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ARTICLES

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Columbia Law School
435 West 116th Street
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https://cjrl.columbia.edu
cjrl@law.columbia.edu

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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

David H. Gans*

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

* Director of the Human Rights, Civil Rights & Citizenship Program, Constitutional Accountability Center.

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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.

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NOTE

FOR THE "WEALTHY AND LEGALLY SAVVY": THE WEAKNESSES OF THE UNIFORM PARTITION OF HEIRS PROPERTY ACT AS APPLIED TO LOW-INCOME BLACK HEIRS PROPERTY OWNERS

Avanthi Cole*

Heirs property is a highly unstable form of land ownership resulting from intestacy that grants full ownership rights to all cotenants, regardless of the size of one's fractional interest. This form of land ownership is particularly vulnerable to partition because any use of the parcel requires consensus among all cotenants, which can be difficult given that many heirs do not live on the land and are frequently unaware of their fractional ownership. The Uniform Partition of Heirs Property Act (the UPHPA) was drafted to address heirs property ownership and the difficulties it presents. The Act has been recommended for enactment in all states, and as of February 2021, has been enacted in seventeen states. This Note argues that the legislation falls short of protecting the interests of those who are land-rich but cash-poor and whose single greatest asset is their fractional interest in heirs property. This Note critiques the Act by rooting its shortcomings in the drafters' decision to normalize the property ownership characteristics of those of higher socioeconomic statuses. The UPHPA fails to support heirs property owners because it treats the "wealthy and legally savvy" as

* J.D. Candidate, Columbia Law School, 2021. African American Studies, A.B., Princeton University, 2018.

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the norm for property owners in the United States, which is inherently in conflict with the socioeconomic realities of most heirs property owners. This Note proposes amendments to the UPHPA that reflect the ownership characteristics of the average heirs property owner rather than those of the "wealthy and legally savvy."

I.S

INTRODUCTION

In 1897, Matthew Allen's great-grandfather, the son of slaves, purchased a twenty-acre parcel of land in what is now known as Hilton Head, South Carolina.[1] Today, that twenty-acre plot is the largest undeveloped parcel of the now-famous tourist destination.[2] Due to a lack of clear title, Allen and other family members are struggling to maintain ownership of this parcel of land, which has been in his family for over 120 years.[3] The property is co-owned by more than 100 known heirs, which makes it particularly vulnerable to division and sale.[4] This type of land ownership is known as "heirs property,"[5] and is especially prevalent in low-income communities and communities of color.[6] Some scholars estimate that anywhere between one-third and one-half of the land owned by Black people in the United States can be classified in this way.[7]

Heirs property is a form of tenancy in common that results from intestacy, the legal term for dying without a will.[8] When a landowner dies without a will, the whole property is distributed to the original landowner's heirs, who become cotenants, each with equal right to possess and use the entire parcel of land, regardless of the size of one's fractional interest.[9] This form of landownership is precarious because many uses of the land requires consensus among all heirs,[10] which can be

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[1] Leah Douglas, *African Americans Have Lost Untold Acres of Land Over the Last Century*, NATION (June 26, 2017), https://www.thenation.com/article/african-americans-have-lost-acres/ [https://perma.cc/P49D-7KHH].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Various scholars use the terms "heirs property," "heirs' property," "heir-locked property," and "heir property" to describe this type of land ownership. Because the Uniform Partition of Heirs Property Act refers to this type of property ownership as "heirs property," and for the sake of consistency, this Note uses the term "heirs property" throughout.

[6] Joan Flocks et al., *The Disproportionate Impact of Heirs' Property in Florida's Low-Income Communities of Color*, 92 FLA. BAR J. 57, 57 (2018).

[7] Janice F. Dyer et al., *Ownership Characteristics of Heir Property in a Black Belt County: A Quantitative Approach*, 24 S. RURAL SOCIO. 192, 193 (2009) [hereinafter Dyer, *Ownership*].

[8] Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, TEX. A&M UNIV. SCH. L. FAC. SCHOLARSHIP, 2019, at 65, 67 [hereinafter Mitchell, *Game Changer*], https://scholarship.law.tamu.edu/facscholar/1327 [https://perma.cc/GS8L-NE7M].

[9] B. James Deaton, *A Review and Assessment of the Heirs' Property Issue in the United States*, 46 J. ECON. ISSUES 615, 618–19 (2012).

[10] *Id.* at 619.

difficult given that many heirs property owners do not live on the land and are, in some instances, entirely unaware of their fractional ownership.[11] Without agreement among all landowners, the only legal remedy is a partition action, which can be exercised by any of the cotenants.[12] Partition actions can either result in a partition-in-kind, which is a physical division of the land, or in a partition-by-sale, which forces the sale of the entire property and divides the proceeds, minus legal fees, among all heirs according to respective fractional interest.[13]

The Uniform Partition of Heirs Property Act (the UPHPA or the Act) was written to address the difficulties presented by this form of land ownership.[14] This Note roots the Act's shortcomings in the drafters' decision to normalize the property ownership characteristics of those of higher socioeconomic statuses. This Note argues that the UPHPA does not do enough to protect the land ownership interests of those who are land-rich but cash-poor—those whose single greatest asset is their fractional interest in heirs property. Many scholars have explored the problem of heirs property, and some have addressed and critiqued the effectiveness of the UPHPA.[15] Some have even gone as far to suggest that the adoption of the UPHPA would not be beneficial to heirs property owners given existing state property and partition laws.[16] This Note does not suggest that the Act should be completely disregarded. The Act is a critical first step in protecting heirs property ownership in the United States. Instead, this Note argues that the UPHPA fails to truly support heirs property owners because it treats the "wealthy and

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[11] ANDREW W. KAHRL, THE LAND WAS OURS: HOW BLACK BEACHES BECAME WHITE WEALTH IN THE COASTAL SOUTH 240 (2016).

[12] Deaton, *supra* note 9, at 619.

[13] *Id.*

[14] UNIF. PARTITION HEIRS PROP. ACT intro. note, at 1 (UNIF. L. COMM'N 2010) [hereinafter UPHPA].

[15] *See generally* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 508 (2001) [hereinafter Mitchell, *Reconstruction*] (discussing the fraught history of heirs property in the United States); Jesse J. Richardson, *The Uniform Partition of Heirs Property Act: Treating the Symptoms and Not the Cause?*, 45 REAL EST. L.J. 507, 560 (2017) (exploring the importance of land ownership and concluding that the Act only effectively addresses the scenario in which a third party is attempting to force a sale of an entire parcel of heirs property).

[16] *See generally* Manuel Farach, *The Uniform Partition of Heirs Property Act: A Solution in Search of a Problem*, 92 FLA. BAR J. 56 (analyzing whether the adoption of the UPHPA would be effective in Florida given existing state property and partition law).

legally savvy"[17] as the norm for property owners in the United States, which is inherently in conflict with the socioeconomic realities of most heirs property owners.

Part II offers a history of heirs property in Black America, with an emphasis on wealth among Black heirs property owners. This section also discusses the creation of the UPHPA and its most important provisions. Part III elaborates on the weaknesses of the UPHPA. It argues that the Act modeled heirs property on the ownership characteristics of the "wealthy and legally savvy" and therefore fails to address problems faced by low-income cotenants of heirs property.[18] It also discusses the three weakest provisions of the UPHPA: the cotenant buyout provision, the availability of judicial discretion in resolving partition actions, and the absence of solutions to address the exorbitant legal fees that result from partition actions. Part IV presents amendments to the UPHPA that could be included by state legislatures interested in adopting the Act. The amendments reflect the ownership characteristics of the average heirs property owner rather than the experiences of the "wealthy and legally savvy." Specifically, this Note proposes that the attorneys' fees of all cotenants be shifted to the cotenant who initiated the partition action. This may serve as a deterrent to land and real estate developers who are looking to take advantage of heirs property owners, and might indirectly encourage resolutions between family members that do not result in the division or sale of property. Further, unless there is agreement among all located cotenants, partition actions must be resolved in kind rather than by sale. This allows land-rich but cash-poor cotenants who live on the land to keep their homes, while also allowing the cotenant(s) no longer interested in their property interest to be relieved of their duties.

II. AN OVERVIEW OF HEIRS PROPERTY AND THE CREATION OF THE UPHPA

Heirs property is a highly unstable form of land ownership that grants full rights of ownership to all cotenants, regardless of the size of one's fractional interest and without equally distributing responsibility among the heirs.[19] Lack of responsibility partnered with full rights of ownership mean that any cotenant can force a sale of the entire property, ending the

[17] UPHPA intro. note, at 3.

[18] *Id.*

[19] Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 2, 38 n.348 (2007).

tenancy-in-common for all cotenants.[20] This section describes the prevalence of this volatile form of ownership in Black communities and articulates some of the challenges faced by heirs property owners of lower wealth brackets. This section also discusses the creation of the UPHPA, which was drafted specifically to address the difficulties faced by low- and middle-income heirs property owners.[21]

A. The Heirs Property Problem in Black America

The challenges associated with heirs property can be seen throughout many communities across the United States.[22] Individuals in lower income brackets and of lower formal education are most likely to own heirs property.[23] Studies have shown that Black landowners are extraordinarily vulnerable to this type of land ownership because of the low rate of will-making in the Black community; up to eighty-three percent of Black people die intestate.[24] When a landowner dies without a will, the parcel generally gets passed down to the decedent's heirs as an undivided unit with no right of survivorship.[25] As each generation dies intestate, the title becomes increasingly clouded

[20] Mitchell, *Reconstruction*, *supra* note 15, at 508.

[21] UPHPA intro. note, at 1.

[22] Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 31–33 (2014) [hereinafter Mitchell, *Reforming*].

[23] SCOTT PIPPIN ET AL., U.S. DEP'T OF AGRIC., IDENTIFYING POTENTIAL HEIRS PROPERTIES IN THE SOUTHEASTERN UNITED STATES: A NEW GIS METHODOLOGY UTILIZING MASS APPRAISAL DATA 13 (2017), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs225.pdf [https://perma.cc/XW3R-YMEY].

[24] Todd Lewan & Dolores Barclay, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, AUTHENTIC VOICE, https://theauthenticvoice.org/mainstories/tornfromtheland/torn_part5/ [https://perma.cc/4KV2-ZE7F] (last visited Dec. 24, 2019). One study concluded that sixty-five percent of those whose income falls below $65,000 had not created wills. Mitchell, *Reconstruction*, *supra* note 15, at 507. Furthermore, over seventy-percent of those with estates worth less than $130,000 did not have wills, and fifty percent of those with estates worth less than $260,000 had not created any wills. *Id.* One scholar theorizes that low rates of will-making among Black people can be attributed to a distrust in the government and the mistaken belief that their children will eventually inherit their land. Roy W. Copeland, *Heir Property in the African American Community: From Promised Land to Problem Lands*, 2 PRO. AGRIC. WORKERS J. 1, 2 (2015).

[25] Janice Dyer, Statutory Impacts of Heir Property: An Examination of Appellate and Macon County Court Cases 2 (Dec. 7–9, 2008) (unpublished manuscript) [hereinafter Dyer, Statutory Impacts], http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.569.1533&rep=rep1&type=pdf [https://perma.cc/TP5C-XK4H] (paper presented at the 66th Annual Professional Agricultural Workers Conference, Tuskegee University).

and the property interests more fractionalized.[26] After numerous generations, a situation could arise where, for example, sixty-six heirs own interests in an eighty-acre plot of land, with some heirs owning fractional interests the size of a parking space.[27] This is what happened in to a family Rankin County, Mississippi.[28] One family member wanted her share of the land separated from the lot, while three others with shares the size of parking spots opposed the division because their interest would essentially become worthless after a partition.[29] As a result, a court decided to partition the land by sale and divide the proceeds according to each heir's fractional interest.[30]

More troubling is that each heir has the right to petition for the sale of the entire property.[31] Thomas Mitchell, a professor of law at Texas A&M University who specializes in the problem of heirs property and partition actions, described this dilemma as such: "'Imagine buying one share of Coca-Cola, and being able to go to court and demand a sale of the entire company' . . . . 'That's what's going on here.'"[32]

1. The Consequences of Owning Heirs Property

Scholars have used the concept of "dead capital" to describe heirs property because this type of land cannot be leveraged for financial gain.[33] Hernando de Soto coined the term "dead capital" to describe property situations in developing countries where lack of "necessary formal structure" prevented certain landowners from leveraging their land to secure loans.[34] B. James Deaton, a scholar whose work focuses on heirs property, equated the situation described by de Soto to the difficulties faced by heirs property owners in the United States; cotenants face similar restraints because they cannot leverage their partial interest in the parcel to secure a loan.[35] Many heirs property owners are considered "land rich but cash poor" because the majority of their wealth is tied to their fractional interest in the

[26] *Id.* at 2.

[27] Lewan & Barclay, *supra* note 24.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Mitchell, *Reforming*, *supra* note 22, at 10.

[32] Lewan & Barclay, *supra* note 24 (quoting Thomas Mitchell, Professor of Law at Texas A&M University).

[33] Conner Bailey et al., *Heirs' Property and Persistent Poverty Among African Americans in the Southeastern United States*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 9, 10 (Cassandra Johnson Gaither et al. eds., 2019).

[34] Deaton, *supra* note 9, at 621.

[35] *Id.*

land,[36] but they are unable to mobilize this wealth due to the financial limitations associated with this dead capital.[37] Banks and other lending institutions, for instance, rarely accept a fractional interest in heirs property as sufficient collateral for a loan.[38] Owners of heirs property are generally ineligible for mortgages or disaster relief through Section 502 of the Housing Act of 1949[39] or other housing programs such as Rural Development loans for repairs.[40] This became a serious problem for low-income heirs property owners whose property was destroyed during Hurricanes Katrina and Rita.[41] According to a study conducted by the U.S. Department of Agriculture, approximately 20,000 heirs property owners were denied assistance grants from the Federal Emergency Management Agency or the U.S. Department of Housing and Urban Development because they lacked the requisite clear title; this number increases when including heirs property owners affected by Hurricane Dolly in Texas.[42]

Unrelated to natural disasters, heirs property owners in Kentucky and Virginia struggle to access grants and loans to upgrade their failing septic systems, which poses a significant health risk not only to the heirs property owners but to others in the community.[43] For one heirs property owner to secure a loan or mortgage, or to build, rebuild, or otherwise use the land, all heirs property owners must agree.[44] Reaching this agreement

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[36] Mitchell, *Game Changer*, *supra* note 8, at 70.

[37] Deaton, *supra* note 9, at 621. *See also* Bailey, *supra* note 33, at 16 (describing the difficulty of using heirs property to its full productive potential).

[38] Mitchell, *Game Changer*, *supra* note 8, at 78. Banks and lending institutions will not accept heirs property as a collateral for a loan unless all living heirs agree to accept the debt. This can be nearly impossible when there are numerous heirs with different ideas of how the land should be used. Those who live on the land generally have no recourse but to live in mobile homes because they can be financed through personal loans; a mortgage is not required. Cassandra Johnson Gaither, *Appalachia's "Big White Ghettos": Exploring the Role of Heirs' Property in the Reproduction of Housing Vulnerability in Eastern Kentucky*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 49, 49 (Cassandra Johnson Gaither et al. eds., 2019).

[39] KAHRL, *supra* note 11, at 176.

[40] Dyer, Statutory Impacts, *supra* note 25, at 3.

[41] PIPPIN, *supra* note 23, at 9–10. Importantly, a large number of wealthy heirs property owners were able to hire attorneys to help the family and land recover from the ravages caused by Hurricane Katrina. UPHPA intro. note, at 6.

[42] PIPPIN, *supra* note 23, at 10.

[43] *Id.* at 10.

[44] Laura Bliss, *The Gullah-Geechee People Called Carolina's Coast Home for Centuries. Then Florence Came*, MOTHER JONES (Sept. 18, 2018), https://www.motherjones.com/environment/2018/09/florence-is-destroying-a-

can be a challenge—if not impossible—particularly in situations similar to that of Matthew Allen whose parcel of land has upwards of 100 co-owners.[45]

Not only do heirs property owners have greatly limited access to services and benefits generally afforded to landowners, they are also extremely susceptible to land loss. In the forty-five years following the end of the Civil War, studies estimate that freed Black people accumulated about fifteen million acres of land, mostly in the South.[46] The land was used primarily for farming, and by the 1920s, there were 925,000 Black-owned farms in the United States.[47] This land, which some hold to be almost sacred,[48] became a source of personal security, independence, satisfaction, pride, and a "will to overcome" for Black families.[49] But by 1975, there were only 45,000 remaining Black-owned farms and as of 2017, only two percent of the farms in the United States were Black-owned.[50] These quantitative valuations of Black land loss stand in stark contrast to the experience of white farmers and farm-owners in similar positions. While the number of Black farmers decreased by 99% between 1920 and 1997, the number of white farmers decreased

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delicate-system-of-land-ownership-going-back-over-100-years/ [https://perma.cc/37ZR-2XZK]. Cain Bryan purchased a parcel of land in South Carolina in 1875. In 2019, his descendants decided to sell the heirs property to land developers. This sale was just as complicated as decisions to use or build on the land. A few family members successfully located all 144 living heirs through court proceedings and research, determined the heirs' respective fractional interests in the land, and ensure that all 144 heirs were in agreement to sell the land. David Slade, *144 Heirs of Black Homesteader Without Will Overcome Odds to Sell Mount Pleasant Property*, POST & COURIER (Sept. 20, 2019), https://www.postandcourier.com/business/real_estate/heirs-of-black-homesteader-without-will-overcome-odds-to-sell/article_84717e74-ba12-11e9-934c-ffa39e62b141.html [https://perma.cc/UG5S-PQRW].

[45] Douglas, *supra* note 1. *See also* John Schelhas et al., *The Sustainable Forestry and African American Land Retention Program*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 20, 21 (Cassandra Johnson Gaither et al. eds., 2019) (describing the difficulty of achieving agreement when heirs are geographically dispersed and diverging interest in the use of the land).

[46] Douglas, *supra* note 1.

[47] *Id.*

[48] Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L. REV. 737, 773 (2000). *See also* Letter from Raymond E. Cole to author (Dec. 30, 2019) (on file with author) ("Land ownership played a huge role [for] Southern Black Americans. . . . Leaving land for the family was a Southern legacy. . . . It's a testament to struggles Black families endured. . . . Land ownership as basically a legacy to be inherited from generation to generation. That's important to me—very!! Not only that, it provides proof that you once existed.").

[49] Bailey, *supra* note 33, at 9.

[50] Douglas, *supra* note 1.

only by 66%.[51] Moreover, almost all of the land lost by Black farmers is now either owned by corporations or white individuals.[52] Commentators estimate that since 1969, Black Americans have lost eighty percent of their land, farms or otherwise—half of which has been lost through the division and sale of heirs property.[53] Due to the vulnerable nature of dead capital as well as landowners' inability to mobilize this land for economic gain, heirs property ownership constrains economic development,[54] prevents the accumulation and transfer of intergenerational wealth, and "contributes to persistent poverty in the Black Belt South."[55]

2. Partition Actions and Their Ramifications

In situations where heirs property owners either cannot agree on how the land should be used, or a co-owner is no longer interested in their fractional interest in the land, the tenancy-in-common can be dissolved through a partition action.[56] There are two primary forms of partition actions. First is a partition-in-kind, which results in the parcel of land being divided among the co-owners according to fractional interest.[57] The land is then allocated to the tenants-in-common.[58] Second is a partition-by-sale, where the entire parcel is forcibly sold and the proceeds (minus the legal fees) are distributed among the various cotenants.[59] Partitions-in-kind present the opportunity for family members to maintain most, if not all, of their land; it also allows cotenants to establish a clear title and better protect their land in the future.[60] For this reason, courts are said to prefer partitions-in-kind to partitions-by-sale.[61]

Scholars have noted that despite this statutory preference, courts tend to order a partition-by-sale to resolve these disputes.[62] One commentator theorizes: "[S]ale normally is the product of a partition proceeding, either because the parties

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[51] Vann R. Newkirk II, *The Great Land Robbery: The Shameful Story of How 1 Million Black Families Have Been Ripped from Their Farms*, ATLANTIC (Sept. 29, 2019), https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/ [https://perma.cc/6BGK-MXKP].

