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EQUAL PROTECTION AGAINST POLICING

Evan D. Bernick*

A White police officer pins his knee against a Black man’s neck.1 The Black man lies prone. He says he can’t move. He says he can’t breathe. He says he’s through. He pleads for his mama. He moans, gasps, and writhes. Blood runs out of his nose and mouth. After eight minutes and forty-six seconds, George Floyd is dead.2

Videos of the killing went viral. All four of the Minneapolis Police Department officers who arrested Floyd for allegedly using a counterfeit $20 bill at a convenience store were fired. Derek Chauvin—who held his knee to Floyd’s neck—was initially charged by the Hennepin County Sheriff’s Office with third-degree murder and second-degree manslaughter with culpable negligence.3 Minnesota Attorney General Keith Ellison then announced that Chauvin was being charged with second-degree murder and that Tou Thao, Thomas Lane, and J.A. Keung—the cops who stood by while Chauvin killed Floyd—were being charged with aiding and abetting

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1 Throughout this Article, I will capitalize “Black” when referring to African American identification and members of other African diaspora culture and “White” when referring to non-Black individuals of European ancestry. I agree with Etienne Touissant that “while race as a tool for human categorization is a social construction that too often essentializes and oversimplifies, racial categorizations are employed with tangible effect in the United States to exploit, suppress, and dehumanize subordinated populations.” Etienne C. Touissant, Tragedies of the Cultural Commons, 110 CAL. L. REV. 1777, 1789 n. 4 (2022).


second-degree murder. On April 21, 2021, Chauvin was convicted on all counts.

Activists are demanding fundamental changes in the distribution of state violence. The demands are new to many, but they are the product of years of advocacy by an ascendant social movement. That movement is the Movement for Black Lives ("M4BL"), the overarching police-related demands, for (1) divestment from the police and investment in other public institutions ("invest-divest"); (2) control of the police by community members who are most affected by police violence ("community control"); (3) support of nonstate, community-based approaches to resolving social conflict ("nonstate protection").

These demands have proven controversial—particularly invest-divest. On the 2020 campaign trail, President Joe Biden went out of his way to oppose "defunding" the police, and he has reiterated and acted consistently with that commitment, endorsing a $37 billion "Safer America Plan" that would spend nearly $13 billion to recruit, train, support, and manage 100,000 officers over the next five years.
A few critics of defunding have suggested that defunding might actually be unconstitutional. They have invoked the Equal Protection Clause of the Fourteenth Amendment and claimed that the Clause requires that police have sufficient resources to protect people against violence. M4BL, for its part, tends to avoid constitutional rhetoric and indeed conventional legal argumentation in general. It might be though that a centuries-old document would have little to offer advocates of radical social change today.

In recent years, however, a number of scholars have contended that the Reconstruction Amendments bear the marks of radical abolitionist influence; have been successfully deployed by radical social movements in more recent times; and might aid radical movements today. In this Article, I join an ongoing conversation about radical constitutionalism, contending that M4BL’s critique of police violence and its demands for radical change are in part a response to a mode of governance—policing—that violates the


11 See Akbar, supra note 6, at 446 (arguing that M4BL’s policy platform is “altogether skeptical about rights.”), but see Rafi Reznik, Retributive Abolitionism, 24 BERKELEY J. CRIM. L. 123, 143–44 (2019) (responding that M4BL has a “positive outlook on rights” in certain areas, including rights to social and political equality).

Fourteenth Amendment. Accordingly, that critique and those demands could be framed and defended as a form of constitutional fidelity.

In ordinary conversation, “police” calls to mind either (a) individual law-enforcement officials (“a police (officer)’’); or (b) the institutional body of which those officials are a part (“the police”). But “police,” which travelled from continental Europe to England to the Americas originally referred neither to individuals nor institutions. It referred to a mode of hierarchical, discretionary, largely legally unaccountable form of governance. Policing has always been part of governance in the United States—particularly the control of racialized populations.

This is more than a linguistic curiosity. The concept of “the equal protection of the laws” was incorporated into the Fourteenth Amendment to put an end to *subjugation*—a condition in which one’s life, liberty, and property are subject to the control of unaccountable others. Because policing-as-governance necessarily subjugates people, the Equal Protection Clause compels us to confront the question of the constitutionality of policing and of the police.

Part I discusses the emergence of M4BL; summarizes M4BL’s policing critique and demands; and examines the premises on which those demands rest. Part II provides an overview of the history of policing-as-governance, beginning with ancient Greece and ending with the ratification of the Equal Protection Clause. I show that the Clause’s structure and content was informed by the policing of Black Americans before and after the war. And I contend that the Clause’s purpose of preventing subjugation directly implicates policing, which subjugates *through* hierarchal, discretionary, largely legally unaccountable violence.

Part III turns to the institutional police. I trace the emergence, development, and expansion of the police in North America, arguing that policing has always been an important part of what police in the United States do. The tension between the Equal Protection Clause’s antisubjugation purpose and policing-as-governance anticipates a conflict between the Clause’s purpose and the police-as-institution.

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Part IV returns to M4BL’s critique and demands and considers them in light of the text and history of the Equal Protection Clause, as well as the history of policing. It analyzes particular proposals that have been advanced and modes of resistance that have been used by Movement activists and scholars, and that might draw strength from constitutional argumentation. Third, it discusses how critical engagement with the strengths and weaknesses of the Equal Protection Clause could be generative of ideas about future constitution-building. Finally, it considers objections.

A conclusion follows.

I. A MOVEMENT AGAINST POLICE VIOLENCE

The summer of 2020 was long, hot, and violent. A novel coronavirus killed tens of thousands, put hundreds of thousands out of work, forced all with the means to do so to shelter in their residences, and exposed the houseless to the ravages of an extraordinarily cruel disease. The boredom and anxiety of social distancing was punctuated by a seemingly endlessly stream of police killings of Black people—some caught on video.

To describe Americans’ collective responses as “protests” would not do justice to their scope and duration.15 The police killings of George Floyd, Breonna Taylor, Tony McDade, Rayshard Brooks, and Jacob Blake inspired some of the largest gatherings in U.S. history.16 States, municipalities, and even the federal government17 confronted people who participated in them

16 See id.
with rubber bullets, flash-bang grenades, and tear gas. These were strikingly multiracial and nonpartisan uprisings against police violence.

The police violence and uprisings focused the nation’s attention on a series of demands advanced by a range of prison-industrial-complex (“PIC”) abolitionist organizations that had spent years campaigning against the carceral state—that is, police, prisons, and the social conditions that make life without these institutions seem unimaginable. Many of these organizations are part of a broader movement—the Movement for Black Lives (“M4BL”)—that was catalyzed by the acquittal of George Zimmerman for the murder of Trayvon Martin and by Ferguson, Missouri police officer Darren Wilson’s killing of Michael Brown. Understanding M4BL’s policing demands requires further discussion and context.

A. M4BL’s Origins

The Movement for Black Lives began in 2012 with two social-media posts that were written by California activists Alicia Garza and Patrisse Cullors. Saddened and enraged by the Zimmerman acquittal, Garza posted a “love letter to black folks” that concluded: “Black people. I love you. I love us. Our lives matter.” Garza and Cullors talked over the phone; Cullors proposed the following on Garza’s wall: “twin, #blacklivesmatter campaign? can we discuss this? i have ideas. i am thinking we can do a whole social media/all out in the streets organizing effort. let me know.”


22 Id.

23 Id.
Shortly thereafter, Garza, Cullors, and Opal Tometi, the executive director of New York immigrant-rights group Black Alliance For Just Immigration, posted on Tumblr and Twitter, encouraging supporters to share stories of why #blacklivesmatter.\(^{24}\) They incorporated the phrase into their activism, organizing (with Brooklyn activist Darnell Moore) a Black Lives Matter ride to Ferguson, Missouri after the police killing of Michael Brown in 2014.\(^{25}\) 600 people from more than 18 different cities joined street protests in Ferguson, which made Black Lives Matter synonymous with opposition to racialized police violence.\(^{26}\) Activists marched in the streets after the police killings of Eric Garner, Freddie Gray, Tamir Rice, and Walter Scott, as well as after Sandra Bland’s death by suicide in police custody following a pretextual traffic stop.\(^{27}\)

M4BL is made up of fifty-plus organizations, including the Black Lives Matter organization that is partially credited for launching the Movement.\(^{28}\) Neither #BlackLivesMatter nor the broader movement that it inspired has been solely concerned with police violence. A review of M4BL’s 2016 policy platform, “A Vision for Black Lives” (“Vision”), created in the course of a year-long process and still undergoing revision, discloses a broader critique of the carceral state as a whole.\(^{29}\) Still, M4BL’s critique of the police is central to the Vision.

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\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) Id.


\(^{28}\) Akbar, supra note 6, at 407 n.3.

\(^{29}\) Policy Platform, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/ [https://perma.cc/87XF-AJHK].
B. M4BL’s Critique

Any generalizations about a mass movement will fail to capture important commitments, complexities, and ongoing controversies. This Section sets forth the moral, historical, and legal premises that I take to be central to M4BL’s critique of police in the United States.

1. Moral

M4BL is committed to the liberation of all oppressed people.30 But it is centered on and rooted in the experiences of Black communities, composed of individual members with multiple, overlapping economic, religious, gender, and sexual identities.31 We can get a sense of what liberation means in M4BL discourse by focusing on M4BL’s demand for “Black self-determination in all areas of society.”32

The demand for self-determination appears in the Vision’s “Political Power” platform. It includes demands for protections for the right to vote, public financing of elections, and increased public funding for Black educational, media, and cultural institutions.33 Black self-determination thus means effective Black control over public institutions that are central to our political life. But the demand for power includes “all areas of society.”

Liberation cannot be secured through “negative” rights that guarantee freedom from state violence. It requires the shifting of power over the political, economic, and social institutions that structure one’s life; power requires “positive” rights of access and a measure of control over resources.

Even so, freedom from state violence is essential. The Vision demands an end to the targeted surveillance, arrest, and incarceration of generations of Black people.34 Before effective Black control over institutions and resources can be actualized, the state must stop monitoring, arresting, imprisoning, and killing Black people; before “positive” rights must come “negative” rights.

30 See id. (“[W]e recognize our shared struggle with all oppressed people: collective liberation will be a product of all of our work.”).
31 See id. (“We are a collective that centers, and is led by and rooted in, Black communities.”).
32 See Political Power, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/political-power/#:~:text=We%20demand%20independent%20Black%20political,effectively%20exercise%20full%20political%20power [https://perma.cc/67L7-882X].
33 Id.
34 See Policy Platform, MOVEMENT FOR BLACK LIVES, supra note 29.
And it is a particular kind of state violence that M4BL has in its sights. State institutions are charged with having “consistently created conditions of violence, deprivation, and exclusion for Black people.” Their “complete abolition and reimagination” is required, as is their replacement with institutions that facilitate “self-governance and mutual commitment and responsibility to each other’s safety and well-being.”

2. Historical

M4BL situates itself in an ongoing history of Black freedom struggles. It has extracted historical insights that structure activists’ approach to present-day policymaking. Among those insights is that racialized violence is endemic to policing in the United States. M4BL traces the origins of the police to pre-Civil War slave patrols; and argues that, in a racial capitalist country, police will always act to reinforce racial hierarchy.

The influence on M4BL of the “Black Marxism” of Cedric Robinson, who coined the term “racial capitalism,” is apparent. Marxists characteristically hold that the function of the police in a capitalist society—the primary reason that the police exist and consistently act as they do—is to accelerate the accumulation of capital by repressing and controlling the working class. Black Marxism emphasizes the racialized content of capitalist exploitation, holding that capitalism’s development, organization, and expansion is permeated with racial categories because capitalism first emerged from a feudal Europe that relied upon racial ordering. Racism is not something that capitalism can overcome or transcend; it is here to stay. In M4BL discourse, the police appear as—borrowing Vision co-drafter (and prison-industrial-complex abolition group Critical Resistance co-founder)
Rachel Herzing’s language—“a set of practices empowered by the state to enforce law and maintain social control and cultural hegemony,” which social control and hegemony has over the course of U.S. history included White supremacy.41

M4BL’s racial-capitalist account of the police and its social function explains why it sees racism fundamental to what U.S. police always have been and will. That is why the police must be transformed, if not abolished entirely.

3. Legal

Transformed how? M4BL’s most sweeping legal proposal is the BREATHE Act, unveiled in 2020.42 It would decriminalize the possession of controlled substances and abolish the Drug Enforcement Administration;43 end federal initiatives allowing for the transfer of military equipment to the police;44 end qualified immunity and mandatory minimum sentences;45 fund a variety of new federal offices dedicated to the promotion of alternatives to police and prisons;46 and offer grants to incentivize states to dissolve departments that are accused of patterns of misconduct, shift resources from the police to “non-carceral, non-punitive approaches to public safety,” and abolish officer “bills of rights” that protect officers against investigation for misconduct.47

The Movement’s engagement with the law and its skeptical view of the judiciary closely tracks dominant themes within Critical Race Theory (“CRT”), a mode of scholarship associated with Kimberlé Crenshaw, Derrick Bell, Richard Delgado, and Mari Matsuda, among others, and

43 Id. at 1–4.
44 Id. at 11.
45 Id. at 17, 126.
46 Id. at 5–6, 18, 33–44.
47 Id. at 48, 127.
united by two core commitments. The first: Since the founding of the United States, its law has imposed White supremacy. The second: The law can and ought to be used to dismantle White supremacy.

CRT scholarship has long taken to task the Supreme Court’s race-blindness when evaluating police violence and the criminal legal system in general. Race-crits have, however, recognized and emphasized the crucial role that litigation has played in empowering racial minorities and in building social movements. And they have participated enthusiastically in those social movements, including M4BL. Crenshaw’s influence on M4BL is particularly notable. The concept of “intersectionality”—coined by Crenshaw—is foundational to the Movement’s analysis of and concern with the experiences of people who share multiple, socially constructed identities. Crenshaw’s African American Policy Forum and the Center for Intersectionality and Social Policy Studies at Columbia Law School have used the #SayHerName to center Black women’s experience of violence at the hands of police.
Implicit in M4BL’s activism is a belief in the law’s capacity to shape as well as be shaped by social forces. After George Zimmerman’s acquittal, activists occupied the Florida governor’s office for a month, trying to force the passage of laws aimed at racial profiling. They seek to make the BREATHE Act part of the law of the land. They do all of this, without expecting much help from the courts or anticipating that any transformative change will take place without constant movement pressure on government officials.

C. M4BL’s Demands

The Vision presents the police as fundamentally unsuited to the creation of public safety. Its proposed reforms are not all neatly arrayed under particular platforms of the Vision; the categorization below reflects the focus areas of this Article.

1. Invest-Divest

The Vision demands “investments in the education, health and safety of Black people, instead of investments in the criminalizing, caging, and harming of Black people.” It then calls for “relocation of funds at the federal, state and local level from policing and incarceration . . . to long-term safety strategies such as education, local restorative justice services, and employment programs.” By canvassing the work of PIC abolitionists, Akbar shows that invest-divest emerged from activism that is dedicated to the dismantling of police, prisons, and all punitive systems of social control.

The Vision does not call for an immediate collective leap into a noncarceral utopia. But there is no suggestion in the Vision that police or prisons are or can be made capable of doing more good than harm. At the same time, the Vision makes clear that divestment from policing must be accompanied by investment in other institutions. The premise of the call for state investment in, e.g., education, health care, and job programs, is that the


57 Id.

58 See Akbar, supra note 6, at 430–31.
root causes of crime are social, political, and economic marginalization; that
the carceral state contributes to the latter; but that state systems of a different
nature can promote social peace and individual flourishing.\footnote{Id. at 464.}

M4BL’s Vision does not articulate a comprehensive plan for divesting
and investing. It does, however, state that certain police practices and
allocations of resources to police must end immediately. For example, police
must be removed from schools; no longer participate in federal programs
that provide them with access to military equipment; and no longer receive
funding to respond to medical and environmental emergencies.\footnote{See End the War on Black People, MOVEMENT FOR BLACK LIVES (2020), https://m4bl.org/end-the-war-on-black-people/ [https://perma.cc/Z9WM-TBSG] [providing the policy platform for the Movement for Black Lives].} These
imperatives have informed activists’ contestation of police budgets across the

M4BL has long sought to subject law enforcement to control by members
of marginalized groups. Its call for community control of law enforcement
has received less mainstream attention in the wake of the murder of George
Floyd than the defunding campaign. But it is comparably transformative in
its ambitions.

2. Community Control

M4BL demands “a world where those most impacted in our communities
control the laws, institutions, and policies that are meant to serve us”—
including protective institutions.\footnote{Community Control, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/community-control/ [https://perma.cc/4VCH-DYMN]} Community control of the police means
“[d]irect democratic community control of local, state, and federal law
enforcement agencies” and entails the “power to hire and fire officers,
determine disciplinary action, control budgets and policies, and subpoena
relevant agency information.”\footnote{Id.}

Community control should not be confused with community policing, which—
as will be detailed below—is a catch-all concept that encompasses a variety
of arrangements whereby the police select and pursue goals in consultation
with community members. Nor should it be confused with civilian review boards, which typically provide nonbinding input.\textsuperscript{64} The empowerment of members of the public to hire and fire officers hasn’t even been seriously considered since the 1970s, when it was proposed by the Black Panther Party and inspired activists in California, Wisconsin, and Portland.\textsuperscript{65} It has been elaborated today by M. Adams, Nefta Freeman, Max Rameau, Olufemi Taiwo and others.\textsuperscript{66} Cities would be divided into districts that are reflective of social and economic composition; community control boards would be composed of randomly selected residents who serve for terms; board members would decide how to allocate police resources, and who to hire and fire, among other things.\textsuperscript{67}

The call for community control arises from dissatisfaction with the absence of input by marginalized communities into police decisionmaking. This absence is said to exacerbate racialized police violence.\textsuperscript{68} Consider Ferguson, Missouri, roughly two-thirds\textsuperscript{69} of the residents of which were Black at the time of the police killing of Michael Brown but which systematically brutalized, extracted wealth from, and tethered Black people to the criminal legal system.\textsuperscript{70}


\textsuperscript{67} \textit{See id.}

\textsuperscript{68} \textit{See Jocelyn Simonson, Police Reform Through a Power Lens}, 130 YALE L.J. 778, 807 (2021) (describing how democratic exclusion can lead to police violence).

