead, the exclusionary rule depends on a balance of costs and benefits. Just as the Court has balanced away the requirement of a warrant and probable cause, it has balanced away the exclusionary rule, viewing the costs of the rule as unacceptably high. Today, the exclusionary rule survives in name only.

In a string of recent rulings, the Roberts Court has insisted that exclusion is a "last resort"[420] and should be used "only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant."[421] Thus, "[t]o trigger

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[414] Brosseau v. Haugen, 543 U.S. 194, 195 (2014); Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); White v. Pauly, 137 S. Ct. 548, 551 (2017); Kisela v. Hughes, 138 S. Ct. 1148, 1154–55 (2018); City of Escondido v. Emmons, 139 S. Ct. 500 (2019).

[415] Baude, *supra* note 22, at 85 (observing that "only a special dispensation from the normal principles of certiorari explains the Court's qualified immunity docket").

[416] *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

[417] *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

[418] *Exclusionary Rule*, ENCYC. BRITTANICA (Feb. 27, 2020), https://www.britannica.com/topic/exclusionary-rule [https://perma.cc/2XKN-EXMR].

[419] Mapp v. Ohio, 367 U.S. 643, 657 (1961).

[420] Hudson v. Michigan, 547 U.S. 586, 591 (2006).

[421] Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[422] There must be a showing that the "police exhibit[ed] 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights."[423] As these formulations reflect, the contours of qualified immunity and the exclusionary rule are converging. In both contexts, the Roberts Court is moving to limit remedies to flagrantly unconstitutional police conduct. Most people injured by unconstitutional searches and seizures have no remedy under this regime.[424]

By making any remedy impossible to obtain, the Court has given the police an even freer hand to stop and search people. The Court has refused to hold the police accountable even when the police have no legal right to make a stop. This makes *Terry* and *Whren*—doctrines that already allow the police to systematically stop people of color—more harmful. This exacerbates the costs of the Court's erasure of the Fourteenth Amendment and our whole constitutional story of race and policing. It allows the police to violate the security and dignity of Black and Brown people on a regular basis with impunity.

Consider the 2016 case of *Utah v. Strieff*,[425] in which the Supreme Court refused to exclude evidence obtained during a suspicionless police stop in which, as the dissent observed, "the officer's sole purpose was to fish for evidence."[426] After the unlawful stop, the officer ran a warrant check, which disclosed an outstanding traffic warrant that led to Strieff's arrest and the discovery of illegal drugs in his possession. In refusing to exclude the evidence, the Court's majority stressed that the officer had

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[422] Herring v. United States, 555 U.S. 135, 144 (2009).

[423] Davis v. United States, 564 U.S. 229, 238 (2011) (quoting *Herring*, 555 U.S. at 144).

[424] *See* Litman, *supra* note 20, at 1507 ("[I]f exclusion is not warranted because the officers acted reasonably in light of existing law, then damages would not be available either because the standards for the two remedies have converged."); Alschuler, *supra* note 391, at 510 (explaining that Court's new doctrinal rules "would require most of the people whom the police have searched and arrested unlawfully to lump it"); Kerr, *supra* note 393, at 255 (arguing that the Roberts Court is moving "toward limiting the exclusionary rule to the rare instances when police conduct is so egregious that qualified immunity does not apply").

[425] 136 S. Ct. 2056.

[426] *Id.* at 2067 (Sotomayor, J., dissenting).

committed "good-faith mistakes," which were "at most negligent."[427] But what the majority described as a good-faith mistake was a complete lack of evidence to justify a stop. The stop was plainly unconstitutional even under the forgiving standards that govern police stops under *Terry*. The officer had seen Strieff leave a residence that the police were surveilling. But, the officer had no arguable "basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction."[428] The majority waved off this clear Fourth Amendment violation, insisting that, to trigger exclusion, "more severe police misconduct is required than the mere absence of proper cause for the seizure."[429] Rather than exclude the evidence, the Court validated what was plainly an impermissible seizure, giving the police the greenlight to do it again. As Justice Sotomayor observed in a powerful dissent, "[t]his case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong."[430] It "tells everyone . . . that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights."[431]