[52] *Id.*

[53] Lewan & Barclay, *supra* note 24.

[54] Deaton, *supra* note 9, at 621.

[55] Bailey, *supra* note 33, at 11.

[56] Deaton, *supra* note 9, at 619.

[57] Mitchell, *Game Changer*, *supra* note 8, at 73.

[58] *Id.* at 73.

[59] *Id.* at 69.

[60] Rivers, *supra* note 19, at 59.

[61] *Id.*

[62] *Id.*

all wish for it or because courts are easily convinced that sale is necessary for the fair treatment of the parties."[63] Others have suggested that since real property is increasingly considered a fungible commodity, there is less of an interest in protecting the non-economic value of a parcel of land, something that would be protected through a partition-in-kind.[64] This non-economic value is salient in the case of Black-owned heirs property—for many Black heirs, these parcels of land represent a dramatic shift in status from that of their ancestors, a shift from being considered and treated as property to becoming the owners of real property themselves.[65]

Partitions-by-sale pose an additional problem for many heirs property owners. Since the earnings, minus the legal fees, are divided among the cotenants,[66] many cotenants are left with very little after a court has sold the land and distributed the proceeds. Theresa White, a descendant of Gullah freed slaves[67] who lives in South Carolina, stated, "by the time they finish dividing the money up [in a partition action], it's not enough. You end up in a public housing complex, or Section 8 housing, or in the mobile home park."[68] There are also instances of cotenants facing homelessness after a partition-by-sale.[69]

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[63] *Id.* at 50. *See also* Sarah Waldeck, *Rethinking the Intersection of Inheritance Law and the Law of Tenancy in Common*, 87 NOTRE DAME L. REV. 737, 751 (2011) ("For the typical tenancy in common, undivided land will be worth more than the sum total of its aggregate parts. Empirical investigation has further suggested that even when land appears to be a good candidate for partition in kind, physical division often works to the disadvantage of one cotenant, at least in financial terms.").

[64] Mitchell, *Reforming*, *supra* note 22, at 12.

[65] Mitchell, *Game Changer*, *supra* note 8, at 65.

[66] Deaton, *supra* note 9, at 619.

[67] The Gullah are a group of Black Americans living on the costal fishing and farming communities of South Carolina and Georgia. Due to geographical isolation and strong community life, they have been able to preserve their African cultural heritage to a larger degree than other groups of Black Americans. Joseph A. Opala, *The Gullah: Rice, Slavery, and the Sierra Leone-American Connection*, YALE UNIV. GILDER LEHRMAN CTR. FOR STUDY SLAVERY, RESISTANCE, & ABOLITION https://glc.yale.edu/gullah-rice-slavery-and-sierra-leone-american-connection [https://perma.cc/AWG4-KQLT] (last visited Feb. 22, 2021).

[68] Meagan Day, *Freedom Gained and Lost*, JACOBIN (Apr. 12, 2019), https://www.jacobinmag.com/2019/04/gullah-geechee-south-carolina-civil-war-slavery [https://perma.cc/6XAD-AN3B].

[69] Craig-Taylor, *supra* note 48, at 757. *See also* UPHPA intro. note, at 2 (recognizing the risk of homelessness faced by individuals who rely on their fractional interest in the land to provide shelter).

Partition actions were intended to resolve disputes between cotenants,[70] but opportunistic land and real estate developers frequently take advantage of this legal mechanism to acquire land far below its market value.[71] Family members no longer interested in the property can "cash out" by selling their interest to a prospective land developer.[72] Once a developer has acquired an interest in the heirs property, a partition action can be initiated.[73] Black heirs property owners in coastal zones or in other areas with a high market value are particularly vulnerable to this type of acquisition. [74] In the 1970s, developers began actively searching for heirs property owners who either did not live on the land of interest or had little understanding of the land's true value; the developers would then offer these landowners small sums of money for their interest.[75] In one especially egregious example, a white South Carolina real estate trader named Audrey Moffitt was able to acquire a 335-acre estate that had been owned by the Becketts, a Black family, since the early 1870s.[76] By paying one sick and elderly cotenant $750 for her 1/72 interest (which was actually worth over six times Moffitt's offer), and by buying the interests of six other cotenants, Moffitt was eventually able to force a partition action and acquire the entire property.[77] Through the law of partitions, Moffitt received $217,000 for land that she had purchased for only $2,775.[78]

The distressing history of heirs property in the United States, with its devastating consequences for the Black community, has led scholars and commentators to suggest modifications to existing partition law such that heirs property owners can better protect their land. One of the most successful solutions is the Uniform Partition of Heirs Property Act, which was presented in 2010 to protect heirs property owners,

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[70] Lewan & Barclay, *supra* note 24.

[71] KAHRL, *supra* note 11, at 239.

[72] Mitchell, *Reconstruction*, *supra* note 15, at 508.

[73] KAHRL, *supra* note 11, at 239.

[74] *Id.* at 240. *See also* Bailey, *supra* note 33, at 14 ("Such partition sales are most common where heirs' property has a high market value, for example along the 'Gullah-Geechee coast' of South Carolina. African-American populations were established there long before beachfront property in places like Hilton Head became a valuable commodity.").

[75] KAHRL, *supra* note 11, at 240.

[76] Lewan & Barclay, *supra* note 24.

[77] *Id.*

[78] *Id.*

especially those from low income communities and communities of color.[79]

B. The UPHPA is Presented as a Solution

The UPHPA was drafted and proposed for state adoption by the Uniform Law Commission in 2010 as a means of addressing the heirs property problem, especially among low- and middle-income families across the United States.[80] The drafters of the UPHPA recognize that those who are land-rich but cash-poor are the most vulnerable to land loss through partition actions; therefore, the Act has the express purpose of creating and enforcing property preservation and wealth protection mechanisms to the benefit of those with modest means.[81] As of February 2021, the UPHPA has been enacted in seventeen states and the U.S. Virgin Islands, and eight of those states fall in the Black Belt.[82] The Act has also been introduced in five other states.[83]

The UPHPA has a few important provisions created to benefit minority and low-income families. First is the cotenant buyout provision, which gives cotenants who did not initiate the partition action the opportunity to buy the property interests of those who did initiate the partition action.[84] This would, in theory, allow cotenants to preserve the entire parcel of land, while minimizing or completely eliminating legal fees and other costs associated with a partition action.[85] The drafters intended for this provision to promote judicial economy and the consolidation of land ownership.[86] Others have asserted that this

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[79] UPHPA intro. note, at 1.

[80] *Id.*

[81] *Id.*

[82] *Partition of Heirs Property Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d (last visited Feb. 19, 2021) (listing Alabama, Arkansas, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, South Carolina, Texas, and Virginia as states where the UPHPA has been enacted). The Black Belt is a group of eleven Southern states with a high percentage of Black residents. The Black Belt includes Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Rosalind Harris & Heather Hyden, *Geographies of Resistance Within the Black Belt South*, 57 SE. GEOGRAPHER 51, 52–53 (2017).

[83] *Id.* (listing California, Indiana, Kentucky, Massachusetts, and New Jersey as states where the UPHPA has been introduced).

[84] UPHPA § 7.

[85] *Id.* § 7(g).

[86] *Id.* § 7 cmt. n.1, at 18 ("This Act includes a mechanism for the buyout of interests as the first preferred alternative to partition by sale to promote judicial economy, to encourage consolidation of ownership, and to accomplish the

buyout provision might serve as a "shark repellant," which would disincentivize disinterested cotenants with very small fractional interests in the property from initiating a partition action at the expense of those who depend on their fractional interest in the land.[87] That being said, the buyout provision might only be a theoretical solution that would be difficult to mobilize in practice. Co-owners who live on the land are frequently land-rich but cash-poor and are thus unable to buy out an initiating cotenant's interests.[88]

The second notable provision is the preference for partition-in-kind.[89] The Act requires the order of partition-in-kind unless—after analysis of the factors in Section 9 of the Act—this order would result in "great manifest prejudice" to the cotenants involved.[90] Section 9 requires judges to evaluate factors such as sentimental or ancestral attachment to the property, whether the land can be practicably divided among the cotenants, and whether the land is being lawfully used.[91] Importantly, judges are also permitted to evaluate "any other relevant factor," which may allow for significant judicial discretion.[92] Courts have demonstrated that they are persuaded by the comparative ease of dividing money as opposed to land with numerous heirs.[93] Thus, allowing a judge to consider "any other relevant factor" might sway the balance away from a preference for a partition-in-kind and towards a partition-by-sale.

Lastly, the Act mandates an open-market sale of land that is ordered to be partitioned by sale, unless sealed bids or an auction is economically preferable.[94] Historically, when land is partitioned by sale, the property is frequently sold in an auction, resulting in sales at fire-sale prices, meaning there is a

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larger goal of establishing a default, statutory approach to partition of inherited property which mirrors the best practices used for family property owned by those who are wealthy and legally savvy.").

[87] Mitchell, *Game Changer*, *supra* note 8, at 73.

[88] Meghan E.B. Pridemore, *Tides, Torrens, and Family Trees: Heirs Property Preservation Challenges*, 23 PROB. & PROP. 24, 26 (2009).

[89] UPHPA § 8.

[90] *Id.*

[91] *Id.* § 9(a).

[92] *Id.*

[93] Sara Hitchner et al., *"A Privilege and a Challenge": Valuation of Heirs' Property by African American Landowners and Implications for Forest Management in the Southeastern U.S.*, 16 SMALL-SCALE FORESTRY 395, 398 (2017).

[94] UPHPA § 10.

significant discount from the fair market value of the land.[95] This sale procedure speaks to a contradiction at the core of partition actions: courts are supposed to select a wealth-maximizing solution, but resolving partition actions through sale is almost always wealth-depleting.[96] An open-market sale ensures that the land is sold at a fair price, maximizing the proceeds received through a partition-by-sale.[97] However, open-market sales yield higher transaction costs,[98] for which the cotenants who did not force the sale may be responsible.[99]

Although the UPHPA presents significant positive changes to the laws of partition, the Act falls short of protecting those who are land-rich but cash-poor and for whom the loss of heirs property can constitute the loss of their single greatest asset.[100]

III. WEAKNESSES IN THE UPHPA AS APPLIED TO LOW-INCOME BLACK HEIRS PROPERTY OWNERS

There are three main problems with the UPHPA as applied to low-income Black heirs property owners: the accessibility of the cotenant buyout, the availability of judicial discretion, and the absence of solutions to address the exorbitant legal fees associated with partition actions. These problems all stem from the legislative purpose of the Act, elucidated in its prefatory note. This section discusses the premise of the UPHPA, and the problems that arise because of the assumptions on which this Act is based.

A. Embracing the "Wealthy and Legally Savvy" as the Norm

The UPHPA was drafted to address the problem of heirs property, seen most frequently in low- to middle-income families across America.[101] The drafters state that the instability of heirs property ownership "stands in sharp contrast" to the property rights enjoyed by wealthier families.[102] The importance of this Act cannot be overstated, as the UPHPA is the most comprehensive and far-reaching reform of partition law seen since the 1800s.[103] The Act, however, is not without fault. The

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[95] Mitchell, *Reforming*, *supra* note 22, at 20.
[96] *Id.*
[97] Mitchell, *Game Changer*, *supra* note 8, at 74.
[98] Richardson, *supra* note 15, at 556.
[99] Mitchell, *Reforming*, *supra* note 22, at 25.
[100] UPHPA intro. note, at 1.
[101] *Id.*
[102] *Id.*
[103] Mitchell, *Game Changer*, *supra* note 8, at 72.

three critical weaknesses of the UPHPA, discussed at length in the following sections, all stem from a major assumption that heirs property owners have the financial ability to protect their land using the same mechanisms as property owners of higher wealth brackets.

In the prefatory note of the UPHPA, the drafters write, "this Act imports certain core property preservation and wealth protection mechanisms already commonly used by wealthy and legally sophisticated family real property owners . . . ."[104] In a way, the drafters' choice to privilege the ownership norms of the wealthy and legally savvy makes sense—the wealthy have the financial means to better protect their land through making wills and hiring attorneys to help with any disputes surrounding ownership of the land. However, a deeper problem emerges in the drafters' decision to treat the wealthy as the norm.

As mentioned in the prefatory note, a large number of heirs property owners cannot afford legal services, thus leaving them vulnerable to the many risks of owning heirs property under the default rules of tenancy-in-common.[105] Thomas Mitchell, the lead drafter of the UPHPA, has also discussed how the economic statuses of heirs property owners impede their ability to protect their land. For example, in a 2010 article, Mitchell acknowledges that property owners who own land under the default rules governing tenancy-in-common (i.e. heirs property) are low- to middle-income people.[106] In a 2014 article, Mitchell does the same.[107] In 2018, Mitchell wrote that the "enhanced instability [of heirs property] arises from the interaction between multi-generational patterns of intestate succession among certain disadvantaged groups, the default partition law, and the low-income/low-wealth status of many heirs' property owners."[108] Despite this repeated recognition that heirs property owners frequently do not have access to the finances and economic stability to protect their land, Mitchell and the other drafters of the UPHPA nonetheless chose to normalize the possession of wealth and used that norm as the

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[104] UPHPA intro. note, at 3.

[105] *Id.*

[106] Thomas Mitchell, et al., *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 FLA. STATE U. L. REV. 589, 620 (2010) [hereinafter Mitchell, *Forced Sale Risk*].

[107] *See* Mitchell, Reforming, *supra* note 22, at 30–31 ("Many heirs property owners are 'land rich but cash poor,' in that they do not have other substantial liquid assets (or tangible assets for that matter) that they can use, including to secure a loan, to enable them to bid effectively at a partition sale.").

[108] Mitchell, *Game Changer*, *supra* note 8, at 69.

basis for an Act written to support low- to middle-income heirs property owners.[109]

The subsequent sections argue that the drafters' decision to rely on the property ownership practices and norms of the wealthy and legally savvy is why the UPHPA falls short for those who are land-rich but cash-poor.

B. Accessibility of the Cotenant Buyout

Section 7 of the UPHPA presents the option for co-owners of a parcel of heirs property to buy out the interest of the cotenant who has initiated a partition action.[110] After valuation of the property, any cotenant (other than the one who has initiated the partition action) may buy the whole interest of the cotenant(s) who requested the partition.[111] The Act covers scenarios in which more than one cotenant elects to buy out the interest, and describes how the cost is divided among electing cotenants.[112] Section 7 of the UPHPA was included as a mechanism to establish a "default, statutory approach to the partition of inherited property which mirrors the best practices used for family property owned by those who are wealthy and legally savvy," while also promoting judicial economy and consolidating ownership among heirs property owners.[113]

The legislative comments also clarify that the buyout option is mandatory for those who initiated the partition action because, in requesting this action, they have demonstrated that they are willing to be divested of their interest in the heirs property in exchange for cash.[114] On its face, this buyout provision seems like an effective protective mechanism against land loss, as it would prevent a partition-by-sale where family members who live on the land are generally unable to outbid the individual who initiated the partition action in a sale of the entire property.[115] Furthermore, it presents a unique opportunity for heirs property owners to prevent any fractionation of their parcel of land. Despite the potential for these positive outcomes, the buyout provision also demonstrates the dangers of treating the ownership characteristics of the "wealthy and legally savvy" as the norm.

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[109] UPHPA intro. note, at 2.
[110] *Id.* § 7.
[111] *Id.*
[112] *Id.*
[113] *Id.* § 7 cmt. n.1, at 18.
[114] *Id.* § 7 cmt. n.3, at 19.
[115] Dyer, Statutory Impacts, *supra* note 25, at 3.

Heirs property owners are often economically marginalized,[116] and the land in question, even when sold below market value, is frequently too expensive for cotenants.[117] Many times, partition actions place cotenants who wish to maintain their interest in the land, especially those who live on the parcel, under notable financial distress.[118] The buyout provision requires that "a disinterested real estate appraiser . . . determine[s] the fair market value of the property assuming sole ownership of the fee simple estate."[119] The purchase price of the initiating cotenant's fractional interest in the parcel is the fair market value multiplied by their fractional interest.[120] If only one cotenant elects to participate in the buyout provision, the court notifies all located cotenants of this fact,[121] and the electing cotenant is responsible for the entire cost. Alternatively, if more than one cotenant elects to participate in the buyout, the court apportions the cost of the initiating cotenant's fractional interest of the parcel among the electing cotenants.[122] In the event that no cotenants elect to participate in the buyout provision, or no electing cotenant timely pays their apportioned price, the court will proceed to either a partition-in-kind or partition-by-sale under Section 8 of the UPHPA.[123] If some of the electing cotenants fail to timely pay their apportioned price, the remaining cost of the initiating cotenant's interest is shifted to those who have already timely paid their apportioned price;[124] if the remaining electing cotenants are unable to pay the difference, the court proceeds with the partition action under Section 8.[125]

The accessibility of the buyout provision is fatally premised on the assumption that heirs property owners are similar to their "wealthy and legally savvy" counterparts and have sufficient cash on hand to execute the buyout provision. Regardless of whether a state has enacted the UPHPA, heirs property sold in a partition-by-sale was frequently subject to

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[116] Tristeen Bownes & Robert Zabawa, *The Impact of Heirs' Property at the Community Level: The Case Study of the Prairie Farms Resettlement Community in Macon County, AL*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 29, 32 (Cassandra Johnson Gaither et al. eds., 2019).

[117] *Id.*

[118] Mitchell, *Reconstruction*, *supra* note 15, at 508.

[119] UPHPA § 6(d).

[120] *Id.* § 7(c).

[121] *Id.* § 7(d)(1).

[122] *Id.* § 7(d)(2).

[123] *Id.* § 7(d)(3), (e)(2).

[124] *Id.* § 7(e)(3).

[125] *Id.* § 7(f)(2).

auctions, yielding fire-sale prices.[126] Individuals who did not have enough cash on hand were unable to participate in the auction, despite the fact that land was sold far below market value.[127] As a result, many land-rich but cash-poor heirs property owners could not retain their land in a partition-by-sale, even at these reduced prices.[128] Even though the cost of a fractional interest of land at market value might be less than the fire-sale price of an entire parcel of land, it is difficult to know whether those whose most valuable asset is their interest in heirs property would have enough cash to mobilize this buyout provision.

For example, Audrey Moffitt, the white real estate trader discussed above, purchased the combined 1/6 interest of two Beckett family members for $5,800.[129] The land was subsequently appraised at $55,833.[130] If the Beckett family utilized the buyout provision of the UPHPA, cotenants interested in retaining the land would have been responsible for $55,833 to buyout the interest of the two Beckett family members who agreed to sell their fractional interest in the land, given that the UPHPA's buyout provision requires that the land be sold at fair market value.[131] For those who are land-rich but cash-poor, $55,000 may be an exorbitant price that the cotenants cannot afford, even if cotenants electing to mobilize the buyout provision were to pool their assets. The first right of purchase is thus, many times, not a feasible option for low- and middle-income heirs property owners.[132]

The buyout provision also assumes that cotenants are able and willing to work together to pool their liquid assets to purchase the fractional interest of the initiating cotenant. If an individual cotenant interested in retaining the land does not have the financial assets required to utilize the buyout provision of the UPHPA, multiple cotenants could ostensibly pool their resources and successfully buy out the fractional interest of the initiating cotenant.[133] However, there are notable challenges associated with coordinating between multiple cotenants.[134] As the number of shares increase and the size of each individual

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[126] Mitchell, *Forced Sale Risk*, *supra* note 106, at 612.

[127] *Id.* at 605.

[128] Mitchell, *Game Changer*, *supra* note 8, at 70.

[129] Thomas Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, WIS. L. REV. 557, 568 n.39. (2006).

[130] *Id.*

[131] UPHPA § 7(c).

[132] Rivers, *supra* note 19, at 78.

[133] Mitchell, *Game Changer*, *supra* note 8, at 73.

[134] Waldeck, *supra* note 63, at 750.

interest decreases, reaching consensus among cotenants can be extremely difficult.[135] Heirs property is known to be the source of intra-family conflict,[136] and coordination among cotenants can be hard to achieve when a number of heirs do not live on the land or have an interest in maintaining it.[137] Between a lack of cooperation between cotenants[138] and heirs property owners' limited liquid assets,[139] the buyout provision of the UPHPA might be effective in theory, but unviable in practice.