\textsuperscript{69} Jennifer E. Cobbina, Hands Up, Don’t Shoot: Why the Protests in Ferguson and Baltimore Matter, and How They Changed America 11 (2019).

Legal scholars and activists have pushed for—and against—democratization of criminal law, criminal procedure, and policing for decades. But M4BL’s demands distinguish themselves by their concern, not with majoritarianism but with specifically empowering populations that are especially vulnerable to state violence.

3. Nonstate Protection

M4BL’s invest-divest and community-control demands are primarily concerned with restructuring state institutions and reallocating public resources across state institutions. But M4BL’s Vision and activism is animated by the conviction that even the least controversial functions that police currently perform—those related to violent crime—are at least sometimes best performed by community-based institutions that the state ought to fund but should not take over.

The Vision demands “invest[ment] in community-based transformative violence prevention and intervention strategies, that offer support for criminalized populations.” Such strategies include violence-interruption programs, such as Cure Violence, whereby street-outreach workers help connect young people at risk for violence with job and educational opportunities and mediate conflicts and thwart retaliations between residents and gangs.

[https://perma.cc/RB4P-X3JB] (describing the findings of the Department of Justice’s review of the Ferguson Police Department in the wake of the killing of Michael Brown).


See Simonson, supra note 68, at 800–02 (reviewing that there is no guarantee that “democratizing” police reform will ultimately shift power to those directly affected by policing).

For a history of the shifting and inconsistent definitions of this concept in U.S. law, culture, and politics, see DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE (2021). I use it here to refer to physically injurious crimes, which are a small fraction of all criminal activity.

End the War on Black People, MOVEMENT FOR BLACK LIVES, supra note 60.

The Vision points to the availability of nonstate institutions that can repair harm in the aftermath of violence—alternatives to police, courts, and prisons that are based on restorative-justice principles. For instance, Common Justice, an organization based in Brooklyn, works with young people aged 16 to 24 who have committed and been victimized by violent crimes. Willing victims and perpetrators participate in a restorative-justice process that is designed to mend frayed community ties rather than punish—forms of accountability include restitution and community service.76

M4BL’s focus on community-based, nonstate safety institutions is continuous with a longstanding tradition of PIC abolitionist experimentation. Abolitionist mutual-aid groups have developed “no call plans” discouraging members from dialing 911;77 hosted workshops in which members are taught to respond to common health-care issues without police assistance;78 and worked with local businesses to provide people safe haven from homophobia and transphobia without involving the police.79 M4BL similarly questions why the police have become the default response to community problems and calls for recourse to and development of nonstate alternatives.80

None of this seems at first to have much to do with the Constitution. Specific constitutional rights are only occasionally discussed in the Vision—

77 See, e.g., Oakland Power Projects, CRITICAL RESISTANCE, https://criticalresistance.org/chapters/cr-oakland/the-oakland-power-projects (providing an example of a no call plan).
78 See Candice Bernd, Community Groups Work to Provide Emergency Medical Alternatives, Separate from Police, TRUTHOUT (Sept. 14, 2015), https://truthout.org/articles/community-groups-work-to-provide-emergency-medical-alternatives-separate-from-police (describing how communities are attempting to create an alternative to the police in Oakland).
80 See End the War on Black People, MOVEMENT FOR BLACK LIVES, supra note 60.
due process, the right to confront witnesses, the right to vote. David McNamee has argued that “Black Lives Matter” constitutes a claim of “fundamental law” that is “deeper than and prior to . . . ordinary law.” Without disputing McNamee’s thesis, I mean to advance different ones about M4BL’s critique and demands of the police.

First, this critique is inspired by and faithful to the history of the policing of non-White people in the United States. Second, the Equal Protection Clause was designed to protect people against subjugation, including but not limited to subjugation through racialized police violence. The next Part provides an historical overview of policing, leading through the Fourteenth Amendment’s ratification. Having established the tension between policing and the Equal Protection Clause’s function, I will consider the constitutional implications of M4BL’s critique of the police and whether and how constitutional argumentation could lend support to its efforts.

II. POLICING AND EQUAL PROTECTION

It’s generally held to be fallacious to infer that an idea, belief, claim, or practice is accurate or justified from facts concerning its origins. A summary of the history of policing-as-governance and the police-as-institution is recounted in Parts II and III in order to establish a continuity across time that is constitutionally salient—not to establish whether the police or policing are all-things-considered justified. It will be shown that the Equal Protection Clause was designed to put an end to a certain kind of governance, and that police in the United States have always engaged in that kind of governance. Part IV will integrate these conclusions with M4BL’s critique of policing.

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81 See End the Surveillance of Black Communities, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/end-surveillance (referencing surveillance as a constitutional violation).
83 See Political Power, MOVEMENT FOR BLACK LIVES, supra note 32.
Readers can judge for themselves whether a case for police/policing can be made notwithstanding this constitutional design and history.

A. Ancient Policing

Like its cognates “policy” and “polity,” the term “police” descends from the Greek “politeia” through the Latin “politia.” Politia is in turn derived from “polis,” meaning city-state. As Markus Dubber has detailed, life within Greek city-states was divided into two spheres—a sphere of autonomous self-governance in which the (male) heads of households participated on equal terms within democratic political life; and a sphere of heteronomous governance-by-another in which the other members of the household were subject to the “autocratic rule of the very man who claimed autonomy for himself in the political realm.”

The head of the household was understood to be obliged to rule for the benefit of all household members, and to maximize the welfare of the household. But those members were not his equals; the law gave him complete discretion to do as he saw fit with them for the household’s welfare. As Aristotle put it, “justice can more truly be manifested towards a wife than towards children and chattels, for the former is household justice.”

Roman law operated in much the same way. The Roman paterfamilias also enjoyed vast discretionary power over both people and things within his household, to the end of maximizing the welfare of his household. True, he was prohibited from exercising his power for any other reason, which meant that he could not maliciously harm household members. What was permitted and what was not turned upon his subjects’ place in the household

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88 See id. at 4–5 (explaining the political role of an Athenian head of household).
89 See id. at 5–6 (describing household governance as explained by Aristotle).
91 See Dubber, supra note 87, at 6 (analyzing the obligations and rights of the paterfamilias in Roman law).
92 Id.
hierarchy—an enslaved person could be disciplined in ways that members of his family could not. As in the Greek household, however, any enforceable external rules governing the householders’ power were minimal.

Hierarchy, discretion, and general lack of legal accountability for household management characterized the relationship between fathers and their dependents in medieval Germany as well. A mature son, however, were considered no longer subject to his father’s guardianship, or mund, which meant both that a father could not treat him as if he were a mere resource and that the father could not be held liable for any harm that his son caused.

The mund came to play a central role in English history following the Norman Conquest in the eleventh century, where the householder’s mund—his guardianship of household order—became the king’s peace—his control over people and things within an entire realm. As William the Conqueror’s lawyers saw it, all power exercised by many “micro” householders was delegated by one “macro” householder—William. Micro-householders were made responsible for the upkeep of the macro-household; William had his officials gather information about the resources in his new realm in what became known as a Domesday Book and commissioned them to raise taxes from his subjects.

Over the centuries, the distinction between the autonomous sphere of political life and the heteronomous sphere of household life eroded, as the state took the form of a large household. At the same time, household management remained hierarchical, discretionary, and legally unconstrained except in the most extreme cases. When in 1755 Rousseau wrote of “that great family, the State,” he was encapsulating a historical development through which the public realm in Europe—particularly in Germany and France—had become a sphere of prudence.

93 See id. at 6–7 (comparing the treatment of family members and slaves by the household head).
94 See id.
95 See id. at 11.
96 See id. at 16–17.
97 Id. at 16.
98 Id. at 17.
Europe, a state of this kind was referred to as a “police state,” the field of study dedicated to its rationalization, “police science.”

B. Modern Policing

A conventional Enlightenment narrative holds that the rule of law eventually eclipsed the rule of police, giving us the Rechtsstaat—or the state under the rule of law—in place of the Polizeistaat—the police state. English authorities spoke often of the rule of law, but rarely used the term “police,” or even “state,” reserving these terms instead for authoritarian Continental governments. But Sir William Blackstone’s 1769 account of the police power in his Commentaries on the Laws of England—is hardly distinguishable from the most expansive Continental discussions of state power:

By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighborhood, and good manner: and to be decent, industrious, and inoffensive in their respective stations.

This definition contains all the hallmarks of policing. We have hierarchy, with “members of a well-governed family” being regulated in accordance with “their respective stations.” We have discretion, in the form of highly general precepts that cover the entirety of the “order of the kingdom.” And we have no suggestion of any legal accountability for regulation that is not “due.”

Three of these offenses deal with suspected vagrants—unattached people who were not part of any lord’s household. In virtue of their unattached status, Blackstone described vagrants as “offenders against the good order, and blemishes in the government, of any kingdom.” Vagrants faced escalating penalties in accordance with their perceived responsiveness to correction, from one month’s imprisonment (for “idle and disorderly

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101 Id. at 22.
102 Id. at 34.
103 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 162 (1769).
104 Id. at 170.
persons”) to whipping and imprisonment for up to two years (for “incorrigible rogues”).

Suspicious people not yet designated as vagrants could be required by justices of the peace to post surety bonds. These were “intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen. . . .” Those who violated the conditions of their surety bonds forfeited the amount. The breadth of the discretion officials enjoyed to demand such bonds is suggested by Blackstone’s seemingly endless list of possible grounds to do so:

Under the general words of this expression, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*; as, for haunting bawdy houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government; or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pílferers or robbers; such as sleep in the day, and wake on the night; common drunkards; whoremasters; the putative father of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute.

Consider as well those non-capital police offenses that were categorized as common nuisances—“inconvenient or troublesome offenses[]” that “annoy the whole community in general.” These offenses are described imprecisely and turn upon the offender’s social status. A “common scold, communis rixatrix (for our law-latin confines it to the feminine gender)” is a nuisance in virtue of her mere *existence*, as are “[e]aves-droppers, or such as listen under walls or windows . . . to hearken after discourse.”

Continental conceptualizations of the police were no less hierarchical, discretionary, and bereft of mechanisms of legal accountability. In lieu of precise definitions of the scope and limits of the police, Continental police scientists offered lists of objects of policing, covering everything from markets

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105 Id.
106 Id. at 249.
107 Id. at 256.
108 Id. at 167.
109 Id. at 169.
110 Id.
As the father made, judged, and executed the rules of the household, so too did Continental police agencies consolidate legislative, judicial, and executive powers, issuing orders, adjudicating their violation, and punishing offenders with fines and imprisonment.

C. Antebellum Policing

In the lead-up to the Declaration of Independence, colonists frequently charged that metropolitan authorities were bent on enslaving the colonies. Those who deployed the rhetoric of slavery were intimately familiar with chattel slavery. They knew that the people who were subjected to it suffered in ways that scarcely resembled those whose fortunes were imperiled by British trade policy. They also knew that indigenous people were dispossessed of their lands and denied some or any of the rights of Englishmen, on the ground that they were unfit for economic and political independence. In essence, the colonists were concerned about being reduced to conditions similar to those whom they subjugated.

In colonial America, enslavers policed. The hierarchical character of the relationship between enslaver and enslaved was fundamental to the institution. Enslaved people were treated in law as resources to be managed for the benefit of the plantation. Accountability to the law came only in the most extreme cases of malicious treatment, and often not even in these.

Jonathan Bush has described the law of slavery as “an extensive set of police measures” operating within both the microhousehold of the plantation.

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111 DUBBER, supra note 87, at 72–73.
112 Id. at 74–75.
115 See Jonathan A. Bush, Free to Enslave: The Foundations of Colonial American Slave Law, 5 YALE J.L. & HUMAN. 417, 426 (1993) (detailing the absence of “anything remotely like a jurisprudence of slavery” and explaining that “within the private world of the master, the formal underdevelopment of slave law was offset by private ‘rule-making,’ described in plantation manuals and rule-books, and enforced with whipping and other punishments, including death.”).
116 See, e.g., State v. Mann, 13 N.C. 263, 265 (1829) (“We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God.”).
and the macrohousehold of the colony. The former, detailed in plantation manuals and rule-books, were enforced with punishments ranging from whipping to execution. The latter consisted in long, disorganized, non-exhaustive lists of “activities that slaves and indentured servants cannot do, must do, or cannot do with Whites, the things that Whites cannot do for slaves, and that [B]lack[ ] [people] cannot do even if free.”

Colonies relied upon police measures to maintain control of enslaved people; vagrancy offenses filled colonial statute-books before Blackstone discussed them. And Blackstone’s reception in the states was largely positive. Ernst Freund, who compiled the last notable treatise on what would come to be called the “police power,” noted that the term “police” was first used to classify legislation in the Revised Statutes of New York in 1829. Antebellum judges and lawyers cited Blackstone’s definition of the public police and his lists of police offenses as authoritative concerning the nature and limits of states’ police powers.

Policing persisted throughout the antebellum period. In 1857, Virginia lawyer and slavery advocate George Fitzhugh called slavery “an indispensable police institution” because of its demonstrated capacity to “subject[] . . . [enslaved people] to the constant control and supervision of their superiors.” Slave laws, enforced by organized patrols that limited nighttime movement, detained suspicious people, and meted out spontaneous whippings and other forms of corporal punishment for noncompliance, were imposed throughout the southern United States. Over time, restrictions on the movement, speech, and economic opportunities of not only enslaved people but free Black people and White opponents of slavery became increasingly severe.

117 Bush, supra note 115, at 421.
118 Id. at 426.
119 Id. at 433.
120 DUBBER, supra note 87, at 51.
121 ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 2 n.2 (1904).
122 See DUBBER, supra note 87, at 59 (discussing cases from Illinois and Pennsylvania which cited Blackstone’s definition).
123 GEORGE FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS 46, 98 (1857).
When Missouri entered the Union as an enslaving state in 1825, legislators enacted a raft of laws that prohibited “free negro[s] or mulatto[s]” to “come into or settle in this state under any pretext whatever.” In 1837 Arkansas required county courts to appoint patrols to “visit negro quarters, and others places suspected of unlawful assemblages of slaves.” When Oregon entered the Union as a free state in 1856, its constitution forbade free Black people from either entering the state or initiating lawsuits. In the wake of an unsuccessful slave rebellion that was led by Denmark Vesey, southern states enacted laws—known as “Negro Seamen Acts”—requiring the seizure and imprisonment of all Black people upon their arrival in southern ports.

The Fugitive Slave Act of 1850 created a federal kidnapping system that disregarded due process norms, threatening both enslaved people and free Black people with the loss of their liberty, and conscripted ordinary citizens as well as public officials in free states into slaveholders’ service. Federal commissioners who exercised judicial power were paid $10 per case if they remanded an alleged fugitive to slavery and only $5 if they ruled in favor of freedom. The Act bolstered the legitimacy and extended the effective reach of slave patrollers and of policing. It also created entirely new antislavery communities and inspired novel modes of resistance to a seemingly insatiable “Slave Power” that had captured the federal government.

The Civil War came in significant part because of policing. The battlefield defeat of the Confederacy provided an opportunity to reckon with the legacy of governance that had proven its destructive power.

126 REVISED STATUTES OF THE STATE OF ARKANSAS 604 (1838).
127 See CONG. GLOBE, 35th Cong., 2d Sess. 974 (1859) (quoting Oregon’s constitution).
130 See 9 Stat. 462, 31st Cong. (1850) (requiring that even freed enslaved people be returned to their former owners).
D. The Thirteenth Amendment and the Black Codes

In 1865, Congress proposed and the states ratified the Thirteenth Amendment:

Section One:
Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section Two:
Congress shall have power to enforce this article by appropriate legislation.

The language of Section One was taken in part from Article 6 of the Northwest Ordinance of 1787: “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.”

The duly-convicted exception was subsequently used to justify policing measures that were designed to recreate as nearly as possible antebellum racial hierarchy. As freed people surged towards the cities, newspapers called for “stringent police regulations” and “the most efficient police system” in order to “prevent strolling, vagrancy, theft, and the utter destruction of or serious injury to our industrial system.” These “Black Codes” punished Black people who refused to contract with former enslavers, forbade Black people to rent land in urban areas, imposed fines and involuntary plantation labor for “insulting” gestures, required Black people to carry written evidence of employment for the coming year, and otherwise limited their economic opportunities and reinforced their social subordination.


134 HADDEN, supra note 124, at 200; THE DAILY LYNCHBURG VIRGINIAN (June 12, 1865).

The Codes were enforced by semiprofessional forces and state militias from which Black people were excluded. Legal accountability was a mirage, thanks to Black exclusion from jury service, official reluctance to prosecute Whites accused of crimes against Black people, and penalties that were imposed on Black people who “falsely and maliciously” brought charges against Whites.

Courts could force Black people who were convicted of crimes to labor without compensation on public projects. They could also bind them out to White employers who would pay their fines, via a convict lease system that was greatly expanded in order to ensure a steady supply of cheap forced labor. Every former Confederate state except Virginia leased large numbers of Black prisoners to railroads, coal mines, and other industries that struggled to rebuild their infrastructure following the war. The Republican framers of the Thirteenth Amendment vociferously denied that the Amendment authorized either the Black Codes or convict leasing. But as Dorothy Roberts has written, the amendment ultimately “provided insufficient protection to black citizens from being exploited, tortured, and killed . . . .” Accordingly, Republicans deliberated over a variety of measures that would deliver this protection. This deliberation culminated in the Fourteenth Amendment.

