

Text and History Narrative Series

“We Do Not Want to Be Hunted”

The Right To Be Secure and Our Constitutional Story
of Race and Policing

By David H. Gans

Forthcoming, 11 Colum. J. Race & Law (2021)

theusconstitution.org

Acknowledgements

The author thanks Amy Gawlak for her work in formatting this narrative, Rebecca Damante and Charlie Miller for cite-checking the narrative, and Roy Austin, Chiraag Bains, Josh Blecher-Cohen, Kristen Clarke, Praveen Fernandes, Eric Foner, Brian Frazelle, Brianne Gorod, Kristine Kippins, Ajmel Quereshi, and Elizabeth Wydra for reviewing earlier drafts and providing useful advice on improving the final product.

About the Author

David H. Gans: David is Director of the Human Rights, Civil Rights & Citizenship Program at CAC. He is an experienced constitutional litigator and scholar. He is the co-author of [Religious Liberties for Corporations?: Hobby Lobby, the Affordable Care Act, and the Constitution](#) (Palgrave MacMillan, 2014), as well as the lead author of CAC's Text and History Narrative Series. His academic writings have appeared in the Yale Law Journal, the Boston University Law Review, the Emory Law Journal, the George Washington Law Review, and the John Marshall Law Review. David has also written commentary for the Washington Post, L.A. Times, USA Today, the Atlantic, the New Republic, and Slate, as well as numerous legal blogs, including the SCOTUSblog, Take Care, Balkinization, and ACS Blog. David joined CAC after serving as Program Director of Cardozo Law School's Floersheimer Center for Constitutional Democracy, and as an attorney with the Brennan Center for Justice at NYU School of Law, where he worked with Burt Neuborne on campaign finance and voting rights cases. Previously, David was an Acting Assistant Professor at NYU School of Law and practiced law at Emery Cuti Brinckerhoff & Abady, PC, where he litigated a wide range of constitutional and civil rights cases. David has also served as an attorney fellow for the Center for Reproductive Law and Policy and as a law clerk for the Hon. Rosemary Barkett on the U.S. Court of Appeals for the 11th Circuit. He is a graduate of Yale Law School, where he served as an editor on the Yale Law Review.

About Constitution Accountability Center

Constitutional Accountability Center (CAC) is a think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests. Visit us at www.theusconstitution.org for more information about the organization and its work.

About the Text and History Narrative Series

["We Do Not Want to Be Hunted:" The Right To Be Secure and Our Constitutional Story of Race and Policing](#) is the seventh in a series of Constitutional Accountability Center reports about the text, history and values of our Constitution. Every provision of the Constitution has a narrative — a story of its enactment; the men and women who pushed for constitutional change; the events and cases that motivated the provision's framers and ratifiers; and the debates — both in the courts and political branches — about its meaning. Through this series, CAC will tell the most important and compelling stories in the American canon: our Constitution's text, its creation, and the efforts over the past 230 years to improve the document. These narratives will not only distill the best legal and historical scholarship and bring alive forgotten Americans, they will also help us better understand our Constitution and inform how modern debates about the Constitution should be resolved.

Copyright © 2020 by Constitutional Accountability Center

Table of Contents

Introduction	4
The Text and History of the Fourth Amendment.....	7
The Fourteenth Amendment and Our Whole Constitutional Story of Race and Policing	16
Maintaining Constitutional Accountability	31
The Document v. The Doctrine: The Supreme Court’s Failure to Honor Our Whole Constitutional Story of Race and Policing	33
Conclusion	51

Introduction

The killing of George Floyd and the waves of police violence that followed in its wake serves as a testament to the Supreme Court's betrayal of our Constitution's text, history, and values. The constitutional law of policing is in shambles today. The Supreme Court has concentrated more and more power in the police. It has sanctioned discriminatory policing and racial profiling. It has allowed police violence to fester. It has gutted virtually every remedy available to hold the police accountable. And the problems go even deeper. The Supreme Court's jurisprudence is rooted in an incomplete understanding of the relevant constitutional history. When the Supreme Court talks about the constitutional limits on policing, it begins and ends with the Founding era. This erases a key part of our constitutional story of policing. Police abuse, including indiscriminate searching and seizing, arbitrary arrests, police violence and killing, lies at the core of the Fourteenth Amendment's history, a fact that has long been ignored and brushed aside by both the Supreme Court and almost all of the scholarly literature.¹ Our understanding of the constitutional law of policing—and the Supreme Court's responses to police abuses—will remain inadequate unless we recover this history.

“Police abuse, including indiscriminate searching and seizing, arbitrary arrests, police violence and killing, lies at the core of the Fourteenth Amendment's history, a fact that has long been ignored and brushed aside by both the Supreme Court and almost all of the scholarly literature.”

This article corrects this omission. It lays out our whole constitutional story of race and policing, focusing on the Fourteenth Amendment's transformative guarantees designed to curtail police abuses and safeguard liberty, personal security, and equality for all regardless of race. It provides the first comprehensive account of the text, history, and original meaning of the

Fourteenth Amendment's limitations on policing. Uncovering this history sheds new light on the meaning of the Fourth and Fourteenth Amendments and offers a new perspective on the many failings of the Supreme Court's jurisprudence in this area.

The Fourteenth Amendment broke new ground, while building off what had come before. Thus, to understand the Fourteenth Amendment, we have to begin with the Fourth Amendment, the founding generation's response to the abusive search and seizure practices they had experienced under British rule. The Constitution's Framers included the Fourth Amendment in the Bill of Rights, refusing to permit the federal government to search and seize at will. The Fourth Amendment's guarantee of “the right to be secure against unreasonable searches and seizures” established personal security as a core constitutional value. It introduced the idea that giving law enforcement excessive discretion to search and seize, in the words of James Otis, “places the liberty of every man in the hands of every petty officer.”² Broad, discretionary powers to search and seize are at war with the right to be secure that the Fourth Amendment promised.³ No longer would individuals be “searched or ransacked by the strong hand of power” in the “most arbitrary manner, without any evidence or reason.”⁴

In most accounts, the story ends there. But our constitutional development did not. Roughly eighty years

after the adoption of our national charter, in the wake of a bloody civil war fought over slavery, the Fourteenth Amendment demanded that states respect Fourth Amendment rights and ensure equal protection of the laws for all persons, vindicating the newly freed slaves' demand that "now we are free we do not want to be hunted," we want to be "treated like human beings."⁵ Against the backdrop of mass arrests of Black people under vagrancy laws, often for pretextual reasons, and police and mob violence directed against them, the Fourteenth Amendment sought to curb police abuses aimed at keeping Black Americans in a subordinate status. The Framers understood that open-ended police power to search and seize offended not only liberty and personal security, but equality as well. In all these ways, criminal justice abuses lie at the very core of the Fourteenth Amendment's guarantees. Yet this Fourteenth Amendment history has never been given its due. As a result of this erasure, key Fourteenth Amendment concerns—such as discriminatory and pretextual searches and seizures and police brutality—are effectively excluded from our constitutional story.⁶ These should be at the center of the story we tell, not relegated to the margins.

And because this part of our constitutional story has long been ignored, the Supreme Court's jurisprudence has suffered. The Court has enabled racial targeting, racial profiling, and racial violence, allowing the police to treat people of color as second-class citizens on the nation's streets and roads.⁷ As study after study has shown, men and women of color are "over-stopped, over-frisked, over-searched, and over-arrested."⁸ They are also more likely to be beaten or killed by the police.⁹ As the police killings of George Floyd, Breonna Taylor, Walter Scott, Laquan McDonald, Philando Castile, Eric Garner and many others attest, "[e]very encounter police officers have with African Americans is a potential killing field."¹⁰ As a result, the sad reality remains that "[t]he black American finds that the most prominent reminder of his second-class citizenship are the police."¹¹

Decades ago, Anthony Amsterdam predicted that "[i]f there are no fairly clear rules telling the policeman what he may or may not do, courts are seldom going to say that what he did was unreasonable."¹² That is exactly what has happened. In case after case, the Court has insisted that the touchstone of the Fourth Amendment is reasonableness, not a warrant or probable cause. In this view, all the Fourth Amendment requires is ad hoc balancing of government and individual interests. This has made the Fourth Amendment into little more than a rational basis test—the most forgiving test in constitutional law—and facilitated a massive expansion in discretionary police power to search and seize. In the hands of the modern Supreme Court, this balance almost always favors the police. The reasonableness test is supposed to consider all factors, but it systematically discounts race, a consequence of the erasure of the Fourteenth Amendment.

It is not only the Court's Fourth Amendment jurisprudence that has suffered. Equal protection, in the policing context, no longer provides the protection it was supposed to. The Framers of the Fourteenth Amendment wrote the equal protection guarantee with policing in mind, seeking to undo discriminatory state laws and policies that subjected newly freed slaves to arbitrary arrests and harsh punishments—including re-enslavement—while turning a blind eye to violent offenses against them. The Supreme Court's earliest equal protection rulings gave the greenlight to Klan violence, writing out of the Fourteenth Amendment the states' constitutional obligation to protect individuals from private violence,¹³ and recent decisions have only made things worse, erecting a stringent requirement of discriminatory purpose that makes it nearly impossible to redress discriminatory policing. This has enabled the police to target men and women of color for arbitrary invasions, while ignoring crimes committed against them.¹⁴ As Rev. William Barber has observed, today, as in the aftermath of the civil war, "[t]he black community gets cuts by both edges of the sword."¹⁵

The turn to rational-basis style reasonableness review and the erasure of equal protection is only half the story. The Supreme Court has also been cutting back sharply on remedies for police misconduct across the board. In most cases, there are simply no remedies available to individuals aggrieved by unreasonable searches and seizures. The result, as Leah Litman has observed, is the “collapse of what is supposed to be an overarching and integrated system of remedies that is adequate to deter constitutional violations.”¹⁶ Instead of a system of remedies we have a system of police unaccountability. Here, too, the Court’s blindness to Fourteenth Amendment history has produced badly flawed doctrine.

The increasing expansion of qualified immunity exemplifies this dynamic. The time-tested remedy of civil damages—a remedy explicitly incorporated into Section 1983, the Reconstruction-era federal law that provides a federal cause of action against state officers for violating federal constitutional rights—is virtually impossible to obtain because of the Supreme Court’s use of qualified immunity to shield police officers from suit for all but the most egregious constitutional violations. Rather than honoring the text and history of Section 1983, the Court has rewritten the law to make it easier for police officers to evade accountability.¹⁷ This turns the Fourteenth Amendment on its head. In passing Section 1983, Congress wanted to vindicate fundamental rights, not immunize lawbreakers bent on stripping Black Americans of the freedom and personal security the Fourteenth Amendment promised. A proper understanding of Fourteenth Amendment history complements the burgeoning literature that demonstrates why the Supreme Court should scrap qualified immunity.¹⁸

This Article proceeds as follows. The first three parts lay out our whole constitutional story of policing from the Founding to the Fourteenth Amendment. Part I examines the text and history of the Fourth Amendment, showing how the Constitution’s Framers established a constitutional right to be secure from unreasonable searches and seizures in order to check excessive discretion in law enforcement. Part II examines the constitutional transformation that culminated in the Fourteenth Amendment, detailing the police abuses at the core of Fourteenth Amendment’s text and history and spelling out the original meaning of the Amendment’s limit on abuse of power. Turning from rights to remedies, Part III demonstrates that the Framers of the Fourth and Fourteenth Amendments viewed civil remedies as essential to safeguard constitutional rights. Part IV examines the Court’s Fourth Amendment, Fourteenth Amendment, and remedies caselaw and shows how the Court’s erasure of the Fourteenth Amendment from the constitutional story of policing has led to a host of flawed constitutional doctrinal rules. A short conclusion briefly sketches how the Court might revitalize the Fourteenth Amendment’s transformative guarantees.

The Text and History of the Fourth Amendment

The Fourth Amendment provides, in relevant part:

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

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹⁹ This language, drafted against the backdrop of decades of abusive British practices, was written to deny the federal government excessive discretion to search and seize.

The Fourth Amendment made three central innovations to check arbitrary invasions by law enforcement. First, it guaranteed to the people a right “to be secure” from unreasonable searches and seizures, language understood to deny the government the power to search and seize indiscriminately.²⁰ Second, it outlawed general warrants—namely—open-ended warrants that did not specify their targets, the reasons for suspicion, or what was to be searched and seized. Third, it required specific warrants supported by probable cause in order to sharply constrain searches and seizures. Refusing to permit the federal government to engage in indiscriminate searches and seizures—whether pursuant to general warrant or otherwise—the Fourth Amendment demanded a specific warrant supported by probable cause.

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

The Framers of the Fourth Amendment knew from experience that giving law enforcement sweeping grants of power to search and seize was incompatible with liberty. In the late seventeenth and eighteenth centuries, British law authorized all manner of invasive searches and seizures, permitting royal authorities to invade the homes of colonists and seize their property as they sought fit. Colonial legislation was similar. General warrants and sweeping powers of search and seizure were common features of these laws.²¹

Searches and seizures by British customs officers were particularly repugnant to the colonists. The Act of Frauds of 1662, which was applied to the colonies in 1696, authorized British officers to “enter and go into any House, Shop, Cellar, Warehouse or Room, or other place, and in Case of Resistance, to break open Doors,

Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncostumed.”²² Further, British customs officers, in the commissions they received

“The Framers of the Fourth Amendment knew from experience that giving law enforcement sweeping grants of power to search and seize was incompatible with liberty.”

from their superiors, were given authority to search all houses and other buildings without any warrant.²³

The Act of Frauds also authorized writs of assistance, a particularly pernicious tool that allowed royal authorities to search and seize as they saw fit. Such writs gave customs officers an extraordinary power: they could commandeer anyone to assist in searching and seizing.²⁴ Once issued, a writ of assistance was a virtual blank check, in effect for the lifetime of the reigning King or Queen.²⁵

“Otis denounced the writ of assistance as ‘the worst instrument of arbitrary power,’ explaining that sanctioning indiscriminate searches and seizures ‘places the liberty of every man in the hands of every petty officer.’”

Matters came to a head in the middle of the eighteenth century, when King George II, facing a war with France, sought to strengthen customs enforcement. Throughout the 1750s, customs officers had obtained writs of assistance from colonial courts. In 1760, King George II died, requiring customs officials to obtain new writs. This set the stage for *Paxton’s Case*, in which James Otis, who represented a group of Boston merchants and citizens, delivered his famous condemnation of writs of assistance. Otis’s arguments did not succeed, but they exerted a powerful influence on the Framers

of the Fourth Amendment.²⁶ Indeed, the big ideas at the core of the Fourth Amendment—the right to be secure, the need for limits on excessive discretion to search and seize, and the specific warrant as a check on government overreaching—can all be traced to Otis.

Otis denounced the writ of assistance as “the worst instrument of arbitrary power,” explaining that sanctioning indiscriminate searches and seizures “places the liberty of every man in the hands of every petty officer.”²⁷ “[E]very hous[e]holder in this province, will necessarily become *less secure* than he was before this writ had any existence among us”²⁸ for British officers could break into houses “when they please; we are commanded to permit their entry. The[y] . . . may enter, may break locks, bars, and every thing in their way; and whether they break through malice or revenge, no man, no court, can inquire.”²⁹ How “can a community be safe with an uncontroll’d power lodg’d in the hands of *such* officers, some of whom have given abundant proofs of the danger there is in trusting them with ANY?”³⁰ Indeed, as Otis stressed, “[e]very one with this writ may be a tyrant. . . . Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor’s house, may get a writ of assistance.”³¹

Otis not only attacked indiscriminate government search and seizure, he insisted that a search warrant was only permissible on the basis of specific evidence of wrongdoing. Searches of the home were permitted only “in cases of the most urgent necessity and importance; and this necessity and importance always is, and always ought to be determin’d by *adequate* and *proper* judges.”³² This required a particularized search warrant, permitting the government to “search certain houses” based on concrete suspicion concerning “those very places he desires to search.”³³ While general warrants had been used in the past, Otis argued, “in more modern books you will find only special warrants to search such and such houses specially named, in which the complainant has before sworn that he suspects his goods are concealed; and you will find it adjudged that special warrants only are legal.”³⁴

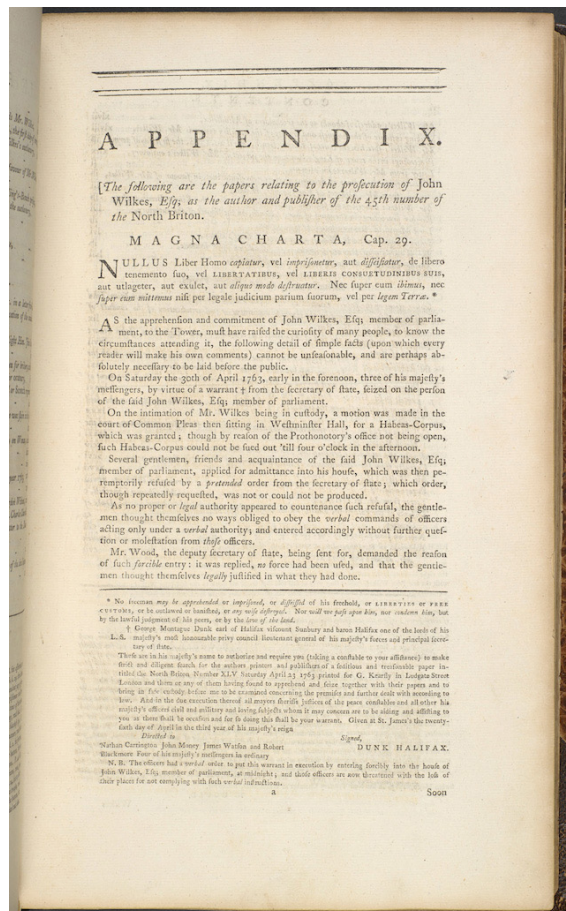
While Otis did not succeed in preventing new writs of assistance from issuing, English courts vindicated his

arguments in a series of famous suits arising out of the King's use of general warrants to silence John Wilkes and other political enemies of King George III. These cases, which recognized that open-ended warrants threatened fundamental protections for liberty, loomed large for the Framers of the Fourth Amendment.³⁵ These cases taught that giving the government general powers of searching and seizure was a recipe for abuse of power, oppression of those out of favor, and destruction of basic security for all.

In 1762, Wilkes published *The North Briton* No. 45, an anonymous pamphlet critical of King George III. Three days after its publication, Lord Halifax, the King's Secretary of State, issued a general warrant directing the King's messengers "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, intitled, *The North Briton*," and "to apprehend and seize [them], together with their papers, and to bring them in custody before me, to be examined."³⁶ The King's officers were not shy about using these powers. When all was said and done, they had searched "at least five houses" and arrested "some forty-nine persons, nearly all innocent" and left in their wake "more than twenty ruptured doors, scores of ransacked trunks, and hundreds of broken locks."³⁷ Some of those searched were detained for days on end.³⁸ That same year, in a similar case, Lord Halifax issued a broadly-worded warrant to search and seize the books and papers of John Entick, the publisher of *The Monitor*, another pamphlet that the King considered seditious.³⁹

In a series of landmark opinions, English courts repeatedly denounced these warrants, emphasizing two key points. First, they noted the evil of permitting unchecked discretion to search and seize, explaining that such a "discretionary power . . . to search wherever their suspicions may chance to fall" "may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."⁴⁰ General warrants were "illegal and void" because "[i]t is not fit that the receiving and judging should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer."⁴¹ Without some check, "the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."⁴²

Second, the courts stressed that the unchecked power claimed by the King's officers was deeply "subversive of all the comforts of society."⁴³ "To enter a man's house by virtue of a nameless



The North Briton, no. 45, Appendix. (Public Domain)

warrant, in order to procure evidence,” one court observed, “was worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.”⁴⁴ If such indiscriminate searches and seizures were permissible, every Englishman could find that “[h]is house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.”⁴⁵

In the colonies, newspaper coverage of these cases was widespread, providing daily reminders that permitting the government indiscriminate powers to search and seize was intolerable.⁴⁶ But rather than respect the fundamental principles vindicated by Wilkes, Britain doubled down on its efforts to search and seize Americans.

“In 1767, Parliament enacted the Townsend Act, which was designed to make it easier to obtain writs of assistance in the colonies. With the passage of the Act, colonial judges rebelled against the writs of assistance, refusing to give such open-ended authority to search and seize.”

In 1767, Parliament enacted the Townsend Act, which was designed to make it easier to obtain writs of assistance in the colonies.⁴⁷ With the passage of the Act, colonial judges rebelled against the writs of assistance, refusing to give such open-ended authority to search and seize. “In the period 1769-1772, no

colonial court beyond New Hampshire or Massachusetts granted the general writ that the customs authorities wanted, and most included constitutional or legal exegeses in their grounds of refusal.”⁴⁸ This demonstrated that courts could provide a valuable check on indiscriminate search and seizure.

In Pennsylvania, the courts repeatedly refused to grant a writ of assistance. In 1771, Chief Judge William Allen told customs officers that “if you will make oath that you have had an information that [uncustomed goods] are in any particular place,” he would “grant you a writ to search that particular place, but no general writ to search every house—I would not do that for any consideration.”⁴⁹ In 1773, new British customs officers applied to the entire bench of the superior court for a writ of assistance, but they, too, were rejected. “[A]rming officers of the Customs with so extensive a power to be exercised, totally at their own discretion would be of dangerous consequences and was not warranted by Law.”⁵⁰

In 1769, in Connecticut, courts “proposed specific search warrants in lieu of general writs of assistance,” explaining that they would only permit search and seizure “consistent with the Liberty and Privilege of the Subject.”⁵¹ In Florida, in 1772, Chief Justice William Drayton insisted that he would only issue specific writs permitting searches of places “which by oath made before me shall be suspected or known to contain [uncustomed] goods.”⁵² But he “absolutely and positively refused” to grant an open-ended writ of assistance, explaining that he was not “justified by Law to issue general writs . . . to be lodged in the hands and to be used discretionally (perhaps without proper foundation) at the will of subordinate officers, to the injury of the rights of His Majesty’s other loyal subjects.”⁵³

Hostility to indiscriminate powers of search and seizure spread like wildfire in the run up to the American

Revolution. Rejection of “writs of assistance and similar methods of search . . . came not only from colonial judges but from town meetings, the Continental Congress, quasi-governmental agencies, pamphleteers, essayists, and the man-on-the-street.”⁵⁴

Arthur Lee, writing as Junius Americanus, charged that writs of assistance left the colonists “laid open to something worse than a General Warrant, namely, to the will and pleasure of every officer and servant in the Customs.”⁵⁵ William Drayton stressed that writs of assistance were pernicious invasions on personal security—even, a petty officer *has power* to cause the doors and locks of any Man to be broke open, to enter his most private cabinet; and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods.”⁵⁶ John Dickinson denounced the unfettered power to search and seize conferred in the Townsend Act as an “engine of oppression,”⁵⁷ contending that “*such a power* was dangerous to freedom, and expressly contrary to the common law, which ever regarded a man’s *house* as his castle, or a place of perfect security.”⁵⁸

Colonists also objected to warrantless searches by the Commissioners of Customs, who were authorized by their commissions to search and seize. At a 1772 Boston town meeting, which was attended by James Otis, Samuel Adams, and others, colonists pointedly denounced these warrantless searches, insisting that “[t]hese Officers are by their Commissions invested with Powers altogether unconstitutional, and entirely destructive to that Security which we have a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives. . . .”⁵⁹ Those at the meeting argued that these commissions vested a “Power more absolute and arbitrary than ought to be lodged in the hands of any Man or Body of Men whatsoever.”⁶⁰ As a result, “our Houses, and even our Bed-Chambers, are exposed to be ransacked, our Boxes, Trunks and Chests broke open, ravaged and plundered by Wretches . . . whenever they are pleased to say they suspect there are in the House, Wares, & c. for which the Duties have not been paid. . . . By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable.”⁶¹

Others agreed with these sentiments. A 1774 general meeting at Leweston, Delaware complained that the “Commissioners of the Customs” had been “authorized by Parliament, in violation of all English liberty, to plunder freemen’s houses, cellars, trunks, bed-chambers, &c.”⁶² In 1774, the Continental Congress included in its list of grievances that “[t]he commissioners of the customs are [e]mpowered to break open and enter houses without the authority of any civil magistrate founded on legal information.”⁶³ The colonists were firmly opposed to such indiscriminate searches and seizures, whether authorized by a warrant or not.