C. Availability of Judicial Discretion

Historically, the law has demonstrated a preference for partition-in-kind as a resolution to partition actions.[140] Courts have stated that a partition-by-sale is a drastic remedy that should only be exercised under specific and limited circumstances.[141] In most jurisdictions, partition statutes only allow for partitions-by-sale if there is evidence to suggest that a partition-in-kind would result in "great prejudice" or "substantial injury" to the cotenants.[142] Despite a *de jure* preference for partitions-in-kind, courts have demonstrated a marked *de facto* preference for partition-by-sale.[143] Legislation preceding the UPHPA relied on an economics-only test[144] that did not specify the definition of "great prejudice" or "substantial injury."[145] Also, courts generally act on the presumption that a large number of heirs partnered with the limited size of property can make a physical division of a parcel complicated to execute.[146] The *de facto* preference for partition-by-sale produces a "vulnerability concern" for cotenants who want to maintain their ownership interest but are dispossessed against their will through a

[135] Dyer, *Ownership*, *supra* note 7, at 195.

[136] Hitchner, *supra* note 93, at 410.

[137] Schelhas, *supra* note 45, at 21.

[138] *Id.*

[139] Bownes & Zabawa, *supra* note 116, at 32.

[140] Deaton, *supra* note 9, at 619.

[141] Thomas Mitchell, *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, 40 STATE & LOC. L. NEWS 6, 8 (2016) [hereinafter Mitchell, *Restoring*].

[142] *Id.*

[143] *Id.*

[144] Under the economics-only test that courts have historically relied on to resolve partition actions, courts rarely consider the sentimental attachments landowners might have to the heirs property. Courts would order a sale "if the hypothetical fair market value of the entire property is significantly more than the aggregated fair market value of separately titled parcels which would arise from a partition in kind." Mitchell, *Reforming*, *supra* note 22, at 12–13.

[145] Mitchell, *Restoring*, *supra* note 141, at 8.

[146] Deaton, *supra* note 9, at 619.

partition action.[147] This concern is especially prevalent when a fractional interest is acquired by a non-family member, like a land developer, whose sole interest is forcing a sale of the entire property.[148] Given that courts only "pay 'lip service'" to historical preference for partition-in-kind, real estate developers and traders are able to use partition law to easily (and legally) gain possession of valuable family land.[149]

The UPHPA includes a series of factors that a court must consider to determine whether a partition-in-kind would result in a "great manifest prejudice to the cotenants as a group,"[150] with the intent to demonstrate a strong preference for partition-in-kind.[151] When determining whether a partition-in-kind or a partition-by-sale would be the appropriate resolution for a partition action, the UPHPA utilizes a "totality of the circumstances" test,[152] which requires a court to evaluate:

1. Whether the heirs property in question can practicably be divided among cotenants;[153]
2. Whether the market value of the individual parcels resulting from a partition-in-kind would be less than the heirs property as a whole;[154]
3. Evidence of collective duration of ownership by a cotenant and a predecessor who is related to said cotenant;[155]
4. A cotenant's sentimental attachment to the property, including any ancestral or other unique value;[156]
5. Whether the land is being lawfully used, and the degree of harm if a cotenant is no longer able to conduct such use;[157]

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[147] *Id.* at 622.

[148] *Id.*

[149] Rivers, *supra* note 19, at 60.

[150] UPHPA § 9(a).

[151] *See id.* § 8 legislative note ("Under this Act, there is . . . a strong preference for a partition in kind.").

[152] *See id.* § 9 cmt. n.1, at 26 ("Under this section, a court in a partition action must consider the totality of the circumstances, including a number of economic and noneconomic factors, in deciding whether to order partition in kind or partition by sale.").

[153] *Id.* § 9(a)(1).

[154] *Id.* § 9(a)(2).

[155] *Id.* § 9(a)(3). This section, in essence, asks a court to consider whether the person requesting a partition action is a part of the family that originally owned the heirs property in question, or whether this individual is a non-relative, such as a land developer or real estate trader who acquired the land by buying one family member's fractional interest.

[156] *Id.* § 9(a)(4).

[157] *Id.* § 9(a)(5).

6. The degree to which each cotenant has paid their share of fees to maintain the property, including property taxes;[158] and
7. "any other relevant factor."[159]

These considerations are supposed to ensure a *de jure* and a *de facto* preference for partition-in-kind by eliminating the economics-only test that states have historically used to justify a partition action by sale.[160] Instead, courts must equally consider both economic and non-economic considerations,[161] with no one factor being dispositive.[162] Despite these new requirements, though, the UPHPA still gives judges substantial discretion to resolve a partition action by sale rather than in kind. In doing so, the Act does not do enough to protect the land ownership interests of heirs property owners who are land-rich but cash-poor.

First, the Act falls short of preventing partitions-by-sale, even though the drafters claim to have promoted a strong preference for partitions-in-kind.[163] The first factor asks a court to determine whether a parcel of land can be practicably divided among cotenants, although historically that question has not swayed the balance in favor of a partition-in-kind.[164] In many instances, judges have ordered a partition-by-sale, even when a physical division of property is feasible or when the majority of the heirs did not want the land to be divided through sale.[165] Also, the Act's recommendation that the courts rely on "any other relevant factor" could continue to allow a court to resolve a partition action by sale for ease. This election for a partition-by-sale is due, in large part, to the comparative convenience of dividing money rather than dividing physical property.[166]

The UPHPA introduces two factors by which to determine "manifest prejudice" or injury—a cotenant's sentimental attachment to the property, including ancestral value,[167] and the degree to which a cotenant would be harmed if no longer allowed

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[158] *Id.* § 9(a)(6).
[159] *Id.* § 9(a)(7).
[160] Mitchell, *Game Changer*, *supra* note 8, at 73.
[161] *Id.*
[162] UPHPA § 9(b).
[163] *Id.* § 8 legislative note.
[164] Mitchell, *Game Changer*, *supra* note 8, at 69.
[165] *Id.*
[166] Hitchner, *supra* note 93, at 398.
[167] UPHPA § 9(a)(4).

to continue lawful use of the property.[168] However, the remaining factors in the "totality of the circumstances" test still lean towards a preference for partition-by-sale, especially for those who are land-rich but cash-poor. The third factor requires evidence of collective duration of ownership by a cotenant and a related predecessor.[169] This can be difficult to prove when the "pattern of property transfer" occurs informally without any documentation, especially among low-income individuals.[170] Further, the land in question frequently cannot be used lawfully, for any purposes, commercial or otherwise, as required by the fifth factor, especially when a cotenant is unable to achieve consensus on how to use the land, assuming they are even able to locate all living tenants.[171] Heirs property is a classic example of the tragedy of the anti-commons—since any economically viable use of the land requires the consent of all cotenants, heirs property owners are inhibited from applying the property to productive, legal use without consensus.[172] No single cotenant can legally use the property without the consent of the other cotenants.[173] Lastly, the chances that cotenants pay their pro rata share of taxes and other maintenance fees, as required by the sixth factor,[174] become more unlikely as the number of heirs increases. It is often too complicated to organize and distribute responsibility for these payments when a number of heirs do not live on the land or have any interest in maintaining it.[175]

The "totality of the circumstances" test is undoubtedly more comprehensive than the economics-only test that courts relied on prior to the enactment of the UPHPA, but these factors still fail to ensure that heirs property is fully protected from partitions-by-sale. These weaknesses stem from the assumption of wealth upon which this Act is based. The requirements that heirs property owners provide evidence of their collective duration of ownership[176] and that every heir pay their pro rata share of taxes[177] assumes that the family has the financial means to access legal services to produce wills and deeds showing

[168] *Id.* § 9(a)(5).
[169] *Id.* § 9(a)(3).
[170] PIPPIN, *supra* note 23, at 16.
[171] UPHPA § 9(a)(5).
[172] Richardson, *supra* note 15, at 511.
[173] *Id.*
[174] UPHPA § 9(a)(6).
[175] Hitchner, *supra* note 93, at 398.
[176] UPHPA § 9(a)(3).
[177] *Id.* § 9(a)(6).

familial ownership of the land[178] and that every heir is able to pay taxes.[179] This is more likely the case for the "wealthy and legally savvy" than for the low-income cotenants the drafters claim the Act was designed to help.[180] The strong possibility for a partition-by-sale under the Act's "totality of the circumstances" test, despite the stated preference for partition-in-kind, demonstrates the dangers of treating the socioeconomic positioning of the "wealthy and legally savvy" as the norm for land-rich but cash-poor heirs property owners.

D. Legal Fees Associated with Partition Actions

Legal fees are another aspect of a partition action that can be particularly harmful to those who are land-rich but cash-poor. Heirs property owners who defend against partition actions can incur thousands of dollars in legal fees,[181] which include attorneys' fees, court fees, and the cost of surveying the land.[182] The exorbitant nature of these fees can undermine any economic benefit cotenants would theoretically receive through a partition-by-sale.[183] In one instance, a parcel of heirs property that had been in the Sanders family for eighty-three years was purchased by a timber company for $505,000.[184] The attorney involved in the partition action collected roughly 20% of the land's proceeds in attorneys' fees, which amounted to $104,730.[185] This left $389,170[186] to be divided among ninety-six heirs ($4,053.85 per heir), who declined to appeal the sale

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[178] *See* Mitchell, *Reconstruction*, *supra* note 15, at 517 (discussing the low incidence of will-making and estate planning among poor Black landowners). *See also* Christy Kane et al., *Addressing Heirs' Property in Louisiana: Lessons Learned, Post-Disaster*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 89, 90 (Cassandra Johnson Gaither et al. eds., 2019) (stating that many heirs are unable to afford the legal services required to secure clear title).

[179] *See* Mitchell, *Reconstruction*, *supra* note 15, at 513 (acknowledging that in many instances, one cotenant will pay more than his pro rata share of taxes).

[180] *See* UPHPA intro. note, at 1 ("The Uniform Partition of Heirs Property Act is an act of limited scope which addresses a widespread, well-documented problem faced by many low to middle-income families across the country who have been dispossessed of their real property and much of their real property-related wealth over the past several decades as a result of court-ordered partition sales of tenancy-in-common properties.").

[181] Lewan & Barclay, *supra* note 24.

[182] Hitchner, *supra* note 93, at 398.

[183] UPHPA intro. note, at 8.

[184] Lewan & Barclay, *supra* note 24.

[185] *Id.*

[186] *Id.*

because they could not afford the legal fees of additional court proceedings.[187]

Individual cotenants who own a small interest in the heirs property can initiate a partition action knowing that they will be able to recover their legal fees from the proceeds of the sale.[188] However, cotenants who want to contest the sale of the property in court are responsible for their own legal fees.[189] This limits the ability of those who are land-rich but cash-poor to protect their fractional interest in the land, which is frequently their most valuable asset.[190] The drafters of the UPHPA recognize the challenges posed by the current allocation of legal fees in partition actions, noting that in most states, those who unsuccessfully resist a partition action are subsequently made responsible for the attorneys' fees of the initiating cotenant, on top of their own fees resulting from hiring counsel to resist the partition action.[191] Currently, partition law only adds insult to injury for those who want to preserve their fractional interest in heirs property;[192] cotenants are forced "to pay for the deprivation of their property rights and their resulting loss of wealth."[193]

Despite the drafters' acknowledgement that the existing distribution of legal fees can be extremely harmful to cotenants, especially those of modest means, the UPHPA does not include any provisions to address these concerns. The drafters suggest that state legislatures include the UPHPA as part of the state's existing partition law,[194] which would mean that state laws dictating the division and allocation of legal fees will remain unchanged. The UPHPA offers no protection for those whose net compensation, which includes deductions for legal fees, does not exceed the perceived financial and sentimental loss.[195]

The absence of a provision accounting for the exorbitant legal fees speaks again to the consequences of normalizing the wealthy and legally savvy. As the drafters explain in the prefatory note to the UPHPA, low-income heirs property owners

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[187] Rivers, *supra* note 19, at 62 n.575.
[188] *Id.* at 61–62.
[189] *Id.* at 62.
[190] UPHPA intro. note, at 1.
[191] *Id.* intro. note, at 2.
[192] Bailey, *supra* note 33, at 14.
[193] UPHPA intro. note, at 2.
[194] *Id.* § 1 note, at 9.
[195] B. James Deaton & Jamie Baxter, *Towards a Better Understanding of the Experience of Heirs on Heirs' Property*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE LAND OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 44, 45 (Cassandra Johnson Gaither et al. eds., 2019).

do not know about and/or are unable to afford legal services that could mitigate the risks of owning heirs property.[196] Also, as described above, cotenants of modest means decide not to pursue appeals when their land is subject to a partition action because they are unable to afford the associated legal fees.[197] Modelling partition law after the ownership characteristics of the wealthy and legally savvy results in the drafters failing to devise effective solutions that address, or at least recognize, the fundamental problem that prevents heirs property cotenants from protecting their land—a lack of liquid and tangible assets, or in other words, a lack of wealth.

IV. MODIFICATIONS TO THE UPHPA TO BETTER PROTECT THE LAND-RICH AND CASH-POOR

This Note proposes two modifications to the UPHPA to better address the needs of heirs property owners who are land-rich but cash-poor. First is a fee-shifting provision that would make the initiating cotenant responsible for all legal fees associated with a partition action. Second is a mandate that all partition actions be resolved through a partition-in-kind, unless there is consensus among all located cotenants that a partition-by-sale is preferred. These proposals tackle the consequences of relying on the "wealthy and legally savvy" as the norm for property ownership.

A. Fee-Shifting Provision

The UPHPA does not include any provisions that address the extreme financial strain cotenants face when seeking to retain their land in a partition action.[198] Some heirs property owners decline to contest a partition action in court because of these legal fees.[199] Due to the challenges posed by the legal fees associated with partition actions, this Note suggests that the UPHPA be amended to include a fee-shifting provision that shifts all legal fees to the individual who initiated the partition action.

The payment of attorneys' fees has historically been allocated according to one of two practices. The English rule, used in countries across the world, utilizes a "loser pays" system, in which the prevailing party's legal fees are paid by the losing

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[196] UPHPA intro. note, at 3.
[197] Rivers, *supra* note 19, at 62 n.575.
[198] UPHPA intro. note, at 2.
[199] Lewan & Barclay, *supra* note 24.

party.[200] The United States generally follows the "American Rule," under which each party is only responsible for their own legal fees.[201] However, in the case of partition actions, courts seem to follow the English rule, in that the initiating cotenant can recoup their legal fees from the proceeds of a partition sale (to which every heir is entitled), and that contesting heirs must pay for their own legal fees.[202]

The American Rule, importantly, is only common practice; exceptions to this "rule" can be made through statute by legislatures.[203] In other words, as long as fee-shifting rules are based in statute, they can be considered exceptions to the American Rule.[204] As such, the UPHPA should be amended to shift the legal fees of all non-initiating cotenants to the cotenant who initiated the partition action. This modification has the potential to minimize the number of partition actions of any type, as well as protect the land ownership interests of all heirs, especially those who are land-rich and cash-poor. If the action is initiated by land developers, this provision might serve as a financial deterrent. Real estate traders and other opportunistic individuals like Audrey Moffitt might be hesitant to buy out an individual interest in heirs property to force a sale of the entire parcel[205] because cotenants would be financially empowered to fight the partition action. There would no longer be scenarios of cotenants declining to resist the sale due to exorbitant legal fees for which they would be responsible.[206] If the partition action is the result of a family disagreement, the financial burden facing the initiating cotenant might encourage less expensive options, such as mediation. This provision would, at its core, discourage long and arduous legal battles to sell or protect the land in question. It would deter land developers from using partition actions to acquire parcels of land that frequently hold financial and sentimental significance for Black families, and it would encourage heirs property owners to search for inexpensive and mutually agreeable solutions.

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[200] John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

[201] *Id.*

[202] Rivers, *supra* note 19, at 61–62.

[203] Vargo, *supra* note 200, at 1587.

[204] *Id.*

[205] Mitchell, *Forced Sale Risk*, supra note 106, at 612.

[206] Rivers, *supra* note 19, at 62.

B. Mandate for Partition-in-Kind

The "totality of the circumstances" test in Section 9 of the UPHPA is supposed to demonstrate a strong statutory preference for partition-in-kind,[207] but historically, a *de jure* preference for this resolution has done very little to influence courts.[208] This leaves cotenants who want to maintain their fractional interest in the land at risk, especially when the sale of the land is forced by a non-family member, such as a real estate trader or land developer.[209] The recommendation for a fee-shifting provision can reduce the chance of a partition-by-sale because those interested in preserving their interest would not have to worry about the legal fees associated with contesting the partition action. That being said, a mandate for partition-in-kind in scenarios where cotenants are unable to reach a consensus on how to treat the land would better preserve the interests of those who depend on their fraction of the land.

A mandate for partition-in-kind would create protections for all co-owners of a parcel of heirs property. First, it most obviously would protect the interests of cotenants who live on the land, who want to maintain their fractional interest. A partition-in-kind would ensure that their fractional interest remains undisturbed, and these cotenants can continue to rely on the land to serve as their home. Second, this mandate can protect heirs property owners who are no longer interested in their fraction of the parcel. A co-owner selling their interest could still recover fair market price of their fraction of the land, which is required under the buyout provision and Section 6 of the UPHPA.[210] As such, the cotenant who no longer wants their interest in the property would receive fair compensation for their fraction of the parcel, while the cotenants who want to maintain the heirs property, especially those who live on the land, can continue to do so. Finally, land developers and real estate traders looking to capitalize on heirs property would have to ensure that all located cotenants agree to relinquish their fractional interests in the property in exchange for the fair market value. Without

[207] UPHPA § 8 note, at 23 ("Under this Act, there is . . . a strong preference for a partition in kind.").

[208] Mitchell, *Restoring*, *supra* note 141, at 8.

[209] Deaton, *supra* note 9, at 622.

[210] UPHPA § 6 (articulating how a court is to determine the fair market value of a parcel of land).

this consensus, a forced sale, similar to what the Becketts[211] and other families have experienced,[212] could not occur.

V. CONCLUSION

The UPHPA is a strong start for providing some solutions to the heirs property problem, but there is room for improving this legislation to better address the issues faced by the socioeconomic groups it was designed to help.[213] Given that the UPHPA is adopted on a state-by-state basis,[214] and that the drafters recommend the Act be included into existing state partition law,[215] state legislatures could modify the Act or its existing law to include the reforms prescribed in this Note. These amendments will only strengthen the UPHPA and ensure the drafters' intent of protecting heirs property in minority and low-income communities.

[211] Lewan & Barclay, *supra* note 24.
[212] Mitchell, *Forced Sale Risk*, *supra* note 106, at 612.
[213] UPHPA intro. note, at 1.
[214] *Partition of Heirs Property Act*, *supra* note 82.
[215] UPHPA intro. note, at 8.

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NOTE

UNENFORCED PROMISES: TREATY RIGHTS AS A MECHANISM TO ADDRESS THE IMPACT OF ENERGY PROJECTS NEAR TRIBAL LANDS

Alyson Merlin*

Treaties between the United States and Native nations are binding until abrogated by the clear and plain intent of Congress. Many treaties signed in the 18th and 19th centuries remain unabrogated, but are also unenforced by the courts of the United States. The Dewey Burdock Project is a proposed uranium mining operation which would sit adjacent to the Pine Ridge Indian Reservation, where many members of the Oglala Sioux reside. The 1851 and 1868 Fort Laramie Treaties impliedly grant the Sioux access to safe drinking water and explicitly reserve for them off-reservation buffalo hunting rights.

This Note posits that unenforced but unabrogated treaty rights may serve as a mechanism for the Oglala Sioux to assert a greater role in decision-making regarding the Dewey Burdock Project. This Note also discusses the failure of the Nuclear Regulatory Commission to consider the project's effect on protected treaty rights, which may be a basis for injunctive relief. It lastly conceptualizes the project's interference with treaty rights as a property loss deserving of monetary compensation, both in the context of a government taking by the agency and as private interference by the mining company.