E. The Original Equal Protection Clause

A comprehensive account of the drafting, ratification, meaning, and functions of the components of Section One of the Fourteenth Amendment

136 See Aya Gruber, Policing and “Bluelining”, 58 Hous. L. Rev. 867, 876 (noting that the new regime “reconstituted preexisting slave-patrol and slave-hunter groups” and “enforced the Black Codes selectively at the behest of plantation owners.”).
137 Du Bois, supra note 135, at 171.
140 See Roberts, supra note 12, at 32.
142 Roberts, supra note 12, at 70.
has been presented elsewhere.\textsuperscript{143} As it is the original meaning and original function of the Equal Protection Clause that are most relevant to the question of policing, I will focus attention on “the equal protection of the laws.”

1. Original Meaning

Black people and their White allies were denied rights to free speech, free exercise of religion, and freedom from unreasonable searches and seizures that were closely associated with citizenship.\textsuperscript{144} And they were deprived of their liberty, property, and lives without due process of law.\textsuperscript{145} But it was the demand for equal protection that emerged most directly from the experience of being—as abolitionist Henry Stanton put it—as “not known to the law as a person” and as a consequence being subject to maiming, mobbing, and murder “with complete immunity.”\textsuperscript{146} To be unknown to the law and to lack recourse against violence is precisely the circumstance of the policed.

The notion that governments were obliged to provide for the protection of all law-abiding people within their jurisdiction against threats to life, limb, and property had deep roots in Anglo-American political theory.\textsuperscript{147} Refracted through the experience of enslaved and free Black Americans and their White allies, protection took on an egalitarian cast—it was something that was being selectively denied or unequally distributed. This meant not mere access but equal access to the courts, including equal rights to testify. It meant freedom from discriminatory laws touching life, liberty, and property.\textsuperscript{148} And it meant not mere protection but equal protection against violence by proslavery actors.\textsuperscript{149}

The phrase “equal protection” made its way from abolitionist constitutionalism to Republican discourse on February 26, 1866, when Ohio

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\textsuperscript{144} Id. at 116.
\textsuperscript{147} Bernick, Antisubjugation and the Equal Protection of the Laws, supra note 14, at 21–25.
\textsuperscript{148} Id. at 40.
\textsuperscript{149} Id. at 31.
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Representative John Bingham introduced his second draft of Section One of the Fourteenth Amendment. That draft provided:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.\(^{150}\)

We do not know why Bingham opted to add “the laws” to subsequent drafts, which took place as the Joint Committee on Reconstruction was deliberating over a plan put forward by Robert Dale Owen.\(^{151}\) We do know that he proposed “equal protection of the laws” twice—first unsuccessfully, then successfully, with the result that the following draft emerged from the Joint Committee on Reconstruction:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.\(^{152}\)

On May 10 Bingham gave the following account of the importance of Section One and drew an illuminating distinction between the coverage of its component Clauses:

The necessity for the first section [is that] . . . [t]here was a want hitherto . . . [o]f express authority of the Constitution to do that by express congressional enactment which hitherto they have not had the power to do, and had never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State . . . .

[T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic.\(^{153}\)

Bingham affirmed both that “every person” was entitled to “the protection of the laws” and that “citizens of the Republic” were entitled to enjoy the privileges and immunities of citizenship unabridged. He also

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152 Id. at 91.

153 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).
acknowledged the lack of federal power to ensure that all people enjoyed equal protection and that all citizens enjoyed the privileges of citizenship. But he did not specify the differences between “inborn rights[]” and privileges and immunities.

Stevens’s May 8 comments are more illuminating. He stated that the proposed amendment would “allow[] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.” That “equally upon all” is a reference to the Equal Protection Clause is confirmed by his illustrative examples of what the Amendment would guarantee:

Whatever law punishes a White man for a crime shall punish a black man precisely in the same way and to the same degree. Whatever law protects the White man shall afford “equal” protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the White man to testify in court shall allow the man of color to do the same.

Equal protection thus entailed equal punishment for the similarly situated offender, equality of access to legal redress, and equal testimonial rights. But what was meant by “[w]hatever law protects the White man shall afford ‘equal’ protection to the black man?” Was Stevens claiming that laws generally must be race-neutral?

Although Stevens was an ardent proponent of equal suffrage rights, he repeatedly denied that the ratification of the Fourteenth Amendment would ensure nondiscriminatory ballot access. So did the vast majority of Republicans. We should instead read “[w]hatever law protects” as representing that laws governing criminal punishment should operate equally on all.

Finally, Howard discussed “[t]he last two clauses of the first section of the amendment”—the Due Process of Law and Equal Protection Clauses—in his introduction of the Fourteenth Amendment to the Senate. These clauses, said Howard,

disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to

155 Id.
another. It prohibits the hanging of a black man for a crime for which the White man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the White man.156

Howard’s references to “class legislation” and “subjecting one caste of persons to a code not applicable to another” seem to be references to the Black Codes. The succeeding sentences appear to offer examples of the kinds of things that will be “abolish[ed].” That is, Howard is saying that either the Due Process of Law or Equal Protection Clauses or both together will do away with laws that permit such things as “the hanging of a black man for a crime for which the White man is not to be hanged.” How broad, then, is this anti-class-legislation prohibition?

Like Bingham, Howard went on to state that “[t]he first section of the proposed amendment does not give . . . the right of voting.”157 Because, like Stevens, he supported equal suffrage, we should not read his statements about class-legislation-abolition as claiming that anything in Section One will prohibit all unjustified discrimination.

The ratification campaign saw Bingham and other prominent Republicans in well-attended and widely publicized speeches expound the Equal Protection Clause in greater detail. In Martinsville, Ohio, Bingham described the New Orleans massacre, in which at least forty-eight people—most of them Black Republicans—were murdered and over two hundred injured by a White mob.158 Bingham emphasized the massacre was organized by the mayor of New Orleans and carried out in part by the Louisiana police.159 The Equal Protection Clause, said Bingham, would “put a fetter forever on the power of the state to do that thing” by guaranteeing that every person—“no matter whence he comes, whether citizen or stranger, so long as he abides by the law, and comports himself well towards all other persons”—would receive the “same protection.”160

156 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).
157 Id.
158 See WHEELING DAILY INTELLIGENCER, Sept. 5, 1866, at 2 (detailing how at least forty-eight people were murdered and over two hundred injured in this massacre, which is sometimes called the “New Orleans Riot”). For a recent history, see generally JAMES G. HOLLANDSWORTH JR., AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866 (2004).
159 WHEELING DAILY INTELLIGENCER, supra note 158.
160 Id.
This egalitarian message was echoed by other Republicans. Indiana Governor (and eventual Senator) Oliver Morton stated that the Equal Protection Clause would secure “every person who may be within the jurisdiction of any State, whether citizen or alien, and without regard to condition or residence, not only as to life and liberty, but also as to property.”\(^{161}\) Indiana Representative Schuyler Colfax referred to the “protection of its equal laws” that could be “invoked by the poor as well as the rich.”\(^{162}\) Representative John Mann of Pennsylvania claimed that the Clause’s adoption “will prohibit any judge in any State from looking at the wealth or poverty, the intelligence or ignorance, the condition and surroundings, or even the color of the skin, of any person coming before him.”\(^{163}\)

By the time that the Fourteenth Amendment was ratified, a tightly structured terrorist organization stood ready to thwart its operation. Borrowing the tactics of prewar slave patrollers, the Ku Klux Klan broke up Black social gatherings, confiscated guns, and whipped, raped, and murdered Black people and their allies throughout the former Confederate states.\(^ {164}\) In its final report on the Fourteenth Amendment, the Joint Committee on Reconstruction detailed a three-day massacre in Memphis in which Whites murdered scores of Black people and destroyed hundreds of homes, churches and schools.\(^ {165}\) It then related that “no protection from the law” was available to Black people—that “[s]uch is the prejudice against the negro that it is almost impossible to punish a White man by the civil courts for any injury inflicted upon the negro.”\(^ {166}\)

Congress responded with Enforcement Acts that targeted state and private conduct threatening civil rights. The 1871 Enforcement Act—known as the “Ku Klux Klan Act”—specifically provided that if states “from any cause” either “fail[ed]” or refuse[d]” to protect people from nonstate violence that obstructed the execution of state or federal laws, such refusal/failure “shall be deemed a

\(^{161}\) **Courier-Journal**, July 19, 1866, at 2.

\(^{162}\) **Weekly Republican**, Sept. 27, 1866, at 2.


\(^{164}\) See *Hadden*, supra at 124, at 208–10.


denial by such State of the equal protection of the laws.” Republicans reiterated during debates over this legislation that systematic state failure to protect people—for whatever reason—could constitute a denial of the equal protection of the laws.  

Finally, Republicans agreed that “the laws” included not only protective state laws but protective federal laws. Accordingly, interference with protective federal laws could constitute an equal-protection violation. No Republican was more explicit on this point than John Bingham.

When discussing the Ku Klux Klan Act, Bingham interpreted the Equal Protection Clause to mean that “[n]o State shall deny any person within its jurisdiction the equal protection of the laws—Not of its laws, but of the laws, and above all other laws, of the law of the Republic, the Constitution itself, which is the supreme law of the land.” He added “that no State should deny to any such person any right secured to him either by the laws and treaties of the United States or of such State.” Defending provisions of the Enforcement Act of 1870 that were designed to protect Chinese immigrants from discrimination, Bingham averred that “immigrants” were “persons within the express words of the fourteenth article of the constitutional amendments.” They were therefore “entitled to the equal protection of the laws.” Bingham insisted that the equal protection of the laws meant, not only protection “of the state itself, but of the Constitution of the United States.”

I can now summarize the coverage of the Equal Protection Clause. Under the Clause, state governments are:

1. Required to impartially execute nondiscriminatory state laws that protect life, liberty, and property.
2. Required to provide people with impartial access to the courts.

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167 17 Stat. 13, § 3 (1871).
168 See Bernick, Antisubjugation and the Equal Protection of the Laws, supra note 14, at 31–41 (discussing in detail Republicans’ sentiments during legislative debates over the Ku Klux Klan Act).
169 CONG. GLOBE, 41st Cong., 3d Sess. 203 (1870).
170 CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870).
171 Id.
172 Id.
173 Id.
(3) Prohibited from enacting discriminatory laws that unreasonably burden or benefit the life, liberty, and property of some people more than that of others.

(4) Prohibited from denying to people life-, liberty-, and property-related protection that is provided by constitutionally proper federal laws.

Implementing these general propositions—for instance, distinguishing reasonable legislative distinctions from unreasonable discrimination—requires more than the historical Equal Protection Clause can yield. Accordingly, I will identify the primary function that the Clause was designed to perform, to guide constitutional decisionmakers when meaning “runs out.”

2. Original Spirit

One of the central features of modern originalism is the distinction between interpretation and construction. Originalists who accept the interpretation-construction distinction hold that the determination of a constitutional provision’s original linguistic meaning—the concepts originally conveyed by the words, phrases, and symbols that constitute the constitutional text, understood in context—is an empirical activity. It entails the study of patterns of language use, the political, economic, and social conditions in which a provision was framed, and other features of the world that a provision was designed to shape.

By contrast, the decision to apply original linguistic meaning in a particular case is a normative activity—the empirical “is” of interpretation does not by itself create any obligation to follow it. If one “ought” to do so, must be for some other reason. The normative decision to apply original meaning is an act of construction. So, too, is the decision to develop rules of construction that guide constitutional decisionmaking when original meaning does not yield clear answers.

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Previous articles have defended an approach to constitutional construction termed “good-faith construction” that is applied if—and only if—original meaning does not clearly resolve a question.\textsuperscript{176} Good-faith construction consists in using the primary function or functions that a provision was designed to achieve to design rules for implementing the provision.\textsuperscript{177} To discover primary functions, it looks to empirical evidence—not only the text itself but publicly available representations about its purposes during framing and ratification, and postratification implementation if necessary.\textsuperscript{178} This approach—identify original meaning, then look to empirical evidence bearing upon original purpose—can guide our efforts to identify the original function of the Equal Protection Clause.

Republicans spoke of what they understood to be the functions of the Equal Protection Clause at varying levels of generality. Broadly, we can identify four nonexclusive candidate aims:

(1) Eradicating the Black Codes;\textsuperscript{179}

(2) Guaranteeing particular protective services and procedural rights that were associated with the protection of the laws in 1868;\textsuperscript{180}

(3) Protecting people against the control of their life, liberty, and property, whether by state or nonstate actors;\textsuperscript{181}

(4) Dismantling racially discriminatory laws, full stop.\textsuperscript{182}

Republicans campaigned for ratification on the ground that the Clause would secure the rights of supporters of the Union in former rebel states, with no suggestion that it would secure only those of Black people.\textsuperscript{183} Further,

\textsuperscript{176} See generally id. at 35 (setting out three separate steps to good-faith interpretation and construction).

\textsuperscript{177} Id. at 35.

\textsuperscript{178} Id. at 34.

\textsuperscript{179} See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (“the last two clauses of the first section . . . disable a State from depriving not merely a citizen . . . but any person.”).

\textsuperscript{180} See, e.g., “Report on Memphis Riots and Massacres,” H.R. Rep. No. 101, 39th Cong., 1st Sess. 30 (“The colored race have been subject to great abuse and ill-treatment. In fact, they have had no protection from the law whatever.”).

\textsuperscript{181} See, e.g., CONG. GLOBE, 43rd Cong., 2nd Sess. 1795 (1875) (setting forth arguments as to why black men and women should be able to act as jurors).

\textsuperscript{182} See, e.g., 2 CONG. REC. 412 (1874) (“When the States by law create and protect . . . benevolent institutions designed to care for those who need their benefits, the dictates of humanity require that equal provisions should be made for all.”).

\textsuperscript{183} See Berrnick, Antisubjugation and the Equal Protection of the Laws, supra note 14, at 34–35 (describing how Bingham, Governor Oliver Morton, and others emphasized that the Equal Protection Clause who protect White supporters of the Union and indeed “every person” regardless of race).
even the most conservative of Republicans acknowledged that the Clause would protect travelers from “Ethiopia, from Australia, or from Great Britain” against violence.\(^\text{184}\) There is too much here that (1) cannot explain.

(4), on the other hand, seems too broad. Republicans chose language that was associated with a tradition of “protection” of natural rights to life, liberty, and property. They insisted that voting rights were not implicated by the Clause’s language.\(^\text{185}\) It must be acknowledged that Black people in particular regarded voting rights as a component of citizenship and an essential means of self-defense.\(^\text{186}\) So, too, were some leading White Republicans committed to equal suffrage. But Republicans overwhelmingly denied that the Fourteenth Amendment would guarantee suffrage in campaigning for its ratification,\(^\text{187}\) and it is telling that some of the more radical suffrage proponents among them, like Frederick Douglass, ultimately came out against the Amendment because it did not guarantee equal suffrage.\(^\text{188}\)

That leaves (2) and (3). “Republicans did identify particular rights that would be protected by the Clause, such as the right to testify.”\(^\text{189}\) But they also frequently spoke in general terms of rights to impartial civil and criminal laws, adequate law enforcement, and adequate civil and criminal remedies for rights-violations. Had the security of a closed set of rights been the goal, one would expect more representations to that effect. (3), antisubjugation, has the virtues of being a consistent theme in the antislavery constitutional discourse in which Republicans were immersed;\(^\text{190}\) general enough to fit the Clause’s broad language and Republican representations about its

\(\text{CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).}\)
\(\text{See Bernick, Antisubjugation and the Equal Protection of the Laws, supra note 14, at 32 (“on the ratification-campaign trail, [Stevens] expressly denied that the ratification of the Fourteenth Amendment would ensure nondiscrimatory ballot access.”).}\)
\(\text{See id. at 66–67 (“[T]hat the liberties of the American people were dependent upon the Ballot-box . . . that without these no class of people could live and flourish in this country . . . .”).}\)
\(\text{See id. at 32 (“on the ratification-campaign trail, [Stevens] expressly denied that the ratification of the Fourteenth Amendment would ensure nondiscrimatory ballot access.”).}\)
\(\text{See DAVID W. BLIGHT, FREDERICK DOUGLASS 483 (2018) (“Over the summer of 1866, Douglass . . . openly opposed the Fourteenth Amendment on the grounds that it did not explicitly provide black suffrage.”).}\)
\(\text{Bernick, Antisubjugation and the Equal Protection of the Laws, supra note 14, at 49.}\)
\(\text{See id. at 51–52 (discussing the choice of the word antisubjugation as opposed to the more familiar antisubordination).}\)
coverage;\footnote{Id. (“[A]antisubjugation is incompatible with slavery. But it regards the security of natural-rights-related civil rights from violation by others as both necessary and sufficient, meaning that antisubjugation is compatible with a much more minimal state than nondomination.”).} and fit for the dire circumstances confronting Black people and their White allies during Reconstruction, in which life, liberty, and property rights were extinguished at will by unaccountable state and nonstate actors.