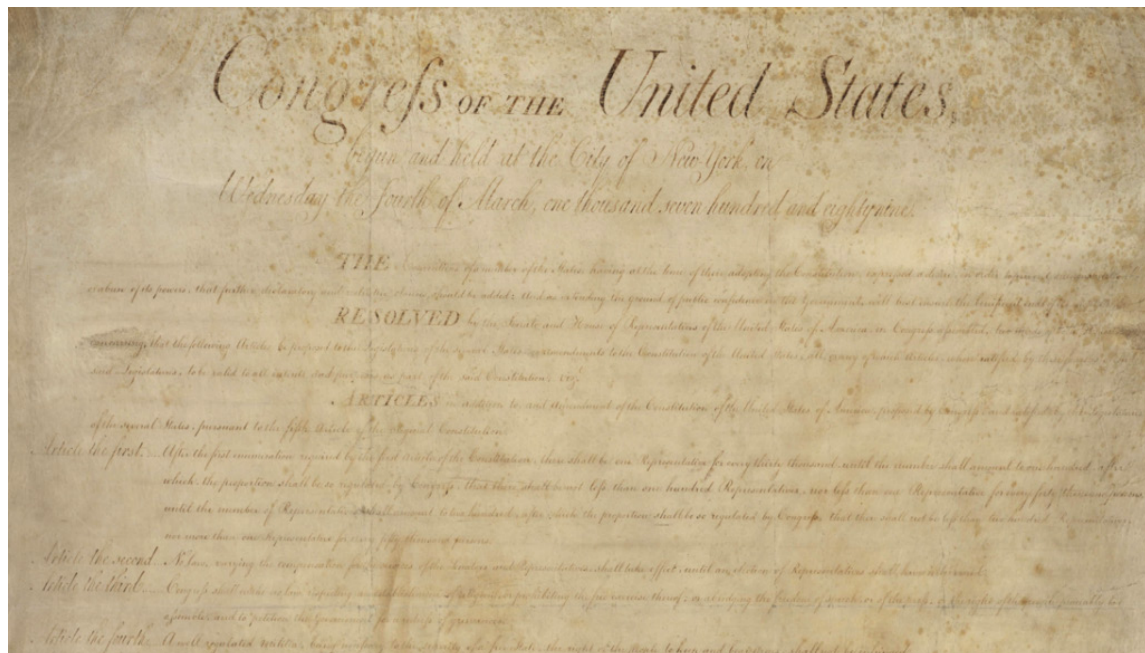
B. The Drafting and Ratification of the Fourth Amendment

Many of the Revolutionary-era state constitutions limited search and seizure by the government. Some, such as the Virginia Constitution of 1776, only banned general warrants; others, like the Massachusetts Constitution of 1780, were broader, recognizing that “[e]very subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.”⁶⁴ The failure of the proposed federal Constitution to provide any protection for personal security produced a groundswell of criticism.

In Pennsylvania, Samuel Bryan, writing as Centinel, observed that “[y]our present frame of government, secures to you a right to hold yourselves, houses, papers and possessions free from search and seizure,” and asked “[h]ow long those rights will appertain to you, . . . whether your houses shall continue to be your castles; whether your *papers*, your *persons*, and your *property*, are to be held sacred and free from *general*

warrants.”⁶⁵ A Maryland Antifederalist, writing as “A Farmer and Planter,” objected that “excise-officers have power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretence of searching for excisable goods, . . . break open your doors, chests, trunks, desks, and boxes, and rummage your houses from bottom to top.”⁶⁶ He pointedly asked whether “Congress excise-officers will be any better.”⁶⁷ In Massachusetts, Mercy Otis Warren, sister of James Otis, denounced the Constitution’s failure to “guard against” such “dangerous encroachments of power,” noting the “insecurity in which we are left with regard to warrants unsupported by evidence.”⁶⁸ She insisted on a constitutional guarantee to prevent “any petty revenue officer” from “enter[ing] our houses, search, insult, and seize at pleasure.”⁶⁹ In New York, a “Son of Liberty” objected that “[m]en of all ranks and conditions” would be “subject to have their houses searched by officers, acting under the sanction of general warrants.”⁷⁰ He feared that “[e]xcise laws” would permit “our bed chambers” to be “searched by brutal tools of power, under pretence, that they contain contraband or smuggled merchandize.”⁷¹

Debates in the state ratifying conventions proceeded along similar lines. In the Virginia ratifying convention, Patrick Henry warned that, under the Constitution, “any man may be seized, any property may be taken, in the most arbitrary manner, without evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power.”⁷² “Suppose an excise-man will demand leave to enter your cellar, or house, by virtue of his office; perhaps he will call on the militia to enable him to go.”⁷³ Henry feared that “[t]he officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes They may, unless the general government be restrained by a bill of rights, . . . go into your cellars and rooms, and search, ransack and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds.”⁷⁴ The Virginia convention recommended



Bill of Rights (Public Domain)

adding to the Constitution a bill of rights, including a right to be secure from unreasonable searches and seizures.⁷⁵ Other states made similar proposals. For example, the Maryland ratifying convention proposed an amendment that would ensure a “constitutional check” on searches and seizures, fearing that “our dwelling-houses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office.”⁷⁶

“The Virginia convention recommended adding to the Constitution a bill of rights, including a right to be secure from unreasonable searches and seizures.”

These arguments carried the day. On June 8, 1789, James Madison introduced the Bill of Rights, including a guarantee that “the rights of the people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.”⁷⁷ Madison’s draft affirmed a right to be secure from unreasonable searches and seizures, using language similar to the Massachusetts Constitution of 1780, but only prohibited violations of the right that were caused by general warrants. Ultimately, the First Congress broadened the Amendment’s scope. The Framers made the two core concepts in Madison’s draft into two independent guarantees, one safeguarding a right to be secure against unreasonable search and seizures and one requiring all warrants to be specific, demanding both probable cause and particularity. Unlike Madison’s draft, the Fourth Amendment proscribes all unreasonable searches and seizures.

C. The Original Meaning of the Fourth Amendment

The opening words of the Fourth Amendment safeguard the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁷⁸ The Amendment then provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.”⁷⁹ The original meaning of the text provides three important lessons and clarifies how its two clauses fit together.

First, the text safeguards a broad right of personal security. Beginning with James Otis, the Founding generation had opposed the Crown’s sweeping discretion to search and seize on the basis that it violated their right to security. Otis argued that “[a] man who is quiet, is as secure in his house, as a prince in his castle” but the writs of assistance took away that promise of security.⁸⁰ “[E]very householder in this province, will necessarily become *less secure* than he was before this writ had any existence among us.”⁸¹ In 1772, when Bostonians denounced the power of the American Commissioners of Customs to engage in warrantless searches, they invoked the right to be secure—“These Officers are by their Commissions invested with Powers altogether unconstitutional, and entirely destructive to that Security which we have a right to enjoy.”⁸²

While the driving impetus for inclusion of the Amendment was the fear that the federal government might reinstitute general warrants, the Amendment sweeps broadly. It constrains all searches or seizures, reflecting that British abuses included not only general warrants and writs of assistance, but also

warrantless searches occurring “without the authority of any civil magistrate founded on legal information.”⁸³ Indeed, Antifederalists had insisted that a constitutional check on all government searches and seizures was necessary to protect personal security, whether pursuant to a warrant or not. “[R]atifying conventions and pamphleteers increasingly spoke in the plural, of unreasonable searches and seizures. General excise searches and search warrants issued groundlessly were condemned almost as much as the general warrant.”⁸⁴ The Fourth Amendment established a federal right to be secure that “transcended the mere denunciation of general warrants that their state constitutions provided.”⁸⁵

Thus, to vindicate personal security, the Fourth Amendment forbids general searches.⁸⁶ A statute that allowed the federal government the power to search and seize at will was no more permissible than a general warrant that permitted such arbitrary invasions.⁸⁷ It would have made “little sense to bar searches conducted under general warrants and then to permit general searches to be made *without warrants*.”⁸⁸

Second, and relatedly, the Fourth Amendment denies the federal government the power to give law enforcement officials the discretion to search and seize who they wish.⁸⁹ The Framers wrote the right to be secure from unreasonable searches and seizures into the Fourth Amendment precisely because it feared giving the federal government excessive discretion to search and seize. As David Gray has argued, “eighteenth-century readers would have regarded grants of broad and unfettered discretion as hallmarks of unreasonable searches and seizures.”⁹⁰ Such discretionary grants of power subject individuals to officials rummaging through their belongings for no good reason and open the door to arbitrary enforcement, allowing the government to target disfavored persons.⁹¹

As one early court made the point, such sweeping authority “would open a door for the gratification of the most malign passions.”⁹² Personal security would be a nullity in a system in which the government could, at will, break into homes, arrest residents, and ransack their possessions. The Framers thought it “better that the guilty should sometimes escape, than that every individual should be subject to vexation and oppression.”⁹³

“The Framers wrote the right to be secure from unreasonable searches and seizures into the Fourth Amendment precisely because it feared giving the federal government excessive discretion to search and seize.”

Third, most searches required warrants and those warrants had to be specific.⁹⁴ The replacement for the general warrants that the Framers abhorred was a specific warrant based on probable cause to believe a crime had been committed and that recited the place to be searched and the things to be seized. This transformation—which was at the heart of Otis’s arguments against the writs of assistance—is fundamental to understanding the Fourth Amendment.⁹⁵ Specific warrants were constitutionally reasonable. Allowing the government broad discretionary powers to search and seize was not. This ensured the judicial check on search and seizure the Framers demanded.⁹⁶

In his famous 1800 report on the Virginia Resolutions, James Madison wrote that “[i]n the administration of preventive justice,” it was a “sacred” rule that “some probable ground of suspicion be exhibited before some judicial authority” and “that it be supported by oath or affirmation.”⁹⁷ As Madison explained, the “ground of suspicion” had to be “judged” by “judicial authority” and could not be left to the “executive magistrate alone.”⁹⁸ In short, judges had a responsibility to ensure compliance with the Fourth Amendment to rein in

abuses. By requiring the government to provide reasons before conducting searches and seizures, the Fourth Amendment ensures that the judiciary has the opportunity to determine whether the police have probable cause for intruding on an individual's security before they do so.

St. George Tucker, a well-known and respected Virginia lawyer, drew on and quoted at length Madison's argument in his discussion of the meaning of the Fourth Amendment in the 1803 edition of Blackstone's Commentaries.⁹⁹ Tucker's lecture notes of the 1790s were crystal clear about the meaning of the right to be secure against unreasonable searches and seizures: "What shall be deemed unreasonable searches and seizures[?] The same article informs us, by declaring, that no warrant shall issue, but first upon probable cause—which cause secondly, must be supplied by oath or affirmation; thirdly the warrant must particularly describe[] the place to be searched; and fourthly—the persons, or things to be seized. All other searches and seizures, except such as are thus authorized, are therefore unreasonable and unconstitutional."¹⁰⁰ While Tucker accepted that some arrests did not require a warrant, he viewed warrantless searches as presumptively unreasonable.¹⁰¹ Madison and Tucker were not alone. In an 1829 treatise, William Rawle wrote that "[t]he term *unreasonable*" in the Fourth Amendment "is used to indicate that the sanction of a legal warrant is to be obtained, before such searches or seizures are made."¹⁰²

The Fourteenth Amendment and Our Whole Constitutional Story of Race and Policing

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

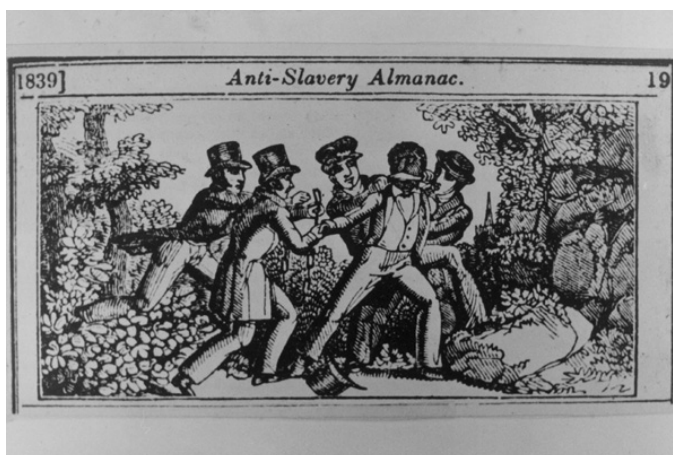
“The Fourteenth Amendment, which puts race at the center of our constitutional story of policing, was necessary to make the Constitution’s promise of a right to be secure a reality for all.”

A. The Prehistory of the Fourteenth Amendment: Slavery, Search, and Seizure

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

Slave patrols that had virtually unfettered power to search and seize—and to terrorize Black people—were a basic feature of slavery beginning in the early 18th century.¹⁰³ Patrollers had all the powers associated with general warrants, including the unfettered power to search and seize.¹⁰⁴ As Sally Hadden has described,

“[p]atrols rummaged through slave dwellings,” broke up “slave gatherings of any kind,” and “questioned and detained slaves who were away from their plantation” to examine whether they had a valid pass.¹⁰⁵ Armed with guns, whips and ropes, the patrols often savagely whipped and brutalized enslaved people.¹⁰⁶ As one former slave remembered, patrollers would “keep close watch” so that we “have no chance to do anything or go anywhere. They ‘jes like policemen, only worsen. . . . If you wasn’t in your proper place when the paddyrollers come they lash you til’ you was black and blue.”¹⁰⁷ Women held as slaves were constantly “threatened by the possibility of sexual



A woodcut from the abolitionist Anti-Slavery Almanac (1839) depicts the capture of a fugitive slave by a slave patrol. (Public Domain)

abuse” since patrollers’ “searches of slave cabins took them into intimate confines whose beds and privacy could be sexually exploited.”¹⁰⁸ Slave patrols were not confined to the countryside. Patrols operated in cities, where slaveowners insisted on an even “more energetic and scrutinizing system” to keep Black people subordinate.¹⁰⁹ So did police forces, who regularly arrested Black people who did not have their papers, could not prove they were free, or who were simply “out of place.”¹¹⁰

Laws subjected Black Americans to arrest simply for being Black. Throughout the South, state legislatures enacted “Negro Seamen” laws that provided that any free Black person who arrived on board a ship would be detained and imprisoned until the ship departed. If the ship’s captain refused to pay the costs of confinement, the seaman could be sold into slavery.¹¹¹ In 1844, the Massachusetts legislature sent two delegates to South Carolina to gather information about the detention of Black citizens of Massachusetts. When Samuel Hoar, one of the delegates, arrived in Charleston, the legislature expelled him from the state. Hoar barely escaped lynching at the hands of an angry mob.¹¹² This incident demonstrated the lengths to which slave states would go to violate fundamental rights. Anyone who even questioned the authority of slave states to arrest, imprison, and sell Black people into slavery was a pariah.¹¹³

In the South, pamphlets and other writings that contained anti-slavery speech, including mainstream northern newspapers, were subject to seizure and even burning.¹¹⁴ For example, an 1836 Virginia law required the postmaster to notify the justice of the peace if abolitionist material appeared in the mails, and the law required the justice of the peace to burn any book or other abolitionist writing.¹¹⁵ Southern courts issued general warrants permitting sweeping searches of books.¹¹⁶ Although the Bill of Rights did not apply to acts of state governments, laws such as these produced widespread fears that the “Slave Power” was threatening American democracy and freedom. As one congressman observed, “postmasters rifle mails and violate the sanctity of private correspondence” and “[t]he newspaper which refuses to recount the blessings and sing the praises of slavery is committed to the flames.”¹¹⁷ Search and seizure was used to squelch dissent, recalling to mind British abuses that sought to silence King George III’s political opposition.

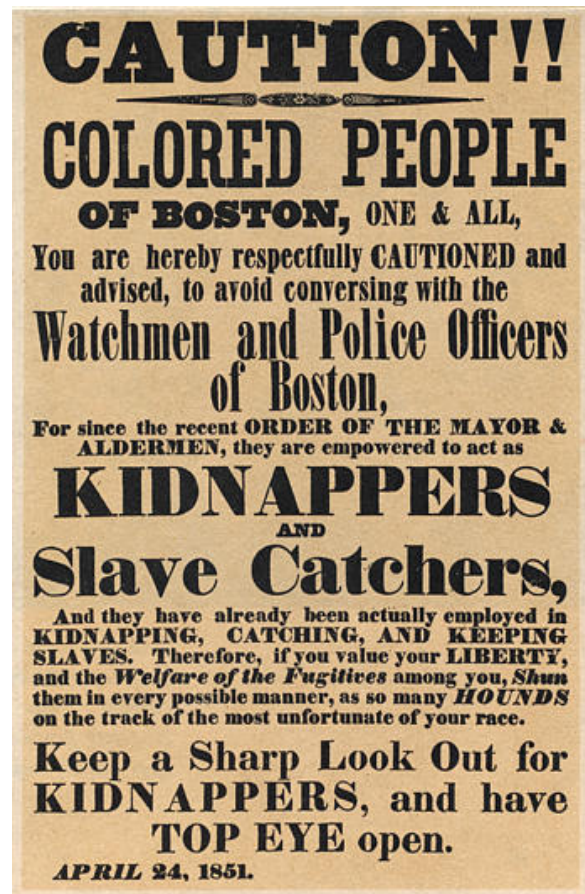
Throughout the country, the Fugitive Slave Act exposed Black Americans to a virulent form of racial profiling and licensed widespread seizures and kidnapping. The Act—first passed in 1793 and overhauled in 1850—delegated sweeping powers to white people to stop, question, search, and seize possible fugitives on the basis of open-ended, racial descriptions.¹¹⁸ Abolitionists repeatedly attacked the constitutionality of the Fugitive Slave Act on Fourth Amendment grounds, but to no avail.¹¹⁹ In a series of cases, the Supreme Court upheld the Act and brushed aside without comment Fourth Amendment objections to it.¹²⁰

Emboldened by these decisions, Southerners pushed through Congress a tougher Fugitive Slave Act, “the most robust expansion of federal authority over the states, and over individual Americans, of the antebellum era.”¹²¹ The 1850 Act permitted seizures without a warrant,¹²² authorized the use of summary procedures to return people to slavery, including proof by affidavit, and created a financial incentive for federal commissioners to accept claims made by slave owners.¹²³ If the commissioner found the individual in question should be returned to slavery, he was paid ten dollars, but if he determined that the individual should remain free, he only received five dollars—effectively a bribe to induce commissioners to rule on behalf of slaveholders. The Act commanded individuals to assist in sending people to slavery, dragooning people in a manner reminiscent of the despised writs of assistance of the revolutionary era.¹²⁴ In all these ways, “the law would give a free hand

to kidnappers.”¹²⁵ Black Americans in the North—like never before—lived in fear of being seized, kidnapped, and forced into slavery. The Act, Frederick Douglass thundered, made the United States “one vast hunting ground for men.”¹²⁶ It was designed, as Charles Langston put it in an 1859 speech, “to crush the colored man” and make him into “an outlaw of the United States,” never free, where ever he was in the country.¹²⁷ In short, the law put in danger “every free colored person” who at any moment could be “claimed and forced into bondage.”¹²⁸ The Act provided a dramatic illustration of the abuse of power inherent in a regime of indiscriminate search and seizure.

Throughout the nation, Black Americans and their allies resisted the Act, using every tool in their arsenal to help their comrades evade capture and secure their freedom, even if it meant making a new life in Canada. Opposition took many forms, including hiding fugitive slaves out of sight, helping them escape to the north, and, in some cases, even rescuing them from custody, including by armed resistance.¹²⁹

Black Americans repeatedly invoked deeply rooted Fourth Amendment ideals in their campaign to prevent their communities from being torn asunder. Many rallied around the defense of home. At an abolitionist meeting in Pittsburgh, Martin Delany insisted that “[m]y house is my castle; in that castle are none but my wife and my children, . . . whose liberty is as sacred as the pillars of God. If any man approaches that house in search of a slave . . . if he crosses the threshold of my door, and I do not lay him a lifeless corpse at my feet, I hope the grave may refuse my body a resting place.”¹³⁰ Others stressed the importance of warrants as a guarantee of personal security. Rev. J.W.C. Pennington warned Black people about warrantless stops by the police. “It is certainly not safe in these times,” he wrote, for “a colored man to be led into a place surrounded by so many grates and bars without the protection of a legal warrant.”¹³¹ Abolitionists warned Black Americans that if “you value your LIBERTY,” you should steer clear of police officers who were nothing but “HOUNDS on the track of the most unfortunate of your race.”¹³² This activism in defense of freedom and personal security succeeded to a considerable extent. Despite many tragic renditions, “many more fugitives escaped the clutches of the law than were apprehended and returned.”¹³³ By contesting every effort to enforce the law, Black communities and their abolitionist allies highlighted the abuse of power the Fugitive Slave Law posed.¹³⁴



An April 24, 1851 poster warning the “colored people of Boston” about policemen acting as slave catchers. (Public Domain)

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

B. The Text and History of the Fourteenth Amendment

When the Founders wrote the Fourth Amendment, there was no such thing as the police.¹³⁵ At the Founding, criminal laws were enforced by private citizens, who took turns serving as constables.¹³⁶ But more than eighty years later, by the time the Fourteenth Amendment was added to the Constitution, local police were responsible for law enforcement in communities across the nation, primarily in cities.¹³⁷ And police abuse lies at the core of the Fourteenth Amendment's history.

“[P]olice abuse lies at the core of the Fourteenth Amendment's history.”

The Fourteenth Amendment changed the constitutional limits on policing in two major ways. First, it required state and local governments to respect the guarantees contained in the Fourth Amendment. In the process, it reconstructed what those guarantees were, taking account of new threats to personal security.¹³⁸ It generated a new set of paradigm cases. At the Founding, the Fourth Amendment was framed against the backdrop of writs of assistance and general warrants that allowed customs officers unlimited power to break into homes. The Fourteenth Amendment, by contrast, was framed against the backdrop of vagrancy laws that gave white police officers sweeping power to arrest Black Americans for failing to sign a work contract, refusing to obey an employer's order, or leaving a plantation; warrantless home invasions to seize weapons belonging to Black persons; and police killings and other forms of state-sponsored violence. The Fourteenth Amendment was a response to the fact that open-ended grants of discretionary police power were a tool of racial oppression.

“The Fourteenth Amendment added to the Constitution the guarantee of equal protection of law, requiring the police to enforce the law in a nondiscriminatory fashion. It embodied the simple, yet radical, notion that ‘the law which operates upon one man shall operate equally upon all.’”

Second, the Fourteenth Amendment added to the Constitution the guarantee of equal protection of law, requiring the police to enforce the law in a nondiscriminatory fashion. It embodied the simple, yet radical, notion that “the law which operates upon one man shall operate *equally* upon all.”¹³⁹ The Fourteenth

Amendment was written to redress both discriminatory over-policing and discriminatory under-policing. It forbids discriminatory policing practices that subject marginalized persons to excessive searches and seizures, just as it also forbids practices that turn a blind eye to private violence against those persons. It sought to put an end to all forms of discriminatory policing.