Refusing to remedy such unconstitutional stops effectively enables racialized policing. As Justice Sotomayor argued, while "anyone's dignity can be violated" by the police—

> [I]t is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, [B]lack and [B]rown parents have given their children "the talk"—instructing them never to run down the street; always keeping your hands where they can be seen; do not think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.[432]

Refusing to hold the police accountable when they make suspicionless stops, she explained, "risk[s] treating members of our communities as second-class citizens."[433] By closing the

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[427] *Id.* at 2063.
[428] *Id.*
[429] *Id.* at 2064.
[430] *Id.* at 2064 (Sotomayor, J., dissenting).
[431] *Id.* at 2070 (Sotomayor, J., dissenting).
[432] *Id.* (Sotomayor, J., dissenting).
[433] *Id.* at 2069 (Sotomayor, J., dissenting).

courthouse doors on those victimized by police abuse of power, the Supreme Court has washed its hands of enforcing the Fourteenth Amendment's promise that everyone—no matter their race, no matter where they are from—is entitled to live and enjoy real freedom.

3. Barriers to Injunctive Relief Against the Police

The Supreme Court has cut back on damages and exclusion as remedies, fearing the consequences if the police are required to pay money judgments or face the loss of critical evidence. What about a remedy that simply tells the police to stop violating the Constitution?[434] That, too, is off the table. The Supreme Court has shut down forward-looking relief against unconstitutional police policies, rewriting standing rules to keep those cases out of court as well. This means that individuals cannot go to court to challenge policing policies that victimize people of color. In this way, the Court frees itself from having to enforce our Constitution's promise of personal security to all persons regardless of race.

In 1983, in *City of Los Angeles v. Lyons*,[435] the Supreme Court held that Adolphus Lyons, a young Black man who had been subjected to a chokehold during a traffic stop, could not sue to enjoin the city's chokehold policy, which had led to the killing of sixteen people, almost all Black men. In a 5-4 opinion, the majority held that, despite the injuries inflicted on him, Lyons could not sue for injunctive relief unless he could show a "real and immediate threat that he would again be stopped . . . by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part."[436] This effectively immunized the city's policy from constitutional scrutiny. As Justice Thurgood Marshall argued in his dissenting opinion, the "Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court."[437] "Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the

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[434] STUNTZ, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 220 (arguing that "institutional injunctions" might be a "better remedy" for police misconduct).

[435] 461 U.S. 95 (1983).

[436] *Id.* at 105.

[437] *Lyons*, 461 U.S. at 137 (Marshall, J., dissenting).

continuation of the policy."[438] *Lyons* dooms most injunctive suits challenging policing policies.[439]

VI. CONCLUSION & RECOMMENDATIONS

This Article makes the case for engaging with our whole constitutional story of race and policing by taking seriously the text, history, and values of the Fourteenth Amendment's transformative guarantees. More than 150 years after its ratification, we have forgotten a critical part of the Fourteenth Amendment's legacy—its limitations on the power of the police designed to ensure liberty, personal security, and equality for all regardless of race. In the aftermath of the Civil War, the South sought to strip Black Americans of the promise of freedom for which they had fought. Police broke into the homes of Black people and stole their guns and personal property. Police aggressively enforced vagrancy laws to stop, seize, and arrest Black people, making freedom of movement a sham. Police beat and killed Black people, while turning a blind eye to crimes and violence committed against them. The Fourteenth Amendment's substantive guarantees were a response to these abuses of official authority. It sought to answer the demands of Black Americans, who asserted, "we do not want to be hunted." In all these ways, history teaches us that the Fourteenth Amendment is fundamentally concerned with police abuse, including home invasions, indiscriminate arrest power, and police violence.

The Supreme Court's collective amnesia about the Fourteenth Amendment's text, history, and values has produced a deeply flawed constitutional jurisprudence. The Court has allowed the police to continue subjecting people of color to more stops, more searches, and more violence, perpetuating one of the most enduring badges of slavery. We cannot hope to begin the immense task of correcting these errors without understanding and engaging with our whole constitutional story of race and policing. As this Article argues, this engagement is essential if we are to revitalize the Fourteenth Amendment's project of ensuring true freedom and security, repudiating slavery's legacy, and securing equal citizenship for all regardless of race.