To be denied the protection of the laws was not merely to lack protection against violence. It was, as Henry Stanton put it, not to be “known to the law as a person” and thus to be at the mercy of an external will—to be subjugated by other people.\footnote{REMARKS OF HENRY B. STANTON, IN THE REPRESENTATIVE HALL, ON THE 23RD AND 24TH OF FEBRUARY, BEFORE THE COMMITTEE OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, TO WHOM WAS REFERRED Sundry Memorials on the Subject of Slavery 28–29, 34 (Boston, Isaac Knapp 1837).} Black people repeatedly described protection against violence by, and subjugation to the will of, Whites as entailments of the protection of the laws. In a 1856 convention at Sacramento, Black people complained that “the law, relating to our testimony . . . is but a shadow. \textit{It affords no protection to our families or property. I [may] see the assassin plunge his dagger to the vitals of my neighbor, yet, in the eyes of the law, I see it not.}”\footnote{PROCEEDINGS OF THE SECOND ANN. CONVENTION OF THE COLORED CITIZENS OF THE STATE OF CALIFORNIA (1856), available at https://omeka.coloredconventions.org/items/show/266 [https://perma.cc/Q946-PEJE] (emphasis added).} That same year an Illinois convention began with a call to oppose laws that “denied the right to testify against a White man before a Court of Justice, thereby denying us all means of access to law to protect ourselves against designing men to impose upon colored men at their will.”\footnote{PROCEEDINGS OF THE STATE CONVENTION OF COLORED CITIZENS OF THE STATE OF ILLINOIS (1856), available at https://omeka.coloredconventions.org/items/show/262 [https://perma.cc/X5XD-HFHE] (emphasis added).}

What might the Equal Protection Clause’s antisubjugation function mean for modern-day policing?

\section{F. Policing and the Fourteenth Amendment}

Policing in the form of the Black Codes and their enforcement gave impetus to the Fourteenth Amendment and was designed to replicate the pre-Civil-War policing of enslaved people. It is uncontroversial that the Fourteenth Amendment established the unconstitutionality of the Black Codes. It does not follow, however, that the Fourteenth Amendment is directed against \textit{all} policing.
Recall the Thirteenth Amendment’s exception for those duly convicted of a crime. If some people may be enslaved without violating the Thirteenth Amendment, and slavery entails policing, then the Thirteenth Amendment permits at least some policing. I have uncovered no evidence that the Fourteenth Amendment—not the Equal Protection Clause, not any other component of it—was meant to withdraw that permission.

The tension between policing and the antisubjugation function of the Equal Protection Clause is, however, easily perceived. It is difficult to imagine hierarchical, discretionary, effectively legally unaccountable violence failing to subject one’s life, liberty, and property to the will of unaccountable others. That policing is a form of subjugation does not mean that it violates the Equal Protection Clause. It does, however, mean that if certain forms of policing are not clearly permitted or forbidden by the Clause, the Clause could be construed against them by constitutional decisionmakers who seek to implement the Clause’s original purpose. If the modern police engage in such policing, the antisubjugation purpose of the Clause invites constructions that limit the power of the police. I explore that possibility in the next Part.

III. The Police and Equal Protection

We cannot pass over the continuities between slave patrols during the antebellum period, on the one hand, and the modern police forms that later emerged. Certain of those continuities are constitutionally salient. Most importantly, each of these forms deployed situationally justified force in the service of hierarchical, discretionary, effectively legally unaccountable policing.

A. The Antebellum Police

The slave patrol was initially created by Spanish and English settlers in the Caribbean and Latin America. It resembled the early-modern *posse comitatus*—the group of men called out to chase down and arrest fleeing felons—and the “hue and cry” of the constable that summoned all available men to capture elusive criminals. But the patrol was distinctive in its

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195 HADDEN, supra note 124, at 7.  
196 Id. at 3.
express reliance upon race. Patrollers focused their attention on slaves who could be identified by race, and their activities consisted largely in “watching, catching, or beating black slaves.”

This was policing. Slave patrols were created in order to preserve an racial hierarchy. Their discretionary power was as vast as their mandate was broad. Freed people wrote of how the patrollers “ke[pt] close watch” on Black people “so they have no chance to do anything or go anywhere”; “cr[ept] into slave cabins, to see if they have an old bone there” and “dr[ove] out husbands from their own beds, and then take their places.” Accountability to the law was virtually nonexistent—even slaveholders had little legal recourse against abusive patrollers who were duly appointed and sworn in. Patrollers enjoyed indemnity against civil or criminal lawsuits.

Sally Hadden has shown that the basic functions of slave patrols were assumed after the Civil War by county and city officials, as well as by vigilante groups. Postwar police forces, composed of men who—like virtually all adult White men—received military training in the Confederate army, drew upon prewar patrolling experience and came to constitute “a highly effective but still legal means of racial oppression.” And these police forces permitted the Ku Klux Klan to engage in terrorism against freed people and Whites who treated Black people as peers. If the Klan surpassed even the patrols in its systematic use of violent racial terror to achieve its end of “reinstat[ing] what it perceived as the antebellum code of correct race relations[,]” freed people often confused the two groups.

The “official” southern police were singled out in the Report of the Joint Committee on Reconstruction for their treatment of freed people. Thomas Conway, assistant commissioner of the Freedmen Bureau in Alabama and Louisiana, detailed how

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197 See id. at 3–4 (“The reliance upon race as a defining feature . . . set slave patrols apart from their European antecedents.”).
198 Id. at 4.
200 See HADDEN, supra note 124, at 78 (“Masters had little recourse against an abusive patroller who chose to ignore community censure . . . .”).
201 Id. at 77.
202 Id. at 202.
203 Id. at 214.
204 Id.
the police of [Louisana] 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, without any form of law whatever, and simply because they did not have in their pockets certificates of employment from their former owners or other White citizens.\footnote{Report of the Joint Committee on Reconstruction 79 (1866).}

The Committee found that police instigated and actively participated in massacres of Black people in New Orleans and Memphis.\footnote{Id. at 80.}

Slave patrols and their post-war functional equivalents had specialized enforcement duties and power. But they relied upon private citizens; were not continuously active; and their procedures changed over short periods of time.\footnote{See David E. Barlow & Melissa Hickman Barlow, Police in a Multicultural Society: An American Story 40 (2018) ("The earliest forms of police were primarily private and hired by industries, but a movement began toward developing more public, efficient and organized police system.").} It would not be until the late nineteenth century that centralized, bureaucratized, and quasi-professional police would spread throughout the nation.

\section*{B. The Semi-Professionals}

The first full-time police forces in the United States were established in the northern U.S. before the Civil War. In 1845 New York organized an 800-person force under captains, each of which was assigned to one city ward.\footnote{Sidney L. Harring, Policing a Class Society: The Experience of American Cities 1865–1915 30 (1983).} Officers were political appointees who served for terms.\footnote{Id. at 30–31.} The New York model was adopted by Chicago, New Orleans, Cincinnati, Philadelphia, St. Louis, Newark, Baltimore, Detroit, and Buffalo over the course of the next two decades.\footnote{Id. at 31.}

The New York model was borrowed from England, where in 1829 Home Secretary Robert Peel established a bureaucratically organized, publicly funded, official police force.\footnote{See Alex S. Vitale, The End of Policing 35 (2017) ("Created in 1829 by Sir Robert Peel . . . this new force was more effective than the informal and unprofessional watch or the excessively violent and often hated militia and army.").} Peel’s successful efforts to persuade Parliament to establish a force of some three thousand men, including a
hundred and sixty-five uniformed “bobbies” with badges and batons (named for “Bobby” Peel), appear to have been animated by labor unrest. So too, did labor troubles play a prominent role in the development of police forces in the United States. Between 1881 and 1900, worker strikes numbered in the thousands, spanned multiple cities, and cost nearly $45 million. Vagrancy played a central role in the deployment of force that served to preserve a social hierarchy, with White Americans at the top.

By the 1890s, several civic commissions in major cities had published reports complaining of pervasive police corruption and incompetence. A comprehensive and rigorous 1922 survey of the criminal legal system in Cleveland demonstrated that police, prosecution, and courts alike suffered from informality, political control, and lack of expertise. Police had little training; lines of authority between commanders and patrol officers were difficult to discern; prosecutorial “traditions and methods [were still those] shaped at the time of the Civil War”; judges lacked a central system for case assignments and had difficulty retrieving written records when making bail, dismissal, and sentencing decisions.

With the late 1920s came President Herbert Hoover’s Crime Commission, chaired by Attorney General George W. Wickersham. Known today as the “Wickersham Commission,” it issued reports documenting the existence of Cleveland-like conditions across the nation’s cities and denouncing “lawlessness in law enforcement.”

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212 Id.
213 See Matthew DeMichele, Policing Protest Events: The Great Strike of 1877 and WTO Protests of 1999, 33 AM. J. CRIM. JUST. 5 (2008) (“Between 1881 and 1900 there were thousands of worker strikes . . . costing nearly $45 million.”).
215 See, e.g., The Cleveland Found., Criminal Justice in Cleveland 230 (Roscoe Pound & Felix Frankfurter eds., 1922) (“The 'crime wave' and several notorious cases have aroused the community to action, with the result that Cleveland has taken the unusually courageous step of asking for and publishing a survey of its administration of justice.”).
216 Id. at 7–8.
217 Id. at 620.
219 Id. at 1–4.
incompetence, political biases, and brutality of the police were central themes.\(^{220}\) The Commission for the development of “a scientific procedure, in which men are given professional education, are trained to use the latest resources of modern science and to employ trained intelligence as a substitute for . . . mere force.”\(^{221}\)

The Commission’s complaints that the police left “the citizen [feeling] helpless in the hands of the criminal class” suggested an enduring perception that certain kinds of people were dangerous and fit to be controlled for the sake of the general welfare.\(^{222}\) Khalil Gibran Muhammad has detailed how the belief that Black people in particular were major producers of urban crime and constituted a dangerous criminal population contributed to and legitimated segregation and discrimination in the northern U.S.\(^{223}\) Leading Black reformers, including W.E.B. Du Bois, leveraged White fears of Black criminality to call for an end to discrimination, arguing that discrimination would reduce “Negro crime.”\(^{224}\)

The Wickersham Commission analyzed mostly northern cities. But policing persisted in southern cities. Among the most potent instruments of racial control was lynching—frequently preceded by beating, burning and humiliation, and succeeded by the display of a tortured Black body.\(^{225}\) Until the the mid-1920s, police sympathetically observed when they did not actively participate in lynching by vigilante groups, and the “law-abiding” among them gave effect to statutes and ordinances that functioned much as the Black Codes did to maintain White supremacy.\(^{226}\) “Jim Crow” laws proliferated in the wake of the Supreme Court’s decision holding unconstitutional provisions of the Civil Rights Act of 1875 that prohibited

\(^{220}\) On brutality in interrogation, see id. at 173–79 (discussing the consequences that result from the police practice of “third degree methods”).

\(^{221}\) U.S. NAT'L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, WICKERSHAM COMM’N REPORTS No. 14, REPORT ON POLICE 9.

\(^{222}\) Id. at 1.


\(^{224}\) Id. at 227–28.


\(^{226}\) Id. at 205 (noting that radio-dispatched police played a role in the demise of lynching).
discrimination in privately owned places of public accommodation\textsuperscript{227} and upholding the segregation of railcars—the latter as “within the police power of the State.”\textsuperscript{228}

\textit{C. The Professionals}

First-wave progressive police reformers were primarily focused on getting officers out of the hands of ward bosses and curbing vice. Second-wave liberal reformers sought to define and maintain high standards of integrity and training for officers and empower others—administrators, civilian review boards, or judges—to ensure that those standards were met.\textsuperscript{229}

Judicial oversight ultimately emerged as the most apparently promising means of professionalizing the police. Insulated from partisan politics, specializing in procedural regularity, and members of a highly educated, civic elite, judges were seen as well-equipped to ensure that police engaged in law enforcement \textit{rather than} policing.\textsuperscript{230}

\textit{Miranda v. Arizona}\textsuperscript{231} illustrates the ascendancy of judicially supervised professionalization. The Court emphasized the Federal Bureau of Investigation’s “exemplary record of effective law enforcement” in requiring state and local police to comply with rules governing interrogation that were “followed as a practice by the FBI.”\textsuperscript{232} But across its criminal-procedural docket, the Warren Court interposed judges as regulators of the police. Investigatory stops and pat-downs had to rest on suspicion that was

\begin{thebibliography}{119}

\bibitem{227} See The Civil Rights Cases, 109 U.S. 3 (1883) (holding provisions under the Civil Rights Act of 1875 as unconstitutional, and Congress could only legislate state action and not private action because it exceeds Congress’s authority under the Fourteenth Amendment).

\bibitem{228} Plessy v. Ferguson, 163 U.S. 537, 545 (1896).

\bibitem{229} See David Alan Sklansky, \textit{Police and Democracy}, 103 Mich. L. Rev. 1699, 1730 (2005) (noting that the Wickersham Commission was assembled to criticize the police and provide suggestions for reform) [hereinafter \textit{Police and Democracy}].

\bibitem{230} See id. at 1737–38 (noting that judges should decide the ideal body of law rather than the police because they are fundamentally “independent of the police”).

\bibitem{231} 384 U.S. 436 (1966).

\bibitem{232} Id. at 483–84.
\end{thebibliography}
sufficiently “articulable” to a judge.\textsuperscript{233} Warrants had to be secured from a judge prior to electronic surveillance and home searches.\textsuperscript{234}

The avowed purpose of certain of these doctrines was to prevent police subjugation. \textit{Miranda} detailed the findings of the Wickersham Commission concerning use of the “third degree”\textsuperscript{235} and highlighted psychological techniques that police continued to use in interrogation to “persuade, trick, [and] cajole [people] out of exercising [their] constitutional rights.”\textsuperscript{236} The Court considered it “obvious” that interrogation environments are designed to “subjugate the individual to the will of his examiner” and considered this subjugation incompatible with the “dignity” of the individual.\textsuperscript{237}

But the Warren Court did not concentrate much attention on substantive criminal law\textsuperscript{238}—the content of the offenses for which individuals are investigated, prosecuted, and convicted. Nor did it impose significant constraints on general patterns of law enforcement, as distinguished from the conduct of individual officers.\textsuperscript{239} These omissions, and their consequences for the prevalence of policing, are illustrated by the enforcement of drug laws.

Although many proponents of the drug laws that proliferated in the 1980s and 1990s sold them to the public by invoking racial stereotypes, the laws themselves did not single out offenders by race.\textsuperscript{240} But like other “vice” crimes, including prostitution, gambling, and—during the 1920s—alcohol, the trade in prohibited drugs consists of consensual transactions that were

\begin{footnotes}
\item[233] See \textit{Terry} v. \textit{Ohio}, 392 U.S. 1, 21 (1968) (holding that searches conducted by the police of a reasonable scope are constitutional under the Fourth Amendment).
\item[234] See\textit{Katz} v. \textit{United States}, 389 U.S. 347 (1967) (holding electronic surveillance by the police required a warrant under the Fourth Amendment); \textit{Chimel} v. \textit{California}, 395 U.S. 752 (1969) (holding that home searches following an arrest as unconstitutional under the Fourth Amendment if the search extends beyond the arrestee’s person).
\item[235] \textit{Miranda}, 384 U.S. at 445–46.
\item[236] Id. at 455.
\item[237] Id. at 457.
\item[238] For a summary, as well as a discussion of several important instances in which the Court did make decisions relating to substantive criminal law, see Richard S. Frase, \textit{The Warren Court’s Missed Opportunities in Substantive Criminal Law}, 3 OHIO ST. J. CRIM. L. 75 (2005).
\item[239] See \textit{DAVID ALAN SKLANSKY}, DEMOCRACY AND THE POLICE 137–38 (2008) [noting that the rules the Supreme Court promulgated focused on fairness but not distributive justice allowing the perpetuation of racial profiling to continue].
\end{footnotes}
and are sufficiently popular that police enjoy a great deal of discretion concerning enforcement.\footnote{Id. at 131; William Stuntz, Unequal Justice, 121 HARV. L. REV. 1969, 1996 (2008).}

This discretion is exercised in a racialized manner. Today, Black Americans are significantly more likely to be arrested for drug crimes than are White Americans.\footnote{See David W. Koch, Jaewon Lee & Kyunghee Lee, Coloring the War on Drugs: Arrest Disparities in Black, Brown, and White, 8 RACE & SOC. PROBLEMS 313, 319 (2016) (stating that blacks (15.8%, 8.9%) were more likely to be arrested for drug use and drug dealing than Whites (10.0%, 2.4%)); MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA, at xi (2011).} One result of racialized law enforcement has been what Monica Bell conceptualizes as the legal estrangement of Black Americans from the U.S. criminal legal system in general and the police in particular.\footnote{Id.} Many Black Americans accept an ideal of law-abiding, law-enforcing police officers.\footnote{Id. at 2119.} But they do not believe that actual police officers measure up to that ideal, and thus perceive themselves to have been specifically excluded from the state’s protection.\footnote{Id.}

The Warren Court’s rules did little to prevent estrangement because they did not generally subject the content of facially neutral criminal laws to exacting scrutiny or address where and whom officers should be investigating, searching, seizing, and arresting under those laws. Within the Warren Court’s rules, moreover, lay considerable room for police discretion. In an opinion that reads as a paean to the newly professionalized cop on the beat, Terry v. Ohio\footnote{392 U.S. 1, 20, 37 (1968).} approved warrantless investigatory stops that are supported by “reasonable suspicion.”\footnote{Id. at 27.} This neologism was coined after the Court’s observation that “every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded”\footnote{Id. at 23.} and in recognition of the “need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.”\footnote{Id. at 24.}

Dissenting alone, Justice William O. Douglas warned that “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
This warning proved prophetic. Reasonable-suspicion doctrine now factors in such things as a suspect’s presence in a “high crime area,” which factor has lent itself to racialized constructions. Paul Butler notes that the Court never mentioned that John Terry was Black in praising Officer Martin McFadden’s work preceding his arrest. But the decision “became the gateway case for racial profiling” in the form of stop-and-frisk policies that have had the effect of “signal[ling] to any Black man that he is subject to being detained and searched.”

Finally, Court made accountability for constitutional violations increasingly elusive. In Pierson v. Ray, the Court held that police and other public officials enjoy qualified immunity from civil suits arising from violations of constitutional or statutory rights. It made no considered inquiry into whether qualified immunity was, as the Court claimed, part of the common law at the time that the Ku Klux Klan Act of 1871—the operative statute authorizing suits—was enacted. This left the impression that concerns about unfair surprise to the hardworking officer on the beat drove the decision.