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

1. The Police Abuses That Led to the Fourteenth Amendment

a. Vagrancy Laws

The Fourteenth Amendment's revolutionary mandates were added to the Constitution against the backdrop of the Black Codes, the South's effort to reimpose slavery and keep Black Americans in a subordinate status. The centerpiece of the Codes were new vaguely worded vagrancy laws that gave Southern police sweeping powers to arrest Black people for failing to sign new labor contracts, disobeying an employer's orders, or otherwise acting in ways whites deemed idle.¹⁴⁰ As one Southern newspaper urged, "[t]he magistrates and municipal officers everywhere should be permitted to hold a rod *in terrorem* over these wandering, idle, creatures. Nothing short of the most efficient police system will prevent strolling, vagrancy, theft, and the utter destruction of or serious injury to our industrial system."¹⁴¹ By requiring Black people to be under contract at all times, these new vagrancy laws enforced a form of "practical slavery,"¹⁴² subordinated newly freed slaves, and gave police new powers to arrest those who did not fall into



Nast, T. (1866) Andrew Johnson's reconstruction and how it works. [Photograph] Retrieved from the Library of Congress, <https://www.loc.gov/item/95512439/>.

line. Some, such as a vagrancy law enacted by the town of Opelousas, Louisiana, went even further, "investing every white man with the power and authority of a police officer as against every black man."¹⁴³ Through laws like these, Southern lawmakers sought to transform slave patrols into postwar police forces armed with sweeping new powers to "place the freedmen under a sort of permanent martial law."¹⁴⁴

The vagrancy laws contained in the Black Codes were astounding in their sweep and in the discretion they afforded. For example, Mississippi's vagrancy statute made it a criminal offense for all "freedmen, free negroes, and mulattoes" to be found, on the second Monday of January 1866 "without lawful employment or business" or "unlawfully assembling themselves together, either in the day or night time."¹⁴⁵ A separate provision condemned as vagrants "persons who neglect their calling or employment, misspend what they earn," "do not provide for the support of themselves or their families," and "all other idle and disorderly persons."¹⁴⁶ These vagrancy laws allowed the police to arrest and harass whomever they pleased. If convicted by the all-white legal system, Black Americans could be subjected to onerous fines, whipped, forced to work on a chain gang,

or sold to white employers to pay off their fines. The “obnoxious features of these singular laws,” O.O. Howard, Commissioner of the Freedmen’s Bureau explained, included “[t]he arrest of unemployed persons as vagrants upon information given by any party; his trial by a justice of the peace; the sale of his services at public outcry for payment of the fine and costs, without limit as to time, and whipping and working in chain-gangs.”¹⁴⁷ The failure of the Thirteenth Amendment to prohibit slavery as method of criminal punishment opened the door to the Black Code’s repressive regime.¹⁴⁸

The first Black Codes, including Mississippi’s, were set aside by the Freedmen’s Bureau and Union military commanders as racially discriminatory,¹⁴⁹ but were soon replaced by virtually identical, race-neutral measures that, like their predecessors, forced Black people to work for white people and gave white police officers nearly unlimited power to arrest those who did not. However they were written, “[e]nforcement of the vagrancy laws revealed an all too familiar double standard. If a

“[W]e do not want to be hunted by negro-runners and th[e]ir hounds... [A]ll we ask is justice and to be treated like human[] beings.”

white man was out of work, as many were in 1865, that was simply unemployment, but if a black man had no job, that was vagrancy. If a planter refused to till the fields himself, that was understandable, but if a former slave declined to work for him, that was idleness if not insolence.”¹⁵⁰ As a Freedmen’s Bureau official observed of Alabama’s vagrancy law, “[n]o reference to color was expressed in terms, but in practice the distinction is invariable.”¹⁵¹ Across the South, white police officers and others arrested Black people en masse for vagrancy and other trivial offenses, often for pretextual reasons.¹⁵² In some communities, police demanded that Black people present a pass, leading to “mass arrests of blacks found on the city streets after a certain hour without the permission of their employers.”¹⁵³

Black Americans bitterly protested these injustices, objecting to the renewal of the “mounted patrol, with their sabers drawn, whose business is the hunting of colored people.”¹⁵⁴ As a group of Black people in Mississippi wrote, “we are to[o] well acquainted with the yelping of bloodhounds and t[e]aring of our fellow serv[a]nts To pi[e]ces when we were slaves and now we are free we do not want to be hunted by negro-runners and th[e]ir hounds unless we are guilty of a . . . crime. . . . [A]ll we ask is justice and to be treated like human[] beings.”¹⁵⁵ By singling out Black people for arrest for suspected minor offenses, a Black teacher in Alabama complained, “[t]he police of this place make the law to suit themselves.”¹⁵⁶

Reports of these oppressive measures flooded the halls of the 39th Congress. As one member of Congress observed, “[e]very mail brings to us the records of injustice and outrage.”¹⁵⁷ Speaker after speaker denounced the vagrancy laws in the Black Codes, arguing that these new criminal offenses “are calculated and intended to reduce [Black people] to slavery again” and “provide for selling these men into slavery in punishment of crimes of the slightest magnitude.”¹⁵⁸ These laws “reduce the negro to vagrancy and then seize and sell him as a vagrant. . . . They are denied a home in which to shelter their families, prohibited from carrying on any independent business, and then arrested and sold as vagrants because they have no homes and no business.”¹⁵⁹ This made a mockery of their newly won freedom.



Joint Committee on Reconstruction. (Public Domain)

The Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, heard extensive evidence of abuses in the South and documented how police officers used vagrancy laws to make baseless arrests of Black people in order to re-establish slavery. As one witness described, “[t]he county police” enforced the vagrancy law “on a person who had employment in Portsmouth and was earning her own living, who went out to get her own children. She was seized . . . ; her children refused to her, and under the vagrant act she was set to work on the old plantation without pay, simply for her board and clothes, as a slave.”¹⁶⁰ Thomas Conway, who had served as an assistant commissioner of the Freedmen’s Bureau in Louisiana, told the Joint Committee that, in New Orleans, “under the orders of the acting mayor . . . , the police of that city conducted themselves towards the freedmen, in respect to violence and ill usage, in every way equal to the old days of slavery; arresting them on the streets as vagrants . . . simply because they did not have in their pockets certificates of employment from their former owners or other white citizens.”¹⁶¹ He described how he had “gone to the jails and released large numbers of them, men who were industrious and who had regular employment; yet because they had not the certificates of white men in their pockets they were locked up in jail to be sent out to plantations.”¹⁶²

As the debate in Congress reflects, the vagrancy laws contained in the Black Codes were objectionable for two reasons. First, they were part and parcel of the South’s effort to re-institute slavery. These vagrancy laws sought to establish a new labor system as close to slavery as possible and to force Black people to work for white people. Second, vagrancy laws accomplished this end by giving white police officers nearly unfettered discretion to control Black Americans, using criminal punishment as a lever to strip Black people of the promise of freedom. Vagrancy laws worked in tandem with a system of criminal justice in which it is “impossible” for the “freedmen . . . to receive anything like justice, protection, [or] equity.”¹⁶³

b. Warrantless Home Invasions to Disarm African Americans

In the final months of 1865, white Southerners were consumed with the baseless fear that the newly freed slaves would mount an armed insurrection. They used this fear as a pretext to break into the homes of people of color, take their guns, and steal their property. As one Black former Union soldier put it, “[t]hey have been accusing the col[o]red people of an ins[ur]rection which is a lie, in order that they might get arms to carr[y] out their wicked designs.”¹⁶⁴ Police, militia, and armed vigilantes ransacked the homes of Black people and violated their most basic personal security to steal their arms, rob them, and leave them defenseless.¹⁶⁵ Sometimes officers presented their “credentials (as militia members or local police officials) and carefully wr[ote] out receipts for confiscated arms. More often than not, however, the raids degenerated into a moblike attack in which freedmen were abused and threatened, furniture [was] overturned, and locked chests [were] smashed. On the assumption that blacks could not have acquired property except by thievery, valuables were taken without justification or explanation.”¹⁶⁶ Police officers “sometimes took their friends along with them on raids that they might share in the emoluments of law enforcement.”¹⁶⁷ This systematic violation of the home left Black people asking “[are] we free?,” while “holding broken locks and empty pocketbooks in their hand.”¹⁶⁸

The Joint Committee heard evidence that, in North Carolina, “the local police have been guilty of great abuses by pretending to have authority to disarm the colored people. They go in squads and search houses and seize arms. . . . [A] tour of pretended duty is often turned into a spree. Houses of colored men have been broken open, beds torn apart and thrown about the floor, and even trunks opened and money taken.”¹⁶⁹ In Alabama, militia companies were formed and “were ordered to disarm the freedmen, and undertook to search in their houses for this purpose.”¹⁷⁰ In Texas, patrols “passed about through the settlements where negroes were living, disarmed them—took everything in the shape of arms from them—and frequently robbed them of money, household furniture, and anything that they could make of any use to themselves.”¹⁷¹ Elsewhere, as the Freedmen’s Bureau documented, “civil law-officers disarm the colored man and hand him over to armed marauders.”¹⁷² In communities across the South, white people, acting “under alleged orders from the colonel of the county militia, went from place to place, broke open negro houses and searched their trunks, boxes,

“In communities across the South, white people, acting ‘under alleged orders from the colonel of the county militia, went from place to place, broke open negro houses and searched their trunks, boxes, &c.,’ and seized ‘not only fire-arms, but whatever their fancy or avarice desired.’”

&c.,” and seized “not only fire-arms, but whatever their fancy or avarice desired.”¹⁷³

On a daily basis, the Freedmen’s Bureau was flooded with complaints of “negroes robbed of guns, pistols, and ammunition, of houses broken into and searched at midnight, of negroes tied hand and foot and brutally whipped, of negroes shot at, and driven from their old homes by threats and violence.”¹⁷⁴

c. Police Killings and Brutality

Police engaged in a campaign of brutal violence against Black Americans. “How many black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known.”¹⁷⁵ But the records of the Joint Committee on Reconstruction describe, in gruesome and painstaking detail, systematic brutality inflicted on many Black persons.

Witness after witness recounted gratuitous, violent seizures by police officers, who were a “terror to . . . all colored people or loyal men.”¹⁷⁶ In North Carolina, the Joint Committee learned, the police “have taken negroes, tied them up by the thumbs, and whipped them unmercifully.”¹⁷⁷ A Freedman’s Bureau officer recounted an incident in which “[a] sergeant of the local police . . . brutally wounded a freedmen when in his custody, and while the man’s arms were tied, by striking him on the head with his gun, coming up behind his back; the freedman having committed no offense whatever.”¹⁷⁸ This beating was so bad that “[t]his freedman lay in the hospital, . . . at the point of death, for several weeks.”¹⁷⁹ The same sergeant, after a search of a freedman’s house turned up no evidence of wrongdoing, “whipped him so that from his neck to his hips, his back was one mass of gashes.”¹⁸⁰ Another witness told the Joint Committee about how a “policeman felled [a] woman senseless to the ground with his baton” and about another incident in which a “negro man was so beaten by . . . policemen that we had to take him to our hospital for treatment.”¹⁸¹ A Freedman’s Bureau officer from New Orleans recounted that, to rousing cheers, “one of the police officers of the city, in front of the same block where my headquarters were, went up and down the street knocking in the head every negro man, woman, and child that he met, tumbling some of them into the gutter, and knocking others upon the sidewalks.”¹⁸²

The Joint Committee also learned that state “militia organizations” are “one of the greatest evils existing in the southern States for the freedmen. They give the color of law to their violent, unjust, and sometimes inhuman proceedings.”¹⁸³ Southern white militia, like Southern police forces, “hunted, beat, and shot” people of color “so indiscriminately.”¹⁸⁴ Freedmen’s Bureau officials told the Joint Committee how the militia was “particularly adapted to hunting, flogging, and killing colored people,”¹⁸⁵ detailing instances in which Black people were “hung and skinned,” “literally cut to pieces,” “inhuman[ly] flogg[ed],” “shamefully beaten” and “shot.”¹⁸⁶

Police brutality and murder flared up in the summer of 1866 as Congress completed its work on the Fourteenth Amendment and the American people considered whether to ratify the Amendment. These tragic events served as a reminder that state governments would not respect the fundamental rights of Black Americans and that racial violence and discriminatory policing would continue unchecked without new constitutional protections. These bloody events, as Harper’s Weekly put it, accomplished “more than the abstract arguments of a year to impress on the country the conviction that we cannot wisely hope for peace in the South so long as inequality of personal and political liberty endure.”¹⁸⁷

In Memphis, Tennessee, on May 1, 1866, clashes between recently mustered out Black soldiers and white police officers exploded in three days of racial violence.¹⁸⁸ The result was a killing spree led by the Memphis police force to exterminate Black people and destroy the community they had built. The conflict, as a subsequent congressional investigation concluded, “was seized upon as a pretext for an organized and

“Police brutality and murder flared up in the summer of 1866 as Congress completed its work on the Fourteenth Amendment and the American people considered whether to ratify the Amendment. These tragic events served as a reminder that state governments would not respect the fundamental rights of Black Americans and that racial violence and discriminatory policing would continue unchecked without new constitutional protections.”

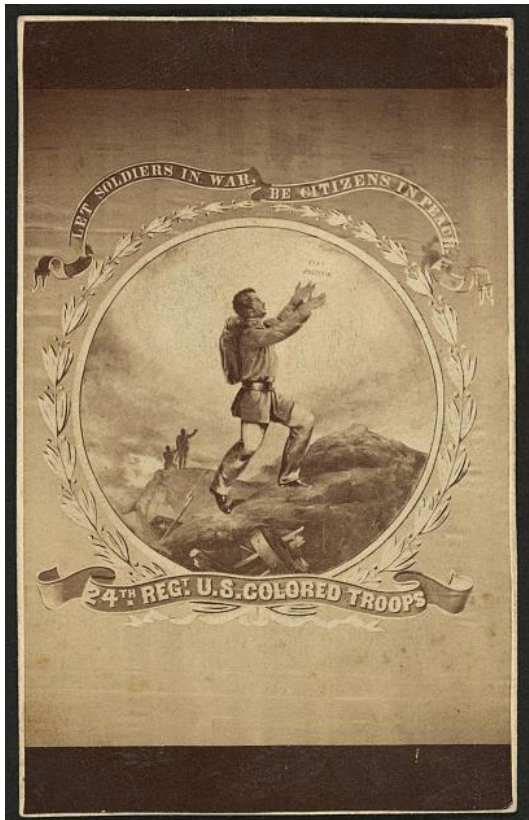
bloody massacre of the colored people of Memphis” and was “led on by sworn officers of the law.”¹⁸⁹ As the investigators found, “[t]he whole evidence discloses the killing of men, women, and children—the innocent, unarmed, and defenceless pleading for their lives and crying for mercy; the wounding, beating, and maltreating of a still greater number; burning, pillaging, and robbing; the consuming of dead bodies in the flames, the burning of dwellings, the attempts to burn up whole families in their houses, and the brutal and revolting ravishings of defenceless and terror-stricken women.”¹⁹⁰

The congressional investigation highlighted the gruesome attacks perpetrated by the Memphis police, an all-white police force that had long abused Black people.¹⁹¹ As the House report explained, “[t]he fact that the chosen guardians of the public peace . . . were found the foremost in the work of murder and pillage, gives a character of infamy to the whole proceeding which is almost without a parallel in all the annals of history.”¹⁹² It detailed one unspeakable act after another: “policemen firing and shooting every negro they met,” “policemen shooting” at Black people and “beating [them] with their pistols and clubs,” high-ranking police officers exhorting the mob that all Black people “ought to be all killed,” and policemen “firing into a hospital.”¹⁹³ Under pretext of effectuating arrests or searching for weapons, police officers brutally raped Black women.¹⁹⁴ The police ransacked houses, broke open doors and trunks, robbed people of hard-earned money, and burnt down schoolhouses and churches.¹⁹⁵ In all these ways “the Memphis massacre had the sanction of official authority; and it is no wonder that the mob, finding itself led by officers of the law, butchered miserably and without resistance every negro it could find.”¹⁹⁶

Twelve weeks later, in New Orleans, local police led another massacre of Black Americans, this one growing out of an attempt to reconvene the Louisiana constitutional convention of 1864 in order to guarantee voting rights to Black Louisianans and establish a new state government.¹⁹⁷ On July 30, 1866, a small cadre of delegates gathered at the Mechanics Institute, joined by a group of Black supporters. Under the pretext of quashing what they viewed as an illegal assembly, the police, joined by a white mob, went on a killing spree. It was, as Maj. Gen. Phillip H. Sheridan wrote, “an absolute massacre by the police,” in which Black people were



Waud, A. R. (1866) *Scenes in Memphis, Tennessee, during the riot. Memphis Tennessee, 1866.*
[Photograph] Retrieved from the Library of Congress, <https://www.loc.gov/item/94507780/>.



(ca. 1865) 24th Regt. U.S. Colored Troops.
Let Soldiers in War, Be Citizens in Peace.
 United States, ca. 1865. [Photograph]
 Retrieved from the Library of Congress,
<https://www.loc.gov/item/2010647924/>.

brutally gunned down, even as they attempted to surrender.¹⁹⁸ By the time federal troops arrived, more than one hundred and fifty Black persons and twenty of their white allies had been killed or wounded.

A congressional committee, once again, investigated and issued a comprehensive report detailing how, on the morning of the convention, “the combined police, headed by officers and firemen, . . . rushed with one will from the different parts of the city towards the Institute, and the work of butchery commenced.”¹⁹⁹ Police officers, who had been armed that morning, were instructed to shoot to kill²⁰⁰ and “the slaughter was permitted until the end was gained.”²⁰¹ As the report laid out in sickening detail, “for several hours, the police and mob, in mutual and bloody emulation, continued the butchery in the hall and on the street, until nearly two hundred people were killed and wounded.”²⁰² “[M]en who were in the hall, terrified by the merciless attacks of the armed police, sought safety by jumping from the windows, . . . and as they jumped were shot by police or citizens. Some, disfigured by wounds, fought their way down stairs to the street, to be shot or beaten to death on the pavement. Colored persons, at distant points in the city, peaceably pursuing their lawful business, were attacked by the police, shot and cruelly beaten.”²⁰³ The scale of the cruelty and terror inflicted is hard to fathom. “[M]en were shot while waving handkerchiefs in token of surrender and submission; white men and

black, with arms uplifted praying for life, were answered by shot and blow from knife and club.”²⁰⁴ Without federal intervention, the report concluded, “the whole body of colored men” would continue to be “hunted like wild beasts, and slaughtered without mercy and with entire impunity from punishment.”²⁰⁵

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

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

The report of the Joint Committee laid out this systematic failure of legal protection, observing that “deep-seated prejudice against color . . . leads to acts of cruelty, oppression, and murder, which the local authorities

are at no pains to prevent or punish.”²⁰⁶ Without the presence of federal troops, Black people “could hardly live in safety” and Unionists “would be obliged to abandon their homes.”²⁰⁷ The Committee collected reams of evidence highlighting the police’s failure to enforce criminal laws on a nondiscriminatory basis.²⁰⁸

Reports flooded in that “the freedmen are exposed to untold hardships and atrocities” and that “combinations of returned rebel soldiers have been formed for the express purpose of persecuting, beating most cruelly, and in some cases actually murdering the returned colored soldiers of the republic,” yet because of the willful blindness of law enforcement, “the civil law affords no remedy at all.”²⁰⁹ In the record built by the Joint Committee, “[w]itness after witness spoke of beatings and woundings, burnings and killings, as well as deprivations of property and earnings and interference with family relations—and the impossibility of redress or protection

except through the United States Army and Freedmen’s Bureau.”²¹⁰ As one Freedmen’s Bureau agent explained, “[o]f the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, and of the very many cases of similar treatment of Union citizens in North Carolina, I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons.”²¹¹ Across the South, the Joint Committee heard, “citizens will not take any steps to arrest the murderers of negroes” and “you cannot trust even the police organized under military orders to do that work.”²¹² In short, “all law that protects the freedman . . . has been withheld from them. *They are absolutely without law.*”²¹³

“Reports flooded in that ‘the freedmen are exposed to untold hardships and atrocities’ and that ‘combinations of returned rebel soldiers have been formed for the express purpose of persecuting, beating most cruelly, and in some cases actually murdering the returned colored soldiers of the republic,’ yet because of the willful blindness of law enforcement, ‘the civil law affords no remedy at all.’”

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

To correct these abuses, the Fourteenth Amendment commanded that no state shall “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” “deprive any person of life, liberty, or property, without due process of law,” or “deny to any person within its jurisdiction the equal protection of the laws.”²¹⁴ This sweeping guarantee of fundamental rights and equality effected a fundamental transformation in the constitutional law governing policing in two respects.

First, the Fourteenth Amendment required states to respect the Fourth Amendment’s guarantee of personal security. Section 1’s overlapping guarantees was written to “forever disable” the states “from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.”²¹⁵ “The great object of the first section of th[e] amendment,” Senator Jacob Howard explained, is “to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”²¹⁶ The Framers affirmed that “there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws,” including the “right to live, the right of personal security, personal liberty, and the right

to acquire and enjoy property.”²¹⁷

Introducing the Fourteenth Amendment in the Senate, Senator Howard stressed that the Amendment would require states to respect the “personal rights guaranteed and secured by the first eight amendments of the Constitution,” including “the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit.”²¹⁸ A bevy of “Reconstruction Congressmen and commentators affirmed Fourth Amendment rights as basic ‘privileges’ and ‘immunities’ that henceforth should never be abridged by any American government.”²¹⁹ Supporters of the Amendment demanded “the Constitutional rights of the citizen; those rights specified and enumerated in the great charter of American liberty” including those that guarantee “*Security to Life, Person and Property*.”²²⁰ The Fourteenth Amendment sought to make “the security of life, person and property, a reality and not a mere sham, all over the land.”²²¹

During the debates in the 39th Congress, members of Congress denounced Southern abuses that denied Black Americans personal security and freedom of movement, subjected them to being stopped or arrested by the police, and, all too often, being sold back into slavery. “What kind of freedom,” Senator Lyman Trumbull asked “is that which the Constitution of the United States guaranties to a man that does not protect him from the lash if he is caught away from home without a pass?”²²² Others described how vagrancy laws that gave the police sweeping powers of arrest made a mockery of the Constitution’s promise of freedom. Senator Henry Wilson argued that “[t]hese freedmen are as free as I am, to work when they please, to play when they please, to go where they please, . . . and to use the product of their labor.”²²³ They had to be treated with “the conscious dignity of a free man.”²²⁴ When Black people “are subject to a system of vagrant laws which sells them into slavery or involuntary servitude, which operates upon them as upon no other part of the community, they are not secured in the rights of freedom.”²²⁵ Many speakers invoked the well-known case of Samuel Hoar, who was expelled from South Carolina in the 1840s when he sought to challenge how the state had “manacled colored seamen on the decks of Massachusetts ships” simply because they were Black.²²⁶

In requiring states to respect the Fourth Amendment’s right to be secure against unreasonable searches and seizures, the Framers of the Fourteenth Amendment rebelled against the broad, discretionary search and seizure powers that Southern governments were using to single out Black people for intrusive searches,

“Like the Founders, the Framers of the Fourteenth Amendment understood that true freedom and personal security could not exist if the police had excessive discretion to search and seize.”

pretextual arrests, and violent seizures. As at the Founding, they viewed such searches and seizures as categorically unreasonable. Like the Founders, the Framers of the Fourteenth Amendment understood that true freedom and personal security could not exist if the police had excessive discretion to search and seize.

To that end, they viewed the requirement of a valid warrant supported by probable cause as crucial. Virtually all of the

police abuses that led to the Fourteenth Amendment involved warrantless searches and seizures, illustrating the dangers of allowing the police to search and seize without any judicial check. As Jacob Howard insisted, states would have to respect the Fourth Amendment’s “right to be exempt” from “any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit.”²²⁷ Howard’s formulation was perhaps too broad.

Some searches—such as searches incident to arrest—did not require a warrant. But Howard’s description captured the basic idea that warrants were understood as a critical check on police overreaching and abuse and thus were generally required.

In applying the Fourth Amendment to the states, the Framers of the Fourteenth Amendment generated new insights as well.