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* Symposium Editor, *Columbia Journal of Race and Law*, Volume 11. J.D. Candidate, Columbia Law School, 2021.

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I. INTRODUCTION

We are very connected to the sacred water . . . . It's up to us to defend that water. When you make your decision, feel that heartbeat. Help us. Help us to survive.

—Dennis Yellow Thunder[1]

The Dewey Burdock Project (DBP) is a proposed mining operation under the authority of the Nuclear Regulatory Commission (NRC)[2] which seeks to excavate uranium through groundwater pumps in South Dakota.[3] The proposed project area spans 10,000 acres and is located on land historically promised to the Great Sioux Nation through the 1851 and 1868 Fort Laramie Treaties with the United States federal government.[4] The DBP is both adjacent to the Pine Ridge Indian Reservation and upstream of the Cheyenne River tributaries that run through it.[5] The Oglala Sioux, a band of the Sioux Nation who live on the Pine Ridge Indian Reservation, heavily oppose the project.[6] This Note applies the canons of Indian treaty interpretation to the 1851 and 1868 Fort Laramie Treaties to assess the legal rights of the Sioux and the DBP's potential impact on those rights.

This Note uses the term "Indian" to describe the indigenous peoples from the area which now makes up the United States. This choice was made in consideration of the term

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[1] Dennis Yellow Thunder, a member of the Oglala Sioux, spoke to the Atomic Safety and Licensing Board in August 2014 about the DBP. Talli Nauman, *Native Sun News: Release of Secret Uranium Mining Data Ordered*, INDIANZ (Sept. 1, 2014), https://www.indianz.com/News/2014/014928.asp [https://perma.cc/E5X2-WDSA]. When delivering his speech, he asked them to "place their hands on their hearts to feel them beating" like the "the water coursing under the earth." *Id.*

[2] *See Application Documents for Dewey-Burdock*, U.S. NUCLEAR REGULATORY COMM'N, https://www.nrc.gov/info-finder/materials/uranium/licensed-facilities/dewey-burdock/dewey-burdock-app-docs.html [https://perma.cc/3NT4-HGM9] (Apr. 1, 2016).

[3] *Public Comments Regarding the EPA Region 8 Proposed Dewey-Burdock In-Situ Uranium Recovery Project Permitting Actions*, ENV'T PROT. AGENCY (2017), https://www.epa.gov/sites/production/files/2017-09/documents/epadewey-burdockcommentsreceivedfromnamedentities.pdf [https://perma.cc/9J8Q-RRGJ] [hereinafter *EPA Public Comments*]

[4] Talli Nauman, *Oglala Sioux Tribe Keeps Up Fight Against Uranium Mine*, NATIVE SUN NEWS TODAY (Feb. 8, 2019), https://www.indianz.com/News/2019/02/08/native-sun-news-today-oglala-sioux-tribe-22.asp [https://perma.cc/7BNB-8WKA].

[5] *Id.*

[6] *Id.*

as the technical legal descriptor[7] for the peoples being discussed, as well as in light of critiques of the phrase "Native American." Critics of the phrase have viewed the shift as an attempt by the United States to distance itself from the promises it has made to and the marginalization it has maintained of the Indians.[8] Where possible, tribes are discussed by name instead of by any single overarching term.

Part II of this Note describes the canons of treaty interpretation and details the leading caselaw governing judicial interpretation of off-reservation treaty rights. The canons of treaty interpretation require ambiguities in treaty language to be interpreted to the benefit of the signatory Indians.[9] They also call for defining treaty terms as they would have been understood by tribes at the time of signing.[10] Finally, these canons hold that acts by the United States that do not demonstrate "clear and plain"[11] intent of Congress to abrogate treaties cannot be held to have done so. The United States government has previously violated federal treaty obligations. This leaves the current state of Indian rights and interests unclear, as treaties may be unabrogated, but also unenforced. Modern resource development has led to the increase of energy infrastructure and natural resource mining projects in the western United States near

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[7] *See American Indian Law*, Legal Info. Inst., https://www.law.cornell.edu/wex/american_indian_law [https://perma.cc/FMB6-H46B](describing the legal definition of the term "Indian").

[8] For an extended critique of the term "Native American" as a manner by which to refer to Native peoples, see Michael Yellow Bird, *What We Want to Be Called*, 23 Am. Indian Q. 3 n.2 (1999); *see also* CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 335–356 (2nd ed. 2006) ("In conversation, every [N]ative person I have ever met (I think without exception) has used 'Indian' rather than 'Native American' . . . [w]e were enslaved as American Indians, we were colonized as American Indians and we will gain our freedom as American Indians and then we will call ourselves any damn thing we choose.") (quoting Russell Means).

[9] *See, e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973) ("[C]ircumstances such as these which have led this Court in interpreting Indian treaties to adopt the general rule that '(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930))); Winters v. United States, 207 U.S. 564, 576–77 (1908) (describing and applying this canon).

[10] *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) ("Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them."); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938) (describing treaty terms with Indian tribes to be construed "in the sense in which naturally the Indians would understand them").

[11] United States v. Dion, 476 U.S. 734, 739–40 (1986).

current and former reservation lands.[12] A clear definition of unabrogated treaty rights is now crucial to assessing Indians' legal ability to protect their interests from projects affecting their lands. These determinations are especially important in the Dakotas, where the United States government has a particularly complex relationship with outstanding treaty obligations and where some of the most controversial Indian rights cases in recent history are currently unfolding.[13]

Part III of this Note describes relevant provisions of the 1851 and 1868 Fort Laramie Treaties which still bind the United States and the Sioux. It also discusses the effect of a prominent Supreme Court case on these treaties. At the end of the 19th century, the United States government violated the 1851 and 1868 Fort Laramie Treaties between the United States and the Great Sioux Nation. [14] Among other territories described in the documents, which span the modern-day Dakotas, the Fort Laramie Treaties protected the Black Hills—a site known to be of sacred religious importance to the Sioux.[15] The United States government withheld food rations from the Sioux until they eventually yielded and surrendered the Black Hills to the United States.[16] These measures have been remembered as especially heinous. As Justice Blackmun recounted in *United States v. Sioux Nation of Indians*, "[a] more ripe and rank case of dishonest dealings may never be found in our history."[17] Despite the severity of these actions, the United States' unilateral taking of the Black Hills did not fully abrogate the Fort Laramie Treaties,

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[12] Clayton Thomas-Muller, *Energy Exploitation on Sacred Native Lands*, RACE, POVERTY & ENV'T (2005), https://reimaginerpe.org/node/307 [https://perma.cc/6289-YEZ8].

[13] Julie Carrie Wong & Sam Levin, *Standing Rock Protesters Hold Out Against Extraordinary Police Violence*, GUARDIAN (Nov. 29, 2016, 3:26 PM), https://www.theguardian.com/us-news/2016/nov/29/standing-rock-protest-north-dakota-shutdown-evacuation [https://perma.cc/U9G4-6HY8] (describing use of excessive police force on pipeline protestors); Talli Nauman, *Clash Mounts over Proposed Black Hills Uranium Mining*, NATIVE SUN NEWS (Feb. 19, 2013), https://www.indianz.com/News/2013/008582.asp [https://perma.cc/4DSK-P43R].

[14] *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 403 (7th ed. 2017) (describing the United States government's interference with the Sioux's treaty-protected rights in the late 1800s).

[15] Timothy Williams, *Sioux Racing to Find Millions to Buy Sacred Land in Black Hills*, N.Y. TIMES (Oct. 3, 2012), https://www.nytimes.com/2012/10/04/us/sioux-race-to-find-millions-to-buy-sacred-land-in-black-hills.html [https://perma.cc/6NP6-4LME].

[16] United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). See *infra* Part III.B for a longer discussion of *Sioux Nation*.

[17] *Sioux Nation*, 448 U.S. at 388 (quoting United States v. Sioux Nation of Indians, 518 F.2d 1298 (Ct. Cl. 1975)).

and the DBP may impact the rights that still exist within these treaties.

Finally, Part IV of this Note discusses the legal obligations owed to the Oglala Sioux in the context of the DBP, as well as the potential remedies available to the tribe should the project proceed. The Oglala Sioux—through the Fort Laramie Treaties, which bind the United States and the entire Great Sioux Nation—have express and implied rights to water, hunting, and land ownership both on- and off-reservation. Therefore, the NRC must give full consideration to the tribe's material interests as environmentally destructive projects like the DBP affect their reservation lands. The *Winters* doctrine guarantees viable water sources to the Oglala Sioux on the Pine Ridge Indian Reservation, and the tribe contends that the DBP jeopardizes that right.[18] Additionally, the National Environmental Policy Act (NEPA)[19] obligates the NRC to fully consider the Sioux's off-reservation hunting rights, which were not mentioned in the DBP permit analysis.[20] For these reasons, the project should not be permitted to proceed in its current form. Should the DBP continue, either the federal government or Azarga Uranium, the full owner of the DBP and its potential uranium harvest,[21] must award monetary compensation to affected Oglala Sioux for the value of their treaty rights—either by conceptualizing their lost land and interests as a taking or as damages caused by the construction and administration of the DBP.

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[18] *EPA Public Comments*, *supra* note 3.

[19] *See National Environmental Policy Act at the NRC*, U.S. NUCLEAR REGULATORY COMM'N, https://www.nrc.gov/about-nrc/regulatory/licensing/nepa.html [https://perma.cc/FMQ8-4LJN] (Dec. 15, 2020) ("The NRC must assess the effects of any proposed action ('undertaking') on historic properties under Section 106 of the National Historic Preservation Act of 1966, as amended. . . . The NRC conducts the Section 106 process as part of its NEPA review.").

[20] *See* U.S. NUCLEAR REGULATORY COMM'N, NUREG-1910, SUPP. 4. VOL. 1, ENVIRONMENTAL IMPACT STATEMENT FOR THE DEWEY-BURDOCK PROJECT IN CUSTER AND FALL RIVER COUNTIES, SOUTH DAKOTA (2014) [hereinafter DEWEY-BURDOCK EIS] (describing the project as not intruding on Sioux hunting but with little mention specifically of treaty-protected hunting rights).

[21] Azarga Uranium, formerly Powertech Uranium Corp., owns 100% of DBP uranium and is the licensee for all DBP permits issued by the NRC. *Dewey Burdock Uranium Project*, AZARGA URANIUM, http://azargauranium.com/projects/usa/dewey-burdock/ [https://perma.cc/C3SY-BGVM] (last visited Feb. 11, 2021).

II. BACKGROUND

A. History of Treaty Interpretation

Longstanding power imbalances between Indian nations and the United States federal government, along with prominent, inadequately-managed language barriers, characterized Indian treaty negotiations and bargaining. These inequities led to present-day doctrine regarding the interpretation of language in treaties between the United States government and Indian tribes. Currently, the Supreme Court employs three main canons of treaty interpretation when determining the rights and privileges that the documents in question vest and confer to tribal signatories. First, all treaties must be understood in light of how the Indians who signed them would have understood their terms.[22] Next, ambiguities in the treaties' terms must be resolved in favor of Indians.[23] Finally, Congress will not be seen as abrogating treaties and the rights therein where such abrogation is ambiguous, and abrogation will not be read into general statutes.[24]

As far back as 1832,[25] the Supreme Court has actively recognized (at least in part) the bargaining imbalances that existed between the federal government and tribal negotiators during treatymaking. Justice Gray discussed this inequity and how the interpretation of Indian treaties must be framed when writing for the court in *Jones v. Meehan*:

> [it must] be borne in mined [*sic*] that the negotiations for the treaty are conducted, on the part of the United States, . . . by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language.[26]

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[22] Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

[23] McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973).

[24] U.S. v. Dion, 476 U.S. 734, 739–40 (1986).

[25] *See* Worcester v. Georgia, 31 U.S. 515 (1832) (implementing the canons of treaty interpretation for the first time).

[26] Jones v. Meehan, 175 U.S. 1, 11 (1899). *Meehan* refers to the United States as "enlightened" and also to the Indians as a "weak and dependent" people. This was common in Supreme Court decisions of the era, and the racism entrenched in these opinions taints all of modern federal Indian law. *Id.*

Justice Gray accurately described the unfairness of the bargaining situation at the time, which was exacerbated by the rampant racial and cultural biases of courts. Tribes were expected to conform to a new set of unfamiliar laws that used unshared Western concepts of property ownership. Tribes were also expected to understand technical legal jargon that United States government officials drafted in order to advance the interests of the new nation at the Indians' expense. Further, government-funded interpreters' translations of these treaties were often inaccurate, skewing negotiated terms in favor of the United States.

Examples of treaty negotiations without proper translation, and therefore without meaningful consent of Indian tribes, abound. For example, in *United States v. State of Washington*,[27] Judge Boldt was tasked with interpreting the various treaties (the Stevens Treaties) that Isaac Stevens, governor of the state in the mid-1850s, had negotiated in the Washington territory. Boldt was tasked with defining the extent of existing off-reservation fishing rights held by several Western Washington tribes.[28] In discussing one of the tribes in question, Judge Boldt began the analysis by recalling that "[t]he Makah could neither read, write nor speak English."[29] In Judge Boldt's retelling, Governor Stevens attempted to combat these linguistic barriers by using interpreters from entirely different tribes. Specifically, Stevens hired a member of one of the Clallam tribes who was said to partially speak the Makah language, despite the stark differences between the two tribes' languages and cultures.[30] In another documented instance, Stevens negotiated with the Makah by speaking in English and having treaty terms translated into the entirely distinct language of Chinook.[31] Chinook Jargon is a trade language borne out of the combination of several Indian languages, English, and French.[32] Not only was Chinook Jargon not universally known among the negotiating parties, the language also consists of fewer than 500 words in total, with vocabulary tailored to the purposes of trade and

[27] United States. v. State of Wash., 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

[28] *Id.*

[29] *Id.* at 364.

[30] *Id.*

[31] *Id.* at 330.

[32] GEORGE GIBBS, DICTIONARY OF THE CHINOOK JARGON, OR, TRADE LANGUAGE OF OREGON [ABRIDGED] (1863), https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Treaties%20&%20Reservations/Documents/Chinook_Dictionary_Abridged.pdf [https://perma.cc/SVN9-76F9].

conveying practical and concrete concepts.[33] Boldt's opinion underscored the fact that the United States did not take care to ensure that treaty negotiations were fair, or even comprehensible, to the tribes involved. Modern doctrine works to at least partially mitigate the impact of these linguistic and cultural barriers.[34]

The final canon of interpretation protects the strength and longevity of binding treaties by requiring that Congress's intent to abrogate treaty documents be "clear and plain" in order for the Court to find abrogation.[35] The seminal case illustrating this canon is *United States v. Dion*, a 1986 Supreme Court decision that explored how the Endangered Species Act (ESA) interacts with existing treaty hunting rights. Dwight Dion, a member of the Yankton Sioux, was prosecuted under the ESA for shooting four bald eagles.[36] In his defense, he pointed to the hunting rights preserved in the Yankton Sioux's 1858 treaty with the United States.[37] When the Yankton Sioux ceded all but 400,000 acres of tribal land to the United States, that remaining land became an official reservation on which the Yankton Sioux were entitled to "quiet and undisturbed possession of their reserved land."[38] The fact that the Indians were to have exclusive

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[33] *Id.*

[34] United States v. Dion, 476 U.S. 734, 739–40 (1986).

[35] Thomas-Muller, *supra* note 12. The use of inference based on legislative history in *Dion* as a means to satisfy the "clear and plain" intent requirement is a departure from, and loosening of, the demonstration of Congressional intent to abrogate described in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). There, the Court heavily preferences explicit statutory language regarding abrogation. *Id.* at 690 ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ."). The *Dion* Court denied that its actions constituted a departure, stating that the court has not strictly "interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, 'the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute.'" *Dion*, 476 U.S. at 739 (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 223 (1982)).

[36] *Dion*, 476 U.S. at 734.

[37] *Id.*

[38] *Id.* at 737. The Supreme Court held in *United States v. Winans* that state licenses preferencing non-Indian fishing techniques could not be used as a vehicle to exclude Yakima fishermen from fishing in off-reservation waters on which the Yakima retained treaty fishing rights. 198 U.S. 371 (1905). In 1942, the Court further clarified the interaction between off-reservation fishing rights and license restrictions, stating that the states have the power to regulate fishing generally but do not have authority to impose license fees on tribal fisherman exercising reserved treaty rights. Tulee v. Washington, 315 U.S. 681 (1942). More modern analysis has held that this general right of states to

hunting and fishing rights on that reserved land was not disputed in *Dion*; instead, the parties disagreed as to whether those rights superseded the species-specific hunting restrictions in the ESA.[39]

In considering whether the Yankton Sioux's right to hunt bald eagles remained intact for purposes of ESA analysis, the Court first examined the intersection between the tribe's hunting rights and the Bald Eagle Protection Act (BEPA).[40] Although the original BEPA made no reference to Indian hunting, a 1962 amendment, which added protection for a new species of eagle, carved out an explicit exception for certain Indian religious ceremonies.[41] The Court took this as an implication that silent provisions of the BEPA did not afford the same exception; the Court also gave great weight to House reports that cited "demand for eagle feathers for Indian religious ceremonies" as one of the threats that motivated BEPA's passage.[42] Though not explicit in the language of BEPA, the Court held that the weight of the evidence justified an inference that the statute was intended to abrogate the Yankton Sioux's treaty hunting rights as applied to golden and bald eagles.[43] To satisfy the "clear and plain"[44] intent requirement, the Court only required "clear evidence that Congress *actually considered* the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[45] The Court then found Dion liable under the ESA because, although the ESA did not have legislative history supporting an intention to abrogate the Yankton Sioux's treaty, Dion could not be protected by rights which the BEPA had already nullified.[46]

Even with the *Dion* Court's liberal interpretation of the BEPA to locate congressional intent to abrogate, the presumption still stands in favor of upholding existing treaties. As Justice

regulate off-reservation fishing can, in some cases, regulate the manner in which fish are caught so long as fishing generally is permitted to continue. Puyallup Tribe v. Wash. Dep't of Game, 391 U.S. 392 (1968). *See infra* Part III for a deeper analysis of off-reservation fishing and hunting rights.

[39] *Dion*, 476 U.S. at 734.

[40] *Id.* at 736.

[41] *Id.*; 16 U.S.C. §§ 668–668d.

[42] *Dion*, 476 U.S. at 743.

[43] *Id.* at 745.

[44] *Id.* at 738.

[45] *Id.* at 740 (emphasis added).

[46] *Id.* at 740, 745.

Marshall put it in *Dion*, "Indian treaty rights are too fundamental to be easily cast aside."[47]

In addition to the three main canons of interpretation, courts also view treaties in light of Chief Justice Marshall's majority opinion in *Worcester v. Georgia*. In *Worcester*, Marshall describes tribal sovereignty and tribal rights as predating the United States and the former colonies, and therefore, as retaining all rights and privileges not directly forfeited by treaty provisions.[48] To Chief Justice Marshall, treaties represent a series of negotiations which sought to exchange existing Indian rights with the United States for certain provisions or to avoid violence.[49] At their core, such treaties are "not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted."[50] Treaties should thus be construed broadly in favor of the Indians that signed them, both through the canons of interpretation and also when viewed as limited agreements representing a narrow forfeiture of existing Indian rights.

B. Historical Implicit and Express Off-Reservation Indian Rights

Among the clearest examples of Indian retention of rights in treaty negotiation are the reserved tribal rights that persist on former Native lands now ceded to the United States government. In addition to fishing and hunting rights, often explicitly enumerated in these reserved off-reservation rights, some treaty language has also been interpreted to impose obligations, owed to Indians, onto the non-Indians occupying that land.

1. Fishing Servitudes

As fishing was a crucial source of food for many tribes, especially those in the modern Pacific Northwest, many treaties explicitly protected the fishing rights of tribes, even in lands that were vested to the United States. The Court has held that these provisions confer upon Indians a right to fish outside of the waters within their territory, even where state law contradicts

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[47] *Id.* at 739.

[48] *See* Worcester v. Georgia, 31 U.S. 515, 542–45 (1832) ("It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.").

[49] *Id.* at 551.