The point here is not that the Warren Court’s professionalism push caused more policing. The first- and second-order effects of the criminal procedural revolution remain controversial. Further, the Burger Court undid a great deal of the Warren Court’s work, recognizing and expanding exceptions to Miranda and the exclusionary rule applied to the states in Mapp.

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250 Terry, 392 U.S. at 39 (Douglas, J., dissenting).
251 See Illinois v. Wardlow, 528 U.S. 119 (2002) (holding that an individual’s presence in a “high crime area” alone is not enough to support “reasonable suspicion” to conduct a warrantless search).
252 See Ben Grunwald & Jeffrey Fagan, The End of Intuition-Based High Crime Areas, 107 Calif. L. Rev. 345 (2019) (finding evidence that officers assessments of areas of high crime are based on the “racial compositions of the area”).
254 Id. at 90, 111.
255 386 U.S. 547 (1967).
256 Id. at 553–55.
257 For such an inquiry, see William Baude, Is Qualified Immunity Unlawful, 106 Calif. L. Rev. 45 (2018) (discussing how the Court should retreat from using the doctrine of qualified immunity).
258 See Pierson, 386 U.S. at 555 (“A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”).
Rather, the point is that policing did continue notwithstanding a concerted judicial effort to create lawful law enforcement.

D. The Warriors

By the late 1960s, the appeal of the professional ideal was waning. The public-legitimacy deficit that the police faced notwithstanding the professional push was evinced by urban uprisings, typically in response to police activity. These uprisings expressed inner-city alienation from police officers whom James Baldwin likened to “occupying solider[s] in a bitterly hostile country.”

Reformers initially sought to simultaneously address public alienation from the police while still giving the police a voice in the management of the work with “team policing” experiments that saw select officers working cooperatively and relatively autonomously to address problems in particular neighborhoods. These were ultimately abandoned, however, in favor of a new paradigm: Community policing.

Community policing entails frequent meetings between police and members of the public and greater discretionary power on the part of line officers to make community-oriented decisions. David Sklansky has observed that community policing is less about community control than community partnership; it is “with minor exceptions . . . implemented unilaterally by the police.”

Seth Stoughton has found that officers who know that they are expected to engage in community policing but lack clear direction about what community policing is “tend to direct their efforts where they are most

259 See, e.g., United States v. Leon, 468 U.S. 897, 928 (1984) (holding that the “good faith” exception can be applied to the Fourth Amendment exclusionary rule); Michigan v. Tucker, 417 U.S. 433 (1974); Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973) (holding that consent for a voluntary search does not require that the individual had knowledge of a right to refuse the search).

260 See Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America 55 (2016) (describing how the uprisings “exposed the tensions that existed between law enforcement officers and residents in segregated urban neighborhoods”).

261 Id. at 1779.
welcome—for example, middle- or higher-income communities with well-organized watch groups or neighborhood associations and relatively low crime.”

By contrast, these officers engage disenfranchised, hostile neighborhoods “by imposing order rather than by cooperatively facilitating the organic growth of stable communities.” And although the rhetoric of community policing is deployed to bolster police legitimacy, Stoughton argues that officers have gravitated towards a different ideal—that of the honorable, dutiful, resolute, Warrior who is willing and able to engage in righteous violence.

Intuitively, honor, duty, resolve, and willingness to use righteous violence might seem like socially valuable qualities for law-enforcement workers to cultivate. And the Warrior ideal seems to offer more specific guidance than does community policing: Police must fearlessly deploy their unique abilities to enforce the criminal law and protect themselves and others from dangerous, violent people, even if their efforts go unappreciated by the public. In practice, however, the Warrior ideal’s emphasis on a handful of martial virtues to the neglect of other virtues, together with the specificity of the guidance, perpetuates policing.

For example, officers are taught that they need to exhibit an authoritative “command presence” in order to protect themselves and others. An officer begins by asking a person to do something; then, orders them to comply; and finally, forces compliance if necessary. At no point in the “ask, tell, make” sequence is the officer required to consider whether they have the legal authority to issue the order in the first place. The relationship is not one of equality—“officers expect civilians to acknowledge their inferior status and defer accordingly.”

Relatively, the Warrior ideal encourages officers to prioritize violence-prevention over compliance with the law that (formally, at least) delimits their violence-prevention authority. Recall that the Wickersham Commission

266 Id. at 629.
267 See id. at 632–41 (describing four attributes that appeals to police officers and how the “warrior” concept appeals to them).
268 Id. at 652.
269 Id. at 653.
270 Id. at 653–54.
271 Id. at 655.
equal protection against policing

complained of “lawlessness in law enforcement.” Lawlessness need not take the form of lazily shirking one’s legal duties; it can also take the form of energetic pursuit of a role-related mission that is deemed more important than compliance with the law.

Summarizing his interviews with more than a hundred cops across the country, Mark Baker reports that his subjects viewed the criminal legal system as “a broken-down machine, spinning its wheels over solipsistic argument rather than turning out clear-cut decisions based on the elemental concepts of right and wrong.” Studies have found that officers express negative views, not just of “the law” but of particular legal rules, such as those governing the use of force and perjury. This is not empty talk; Stoughton point out that the Mollen Commission, which investigated “the nature and extent of corruption in the [New York Police] Department,” found that police perjury was “so common in certain precincts that it has spawned its own word: ‘testilying.”’ The Commission further found that testilying flourished because it was seen as “necessary and justified, even if unlawful.” The idea that hierarchical superiors ought be given discretion to deploy force against hierarchical inferiors in the service of elemental protective priorities, unbound by external rules, is as old as policing.

The Supreme Court has encouraged policing in its Fourth Amendment doctrine. Terry acknowledged that frisking is sometimes “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.” But Terry’s deference to police experience has empowered police to act on that motivation in minority neighborhoods without fear of running afoul of the Fourth Amendment. Thus, the Court in Graham v. Connor emphasized that officers must be allowed “to make split-second judgments about the amount of force that is necessary in a particular situation” and denied the constitutional relevance of “evil

272 Mark Baker, Cops: Their Lives in Their Own Words 299 (1985); see also id. at 660 (describing that some officers view a violation of Fourth Amendment as a failure of legal system rather than an officer’s misbehavior).

273 Stoughton, supra note 265, at 660.


275 Id. at 41.

276 Terry v. Ohio, 392 U.S. 1, 14–15 n.11 (1968) (cleaned up).
intentions” in Fourth Amendment cases. This was in a case in which a cop tightly handcuffed, pummeled, and threw into a squad car a Black man (Dethorne Graham) suffering from a diabetic reaction after ignoring Graham’s friend’s exhortations that Graham be given sugar.

So, too, has the Court encouraged policing by making it extraordinarily difficult for victims of unconstitutional police conduct to obtain remedies for rights-violations. In Monell v. Department of Social Services of the City of New York, the Court held that a municipality is ordinarily not liable for officials’ constitutional torts; rather, a challenged action must be shown to have been taken pursuant to an official policy. As for damages suits against individuals, the Court has extended immunity’s protections to “all but the plainly incompetent or those that knowingly violate the law.”

Congress has occasionally taken measures to redress policing in the wake of widely publicized, particularly extreme abuses. After the savage LAPD beating—captured on video—of Rodney King, an unarmed Black man, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994. The Act included a provision that empowers the Department of Justice to pursue injunctive or equitable relief against police agencies; the provision can only by triggered by a “pattern or practice” of unconstitutional conduct. A DOJ investigation into a department’s misconduct can lead to a consent decree that requires reforms, and an appointed monitor may supervise the implementation of the decree.

Because the DOJ can act only upon discovering a pattern or practice of unconstitutional conduct and what constitutes “unconstitutional conduct” has been interpreted to track Supreme Court doctrine, the capacity of consent decrees to thwart policing tends to be limited by what the Court deems unconstitutional.

278 Gruber, supra note 136, at 904.
280 See Avidan Y. Cover, Revisionist Municipal Liability, 52 GA. L. REV. 375, 401 (2018) (relating that “[i]ncreased concern over police brutality—in particular the beating of Rodney King and resulting social unrest—and appreciation that the courts effective foreclosed § 1983 litigation as police reform tool, impelled Congress to enact new legislation.”).
281 Id. at 341.
The DOJ has on occasion gone above and beyond the demands of Supreme Court doctrine in requiring departmental reforms. After Darren Wilson shot and killed Michael Brown, the DOJ investigated the Ferguson police department. In one of two reports, the DOJ found that “nearly every aspect of Ferguson police and court operations” was pervaded by bias against Black people. In the second, the DOJ found that because Wilson reasonably perceived a threat from Brown when he shot him, the shooting did not meet the DOJ’s standard for prosecution. A consent decree based on the first report included:

- Prohibitions on pretextual traffic stops other than in limited circumstances.
- Limitations on the offenses for which people can be arrested
- A requirement that police not command a driver to leave a car without an “articulable basis.”
- A prohibition against seeking consent for a search unless police have a reasonable suspicion.
- A requirement that officers inform suspects of their constitutional right to refuse consent.

As Paul Butler explains, constitutional doctrine requires none of these things. One could therefore read the Ferguson decree as an implicit criticism of the Court for failing to enforce what Vanita Gupta, then the head

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286 Consent Decree, United States v. City of Ferguson, No. 4:16-cv-000180-CDP, Dkt. 41, at §§ 76.c, 80.

287 Id. at § 93.

288 Id. at § 82.

289 Id. at § 85.

290 Id. at § 86.

of the DOJ’s Civil Rights division, referred to as “the protections of our Constitution.”

At the same time, the same DOJ that concluded that Ferguson’s police department needed to be transformed also concluded that the police conduct that focused attention on Ferguson was not prosecutable. Michael Brown was arrested after he declined to consent to a search of his parked car. The DOJ found not credible a witness report that Brown was shot despite having his hands up. But it suggested that even if the report was credible, it could still be constitutionally reasonable for Wilson to shoot Brown, citing an Eighth Circuit decision that it deemed “dispositive on this point.” It further determined that “[u]nder the law, Wilson has a strong argument that he was justified in firing his weapon at Brown as he continued to advance toward him” because “[t]he law gives great deference to officers for their necessarily split-second judgments.” This is the language of Graham v. Connor, and it simultaneously reveals the influence of the Court’s decisions on the constitutional deliberations of coordinate branches of government concerning the police and the limitations of DOJ investigations as a means of thwarting policing.

The Ferguson investigation also drew public attention to the fact that little of what police actually do calls for Warriors. The DOJ found that Ferguson’s municipal court routinely issued, and police routinely enforced, arrest warrants predicated upon failure to make court appearances or pay traffic fines. Of 376 actively charged municipal offenses, approximately 229 required a court appearance, including “Dog Creating Nuisance” and “Failure to Remove Leaf Debris.” The predictable result was constant, adversarial police contact with members of the community in contexts far removed from any violence-prevention mission.

Police generally don’t do much to fight violent crime. Decades of research by social scientists who have sifted duty logs and dispatch reports,
accompanied cops in ride-alongs, made lists and kept track of just much of the urban officer workload consists in crime-fighting attests to this.²⁹⁹ Analyzing this research, Barry Friedman has determined that the vast majority of face-to-face encounters that do lead to some sort of charge stem from traffic violations.³⁰⁰ Parking tickets are in many jurisdictions not issued by police.³⁰¹ Most police encounters that do not result in charges involve events like vehicle issues, noise complaints, animal problems, lost belongings, fights, and alcohol-driven behavior.³⁰²

It bears emphasizing that policing has never been impartially distributed. Here, a Department of Justice report focusing on the Baltimore Police Department in the aftermath of Freddie Gray’s killing by Baltimore police officers³⁰³ is instructive. Summarizing interviews conducted of residents, the Report describes “two Baltimores,” one “affluent and predominately White . . . the other . . . impoverished and largely black.”³⁰⁴ In the first, officers were “respectful and responsive”; in the second, the opposite.³⁰⁵

Statutes are no longer laden with express race or class-based classifications. But criminal laws, the enforcement of which turns in practice upon a person’s status and which reinforces social hierarchies, are still with us. The delegation of an increasing number of social functions to the police

²⁹⁹ See, e.g., Theresa E. Conover & John Liederbach, Policing on Demand: An Observational Study of Mobilization and Citizen Encounters Across Communities, 17 INTL. J. POLICE SCI. & MGMT. 170 (2015) (using data collected through the systematic social observation of police officers to study how communities influence police); Christine N. Famega, Proactive Policing by Post and Community Police Officers, 55 CRIME & DELINQUENCY 78, 98 (2009) (finding that 50% of traditional patrol officers’ time is spent on engaging in proactive activities); Brian K. Payne, Bruce L. Berg, & Ivan Y. Sun, Policing in Small Town America: Dogs, Drunks, Disorder, and Dysfunction, 33 J. CRIM. JUST. 31 (2005) (finding that rural policing requires officers who are trained as generalists to deal with community activities that are not considered true law enforcement jobs).

³⁰⁰ See Barry Friedman, Disaggregating the Police Function, 169 U. PA. L. REV. 925, 948–50 (2021) (“When not filling out reports to taking personal time, a lot of an officer’s working time—easily upwards of thirty percent—is spent on patrol.”).

³⁰¹ Id. at 960.

³⁰² Id. at 950.

³⁰³ See Peter Hermann & John Woodrow Cox, A Freddie Gray Primer: Who Was He, How Did He Die, Why Is There So Much Anger?, WASH. POST (Apr. 28, 2015, 12:15 AM), https://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer who-was-he-how-did-he-die-why-is-there-so-much-anger/ [https://perma.cc/CB35-8C87]. The investigation itself did not focus on Gray’s killing (discussing Freddie Gray’s death and the aftermath in West Baltimore, where relations between residents and police have long been strained).


³⁰⁵ Id. at 5.
ensures that policing covers far more territory than the Warrior ideal suggests that it ought to. And legal accountability for police violations of the law is elusive, thanks to the Supreme Court’s rationing of remedies.

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Policing—the mode of governance—has always been part of the routine business of the police—the institution—in the United States. The Equal Protection Clause was designed to thwart a form of control that police regularly exercise. We are now in a position to revisit M4BL’s demands.

IV. CONSTRUCTING PROTECTION WITHOUT POLICING

The Constitution is not centered in M4BL’s efforts to achieve transformational change. Skepticism of constitutionalism is not, however, universal among those whom Amna Akbar, Sameer Ashar, and Jocelyn Simonson call “Movement law scholars” who “cogenerate[] ideas with social movements seeking to transform the political, economic, and social status quo.”

Dorothy Roberts’s Abolition Constitutionalism presents a constitutional agenda for PIC abolitionists. She carefully engages abolitionist constitutionalism that ultimately informed the content of the Reconstruction Amendments and stakes a number of claims about the original meaning and purpose of those amendments. She adopts no rule or even any presumption in favor of following original meaning or purpose; but she contends that original meaning and purpose have much to offer PIC abolitionists. In a similar vein, Daniel Farbman has conducted exhaustive analysis of “resistance lawyering” by abolitionists, showing that abolitionist lawyers were far more effective than is conventionally thought, both in respect of securing their clients’ freedom and in using their practice to build political opposition to slavery. He finds that although abolitionist lawyers

307 Id. at 844.
308 See id. at 12.
309 See id. at 108.
310 See id. at 50–51, 84.
rejected the legality of slavery and the Fugitive Slave Law of 1850, even the most radical among them held “a deep faith in law and legal process.”

Finally, Brandon Hasbrouck has contended that central to modern policing is a delegation of discretion to police to stop, seize, and search that effectively makes police into lawmakers in ways that slash through the separation of powers. He further contends that this delegation enables police to target Black people in ways that would clearly violate the Equal Protection Clause if legislatures did it “by encoding into law racially discriminatory police practices.” More broadly, he has called for a “movement constitutionalism” in which legislators, executive officials, and judges draw upon the Reconstruction Amendments “to usher in an abolition democracy.”

This Part does not contend that M4BL is self-consciously advancing arguments from original meaning or purpose. But the M4BL critique of the police has constitutional implications, and its specific demands could be justified as constructions of the Equal Protection Clause that fit the Clause’s antisubjugation function. It is within the spirit of the Equal Protection Clause for M4BL to demand investment-divestment, community control of the police, and noncarceral, nonstate alternatives to the modern police as a means of reducing racialized police violence.

Drawing upon the historical resources provided in this Article might help advance those demands. Still further, recourse to that spirit might justify other liberatory demands, as well encourage and guide deliberation about constitutional transformation.

A. M4BL and Construction

Much originalist literature has focused on the responsibility of judges to engage in constitutional interpretation and constitutional construction. But proponents of the interpretation-construction distinction have emphasized that other actors engage in interpretation and construction. And Jack
Balkin contends that members of social movements have unified behind particular interpretations and constructions, transforming the law both inside and outside the courts in the process. Bruce Ackerman, Lani Guinier, Larry Kramer, Reva Siegel and Gerald Torres have in their work on popular constitutionalism showcased the lawmaking potential of social movements.

M4BL does not present itself as being engaged in constitutional construction. Even on what may be the most inclusive theory of constitutional construction on offer—that of Jack Balkin—movements must deliberately position themselves in relation to the Constitution in order to participate in an authentically constitutional project. They must “make claims on the Constitution as their Constitution” and “make arguments to the officials, and citizens) ought to be constrained by original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases, but also including constitutional decisionmaking outside the courts by officials and citizens.”); Keith E. Whittington, The New Originalism, 2 GEO. J.L. & PUB’L POL’Y 599, 612 (2004) (arguing that “constitutional constructions . . . must be and are made by political actors in and around the elected branches of government”).

317 See JACK BALKIN, LIVING ORIGINALISM 83–84 (2011) (“[I]nterest groups . . . engage in advocacy and litigation [and] make constitutional arguments in the course of promoting their favored ideals and policies. Their participation in public life can significantly affect constitutional construction and constitutional change.”).