Most significantly, the reconstructed Fourth Amendment was intimately tied to principles of equality. The Framers understood that giving the police excessive discretion licensed discrimination and subordination. Thus, open-ended police power offended not only liberty and personal security, but also equality. The promise of equal citizenship at the core of the Fourteenth Amendment demanded limits on police discretion to search and seize.

Just as important, the Fourteenth Amendment was centrally concerned, in a way the original Fourth Amendment was not, with police violence. The Fourteenth Amendment repudiated what Carl Schurz called rule by “the terrorism of the mob,” “the policeman’s club,” and “the knife of the assassin,”²²⁸ ensuring a remedy against the police “driving away and murdering like outlaws the most faithful friends of the Union of liberty” and “repeating the horrors of Fort Pillow,” a gruesome Civil War massacre of Black soldiers, “on the streets of Memphis and New Orleans.”²²⁹ The Amendment would prevent individuals from “being beaten, maimed, murdered or driven away for exercising the freedom of speech,” as had occurred in New Orleans.²³⁰ The American people ratified the Fourteenth Amendment against the backdrop of horrific instances of police beatings and murder, recognizing that new constitutional protections were necessary to ensure the right to life, basic dignity, and personal security for all regardless of race.

Second, the Fourteenth Amendment added to the Constitution the guarantee of the equal protection of the laws. Both the constitutional command of equality and duty of protection loomed large to the Framers of the Fourteenth Amendment.

The equal protection guarantee “establishes equality before the law,” and “does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged.”²³¹ It forbids states from meting out “one measure of justice . . . to a member of one caste while another and a different measure is meted out to the member of another caste, . . . both bound to obey the same laws.”²³² It demands that “[w]hatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree.”²³³ Against the backdrop of a long list of police abuses, the Fourteenth Amendment’s simple but far-reaching command of equality prohibited all forms of discrimination in the criminal justice system, including all forms of discriminatory policing.

The Fourteenth Amendment’s use of the term “equal protection” was consciously chosen. As Eric Foner has observed, “[i]n the context of the violence sweeping the postwar South, the word ‘protection’; in the Fourteenth Amendment conjured up not simply unequal laws but personal safety.”²³⁴ The Framers understood the right to protection as a basic fundamental right,²³⁵ and in the text of the Equal Protection Clause, they imposed a constitutional obligation on the states to protect all persons equally. States could not turn a blind eye on

criminal acts or private violations of rights committed against people of color or other disfavored groups. The Fourteenth Amendment “h[e]ld over every American citizen, without regard to color, the protecting shield of law” and gave to “the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.”²³⁶ In sum, as framer Samuel Shellabarger later observed, the Fourteenth Amendment mandates “equal laws and protection for all; and whenever a State denies that protection Congress may by law enforce that protection.”²³⁷

The Fourteenth Amendment’s guarantee of equal protection meant that Southern police could not continue to ignore white terroristic violence aimed at people of color. The government had to enforce its criminal laws to protect Black Americans and their allies from murder, rape, robbery, and other offenses.²³⁸

“The Fourteenth Amendment’s guarantee of equal protection meant that Southern police could not continue to ignore white terroristic violence aimed at people of color. The government had to enforce its criminal laws to protect Black Americans and their allies from murder, rape, robbery, and other offenses.”

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

Maintaining Constitutional Accountability

Courts are at the center of our Constitution's system of accountability. The Framers designed "the judicial department" to be a "constitutional check,"²³⁹ reflecting their understanding that "no other body . . . can afford such a protection" against "infringement on the Constitution."²⁴⁰ They did not trust the other branches to police themselves and they therefore empowered the courts to play the essential role of maintaining constitutional accountability. Steeped in the writings of William Blackstone, the Framers understood that rights and remedies must go hand in hand if courts are to play their role of expounding the law and vindicating individual rights. In other words, "a right implies a remedy."²⁴¹

The text of the Fourth Amendment does not address remedies for violations of the right to be secure from unreasonable searches and seizures. But the historical record is clear that the Framers viewed civil suits against law enforcement officers as a critical check on abusive searching and seizing by the government. This was one of the central lessons of *Wilkes* and other cases of the 1760s, in which juries awarded tort damages to individuals whose homes were invaded or whose papers were searched by the Crown.²⁴² These cases put the role of the jury in awarding damages and limiting abuse of power by the government center stage.

As *Wilkes'* counsel urged, "the constitution of our country had been so fatally wounded, that it called aloud for the redress of a jury of Englishmen."²⁴³ The jury, he insisted, should perform its role of "instructing those great officers in their duty, and that they (the jury) would now erect a great sea mark, by which our State pilots might avoid, for the future, those rocks upon which they now lay shipwrecked."²⁴⁴ The jury's award of £4000 in damages, "roughly equivalent to £500,000 today," vindicated these arguments.²⁴⁵ Indeed, in *Wilkes*, the court recognized the jury's authority to award damages "not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future."²⁴⁶ These cases taught the Founding generation a powerful lesson: juries could help prevent unreasonable searches and seizures by making officers pay when they abused their authority.

The Framers did not forget these lessons when they debated adding a search-and-seizure guarantee to the Constitution. Those urging new protections consistently emphasized the role of and need for, civil damage remedies to curb the unbridled discretion of federal officers. For example, a Maryland Anti-Federalist essayist, writing under the name of *A Farmer*, insisted on the constitutional checking function performed by civil suits. "[N]o remedy has been yet found equal to the task of deterring and curbing the insolence of office, but a jury—It has become an invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression."²⁴⁷

Elsewhere, too, Anti-Federalists highlighted the need for civil damage remedies to prevent abuse of government power. During debates in Pennsylvania in 1787, one Anti-Federalist wrote that, if "a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift . . . a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from committing the same."²⁴⁸ Likewise, in Massachusetts, the essayist Hampden insisted that "without [a jury], in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens."²⁴⁹ The Fourth Amendment was added against the backdrop of a system that

allowed individuals to bring civil suits to redress unlawful searches and seizures by the government.

Eight decades later, in the wake of the Fourteenth Amendment's ratification, the Framers of the Fourteenth Amendment built on this same system of remedies. In 1871, Congress enacted 42 U.S.C. § 1983 to enforce the Fourteenth Amendment. To this day, this remains one of the most important federal statutes ensuring that individuals have their day in court when state actors violate federal rights. Against the backdrop of systematic discrimination in the criminal justice system,²⁵⁰ Congress provided that an "injured party should have an original action in our federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights."²⁵¹ This would "carry into execution the guarantees of the Constitution in favor of personal security and personal rights."²⁵² As Senator Henry Wilson observed, "[w]hat legislation could be more appropriate than to give a person injured by another under color of such unconstitutional state laws a remedy by civil action?"²⁵³ In enacting Section 1983, Congress concluded that it was necessary to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired," and ensure the power of the judiciary

"In 1871, Congress enacted 42 U.S.C. § 1983 to enforce the Fourteenth Amendment. To this day, this remains one of the most important federal statutes ensuring that individuals have their day in court when state actors violate federal rights."

to "hear with impartial attention the complaints of those who are denied redress elsewhere."²⁵⁴ In this respect, Section 1983 reflected the Framers' vision that "judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free Government."²⁵⁵

Our Constitution's Framers entrusted the courts with the responsibility to police the police. But,

as the next section shows, the Supreme Court has time and again deferred to the police and swelled their power, leaving us without the security our Constitution promised. The next section charts the ways in which the Court has failed us.

The Document v. The Doctrine: The Supreme Court's Failure to Honor Our Whole Constitutional Story of Race and Policing

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

The Court's modern Fourth Amendment jurisprudence is organized around the idea that "the ultimate measure" of the constitutionality of a government search or seizure is "reasonableness."²⁵⁶ The Court's governing doctrinal test requires "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."²⁵⁷ This ad hoc balancing test "eschew[s] the Fourth Amendment's foundational principles, instead using social needs, wants, and goals as reasons for decision."²⁵⁸ And as a result, fundamental Fourth Amendment safeguards, such as the need to check excessive discretion and prevent arbitrary and discriminatory policing, often play virtually no role in the Court's conception of Fourth Amendment reasonableness. Instead, reasonableness review is simply a matter of comparing costs and benefits. This subjective, easily manipulable balancing test has swelled police power.

Indeed, rather than serving as a check on the police, the Supreme Court has, all too often, permitted discretionary searches and seizures, dispensed with the requirement of a warrant and probable cause, and diluted the protection afforded by the Fourth Amendment's right to be secure from unreasonable searches and seizures. The Court has balanced away the Fourth Amendment's core safeguard against excessive police discretion to search and seize, often making Fourth Amendment reasonableness review into a toothless

"By giving the police new discretionary powers, the Court has enabled discriminatory policing, racial profiling, and police violence. It has turned a blind eye to the Fourteenth Amendment's transformative guarantees designed to put a stop to such practices and erased the Fourteenth Amendment from the constitutional narrative of policing."

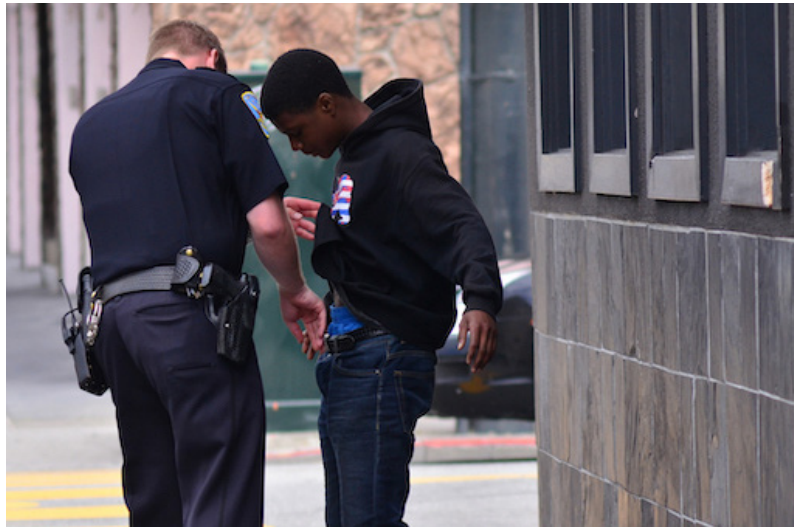
inquiry, akin to the rational basis test. By giving the police new discretionary powers, the Court has enabled discriminatory policing, racial profiling, and police violence. It has turned a blind eye to the Fourteenth Amendment's transformative guarantees designed to put a stop to such practices and erased the Fourteenth Amendment from the constitutional narrative of policing.

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

1. *The Right To Be Secure in the Streets*

The Fourteenth Amendment promised security in the streets to all without regard to race, ensuring Black Americans the same rights as white people to freely walk the streets. The Amendment sought to prevent Southern police from enforcing vagrancy laws to curtail Black people's freedom of movement, stop them, and arrest them en masse. For a brief moment, the nation kept the promises contained in the Fourteenth Amendment.

But “[w]hen whites after Reconstruction moved on every front to solidify their supremacy, nowhere was the reassertion of power over black lives more evident than in the machinery of the police and the criminal justice system.”²⁵⁹ Well into the mid-1960s, police continued to use vagrancy laws to subordinate Black Americans.²⁶⁰ Anyone who bucked Jim Crow would find themselves under arrest. Vagrancy laws would eventually be declared unconstitutionally vague



Rafael Ben-Ari/Shutterstock.com

because of the “unfettered discretion” they gave the police.²⁶¹ But they would soon be replaced by a new tool: stop and frisk.²⁶² Just as vagrancy laws replaced slave patrols, stop-and-frisk replaced vagrancy laws as a means of controlling Black people and enforcing their subordinate status.²⁶³

*Terry v. Ohio*²⁶⁴ ushered in this change. In one of the Court’s most important Fourth Amendment rulings, *Terry* upheld the constitutionality of stop-and-frisk and dispensed entirely with the Amendment’s foundational requirements of a warrant and probable cause. This key move contained the seeds for a massive expansion in the power of the police to invade the personal security of people—particularly people of color—in the streets and elsewhere.

The linchpin of Chief Justice Earl Warren’s opinion was that stop-and-frisk “must be tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures.”²⁶⁵ Rather than hewing to the requirement of probable cause, Warren employed a balancing test that gave sweeping new powers to the police with no clear limits. While the Court recognized that stop-and-frisk “is a serious intrusion upon the sanctity of the person” and could give rise to “wholesale harassment” of people of color, it upheld the practice under a very forgiving standard.²⁶⁶ A police officer only had to “point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.”²⁶⁷ *Terry* permitted police to frisk suspects for weapons “for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”²⁶⁸ By dispensing with probable cause in favor of an easily met reasonable suspicion standard, *Terry* opened the door to a wide swathe of police intrusion on freedom of movement on the streets. As Justice William O. Douglas observed in a prescient dissent, “if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can ‘seize’ and ‘search’ him in their discretion, we enter a new regime.”²⁶⁹

Terry employed its balancing approach without any sensitivity to the Constitution's text, history, and values. Chief Justice Warren took it as a given that the Court could balance individual and governmental interests on a clean slate. It gave no consideration at all to the text and history of the Fourteenth Amendment, including the Framers' concerns about vagrancy laws that gave police the power to sweep Black Americans from the streets. A Court that took seriously the Fourteenth Amendment's text and history would not have approved stop-and-frisk on the basis of a loose constitutional standard that invited racial discrimination. It would not have accepted a constitutional rule that permitted the police to target people of color for arbitrary, degrading, and humiliating intrusions on a regular basis.²⁷⁰

“By permitting such searches on such a lenient standard, the Court sanctioned lots of intrusions—mostly on people of color—that are unlikely to lead to evidence of a crime.”

In *Terry*, Chief Justice Warren described the officer's stop-and-frisk as simply good police practice, insisting that “the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do.”²⁷¹ But the Court did not sufficiently consider the system-wide costs of permitting police stops on such a

forgiving standard. By jettisoning probable cause, *Terry* made it easy for the police to stop and frisk people with virtually no evidentiary foundation. By permitting such searches on such a lenient standard, the Court sanctioned lots of intrusions—mostly on people of color—that are unlikely to lead to evidence of a crime.²⁷²

Over time, in cases decided by the Burger and Rehnquist Courts, *Terry*'s standard—forgiving from the start—became even more so. In a trio of cases decided by then-Justice and Chief Justice William Rehnquist, the Court moved the law sharply in the direction of increasing police authority. The original justification for stop-and-frisk—protecting officer safety—gave way to a more general interest in crime control.²⁷³

In 1972, in *Adams v. Williams*,²⁷⁴ the Court upheld a frisk of a suspect based on an anonymous tip. The majority held that “[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.”²⁷⁵ In 1989, in *United States v. Sokolow*,²⁷⁶ the Court approved a *Terry* stop of a suspect in an airport based on a drug courier profile. It did not matter that the evidence on which the officer relied to justify the stop “[wa]s quite consistent with innocent travel.”²⁷⁷ All the officer needed was “reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.”²⁷⁸ The match with a drug courier profile sufficed, even though, as Justice Marshall observed in dissent, such profiles could be easily manipulated to allow the police to stop whoever they wanted.²⁷⁹

And, in 2000, in *Illinois v. Wardlow*,²⁸⁰ the Court, by a 5-4 vote, approved a stop-and-frisk based on a suspect's “unprovoked flight” in a high crime area. Even if “the conduct justifying the stop was ambiguous and susceptible of an innocent explanation,” police officers could “detain the individuals to resolve the ambiguity.”²⁸¹ As Chief Justice Rehnquist wrote, “*Terry* accepts the risk that officers may stop innocent people.”²⁸² *Wardlow*'s presence in an “area of heavy narcotics trafficking” together with his “unprovoked flight upon noticing the police” permitted the police to stop and frisk him for weapons.²⁸³ *Wardlow* gives the police more power to stop and frisk individuals in a high-crime neighborhood, brushing aside the dissent's argument that “some citizens,

particularly minorities” might flee from the police out of concern that “contact with the police can itself be dangerous.”²⁸⁴ The toxic role of race in policing plays no role in *Terry*’s construction of Fourth Amendment reasonableness.²⁸⁵

The Court has reviewed stop-and-frisk in the context of individual encounters, but “in reality stop-and-frisk is typically carried out by a police force en masse as a program” by “proactively policing people that they suspect could be offenders.”²⁸⁶ That is what happened in New York City from 2004-2012, when the New York Police Department conducted more than four million stops and two million frisks, almost all of which were on Black or Brown people, and which turned up at best paltry evidence of criminality.²⁸⁷ No weapon was found in 98.5% of the frisks; nearly 90% of people stopped were released without further police action.²⁸⁸ The police targeted Black and Brown people, in the words of NYPD Commissioner Ray Kelly, “to instill fear in them, every time they leave their home, they could be stopped by the police.”²⁸⁹ This is what stop-and-frisk has become today as the result of the Supreme Court’s abandonment of fundamental Fourth and Fourteenth Amendment principles.²⁹⁰

Stop-and-frisk is just one part of the story. The Supreme Court has also given the police sweeping powers to arrest even for very minor crimes without a warrant.

In 2001, in *Atwater v. City of Lago Vista*,²⁹¹ the Supreme Court held, by a 5-4 vote, that the Fourth Amendment permitted the police to make warrantless arrests for minor offenses only punishable by a fine. The police arrested Gail Atwater for driving without her seatbelt fastened, an offense that was punishable by a fine of \$25-50 dollars. The Court called the arrest a “pointless indignity,” but nevertheless upheld it, concluding that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”²⁹²

Atwater exemplifies the modern Supreme Court’s tendency to treat eighteenth-century common law and practice as dispositive of what constitutes a reasonable search or seizure.²⁹³ The Court emphasized that, “[d]uring the period leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures, like Parliament before them, regularly authorized peace officers to make warrantless misdemeanor arrests.”²⁹⁴ Based on this practice, the Court concluded that “the Fourth Amendment, as originally understood,” did not forbid “local peace officers [from] arrest[ing] without a warrant for misdemeanors not amounting to or involving breach of the peace.”²⁹⁵

Atwater’s account of Framing-era history is, at best, questionable. As Thomas Davies has argued, “[i]f one asks whether there were any framing-era sources that supported unlimited discretionary warrantless arrest authority for even the most minor nonbreach offenses . . . the answer is plainly negative. All the framing-era authorities limited arrest authority to something less—a good deal less—than all nonbreach misdemeanors.”²⁹⁶

Atwater’s more significant error was making eighteenth-century practice the touchstone of constitutional meaning.²⁹⁷ By focusing on the practice in 1791, the majority brushed aside the original meaning of the Fourth Amendment, which curbed excessive law enforcement discretion. In so doing, the Court blessed a truly sweeping power to arrest, even for the most minor offenses. It licensed what the majority called “gratuitous humiliations” and “pointless indignity” and, as the dissent observed, “cloak[ed]” them in the “mantle of reasonableness.”²⁹⁸

By beginning and ending its analysis in 1791, *Atwater* gave no consideration to the Fourteenth Amendment. The Framers of the Fourteenth Amendment were concerned that Southern police officers were arresting Black people for a host of trivial crimes.²⁹⁹ But none of that history is discussed or accounted for in the *Atwater* ruling even though the case involved a warrantless arrest made by a municipal police officer. *Atwater*'s holding would permit arrests for a wide range of extremely minor offenses, giving police officers virtually unbridled discretion to use "a relatively minor traffic infraction" to "serve as an excuse for stopping and harassing" people of color.³⁰⁰

Indeed, many aspects of eighteenth-century common law and practice are particularly difficult to square with the Fourteenth Amendment's text, history, and values. For example, as David Sklansky notes, eighteenth-century search-and-seizure rules on both sides of the Atlantic "systematically codified class privilege,"³⁰¹ such as by allowing general searches to enforce vagrancy laws against poor people,³⁰² who were often dismissed as "pests of society."³⁰³ Such rules, of course, did not survive the Fourteenth Amendment, which promised personal security for all against the backdrop of vagrancy laws that were being employed to arrest Black people en masse. The Fourteenth Amendment affirmed "the absolute equality of rights of the whole people, high and low, rich and poor, white and black."³⁰⁴

The *Atwater* majority justified creating a sweeping warrantless arrest power by insisting that "a responsible Fourth Amendment balance" requires "readily administrable rules," putting the thumb on the scales in favor of increased police authority.³⁰⁵ The Court elevated the desire for clear rules over the Fourth Amendment's fundamental concerns of ensuring personal security for all. *Atwater* rigged the Fourth Amendment balancing inquiry—the heart of the modern conception of Fourth Amendment reasonableness—in favor of the police. The police officer's need for clear rules trumped the individual's right to avoid a pointless seizure that resulted in more jail time than would have been imposed on conviction.

Every *Terry* stop-and-frisk or arrest creates the potential for a tragic violent encounter between the police and the populace. As Devon Carbado has written, this "'front-end' police conduct—which Fourth Amendment law enables—is often the predicate to 'back end' police violence—which Fourth Amendment law should help to prevent."³⁰⁶ But Fourth Amendment law has not been preventing it. Instead, in the hands of the Supreme Court, the Fourth Amendment has done little to check police violence. The Court has erased police violence from our whole constitutional story of policing. The Court's cases have never recognized that ending brutal police violence was at the heart of the Fourteenth Amendment's limits on abuse of power by the states.

"The Court has erased police violence from our whole constitutional story of policing. The Court's cases have never recognized that ending brutal police violence was at the heart of the Fourteenth Amendment's limits on abuse of power by the states."

Police violence should run afoul of the Constitution, but it rarely does because the open-ended test the Court uses is vague and deferential to the police. In 1989, in *Graham v. Connor*,³⁰⁷ the Supreme Court, in an opinion by Chief Justice Rehnquist, held that "all claims that law enforcement officers have used excessive force" must be "analyzed under the Fourth Amendment and its 'reasonableness' standard."³⁰⁸ This requires "careful

balancing” and recognition that “the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”³⁰⁹ Further, according to the Court, “[t]he ‘reasonableness’ must be judged from the perspective of a reasonable officer on the scene,” and “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”³¹⁰

So much for the need for clear rules. The law that governs police violence is a vague and indeterminate mess, requiring courts to “slosh [their] way through the fact bound morass of ‘reasonableness.’”³¹¹ The Court’s first major excessive force case held that a “police officer may not seize an unarmed, nondangerous suspect by shooting him dead.”³¹² But, since then, it has all been downhill, and the lack of clear rules makes it much harder to hold police officers accountable when they engage in violent, unjustified acts.³¹³ The Court’s doctrine is a colossal failure, opening the door to systemic police violence, much of it directed against people of color.

2. The Right To Be Secure on the Road

Driving on the open road is a potent symbol of freedom, but the very mobility that we celebrate also allows criminals to get away and hide evidence. Rather than striking a sensible accommodation between freedom of movement and crime prevention, the Supreme Court has diluted the Fourth Amendment’s promise of security on the road, making “driving, or even just being in a car” the “most policed aspect of everyday life.”³¹⁴ The Court has given the police extremely broad power over motorists and their passengers, licensing arbitrary stops and systematic racial profiling of people of color. On the road, our personal security exists at the whim of the police. Virtually anytime they want, the police can stop a car,³¹⁵ order the driver and passengers out of the car,³¹⁶ and pressure them into consenting to a further search.³¹⁷ Sadly, these encounters all too often go badly awry, ending with another young Black man gunned down.³¹⁸ Because traffic laws are so extensive that virtually everyone is violating them some of the time, traffic laws, like the general warrants the Framers detested, give virtually unfettered authority to the police.³¹⁹ Rather than checking police discretion, the



Photo spirit/Shutterstock.com

Supreme Court has given the police a blank check to stop anyone who might have violated a traffic law, no matter how insignificant.