[50] United States v. Winans, 198 U.S. 371, 381 (1905).

these terms.[51] Some treaty provisions even impliedly grant upstream protection of fish to ensure eventual entrance into tribal waters.[52] Off-reservation fishing rights are among the most heavily-litigated treaty benefits tribes maintain on ceded lands and are important in defining the potential scope of off-reservation rights more generally.

In 1905, the Supreme Court decided *United States. v. Winans*, a seminal case on the breadth of off-reservation fishing rights. The case interpreted provisions of one of the Stevens Treaties, the 1859 treaty between the Yakima and the United States that promised the Yakima people the "exclusive right of taking fish" on their reservation as well as a right to fish "at all usual and accustomed places, in common with citizens of the Territory"[53] on lands ceded to the United States.[54] The Yakima contended that the state of Washington inhibited their ability to exercise their fishing rights and the United States brought suit against the state on the Yakima's behalf.[55] In the years leading up to this litigation, the state of Washington issued fishing licenses to non-Indian fishers outside of the Yakima reservation, allowing the use of fishing wheels[56] that caught the vast majority of harvestable fish and deprived the Yakima of meaningful fishing access to those bodies of water.[57] Interpreting the 1859 treaty as the Yakima would have understood it, the Court reasoned that the Yakima would never have agreed to cede lands to the United States if that would have resulted in a loss of fishing ability.[58] The Court emphatically underscored that the "right to resort to the fishing places in controversy was a part of

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[51] *Id.*

[52] Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

[53] Treaty with the Yakima art. 3, Mar. 8, 1859, 12 Stat. 951.

[54] *Winans*, 198 U.S. at 380.

[55] *Id.* at 379. The United States sued on behalf of the Yakima in its role as trustee for the tribe. The federal government maintains a trust relationship over all federally recognized tribes, and under certain circumstances has a duty to act in the tribe's benefit. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984). As such, the United States had an obligation to initiate this suit against the State of Washington to protect the Yakima's protected treaty rights to fish in the specified locations.

[56] A fishing wheel, also known as a salmon wheel, is "a trap for catching salmon, consisting of a revolving wheel with attached nets set in a river so that it is turned by the current to capture the passing fish." *Fishing Wheel*, DICTIONARY.COM, https://www.dictionary.com/browse/salmon-wheel [https://perma.cc/32WX-3Z8G] (last visited Oct. 29, 2020).

[57] *Winans*, 198 U.S. at 380.

[58] *Id.* at 381.

larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."[59] The Court found that the state of Washington's authority to issue or revoke fishing licenses as the governing authority in the location where those waters ran was limited by the Yakima's treaty fishing rights.[60]

Further, the Court noted that since the Yakima were owners of the historical right to fish, the treaty represented a limited grant of fishing rights from the Yakima to the United States for new settlers to share.[61] The Yakima had always maintained the right to fish on the rivers in question, and this right persisted despite the tribe ceding physical possession of the land and notwithstanding its grant of shared access to the fish to the general population.[62]

Many treaty rights endure in this same way across the United States, preserving tribal access to fishing and hunting despite the United States' physical ownership of formerly Indian lands. *Washington v. Washington State Commercial Passenger Fishing Vessel Association* (the Boldt Decision) was a consolidated opinion interpreting the Stevens Treaties between the United States and Indian nations. The United States brought the suit on behalf[63] of seven tribes located in the Northwest, asking the Court to clarify how to interpret the rights preserved in a series of treaties using common phrases.[64] The Boldt Decision interpreted language almost identical to the language discussed above in *Winans*, granting the United States certain ceded lands but retaining Indians' right to fish in rivers that the tribes had historically used.[65] The Court held that the retained fishing rights not only permitted Indian fishing on off-reservation lands, but also that treaty-bound Indians were "entitled to a 45% to 50% share of the harvestable fish passing through their recognized tribal fishing grounds in the case area, to be calculated on a river-by-river, run-by-run basis, subject to certain adjustments."[66] This decision bound both the state of

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[59] *Id.*

[60] *Id.* at 381–84.

[61] *Id.* at 381.

[62] *Id.*

[63] *See* Newton *supra*, note 55 (explaining general federal trust obligations).

[64] Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 658, 665–67 (1979).

[65] *Id.* at 674.

[66] *Id.* at 658.

Washington and its non-Indian citizens to limit their fish harvest off-reservation in order to afford an equitable percentage of catch to tribal fishers.[67]

Decades later, the state of Washington attempted to circumvent the Boldt Decision in *United States v. Washington*, better known as "the Culverts Case."[68] On appeal, the state sought to escape an injunction imposed by the lower courts, which found that the state violated protected treaty rights by building and sustaining culverts.[69] These culverts prevented salmon from travelling for food and to spawn, reducing the salmon population entering Indian reservations.[70] According to the state, though the tribes were entitled to 50% of the actual catch, the treaties did not guarantee a minimum harvestable fish population.[71]

The Ninth Circuit flatly rejected the state's reading of the Stevens Treaties, concluding that "in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties."[72] Although the treaties outright promised[73] a quantity of fish to the tribes, the court reiterated that such a promise would have been inferred regardless, as treaties afford an implied promise to the number of fish "sufficient to provide a 'moderate living'[74] to the Tribes."[75] The Boldt Decision and the Culverts Case demonstrate the scope of the judiciary's existing

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[67] *Id.*

[68] United States v. Washington, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided court* Washington v. United States, 138 S.Ct. 1832 (2018) (mem.).

[69] A culvert is a "a drain or channel crossing under a road," which in this case posed a physical barrier for underground water channels to regenerate nearby streams. *Culvert*, DICTIONARY.COM, https://www.dictionary.com/browse/culvert [https://perma.cc/KD2N-KWCV] (last visited Jan. 7, 2021).

[70] *United States v. Washington*, 853 F.3d at 954.

[71] The State of Washington asserted at oral arguments that the Stevens treaties would not prohibit the state from blocking every single salmon from entering tribal waters. *Id.* at 962.

[72] *Id.* at 966.

[73] Governor Stevens said, "'I want that you shall not have simply food and drink now but that you may have them forever.' During negotiations for the Point-No-Point Treaty, Stevens said, 'This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . This paper secures your fish. Does not a father give food to his children?'" United States v. Washington, 853 F.3d at 964 (quoting Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 n.11 (1979) (ellipsis in original)).

[74] *Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. at 686.

[75] *United States v. Washington*, 853 F.3d at 965.

treatment of off-reservation rights and the far-reaching breadth of legal protection potentially available to tribes with unextinguished treaty rights.

2. Implied Water Rights

In addition to granting Indians broad latitude in asserting that fishing rights and a quantity of fish are reserved, courts have interpreted treaties to confer the much more intangible right to water to Indians. This right has been read into treaties in a variety of contexts, including for the continuation of fishing and hunting rights on reservations[76] and for the sustenance of life on the reservation in general.[77]

The reserved and implied water rights doctrine originates in the 1908 Supreme Court case *Winters v. United States*. In *Winters*, the Court adjudicated a dispute between residents of the Fort Belknap Indian Reservation[78] and Winters, a non-Indian defendant who settled near the reservation.[79] Non-Indian use of the river outside of the reservation—through dams, reservoirs, and canals—had re-routed the water in a manner that precluded any meaningful Indian use of water on the reservation.[80] No specific treaty language guaranteed the Indians continued flow of the rivers and streams that had always run through the territory in question. Nevertheless, the Court still found this to be an implicit and inseverable part of the 1888 treaty establishing the Fort Belknap Reservation.[81] The Court reasoned that the Indians—whose dry and arid reservation would have made agriculture impossible without the ability to divert water from the river in question—would not have agreed to a treaty that would render its purpose of increasing agricultural capacity for the Indians impossible to achieve.[82] In resolving the ambiguities of the treaty in favor of the Indians, the Court held that a right to water must be implied where the right is necessary

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[76] *See* United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983) (recognizing a "continued water right to support [the Tribe's] hunting and fishing lifestyle").

[77] *See* Winters v. United States, 207 U.S. 564, 576 (1908) (recognizing the Tribe's right to irrigated water since the lands "without irrigation, were practically valueless").

[78] The United States acting in its tribal trust obligation represented the residents of the Fort Belknap Indian Reservation in the dispute. *See* United States v. Winans, 198 U.S. 371, 380 (1905) (explaining "trust relationship").

[79] Winters v. United States, 207 U.S. 564 (1908).

[80] *Id.* at 567.

[81] *Id.* at 577.

[82] *Id.* at 576.

to afford the full use of reservation lands.[83] The Court did not find it material that Winters and other landowners would have frustrated purpose and meaningless property without the same rights to divert the river.[84]

The implied right to water also applies in the context of protecting reserved fishing and hunting rights. In *United States v. Adair*, the United States brought suit asking the Oregon courts to clarify the extent of existing water rights between the Klamath and Oregonian private landowners.[85] Though the Klamath had "hunted, fished, and foraged in the area . . . for over a thousand years,"[86] they ceded much of their land to the United States in 1864, reserving for themselves the land that eventually became the Klamath Reservation. They retained the exclusive right to hunt and fish on the reservation under the treaty.[87] At issue in the case was whether deprivation of water to the reservation through consumptive, non-Indian upstream use violated the Klamath's treaty right to hunt and fish on reservation marshlands, which could not sustain meaningful fish and game populations without adequate water flow.[88] The right to water itself was not explicit in the treaty; however, the Ninth Circuit held that the tribe was entitled to the amount of water necessary to maintain fish and wildlife populations and the continuation of Indian hunting and fishing.[89] The consumptive, non-Indian water use that was depriving the marshland of necessary moisture had to be enjoined to a level that allowed the Indians to continue to use their land in the manner they negotiated in their treaty with the United States.[90] The court held that the Indians were entitled to sufficient water so as not to frustrate the original purpose of the reservation lands.[91] As the right to hunt and fish was one of the primary purposes for establishing the Klamath Reservation, the water needed to exercise those rights was also guaranteed under the treaty.[92] In describing the right of the Klamath to indirectly impose restrictions on the water use of government and individual non-Indians off-reservation, the court defined the Indian entitlement as "the right to prevent other

[83] *Id.*
[84] *Id.* at 574.
[85] United States v. Adair, 723 F.2d 1394, 1397 (9th Cir. 1983).
[86] *Id.*
[87] *Id.* at 1398–99.
[88] *Id.* at 1399–1400.
[89] *Id.* at 1410.
[90] *Id.* at 1411.
[91] *Id.* at 1410.
[92] *Id.*

appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies."[93] The Klamath's treaty with the United States afforded them the distinct off-reservation privilege to enjoin certain non-Indian activities.

The *Winters* doctrine of reserved water rights affords the Indians vital protections of a resource necessary for all facets of everyday life. As demonstrated by the *Adair* case, courts are willing to enforce this right, even at the expense of non-Indian water appropriators.

3. Off-Reservation Hunting Rights

Many treaties between the United States government and Indian tribes also included provisions which guaranteed Indians the right to hunt outside of the borders of their reservations. As with fishing servitudes, these provisions are often read broadly in favor of continuing tribal use. Treaty provisions to hunt outside of reservation lands have been interpreted to withstand political reorganization, such as the incorporation of statehood,[94] and to apply in National Forests.[95] The treaty right to hunt outside of reservation lands has even been applied to Indian tribes who were not signatories to any treaty document.[96]

As recently as 2019, the Supreme Court reaffirmed that off-reservation hunting rights survive the United States government's structural reorganization of tribal lands and interests, including after the establishment of statehood, absent a clear congressional intent to abrogate those interests. In *Herrera v. Wyoming*,[97] the Court interpreted treaty language stating that the Crow Indians would "have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . . and peace subsists . . . on the borders of the hunting districts."[98] At issue in the case was Clayvin Herrera's elk hunt, which took place within Bighorn National Forest. Herrera did not have a state hunting license at the time; however, he was a member of the Crow tribe and argued that the Crow's off-reservation right to hunt afforded him the ability to

[93] *Id.* at 1411.

[94] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999).

[95] Herrera v. Wyoming, 139 S.Ct. 1686, 1691 (2019).

[96] State v. Coffee, 556 P.2d 1185, 1193 (Idaho 1976).

[97] *Herrera*, 139 S.Ct. at 1691.

[98] *Id.* at 1691 (citations omitted) (quotations omitted).

hunt irrespective of state licenses and prescribed hunting seasons.[99] The state court had prevented him from asserting a treaty defense, holding that Wyoming's 1890 entrance into the union abrogated the Crow's treaty.[100] In *Herrera*, the Court reaffirmed its precedent in *Minnesota v. Mille Lacs Band of Chippewa Indians* that the establishment of statehood alone does not abrogate Indian treaty rights to hunt and fish, and held that Herrera should have been permitted to put forth his treaty-based defense.[101]

The Court went even further to protect off-reservation hunting rights by establishing a broad interpretation of the Crow treaty's use of the phrase "unoccupied lands of the United States."[102] Although Bighorn National Forest is a federally protected forest subject to United States Forest Service management, government maintenance of the forest does not meet the definition of occupation as the signatory Crow would have understood it. Applying a canon of interpretation to read treaty terms as the Indians would have understood them, the Court determined that the Crow would have conflated the ideas of occupation and settlement, and would have seen Bighorn National Forest as "unoccupied."[103]

Protected treaty rights to hunt outside of reservation boundaries have even been applied to Indians who do not have treaties with the United States. In *State v. Coffee*,[104] the Supreme Court of Idaho considered Dianne Coffee's criminal convictions for hunting deer off-season and using certain technologies prohibited by state statute.[105] Coffee's defense was her membership in the Idaho Kootenai Indian Tribe—one of the five tribes that makes up the greater Kootenai Tribe, and one that is federally recognized, but also has neither a treaty with the United States nor an established reservation.[106] The Court held that because the 1855 Hellgate Treaty ceded Kootenai land to the United States, along with other Indian lands negotiated by other

[99] *Id.* at 1693.

[100] *Id.*

[101] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999); *Herrera*, 139 S.Ct. at 1694.

[102] *Herrera*, 139 S.Ct. at 1691.

[103] *Id.* at 1702.

[104] State v. Coffee, 556 P.2d 1185, 1185 (Idaho 1976).

[105] *Id.* at 1186.

[106] *Id.*

tribes, the treaty applied to the Kootenai.[107] After this treaty, the United States subsequently treated those lands as ceded to American control and monetarily compensated the Idaho Kootenai accordingly; therefore, the rights exchanged ought to be applied to the Idaho Kootenai.[108] Since the Hellgate Treaty did not surrender hunting rights on the ceded lands, neither had the Kootenai.[109] The cession of hunting rights would not be implied either: "where established by historical use, aboriginal title includes the right to hunt and fish and where those rights have not been passed to the United States, by treaty or otherwise, the rights continue to adhere to the current members of the tribe which held them aboriginally."[110]

III. TREATIES AT ISSUE: FORT LARAMIE

The Dewey Burdock Project seeks to mine uranium from aquifers in South Dakota on lands that the Sioux retained as part of the 1851 and 1868 Fort Laramie Treaties. As these treaties were originally negotiated between the United States and the Great Sioux Nation, the word "Sioux" in this context also applies to each of the seven bands of the Great Sioux Nation that the original treaty binds, including the Oglala Sioux.[111]

A. The 1851 and 1868 Fort Laramie Treaties

The 1851 Fort Laramie Treaty defined the geographic boundaries of the Great Sioux Nation to allow for non-Indian settlement of areas not under Sioux control. However, the treaty did not establish an official reservation for the Sioux. Article V of the treaty clarifies that the Sioux—by recognizing the existing boundaries outlined in the 1851 document—"do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described."[112] However, the United States soon violated the terms of the 1851 treaty. Post-Civil War settlement of white people within Great Sioux Nation's defined territory, as

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[107] *Id.* at 1187. The Court also discussed the "Kootenay" signatories to the Hellgate Treaty as a potential transcription error and as further evidence that the Kootenai were contemplated at signing. *Id.*

[108] *Id.* at 1188.

[109] *Id.* at 1193.

[110] *Id.* at 1189.

[111] D.L. Birchfield, *Sioux*, COUNTRIES & THEIR CULTURES, https://www.everyculture.com/multi/Pa-Sp/Sioux.html [https://perma.cc/M8QJ-MML6] (last visited Jan. 7, 2021).

[112] CHARLES J. KAPPLER, INDIAN AFFAIRS LAWS AND TREATIES 1066 (1927).

well as establishment of United States military posts on Sioux land, caused conflict between the United States and the Sioux.[113] Largely in order to avoid violence, and without a real choice in the matter, the Sioux agreed to renegotiate their treaty to form the Fort Laramie Treaty of 1868.[114]

In the 1868 treaty, the Sioux ceded large swaths of land in return for the Great Sioux Reservation, which contained the Black Hills, a site extremely sacred to the Sioux, as well as the promise of food and clothing provisions.[115] The Great Sioux Reservation encompassed the lands now subject to discussions of development of the DBP. In addition to delineating the new boundaries of the Sioux territory, the treaty promised the Indians the right to exclude most unwanted visitors and settlers from their land:

> The United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized[,] . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.[116]

The treaty also preserved the Sioux's right to hunt on both reservation and certain described off-reservation lands "so long as the buffalo may range thereon in such numbers as to justify the chase."[117]

Other aspects of the 1868 Fort Laramie Treaty were specifically focused on the tensions that arose between the settlers and the Sioux after the signing of the 1851 treaty. For

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[113] *The Treaties of Fort Laramie, 1851 & 1868*, N.D. STUD., https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-4-alliances-and-conflicts/topic-2-sitting-bulls-people/section-3-treaties-fort-laramie-1851-1868 [https://perma.cc/FLR7-SLWR] (last visited Jan. 7, 2021).

[114] *Id.*

[115] *Id.*

[116] Treaty of Fort Laramie art. II, Apr. 29–Nov. 6, 1868, 15 Stat. 635.

[117] The reserved hunting right applied to lands "north of North Platte[] and on the Republican Fork of the Smoky Hill river." *Id.* art. XI.

example, the second provision of Article XI of the 1868 treaty describes a promise by the Indians that "they will permit the peaceful construction of any railroad not passing over their reservation as herein defined."[118]

Finally, the treaty described the conditions under which the terms of the document could be renegotiated or altered, stating in plain language that no further land cession "shall be of any validity or force as against the said Indians unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same."[119]

B. Effect of *Sioux Nation* and Subsequent Land Confiscation on Fort Laramie Treaty Rights

Although the DBP is technically on lands protected by the 1868 treaty, determining ownership of the area is not so simple. Almost immediately after the United States signed the treaty, white settlers found gold in the Black Hills and began to force the Sioux out of their sacred site.[120] In June of 1876, tensions eventually erupted into the now-infamous battle of Little Bighorn, where the Sioux defeated the American forces led by General Custer.[121] Although the Sioux won the battle, the United States won the war. The Americans took all of the Sioux's weapons and horses, leaving them unable to hunt and entirely dependent on rations of food and clothing that the United States government provided.[122] In August of 1876, Congress enacted an appropriations bill that halted the annual provision of annuities to the Sioux unless they ceded the Black Hills and gave up their right to hunt on the unceded territory north of the reservation.[123] The United States then sent a presidentially-appointed commission to negotiate the annexation of the Black Hills.[124]

Out of food and out of options, a few Sioux leaders eventually conceded to the terms: the Sioux would allow the United States to take legal and physical control of the sacred Black Hills in exchange for subsistence rations.[125] Although Article XII of the 1868 Fort Laramie Treaty requires at least three-fourths of adult Sioux males to assent to treaty

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[118] *Id.*

[119] *Id.* art. XII.

[120] *Id.*

[121] GETCHES ET AL., *supra* note 14, at 403.

[122] *Id.*

[123] *Id.* at 404. These lands north of the Great Sioux Reservation do not intersect with the project area of the DBP.

[124] *Id.*

[125] *Id.*

negotiations, less than ten percent of adult male Sioux agreed to the terms.[126] The United States government ignored this crucial provision of the 1868 Fort Laramie Treaty and codified the forced agreement into a formal document in 1877 (the 1877 Act).