318 See 1 BRUCE ACKERMAN, WE THE PEOPLE (1993) (arguing the Founding established paradigms of lawmaking that subsequent generations used to change their future); 2 BRUCE ACKERMAN, WE THE PEOPLE (2000) (comparing the path of change in during Reconstruction and during the New Deal); 3 BRUCE ACKERMAN, WE THE PEOPLE 11 (2014) (describing how Civil Rights leaders “affirmed that landmark statutes were a legitimate alternative to Article V in expressing the . . . judgements of [citizens]”).

319 See Lani Guinier, Foreword: Demosprudence Through Dissent, 122 HARV. L. REV. 4, 131–32 (2008) (describing how “demosprudential dissenters call the public—through their representatives or their own marching feet—to act in the name of democracy.”).


321 See Reva B. Siegel, Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA, 94 CALIF. L. REV. 1325, 1418 (2006) (“[S]ocial movements have acted as a constructive force in the American constitutional tradition [and] sustained the normative vitality of the American constitutional order over the course of the nation’s history.”).

322 See Lani Guinier & Gerald Torres, Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements, 123 YALE L.J. 2740, 2743 (2014) (arguing that “social movements are critical . . . to the cultural shifts that make durable legal change possible”).
public premised on their and the public’s common commitment to the Constitution.”

What is proposed here is that M4BL’s critique and demands could be presented and defended as constructions of the Equal Protection Clause; that other avenues of construction are left open as well by the Clause; and use of the Clause, together with consideration of its virtues and vices, may facilitate harm-reducing legal reforms and inspire future constitutional-building.

1. An Initial Case for Construction

A few words are necessary by way of putting an antipolicing constitutional construction “on the table” as a plausible path for M4BL to pursue.324

First, there is the question of whether the original Fourteenth Amendment accommodates M4BL’s critique and demands. Does the original meaning of the “letter” of the Equal Protection Clause permit constitutional decisionmakers to act on the belief that because the police under racial capitalism will always inflict racialized violence, the modern police should be transformed in the specific ways that M4BL proposes?

States are not left free by the Fourteenth Amendment to abandon the protection of people’s basic civil rights to nonstate entities. And they must ensure that nondiscriminatory, protective laws are enforced. But the mode of enforcement is constitutionally unspecified.

Even if M4BL’s critique and demands are permitted by the letter of the Fourteenth Amendment, constitutional argumentation may not do much to support them. Two potential obstacles loom: (1) The critique may rest upon premises that are incompatible with good-faith constitutional arguments for M4BL’s demands; (2) even if such arguments can be made in good faith, they are unlikely to persuade.

The content of M4BL’s critique of policing does not require activists to lie about the Constitution in order to appeal to the Equal Protection Clause. It is entirely possible, both that the police will always police in a racial capitalist society, and that members of a racial capitalist society could frame

and ratify a constitutional provision, the function of which is incompatible with the existence of an institution that routinely inflicts racialized violence. Racial capitalism allows for the law’s relative autonomy from existing class power; it is not committed to the belief that any given law serves the interests of a ruling class. So, nothing in M4BL’s critique of policing entails a belief that the Equal Protection Clause specifically is—as radical abolitionist William Lloyd Garrison said of the antebellum Constitution—an “agreement with hell.”

We must turn, then, to the question of strategy. As Dorothy Roberts has explained, PIC abolitionists have conceptualized their efforts to change the system from within as “non-reformist reforms” that “reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.” Rhetoric doesn’t reduce an oppressive system’s power. But if non-reformist reforms are valuable, rhetoric that increases the likelihood that a carceral-power-reducing, illuminating change in the legal system will take place should, all else equal, be deemed valuable as well. All else may not be equal; an argumentative strategy that delivers present benefits in the form of immediate victories may increase future costs in the form of carceral-state legitimation that exceeds those benefits. Yet—as Roberts has shown—constitutional rhetoric has played a central role in Black freedom struggles.

Might the rhetoric of original meaning or purpose be more risky than other kinds of rhetoric? Leading originalist judges—in particular, Justice Antonin Scalia and Justice Clarence Thomas—have espoused a “color blind” construction of the Equal Protection Clause that subjects affirmative

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325 For an overview of relative autonomy within Marxist legal and political theory, with a special focus on the contributions of Louis Althusser and Nicos Poulantzas to its development, see Christopher Tomlins, Marxist Legal History, in The Oxford Handbook of Legal History 525–26 (Markus D. Dubber & Christopher Tomlins, eds., 2017). See also Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323, 328 n.23 (1987) (“In contrast to the view of law as completely reflexive, ‘relative autonomy’ attempts to account for the occasional development of law in seeming contradiction to existing material conditions”); Isaac D. Balbus, Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law, 11 L. & Soc’y Rev. 571 (1977) (providing a detailed and influential discussion).

326 See WALTER M. MERRILL, AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON 205 (1963) (describing a resolution Garrison introduced before the Massachusetts Anti-Slavery Society in 1843: “That the compact which exists between the North and South is ‘a covenant with death, and an agreement with hell’ involving both parties in atrocious criminality; and should be immediately annulled.”).

327 Roberts, supra note 12, at 114.

328 See id. at 105–13.
action programs intended to redress harms from racial injustice to the same strict scrutiny as racial classifications that are intended to perpetuate those harms.\textsuperscript{329} Does this methodology have a race problem?\textsuperscript{330}

It is crucially important to distinguish originalism from responsiveness to or use of arguments from original meaning and purpose. Originalism characteristically assigns priority to original meaning—it holds that “all of the communicative content of the constitutional text and its logical implications must be reflected in constitutional doctrine[].”\textsuperscript{331} Nonoriginalist methodologies characteristically consider original meaning to be one of many considerations to weigh in making constitutional decisions; they do not ignore original meaning or purpose entirely.\textsuperscript{332}

It is true that judicial originalists have embraced a color-blind view of the Fourteenth Amendment. But it is also true that they have not grounded this view in original meaning or purpose.\textsuperscript{333} Thus, even if the association between judicial originalism and racial conservatism is durable, it does not follow that arguments from original meaning and purpose have a racially conservative tendency. It is precisely the absence of careful attention to original meaning and purpose that stands out in the Fourteenth Amendment opinions of conservative originalists.

Further, constitutional arguments are not useless just because they do not give rise to judicially enforceable claims. Scholars like Karen Tani,\textsuperscript{334}
Rebecca Zietlow,⁵³³ and Joseph Fishkin and William Forbath⁵³⁶ have documented how rights-talk has played a central role in social-movement argumentation that led to the enactment of progressive legislation. Conversely, failure to frame arguments for transformative social change in constitutional terms invites defenders of the status quo to shoot down legislative proposals by deploying constitutional rhetoric against what can be painted as “mere” policy arguments.⁵³⁷ We have seen that calls for defunding have already been attacked as anti-constitutional policy arguments.⁵³⁸

a. Demands as Constructions

M4BL’s demands for investment-divestment, community control of the police, and nonincarceral alternatives to the police have not been defended by activists in constitutional terms. Each one of them, however, can draw support from antisubjugation.

i. Invest-Divest

Invest-divest would shrink the size of the carceral state, including the police, and to build and grow state institutions that do not inflict racialized violence. That violence effects and perpetuates subjugation. Divesting from the police and investing in nonpolice institutions can reduce subjugation by shrinking the police’s effective power to subjugate and by attacking the root causes of nonstate violence.

There is far more to invest-divest than antisubjugation. The Equal Protection Clause was directed at control over negative, natural rights to life, liberty, and property. The means through which the letter of the Clause secured these natural rights consisted in positive civil rights, like the right to testify in court. But those positive rights were tightly connected to natural

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³³⁷ See id. at 19 [arguing that “the border between constitutional politics outside the courts and constitutional litigation inside the courts is a thin, permeable membrane” and that “[e]ven where [constitutional claims] cannot be directly enforced in court, they can nonetheless inflect court decisions”].
³³⁸ See supra note 10.
rights—thus, absent the right to testify, one was legally helpless to seek redress for violence against one’s person and things.

M4BL’s Vision calls for divestment from “criminalizing, caging, and harming . . . Black people” and “investments in the education, health and safety of Black people.”339 Among the ways in which these demands are to be operationalized are (1) “[a] reallocation of funds at the federal, state, and local level from policing and incarceration . . . to long-term safety strategies such as education, local restorative justice services, and employment programs” and (2) “[r]eal, meaningful, and equitable universal health care.”340

A connection between the first means and protection of negative rights is suggested by the language of “long-term safety.”341 If we construe safety as including safety against violence, this fits the frame of antisubjugation. By contrast, no claim about any connection between health care and protection of one’s body and possessions against police violence is put forward in the Vision.

Yet at the core of invest-divest is a deep concern with racialized violence—violence that is not identical to but resembles in important respects the violence that abolitionists and Republicans sought to eradicate. Like the latter violence, racialized police violence today subjects people’s life, liberty, and property to legally unaccountable control by others. The continuity between resistance to policing past and present supports the reallocation of resources away from the police-as-institution and towards public institutions that can both reduce policing and the social conditions that make it seem as if there is no alternative to it.

ii. Community Control

The demand for community control includes not only the police but includes as well “our schools . . . our local budgets, economies, . . . and our land.”342 But “democratic community control of . . . law enforcement agencies” has been emphasized by M4BL because of the “destructive

339 Invest-Divest, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/invest-divest/ [https://perma.cc/TX8H-WLQ4].
340 Id.
341 Id.
342 Community Control, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/community-control/ [https://perma.cc/DP8B-F7NV].
policing” that marginalized communities have experienced. Empowering those “most harmed” by policing “to hire and fire officers, determine disciplinary action, control budgets and policies, and subpoena relevant agency information” will render visible, remedy, and reduce police violence against marginalized people.

Jocelyn Simonson explains that “by using the word ‘community’ in their demands for power over policing, social movement actors are both nodding to past struggles against racialized police violence and claiming inclusion in systems of local governance from which they feel excluded.” They are rejecting “community policing” because the input that it has given them into police governance has proven insufficient to protect them against police violence.

Community control of policing is a controversial demand among abolitionists. It is controversial, however, precisely because of concerns that community control cannot reduce the violence inherent in policing and will legitimate it. Those arrayed on opposite sides of debates over community control of the police agree that the police as presently constituted subjugate marginalized people. Both sides seek alternatives that establish control by the marginalized over the provision of public safety. They differ as to the best means of accomplishing that end.

Hierarchy, discretion, and lack of legal accountability cannot be eliminated solely by injecting a strong measure of participatory democracy into decisionmaking. These characteristic features of policing are a function of vague criminal statutes that necessarily confer broad discretion upon

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343 Id.
344 Id.
346 See id.
347 See, e.g., CRITICAL RESISTANCE, Problems With Community Control of Police and Proposals for Alternatives, available at https://drive.google.com/file/d/12qi4eWZQw6J-EFrL4U2XlmLq6KnXluG/view [https://perma.cc/2LCK-9M46] (contending that “even in best case scenarios, the institution of policing cannot be reformed”); Carl Williams & Christian Williams, Community Control Won’t Fix What’s Wrong With Cops, IN THESE TIMES (Aug. 25, 2020), https://www.inthesetimes.com/article/carl-christian-williams-police-control-abolition [https://perma.cc/XYY2-RN4U] (arguing that because “[t]he police system has served as the country’s primary engine to uphold White supremacy by destroying the lives of Black people”, “[a]ny policy that does not directly move us toward abolition should be viewed with suspicion, including proposals [popular even on the Left] for community control over police”).
348 See CRITICAL RESISTANCE and Williams & Williams, supra note 347.
police, prosecutors, and courts;\textsuperscript{349} highly specific criminal statutes that are violated sufficiently often by a sufficient number of people that they can only be enforced selectively;\textsuperscript{350} Supreme-Court-fashioned doctrines like qualified immunity that limit legal remedies for constitutional wrongs; and many other factors that are beyond the control of any community over a police department. Accordingly, community control would not eliminate police subjugation.

But community control might reduce police subjugation. A police officer who cannot be held civilly liable for an act of brutality because of qualified immunity can still be fired; a police department that is held to have the constitutional power to implement a stop-and-frisk policy can be prohibited from doing so, if the community that controls it so decides. If these remedies are reasonably available, they might discourage police from engaging in certain kinds of subjugating behavior or implementing certain subjugating policies.

iii. Nonstate Protection

Because the Equal Protection Clause makes states responsible for providing people with the equal protection of the laws, states cannot refuse to provide for the enforcement of legal prohibitions on activity that violates life, liberty, and property rights. But that doesn’t mean that police must be the first to respond to calls involving individuals with mental disabilities or cows blocking vehicular traffic, nor that they must dispense tickets for parking infractions or provide medical assistance. Nor does it follow that police must be the first to respond to incidents that do implicate life, liberty, and property rights. The Clause leaves space for institutional choice in the delivery of protection, so long as the state sees to it that a baseline level of protection is maintained.

M4BL’s call for the development of noncarceral, nonstate safety institutions can be presented as an effort to fill this space, with an eye to reducing both state and nonstate subjugation. The connection between antisubjugation and the delegation of functions like traffic enforcement to


\textsuperscript{350} See \textsc{William J. Stuntz}, \textit{The Collapse of American Criminal Justice} 265–74 (2011) (discussing the pitfalls of increasing reliance on precise and mechanical legislative rules to make criminal enforcement less subjective).
other institutions is straightforward—less for the police to do means less police subjugation, and traffic violations don’t subjugate anyone. But how would scaling back police performance of functions that fit comfortably within the state’s constitutional mandate to provide protection promote antisubjugation? If the police withdraw, mightn’t we get more nonstate subjugation?

Existing community-based responses to nonstate violence illustrate what kind of projects M4BL’s call for nonstate protection entails in practice. These include the Cure Violence violence-interruption program, discussed above;351 the Oakland Power Projects in Oakland, California, which train residents in creating social spaces where violence is unacceptable and deescalating potentially violent situations;352 Advance Peace, which originated in Richmond, California and not only relies upon mediators to intervene in violent disputes but financially supports and mentors young people who are at risk of violence;353 and the Audre Lorde Project’s Safe OUTside the System Safe Neighborhood Campaign in Brooklyn, New York, which is particularly focused on protecting queer and gender-nonconforming people of color.354 These programs reduce police presence in and control over marginalized people’s lives while supplying protective and remedial resources that the police—and the state more generally—do not provide.

Perhaps more clearly than other demands, the demand for the development of community-based safety institutions expresses what Mariame Kaba has described as “a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation.”355 These safety institutions respond to the kind of interpersonal harms for which the police are the default first-responders and are designed to reduce the harms from policing. But they are also seen as positive, protection-creating measures that demonstrate the capacity of people, working together outside the state, to improve upon the state. Far

351 Supra note 75.
352 Supra note 77.
353 The Solution, ADVANCE PEACE, https://www.advancepeace.org/about/the-solution [https://perma.cc/6SU7-E38W].
from exposing people to more subjugation, then, the cautious reduction of the police footprint and the development of nonstate safety may not only reduce subjugation but affirmatively empower people.

2. Other Constructive Possibilities

Invest-divest, community control, and nonstate protection are broad demands, the implementation of which can take a variety of forms. They are not the only demands articulated in the Vision, nor the only demands related to police. Further, M4BL activists have floated and fought for non-reformist police reforms and trodden out paths of resistance to police violence that cannot easily be categorized. What follows is a nonexhaustive enumeration and discussion of ideas and initiatives that have at some point been proposed or are similar in spirit to those articulated by activists and Movement lawyers and legal scholars; which can be enriched by bringing to bear the history of policing and the antisubjugation spirit of the Equal Protection Clause; and which have not already been discussed in connection with invest-divest, community control, or nonstate protection.

a. Local Construction

Most decisions implicating the precise scope and nature of policing are made at the municipal level, and it is the violence of municipal police that tends to inspire uprisings. It is thus unsurprising that reforms of and resistance to policing have centered on particular police departments.

i. Copwatching

By “copwatching” is meant the organized filming by uniformed local residents of local police officers. Copwatchers point recording devices at officers, ask questions about their policies and practices, gather data to be used later in adversarial proceedings, and share information via social media. Among the purposes of copwatching to express to the police a

356 See Jocelyn Simonson, Copwatching, 104 CALIF. L. REV. 391, 393 (2016) (describing the phenomenon of organized copwatching as “group[s] of local residents who wear uniforms . . . and film police-citizen interactions in an effort to hold police departments accountable to the populations they police.”).