On the road, as in the streets, *Terry* looms large. The Supreme Court has held that, under *Terry*, police may stop a car “when a law enforcement officer has ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’”³²⁰ In *Navarette v. California*,³²¹ a patrol officer stopped a pick-up truck on the basis of an anonymous 911 caller’s report. The truck matched

the description of a vehicle that, according to the caller, had run her off the road. That was enough, the majority held, to create a reasonable suspicion of drunken driving and justify a *Terry* stop.³²² It did not matter that, when police tailed the truck for five minutes, they saw no evidence of drunken driving.³²³ This is an incredibly broad license to stop, that, as Justice Antonin Scalia argued in dissent, could not be squared with “the Framers’ [concept]” of “a people secure from unreasonable searches and seizures.”³²⁴ All a 911 caller “need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police.”³²⁵ It is worth remembering that the original rationale for *Terry* was to protect officers from violence. *Navarette* shows how far we have come from that initial justification.

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

In 1976, in *United States v. Martinez-Fuerte*,³²⁹ in yet another expansion of *Terry*, the Court held that, at fixed checkpoints more than 50 miles from the U.S.-Mexico border, an officer may stop a vehicle “for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens.”³³⁰ *Martinez-Fuerte* reasoned that a stop even on something as slight as reasonable suspicion “would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car.”³³¹ In the majority’s view, “the Fourth Amendment imposes no irreducible requirement of such suspicion.”³³² Explicitly upholding race-based stops once again, the Court was untroubled that stops would be “made largely on the basis of apparent Mexican ancestry,” insisting that “Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved.”³³³ Under *Terry*’s balancing regime, every Fourth and Fourteenth Amendment protection can be balanced away.

“Since the early 20th century, Black motorists have experienced ‘traffic stops for minor or fabricated charges that left them terrified’ in some cases and ‘falsely arrested, beaten, or shot’ in others.”

This extremely broad discretion results in systematic racial profiling on our nation’s roads. This is hardly a new phenomenon. Since the early 20th century, Black motorists have experienced “traffic stops for minor or fabricated charges that left them terrified” in some cases and “falsely arrested, beaten, or shot” in others.³³⁴ In the 1940s, Thurgood Marshall was almost lynched following

a pretextual traffic stop.³³⁵ A decade later, in the midst of the Montgomery bus boycott, police officers arrested

Dr. Martin Luther King for a minor traffic violation in order to intimidate him.³³⁶ And discriminatory traffic stops remain an enduring problem: as study after study has shown, “racial disparities in traffic stops remain rampant.”³³⁷ But according to the Supreme Court, pretextual traffic stops pose no Fourth Amendment issue. In *Whren v. United States*,³³⁸ the police were patrolling a high-crime area when their suspicions became aroused by a truck with temporary license plates. When the truck made a right turn without signaling, the officers stopped the truck and discovered crack cocaine in Whren’s hands. Although the traffic stop was pretextual and violated police policy, the Court unanimously held that it was reasonable under the Fourth Amendment. The Court held that the “constitutional reasonableness of traffic stops” depends on “ordinary, probable-cause Fourth Amendment analysis,” not the “actual motivations of the individual officers involved.”³³⁹ Across the board, “probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police conduct.”³⁴⁰ Far from constraining the police, probable cause in this context operates as “a lever to initiate an arbitrary seizure” and “insulate[] the decision from judicial review.”³⁴¹

Justice Scalia’s opinion in *Whren* recognized that, in other contexts, searches and seizures were so invasive of Fourth Amendment interests that probable cause alone did not make them reasonable. But he saw no constitutional problem in giving police close to unfettered power to stop individuals for traffic violations. *Whren* thus turned a blind eye to the Fourth Amendment’s fundamental goal of checking police discretion. It ignored that such unchecked discretion inevitably breeds arbitrariness and discrimination. *Whren*’s version of Fourth Amendment reasonableness, which is supposed to consider all circumstances, ignored race entirely.³⁴² *Whren* illustrates the Court’s continuing blindness to race, even as it systematically infects policing. Scalia relegated claims of discriminatory policing to the Equal Protection Clause, even as he ignored the virtually insurmountable hurdles to a successful equal protection claim.³⁴³

3. The Right To Be Secure in School

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

*New Jersey v. T.L.O.*³⁴⁷ jumpstarted this transformation. In that case, a high school assistant principal, who was investigating two girls smoking cigarettes in a bathroom, conducted a search of a student’s purse, first for cigarettes, and then for drugs. When the search

“The ‘special needs’ doctrine has transformed policing in school, giving school authorities broad powers to search and seize students, sometimes without any suspicion at all. This has fueled the school-to-prison pipeline and subjected students to a host of intrusive searches in the name of maintaining law and order.”

revealed both evidence of drugs and drug dealing, the principal turned the evidence over to the police. The Supreme Court upheld the search, announcing a new constitutional standard giving broad powers to school officials to search and seize without a warrant or probable cause. *T.L.O.* made the same move as *Terry*: it jettisoned basic Fourth Amendment concepts of a warrant and probable cause and replaced them with a malleable balancing test that makes it easy for courts to trade away the individual's right to be secure.

The *T.L.O.* Court held that the warrant and probable cause requirements were "unsuited to the school environment," insisting that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."³⁴⁸ As in *Terry*, *T.L.O.* held that searching a person's belongings was a search, but that reasonable suspicion would suffice to justify it. Probable cause, six justices concluded, "is not an irreducible requirement of a valid search."³⁴⁹ School authorities would be spared "the necessity of schooling themselves in the niceties of probable cause" and permitted to search and seize "according to the dictates of reason and common sense."³⁵⁰

Next the Court validated suspicionless searches of wide segments of the student body. In *Vernonia School District 47J v. Acton*,³⁵¹ decided in 1995 and *Board of Education v. Earls*,³⁵² decided in 2002, the Court held that it was constitutionally reasonable to require all student athletes and students engaged in other competitive extracurricular activities to be tested for drugs. Dissenting in *Vernonia*, Justice O'Connor looked to the Fourth Amendment's text and history and concluded that "mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment."³⁵³ But narrow majorities dismissed the relevance of this history. As Justice Clarence Thomas observed in *Earls*, "we have long held that 'the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.'"³⁵⁴ In reaching this result, the Court's majorities drew explicitly on past rulings that had permitted suspicionless car stops to enforce immigration laws at the border. One Fourth Amendment evasion begat another.

Under *T.L.O.*'s forgiving standard, students have been subjected to all manner of intrusive, humiliating searches and seizures. In one recent case, a federal court of appeals upheld an officer's handcuffing of a seven-year-old Black child for twenty-minutes, insisting that the boy's unruly behavior justified the use of handcuffs.³⁵⁵ In the court's view, there was nothing constitutionally unreasonable in treating a little boy as a common criminal simply because he had an emotional outburst at school. Even strip searches may be permissible if school officials have a colorable basis for believing that students are hiding drugs in their underwear. In 2009, in *Safford Unified School District v. Redding*,³⁵⁶ the Supreme Court held that school officials violated the Fourth Amendment by searching the bra and underpants of a thirteen-year-old girl for ibuprofen pills. The Court did not forbid the strip search of a student, but simply held that "the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts," and, in *Redding*'s case, there was none.³⁵⁷ Indeed, even affording a "high degree of deference" to school officials, there was no reason to think that she was "hiding common painkillers in her underwear."³⁵⁸ And notwithstanding that, seven justices held that *Redding*'s suit had to be dismissed under the doctrine of qualified immunity because it was not clear how *T.L.O.* applied to strip searches.³⁵⁹ *Redding* invalidated an obvious abuse of power, but left school officials with a troubling degree of authority.

School officials deserve broad authority to maintain discipline, but the Court's cases have failed to give due

weight to the rights secured by our foundational charter. The Court has consistently exaggerated the strength of the governmental interests at stake and downgraded the individual's right to security, rigging the balancing test to favor the government. An unadorned subjective balancing test is a recipe for inflating police power. Here, as elsewhere, we need rules that actually check official discretion, limit arbitrary and discriminatory searches and seizures, and ensure some real protection for our right to be secure.

B. The Erasure of Equal Protection

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

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

In 1873, in *Colfax*, Louisiana, in what Eric Foner has called the "bloodiest single act of carnage in all of Reconstruction,"³⁶⁰ a white mob slaughtered scores of Black people, seeking to retake political power by

"The Supreme Court has all but erased equal protection as a constraint on policing. Equal protection, when it comes to policing, no longer protects."

murdering their opposition. Three years later, in *United States v. Cruikshank*,³⁶¹ the Supreme Court overturned federal convictions of three members of the mob and held that the federal government lacked the power to protect Black Americans from white terrorists. *Cruikshank* gutted one of the key promises of the Fourteenth Amendment—the states' constitutional obligation to protect individuals from private

violence—and gave the Klan and other white terror groups the greenlight to use terror and violence to bring down Reconstruction. In the wake of *Cruikshank*, thousands of Black people were dead. So was the constitutional concept that states had to protect Black and white Americans equally from private violence.³⁶²

Cruikshank held that the Fourteenth Amendment's guarantee of equal protection "does not . . . add any thing to the rights one citizen has under the Constitution against another."³⁶³ Because the murderers were private individuals, the federal government could not intervene. The duty of protection, the Court said, "was originally assumed by the States; and it still remains there."³⁶⁴ The Court did not even consider the argument that the federal government was enforcing the guarantee of equal protection by bringing charges in the face of the state's refusal to bring the killers to justice. In an 1883 sequel, *United States v. Harris*,³⁶⁵ the Court threw out federal charges against R.G. Harris and nineteen others for lynching four Black men in Tennessee. *Cruikshank* and *Harris* permitted unchecked terror, squelched Black Americans' hopes of freedom, equal citizenship, and equal participation in democracy, and turned a blind eye to the text and history of the Fourteenth Amendment. They gave police and prosecutors the power to choose to enforce the law in racially biased ways.

The post-Reconstruction Court eliminated the right to protection and disabled Congress from stepping in when



states turned a blind eye to terror against Black people. The modern Court has extended these cases in a series of decisions that have left women unprotected against sexual assault and domestic violence.³⁶⁶ Today what is “deep[ly]-rooted” is not the constitutional duty of protection, but “law-enforcement discretion.”³⁶⁷ The police have the power to pick and choose how they enforce the law. The result is a criminal justice system that has “long failed to place black injuries and the loss of black lives at the heart of its response when mobilizing the law.”³⁶⁸ Not only that. The modern Supreme Court has made things much worse by virtually erasing the Equal Protection Clause as a constraint on policing. The basic problem lies in equal protection doctrine’s requirement of a discriminatory animus or purpose—a standard that dooms virtually all challenges to discriminatory policing because it is so difficult to prove.³⁶⁹ In a number of different contexts, the Court has set an incredibly high bar, repeatedly turning away constitutional challenges to discretionary decisions made by law enforcement.

In 1987, in *McCleskey v. Kemp*,³⁷⁰ the Supreme Court, by a 5-4 vote, rejected a death row inmate’s argument that Georgia’s administration of the death penalty was racially biased. McCleskey’s lawyers relied on a detailed statistical study, which, controlling for hundreds of variables, demonstrated that the race of the defendant



Black Lives Matter Protest in Washington D.C., June 2020. Koshu Kunii/Unsplash.com

and the race of the victim played a substantial role in determining who lived and who died. Defendants who killed a white person were more likely to receive the death penalty than those who killed a Black person. Black persons charged with the murder of a white person were most likely to get the ultimate punishment of death. But the majority brushed aside these findings, insisting that McCleskey needed to show that “racial considerations played a part in his sentence.”³⁷¹ The fact that McCleskey challenged discretionary decisions, the majority said, demanded a particularly high burden of proof. “Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.”³⁷² In the tug of war between discretion and discrimination, discretion won. Equal protection gave way to prosecutors’ and juries’ broad discretion.

In 1996, in *United States v. Armstrong*,³⁷³ the Court set a high bar for proving an equal protection claim once again. Armstrong, indicted on crack cocaine drug conspiracy charges, sought discovery to prove selective prosecution, stressing that every crack case filed by federal prosecutors in the district had been against a Black defendant. The Court held that Armstrong was not entitled to discovery. The “demanding” standard required a showing of discriminatory purpose and that “similarly situated individuals of a different race were not prosecuted.”³⁷⁴ Armstrong had to have “clear evidence” that similarly-situated white persons could have been prosecuted, but were not.³⁷⁵ Failing that, he could not even obtain discovery. In other words, a criminal defendant cannot get the discovery he needs to prove that he has an equal protection claim unless he can make out a compelling equal protection claim without any discovery. This Catch-22 makes such claims a losing proposition.³⁷⁶

Whren held open the possibility of an equal protection claim, but, as these cases illustrate, equal protection doctrine is a dead-end under these stingy standards. The difficulty of proving either a racial classification or a discriminatory racial purpose or animus makes it incredibly difficult to mount any equal protection claim.³⁷⁷ Modern equal protection law is blind to the reality that, due to explicit or implicit bias, police stop, search, beat up, and kill people of color based on racial fears and stereotypes.³⁷⁸ Current equal protection law offers no tools to smoke out this kind of unconstitutional bias. It permits policing based on racial profiling and stereotypes to fester.³⁷⁹

“Modern equal protection law is blind to the reality that, due to explicit or implicit bias, police stop, search, beat up, and kill people of color based on racial fears and stereotypes.”

Contrast *McCleskey* and *Armstrong*, in which the Court’s incredibly high threshold has allowed discrimination to flourish, with what the Court has done in its cases limiting racially discriminatory peremptory strikes, where it has had at least some measure of success in enforcing the equal protection guarantee and limiting the unfettered discretion of prosecutors.³⁸⁰ Beginning with *Batson v. Kentucky*, the Court devised a burden shifting framework that allows a criminal defendant to rely on statistical and other evidence to establish a prime facie case of racial discrimination and gives him or her the opportunity to show that the reason offered by the prosecutor for using a peremptory strike was a pretext for discrimination. This framework, while not without its problems,³⁸¹ helps ensure meaningful enforcement of the equal protection command, responding to the “practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences.”³⁸² But nothing like this exists in the policing context. Under current doctrine, the Court has erased the equal protection guarantee as a real constraint on policing.

The case of *Brown v. City of Oneonta*³⁸³ illustrates the sorry state of equal protection doctrine when it comes to policing. In *Brown*, the police attempted to apprehend a suspect by stopping and questioning every young Black man in a small New York town following a break-in and attack in the home of an elderly woman. The woman who had been attacked told the police that she believed that her assailant was a young Black man and that he had cut his hand as they struggled. Based on this information, police contacted the state university to obtain a list of its Black students and then, with the list in hand, conducted a sweep of the entire Black community of Oneonta, stopping and questioning more than two hundred Black persons, including at least one woman, to examine their hands. The Second Circuit upheld the racial sweep, holding that the sweep was “race-neutral on its face” because it was based on a “physical description given by the victim of a crime.”³⁸⁴

Brown allows the police to stop and harass every member of a town’s Black community based on a crime victim’s description. It is hard to imagine a more vivid demonstration of how little purchase equal protection principles have when it comes to policing. Black Americans can be stopped en masse, as they have since the days of slavery, in a way that white people never have. This mass sweep should have been treated as a racial classification: the police elevated race above all else and subjected the town’s Black community to intrusive, intimidating stops to examine their hands for a cut.³⁸⁵ It is unfathomable that the police would have done the same if the suspect had been white. As Richard Banks has observed, “[r]esearch has unearthed *not one* case anywhere in the United States in which law enforcement authorities conducted a search of comparable scope and intensity for a white perpetrator of a crime against a black victim.”³⁸⁶ Such racial sweeps are race-

based state action, but under *Brown*, they warrant virtually no constitutional scrutiny.

“The Court has blessed policies that reflect that Black lives do not matter in the same way white lives do. The promises made in the Fourteenth Amendment, which was written to end discriminatory policing root and branch, have gone radically unfulfilled.”

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

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

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

For decades, one of the great debates in Fourth Amendment law was whether the exclusionary rule was a constitutionally necessary remedy to hold the police accountable or a travesty that let the guilty go free.³⁸⁷ Today the debate continues, but has been eclipsed by an even more important development: there are virtually no remedies for all but the most egregious forms of police abuse. The Supreme Court has cut down every available remedy. The Court has rewritten the doctrine of qualified immunity to close the courthouse doors to individuals seeking damages to redress constitutional violations by the police, making the Framers’

preferred remedy presumptively unavailable. The Court has invented so many exceptions to the exclusionary rule that there is little left of it. And the Court's Article III standing doctrine makes it extremely difficult to seek injunctive relief challenging an unconstitutional police policy.

These trends, which began during the Burger Court, have accelerated more recently. Converging doctrinal rules have led to the collapse of a system of remedies capable of holding the police to account when they violate the Constitution.³⁸⁸ While remedies still remain for victims of the most flagrant constitutional violations, for virtually everyone else, there is no remedy to which to turn. This is a system that breeds police unaccountability. Without a workable system of remedies, police abuse their authority and get away with it.



Black Lives Matter Protests at Black Lives Matter Plaza, Washington D.C., June 2020. Johnny Silvercloud/Shutterstock.com

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

1. The Invention of Qualified Immunity

Qualified immunity is not a constitutional rule, but a statutory one grounded in the Court's interpretation of Section 1983, a federal statute enacted during Reconstruction to enforce the Fourteenth Amendment, which provides a federal cause of action against state actors who violate federal constitutional rights. Section 1983, in relevant part, provides that "[e]very person" who, under color of law, subjects "any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress . . . in the several district or circuit courts of the United States."³⁸⁹ The statute, by its terms, does not provide state officials any legal immunity from suit.

The Justices may not rewrite a statute to pursue their own policy goals, but that is exactly what they have done to Section 1983. In a series of cases, the Court rewrote Section 1983 to make it easier for courts to dismiss suits brought against the police and other government officials. The resulting doctrine has eroded the enforcement of constitutional rights, undermined the rule of law, and denied justice to those victimized by the police.

The Supreme Court established the defense of qualified immunity based on the idea that the Congress that enacted Section 1983 gave “no clear indication” that it “meant to abolish wholesale all common-law immunities.”³⁹⁰ But even at its inception the contours of qualified immunity had nothing to do with the common law. And over time, it has only gotten worse. In 1982, in *Harlow v. Fitzgerald*,³⁹¹ the Court, by its own admission, “completely reformulated qualified immunity along principles not at all embodied in the common law” in order to protect public officials from being sued for damages.³⁹² Qualified immunity, as applied post-*Harlow*, requires a plaintiff to establish that the officer violated “clearly established . . . constitutional rights of which a reasonable person would have known.”³⁹³ In practice, this means that a police officer cannot be sued for violating an individual’s constitutional rights unless there was no prior case closely on point.

This standard was made up by the Court to keep suits against the police and other state actors out of court. As William Baude has demonstrated, “there was no well-established good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment.”³⁹⁴ Such a defense is unnecessary because police officers are virtually always indemnified in cases in which they are sued.³⁹⁵ The sweeping immunity defense created by the Court turns Section 1983 on its

“The sweeping immunity defense created by the Court turns Section 1983 on its head, establishing a gaping hole in the congressional plan to give an injured person a right to go to federal court to hold police officers and other actors liable for violating constitutional rights.”

head, establishing a gaping hole in the congressional plan to give an injured person a right to go to federal court to hold police officers and other actors liable for violating constitutional rights. The Congress that wrote the statute wanted to enforce the Fourteenth Amendment by holding state actors accountable for legal wrongs, not give them a free pass. It wanted to vindicate fundamental rights, not immunize officers bent on denying Black Americans equal citizenship.³⁹⁶ The Court’s invention of qualified immunity was made possible by its erasure of the Fourteenth Amendment from the constitutional story of policing.

Despite these huge flaws, the Roberts Court has doubled-down on the doctrine, insisting that qualified immunity permits liability only when “existing precedent” was so clear that the “constitutional question” was “beyond debate.”³⁹⁷ Consider *Safford*, discussed above, where the Court held that school officials had violated the Fourth Amendment by strip searching thirteen-year-old Savana Redding, believing that she had stashed common painkillers in her underwear. *Safford* did not break new ground but simply held that “the content of the suspicion failed to match the degree of intrusion.”³⁹⁸ Still the school officials got off scot-free because the Court concluded that there were “doubt[s] that we were sufficiently clear in the prior statement of law.”³⁹⁹ The upshot is that the discretion-laden standards that the Court chooses to employ throughout Fourth Amendment law simultaneously empower the police and guarantee them immunity when they violate our right to be secure from unreasonable searches and seizures. Rulings such as *Safford* send a message that government officials can act with impunity, even when they engage in outrageous behavior, such as searching a girl’s underwear in the hopes of finding ibuprofen.

This pattern has repeated itself again and again. Virtually every qualified immunity ruling from the Roberts Court ends in the same way: the police get immunity and cannot be sued.⁴⁰⁰ The Court has simply been

unwilling to permit the police to be subject to liability. The last time the Supreme Court concluded that a police officer violated clearly established law was in 2004, before John Roberts became Chief Justice.⁴⁰¹ Indeed, in case after case, the Roberts Court has summarily reversed rulings denying qualified immunity,⁴⁰² many in the context of police killings and other violence, by reaching out to decide cases that normally would not merit Supreme Court review.⁴⁰³ These cases

do not clarify the law at all, but just send the message that lower courts should grant qualified immunity across-the-board. As Justice Sonia Sotomayor has correctly recognized,

“The last time the Supreme Court concluded that a police officer violated clearly established law was in 2004, before John Roberts became Chief Justice.”

“[s]uch a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers”⁴⁰⁴ and “renders the protection of the Fourth Amendment hollow.”⁴⁰⁵

2. The Exclusionary Rule: Death By 1,000 Cuts

The exclusionary rule was born out of the principle that the courts were responsible for holding police officers accountable when they violated constitutional rights in gathering evidence. “The efforts of the courts and their officials to bring the guilty to punishment,” the Supreme Court held in 1914, “are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.”⁴⁰⁶ Thus, at its inception, the Court viewed the exclusionary rule as “an essential part of both the Fourth and Fourteenth Amendments.”⁴⁰⁷ Over the last thirty years, however, the Court has discarded this view. Instead, the exclusionary rule depends on a balance of costs and benefits. Just as the Court has balanced away the requirement of a warrant and probable cause, it has balanced away the exclusionary rule, virtually always viewing the costs of the rule as unacceptably high. Today, the exclusionary rule survives in name only. The Court will virtually always find a way to let in evidence that was used to convict a criminal defendant.

In a string of recent rulings, the Roberts Court has insisted that exclusion is a “last resort”⁴⁰⁸ and should be used “only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.”⁴⁰⁹ Thus, “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”⁴¹⁰ There must be a showing that the “police exhibit[ed] ‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for Fourth Amendment rights.”⁴¹¹ As these formulations reflect, the contours of qualified immunity and the exclusionary rule are converging. In both contexts, the Roberts Court is moving to limit remedies to flagrantly unconstitutional police conduct. Most people injured by unconstitutional searches and seizures will have no remedy under this regime.⁴¹²

By making any remedy impossible to obtain, the Court has given the police an even freer hand to stop and search people. The Court has refused to hold the police accountable even when the police have no legal right to stop you. This makes *Terry* and *Whren*—doctrines that already allow the police to systematically stop people of color—more harmful. This exacerbates the costs of the Court’s erasure of the Fourteenth Amendment and our whole constitutional story of race and policing.