The Sioux attempted to regain their sacred site through the courts, a journey which began as a claim for land title in claims court in 1923 and eventually rose to the Supreme Court, under the theory that the Sioux were owed just compensation in response to the government's unlawful Fifth Amendment taking of the Black Hills.[127] In 1980, Justice Blackmun acknowledged the unjust and illegal taking of the Black Hills in his strongly-worded opinion in *United States. v. Sioux Nation of Indians*,[128] reiterating that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history."[129] Writing for the majority, Justice Blackmun determined that the government's unilateral annexation of the Black Hills clearly violated the 1868 treaty and was a taking within the definition of the Fifth Amendment, and affirmed the lower court's grant of a substantial financial award to the Sioux.[130]

Although valid critiques of the *Sioux Nation* decision persist, including by the Sioux,[131] applying the case as written

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[126] *Id.* at 403.

[127] United States v. Sioux Nation of Indians, 448 U.S. 371, 384 (1980).

[128] *Id.*

[129] *Id.* at 371.

[130] *Id.* at 424.

[131] Although *Sioux Nation* was formally decided in 1980, many tribal members and advocates consider the issue to be ongoing. At the time the Sioux Nation's claims were in their final stages, "attorney contracts with tribes representing a majority of the Sioux had expired and the attorneys and the court were aware that many Sioux opposed the settlement." GETCHES ET AL., *supra* note 14, at 311. Despite this, the settlement was signed on behalf of all of the tribes, and the Court of Claims submitted judgement. *Id.* Some bands of the Sioux, including the Oglala Sioux, refused to re-sign attorney contracts because the lawyers were only advocating for monetary compensation, not for restitution of the Black Hills land title. Linda Greenhouse, *Sioux Lose Fight for Land in Dakota*, N.Y. TIMES (Jan. 19, 1982), https://www.nytimes.com/1982/01/19/us/sioux-lose-fight-for-land-in-dakota.html [https://perma.cc/JY7A-HH9K]. Overall, the Great Sioux Nation has been vocal in demanding the return of the physical land title to the Black Hills; the seven bands of the tribe refused the settlement money awarded in *Sioux Nation*, which sits in a federal bank account accumulating interest and is now valued at $1.3 billion. *Why the Sioux Are Refusing $1.3 Billion*, PBS NEWS HOUR (Aug. 24, 2011, 3:57 PM), https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23#:~:text=The%20refusal%20of%20the%20money,region%20of%20western%20South%20Dakota [https://perma.cc/27YK-Q5C7].

does not inhibit the Oglala Sioux's ability to pursue judicial recognition of their treaty rights. Based on *Sioux Nation*, title to the lands outside the Pine Ridge Indian Reservation and below the DBP remain under the legal ownership of the United States government, private individuals, and corporations who have purchased them. However, the forced exchange of Sioux lands through the Fifth Amendment Takings Clause does not abrogate the entire 1868 Fort Laramie Treaty—specifically, those provisions that do not depend on physical ownership of the land.

Nor would the land confiscation which took place after the 1877 Act serve to abrogate the Fort Laramie Treaties. Although the United States continued to take land from the Great Sioux Nation without adhering to the 1868 Fort Laramie Treaty's Article XII ratification procedures, the federal government never explicitly adopted an intention to abrogate the treaty's usufructuary rights.

In 1889, the United States vastly reduced the total size of the Great Sioux Reservation and divided it into six smaller reservations, including the modern-day Pine Ridge Indian Reservation.[132] The so-called negotiations behind the 1889 Act took place during a time of armed conflict between the Sioux and the white settlers. The events of 1889 are described similarly to the loss of the Black Hills in 1877: "[g]iven this situation, tribal representatives acceded to demands for land cession under some duress if not a threat of attack during intermittent war."[133] Sioux displeasure about the 1889 Act is not just implied by the historical context of the dealings. A delegation of Sioux leaders travelled to Washington, D.C. the year before the 1889 document took effect to discuss their desire to keep the Great Sioux Reservation intact. Leader John Grass, a member of the Blackfoot Sioux, protested so publicly that his complaints were documented in the October 11, 1888 edition of the *New York Times*.[134]

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[132] HERBERT T. HOOVER, S.D. STATE HIST. SOC'Y, THE SIOUX AGREEMENT OF 1889 AND ITS AFTERMATH (1989), https://www.sdhspress.com/journal/south-dakota-history-19-1/the-sioux-agreement-of-1889-and-its-aftermath/vol-19-no-1-the-sioux-agreement-of-1889-and-its-aftermath.pdf [https://perma.cc/7PS2-S4PH] at 68.

[133] *Id.* at 59.

[134] *Indian Chief John Grass; The Sioux Treaty from His Standpoint. Sixty-Four Chiefs on Their Way to Visit the Great Father—Sitting Bull Among Them*, N.Y. TIMES, Oct. 1, 1888, at 3, https://www.nytimes.com/1888/10/11/archives/indian-chief-john-grass-the-sioux-treaty-from-his-standpoint.html [https://perma.cc/92M4-2CX2].

Despite the federal government's clear disregard for the preferences of the Great Sioux Nation, none of these acts articulated clear and plain congressional intent to abrogate the outstanding rights promised to the Great Sioux Nation in the Fort Laramie Treaties.

The canons of treaty interpretation hold that a statute or act cannot abrogate a treaty without clear and plain congressional intent.[135] The rights and privileges of the Indians cannot be abolished by implication, especially with regards to uses such as hunting, fishing, and other activities "established by historical use."[136] Therefore, the 1868 Fort Laramie Treaty between the United States and the Sioux remains intact, absent the provisions the 1877 and 1889 Acts specifically abrogated. Neither the plain language of the acts nor the legislative history surrounding the documents support a reading that abolishes the totality of the 1868 treaty.

The terms of the 1877 Act are precise. The act identifies the exact swath of land the Sioux agreed to cede to the United States and outlines the geographic area where the Sioux were to forfeit their hunting rights.[137] These lands and interests relate to the annexation of the Black Hills and other lands adjacent to the Great Sioux Reservation, and do not intersect with the rights and interests the Oglala Sioux may have in relation to the DBP.[138] Importantly, despite the attention to detail in the 1877 Act, the document made no mention of the potential abrogation of any other rights and privileges not expressly stated.[139] Courts have historically declined to find abrogation of treaty rights by implication, even with regards to treaties whose language more heavily implies the forfeiture of privileges and interests than does the 1877 Act. For example, in *Minnesota v. Mille Lacs Band of Chippewa Indians*,[140] the Supreme Court interpreted treaty language outlining broad renunciation of rights as insufficient to abrogate Chippewa usufructuary rights guaranteed in earlier negotiations. Although the terms of the treaty explicitly stated that the "Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest,

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[135] United States v. Dion, 476 U.S. 734 (1986).

[136] State v. Coffee, 556 P.2d 1185, 1189 (Idaho 1976).

[137] Act of 1877, Ch. 69, 72, 44th Cong. (1877), https://www.loc.gov/law/help/statutes-at-large/44th-congress/session-2/c44s2ch72.pdf [https://perma.cc/NP3R-B67A].

[138] *Id.*

[139] *Id.*

[140] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

of whatsoever nature . . . to any other lands,"[141] the Court found that the Chippewa's rights to hunt, fish, and gather remained intact. The treaty language, although broad enough to cover such usufructuary rights, "does not mention hunting, fishing, and gathering rights."[142] And in fact, the treaty as a whole "is devoid of any language expressly mentioning—much less abrogating—usufructuary rights . . . [or] providing money for the abrogation of previously held rights."[143] The 1877 Act is similarly devoid of express mention of the lands and interests relevant to the modern Oglala Sioux's objection to the DBP, nor does it contain broad provisions relinquishing unspecified rights.[144] Instead, the 1877 Act is a detailed document that leaves out the majority of usufructuary rights promised to the Great Sioux Nation in 1851 and 1868.[145]

Absent clear language in the statute or act directing abolishment of treaty provisions, courts can still find that Congress abrogated a treaty document if it is clear that the legislators contemplated such abrogation and decided to draft accordingly.[146] However, the legislative history surrounding the 1877 Act provides no rationale for abrogation of the 1868 Fort Laramie Treaty. The explicit purpose of the 1877 Act was to "secure to the citizens of the United States the right to mine the Black Hills for gold."[147] This purpose was underscored by the previous settlement patterns of miners who flooded the area despite the 1868 treaty protections, and the United States military shared this goal.[148] In a letter dated November 9, 1875, General Sheridan describes meeting with President Grant and other cabinet personnel and deciding to officially withdraw military forces and allow miners to flood the Black Hills.[149] The President then authorized a commission to draft the 1877 Act with specific instructions to annex the Black Hills.[150] Nowhere in the history of the 1877 Act is there explicit legislative intent to fully abrogate the 1868 Fort Laramie Treaty nor the treaty rights to hunt outside of the Black Hills.

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[141] *Id.* at 195.
[142] *Id.*
[143] *Id.*
[144] Act of 1877, *supra* note 137.
[145] *Id.*
[146] United States v. Dion, 476 U.S. 734 (1986).
[147] United States v. Sioux Nation of Indians, 448 U.S. 371, 378 (1980).
[148] *Id.*
[149] *Id.*
[150] GETCHES ET AL., *supra* note , at 404.

The terms of the 1889 Act are even more narrow. The document only addresses the restructuring of the Great Sioux Reservation and is entitled "[a]n act to divide a portion of the reservation of the Sioux Nation of Indians . . . ."[151] There is sparse legislative history surrounding the document, but from its plain text it is clear that, as was true for the 1877 Act, there was not clear and plain congressional intent to abrogate any Fort Laramie treaty provisions other than those directly relating to the formation of the Great Sioux Reservation. Therefore, despite the historical and practical significance of the 1877 and 1889 documents, they do not affect the off-reservation hunting rights of the Oglala Sioux in the context of the DBP.

IV. APPLICATIONS OF TREATY RIGHTS PRINCIPLES TO THE DEWEY BURDOCK PROJECT

The Dewey Burdock Project is a proposed mining operation that would use in-situ leach mining[152] for uranium removal.[153] The DBP site will cover 10,000 acres and is located on "1868 Fort Laramie Treaty land in Custer and Fall River counties adjacent to the Pine Ridge Indian Reservation and upstream on Cheyenne River tributaries."[154] The Oglala Sioux—the band of the Sioux that lives on the Pine Ridge Indian Reservation—oppose the project.[155] The Environmental Protection Agency (EPA), at the time of this writing, is considering renewal of DBP mining licenses.[156] The Oglala Sioux

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[151] Act of 1889, Ch. 405, 406, 50th Cong. (1889), https://www.loc.gov/law/help/statutes-at-large/50th-congress/session-2/c50s2ch405.pdf [https://perma.cc/FZV9-UE72].

[152] In-situ leach mining is a method of uranium extraction wherein a chemical solution is pumped into the uranium ore, and the metal is extracted through the groundwater to avoid surface-level land disturbance. *In Situ Leach Mining of Uranium*, WORLD NUCLEAR ASS'N, https://www.world-nuclear.org/information-library/nuclear-fuel-cycle/mining-of-uranium/in-situ-leach-mining-of-uranium.aspx [https://perma.cc/9CFB-KNEK] (Sept. 2020).

[153] *EPA Public Comments*, *supra* note 3.

[154] Nauman, *supra* note 4. *See infra* Figure 1 (providing a visual representation of the DBP project area).

[155] *Id.*

[156] The public comment period on EPA renewal of two permits associated with the DBP closed on December 11, 2019. The EPA is now considering those comments, as well as others from 2017, to make a decision about the project's status. *Public Notice: EPA Dewey-Burdock Class III and Class V Injection Well Draft Area Permits, 2019*, ENV'T PROT. AGENCY (Aug 26, 2019), https://www.epa.gov/uic/epa-dewey-burdock-class-iii-and-class-v-injection-well-draft-area-permits-2019 [https://perma.cc/UV3C-RXF4].

have an opportunity to contest the DBP as a violation of their protected treaty rights under the 1868 Fort Laramie Treaty because it potentially defies the implied reservation of water rights, found in *Winters*, by jeopardizing the water supply of the reservation. It may also disrupt treaty protected Oglala Sioux hunting rights not considered in the NRC's permit analysis.

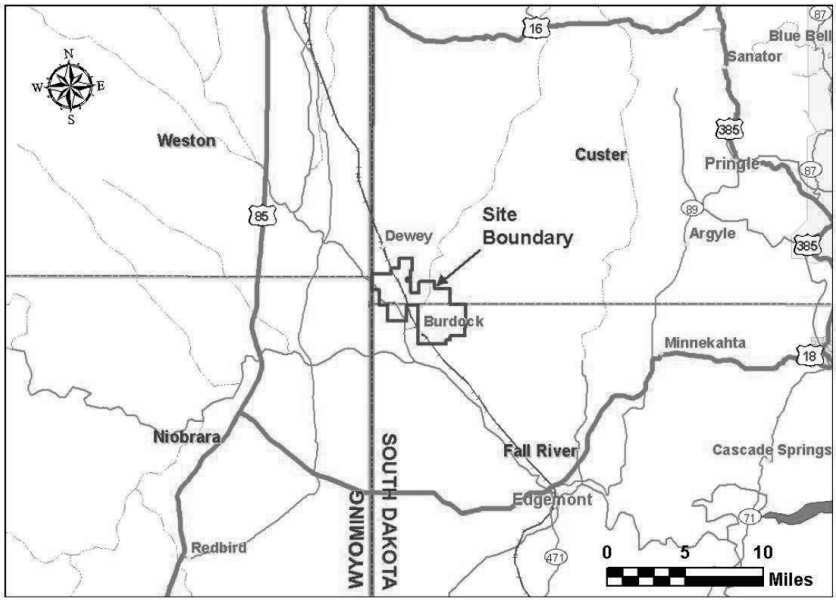

Figure 1: Map of the Dewey Burdock Project and Surrounding Area[157]

A. Judicial Review and Procedural Posture of the DBP

The NRC's mission is to "license[] and regulate[] the Nation's civilian use of radioactive materials to provide reasonable assurance of adequate protection of public health and safety, and to promote the common defense and security, and to protect the environment."[158] Certain privately-owned and operated projects that relate to nuclear materials, such as the

[157] Map of the Dewey Burdock Project Area (illustration), *in* Seth Tupper, *Oglala Sioux Tribe Appeal Seeks Survey of Uranium Mine Site*, S.D. PUB. BROADCASTING RADIO (Jan. 23, 2020), https://listen.sdpb.org/post/oglala-sioux-tribe-appeal-seeks-survey-uranium-mine-site [https://perma.cc/7R8N-F45W] (crediting the Nuclear Regulatory Commission for the map).

[158] U.S. NUCLEAR REGULATORY COMM'N, 2018–2019 INFORMATION DIGEST, NRC AT A GLANCE, https://www.nrc.gov/docs/ML1822/ML18226A117.pdf [https://perma.cc/NK25-GS36] (last visited Jan. 7, 2021).

DBP, are approved and overseen by the NRC.[159] Like other agencies which oversee public and private developments, the NRC is bound to consider certain federal statutes when reviewing project proposals, such as NEPA and the National Historic Preservation Act (NHPA).[160]

In accordance with the Administrative Procedure Act (APA), federal agencies must open certain decisions, such as the approval of certain licenses or the promulgation of rules, for public comment.[161] The Oglala Sioux were among the many parties that submitted comments during the public comment period of the DBP's license approval process.[162] The tribe eventually challenged the license in court, contending that the NRC had not adequately addressed the DBP's impact on the 1868 Fort Laramie treaty protections.[163] In their public comment, the Oglala Sioux challenged the scientific analysis of the NRC regarding the DBP and raised concerns about the cumulative effects of uranium from the DBP in the watershed encompassing the reservation.[164] However, federal courts only have jurisdiction to review final agency actions.[165] Therefore, the ongoing issue of the potential water quality impacts of the DBP was not ripe for review when the Oglala Sioux brought suit in D.C. Circuit Court in 2018. Instead, the tribe challenged whether the NRC's decision to keep the project license for the DBP active while the NRC investigated water quality, and other potential project impacts on tribal welfare, violated NEPA's requirement that agencies take a "hard look"[166] at the environmental and cultural impacts

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[159] *Id.*

[160] Section 102 of the National Environmental Policy Act directs federal agencies to prepare detailed statement on environmental impacts of projects, including the consideration of alternatives to project construction. 42 U.S.C. § 4332(2)(C). Similarly, Section 106 of the National Historic Preservation Act mandates that federal agencies to "take into account" the effects of projects on historic, including Native, property prior to expending federal funds or issuing license approvals. 54 U.S.C. § 306108.

[161] 5 U.S.C. §§ 551–559 (2011).

[162] *EPA Public Comments*, *supra* note 3.

[163] Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n, 896 F.3d 520 (D.C. Cir. 2018).

[164] *EPA Public Comments*, *supra* note 3, at 164.

[165] *See* 28 U.S.C. § 2342(4) ("[A]ll final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.").

[166] *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." (internal citations omitted)).

of agency actions.[167] In *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*,[168] Judge Garland found that these actions violated NEPA and remanded the decision to keep the license active back to the NRC.[169] Judge Garland noted that the court did "not have jurisdiction over the bulk of the rulings challenged by the Oglala Sioux Tribe" due to the lack of finality in the NRC's 2016 determinations on the DBP.[170] The Oglala Sioux petition challenging both the accuracy and the depth[171] of the NRC's review of groundwater impacts was still in internal NRC review and thus was procedurally barred from consideration by the D.C. Court of Appeals. Only the NRC and the Atomic Safety and Licensing Board have deemed the agency's groundwater impacts analysis of the DBP sufficient. No federal court has reviewed this decision.[172] Now that the NRC's rulings on the DBP are final, the Oglala Sioux are procedurally situated to challenge the NRC's decision based on the *Winters* implied water protections.

B. Implied Water Rights

The *Winters* doctrine of reserved water rights holds that tribes are entitled to sufficient water to support the original purpose for creating their federal reservations.[173] Under the 1868 Treaty of Fort Laramie, the Oglala Sioux have a right to sufficient water to support the Great Sioux Reservation, and thus, to support the present-day Pine Ridge Indian Reservation. The Oglala Sioux claim that the DBP will directly affect the Cheyenne River—which is interconnected with the Madison and Minnelusa aquifers—the groundwater, and Cheyenne headwaters.[174] The Oglala Sioux contend that these bodies of water have the potential to impact baseline tribal water

[167] Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n, 896 F.3d 520, 530–31 (D.C. Cir. 2018).

[168] *Id.*

[169] *Id.* at 539.

[170] *Id.* at 538.

[171] Public comments on the proposed project focused not only on the perceived strength of the groundwater analysis, but also on the NRC's failure to consider the existing threats to the Cheyenne River when predicting the effects of DBP. The Oglala Sioux assert a risk of cumulative impacts to the Cheyenne watershed, both upstream of and adjacent to the Pine Ridge Indian Reservation, due to a history of agricultural pollution and existing upstream uranium mining waste. *EPA Public Comments*, *supra* note 3.

[172] Powertech (USA), Inc.; Establishment of Atomic Safety and Licensing Board, 75 Fed. Reg. 13141 (Mar. 18, 2010) (notice).

[173] Winters v. United States, 207 U.S. 564 (1908).

[174] *EPA Public Comments*, *supra* note 3, at 283.

quality.[175] As explained above, *Winters* prohibits deprivation of water on tribal land if doing so is contrary to the purpose of the treaty which established the reservation in question.[176] Now that the Oglala Sioux are procedurally situated to bring a case about the DBP and other uranium mining projects' potential impacts on their reservation waters, they are entitled to relief, so long as their experts can prove this harm.

Polluting the ground and surface water that residents of the Pine Ridge Indian Reservation use for drinking, agriculture, and bathing contravenes the purpose of the reservation, which was created with the intent to provide a home for members of the Great Sioux Nation. Article XV of the 1868 Fort Laramie Treaty acknowledges the intended longevity of that goal, saying that the Sioux "will regard said reservation their permanent home."[177] The purpose of providing a permanent residence for the Oglala Sioux is fundamentally at odds with the virtual elimination of clean and safe water sources on the reservation. The *Winters* right to water, as later courts have held, includes the right to water free from contamination or degradation, not just the right to have water itself flow through the land.[178] The DBP cannot be permitted to infringe upon these *Winters* rights by polluting reservation waters with uranium.