357 Id.
communal sense of what is constitutionally permissible that is not dictated by what courts are prepared to uphold.\textsuperscript{358}

Though traceable to social movements in the 1960s, copwatching groups have spread in recent years following the rise of M4BL, with new copwatching patrols being established in Ferguson, Chicago, New York City, Baltimore, and elsewhere.\textsuperscript{359} Many were inspired by high-profile incidents of police violence.\textsuperscript{360} As Jocelyn Simonson notes, however, “organized copwatchers are strategic—the central idea is to prevent police misconduct rather than to catch it” by deterring, deescalating, and documenting misconduct.\textsuperscript{361} Further still, many copwatchers seek “to articulate a vision of a world in which police officers act differently with respect to disempowered populations” and have aligned themselves with broader social movements against police violence and for equality.\textsuperscript{362}

Simonson describes copwatching as in part a response to the inadequacy of Fourth Amendment law as a limitation on the police.\textsuperscript{363} We have seen that hierarchical, discretionary, legally unaccountable violence—violence enabled by permissive Fourth Amendment law—is characteristic of policing, and that the Equal Protection Clause was directed against the subjugation that police violence perpetuates. Accordingly, equal protection holds promise as a discursive weapon that can be used to contest police conduct affecting the rights of marginalized people. Indeed, a landmark 2013 district court decision holding New York City’s stop-and-frisk practices unconstitutional relied upon the Equal Protection Clause in addition to Fourth Amendment doctrine.\textsuperscript{364} And it drew upon concepts of race and dignity that sound more in equal protection than in Fourth Amendment reasonableness.\textsuperscript{365}

\textsuperscript{358} Id. at 421.
\textsuperscript{359} Id. at 409.
\textsuperscript{360} Id.
\textsuperscript{361} Id.
\textsuperscript{362} Id. at 412.
\textsuperscript{363} See id. at 400 (“The Fourth Amendment’s enforcement mechanisms are notoriously weak, both in their ability to deter misconduct and in their ability to hold officers accountable for misconduct.”).
\textsuperscript{365} See id. at 557, 562 (observing that “[t]hose who are routinely subjected to stops are overwhelmingly people of color,” and that the defendant “willfully ignored overwhelming proof that the policy of targeting ‘the right people’ is racially discriminatory”).
Copwatchers do not tether their constitutional constructions to judicial decisions. But the history of equal protection lends itself readily to violence-reducing, empowering constructions. Copwatching can be framed as one such construction. It empowers communities, limits police discretion to deploy violence, and substitutes for a lack of legal accountability social accountability, to the ultimate end of less policing—and less subjugation.

ii. Community Bail Funds

Community bail funds are posted on behalf of strangers, using a revolving pool of money, to ensure that a defendant is not jailed for lack of ability to satisfy a judge’s demand for a specific amount of cash. Community groups have in recent years have used bail funds in connection with police violence against marginalized communities, including communities protesting against police violence.

Bail funds protect people against state violence in at least two respects. First, they can reduce the downstream harms of police violence by securing a person’s liberty following its use and protecting a person from the violence of jail. Second, they can build community support for long-term changes in how state violence is distributed. For instance, local activists in Ferguson, Baltimore, Oakland, and elsewhere established bail funds to pay the bail of those arrested while protesting police violence. Some bail funds are conditioned on fidelity to particular movements that are dedicated to transformative change in law enforcement.

As we have seen, the original meaning of the Equal Protection Clause requires equal access to the processes of the courts. Equality of access to judicial process is not the same as equality of judicial outcome. But in virtue of their capacity to reduce the collateral consequences of police violence and build community power to resist police violence, community bail funds fit the Clause’s antisubjugation spirit.

366 See Jocelyn Simonson, Bail Nullification, 115 MICH. L. REV. 585, 587 (2016) (“In recent years, community groups in jurisdictions across the United States have increasingly begun to use bail funds to post bail on behalf of strangers, using a revolving pool of money.”).
367 Id. at 588.
368 Id. at 636.
369 Id. at 603.
370 See Bernick, supra note 14, at 56 (“Recall that the original meaning of equal protection includes the provision of equal access to the courts.”).
b. Congressional Construction

The BREATHE Act would embed in federal law demands generated by M4BL activists over the course of many years, from the relatively small-scale (an end to programs allowing local police to acquire military equipment)\textsuperscript{371} to the breathtakingly large-scale (the repeal of all mandatory minimum sentences, the closure of all federal prisons).\textsuperscript{372} The following features are not exhaustive of the police-related transformations that the law would achieve, and the law is not all about policing—it provides, for instance, for public access to safe drinking water.\textsuperscript{373} These features are, however, sufficient to illustrate how the antisubjugation frame could lend support to the Act.

i. Incentivizing Defunding

Most of the BREATHE Act is concerned with federal law enforcement. Its primary mechanism of effectuating change in state and local policing is a set of competitive grant programs that are open to all local and state governments. It creates a new agency—the Community Public Safety Agency (“CPSA”) to administer a competitive grant program for which local or state government may apply.\textsuperscript{374} The CPSA is to develop frameworks for evaluating applicants; the BREATHE Act specifies that the frameworks must include points for having enacted certain policy changes.

One category of policy changes for which points must be assigned under the state grant framework is “REDUCE POLICING.” States are to be given points if they have enacted policies that

Require all localities to develop plans that will significantly reduce the size of, funding for, and activities permissible by law enforcement, while shifting saved resources to non-carceral, non-punitive approaches to public safety;

Require localities to eradicate local laws and policies that increase contact with police and/or are primarily designed to raise revenue; and

\textsuperscript{372} Id. at 17, 20, 22.
\textsuperscript{373} Id. at 76.
\textsuperscript{374} Id. at 47–48.
Require and incentivize localities to reduce stops, tickets, arrest, citations, and civil proceedings initiated against individuals while ending racial and economic disparities in policing practices.375

The function of this program is to encourage states that choose to participate in it to engage in less policing without abandoning their obligation to protect people. It does not merely defund; it reallocates resources “to non-carceral, non-punitive approaches to public safety.” It singles out “laws and policies” that “increase[s] contact with police” without justification and are “primarily designed to raise revenue” rather than to protect anyone against violence. And it highlights “racial and economic disparities in policing practices,” thereby expressing the conviction that “stops, tickets, arrest, citations, and legal proceedings” are distributed as a function of race and class—that at present, people are not equally protected by the laws.

We have discussed the connection between invest-divest and antisubjugation. “[S]tops, tickets, arrests, citations, and legal proceedings” describes a series of steps through which a person is subjected to police control. And the reference to “racial and economic disparities” makes clear that whether a given person is subjugated by the police depends upon contingent features of our institutions and social order. Today, as throughout our history, some people are policed, treated as nuisances or revenue-generators rather than people; other people are not. The Act promotes antisubjugation by encouraging states to police less.

ii. Encouraging Decriminalization

The CPSA’s grant program also encourages states to repeal particular criminal laws that collectively make a large policing footprint seem necessary to minimal law enforcement. These include:

- Public order and “quality of life” offenses;
- Offenses that stem from homelessness, poverty and unmet health needs;
- Offenses that involve inability to control other people’s actions where there were conditions of violence, such as “failure to protect;”
- Laws criminalizing prostitution;

375 Id. at 48.
Laws penalizing failure to pay;
State traffic offenses;
Laws penalizing drug possession and sale;
Conspiracy offenses and accessorial conduct offenses;
Juvenile offenses;
Membership or affiliation offenses.\(^{376}\)

This is the stuff of policing. Some of these offenses reinforce hierarchy because they are either expressly tethered to status (“[m]embership or affiliation offenses”) or indirectly tethered to status (“stem from homelessness, poverty, and unmet health needs[,]” “[l]aws penalizing failure to pay”). Others are vague and enforced in racialized ways (“public order and ‘quality of life’ offenses”); or are specific target activities in which so many people engage that police enjoy effectively unconstrained enforcement discretion, which they exercise in racialized ways (“[l]aws penalizing drug possession and sale”). Still others mandate violent state responses to nonviolent activities (“[s]tate traffic offenses,” “[l]aws criminalizing prostitution.”). The history of policing is laden with such offenses, which often go hand-in-hand with—where they are not inseparable from—hierarchical, discretionary, largely legally unaccountable violence.

Vagrancy laws necessitate policing because they are explicitly contingent upon what others deem one’s status to be rather than anything specific that one does. Prohibitions on drug possession and sale necessitate policing because they are practically contingent upon status—because there are too many offenders for police to arrest, marginalized identity characteristics dictate enforcement patterns rather than whether one in fact possesses or sells a forbidden substance. If reducing the size of police departments can reduce subjugation by reducing the number of police, the decriminalization of certain offenses can reduce subjugation by reducing the number of laws that require it.

\(\text{iii. Abolishing Immunities}\)

The BREATHE Act expressly guarantees a private right of action for damages for all constitutional violations by federal officials.\(^{377}\) It also

\(^{376}\) Id. at 47.
\(^{377}\) Id. at 126.
incorporates the proposed Ending Qualified Immunity Act, which would end qualified immunity for state officials.\textsuperscript{378}

The connection between qualified-immunity abolition and subjugation lies in qualified immunity’s exacerbation of all three of policing’s distinctive characteristics. It confers discretion upon police by insulating them from accountability for violating what little constraints constitutional law imposes upon them. The effect is to reinforce a hierarchy between police officers and others, as well as give police more space to engage in violence that reflects and perpetuates other hierarchies.

No more than the incentives to defund and decriminalize would the abolition of qualified immunity eliminate policing. Most police officers are indemnified against civil suits, meaning that they stand little chance of being held personally responsible for constitutional violations.\textsuperscript{379} And departmental culture may reward officers who stray beyond the Constitution in their zeal to exemplify the Warrior ideal. But eliminating qualified immunity would express a commitment to equality, legality, and accountability that are hostile to policing and could be implemented through subsequent remedial measures.

c. Judicial Construction

Neither the abolitionists who constructed the constitutional theory that the Thirty-Ninth Congress relied upon; nor the leading Republicans who framed the Fourteenth Amendment; nor those who enacted enforcement statutes immediately following ratification placed much confidence in the institution that upheld the Fugitive Slave Act of 1793 in \textit{Prigg v. Pennsylvania}\textsuperscript{380} or denied even the possibility of Black citizenship in \textit{Dred Scott v. Sandford}.\textsuperscript{381} And their pessimism was vindicated by \textit{The Slaughter-House Cases},\textsuperscript{382 United

\begin{footnotesize}
380 41 U.S. (16 Pet.) 539 (1842).
381 60 U.S. (19 How.) 393 (1856).
382 83 U.S. (16 Wall.) 36 (1872).
\end{footnotesize}
States v. Cruikshank, The Civil Rights Cases, and Plessy v. Ferguson among other decisions limiting federal power to protect Black people and entrenching White supremacy in the South. But the work of the Warren Court in promoting desegregation has earned the Court cultural reputation as a steadfast defender of civil rights, in particular the rights of racial minorities.

This reputation is overstated. Race crits have contended that the Warren Court’s most widely applauded civil-rights decisions must be understood as the byproduct of convergent racial interests—the fact that segregated schools were an international embarrassment to White elites during the Cold War played an important role in arguments by lawyers for both the NAACP and the federal government. This “interest-convergence thesis” has been criticized. But there is more general agreement that only with convergence across institutions—that is, not only a unanimous Supreme Court but a Democratic Congress and President committed to racial equality in public education—did any significant desegregation of schools actually take place. And the Court’s record of securing the rights of racial minorities against police violence has at its best been uneven.

Still, carefully chosen litigation targets can empower the disempowered; constrain state violence; and, by illustrating the limits of the law, generate conversations about how to build beyond it. The following suggestions target doctrines that enable policing, as well as police practices that could be thwarted by revising those doctrines.

383 92 U.S. 542 (1875).
384 109 U.S. 3 (1883).
385 163 U.S. 537 (1896).
386 See Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 518 (1980) (arguing that “the interests of the races converged to make the Brown decision inevitable”).
389 See Crenshaw, Twenty Years of Critical Race Theory, supra note 48 (hypothesizing that “legal discourse presented a particularly legible template from which to demystify the role of reason and the rule of law in upholding the racial order”); Roberts, Abolition Constitutionalism, supra note 12.
Equal Protection Against Policing

i. Pretextual Stops

The Court’s holding in *Whren v. United States* that an officer’s subjective intent is irrelevant to whether their decision to stop a driver violates the Fourth Amendment has been extraordinarily influential. And it permits police to engage in racial profiling without fear of violating the Fourth Amendment. Because virtually every driver breaks traffic laws at some point on any given day, police enjoy the discretion under *Whren* to rely upon racial stereotypes in targeting drivers whom they suspect of drug crimes.

Justice Scalia’s unanimous opinion did acknowledge that “selective enforcement of the law based on considerations such as race” was forbidden by the Equal Protection Clause. But Equal Protection law respecting selective enforcement is extraordinarily demanding of litigants. It would not be enough for a Black victim of a pretextual stop to adduce evidence that police stop a wildly disproportionate number of Black drivers for traffic violations in a given jurisdiction. Instead, the victim would have to show that they specifically had been the object of conscious racial bias.

The Court has never claimed that the original meaning of the Fourth Amendment requires a rule excluding consideration of subjective intent. The emphasis on objective reasonableness in Fourth Amendment law has been justified in functional terms. Objective reasonableness has been said to ensure that good intentions are not sufficient to validate a search; to promote even-handed law enforcement; to prevent “grave and fruitless misallocation of judicial resources” through futile inquiry; and to provide clear rules for police to follow. Basically, *Whren* is a constitutional construction.

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392 See David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY, 544, 582 (1997) (arguing that *Whren* creates an unsatisfactory situation where drivers can be stopped by the police “virtually at their whim because full compliance with traffic laws is impossible”).
393 *Whren*, 517 U.S. at 813.
394 Chin & Vernon, *supra* note 391, at 885–86.
It also undermines the function of the Equal Protection Clause. The race-based policing that *Whren* licenses is a form of subjugation. There is little that a Black motorist who happens to live in or be passing through a “high crime neighborhood” in which police focus their drug-enforcement efforts can do to ensure that they are not stopped. *Whren* himself was pulled over for waiting too long for a stop sign.\(^{397}\)

The Court often characterizes the Fourth Amendment as a means of preventing the exercise of arbitrary government power, understood as unchecked official discretion.\(^{398}\) Commentators generally agree that *Whren* enables arbitrary power by allowing police whims to dictate whether a person is stopped and searched.\(^{399}\) Antisubjugation reinforces the case against *Whren* by enabling us to see how the rule that it articulated undermines both the Fourth and the Fourteenth Amendment.

ii. Discriminatory Intent

In *Washington v. Davis*, the Court held that a viable equal-protection claim requires a showing of discriminatory intent.\(^{400}\) Evidence that an official action or policy has a disparate impact on a protected class of people may, in conjunction with other evidence, give rise to an inference of intentional discrimination.\(^{401}\) But it is insufficient to establish a constitutional violation.

This is a notoriously demanding requirement, and neither the text or history of the Clause lends support to it. Republicans implementing Reconstruction made plain that they did not consider it constitutionally important why the equal protection of the laws was being denied in southern

\(^{397}\) *Whren*, 517 U.S. at 808.

\(^{398}\) *See*, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (“The ‘basic purpose of this Amendment[] . . . is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.”) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

\(^{399}\) *See* David A. Harris, supra note 392, at 543 (noting that after *Whren*, officers’ purpose for stopping vehicles “make[s] no difference at all”); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273 (noting that these decisions enable police officers to “pull over almost anyone they choose”).

\(^{400}\) 426 U.S. 229, 242 (1976).

\(^{401}\) Id.
states. And policing’s hierarchical, discretionary, and unaccountable character is not contingent upon bad intentions.

The Court is sufficiently committed to its discriminatory-intent requirement that it seems futile to urge it to discard it entirely. It may—and ought—be more open to allowing Congress to enact civil-rights legislation on the premise that the disparate impact of law-enforcement policies or practices can deny people the equal protection of the laws. Section Five of the Fourteenth Amendment specifically empowers Congress “to enforce, by appropriate legislation, the provisions of this article.” This choice of language expresses a congressional judgment that Congress was better-equipped to construct the Fourteenth Amendment in favor of civil rights than was the judiciary.

Honoring that judgment by deferring to good faith, factually supported legislation targeting racialized policing would be consonant with the antisubjugation spirit of Equal Protection and the Congress-empowering spirit of Section 5. Disparate-impact liability is available under federal statutes that regulate local police departments, including the Civil Rights Act of 1964 and the Safe Streets Act. It could also be used to issue regulations prohibiting the programmatic use of Terry stops that are largely predicated on race and place rather than individual behavior.

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402 See Bernick, Antisubjugation and the Equal Protection of the Laws, supra note 14, at 37 (noting that the 1871 “Ku Klux Klan Act” provided that if non-state violence (1) obstructed the execution of either state or federal laws (2) so as to deprive people of any of rights “named in the Constitution and secured by this act” and states (3) “from any cause” either “fail [ed]” or “refuse[d]” to protect them from that violence, “such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States.”).

403 See U.S. Const. amend. XIV, § 5.


iii. Predictive Policing

“Predictive policing” uses algorithms that sift massive amounts of data to predict the incidence of crime.\textsuperscript{406} Different predictive-policing algorithms use different variables to predict the incidence and location of future crimes; all in common use explicitly exclude race as an algorithmic inputs.\textsuperscript{407}

Critics have urged that prohibiting the use of protected characteristics is not enough to prevent unconstitutional discrimination. They argue that even seemingly neutral variables can serve as proxies for constitutionally protected characteristics and can harm those who share them.\textsuperscript{408} Criminal history, for instance, is commonly used in predictive algorithms and has been even upheld as a paradigmatic example of a legitimate variable.\textsuperscript{409} And yet it is highly correlated with race, for reasons related to past and present discrimination—including racialized policing.\textsuperscript{410}

Equal-protection law’s discriminatory-intent requirement renders it wholly unequipped to address any racial disparities arising from predictive policing. It is questionable whether algorithms act “intentionally” at all.\textsuperscript{411} And it would be very difficult to show that any given algorithm was designed by humans with racially discriminatory intent.\textsuperscript{412}

But the glaring nature of the lack of fit between current law and predictive policing may open up constructive opportunities that the Court has thus far closed off in equal-protection doctrine. Unless the Court is prepared to entirely exclude from constitutional consideration the ways in which the increasing use of algorithmic instruments affect the racial distribution of the costs of policing, something in its doctrine has to give.


\textsuperscript{408} See id. at 296 (“There are also concerns that seemingly neutral algorithmic inputs such as employment and education may nonetheless result in unwarranted racial disparities because they may serve as proxies for race.”).

\textsuperscript{409} Id.

\textsuperscript{410} See generally MUHAMMAD, supra note 223, at 1 (describing a history of the use of purportedly neutral crime statistics to reinforce and reproduce racial inequality during the late-nineteenth and early-twentieth centuries).

\textsuperscript{411} Aziz Huq, Racial Equity in Algorithmic Criminal Justice, 68 DUKE L.J. 1043, 1088–89 (2019).