"Policemen during a Black Lives Matter protest in Portland, Oregon, June 2020. Tito Texidor III/Unsplash.com

Consider *Utah v. Strieff*,⁴¹³ in which the Supreme Court refused to exclude evidence obtained during a suspicionless police stop in which, per the dissent, "the officer's sole purpose was to fish for evidence."⁴¹⁴ After the unlawful stop, the officer ran a warrant check, which disclosed an outstanding traffic warrant that led to Strieff's arrest and the discovery of illegal drugs in his possession. In refusing to exclude the evidence, the Court stressed that the officer had committed "good-faith mistakes," which were "at most negligent."⁴¹⁵ But what the majority described as a good-faith mistake

was a complete lack of evidence to justify a stop. The officer had seen Strieff leave a residence that the police were surveilling. But he had no arguable "basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction."⁴¹⁶ The majority waved off this clear Fourth Amendment violation, insisting that, to trigger exclusion, "more severe police misconduct is required than the mere absence of proper cause for the seizure."⁴¹⁷ Rather than exclude the evidence, the Court validated what was plainly an impermissible search, giving the police the greenlight to do it again. As Justice Sotomayor observed in a powerful dissent, "[t]his case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong."⁴¹⁸ It "tells everyone . . . that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights."⁴¹⁹

Refusing to remedy such unconstitutional stops enables racialized policing. As Justice Sotomayor argued, while "anyone's dignity can be violated" by the police, "it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keeping your hands where they can be seen; do not think of talking back to a stranger—all out of fear of how an officer with a gun will react to them."⁴²⁰ Holding the police unaccountable when they make suspicionless stops, she explained, "risk[s] treating members of our communities as second-class citizens."⁴²¹

3. Injunctive Relief Against the Police

The Supreme Court has cut back on damages and exclusion as remedies, fearing the consequences if the police are required to pay money judgments or face the loss of critical evidence. What about a remedy that simply tells the police to stop violating the Constitution?⁴²² That, too, is off the table as well. The Supreme Court has shut down forward-looking relief against unconstitutional police policies, rewriting standing rules to keep those case out of court as well. This means that individuals cannot go to court to challenge

policing policies that victimize people of color. In this way, the Court frees itself from having to enforce our Constitution's promise of personal security to all persons regardless of race.

In 1983, in *City of Los Angeles v. Lyons*,⁴²³ the Supreme Court held that Adolphus Lyons, a young Black man who had been subjected to a chokehold during a traffic stop, could not sue to enjoin the city's chokehold policy, which had led to the killing of sixteen people, almost all Black men. In a 5-4 opinion, the majority held that, despite the injuries inflicted on him, Lyons could not sue for injunctive relief unless he could show a "real and immediate threat that he would again be stopped . . . by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part."⁴²⁴ This effectively immunized the city's policy from constitutional scrutiny.⁴²⁵ As Justice Thurgood Marshall argued in his dissenting opinion, the "Court's decision removes an entire class of constitutional violations from the equitable powers of a federal court."⁴²⁶ "Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy."⁴²⁷ *Lyons* dooms most injunctive suits challenging policing policies.⁴²⁸

Conclusion

This Article makes the case for engaging with our whole constitutional story of race and policing by taking seriously the text, history, and values of the Fourteenth Amendment's transformative guarantees. More than 150 years after its ratification, we have forgotten a critical part of the Fourteenth Amendment's legacy—its limitations on the power of the police designed to ensure liberty, personal security, and equality for all regardless of race. In the aftermath of the Civil War, the South sought to strip Black Americans of the promise of freedom they had fought for. Police broke into the homes of Black people and sought to steal their guns and personal property. Police aggressively enforced vagrancy laws to sweep Black people from the streets, making freedom of movement a sham. Police beat and killed Black people, while turning a blind eye to crimes committed

“More than 150 years after its ratification, we have forgotten a critical part of the Fourteenth Amendment's legacy—its limitations on the power of the police designed to ensure liberty, personal security, and equality for all regardless of race.”

against them. The Fourteenth Amendment's substantive guarantees were a response to these abuses of official authority. It answered the demands of Black Americans, who insisted “we do not want to be hunted.” In all these ways, history teaches us that the Fourteenth Amendment is fundamentally concerned with police abuse, including home invasions, indiscriminate arrest power, and police violence.

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

What would it mean for the Court to honor the Fourteenth Amendment's transformative guarantees and get our whole constitutional story of race and policing right? This section sketches six ways the Court could bring its case law in line with the Constitution's text and history.

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

This would require major changes to the Court's doctrines governing stop-and-frisk and traffic stops, which license systemic racial profiling, particularly of young Black men. *Terry* has already been criticized on originalist grounds for dispensing with the constitutional requirement of probable cause and permitting "police to seize and search in situations when magistrates would be forbidden to authorize an interference with liberty."⁴²⁹ Taking seriously the text and history of the Fourteenth Amendment adds what is perhaps an even more powerful argument. *Terry* and its progeny invite racially discriminatory searches and seizures just as did the vagrancy laws condemned by the Fourteenth Amendment. *Terry* sanctions racial profiling and allows people of color to enjoy freedom of movement and personal security only at the whim of the police.

Whren, which sanctions racially motivated seizures, should likewise be scrapped. Police should not be permitted to use the nearly limitless authority provided by the traffic laws to stop people because of the color of their skin. As James Forman has argued, pretext stops are a "direct, easily remedied source of racial disparities in the criminal justice system," which are "responsible for most of the racial disparity in traffic stops nationwide."⁴³⁰ Under a view of Fourth Amendment reasonableness that takes seriously our whole constitutional story of race and policing, pretext stops are constitutionally unreasonable because they permit widespread racial profiling by the police. Because of the virtually unfettered discretion police enjoy under traffic laws, probable cause to believe a person violated traffic laws should not insulate pretext searches from constitutional scrutiny.

Second, nothing invites discriminatory policing so much as the Court's willingness to apply a porous reasonable suspicion test. Where the reasonable suspicion test applies, discrimination is endemic. On the nation's streets, roads, and schools, the reasonable suspicion standard has allowed the police to accost innocent people and engage in racial profiling. For that reason, "probable cause must be the center of the Fourth Amendment universe."⁴³¹ Taking seriously the text and history of the Fourteenth Amendment's transformative guarantees complements the literature that urges the Court to enforce the constitutional requirement of probable cause, rather than employ invented standards, such as reasonable suspicion, that have no basis in the Constitution.⁴³²

Third, a jurisprudence that took the Fourteenth Amendment's text and history seriously would put ending unjustified police violence at its center. Eliminating such brutality must be regarded as one of the critical purposes of the Fourteenth Amendment. The Court's current approach to police violence enables, not constrains, police brutality. It is not enough to simply insist that police use force in an objectively reasonable manner. The doctrine must insist that police violence be used only when necessary to respond to an imminent threat and that the use of force must be proportional to the threat.⁴³³ We need a standard that reins in police violence and vindicates the Fourteenth Amendment's promise of personal security for all persons regardless of race, not one that condones and legitimizes more police shootings and beatings of our populace.

Fourth, a Supreme Court that took seriously our whole constitutional story of race and policing would revitalize equal protection doctrine to ensure meaningful limits on discriminatory policing. Our constitutional law denounces the "racial stereotype" that Black people are prone to violence and criminality as a "particularly noxious strain of racial prejudice."⁴³⁴ We need a doctrine that takes the Fourteenth Amendment's text and history seriously and gives courts the tools to root out conscious and unconscious bias in policing. One way to do this would be to build off the burden-shifting approach the Court has used in *Batson* and its progeny.

When a plaintiff comes forward with statistical and other proof of systematic racial targeting of people of color by the police, such as a drug courier profile that makes race part of the profile, the Court should shift the burden to the government to rebut the showing that race matters in policing and justify its policing practices.⁴³⁵ As Barry Friedman has written, “courts should require the government to answer the perennial question under the Constitution when one is searched or seized: Why me?”⁴³⁶ If the race is a factor in policing, strict scrutiny should apply.

Fifth, the Supreme Court should recognize that the Equal Protection Clause creates a constitutional obligation on states to protect all persons equally from private violence, and that, where a state fails to do so, the federal government has the authority to step in to provide the protection the Fourteenth Amendment guarantees. This part of the Fourteenth Amendment has deep roots in the Amendment’s text and history but has never been given its due. The Department of Justice should play a leading role in helping restore this bedrock aspect of equal protection. Federal law explicitly authorizes the Department of Justice to bring suit to redress a “pattern and practice” of unconstitutional police misconduct, and pattern or practice suits aimed at under-policing could provide an opportunity to revitalize this critical aspect of the Fourteenth Amendment’s guarantee of equal protection.⁴³⁷

Sixth, we also need a system of meaningful remedies to redress police overreach. Our constitutional commitments are only as good as the remedies that back them up. In the case of policing, our remedies hardly exist, even on paper. This is not our Constitution’s system of accountability. If we do not have remedies, we do not really have rights. We cannot hope to rein in police abuse of power if courts give the police a free pass when they violate our rights. At a minimum, the Court should scrap qualified immunity doctrine, which guts the remedy the Reconstruction Congress enacted to enforce the Fourteenth Amendment. This would ensure government accountability, permit courts to play their historic role of redressing abuse of power, and shift the focus of policing litigation away from the scope of judicially invented immunities to fundamental constitutional questions about the meaning our Constitution’s safeguards of liberty, security, and equality.⁴³⁸

In short, the Court has many avenues at its disposal to move the doctrine in line with our whole constitutional story of race and policing.



Endnotes

- 1 For notable exceptions, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 267-68 (1998); ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868*, at 242-57 (2006); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 99-128 (2011). But these authors tell only a part of the Fourteenth Amendment story. Amar primarily focuses on the Fourteenth Amendment's incorporation of the Bill of Rights, and only addresses policing in passing. Taslitz tells more of the story, but he never really develops how police abuses shaped the Fourteenth Amendment's original meaning. TASLITZ, *supra*, at 258 (looking to history "to ask new questions about the Fourth Amendment's meaning or to see old questions in a new light"). Stuntz focuses only on the constitutional guarantee of equal protection and does not delve into how the Fourteenth Amendment reshaped the meaning of the Fourth Amendment.
- 2 2 THE WORKS OF JOHN ADAMS app. A, 524-25 (Charles Francis Adams ed., 1850).
- 3 See, e.g., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) ("[T]he central meaning of the Fourth Amendment is distrust of police power and discretion."); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 582 (1999) (discussing Framers' "deep-rooted distrust and even disdain for the judgment of ordinary officers"); Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance From the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905, 921-22 (2010) ("The Fourth Amendment was . . . adopted for the purpose of checking discretionary police authority."); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1194 (2016) ("The Founders' primary concern was that the government not be allowed free rein to search for potential evidence of criminal wrongdoing").
- 4 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 588 (Jonathan Elliot ed., 1836) [hereinafter "*Elliot's Debates*"].
- 5 Letter from Mississippi Freedpeople to the Governor of Mississippi (Dec. 3, 1865), reprinted in *FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867*, SER. 3: VOL. 1: LAND AND LABOR, 1865, at 857 (Steven Hahn et al. eds., 2017).
- 6 Cf. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995) (arguing that the Fourth Amendment's protection of privacy "tends to obscure more serious harms that attend police misconduct, harms that flow not from information disclosure but from the police use of force").
- 7 See, e.g., Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 S. CT. REV. 271; Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508 (2017); Tracey Maclin & Maria Savarese, *Martin Luther King, Jr. and Pretext Stops (and Arrests): Reflections on How Far We Have Not Come Fifty Years Later*, 49 U. MEM. L. REV. 43 (2018).
- 8 Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 27 (Oct. 2008), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiles-Report-ACLU.pdf>; see CHARLES R. EPP, ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 26 (2014) ("Police stop and search racial minorities at disproportionately high rates, and these disparities have grown wider in recent years . . ."); JAMES FORMAN, JR. *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 212-13 (2017) (observing that when the police "are carrying out investigatory or pretext stops, they are *much more likely* to stop black and other minority drivers: blacks are about two and a half more times likely to be pulled over for pretext stops"); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 820 (2017) ("A large body of research finds that, for similar offenses, members of the African American and Hispanic communities are more likely to be stopped, searched, arrested, convicted, and sentenced to harsher penalties."); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854-59 (2011) (reviewing data and studies from across the country that show that people of color are "overstopped, oversearched, and overfrisked in comparison to whites").
- 9 Rob Arthur, *New Data Shows Police Use More Force Against Black Citizens Even Though Whites Resist More*, SLATE (May 30, 2019, 2:41 PM), <https://slate.com/news-and-politics/2019/05/chicago-police-department-consent-decree-black-lives-matter-resistance.html>; Clark Merrefield, *Black Men 2.5 Times More Likely Than White Men to be Killed by Police, New Research Estimates*, JOURNALIST'S RESOURCE (Aug. 5, 2019), <https://journalistsresource.org/studies/government/criminal-justice/killed-police-black-men-like-white-men/>

- 10 Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 129 (2017).
- 11 Don Jackson, *The Police Embody Racism To My People*, N.Y. TIMES, Jan. 23, 1989, at A25.
- 12 Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974).
- 13 STUNTZ, *supra* note 1, at 101 (arguing that the Court “read the equal protection clause in a manner that protected the Klan from federal prosecutors rather than its victims from the Klan”).
- 14 JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 7 (2015) (calling the “impunity for the murder of black men . . . America’s great, though mostly invisible, race problem”); Wesley Lowery, et al., *An Unequal Justice*, WASH. POST (July 25, 2018), https://www.washingtonpost.com/graphics/2018/investigations/black-homicides-arrests/?utm_term=.681b41f0ee8c (reporting that “[b]lack victims, who accounted for the majority of homicides, were the least likely . . . to have their killings result in an arrest”).
- 15 Lowery, *supra* note 14.
- 16 Leah Litman, *Remedial Convergence and Collapse*, 106 CAL. L. REV. 1477, 1528 (2018).
- 17 See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) (urging reconsideration of the Court’s qualified immunity precedents because they “substitute our own policy preferences for the mandates of Congress”).
- 18 See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).
- 19 U.S. CONST. amend IV.
- 20 BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 23-24 (2017); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 344-66 (1998); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 115-31 (2008); Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 732-50 (2014).
- 21 WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791, at 192-93 (2009); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 939 (1997) (explaining that “[p]rior to 1760, general, promiscuous intrusion by government officials provided the standard method of search and seizure in colonial America”).
- 22 See Act of Frauds of 1662, 12 Car. 2, cl. 11, § V(2), reprinted in 8 THE STATUTES AT LARGE OF ENGLAND AND GREAT-BRITAIN 78, 81 (1763); Act of Frauds of 1696, 5 W. & M. c. 22, § VI, reprinted in 9 THE STATUTES AT LARGE OF ENGLAND AND GREAT-BRITAIN 428, 430 (1764).
- 23 3 THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY 92 (1828) (“The collectors and inferior officers of the customs, merely by the authority derived from their commissions, had forcibly entered warehouses, and even dwelling houses, upon information that contraband goods were concealed in them.”); M.H. SMITH, THE WRITS OF ASSISTANCE CASE 116-18 (1978).
- 24 Donohue, *supra* note 3, at 1242.
- 25 SMITH, *supra* note 23, at 130.
- 26 *Id.* at 7 (arguing that Otis’s argument represented the first “articulate expression” of “the American tradition of hostility to general powers of search”).
- 27 2 WORKS OF JOHN ADAMS, *supra* note 2, app. A, at 523, 524 (abstract of Otis’s argument written by Adams).
- 28 JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, app. I, at 489 (1865) (1762 article in Boston Gazette attributed to Otis).
- 29 2 WORKS OF JOHN ADAMS, *supra* note 2, app. A, at 524.
- 30 QUINCY, *supra* note 28, app. I, at 494.
- 31 2 WORKS OF JOHN ADAMS, *supra* note 2, app. A, at 524, 525.
- 32 QUINCY, *supra* note 28, app. I, at 490.
- 33 2 WORKS OF JOHN ADAMS, *supra* note 2, app. A, at 524.
- 34 *Id.*
- 35 See, e.g., *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); *Leach v. Money*, 19 How. St. Tr. 1001 (K.B. 1765).
- 36 Donohue, *supra* note 3, at 1201 (quoting *The General Warrant on Which John Wilkes Was Arrested*, 30 April 1763, in ENGLISH HISTORICAL DOCUMENTS 1714-1815, at 61-62 (D.B. Horn ed., 1967)).
- 37 CUDDIHY, *supra* note 21, at 442-43.
- 38 *Id.* at 441 (noting that the King’s officer “entered Leach’s

house in the dead of night, took him out of his bed from his wife, seized all of his personal papers” and “kept him in custody for four days”).

- 39 *Id.* at 451.
- 40 *Wilkes*, 19 How. St. Tr. at 1167.
- 41 *Leach*, 19 How. St. Tr. at 1027.
- 42 *Entick*, 19 How. St. Tr. at 1063.
- 43 *QUINCY*, *supra* note 28, app. I, at 490.
- 44 *Huckle*, 95 Eng. Rep. at 769.
- 45 *Entick*, 19 How. St. Tr. at 1064.
- 46 CUDDIHY, *supra* note 21, at 538; *Davies*, *supra* note 3, at 563.
- 47 CUDDIHY, *supra* note 21, at 503-08.
- 48 *Id.* at 518; O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION 74* (Richard B. Morris ed., 1939) (noting that “the judiciary from Connecticut to Florida . . . stood firm in opposing the legality of the particular form of writ demanded of them and continued in their judicial obstinacy through six years of nearly constant efforts to force them to yield”).
- 49 Dickerson, *supra* note 48, at 60.
- 50 *Id.* at 60-61 (quoting Letter of Customs Officers at Philadelphia to the Custom Commissioners, July 3, 1773, Treasury I, Bundle 501).
- 51 CUDDIHY, *supra* note 21, at 520, 521 (internal citation omitted).
- 52 Dickerson, *supra* note 48, at 64 (internal citation omitted).
- 53 *Id.* at 63, 64 (internal citation omitted).
- 54 CUDDIHY, *supra* note 21, at 541.
- 55 Letter from Junius Americanus to the People of England (Mar. 13, 1770) in ARTHUR LEE, *THE POLITICAL DETECTION: OR THE TREACHERY AND TYRANNY OF ADMINISTRATION, BOTH AT HOME AND ABROAD* 99 (1770).
- 56 WILLIAM HENRY DRAYTON, *A LETTER FROM FREEMAN OF SOUTH CAROLINA TO THE DEPUTIES OF NORTH AMERICA* 10 (1774).
- 57 JOHN DICKINSON, *LETTERS FROM A FARMER IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES* 65 (3d ed. 1769).
- 58 *Id.*
- 59 *THE VOTES AND PROCEEDINGS OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON* 15 (1772).
- 60 *Id.*
- 61 *Id.* at 16-17.
- 62 *A Brief Examination of American Grievances; being the heads of a Speech at the General Meeting at Lewestown, on Delaware, July 28, 1774*, reprinted in 1 *AMERICAN ARCHIVES, FOURTH SERIES* 659-60 (M. St. Clair Clarke & Peter Force eds., 1837).
- 63 1 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774 TO 1789*, at 96-97 (Worthington C. Ford et al. eds., 1904).
- 64 VA. DECL. OF RIGHTS § 10 (1776); MASS. CONST. art. 14 (1780).
- 65 *Centinel I* (Oct. 5, 1787), reprinted in *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS* 65-66 (David Wootton ed., 2003); see PA. CONST. OF 1776. art. X.
- 66 *Essay by a Farmer and Planter*, MD. JOURNAL, Mar. 27, 1788 in 5 *THE COMPLETE ANTI-FEDERALIST* 74-75 (Herbert J. Storing ed., 1981).
- 67 *Id.*
- 68 A COLUMBIAN PATRIOT, *OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS, IN PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788*, at 12 (Paul Leicester Ford. ed., 1888). Ford thought the pamphlet was authored by Elbridge Gerry, but it is now recognized as Mercy Otis Warren’s work. See CUDDIHY, *supra* note 21, at 677 n.27.
- 69 A COLUMBIAN PATRIOT, *supra* note 68, at 13.
- 70 *A Son of Liberty*, N.Y. JOURNAL, Nov. 8, 1787, reprinted in 6 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 66, at 33-34.
- 71 *Id.*
- 72 3 *Elliot’s Debates*, *supra* note 4, at 588.
- 73 *Id.* at 412.
- 74 *Id.* at 448-49.
- 75 *Id.* at 657-58.
- 76 2 *id.* at 551.
- 77 1 *ANNALS OF CONG.* 452 (1789) (Joseph Gale ed., 1834).
- 78 U.S. Const. amend IV.

- 79 *Id.*
- 80 2 WORKS OF JOHN ADAMS, *supra* note 2, app. A, at 521.
- 81 QUINCY, *supra* note 28, app. I, at 489.
- 82 THE VOTES AND PROCEEDINGS, *supra* note 59, at 15.
- 83 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774 TO 1789, *supra* note 63, at 97.
- 84 CUDDIHY, *supra* note 21, at 690.
- 85 *Id.* at 691.
- 86 *Id.* at 742 (arguing that the Amendment “extinguish[ed] general searches categorically”); Donohue, *supra* note 3, at 1193 (observing that the “proper way to understand the Fourth Amendment is as a prohibition on general search and seizure authorities” and that the “first clause outlaws promiscuous search and seizure”); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1467 (2005) (“[U]nreasonable searches and seizures’ included any type of general search, whether by warrant or not.”).
- 87 Amsterdam, *supra* note 12, at 411; Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1729 (1996) (reviewing CUDDIHY, *supra* note 21, at 376); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Basis,”* 16 CREIGHTON L. REV. 565, 575 (1983).
- 88 Thomas, *supra* note 86, at 1466.
- 89 Rubinfeld, *supra* note 20, at 125 (“[T]he core meaning of the Fourth Amendment’s right of security is to deny government the power to effect generalized arrests or searches of homes without probable cause.”).
- 90 DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 162 (2017); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 632-33 (1995) (“[P]articularly described persons, places, or things, based on individualized suspicion were considered inherent characteristics of reasonable searches and seizures by the framers. Individualized suspicion was considered an element of reasonableness.”).
- 91 Amsterdam, *supra* note 12, at 411 (observing that “indiscriminate searches or seizures . . . expose people and their possessions to interferences by government when there is no good reason to do so” and “are conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize”).
- 92 Grummon v. Raymond, 1 Conn. 40, 44 (1814).
- 93 Conner v. Commonwealth, 3 Binn. 38, 44 (Pa. 1810).
- 94 While the common law permitted some warrantless arrests, such as arrests pursuant to hue and cry, a common law form of hot pursuit, as well as warrantless searches incident to arrests, see Davies, *supra* note 3, at 627-34; Thomas, *supra* note 86, at 1467-72, warrants were “the salient mode of arrest and search authority.” Davies, *supra* note 3, at 641.
- 95 FRIEDMAN, *supra* note 20, at 134-37; Cloud, *supra* note 87, at 1730-31; Donohue, *supra* note 3, at 1193. In a provocative article, Akhil Amar argues that the Fourth Amendment does not require warrants or probable cause, but simply requires that searches be reasonable, a question Amar would leave to juries. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). But Amar’s argument turns the Fourth Amendment on its head, ignores the judicial check the specific warrant serves, and would reintroduce the kinds of excessive discretion the Framers sought to eliminate.
- 96 GRAY, *supra* note 90, at 162-63 (arguing the “general warrants were regarded as unreasonable . . . because they forgave any obligation to justify a search or seizure before the fact through a process of reason-giving before a neutral arbiter”).
- 97 4 *Elliot’s Debates*, *supra* note 4, at 555.
- 98 *Id.*
- 99 1 St. George Tucker, *BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA*, app. 302 (1803).
- 100 David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. COLLOQUY 272, 280 (2008) (quoting from Tucker’s lecture notes dating from approximately 1791-1792).
- 101 *Id.*
- 102 WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION* 127 (2d ed. 1829).
- 103 CUDDIHY, *supra* note 21, at 218 (noting that “South Carolina created the first slave patrol in 1704, followed by Virginia in 1726 and 1738, North Carolina in 1753, and Georgia in 1757”); Maclin, *supra* note 7, at 334-36 (detailing colonial

enactments).