Although the court in *Oglala Sioux* did not yet have the jurisdiction to review the Oglala Sioux's claims regarding the NRC's inadequate consideration of baseline water quality impacts, the tribe put forth the testimony of hydrologist Dr. Robert E. Moran[179] in their briefing. Dr. Moran had over forty years of professional experience related to water quality, hydrogeology, and geochemical work at the time of filing.[180] He earned his Ph.D. from the University of Texas at Austin in Geological Sciences, and his thesis work explored trace contamination of metals in Colorado streams.[181] In his capacity

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[175] *Id.*

[176] *Winters*, 207 U.S. at 577.

[177] Treaty of Fort Laramie, *supra* note 116, art. XV.

[178] United States v. Gila Valley Irrigation Dist., 920 F. Supp. 1444, 1454–55 (D. Ariz. 1996) (issuing an injunction to prevent upstream activities which harm water quality in an effort to "restore to the Apache Tribe water of sufficient quality to sustain commercial production" of crops).

[179] Final Opening Brief of Petitioner Oglala Sioux Tribe at 31, Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n, 896 F.3d 520 (D.C. Cir. July 20, 2018) (No. 17-1059).

[180] *Dr. Robert Moran*, MICHAEL-MORAN ASSOCS., LLC, https://remwater.org/#experience [https://perma.cc/JZ24-ZABS] (last visited Jan. 7, 2021).

[181] *Id.*

as a consultant, he has worked with public and private organizations, citizens, tribes, and government agencies.[182] In his original report to the NRC, Dr. Moran asserted that the DBP's Environmental Impact Statement (EIS)[183] did not sufficiently consider the effects of past mining operations and other contamination to the watershed; therefore, it could not have accurately analyzed the baseline groundwater quality of the aquifers which the DBP could affect.[184] The *Winters* doctrine compels the enjoining of the project if such impacts are proven, even if they do not rise to the level of danger which might implicate other common law rights.

Indians, like most other classes of plaintiffs, can pursue legal relief for groundwater contamination without pre-existing treaty rights. For example, plaintiffs can bring tort claims such as negligence and nuisance[185] against parties responsible for groundwater contamination.[186] However, these common law claims must meet sometimes stringent standards of harm for injured parties to find relief. In South Dakota, an injured party bringing a nuisance claim must show that the defendant's alleged groundwater pollution is pervasive enough to *substantially and unreasonably* interfere with the use of their land.[187] Further, the Supreme Court of South Dakota has been clear that the defendant's pollution discharge must be both intentional and unreasonable, or they must be both unintentional and negligent in order to be held liable.[188] In South Dakota, to bring a claim for nuisance based on an unintentional action, or to bring a standalone claim for negligence, a plaintiff must prove not only

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[182] *Id.*

[183] An Environmental Impact Statement is a document prepared as part of an application for an NRC license, detailing all expected impacts of the project on the "human environment." *National Environmental Policy Act at the NRC*, *supra* note 19. It is required by NEPA for any "major federal action," including in this case a uranium mining project. *Id.*

[184] Opening Written Testimony of Dr. Robert E. Moran, In the Matter of Powertech (USA), Inc. (June, 20, 2014) (No. 40-975-MLA, ASLBP No. 10-898-02-MLA-BD01), https://www.nrc.gov/docs/ML1417/ML14171A785.pdf [https://perma.cc/UUH9-3RN6].

[185] Illinois v. City of Milwaukee, Wis., 406 U.S. 91, 107 (1972) ("[F]ederal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.").

[186] *See* Allan Kanner et al., *New Opportunities for Native American Tribes to Pursue Environmental and Natural Resource Claims*, 14 DUKE ENVTL. L. & POL'Y F. 155 (2003) (discussing Indian tort claims in the context of environmental degradation).

[187] Greer v. City of Lennox, 107 N.W.2d 337, 339 (S.D. 1961).

[188] Kuper v. Lincoln-Union Elec. Co., 557 N.W.2d 748, 761 (S.D. 1996) (quoting RESTATEMENT (SECOND) OF TORTS § 822 (AM. L. INST. 1979)).

the injury suffered, but also that such an injury was a foreseeable result of the original action.[189]

These common law claims require a higher standard for assigning liability than the guaranteed right to water protected in *Winters*. Under *Winters*, courts need not determine whether an action is unreasonable, nor whether the harm at issue was foreseeable by the actors being accused. Instead, courts look at whether the deprivation[190] or contamination[191] of water frustrates the original purpose of the Indian reservation. Therefore, the implied treaty protection to water under *Winters* entitles the Oglala Sioux to a more favorable, consequence-based standard than does tort law. It is not uncommon for tribal rights and interests to be treated differently than those of the average American citizen under the law. For example, although project applicants seeking approval under NEPA can meet federal standards through mitigation—or by generating environmental benefits outside of a project area to offset harms—impacts to tribal fishing rights cannot be mitigated, and instead must be avoided.[192] Here, if the DBP impacts nearby water quality, courts need not determine whether the project actions were reasonable, nor whether the harms were foreseeable. If the Oglala Sioux were to raise their claim about the potential adverse impacts of the DBP on water quality, the D.C. Circuit must only decide whether those impacts frustrate the original purpose of the Pine Ridge Indian Reservation.

C. Off-Reservation Hunting Rights

The Oglala Sioux may also have a simpler remedy to address the DBP by focusing on off-reservation hunting rights rather than water rights. The Oglala Sioux have argued that the NRC did not adequately consider their implied water rights, but a court determining whether that is true would have to rely on scientific and expert analysis on the DBP's water quality impacts. In contrast, the Oglala Sioux can simply point out that the hunting rights preserved in the 1868 Fort Laramie treaty have been outright ignored. The Oglala Sioux's treaty-protected

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[189] Rikansrud v. City of Canton, 116 N.W.2d 234, 239 (S.D. 1962).

[190] *Winters*, 207 U.S. at 577.

[191] United States v. Gila Valley Irrigation Dist., 920 F.Supp. 1444, 1454-55 (D. Ariz. 1996).

[192] Bart J. Freedman & Benjamin A. Mayer, *Considering the Difference: Treaty Rights and NEPA Review*, LAW360 (Aug. 29, 2016), https://www.law360.com/articles/833840/considering-the-difference-treaty-rights-and-nepa-review [https://perma.cc/7PXD-54MQ].

hunting rights are not mentioned a single time in the 614-page EIS discussing the human and ecological impacts of the DBP.[193]

In addition to the DBP's obligation to consider the Oglala Sioux's hunting rights, the DBP is required to consider all project impacts relating to Indian treaty rights, culture, and religion. NEPA calls for assessment of risks to interests which are "aesthetic, historic, cultural, economic, [or] social . . . whether direct, indirect, or cumulative,"[194] including historic treaty rights.[195] Further, the NRC's own provisions require "an analysis of significant problems and objections raised by . . . any affected Indian Tribes."[196] Although the court in *Oglala Sioux* did not reach the issue of hunting rights because it was absent from both the EIS and the complaint, it did consider the DBP's obligation to assess the religious and historic value of the Black Hills under this provision of NEPA.[197] The court found that both NEPA and the NHPA obliged the NRC to withhold project approval since the DBP had not completed cultural and religious interest surveys about the sacred site.[198] Further, the court held that the NRC acted in a manner that was "arbitrary and capricious" when it permitted the DBP license to remain active despite failing to meet NEPA standards. As a result, it remanded the DBP's license to the NRC for reconsideration of the status of the license while the DBP worked to cure the NEPA deficiency.[199]

The arbitrary and capricious standard is the bar at which an agency action can be overturned by the courts; when an action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[200] courts have the authority to set aside or outlaw the agency decision. An agency acts in an arbitrary and capricious manner when it inadequately considers federal requirements, as the NRC did with the NEPA requirements to assess the religious and cultural impacts of the DBP. However, an agency action can also be considered arbitrary and capricious where it "entirely failed to consider an important aspect of the

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[193] DEWEY-BURDOCK EIS, *supra* note 20.

[194] 40 C.F.R. § 1508.8 (2019).

[195] *Tribal Treaty Rights in the Section 106 Process*, ADVISORY COUNCIL ON HISTORIC PRES. (Feb. 2020), https://www.achp.gov/native-american/information-papers/tribal-treaty-rights [https://perma.cc/BGS4-ZREF].

[196] 10 C.F.R. § 51.71(b) (2020).

[197] Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n, 896 F.3d 520, 530–31 (D.C. Cir. 2018).

[198] *Id.*

[199] *Id.*

[200] 5 U.S.C. § 706(2)(A).

problem."[201] Here, the NRC has entirely failed to consider the hunting rights of the Oglala Sioux, which may be cause for a reconsideration of the DBP license.

1. "In Such Numbers as to Justify the Chase"

Article XI of the 1868 Fort Laramie Treaty lays out for the Sioux terms which "reserve the right to hunt . . . so long as the buffalo may range thereon in such numbers as to justify the chase."[202] In applying the canons of treaty interpretation, these terms must be read in the manner that the Sioux signing the treaty would have understood them,[203] and ambiguities in the treaty language must be understood broadly and favorably to the Sioux.[204]

Interpreting these treaty terms in the manner in which the Sioux would have understood them, the treaty allows buffalo hunting on the specified off-reservation lands, so long as the Sioux can justify the effort to chase the herd. Courts have consistently interpreted off-reservation hunting and fishing servitudes to guarantee Indian use of resources, despite local government[205] and settler[206] inconvenience. For example, the Court in *United States v. Winans* interpreted treaty language protecting Yakima fishing rights as impliedly prohibiting the state of Washington from regulating fisheries in a way that impinged upon Indian use.[207] The Court, using the canons of interpretations, found that the tribe never would have agreed to a document that gave the United States control over the Indians' main food source.[208] A similar logic applies to the Oglala Sioux because the 1868 Treaty of Fort Laramie discussed retained

[201] Motor Vehicle Mfrs. Ass'n U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[202] Treaty of Fort Laramie, *supra* note 116, art. XI.

[203] *See*, *e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Starr v. Long Jim, 227 U.S. 613, 622–23 (1913); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (cases applying this canon of interpretation to find that terms should be read as the Indians would have understood them).

[204] *See*, *e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576–77 (1908) (cases applying this canon and reading ambiguities generally in favor of the Sioux).

[205] *See, e.g.*, United States v. Winans, 198 U.S. 371 (1905).

[206] *See, e.g.*, Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

[207] *Winans*, 198 U.S. at 381–82.

[208] *Id.*

hunting rights to buffalo, which was the main source of Sioux food at the time of signing.[209]

Even if the hunting rights provision of the 1868 Fort Laramie treaty is seen as ambiguous, that ambiguity must be resolved in favor of the Sioux signatories.[210] If the plain language of a treaty document allows two potential inferences about treaty language—one "which would support the purpose of the agreement and the other impair or defeat it"[211]—courts must favor the first interpretation.[212] One potential ambiguity may exist in interpreting which party, the Indians or the United States, is empowered to decide the size of a buffalo herd which can "justify"[213] chase. One of the purposes of the 1868 Fort Laramie Treaty was to bring peace between the Indians and the white settlers who were encroaching on Sioux land and inhibiting their traditional way of life.[214] Treaty language granting the United States the authority to terminate hunting rights crucial to the cultural heritage and subsistence[215] of the Sioux people likely would not promote peace. Further, resolving this ambiguity in the 1868 treaty in favor of the Indians supports a reading that grants autonomy to the Sioux to decide whether a buffalo hunt is worthwhile.

A Seventh Circuit case applies similar logic. At issue in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* was the meaning of an ambiguous phrase.[216] A treaty between the Chippewa and the United States provided that the treaty would remain in effect "during the pleasure of the President of the United States."[217] One way to construe this language is to allow the treaty to be terminated at the will of the

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[209] *See generally* Richard B. Williams, *History of the Relationship of the Buffalo and the Indian*, TANKA, http://www.tankabar.com/cgi-bin/nanf/public/viewStory.cvw?sessionid=<<sessionid>>&sectionname=Buffalo Nation&storyid=61954&commentbox= [https://perma.cc/7SZJ-JDU7] (arguing that the survival of tribal societies is dependent on buffalo).

[210] *See, e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576–77 (1908).

[211] *Winters*, 207 U.S. at 577.

[212] *Id.*

[213] Treaty of Fort Laramie, *supra* note 116, art. XI.

[214] Linda Darus Clark, *Sioux Treaty of 1868*, NAT'L ARCHIVES (Sept. 23, 2016), https://www.archives.gov/education/lessons/sioux-treaty [https://perma.cc/4QQX-Q4R6].

[215] *See generally* Williams, *supra* note 209 (discussing the relationship between the Sioux and wild buffalo).

[216] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983).

[217] *Id.* at 356.

president. The other interpretation is that the treaty remains active so long as the tribes do not disobey a treaty provision, which would cause the president displeasure. The court took the latter interpretation to resolve this ambiguity in favor of the Chippewa and to apply the treaty terms as the Indians would have understood them.[218]

The potential ambiguity in the 1868 Fort Laramie Treaty—in the phrase "reserve the right to hunt . . . so long as the buffalo may range thereon in such numbers as to justify the chase"[219]—can more easily be resolved than the "pleasure of the President."[220] It is plausible both that a nation would enter into a treaty defined in length by the whims of its leader, and also that it would expire upon the disobedience of one of the signatories. It is less plausible that the federal government would make rights contingent on their ability to judge which hunts are justified without experience in nomadic buffalo hunting. It is even less plausible that, taking the terms of the treaty as the Indians would have understood them, the Sioux would have signed a treaty which makes the right to hunt their primary food source contingent on the caprices of an American definition of what would "justify the hunt."[221] Moreover, the other canon, which resolves ambiguities broadly in favor of tribal signatories, supports a definition of "justify"[222] that gives the Oglala Sioux the authority to determine what number of buffalo justifies their own hunt.

Only once has a court suggested that an executive of the United States federal government had the authority to define for the Oglala Sioux what "justifies"[223] a hunt. A 1942 Court of Claims case, *Sioux Tribe of Indians v. U.S.*, incidentally addressed the issue in response to a claim by several bands of the Sioux against the United States for compensation for wrongfully seized territory.[224] The court quoted the then-Secretary of the Interior, who had convinced representatives of the Sioux to sign away the tribe's off-reservation hunting rights in Nebraska by stating that by the time of their conversation in 1875, "buffalo [wa]s not found on the Smoky Hill Fork of the Republican, so as

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[218] *Id.*

[219] Treaty of Fort Laramie, *supra* note 116, art. XI.

[220] *Lac Courte Oreilles Band*, 700 F.2d at 356.

[221] Treaty of Fort Laramie, *supra* note 116, art. XI.

[222] *Id.*

[223] *Id.*

[224] Sioux Tribe of Indians v. United States, 97 Ct. Cl. 613, 629–30 (1942).

to make it worth while [sic] to hunt them."[225] More importantly, the Secretary of the Interior admitted that with regards to these Nebraska lands, the federal government "cannot stop the white people from going out there" and seizing the land from the Indians.[226] Without an agreement binding the Sioux to cede their hunting rights in Nebraska, the court would not have been able to accept the Secretary of the Interior's opinion without violating the canons of treaty interpretation. No other court has attempted to do so, nor has any case spoken directly to the off-reservation hunting rights that the Sioux maintain in South Dakota.

2. The Term "Buffalo"

Although the NRC acknowledged the presence of big game hunting of elk and deer on DBP lands in the project's EIS,[227] this acknowledgement is unlikely to implicate the Oglala Sioux's treaty rights to off-reservation hunting. Though ambiguities are resolved in favor of the Indians, this canon does not permit "reliance on ambiguities that do not exist."[228] The treaty specifies that the Sioux who signed it are permitted to hunt "buffalo" on the original boundaries of their land as defined in 1868. As described above,[229] the Sioux retained off-reservation hunting rights, despite ceding physical occupation of the land. Taking terms as the Sioux would have understood them, it is unlikely that "the buffalo" would have stood as a placeholder for all wild game because the animal holds a distinct importance in Sioux culture.[230]

Full understanding of historical context of treaty terms may at times require exploration of the "cultural context"[231] of the signatory Indians. The Lakota are one of three subgroups of regionally and linguistically distinct tribal communities which make up the seven bands of the Great Sioux Nation.[232] The Oglala Sioux are one of the bands of the Sioux within the Lakota

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[225] *Id.* at 629.

[226] *Id.* at 630.

[227] DEWEY-BURDOCK EIS, *supra* note 20.

[228] South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986).

[229] *See supra* Part II.B (explaining that the rights and privileges of Indians will respect to hunting are not abolished by implication and that the 1868 Fort Laramie treaty between the United States and the Sioux remains intact, absent the provisions the 1877 Act specifically abrogated).

[230] Williams, *supra* note 209.

[231] Menominee Indian Tribe of Wis. v. Thompson, 922 F.Supp. 184, 199 (W.D. Wis. 1996).

[232] Birchfield, *supra* note 111.

subgroup.[233] Buffalo have always occupied a special place in Lakota culture: buffalo heads feature prominently in many religious Lakota ceremonies, including the Sun Dance, and buffalo symbolism is consistent across Lakota culture.[234] Buffalo meat has historically been the predominant food source of the Lakota, and the relationship between the two populations is beyond the Western conceptualization of predator and prey.[235] Oglala writer Richard Williams wrote of this connection: "[t]he adage 'You are what you eat' was never more applicable than in the symbiotic relationship between the buffalo and the Plains Indian. The Plains Indian culture was intrinsic with the buffalo culture. The two cultures could not be separated without mutual devastation."[236] Moreover, the Lakota word for buffalo, tȟatȟáŋka (or its English transliteration tatanka), is distinct from the Lakota words for other game such as elk (heȟáka or hexaka) and deer (tȟáȟča or tahca).[237] The deep cultural ties and linguistic distinctions between the Lakota Sioux and the buffalo make it unlikely that the Sioux signing the 1868 Fort Laramie Treaty would have understood buffalo to be synonymous with any other presence of wild game.

However, even if other game is not protected by treaty terms preserving the Oglala Sioux's buffalo hunting rights, the NRC's failure to consider this treaty right in the context of the DBP remains unjustified. Although many refer to wild buffalo as part of the distant history of the plains, there are still herds of buffalo in and around the Pine Ridge Indian Reservation.[238] These herds graze on the Pine Ridge Indian Reservation as well as in Badlands National Park,[239] and the approval process for the

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[233] *Oglala Sioux Tribe*, TRAVEL S.D., https://www.travelsouthdakota.com/trip-ideas/article/oglala-sioux-tribe [https://perma.cc/76J2-S5FP] (last visited Jan. 7, 2021).

[234] Oglala Sioux Tribe, *Oglala Sioux Tribe*, https://www.lakotamall.com/importance-of-buffalo [https://perma.cc/4BEA-9A9Z] (last visited Nov. 22, 2020).

[235] Williams, *supra* note 209.

[236] *Id.*

[237] Sunshine Carlow & Nacole Walker, *Intensive L/Dakota for Beginners*, STANDING ROCK SIOUX TRIBAL DEP'T EDUC., http://wotakuye.weebly.com/uploads/2/3/7/4/23749479/ldl121_packet.pdf [https://perma.cc/2RA6-CDKL] (last visited Nov. 22, 2020).

[238] Sharon Pieczenik, *Bison Hunting on the Pine Ridge Indian Reservation*, NAT'L GEOGRAPHIC (Aug. 11, 2016), https://blog.nationalgeographic.org/2016/08/11/bison-hunting-on-the-pine-ridge-indian-reservation/ [https://perma.cc/6ED6-YJND].

[239] Katherine Rivard, *Conservation of the Badlands Bison*, NAT'L PARK FOUND. BLOG, https://www.nationalparks.org/connect/blog/conservation-badlands-bison [https://perma.cc/MZU4-TMAG] (last visited Nov. 22, 2020).

DBP did not address the potential impact of the project on these animals.