What would it mean for the Court to honor the Fourteenth Amendment's transformative guarantees and craft

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[438] *Id.* at 113.

[439] Kerr, *supra* note 393, at 244–45; Litman, *supra* note 20, at 1512–13.

doctrine that enforces its promises? This Section sketches six ways the Court could bring its case law in line with the Fourteenth Amendment and its history.

First, Fourth Amendment reasonableness should be sensitive, not blind, to race. The police should not be permitted to target people of color for arbitrary, degrading, or humiliating intrusions. Discretionary searches and seizures that enable racial profiling should be presumptively unreasonable under the Fourth and Fourteenth Amendment. The Fourteenth Amendment outlawed the discretionary search and seizure powers that Southern governments used to single out Black people for intrusive searches and seizures. Such discretionary powers were a tool of racial oppression. The Supreme Court's doctrine should be organized around the text and history of the Fourteenth Amendment.

This would require major changes to the Court's doctrines governing stop-and-frisk and traffic stops, which license systemic racial profiling, particularly of young Black men. *Terry* has already been criticized on originalist grounds for dispensing with the constitutional requirement of probable cause and permitting "police to seize and search in situations when magistrates would be forbidden to authorize an interference with liberty."[440] Taking seriously the text and history of the Fourteenth Amendment adds what is perhaps an even more powerful argument. *Terry* and its progeny invite racially discriminatory searches and seizures just as did the vagrancy laws condemned by the Fourteenth Amendment. *Terry* enables racial profiling and allows people of color to enjoy freedom of movement and personal security only at the whim of the police.

Whren, which sanctions racially motivated seizures, should likewise be scrapped. Police should not be permitted to use the nearly limitless authority provided by the traffic laws to stop people because of the color of their skin. As James Forman argues, pretext stops are a "direct, easily remedied source of racial disparities in the criminal justice system," which are "responsible for most of the racial disparity in traffic stops

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[440] Thomas, *supra* note 68, at 1496. *See also* Minnesota v. Dickerson, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (observing that, in the absence of a "full-blown arrest," there was "no clear support at common law for physically searching the suspect").

nationwide."[441] Under a view of Fourth Amendment reasonableness that takes seriously our whole constitutional story of race and policing, pretext stops are constitutionally unreasonable because they permit widespread racial profiling by the police. Given the virtually unfettered discretion police enjoy under traffic laws, probable cause to believe a person violated traffic laws should not insulate pretext stops from constitutional scrutiny.

Second, the Court should reconsider its use of the reasonable suspicion standard as a basis to uphold search and seizures. Nothing invites discriminatory policing so much as the Court's willingness to apply a porous reasonable suspicion test. Where the reasonable suspicion test applies, discrimination is endemic. In the nation's streets, roads, and schools, the reasonable suspicion standard has allowed the police to accost innocent people and engage in racial profiling. For that reason, "probable cause must be the center of the Fourth Amendment universe."[442] Taking seriously the text and history of the Fourteenth Amendment's transformative guarantees complements the literature that urges the Court to enforce the constitutional requirement of probable cause, rather than employ invented standards, such as reasonable suspicion, that have no basis in the Constitution.[443]

Third, a jurisprudence that takes the Fourteenth Amendment's text and history seriously would put an end to unjustified police violence. Eliminating such brutality must be regarded as one of the critical purposes of the Fourteenth Amendment. The Court's current approach to police violence enables police brutality. It is not enough to simply insist that police use force in an objectively reasonable manner. The doctrine must insist that police violence be used only when necessary to respond to an imminent threat, and that the use of force must be

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[441] FORMAN, *supra* note 10, at 214, 212.

[442] Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133, 1138 (1998).

[443] FRIEDMAN, UNWARRANTED, *supra* note 24, at 156 ("The Constitution says how much cause is appropriate. *Probable* cause."); Sundby, *supra* note 442, at 1138 (arguing that "probable cause should be the Fourth Amendment norm from which departures must be viewed as narrow exceptions that require independent justification"); Thomas, *supra* note 68, at 1518 (arguing that courts should require "probable cause for all seizures and for all searches for evidence of crime except searches incident to arrest").

proportional to the threat.[444] We need a standard that reins in police violence and vindicates the Fourteenth Amendment's promise of personal security for all persons regardless of race, not one that condones and legitimizes more police shootings and beatings of our populace.