- 104 SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 77 (2001); CUDDIHY, *supra* note 21, at 225 (explaining that “no neutral and detached magistrate intervened between a patrolman’s suspicions and his power to arrest or search”). Indeed, patrollers carried a special patrol warrant, reflecting that they were “sanctioned officer[s] of the state.” HADDEN, *supra* note 104, at 77.
- 105 HADDEN, *supra* note 104, at 106, 108, 109; PETER H. WOOD, *BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION* 275 (1974) (discussing a 1734 law that permitted slave patrol to “question or search any travelling Negro,” “administer up to twenty lashes to any slave stopped outside his plantation without a ticket,” and “to search the homes of Negroes arbitrarily and to confiscate firearms or other weapons and any goods suspected of being stolen”).
- 106 HADDEN, *supra* note 104, at 106, 108, 117.
- 107 *Id.* at 71.
- 108 *Id.* at 117.
- 109 RICHARD C. WADE, *SLAVERY IN THE CITIES, THE SOUTH 1820-1860*, at 80 (1964); HADDEN, *supra* note 104, at 51-61.
- 110 WADE, *supra* note 109, at 104, 219.
- 111 See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 81 (1997); Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 ALA. L. REV. 111, 140-44 (2010).
- 112 AMAR, *supra* note 1, at 236 (describing how Hoar was “riden out of town on a rail by an enraged populace after the South Carolina legislature passed an act of attainder and banishment”).
- 113 TASLITZ, *supra* note 1, at 246 (arguing that Hoar’s expulsion is “best understood as fusing concerns about search and seizure, free speech, and judicial access”).
- 114 AMAR, *supra* note 1, at 235, 267; Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper’s Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1130-38, 1158-62 (1993). Bills requiring seizure of abolitionist materials failed to pass Congress, but pro-slavery executive interpretation gave the post office leeway to refuse to distribute abolitionist materials that violated state law. See MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* 155-75 (2000).
- 115 Curtis, *supra* note 114, at 1133-34.
- 116 *Id.* at 1162.
- 117 CONG. GLOBE, 36th Cong., 1st Sess. 1872 (1860).
- 118 Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369, 391-92 (2003) (noting that “[a]ll Negro men, women and children were potential suspects and potential victims of seizures by slave hunters” and describing “advertisement after advertisement containing descriptions that would permit slave catchers extraordinary discretion in their seizures of alleged run-aways”); Vanessa Holden & Edward E. Baptist, *Policing Black Americans Is a Long-Standing, and Ugly American Tradition*, WASH. POST (Mar. 6, 2019), https://www.washingtonpost.com/opinions/2019/03/06/policing-black-americans-is-long-standing-ugly-american-tradition/?utm_term=.69a8a1ea8aa1 (“Law and practice empowered white people to act as the police when it came to black people, including stopping, questioning and searching possible fugitives, which could mean any black person who vaguely fit the description.”).
- 119 TASLITZ, *supra* note 1, at 164-65, 166-68.
- 120 *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847).
- 121 ERIC FONER, *GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD* 125 (2015).
- 122 Cloud, *supra* note 118, at 414 (explaining that “no warrant was necessary in most cases”).
- 123 R.J.M. BLACKETT, *THE CAPTIVE’S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY* 7-13 (2018); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 80 (1988).
- 124 Cloud, *supra* note 118, at 417.
- 125 BLACKETT, *supra* note 123, at 8; *id.* at 293 (noting that “because the law denied accused fugitive slaves the right to a trial by jury, it increased the chances that African Americans, who were born free, and so had no need for free papers, would fall victim to kidnappers”); *id.* at 305 (describing “depredations of kidnapping gangs”).
- 126 DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 176 (2018); *id.* at 234 (describing how the Fugitive Slave Act transformed “your broad republican domain” into a “hunting ground for men”).

- 127 BLACKETT, *supra* note 123, at 260; Charles Langston, Speech at the Cuyahoga County Courthouse (May 12, 1859), available at http://www2.oberlin.edu/external/EOG/Oberlin-Wellington_Rescue/c._langston_speech.htm.
- 128 BLACKETT, *supra* note 123, at 15; *id.* at 177 (“[F]ree blacks” were “in constant danger of being taken into slavery.”); KENNEDY, *supra* note 111, at 84 (explaining that the law “profoundly undermined blacks’ sense of security . . . by making any African-American an accusation away” from being enslaved).
- 129 BLACKETT, *supra* note 123, at xiv (summarizing forms of opposition).
- 130 *Id.* at 32.
- 131 *Id.* at 390.
- 132 KENNEDY, *supra* note 111, at 84.
- 134 *Id.* at 460.
- 135 Davies, *supra* note 3, at 620; Thomas, *supra* note 86, at 1468.
- 136 Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830-31 (1994).
- 137 EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 82-83 (1978) (“Between 1845 and the Civil War virtually all of the largest cities in the country established uniformed police forces, and included in this group were Southern cities of Baltimore, New Orleans, Charleston, Richmond, and Savannah.”); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 67 (1993) (“One of the major social innovations of the first half of the nineteenth century was the creation of police forces: full time, night-and-day agencies whose job was to prevent crime, to keep the peace, and capture criminals.”).
- 138 AMAR, *supra* note 1, at 268 (urging us to “ponder the ways in which the Reconstruction experience refracted the Founders’ words, and perhaps deepened and extended their meaning”); TASLITZ, *supra* note 1, at 12 (arguing that the Fourteenth Amendment “mutated the meaning of the constitutional rules governing search and seizure”).
- 139 CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866); see Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 70-71 (2019) (stressing the “Reconstruction Amendments’ constitutional imperatives to end enslaving systems, provide equal protection against state and private violence, and install full citizenship”).
- 140 See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at 199-202 (1988); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 366-71 (1979); FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, SER. 3, VOL. 2: LAND AND LABOR, 1866-1867, at 10-12, 500-01 (René Hayden et al., eds. 2013).
- 141 HADDEN, *supra* note 104, at 200.
- 142 Letter from Maj. Gen. O.O. Howard to Sec’y of War E.M. Stanton (Dec. 21, 1866), reprinted in S. EXEC. DOC. NO. 39-6, at 3 (1867).
- 143 Report of Maj. Gen. Carl Schurz on Conditions of the South, S. EXEC. DOC. NO. 39-2, at 24 (1865).
- 144 *Id.*
- 145 An Act to Amend the Vagrant Laws of the State, § 2 (Nov. 24, 1865), reprinted in S. EXEC. DOC. 39-6, at 192 (1867).
- 146 *Id.* § 1.
- 147 Letter from Maj. Gen. O.O. Howard to Sec’y of War E.M. Stanton, reprinted in S. EXEC. DOC. 39-6, at 3.
- 148 ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 47-51 (2019); Michelle Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism and Mass Incarceration*, 104 CORNELL L. REV. 899, 933 (2019) (discussing how Thirteenth Amendment’s Punishment Clause “functionally preserved slavery as a means of persistent racial subjugation”); Roberts, *supra* note 139, at 67 (arguing that “the Punishment Clause facilitated the expansion of prisons as a form of state subordination of black people and forced exploitation of black labor”); cf. James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1492 (2019) (arguing that Amendment’s Framers “read the Punishment Clause narrowly to cover only those features of slavery or involuntary servitude that fell within what they conceived as the ‘ordinary’ or ‘usual’ operation of a penal system”).
- 149 FONER, *supra* note 140, at 208-09; FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, LAND AND LABOR, 1866-1867, *supra* note 140, at 11.
- 150 LITWACK, *supra* note 140, at 321; FONER, *supra* note 140, at 200 (“Blacks who broke labor contracts could be whipped, placed in the pillory, and sold for up to one’s year’s labor, while whites who violated contracts faced only the threat of civil suits.”); Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress, pt. II, at 86 (1866) (“There is nothing said about a white man being a vagrant if he stands around and begs for drinks; but for a

black man there is a great deal of legislation necessary.”).

- 151 War Dep’t, Bureau of Refugees, Freedmen, and Abandoned Lands, Report of Asst. Comm’rs, Ala. (Oct. 31, 1866), reprinted in S. EXEC. DOC. 39-6, at 7.
- 152 *Id.*, Report of Asst. Comm’r, Tenn. (Nov. 1, 1866), reprinted in S. EXEC. DOC. 39-6, at 129 (“About three weeks since the police of [Nashville] arrested some forty or fifty young men and boys (colored) on various pretexts, mostly for vagrancy, and they were thrown into the work-house to work out fines of from \$10 to \$60 each.”); Letter from Mississippi Blacks to Commander of the Department of the Gulf (Jan. 20, 1867), reprinted in FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, SER. 2: THE BLACK MILITARY EXPERIENCE 821 (Ira Berlin et al., eds., 1982) (“His De[p]uty is taking people all the time[,] men that is trave[l]ling is stop[p]ed and put in jail or Forced to contract”); Report of the Joint Committee on Reconstruction, pt. III at 8 (observing that “there were a large number of negroes in jail, the most of them for the most trivial of offenses,” including “breaking a plate” and “throwing a stone and a sheep”); LITWACK, *supra* note 140, at 284, 287-88, 318-19, 370 (describing mass arrests and arrests for trivial offenses); AYERS, *supra* note 137, at 165 (noting that, in Greene County, Georgia, “twenty-one blacks came before the County Court for vagrancy in 1866; most of them received a whipping of thirty-nine lashes”); VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI, 1865-1890, at 91 (1947) (discussing vagrancy roundups in Mississippi); FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, LAND AND LABOR, 1866-1867, *supra* note 140, at 125-27, 153, 527, 530-32, 536-37, 928-29 (detailing vagrancy arrests).
- 153 LITWACK, *supra* note 140, at 319.
- 154 FONER, *supra* note 140, at 155; HADDEN, *supra* note 104, at 193.
- 155 Letter from Mississippi Freedpeople to the Governor of Mississippi (Dec. 3, 1865), reprinted in FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, LAND AND LABOR, 1865, *supra* note 5, at 857.
- 156 LITWACK, *supra* note 140, at 288.
- 157 CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866).
- 158 *Id.* at 1160; see *id.* at 588 (“The adult negro is compelled to enter into contract with a master, and the district judge, not the laborer, is to fix the value of the labor. If he thinks the compensation is too small and will not work, he is a vagrant, and can be hired out for a term of service at a rate again to be fixed by the judge.”); *id.* at 589 (“[T]he vagrant negro may be sold to the highest bidder to pay his jail fees.”); *id.* at 783 (“[T]heir courts have sold the freedmen into slavery the next day under some pretense of punishing him for vagrancy or something else equally absurd.”); *id.* at 1833 (quoting press report stating that the “barbarous vagrant law recently passed by the rebel State Legislature is rigidly enforced” and “freed slaves are rapidly being reenslaved”).
- 159 *Id.* at 1123.
- 160 Report of the Joint Committee on Reconstruction, pt. II, at 177; see *id.* at 62 (describing “[s]everal instances” in Virginia “where officers of the State attempted to enforce the vagrant laws” and “sold colored people for the coming year—sold them to service”).
- 161 *Id.*, pt. IV, at 79.
- 162 *Id.*
- 163 CONG. GLOBE, 39th Cong., 1st Sess. 1838 (1866).
- 164 Letter from a Mississippi Black Soldier to the Freedmen’s Bureau Commissioner (Dec. 16, 1865), reprinted in FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, THE BLACK MILITARY EXPERIENCE, *supra* note 152, at 755; Report of the Joint Committee on Reconstruction, pt. III, at 185 (calling fears of insurrection a “mere subterfuge by which to justify the most foul and bloody murders known to any people, upon a race that is unarmed and unable to defend themselves, much less to assume the offensive”).
- 165 CONG. GLOBE, 39th Cong., 1st Sess. 915 (1866) (“There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description.”); *id.* at 40 (“In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them; and the same things are done in other sections of the country.”).
- 166 Dan T. Carter, *The Anatomy of Fear: The Christmas Day Insurrection of 1865*, 42 J. SOUTHERN HIST. 345, 361 (1976); WILLIAM MCKEE EVANS, *BALLOTS AND FENCE RAILS: RECONSTRUCTION ON THE LOWER CAPE FEAR* 71-72 (1967) (observing that “the county police began ransacking Negro homes in search of weapons” and taking their property on the assumption that “any property the[] [police] found in the possession of a freedman was stolen unless he could prove otherwise in court” or “to the satisfaction of the raiding officers”).

- 167 EVANS, *supra* note 166, at 73.
- 168 Letter from Freedmen's Bureau Subcommissioner at Columbus, Mississippi to the Headquarters of the Freedmen's Bureau Acting Commissioner for the Northern District of Mississippi (Dec. 30, 1865), *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, LAND AND LABOR, 1865, *supra* note 5, at 898.
- 169 *Report of the Joint Committee on Reconstruction*, pt. II, at 272.
- 170 *Id.*, pt. III, at 140.
- 171 *Id.*, pt. IV, at 49-50.
- 172 H.R. EXEC. DOC. 39-70, at 239 (1866); *id.* at 238 ("The town marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs."); *id.* at 297 (explaining the Freedmen's Bureau's "desire[] to convince the local militia that stealing clothing, pistols, and money, under guise of 'disarming the negroes' or stealing pistols only, is robbery").
- 173 *Id.* at 292.
- 174 Letter from Former Freedmen's Bureau, Acting Subassistant Commissioner, at Athens, Georgia, to the Freedmen's Bureau Acting Assistant Commissioner for Georgia, *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, LAND AND LABOR, 1865, *supra* note 5, at 906.
- 175 LITWACK, *supra* note 140, at 276-77.
- 176 *Report of the Joint Committee on Reconstruction*, pt. II, at 271.
- 177 *Id.* at 185.
- 178 *Id.* at 209.
- 179 *Id.*
- 180 *Id.*
- 181 *Id.* at 271.
- 182 *Id.*, pt. IV, at 80. For additional documentation, see FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, THE BLACK MILITARY EXPERIENCE, *supra* note 152, at 743 (statement of a Tennessee black sergeant that a policeman "struck me with his club, on the head" and then "another Policeman came up and he struck me several times[,] and they thru [sic] me down and stamped me in the back while lying on the ground"); HADDEN, *supra* note 104, at 217 (describing "white officers . . . beating black suspects for no reason"); HOWARD N. RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH 1865-1890, at 55 (1978) (discussing 1866 case of "Richmond policeman . . . charged with kicking a Negro down the station house steps," which was dismissed with "the admonition that he be less aggressive in the future"); LITWACK, *supra* note 140, at 290 (describing May 1866 incident in which "the chief of police shot and killed a young freedman while arresting him for a misdemeanor").
- 183 *Report of the Joint Committee on Reconstruction*, pt. III, at 46.
- 184 *Id.* at 185.
- 185 *Id.*
- 186 *Id.* at 142, 146, 185.
- 187 *The New Orleans Report*, 10 *Harper's Weekly* 658, Oct. 20, 1866; see Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 *GEO. L.J.* 1275, 1307 (2013) ("No single event in 1866 more clearly illustrated the states' continued failure to protect the constitutionally enumerated rights of American citizens than the New Orleans Riot of July 30, 1866.").
- 188 For accounts of the Memphis massacre, see FONER, *supra* note 140, at 261-62; GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 33-43 (1984); James Gilbert Ryan, *The Memphis Riots of 1866: Terror in a Black Community During Reconstruction*, 62 *J. NEGRO. HIST.* 243 (1979).
- 189 *Memphis Riots and Massacres*, H.R. REP. NO. 39-101, at 5 (1866).
- 190 *Id.* at 5; Report of Colonel Charles F. Johnson and Major F.W. Gilbraith on Memphis Riot (May 22, 1866), *available at* <https://www.freedmensbureau.com/tennessee/outrages/memphisriot.htm> ("Negroes were hunted down by police, firemen, other white citizens, shot, assaulted, robbed, and in many instances their houses searched under the pretense of hunting for concealed arms, plundered, and then set on fire.")
- 191 *Memphis Riots and Massacres*, H.R. REP. NO. 39-101, at 6 ("[W]henver a colored man was arrested for any cause, even the most frivolous, and sometimes with cause, by the police, the arrest was made in a harsh and brutal manner, it being usual to knock down and beat the arrested party."); *id.* at 30 (describing a case in which "a negro was most brutally and inhumanly murdered publicly in the streets by a policeman"); *id.* at 156 (testimony that "[w]hen the police arrested a colored man they were generally very brutal towards him. I have seen one or two arrested for the slightest offence, and instead of taking the man quietly to

the lock-up, as officers should, I have seen them beat him senseless and throw him into a cart.”); RABLE, *supra* note 188, at 36 (“[T]he predominantly Irish police went out of their way to harass blacks; they often beat and sometimes shot black prisoners while hauling them off to jail or fired at drunken Negroes who fled from them or made even a token resistance to arrest.”).

192 *Memphis Riots and Massacres*, H.R. REP. NO. 39-101, at 34.

193 *Id.* at 8, 9, 10.

194 *Id.* at 13-15.

195 *Id.* at 10, 25.

196 *Id.* at 34.

197 See FONER, *supra* note 140, at 262-63; RABLE, *supra* note 188, at 43-58.

198 *New Orleans Riots*, H.R. EXEC. DOC. 39-68, at 11 (1867).

199 *New Orleans Riots*, H.R. REP. NO. 39-16, at 17 (1867).

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

201 *Id.* at 17.

202 *Id.* at 11.

203 *Id.* at 10.

204 *Id.*

205 *Id.* at 35.

206 *Report of the Joint Committee on Reconstruction*, at xvii.

207 *Id.*

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

209 CONG. GLOBE, 39th Cong., 1st Sess. 95, 339 (1866).

210 JACOBUS TENBROEK, *EQUAL UNDER LAW* 203-04 (rev. ed. 1965).

211 *Report of the Joint Committee on Reconstruction*, pt. II, at

209.

212 *Id.* at 185; *id.* pt. III, at 141 (“I have not known, after six months’ residence at the capital of the State, a single instance of a white man being convicted and hung or sent to the penitentiary for crime against a negro, while many cases of crime warranting such punishment have been reported to me.”); *id.* at 143 (“Not a single instance of the outrages we investigated was ever investigated or prosecuted by the civil authorities.”); *id.* at 149 (“[W]henver a wrong was done to a freedman it seldom, if ever, occurred that any of the white people would interpose to bring the wrong-doer to justice.”); *id.* at 184 (“Since my arrival more than fifty well-authenticated complaints have been made by the freedmen, . . . all of which have been referred to the civil authority; but, with one single exception, no action has been taken in any instance.”); *id.* pt. IV, at 48 (testimony that “it was impossible” for state authorities “to arrest anybody or hold anybody accountable for acts committed against the negroes”); *id.* at 75 (“[I]t is of weekly, if not of daily, occurrence that freedmen are murdered. Their bodies are found in different parts of the country, and sometimes it is not known who the perpetrators are; but when that is known no action is taken against them.”); *id.* at 125 (“[W]here blacks were killed, no white resident interposed to bring the offender to justice.”); *id.* at 153 (“[T]he prevailing sentiment is so adverse to the negro that acts of monstrous crime against him are winked at.”).

213 *Id.* pt. III, at 184.

214 U.S. CONST., amend. XIV, § 1.

215 CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

216 *Id.*

217 *Id.* at 1832, 1833.

218 *Id.* at 2765; *id.* at 1629 (arguing that the very definition of republican government required respect for “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”).

219 AMAR, *supra* note 1, at 267.

220 *The Southern Loyalists Convention*, Trib. Tracts No. 2, July 10, 1866, at 25.

221 Lash, *supra* note 187, at 1322 (quoting *Secretary Browning’s Letter*, EVENING POST, Oct. 24, 1866).

222 CONG. GLOBE, 39th Cong., 1st Sess. 941-42 (1866).

223 *Id.* at 41; *id.* at 111 (“[W]e must see to it that the man made free by the Constitution of the United States . . . is a free-

man indeed; that he can go where he pleases; work when and for whom he pleases.”).

224 *Id.*

225 *Id.* at 1124; see *id.* at 111 (rejecting “that kind of freedom that turns the emancipated working man out into the highway, then takes him up as a vagrant and makes a slave of him because he cannot get a home”).

226 *Id.* at app. 142; CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865) (describing the “celebrated case of Mr. Hoar, who went to South Carolina” and “was driven out, although he went there to exercise a plain constitutional right”); AMAR, *supra* note 1, at 236 (noting that “Hoar’s case still burned bright in the memories of members of Congress, who repeatedly cited the incident”).

227 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

228 Carl Schurz, *The Logical Results of the War* (Sept. 8, 1866), in 1 SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 413 (Frederic Bancroft ed., 1913).

229 *Id.* at 390.

230 MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 144 (1986) (quoting *North American (Pa.)*, Aug. 30, 1866).

231 CONG. GLOBE, 39th Cong., 1st Sess. 2766.

232 *Id.*

233 *Id.* at 2459.

234 FONER, *supra* note 148, at 79.

235 Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J., 507, 546-61 (1991); Balkin, *supra* note 208, at 1847 (describing “right of protection” as “one of the most basic rights of citizens”).

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

237 CONG. GLOBE, 42nd Cong., 1st Sess. app. 71 (1871).

238 STUNTZ, *supra* note 1, at 291 (“[T]he Fourteenth Amendment’s guarantee of equal protection of the laws’ meant roughly what it said: all citizens had the same right to the law’s protection. Ex-slaves terrorized by Klan members were entitled to a government that did its best to stop the terrorism.”); Balkin, *supra* note 208, at 1847 (arguing that “the protection of blacks and their white allies from private violence” was “a central and immediate purpose of the new amendment”); Akhil Reed Amar, *Foreward: The*

Document and the Doctrine, 114 HARV. L. REV. 26, 102 (2000) (explaining that the equal protection guarantee “at its core affirms the rights of victims to be equally protected by government from criminals”).

239 2 *Elliot’s Debates*, *supra* note 4, at 196.

240 3 *id.* at 554.

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

242 For discussion, see text accompanying notes 35-45.

243 *Wilkes v. Wood*, 19 How. St. Tr. 1153, 1154 (C.P. 1763).

244 *Id.* at 1155.

245 Michael, *supra* note 3, at 910.

246 *Wilkes*, 19 How. St. Tr. at 1167.

247 *Essays by a Farmer (I)*, BALTIMORE MD. GAZETTE, Feb. 15, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 66 at 14.

248 *Essay of A Democratic Federalist*, PENN. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 66, at 61.

249 *Essays by Hampden*, MASS. CENTINEL, Feb. 2, 1788, *in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 66, at 200.

250 Donald Ziegler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 1013 (1983) (discussing the Reconstruction Congress’s “repeated familiar complaints concerning the widespread, systemic breakdown in the administration of southern justice”).

251 CONG. GLOBE, 42nd Cong., 1st Sess. 501 (1871).

252 *Id.* at 374.

253 *Id.* at 482.

254 *Id.* at 376, 459.

255 *Id.* at 578.