Though bison numbers have dwindled, tribal and environmental support of remaining herds has been consistent, and buffalo hunting by the Oglala Sioux still continues.[240] At one point in 2013, the buffalo population on the Pine Ridge Indian Reservation was estimated to be as low as 900.[241] Even at 2013 levels, the Oglala Sioux deemed this number satisfactory to justify a hunt.[242] Since 2013, conservation efforts by tribal and environmental organizations have focused on increasing herd size and expanding herd range,[243] which would also increase the potential for buffalo hunting. The Oglala Sioux have continuously exercised their treaty right to hunt buffalo on and off of the Pine Ridge Indian Reservation. In recent years, public interest in the Oglala Sioux's buffalo hunt has permeated mainstream American media.[244] With that trend has come substantial documentation of the Oglala Sioux exercising their treaty right to hunt buffalo.[245] In 2016, a *National Geographic* employee documented his experience hunting buffalo with the Oglala Sioux,[246] and a separate video documentary detailing a hunt with members of the tribe was released on Amazon Video in June 2019.[247] Moreover, buffalo are still part of the economic livelihood of some Oglala Sioux. Tanka is a food company run by "Oglala Lakotas on the Pine Ridge Reservation, SD, with a deep commitment to helping the People, the Buffalo and Mother Earth."[248] The site features nutritional bars based on traditional recipes and made from "high-protein, prairie-fed buffalo and tart-sweet cranberries."[249] These bars, which exploded into success in 2018, were featured in grocery stores like Whole Foods

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[240] Russell Contreras, *'The Buffalo Hunt' Seeks to Show Tribe in a New Light*, ASSOC. PRESS (June 7, 2019), https://apnews.com/24e9dea429774b75bd1804b89ee2ad25 [https://perma.cc/Z67R-HZLH].

[241] Katie Gustafson, *Bringing the Bison Home*, WORLD WILDLIFE FUND (June 13, 2013), https://www.worldwildlife.org/stories/bringing-the-bison-home [https://perma.cc/GP6F-CYKR].

[242] *Id.*

[243] *Id.*

[244] *See, e.g.*, Pieczenik, *supra* note 238; Contreras, *supra* note 240 (focusing on, and romanticizing, the Oglala Sioux's buffalo hunting technique).

[245] Pieczenik, *supra* note 238.

[246] *Id.*

[247] Contreras, *supra* note 240.

[248] *Ancient Nutrition for Today's Healthy Lifestyle*, TANKA, http://www.tankabar.com/cgi-bin/nanf/public/main.cvw [https://perma.cc/LQP4-FZMY] (last visited Nov. 22, 2020).

[249] *Id.*

for a brief period, and are now predominantly available online.[250] Although the brand has scaled back, it represents a well-known business that generates revenue for members of the Oglala Sioux tribe based around buffalo products.[251]

The full range of the buffalo herd or herds on and near the Pine Ridge Indian Reservation is unclear, as is whether the lands beneath the DBP overlap with their grazing areas. It is also unknown whether, or to what extent, changes in water composition and construction noise associated with the project might impact the well-being of the animals or the Oglala Sioux buffalo hunt. This information is unknown because the NRC did not conduct any studies nor issue any analyses on the impact of the project on the Oglala Sioux's treaty right to hunt buffalo on the land covered in the 1868 Fort Laramie Treaty.

To produce a comprehensive EIS, as NEPA requires, an analysis of the project's impact on treaty-protected hunting rights was necessary because the DBP will be built on land over which the Oglala Sioux have retained hunting rights and as well as on land adjacent to the Pine Ridge Indian Reservation. The failure of the NRC's permitting analysis regarding DBP to address the Sioux's hunting rights is arbitrary and capricious within the meaning of the APA, and the project should not proceed without this crucial evaluation.

D. DBP as a Property Loss Deserving of Monetary Compensation

Although ensuring continued fulfillment of Oglala Sioux treaty rights by analyzing and limiting the impacts of the DBP is most appropriate here, at minimum, the Oglala Sioux are entitled to monetary compensation for the value of their lost treaty rights, should the project continue. This is because the DBP, if constructed, would constitute a loss of Oglala Sioux treaty interests conceivable as either a Fifth Amendment taking by the United States, or as property damage resulting from the actions of Agarza Uranium.

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[250] Marilyn Noble, *One Year After Native-Owned Tanka Bar Had Lost Nearly Everything, the Buffalo Are on Their Way Back*, COUNTER (Jan. 24, 2020), https://thecounter.org/tanka-bar-niman-ranch-bison-grassfed/ [https://perma.cc/EGS4-YAKX].

[251] *Id.*

1. DBP as a Fifth Amendment Taking

As the Supreme Court found in *Sioux Nation*,[252] it is possible to acknowledge and resolve a breach of treaty terms by awarding the harmed tribe financial compensation for their lost resources or land. There is no dispute that the United States government has the ability to breach or abrogate treaty terms to which it once agreed.[253] However, it is also well-established that the government has a duty to act within the bounds of its trustee obligation in caring for the needs of the tribes.[254] There is an inherent conflict of interest when the United States acts both as trustee of Indian assets and as a governing body exercising its eminent domain power in acquiring land. This conflict is discussed in *Shoshone Tribe v. United States*[255] and relied upon in the *Sioux Nation* decision. When the United States government acquires land from a tribe, the exchange is a taking unless Congress makes a "good faith effort to give the Indians the full value of the land."[256] The United States is not permitted "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . for that would not be an exercise of guardianship, but an act of confiscation."[257]

The Court, in *Sioux Nation*, found that the 1877 Act did not represent a good-faith effort to negotiate a fair deal, and thus annexing the Black Hills constituted a taking.[258] The further reduction of these lands in 1889 would likely fare no better under an analysis of fair dealings. *Sioux Nation* was based upon the United States' failure to adequately financially compensate the Sioux for their land, and also on the United States' outright disregard for the 1868 Fort Laramie Treaty's tribal voting procedures for treaty ratification—both characteristics of American dealings were also true of the federal government's actions in 1889.[259]

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[252] United States v. Sioux Nation of Indians, 448 U.S. 371, 373 (1980).

[253] Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

[254] *See supra* text accompanying note 55 (explaining the trust relationship).

[255] Shoshone Tribe v. United States, 299 U.S. 476 (1937).

[256] Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968).

[257] United States v. Creek Nation, 295 U.S. 103, 110 (1935) (internal citations omitted).

[258] United States v. Sioux Nation of Indians, 448 U.S. 371, 409 (1980).

[259] HOOVER, *supra* note 132; *see also* the discussion of the 1889 Act in Part III.B.

The United States continued to redefine Sioux lands after the 1877 Act, but it never adhered to the 1868 Fort Laramie Treaty requirements that three-fourths of the adult male Sioux must assent to changes.[260] The continued, unilateral, and, often, forced land exchanges between the United States and the seven bands of the Sioux have not escaped domestic and international attention. Although *Sioux Nation* aimed to settle the issue of the federal taking of the Black Hills, subsequent lawsuits,[261] congressional bills,[262] presidential policy stances,[263] and United Nations investigations[264] have all attempted to address the

[260] Treaty of Fort Laramie, *supra* note 116, art. XII.

[261] *See* Greenhouse, *supra* note 131 (The Oglala Sioux independently sued after *Sioux Nation*, seeking "the [Black Hills] land plus $10 billion in compensation for the removal of nonrenewable resources and $1 billion additional in damages for 'hunger, malnutrition, disease and death.'" The Supreme Court denied certiorari.). In 2011, the District of South Dakota, Southern Division, dismissed another claim for physical control of the Black Hills. Different Horse v. Salazar, 2011 WL 3422842 (D.S.D. Aug. 4, 2011).

[262] Senator Bill Bradley from New Jersey proposed in 1985 "A bill to reaffirm the boundaries of the Great Sioux Reservation to convey federally held lands in the Black Hills to the Sioux Nation." Sioux Nation Black Hills Act, S. 1453, 99th Cong. (1985). Bradley sent the bill to committee, where it died, after spending time on the Pine Ridge Indian Reservation. Wayne King, *Bradley Offers Bill to Return Land to Sioux*, N.Y. TIMES (Mar. 11, 1987), https://www.nytimes.com/1987/03/11/us/bradley-offers-bill-to-return-land-to-sioux.html [https://perma.cc/F7RV-4FH7].

[263] During his presidential campaign, the Lakota County Times published a statement by Barack Obama in support of the Lakota's quest for Black Hills land restoration, and for tribal sovereignty generally. Loretta Afraid of Bear-Cook, *Pine Ridge Indian Reservation Community & District Hearings to Appoint Representatives of the Oglala Sioux Tribe to Meet with President Barack Obama on Black Hill's Land Claim Issues and Re-Affirm that the Black Hills are Not for Sale, Following an Historic Gathering of Oglala Lakota Nation*, LAKOTA TIMES (Sept. 1, 2009), https://www.lakotatimes.com/articles/monday-august-24th-2009-for-immediate-press-release/ [https://perma.cc/NSZ8-CJZ8]. Oglala Sioux Tribal President John Yellowbird Steele wrote a public letter to Obama in response to the press release, stating that the "Oglala Sioux Tribe feels that there are innovative solutions that can fulfill our sacred obligation to protect our aboriginal homelands . . . and still enter into a mutually agreeable accord with the Federal government to resolve all the issues involved in the Black Hills Land Claim." Brandon Ecoffey, *Lakota Country Times: Oglala Sioux Tribe Eyes Land Claim Talks*, INDIANZ (July 11 2016), https://www.indianz.com/News/2016/07/11/lakota-country-times-oglala-sioux-tribe-2.asp [https://perma.cc/7EYS-V5Z8].

[264] In 2012 James Anaya, a United Nations Special Rapporteur on the Rights of Indigenous People, took a 12-day tour of the United States to speak with tribal leaders across the nation. At the end of it, he publicly endorsed land restoration of the Black Hills. *UN Official Calls for US Return of Native Land*, BBC NEWS (May 5, 2012), https://www.bbc.com/news/world-us-canada-17966113 [https://perma.cc/7VG3-EB3X]. These findings were officially published in a U.N. General Assembly Report. *See* James Amaya (Special Rapporteur on the

inadequacy of financial compensation for the loss of the Black Hills, and have endeavored to at least partially restore Sioux land ownership of the area.

As the United States, through unfair dealings, did take the Sioux land in the Black Hills that now sits underneath the DBP construction site, this too could be conceptualized as a Fifth Amendment taking deserving of compensation. Such a finding would entitle the Oglala Sioux to further financial award than was granted in *Sioux Nation*. It may also entitle the tribe to seek restoration of the former Sioux lands underneath the project site by allowing federal courts to reconsider the taking of the Black Hills. Such a court would be able to take into account the persistent, ongoing[265] efforts of the Oglala Sioux post-*Sioux Nation* to seek restoration of title.

2. Private Financial Liability

Another remedy available to the Oglala Sioux would be to seek private damages directly against Agarza Uranium.

Though written in the context of a government taking, the Supreme Court has implied that tribes may be due financial reimbursement for the loss of their off-reservation fishing and hunting rights. In *Menominee Tribe of Indians v. United States*[266]—while deciding that the Termination Act was not meant to fully abrogate usufructuary rights in the treaties it discussed—the Court stated: "[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation."[267] This indicates a potential willingness by the courts to conceptualize usufructuary rights as interests due monetary compensation, which could translate to private financial liability in the context of damages.

Here, the Oglala Sioux could levy a common law damages claim for the monetary value of the cultural and nutritional benefits of buffalo hunting lost due to DBP impacts. A quantification of these off-reservation rights would not be entirely novel. The Boldt Decision marks an example of an explicit determination of the amount of fish owed to the tribes of the Pacific Northwest by their treaty rights to fish in

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Rights of Indigenous Peoples), *Rep. on the Situation of Indigenous Peoples in the U.S.*, U.N. Doc. A/HRC/21/47/Add.1 (Aug. 30, 2012).

[265] *See supra* text accompanying note 131 (summarizing the Oglala Sioux's efforts to restore tribal land title to the Black Hills).

[266] Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

[267] *Id.* at 413.

off-reservation rivers.[268] In that case, the tribes were owed between forty-five and fifty percent of all harvestable fish passing through the runs where they had fishing interests.[269] The Boldt Decision demonstrates that a numeric value of an off-reservation right can be determined and utilized to calculate money damages for lost catch. Courts regularly valuate abstract concepts, such as potential lost wages of injured workers, in order to adjudicate common law damages claims associated with negligence. In those instances, the monetary reward is estimated as "'the difference . . . between the value of the plaintiff's services as they will be in view of the harm and as they would have been had there been no harm.'"[270] Using this formula, federal courts could assess the value of the damage to the Oglala Sioux's buffalo hunting from the construction and operation of the DBP.

Nez Perce Tribe v. Idaho Power Co.[271] details a similar claim for compensation by the Nez Perce Indians. The tribe sought financial reimbursement for the reduction of fish in the Snake River, an off-reservation site where they retained a treaty fishing right.[272] Three dams constructed and operated by Idaho Power Company significantly reduced the fish catch in the Snake River.[273] Although the court declined to find any federal cause of action that would allow collection of monetary damages from Idaho Power for this harm,[274] the details of the *Nez Perce* case are distinct from the Oglala Sioux's potential claim.

The Federal Power Act (FPA) coordinates the development of the United States' hydroelectric projects, and it empowers the Federal Energy Regulatory Commission to oversee the licensing and operation of federal dams.[275] The FPA also governs the Nez Perce Indians' claim for monetary compensation relating to the Snake River dam projects.[276] The court in *Nez Perce* failed to see a state action at common law which would not be preempted by the FPA's general damages provisions, which did not provide for compensation for lost usufructuary rights.[277]

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[268] United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974).

[269] *Id.* at 343.

[270] Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 132 (1997) (quoting RESTATEMENT (SECOND) OF TORTS § 924 (AM. L. INST. 1979)).

[271] Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994).

[272] *Id.* at 794.

[273] *Id.*

[274] *Id.* at 812.

[275] *Id.*

[276] *Id.*

[277] *Id.*

The court further declined to read the tribe's novel cause of action into FPA section 803(c), which details the liability of potential licensees for damages that their projects cause.[278] In determining whether a litigant has a private right of action under a federal statute, the Supreme Court has held that the "ultimate issue is whether Congress intended to create a private cause of action."[279] Applying that standard, the Idaho court determined that it was inconsistent with the legislative history of the FPA to find a common law cause of action to recover damages for impacts to treaty fishing rights.[280]

The NRC operates under an entirely different liability scheme, largely due to the high-risk nature of nuclear projects.[281] Section 170 of the Atomic Energy Act of 1954 provides that the NRC must require certain licensees to obtain liability insurance "to cover public liability claims."[282] The statute defines public liability as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or political subdivision of a State, in the course of responding to a nuclear incident or precautionary evacuation)," not including claims related to workers' compensation or war.[283] The NRC language regarding project liability is broader than that of the FPA, but this language has not yet been interpreted to allow damages claims relating to Indian usufructuary rights.

Finally, the *Nez Perce* court declined to create a cause of action under federal common law, although the court acknowledged that it could have done so.[284] In making this decision, the *Nez Perce* court stressed that the right to have an

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[278] 16 U.S.C. § 803(c).

[279] Karahalios v. Nat'l Fed'n Fed. Emps., Local 1263, 489 U.S. 527, 532 (1989) (quoting California v. Sierra Club, 451 U.S. 287, 293 (1981)).

[280] *Nez Perce Tribe*, 847 F.Supp. at 812. As courts have a long history of denying private rights of action to recover damages under NEPA, it is unlikely that the Oglala Sioux would fare any better than the Nez Perce in trying to recover under the statutory and regulatory scheme which governs energy development. *See* Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It*, REGUL. TRANSPARENCY PROJECT (Oct. 16, 2018), https://regproject.org/paper/national-environmental-policy-act/ [https://perma.cc/3DD3-JN3X].

[281] U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-654, NUCLEAR REGULATION: NRC'S LIABILITY INSURANCE REQUIREMENTS FOR NUCLEAR POWER PLANTS OWNED BY LIMITED LIABILITY CORPORATIONS (May 2004).

[282] 42 U.S.C. § 2210.

[283] 10 C.F.R. § 140.92, App. B.

[284] *Nez Perce Tribe*, 847 F.Supp. at 811.

opportunity to catch fish was not equivalent to a vested property interest in a catch of fish; therefore, there was no claim to lost property which they could compensate.[285] However, the *Nez Perce* court fails to acknowledge that the Boldt Decision—written fifteen years before the District of Idaho heard the Nez Perce Indians' claim—provides support for the exact opposite conclusion.[286] As discussed in Part I, treaty fishing rights cannot be circumvented or nullified by otherwise legal actions of non-Indians.[287] Further, the Boldt Decision explicitly held that treaty fishing rights afford Indians more than the opportunity to fish, and conferred several tribes of the Pacific Northwest a specific entitlement of forty-five to fifty percent of all fish passing through the rivers on which the Indians have fishing servitudes.[288] Although the *Nez Perce* court would not have been legally bound by the Boldt Decision, it may have been persuaded by the case. The Boldt Decision remains a highly influential and well-cited decision, and the Ninth Circuit has been home to several decades-long cases about interpreting treaty language preserving usufructuary rights.[289]

There are also normative rationales for granting damages to tribes whose treaty rights have been trampled by private projects. Courts might provide a mechanism for Indians to demand corporate prioritization of tribal consultation by recognizing federal common law damages claims against private parties that violate treaty interests. If tribes are able to recover the monetary value of their lost treaty rights as a result of environmentally damaging energy infrastructure projects, the corporations behind them would be forced to take that financial burden into consideration when assessing a project's economic viability. Corporations may find extended conversation with tribes about existing treaty interests to be less costly than legal fees and property damage payouts. Federal statutes currently require corporations to engage in some consultation with tribes,[290] but this system does not mandate a sufficient level of discussion, and is inadequate to address the current onslaught of planned infrastructure projects on and near tribal lands. In the context of the DBP, treaty protections may offer the Oglala Sioux a mechanism by which they can influence Agarza and the federal

[285] *Id.*

[286] United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974).

[287] *See generally* United States v. Winans, 198 U.S. 371 (1905).

[288] United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974).

[289] *See, e.g.*, United States v. Washington, 520 F.2d 676 (9th Cir. 1975).

[290] *See* discussion in Part IV A and C of the NEPA and NHPA obligations corporations applying for federal agency permits must comport with.

agencies involved in project approval to more meaningfully consult with tribal needs and interests.

The current system incentivizes utility companies to carry out bare minimum impact analysis and tribal consultation before developing large swaths of land that may directly impact federally protected Indian rights and interests. Broadening our understanding of common law damages to hold companies financially accountable for the economic value of the tribal interests these developments destroy would encourage robust analysis of tribal interests before construction to avoid future financial liability. This new system is also a practical one; it would ensure that Indians have an opportunity to seek proper compensation for diminished or extinguished treaty rights.

The Oglala Sioux have a treaty-protected right to hunt buffalo in perpetuity, so long as sufficient numbers of the herd exist. Therefore, if the DBP is proven to impact the health or size of surrounding herds, or should the construction or operation of the uranium mining impact Indians' ability to hunt these animals, the Oglala Sioux should at minimum be permitted to seek federal compensation at common law.

V. CONCLUSION

The 1851 and 1868 Fort Laramie Treaties guarantee the Oglala Sioux access to clean water on the Pine Ridge Indian Reservation and to off-reservation buffalo hunting. The *Winters* doctrine of reserved water rights mandates that the quantity and quality of Indian water sources be maintained, and the DBP cannot threaten to degrade these tribal waterways. Reevaluation of the DBP's safety with regards to groundwater quality is ripe for judicial review, should the Oglala Sioux wish to pursue a claim in federal court. Additionally, the Oglala Sioux have a protected right to hunt buffalo on lands in and around the DBP site. This right was ignored by the DBP's EIS, and the NRC has an obligation to consider the Oglala Sioux's hunting rights before issuing further permission to develop the DBP. The Oglala Sioux have legal rights created to maintain their quality of life on the Pine Ridge Indian Reservation, and federal agencies such as the NRC should not approve projects which disregard the treaties of the United States, to which we are *all* still bound. Should the project proceed despite these objections, and if the water quality of the Pine Ridge Indian Reservation declines, or if hunting by the Oglala Sioux is impacted, the tribe is due monetary compensation either as a taking of their land and interests, or as private damages for the value of their losses.