\textsuperscript{412} Id. at 1091.
Antisubjugation and the history of policing can help us understand how neutral algorithmic variables can yield racialized policing, as well as develop means of resisting it. Take “criminal history” as an example. Neither a crime nor a criminal is a “natural kind” awaiting discovery by an objective observer of the world. Both are social artifacts, a function of the content and enforcement of the criminal law by culturally situated actors. And the content and enforcement of the law by culturally situated actors has throughout the history of the United States been influenced by and reinforced racial hierarchies.

Racialized policing did not stop when formal racial neutrality became constitutional law; even today, police, judges, and prosecutors respond to similarly situated Black and White suspects in different ways.\footnote{Id. at 1046; see also CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE DEFINE RACE AND CITIZENSHIP 32–33 (2014) (discussing the difference between the war on drug enforcement across racial lines).} Because those responses in turn determine who has a “criminal history,” we have good reason to think that uncritical use of the category will perpetuate racialized policing and subjugation. Because good intentions are no security against policing subjugation, we need to go beyond intentions to prevent algorithmic injustice.

All disparate-impact-based discrimination claims are a long shot under current equal-protection doctrine. But the Court might be persuaded to uphold congressional efforts to target use of algorithms that rely upon race-correlated variables or regulations issued under statutes that establish disparate-impact liability. Arguments that the Clause is silent on intentions; that police subjugation can and does take place in the absence of animus; and that the Court would not have to assume primary responsibility for assessing the constitutionality of racially disparate policing could further strengthen the case for deference.

3. Beyond Equal Protection

The Equal Protection Clause is both a radical provision and a limited one. It is radical in that protection was demanded at first by unpopular—indeed, widely reviled—abolitionists who either rejected the Constitution outright or interpreted it what were initially highly idiosyncratic ways. But it is limited in that it guarantees an equality that is tethered to notions of natural
rights; is compatible with sharp distinctions between the rights of citizens and those of other people; does not prevent the subjugation of people convicted of crimes; and does not resolve the tension between policing and law. It makes apparent the need to imagine and construct an inclusive polity that does not merely protect but empowers.

a. The Radicalism of Equal Protection

The Equal Protection Clause is the only provision of Section One that contains language with no counterpart in the antebellum Constitution. The Clause’s novelty makes it surprising that it received far less attention than other provisions during the framing and campaign for the ratification of the Fourteenth Amendment. The most plausible explanation for this lack of discussion is that its content was deemed comparatively uncontroversial. How could such an uncontroversial provision, framed by Republicans who were conscious of the need to hold a supermajority together, be said to be radical?

In the context of Republican constitutional thought circa 1868, the Clause was not radical—it was orthodox. Post-War Republican constitutional orthodoxy, however, closely resembled the constitutionalism of radical abolitionists during the pre-War period. The primary differences between pre-War Republican and abolitionist constitutionalism concerned whether enslaved people were citizens and whether the federal government could abolish slavery in the states as well as the federal territories; Republicans answered no; abolitionists answered yes.

After the ratification of the Thirteenth Amendment, both of these differences dropped out of the picture. It is a measure of the long-run political success of abolitionist constitutionalism that the Equal Protection Clause was perceived as anything other than a radical text when it was ratified into law. Any doubts about Equal Protection’s radicalism ought to have been dispelled by the way in which it was initially enforced by Reconstruction Congress. Republicans united behind the use of federal force to protect Black people and White Republicans against private conspiracies where states had demonstrably failed in respect of their protective duties.

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414 See Green, supra note 146, at 16.
415 See BARNETT & BERNICK, supra note 143, at 93–108.
416 See Bernick, supra note 14, at 137–41.
They rebutted Democratic arguments that the Clause only applied to state action and state legislation and had no reference to failures to enforce the law.\textsuperscript{417}

More radical than any positive right, however, was the explicit, unambiguous extension of that right to \textit{all people}, and the provision that it be \textit{equal}. The Equal Protection Clause expressed what abolitionist constitutionalists had always believed and affirmed about the Constitution—that all people were entitled to enjoy those basic civil rights, the security of which legitimated government. Still further, it guaranteed that protection for those basic rights could not be unequally distributed among similarly situated people, even if all enjoyed a bare minimum of protection.

And yet the Equal Protection Clause is not as radical as it might have been, had abolitionist constitutionalists or the Republicans whose views most closely resembled those of abolitionist constitutionalists been alone responsible for shaping its content. For instance, it probably does not cover voting rights. There was some antebellum legal authority for the proposition that suffrage was among the privileges and immunities of citizenship.\textsuperscript{418} Black abolitionists in particular insisted that it was and also claimed that voting rights were necessary for protection of their civil rights.\textsuperscript{419} But consistent, widely publicized representations by even the most radical of Republicans to the effect that the proposed Fourteenth Amendment would not secure voting rights make it doubtful that the text’s original public meaning is so expansive.

We turn now to the precise nature of the limitations of the Equal Protection Clause, assessed with reference to M4BL’s liberatory goals.

\textit{b. The Limitations of Equal Protection}

“Equal protection of the laws” owes its constitutional codification in part to political thought that assesses the legitimacy of any given government by determining whether that government secures natural rights.\textsuperscript{420} Natural

\begin{footnotesize}
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\item[\textsuperscript{417}] See id.
\item[\textsuperscript{418}] See Paul Gowder, \textit{Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation}, 114 NW. L. REV. 335, 390 (2019) (”[T]he Black citizens of Norfolk simultaneously claim authorship of the Constitution—as ‘recognized voters’ at the time of ratification—and . . . to entitle them to the right to vote.”).
\item[\textsuperscript{419}] Bernick, \textit{supra} note 14, at 66–68.
\item[\textsuperscript{420}] See id. at 21–25.
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rights are negative rights—they are freedoms of action that one would be morally entitled to enjoy absent any government at all but which are insecure without a monopoly on justified force. The right to protection is a positive right—a claim on state resources to which one is morally entitled as a member of a political community—but it is a positive right to have one’s negative rights secured. Its status as any kind of right is contingent upon its connection to negative rights—specifically, the negative rights to life, liberty, and property.

Each of the four components of the original meaning of the protection are connected to negative rights. Two of those components are themselves negative rights: (1) the right to be free from unjustified state discrimination in the regulation of civil rights that secure natural rights to life, liberty, and property; (2) the right to be free from interference with federal laws that protect civil rights that secure natural rights to life, liberty, and property. The other two require states to ensure that natural rights are protected by (1) impartially enforcing protective laws; and (2) providing equal access to the protective processes of the courts.

Antisubjugation itself rests on natural-rights premises. To see why, consider the kindred concept of “nondomination,” emergent from a civic-republican tradition that has been systematically articulated and developed by political philosophers and informs the work of some Movement-aligned scholars. Nondomination is contrasted with slavery, understood as subjection to another’s arbitrary will. But it is more than slavery’s absence. Thus, civic republican Philip Pettit characterizes freedom-as-nondomination as a “social status” that is preserved by the state not merely through force but through expression, such as symbols that affirm the equal status of all people,

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421 Id. at 52–53.
423 See, e.g., Pettit, supra note 422, at 52 (defining domination as “a power of interference on an arbitrary basis”).
and through the allocation of resources to members of the community that enable them to avoid dominating relationships with others.\textsuperscript{424}

Like nondomination, antisubjugation is incompatible with slavery. But antisubjugation regards the security and enlargement of individual freedoms as both necessary and sufficient to its liberatory ends, meaning that it is compatible with a much more minimal state than is nondomination. Rights to health care, clean drinking water, housing and other goods that may be central to a flourishing life but which cannot be connected to purportedly state-independent rights are difficult to justify.\textsuperscript{425}

c. Nonreformist Constitutionalism

The limitations of the Equal Protection Clause are instructive in at least three respects that are salient to transformational politics like M4BL’s. First, certain of them flowed from constitutional structure. Absent an Article-V-driven need for a supermajoritarian consensus among Congressional Republicans and ratification by twenty-eight states, a Fourteenth Amendment closer to Thaddeus Stevens’s ideal point would have been possible.

Second, certain of the Clause’s limitations flow from Republican political theory. Natural-rights theory structured Republican thought about state legitimacy; accordingly, Republicans framed a constitutional amendment that was centrally—though not exclusively—concerned with the security of natural, negative rights. The more radical among them envisioned the confiscation and redistribution of Confederate lands to former slaves, both to break the “Slave Power” and to ensure that freed people had a bare minimum to live and were not susceptible of being pulled into exploitive relationships. Stevens’s claim that it was “impossible that any practical equality of rights can exist where a few thousand men monopolize the whole landed property” sounds in nondomination rather than noninterference with natural rights.\textsuperscript{426} But his land-reform bill was resoundingly defeated. The road to what Du Bois—and later, Angela Davis—called “abolition

\textsuperscript{424} Id. at 87.

\textsuperscript{425} But see \textit{WEST}, supra note 12, at 36 (arguing that “the state has an obligation to protect citizens from abject subjection to the whim of others occasioned by extreme states of poverty, no less than to protect citizens from vulnerability to the threats of physical violence from others.”).

“Abolition-democracy demands for Negroes physical freedom, civil rights, economic opportunity and education as a right to vote, as a matter of sheer human justice and right.”}; ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 95 (2005) (“DuBois argued that the abolition of slavery was accomplished only in the negative sense. In order to achieve the comprehensive abolition of slavery . . . new institutions should have been created to incorporate black people into the social order.”).
Engagement with both kinds of limits promises to be generative. The Clause is thus an especially fit instrument for non-reformist reform.

4. Objections

a. Limiting Radical Imagination

One obvious objection to the above project is that it will place constraints upon political action and imagination that aims at ends and explores possibilities that cannot be achieved or exhausted within a morally nonideal constitutional system. This is an objection one that any movement that considers using the Constitution to achieve social transformation in the United States must confront.

One response might be to distinguish a Constitution that is morally nonideal from one that is not even minimally morally legitimate; and argue that use of today’s nonideal but morally legitimate Constitution escapes the Garrisonian critique. The trouble with this response is that it is unlikely to satisfy those who hold that today’s Constitution is not minimally morally legitimate. The range of political theories to which those who are active in and support M4BL adhere is sufficiently broad that no consensus on the Constitution’s legitimacy can be taken for granted.

Yet another response might be to argue that Garrisonianism is simply bad politics in the United States. This response neglects influential social movements with an adversarial if not oppositional relationship with the Constitution. Because of its continued influence on Black freedom struggles, including M4BL, the Black Panther Party (“BPP”) offers a particularly powerful example.

At a 1970 Revolutionary People’s Constitutional Convention attended by as many as 15,000 people, including members of the American Indian Movement, the Young Lords, Students for a Democratic Society, the Young Patriots, and the National Urban League, among other groups, the BPP identified the United States as a colonial project and condemned the Constitution for its role in economic and political subordination. A joint BPP message calling for the convention is worth quoting at length:

The Constitution of the U.S.A. does not and never has protected our people or guaranteed to us those lofty ideals enshrined within it. When the Constitution was first adopted we were held as slaves. We were held in slavery under the Constitution. We have suffered every form of indignity
and imposition under the Constitution, from economic exploitation, political subjugation, to physical extermination.

We need no further evidence that there is something wrong with the Constitution of the United States of America. We have had our Human Rights denied and violated perpetually under this Constitution—for hundreds of years. As a people, we have received neither the Equal Protection of the Laws nor Due Process of Law. . . . The Constitution of the United States does not guarantee and protect our Economic Rights, or our Political Rights, nor our Social Rights. It does not even guarantee and protect our most basic Human Right, the right to LIVE!

. . . .

For us, the case is absolutely clear: Black people have no future within the present structure of power and authority in the United States under the present Constitution. For us, also, the alternatives are absolutely clear: the present structure of power and authority in the United States must be racially changed or we, as a people, must extricate ourselves from entanglement with the United States.

If we are to remain a part of the United States, then we must have a new Constitution that will strictly guarantee our Human Rights to Life, Liberty, and the Pursuit of Happiness, which is promised but not delivered by the present Constitution. We shall not accept one iota less than this, our full, unblemished Human Rights.428

One can scarcely imagine a clearer repudiation of the moral legitimacy of the Constitution of the United States—Reconstruction Amendments and all. The message criticizes the Constitution, both for failing to effectively deliver on its promises (“promised and not delivered”) and for not promising enough (“does not guarantee”). These limitations have enabled “every form of indignity and imposition,” among which police violence emphasized. They are too fundamental to admit of redress within the existing constitutional system; a revolution is required, and revolutionary convention is therefore demanded.

Critical though they were of the Constitution, the Panthers knew it well and made use of it with great facility. David Ray Papke details how readily the Panthers deployed constitutional argumentation, not only in the midst of conflict with the authorities but in defining their organizing principles.429 They insisted upon their rights to bear arms, assemble, speak, and publish,

regarding the denial of these as evidence of fascism. They cited amendments to the Constitution in support of three of ten demands set forth in their party platform—demands for the end of anti-Black police violence, the release of Black prisoners, and the empaneling of Black juries for cases involving Black defendants.

The BPP’s relationship with the Constitution was importantly different from that of abolition constitutionalists like Frederick Douglass. Douglass came to believe that the Constitution had not been designed to exclude him; the Panthers believed the opposite. As Dorothy Roberts observes, however, both “relentlessly demand[ed] that [the Constitution’s] interpretation live up to its highest principles and follow its strictest requirements.”

Both of these options—as well as intermediate positions regarding constitutional fidelity—are available to activists who would make use of the Equal Protection Clause to resist police violence. Neither Douglass nor the Panthers lied about the Constitution; they presented it as they thought it was and made use of it as they thought they could. Neither acquiesced in the status quo as a consequence of their strategy. Those concerned that constitutionalism will impose constraints upon politics options and imagination can draw upon their examples for guidance.

b. Pro-Carceral Constructions

Distinguishable from the general question whether constitutional argumentation threatens to hinder more than help liberatory politics are specific questions of whether a particular kind of argument is likely to help. We have already encountered one such question—whether appeals to original constitutional meaning and purpose are especially likely to hit the ground in a racially regressive way. Now we must confront another—whether appeals to protection are particularly susceptible of carceral cooption.

There is history comparatively ancient and recent to be concerned with here. Racialized policing in the U.S. before and after Appomattox was defended in terms of self-preservation, understood as the preservation of

430 Id. at 666.
431 Id.
432 Roberts, supra note 52, at 1768.
White supremacy. And in a penetrating history of civil-rights rhetoric in the twentieth century, Naomi Murakawa shows that the language of “the right to safety,” first deployed by racial liberals against racist mob violence and racial prejudice in the criminal legal system, was later used by racial liberals and racial conservatives to defend the expansion of the carceral state.

Nor can concerns about racially disparate underenforcement of protective laws against nonstate violence be dismissed, either as a historical matter or as a matter of racial justice. As a historical matter, underenforcement of protective laws by southern police in the 1860s facilitated the Klan’s racial terrorism, and the Republicans who framed and expounded the Equal Protection Clause to the ratifying public highlighted this underenforcement as paradigmatic denial of equal protection. As a matter of racial justice, what Alexandra Natapoff calls “underenforcement zones”—zones in which “the state routinely and predictably fails to enforce the law to the detriment of vulnerable residents”—reflect and reinforce the state’s failure to “protect against the private domination of physical and economic victimization” and to give racial minorities a voice in law-enforcement decisionmaking.

Further still, well-intended policies can have negative consequences for those that they are designed to benefit. A newly democratically empowered community may demand more policing. Defunding may mean less training of officers in constitutionally sound use-of-force practices and lower salaries with which to attract and retain talented officers.

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435 See supra notes 166–68.
436 Alexandra Natapoff, Underenforcement Zones, 75 FORDHAM L. REV. 1715, 1717, 1764 (2006); see also WEST, supra note 12, at 32 [arguing that “the reluctance, delay, or outright refusal of some urban police forces to enter high-crime neighborhoods . . . is a violation of the guarantee of equal protection”]
437 Simonson, supra note 345, at 809.
These are concerns and objections that those who seek transformative change in policing have to confront, regardless of whether they make use of constitutional argumentation. They are concerns and objections that have already been raised. Appealing to the Equal Protection Clause will not alert M4BL’s critics to the existence of new arguments, ready to be taken up; critics have already invoked the Equal Protection Clause to resist M4BL’s demands and raised concerns about perverse, unintended consequences.439

Integrating the historical function of the Equal Protection Clause with the history of policing can provide new resources with which to argue for the reduction of the police footprint. It can do so by (1) showing continuities between the evils at which the Equal Protection Clause was aimed and racialized police subjugation today; (2) highlighting the inadequacy of police reform efforts to prevent police subjugation; and (3) situating opposition to policing in the context of a freedom struggle against subjugation that is older than the United States and which shaped the Fourteenth Amendment. Critics can be expected to deny those continuities, question that account, and deny that M4BL is fighting anything resembling the same battle as did nineteenth-century abolitionists. But making use of these resources cannot hurt; and it may help quite a bit.

CONCLUSION

The Movement for Black Lives is a response to violence of a kind that has been inflicted and resisted throughout U.S. history. Its critique and demands could draw strength from explicit constitutional argumentation from the history of policing and the Fourteenth Amendment.

Recognizing that an antipolicing construction of the Fourteenth Amendment is available to a radical social movement is simultaneously troubling and inspiring. It should not surprise us that a constitutional amendment made possible by radical contestation can provide resources to a radical movement today. But it should profoundly trouble us to see radical social movements separated by centuries fighting against policing. The persistence of police violence might seem sufficient to justify M4BL’s omission to engage in much constitutional argumentation.

439 See supra note 10.
It is true that constitutionalism did not stop policing. And it is true that its failure to do so illustrates constitutionalism’s limits. Those struggling today, however, can take inspiration from the fact that nineteenth-century radicals were successful in embedding such a liberatory promise in the Constitution at all—one that, if honored, would transform society today.