256 See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Maryland v. King*, 569 U.S. 435, 447 (2013).

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

258 Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*,

- 48 STAN. L. REV. 555, 617 (1996). For criticism, see Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1028 (2004) (urging that “[a]ny measure of reasonableness must be premised on [constitutional] values; otherwise, reasonableness analysis is subject to deprecation by interpretation favoring governmental needs”).
- 259 LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 247-48 (1998).
- 260 RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 112-127 (2016).
- 261 *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972).
- 262 On the relationship between vagrancy laws and stop-and-frisk, see GOLUBOFF, *supra* note 260, at 198-208; Tracey Meares, *This Land is My Land?*, 130 HARV. L. REV. 1877, 1893 (2017) (reviewing GOLUBOFF, *supra* note 260) (observing that “the stories told by usually black and brown youth being policed programmatically in cities across the country echo the accounts of vagrancy policing Goluboff offers in her book”); Pope, *supra* note 148, at 1528-29 (“No sooner had the Supreme Court at long last struck down traditional vagrancy laws, than they were replaced with a host of new statutory crimes, harsh sentences, and enforcement policies targeted at behaviors, conditions, and locations associated with poverty and racial disadvantage”).
- 263 This is a textbook example of the dynamic that Reva Siegel calls preservation-through-transformation. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997).
- 264 392 U.S. 1 (1968).
- 265 *Id.* at 20.
- 266 *Id.* at 17, 14.
- 267 *Id.* at 21.
- 268 *Id.* at 27.
- 269 *Id.* at 39 (Douglas, J., dissenting).
- 270 Carbado, *supra* note 7, at 1537 (describing how Terry “facilitates the ‘wholesale harassment’ of African Americans through ‘prophylactic racial profiling’”); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1278 (1998) (explaining how “Terry provided a springboard for modern police methods that target black men and others for arbitrary and discretionary intrusions”).
- 271 *Terry*, 392 U.S. at 28 (majority opinion).
- 272 FRIEDMAN, *supra* note 20, at 150 (“With probable cause out the window, lots of people get stopped and frisked by the police, and comparatively little evidence or contraband is found. . . . [T]he whole point of probable cause is to indicate when a search for evidence might prove fruitful.”).
- 273 Jeffrey Fagan, *Terry’s Original Sin*, 2016 U. CHI. LEGAL. F. 43, 56 (2016) (describing the “doctrinal shift over time from the original officer safety rationale to permitting reasonable suspicion stops in the interest of crime control”); David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 22-23 (1994) (describing expansion of *Terry* in the lower courts to “allow frisks automatically—categorically—in many situations in which the offense suspected does not require a weapon, and the suspect shows no outward sign he might be armed and dangerous”).
- 274 407 U.S. 143 (1972).
- 275 *Id.* at 146.
- 276 490 U.S. 1 (1989).
- 277 *Id.* at 9.
- 278 *Id.* at 7.
- 279 *Id.* at 13-14 (Marshall, J., dissenting) (observing past cases in which stops were justified by the fact that suspect was “first to deplane,” “deplaned from middle,” “last to deplane,” bought “one-way tickets,” “round-trip tickets,” was “traveling alone,” or “travelling with companion,” was “act[ing] nervously” or “too calmly”); see DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE CRIMINAL JUSTICE SYSTEM* 47 (1999) (describing the drug courier profile as “a scattershot hodge-podge of traits and characteristics so expansive that it potentially justifies stopping anybody and everybody”).
- 280 528 U.S. 119 (2000).
- 281 *Id.* at 125.
- 282 *Id.* at 126.
- 283 *Id.* at 124-25.
- 284 *Id.* at 132 (Stevens, J., concurring in part and dissenting in part).
- 285 Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L.

- REV. 245, 249 (2010) (describing how the Court “pay[s] short shrift to race—even when race seemed an integral element”); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962 (1999) (criticizing “the Court’s conception of a raceless world of Fourth Amendment jurisprudence”).
- 286 Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 162, 164 (2015) (emphasis omitted); see also FRIEDMAN, *supra* note 20, at 154 (“[R]ather than stopping on cause and frisking for protection, over time, the search became the goal and the stop merely a means to that end.”); Carbado, *supra* note 7, at 1540 (describing use of stop-and-frisk as an “order-maintenance strategy and a prophylactic device to deter blacks from carrying weapons or otherwise engaging in criminal conduct.”)
- 287 *Floyd v. City of New York*, 959 F. Supp.2d 540, 558-59 (S.D.N.Y. 2013); see FRIEDMAN, *supra* note 20, at 140-42, 155-56; Carbado, *supra* note 7, at 1537-51; Meares, *supra* note 286, at 164-65.
- 288 *Floyd*, 959 F.2d at 558-59.
- 289 *Id.* at 606.
- 290 In *Floyd*, a federal trial court held New York’s stop-and-frisk program unlawful, finding that the city had been deliberately indifferent to the New York Police Department’s practice of making unconstitutional stops and conducting unconstitutional frisks. That decision was not tested on appeal. But even on the most generous reading of the law, most of the more than four million stops were actually valid under *Terry*. According to the plaintiffs’ expert, between seven and thirty percent of the stops lacked reasonable suspicion, meaning that at least seventy percent were constitutional. See Carbado, *supra* note 7, at 1549 (observing that “most of the stops that formed the basis for the *Floyd* litigation, were legal, not illegal”).
- 291 532 U.S. 318 (2001).
- 292 *Id.* at 347, 354.
- 293 The Court has even made common law analysis a mandatory part of the test it used to assess Fourth Amendment reasonableness, asking “whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.” *Houghton*, 526 U.S. at 299; see *California v. Hodari D.*, 499 U.S. 621, 624-25 (1991); *Florida v. White*, 526 U.S. 559, 563 (1999); *Atwater*, 532 U.S. at 326-27; *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019). For critiques, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1776-93 (2000); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 955-57 (2002).
- 294 *Atwater*, 532 U.S. at 337.
- 295 *Id.* at 340.
- 296 Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 318 (2002) (emphasis added).
- 297 Maclin, *supra* note 293, at 968 (stressing the need to “distinguish between what the Framing generation meant when the Fourth Amendment was adopted and what the expectations of other legal actors regarding the permissibility of different search and seizure practices were at the time” (emphasis added)).
- 298 *Atwater*, 532 U.S. at 346, 347; *id.* at 373 (O’Connor, J., dissenting).
- 299 See *Report of the Joint Committee on Reconstruction*, pt. III at 8.
- 300 *Atwater*, 532 U.S. at 372 (O’Connor, J., dissenting); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1489 (2016) (observing that, because of “mass criminalization,” police officers have “mostly unbridled” discretion “to target African-Africans, particularly young African-Americans in public places”).
- 301 Sklansky, *supra* note 293, at 1773.
- 302 *Id.* at 1805 (“Peers and members of Parliament received special protections against search and seizure, while the homes of the poor were freely inspected for vagrants, poached game and morals violations.”); Cloud, *supra* note 87, at 1719 (“Warrantless general searches to round up vagrants and other social ‘undesirables’ were a common social control device in England.”).
- 303 CUDDIHY, *supra* note 21, at 482 (internal citations omitted).
- 304 CONG. GLOBE, 39th Cong. 1st Sess. 1159 (1866).
- 305 *Atwater*, 532 U.S. at 347.
- 306 Carbado, *supra* note 10, at 127.
- 307 490 U.S. 386 (1989).
- 308 *Id.* at 395 (emphasis omitted).

- 309 *Id.* at 396.
- 310 *Id.* at 396, 397.
- 311 Scott v. Harris, 550 U.S. 372, 383 (2007); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1140 (2008) (arguing that Supreme Court doctrine provides “almost no direction at all about what constitutes reasonable force”); Stuntz, *supra* note 6, at 1043 n.93 (lamenting the lack of “any body of case law that gives this standard some content”).
- 312 Tennessee v. Garner, 471 U.S. 1, 11 (1985).
- 313 Harmon, *supra* note 311, at 1123 (arguing that “the indeterminate nature of the Court’s doctrine leads many unconstitutional uses of force to go uncompensated and undeterred”).
- 314 SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 12 (2019).
- 315 Whren v. United States, 517 U.S. 806 (1996).
- 316 Pennsylvania v. Mimms, 434 U.S. 106 (1977); Maryland v. Wilson, 519 U.S. 408 (1997).
- 317 Ohio v. Robinette, 519 U.S. 33 (1996); Stuntz, *supra* note 6, at 1064 (describing the Court’s doctrine as a “kind of Jeopardy rule: if the officer puts his command in the form of the question, consent is deemed voluntary”); George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L. REV. 525, 540 (2003) (“The consent search doctrine is the handmaiden of racial profiling. On the street, police can approach young men and ask for consent to search solely on the basis of race.”).
- 318 SEO, *supra* note 314, at 266 (observing that “nearly a third of police shootings in 2015 began with a traffic stop”); Maclin & Savarese, *supra* note 7, at 59 (noting a number of “black motorists stopped for trivial traffic violations and then killed by police”).
- 319 Sklansky, *supra* note 7, at 298-99 (“Because almost everyone violates traffic rules sometimes, this means that the police, if they are patient, can eventually pull over anyone they are interested in questioning”); Barbara C. Salken, *The General Warrant of the Twentieth Century?: A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 222 (1989) (likening traffic laws to general warrants because “police officers in most states may arrest and search virtually every adult almost at whim”).
- 320 Navarette v. California, 572 U.S. 393, 396 (2014) (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)); United States v. Arvizu, 534 U.S. 266, 273 (2002).
- 321 572 U.S. 393.
- 322 *Id.* at 401-03; *id.* at 409 (Scalia, J., dissenting) (arguing that 911 call “neither asserts that the driver was drunk nor even raises the *likelihood* that the driver was drunk”).
- 323 *Id.* at 403-04 (majority opinion).
- 324 *Id.* at 405 (Scalia, J., dissenting).
- 325 *Id.* at 413.
- 326 422 U.S. 873 (1975).
- 327 *Id.* at 881.
- 328 *Id.* at 886-87; Carbado & Harris, *supra* note 7, at 1575 (explaining that *Brignoni-Ponce* “authorizes the express utilization of race as a basis for suspicion”).
- 329 428 U.S. 543 (1976).
- 330 *Id.* at 545.
- 331 *Id.* at 557.
- 332 *Id.* at 561.
- 333 *Id.* at 563-64; Carbado & Harris, *supra* note 7, at 1583 (observing that “because no level of suspicion is required to justify checkpoint stops, and because race is relevant to immigration enforcement, Border Patrol agents can employ apparent Mexican ancestry as the basis for suspicion”).
- 334 SEO, *supra* note 314, at 183.
- 335 *Id.*
- 336 Maclin & Savarese, *supra* note 7, at 43-45.
- 337 *Id.* at 66; see DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 72 (2002) (“The data on stops are incontrovertible. The information comes from many cities and involves many different police departments and law enforcement contexts. . . . [A]ll of the data points in the same direction: minorities are stopped, questioned, and searched in numbers far out of proportion to their presence in the driving population. And it is not their driving behavior or vehicles that account for this.”); John Eligon, *Stopped, Ticketed, and Fined: The Perils of Driving While Black in Ferguson*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/black-drivers-traffic-stops.html>; John Sides, *What Data on 20 Million Traffic Stops Can Tell Us About “Driving While Black”*, WASH. POST (July

- 17, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/17/what-data-on-20-million-traffic-stops-can-tell-us-about-driving-while-black/>.
- 338 517 U.S. 806 (1996).
- 339 *Id.* at 813.
- 340 *Id.* at 818.
- 341 Maclin, *supra* note 7, at 377.
- 342 *Id.* at 370-71, 375; Sklansky, *supra* note 7, at 329.
- 343 *Whren*, 517 U.S. at 813; Sklansky, *supra* note 7, at 326 (observing that equal protection doctrine “has developed in ways that poorly equip it to address the problems of discriminatory police conduct”).
- 344 For discussion, see FRIEDMAN, *supra* note 20, at 167-84; Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254 (2011).
- 345 Barry C. Feld, T.L.O. and Redding’s *Unanswered* (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies, 80 MISS. L.J. 847, 851 (2011); Jason Nance, *Student, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 937-939 (2016).
- 346 See James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION* 152-55 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing racial profiling of students by police at schools in Washington, D.C.); Evie Blad & Alex Harwin, *Analysis Reveals Racial Disparities in School Arrests*, PBS NEWS HOUR (Feb. 27, 2017), <https://www.pbs.org/newshour/education/analysis-reveals-racial-disparities-school-arrests>; German Lopez, *Black Kids Are Way More Likely to be Punished in School than White Kids, Study Finds*, VOX (Apr. 5, 2018), <https://www.vox.com/identities/2018/4/5/17199810/school-discipline-race-racism-gao>.
- 347 469 U.S. 325 (1985).
- 348 *Id.* at 340, 341.
- 349 *Id.* at 340.
- 350 *Id.* at 343.
- 351 515 U.S. 646 (1995).
- 352 536 U.S. 822 (2002).
- 353 *Vernonia*, 515 U.S. at 667 (O’Connor, J., dissenting).
- 354 *Earls*, 536 U.S. at 829 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)); *Vernonia*, 515 U.S. at 653.
- 355 K.W.P. v. Kansas City Pub. Schs., 931 F.3d 813, 826-27 (8th Cir. 2019).
- 356 557 U.S. 364 (2009).
- 357 *Id.* at 376.
- 358 *Id.* at 377, 376.
- 359 *Id.* at 377-79.
- 360 FONER, *supra* note 140, at 530.
- 361 92 U.S. 542 (1876).
- 362 STUNTZ, *supra* note 1, at 106-17.
- 363 *Cruikshank*, 92 U.S. at 554-55.
- 364 *Id.* at 555.
- 365 106 U.S. 629 (1883).
- 366 *United States v. Morrison*, 529 U.S. 598, 621-22 (2000); *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005) (finding no Fourteenth Amendment violation in state police’s refusal to enforce restraining order protecting a woman and her family from her abusive husband).
- 367 *Castle Rock*, 545 U.S. at 761.
- 368 LEOVY, *supra* note 14, at 307.
- 369 Sklansky, *supra* note 7, at 326 (“[C]hallenges to discriminatory police practices will fail without proof of conscious racial animus on the part of the police. . . . [T]his amounts to saying that they will almost always fail.”).
- 370 481 U.S. 279 (1987).
- 371 *Id.* at 292-93.
- 372 *Id.* at 297.
- 373 517 U.S. 456 (1996).
- 374 *Id.* at 463, 465.
- 375 *Id.* at 465 (internal citations omitted).
- 376 STUNTZ, *supra* note 1, at 120; COLE, *supra* note 279, at 159; Pamela S. Karlan, *Race, Rights and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005 (1998) (describing how the Court has “strip[ped] the concept of selective

prosecution of virtually any real-world effect”).

- 377 Maclin, *supra* note 7, at 337 n.22 (calling *Whren's* treatment of equal protection “hollow”); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI. L. REV. 425, 438 (1997) (detailing that it is often impossible, in the context of pretextual traffic stops, to show that similarly situated whites were not stopped since “[p]olice officers do not keep records of instances in which they could have stopped a motorist for a traffic violation, but did not”); Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1535, 1536 (2007) (arguing that “a motorist who was discriminated against would have little chance of proving it” because “the permissibility of pretextual stops and the presumption of good faith accorded police officers would almost always lead a court to credit any race-neutral explanation given for the stop”).
- 378 Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERS. & SOC. PSYCH. 876, 876 (2004) (“[J]ust as Black faces and Black bodies can trigger thoughts of crime, thinking of crime can trigger thoughts of Black people”); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2039 (2011) (explaining that “[a]s a result of implicit biases, an officer might evaluate behaviors engaged in by individuals who appear black as suspicious even as identical behavior by those who appear white would go unnoticed”); Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1993 (2018) (“[I]mplicit biases are most likely to influence behaviors and judgments in situations where decisionmaking is highly discretionary, information is limited and ambiguous, and individuals are cognitively depleted. These are the conditions under which most police officers . . . operate on the street.”) (reviewing FORMAN, *supra* note 8); Steiker, *supra* note 136, at 840 (discussing “widespread use by police of race as a proxy for criminality”).
- 379 See Karlan, *supra* note 376, at 2025 (observing that there is no “single other area of current equal protection doctrine in which the Court is prepared to assume . . . that blacks and white differ in a legally cognizable way”).
- 380 See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). As David Cole has observed, “[v]irtually all the attention the Court has paid to race discrimination in criminal justice has been focused on the jury.” COLE, *supra* note 279, at 101.
- 381 See Roberts, *supra* note 139, at 99 (arguing that *Batson* permits “the continued prosecutorial use of race-neutral pretexts for peremptory challenges in order to produce all-white juries”); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1022-23 (1988) (arguing that *Batson* is “flawed by the assumption that merely allowing defendants to challenge the racially discriminatory use of peremptory challenges in individual cases will end the illegitimate use of the peremptory challenge”).
- 382 *Miller-El*, 545 U.S. at 238.
- 383 221 F.3d 329 (2d Cir. 2000).
- 384 *Id.* at 337; see *Monroe v. City of Charlottesville*, 579 F.3d 380, 382, 389 (4th Cir. 2009) (holding that the police did not violate equal protection when they stopped 190 black men and asked them for DNA samples because the stops “did not stem from an explicit government classification”).
- 385 *Brown v. City of Oneonta*, 235 F.3d 769, 781 (2d Cir. 2000) (Calabresi, J., dissenting from the denial of rehearing en banc) (urging that sweep was a racial classification because “the police created and acted upon a racial classification by setting aside all but the racial elements in the victim’s description” in order to “stop and question all members of that race they can get hold of”); FRIEDMAN, *supra* note 20, at 193; Albert Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 181-83 (2002); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1108-15 (2001).
- 386 *Id.* at 1113 (emphasis added).
- 387 Compare Steiker, *supra* note 136, at 851 (defending the exclusionary rule because it “involves the courts in the ongoing project of developing a detailed body of Fourth Amendment law” and establishes rules that “the political branches of government would otherwise neglect”); Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 Ohio. St. J. Crim. L. 463, 508 (2009) (calling the exclusionary rule “one of the law’s success stories” because it has “permitted the judicial articulation and reiteration of Fourth Amendment standards”) with Amar, *supra* note 95, at 785, 799 (calling the exclusionary rule an “awkward and embarrassing remedy” that “renders the Fourth Amendment contemptible in the eyes of judges and citizens”).
- 388 Litman, *supra* note 16, at 1528; Orin Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, 2011 CATO SUP. CT. REV. 237, 254 (discussing the trend toward “less law development, fewer remedies, or both . . . coming from all directions simultaneously”).
- 389 An Act to Enforce the Provisions of the Fourteenth

Amendment to the Constitution of the United States, and for Other Purposes, § 1, ch. 22, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983).

390 *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

391 457 U.S. 800 (1982).

392 *Anderson v. Creighton*, 483 U.S. 635, 645 (1987); see *Wyatt v. Cole*, 504 U.S. 158, 170-71 (1992) (Kennedy, J., concurring) (describing how qualified immunity “diverge[s] to a substantial degree from historical standards” based on the “special policy concerns arising from public officials’ exposure to repeated suits”).

393 *Harlow*, 457 U.S. at 818.

394 Baude, *supra* note 18, at 55; see David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 19 (1972) (discussing the “insistence of nineteenth century courts upon [a] strict rule of personal official liability” and noting that the fact that “an officer personally could be separately liable *where the wrong was equally a wrong by the state*, is what gave the principal of personal official liability its major importance”); Alschuler, *supra* note 387, at 501 (observing that at the time of the framing of the Fourth Amendment, “officers who conducted illegal searches and seizures were held strictly liable in damages” and “had no immunity from civil lawsuits”); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1924 (2010) (contrasting qualified immunity with the “antebellum system of government accountability” in which “the courts—state and federal—did not take responsibility for adjusting the incentives of officers or for protecting them from the burdens of litigation and personal liability”).

395 Schwartz, *supra* note 18, at 1804.

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

397 *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011).

398 *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 375 (2009).

399 *Id.* at 379.

400 See, e.g., *Messerschmidt v. Millender*, 565 U.S. 535, 539 (2012); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017 (2014); *City and Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1769

(2015); *District of Columbia v. Wesby*, 138 S. Ct. 577, 582 (2018); Baude, *supra* note 18, at 82 (“[N]early all the Supreme Court’s qualified immunity cases come out the same way—by finding immunity for the officials.”).

401 *Groh v. Ramirez*, 540 U.S. 551, 563-66 (2004).

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

403 Baude, *supra* note 18, at 85 (observing that “only a special dispensation from the normal principles of certiorari explains the Court’s qualified immunity docket”).

404 *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

405 *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

406 *Weeks v. United States*, 232 U.S. 383, 393 (1914).

407 *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

408 *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

409 *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

410 *Herring v. United States*, 555 U.S. 135, 144 (2009).

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

412 *Litman*, *supra* note 16, at 1507 (“[I]f exclusion is not warranted because the officers acted reasonably in light of existing law, then damages would not be available either because the standards for the two remedies have converged.”); Alschuler, *supra* note 387, at 510 (explaining that Court’s new doctrinal rules “would require most of the people whom the police have searched and arrested unlawfully to lump it”); Kerr, *supra* note 388, at 255 (arguing that the Roberts Court is moving “toward limiting the exclusionary rule to the rare instances when police conduct is so egregious that qualified immunity does not apply”).

413 136 S. Ct. 2056.

414 *Id.* 2067 (Sotomayor, J., dissenting).

415 *Id.* at 2063 (majority opinion).

416 *Id.*

417 *Id.* at 2064.

418 *Id.* at 2064 (Sotomayor, J., dissenting).

419 *Id.* at 2070.

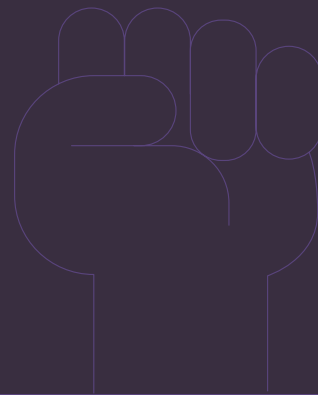
- 420 *Id.*
- 421 *Id.* at 2069.
- 422 STUNTZ, *supra* note 1, at 220 (arguing that “institutional injunctions” might be a “better remedy” for police misconduct).
- 423 461 U.S. 95 (1983).
- 424 *Id.* at 105.
- 425 For criticism, see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 30 (1984) (arguing that *Lyons* “represents an unnecessary and unjustified doctrine that reduces judicial capacity to protect constitutional rights”); Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 167 (2014) (arguing that the ruling “left *Lyons*, and those situated like him, without an effective remedy to provide for their future security”).
- 426 *Lyons*, 461 U.S. at 137 (Marshall, J., dissenting).
- 427 *Id.* at 113.
- 428 Kerr, *supra* note 388, at 244-45; Litman, *supra* note 16, at 1512-13.
- 429 Thomas, *supra* note 86, at 1496; *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (observing that, in the absence of a “full-blown arrest,” there was “no clear support at common law for physically searching the suspect”).
- 430 FORMAN, *supra* note 8, at 214, 212.
- 431 Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133, 1138 (1998).
- 432 FRIEDMAN, *supra* note 20, at 156 (“The Constitution says how much cause is appropriate. *Probable cause*.”); Sundby, *supra* note 431, at 1138 (arguing that “probable cause should be the Fourth Amendment norm from which departures must be viewed as narrow exceptions that require independent justification”); Thomas, *supra* note 86, at 1518 (arguing that courts should require “probable cause for all seizures and for all searches for evidence of crime except searches incident to arrest”).
- 433 See Harmon, *supra* note 311, at 1166-1183 (discussing concepts of imminence, necessity, and proportionality).
- 434 *Buck v. Davis*, 137 S. Ct. 759, 776 (2017).
- 435 David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1318-19 (1995) (urging use of a burden-shifting approach to adjudicate challenges to federal sentencing laws with racially disproportionate impacts).
- 436 FRIEDMAN, *supra* note 20, at 188.
- 437 34 U.S.C. § 12601 (previously codified at 42 U.S.C. § 14141); Deborah Turkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1310-30 (2016) (discussing suits brought by the Department of Justice under § 14141 during the Obama administration to redress unconstitutional underenforcement by local police departments).
- 438 Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020).

About the Text and History Narrative Series

"We Do Not Want to Be Hunted: The Right To Be Secure and Our Constitutional Story of Race and Policing" is the seventh in a series of Constitutional Accountability Center reports about the text and history of our Constitution. Every provision of the Constitution has a narrative — a story of its enactment; the men and women who pushed for constitutional change; the events and cases that motivated the provision's framers and ratifiers; and the debates — both in the courts and political branches — about its meaning. Through this series, CAC will tell the most important and compelling stories in the American canon: our Constitution's text, its creation, and the efforts over the past 220 years to improve the document. These narratives will not only distill the best legal and historical scholarship and bring alive forgotten Americans, they will also help us better understand our Constitution and inform how modern debates about the Constitution should be resolved.

Help us wage the fight
against interests threatening
our Constitution's text,
history, and enduring values.

Make a tax-deductible donation at
www.theusconstitution.org



Constitutional Accountability Center (CAC) is a think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history.

Constitutional Accountability Center

1200 18th Street NW, Suite 501, Washington, D.C. 20036

Phone: 202-296-6889 | Fax: 202-296-6895

theusconstitution.org