Fourth, the Supreme Court should revitalize equal protection doctrine to ensure meaningful limits on discriminatory policing. Our constitutional law denounces the "racial stereotype" that Black people are prone to violence and criminality as a "particularly noxious strain of racial prejudice."[445] We need a doctrine that takes the Fourteenth Amendment's text and history seriously and gives courts the tools to root out conscious and unconscious bias in policing. One way to do this would be to build on the burden-shifting approach the Court has used in *Batson* and its progeny. When a plaintiff comes forward with statistical and other proof of systematic racial targeting of people of color by the police, such as a drug courier profile that includes race, the Court should shift the burden to the government to rebut the showing that race matters in policing and justify its policing practices.[446] As Barry Friedman writes, "courts should require the government to answer the perennial question under the Constitution when one is searched or seized: Why me?"[447] If race is a factor in policing, strict scrutiny should apply.

Fifth, the Supreme Court should recognize that the Equal Protection Clause creates a constitutional obligation on states to protect all persons equally from private violence, and that, where a state fails to do so, the federal government has the authority to step in to provide the protection the Fourteenth Amendment guarantees. This part of the Fourteenth Amendment has deep roots in the Amendment's text and history but has never been given its due. The Department of Justice should play a leading role in helping restore this bedrock aspect of equal protection. Federal law explicitly authorizes the Department of Justice to

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[444] *See* Harmon, *supra* note 310, at 1166–83 (discussing concepts of imminence, necessity, and proportionality).

[445] Buck v. Davis, 137 S. Ct. 759, 776 (2017).

[446] David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1318–19 (1995) (urging use of a burden-shifting approach to adjudicate challenges to federal sentencing laws with racially disproportionate impacts).

[447] FRIEDMAN, UNWARRANTED, *supra* note 24, at 188.

bring suit to redress a "pattern and practice" of unconstitutional police misconduct, and pattern or practice suits aimed at under-policing could provide an opportunity to revitalize this critical aspect of the Fourteenth Amendment's guarantee of equal protection.[448]

Sixth, we also need a system of meaningful remedies to redress police overreach. Our constitutional commitments are only as good as the remedies that enforce them. In the case of policing, remedies hardly exist, even on paper. This is not our Constitution's system of accountability. If we do not have remedies, we do not truly have rights. We cannot hope to rein in police abuse of power if courts give the police a free pass when they violate our rights. At a minimum, the Court should scrap qualified immunity doctrine, which guts the remedy the Reconstruction Congress enacted to enforce the Fourteenth Amendment. This would ensure government accountability, permit courts to play their historic role of redressing abuse of power, and shift the focus of policing litigation away from the scope of judicially invented immunities to fundamental constitutional questions about the meaning of our Constitution's safeguards of liberty, security, and equality.[449]

The killing of George Floyd[450] has laid bare the yawning chasm between our Constitution's promises and the reality of policing in America. For too long, the courts have failed us, inventing doctrines that are badly out of sync with our Constitution's text, history, and values. As our nation continues to reckon with its tragic history of police violence and racial injustice, so too must the courts. It is long past time for the courts to take seriously the Fourteenth Amendment's promise to safeguard personal security, guarantee equal citizenship and put an end to state-sponsored white supremacist violence, and

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[448] 34 U.S.C. § 12601(previously codified at 42 U.S.C. § 14141); Deborah Turkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1310–30 (2016) (discussing suits brought by the Department of Justice under § 14141 during the Obama administration to redress unconstitutional underenforcement by local police departments).

[449] Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020).

[450] Emily Stewart, *George Floyd's Killing Has Opened the Wounds of Centuries of American Racism*, VOX, https://www.vox.com/identities/2020/5/30/21275694/george-floyd-protests-minneapolis-atlanta-new-york-brooklyn-cnn [https://perma.cc/6JH2-JXSB] (June 10, 2020).

rethink flawed doctrines that have permitted police brutality and racialized policing practices to run amok. Engagement with the history detailed in this Article is essential if we are to revitalize the Fourteenth Amendment's limits on police abuse of power and repair our system of constitutional accountability.