EQUALITY AND PROTECTION: THE FORGOTTEN MEANING OF THE FOURTEENTH AMENDMENT

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ABSTRACT

At the heart of the Fourteenth Amendment's Equal Protection Clause are two fundamental principles: equality and protection. Tragically, the Supreme Court has read one of these two principles—protection—out of our foundational charter. While the Justices repeatedly invoke the textual promise of equal protection, their precedent turns a blind eye to the constitutional command of protection and the idea that, in return for allegiance, the government owes its citizenry protection. Until the Supreme Court takes seriously the right to protection embedded in the Fourteenth Amendment, its jurisprudence will continue to be deeply flawed.

As the text and history laid out in this Article demonstrate, the Fourteenth Amendment wrote the duty of protection into the Constitution, imposing on states an affirmative constitutional obligation to protect their people and forbidding all forms of unequal protection, whether due to heavy-handed discrimination or state neglect. And protection was a broad concept, reflecting the idea that the government has a wide array of affirmative duties that it owes to its citizenry. States had to protect the people from violence and other legal wrongs; provide access to courts; protect rights essential to life, liberty, property, and the pursuit of happiness; and provide goods and services, such as education, on an equal basis. We cannot hope to recover the true meaning of the guarantee of the equal protection of the laws without taking seriously the broad concept of protection.

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INTRODUCTION

The Equal Protection Clause rests on a simple idea: the government has a constitutional duty to protect the legal rights of the people and that protection must be equal for all persons. The most marginalized people are entitled to the same rights and the same protection under the law as the most powerful. This idea is traceable to an old principle—now often forgotten—that in return for allegiance, the government owes all citizens its protection.[1] In a constitution largely composed of negative rights, protection is an affirmative right, requiring the government to act to secure individual rights to life, liberty, property, and the pursuit of happiness. This commitment to protection as a positive right reflects a constitutional affirmation that, in the words of the Black abolitionist Frances Ellen Watkins Harper, "[w]e are all bound up together in one great bundle of humanity, and society cannot trample on the weakest and feeblest of its members without receiving the curse in its own soul."[2] A nation committed to equal protection should "have no privileged class, trampling upon and outraging the unprivileged classes" but instead should be "one great privileged nation, whose privilege will be to produce the loftiest manhood and womanhood that humanity can attain."[3]

This Article joins a growing body of scholarship that takes the constitutional concept of protection embedded in the Fourteenth Amendment seriously.[4] It lays out the text and history of the Fourteenth Amendment's Equal Protection Clause, shows why the right of protection is crucial to the promise of freedom and equality, details how a broad understanding of protection was fundamental to the landmark federal civil rights laws

1. Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 21 (2021); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 513 (1991); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 891 (1986).

2. *See* Frances Ellen Watkins Harper, Speech at the National Woman's Right's Convention (May 10, 1866), *in* RECONSTRUCTION: VOICES FROM AMERICA'S FIRST GREAT STRUGGLE FOR RACIAL EQUALITY 242 (Brooks D. Simpson ed., 2018).

3. *Id.* at 243.

4. For recent scholarship on protection, including my own: *see generally* Bernick, *supra* note 1, at 3; Heyman, *supra* note 1, at 509; Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 113 (1991); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 3 (2008); Andrew T. Hyman, *The Substantive Role of Congress Under the Equal Protection Clause*, 42 S. U. L. REV. 79, 86, 89 (2014); Andrew J. Lanham, *"Protection for Every Class of Citizens": The New York City Draft Riots of 1863, the Equal Protection Clause, and the Government's Duty to Protect Civil Rights*, 13 U.C. IRVINE L. REV. 1067, 1073–74 (2023); Jacob D. Charles & Darrell A.H. Miller, *The New Outlawry*, 124 COLUM. L. REV. 1195 (2024); David H. Gans, *"I Am Free but Without a Cent": Economic Justice as Equal Citizenship*, 93 GEO. WASH. L. REV. 221, 253–77 (2025).

enacted during Reconstruction, and criticizes the Supreme Court's modern equal protection jurisprudence for turning a blind eye to protection.

The right to protection seldom appears in recent volumes of the U.S. Reports, but the idea has deep roots in American constitutionalism. The idea of protection as a fundamental duty of government surfaced in the Declaration of Independence, which affirmed that "Governments are instituted among [m]en" in order "to secure" to the people their inalienable rights of "Life, Liberty and the pursuit of Happiness."[5] Early American state constitutions also recognized protection as a fundamental right.[6] Perhaps the most important influence on the equal protection guarantee, however, was the abolitionist movement.[7] Abolitionists attacked the terrible power of the law wielded by state and private actors against those held in bondage as a denial of legal protection. The law denied enslaved persons basic human rights: it denied them rights to bodily and family integrity; locked them out of seeking redress in court; and sanctioned the horrific and unchecked violence they experienced at the hands of white enslavers.[8] Guarding against these abuses would be central to the meaning of protection.

Out of the abolitionist focus on protection, the Fourteenth Amendment ensured that all persons were guaranteed the law's equal protection.[9] The Equal Protection Clause "h[e]ld over every American citizen, without regard to color, the protecting shield of law" and afforded to "the humblest, the poorest, the most despised of the race the same rights and protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[10] To the Reconstruction Framers, it was plain that the Equal Protection Clause made everyone equal before the law and constrained state-sponsored discrimination.[11] And, just as important, this guarantee imposed a positive constitutional duty upon states to protect the legal rights of their residents.[12] Rather than turning a blind eye when white people conspired to kill, brutalize, or subjugate Black Americans, states now had a constitutional obligation to protect Black Americans' enjoyment of legal rights. The Fourteenth Amendment answered the pleas of

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5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

6. Heyman, *supra* note 1, at 523–24.

7. *See* Dorothy E. Roberts, *The Supreme Court, 2018 Term, Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 54 (2019) ("The abolition struggle profoundly shaped not only the specific language of the Reconstruction Amendments but also the very meaning of those constitutional principles.").

8. *See* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951), *reprinted in* JACOBUS TENBROEK, EQUAL UNDER LAW 118 (1965); Bernick, *supra* note 1, at 26.

9. *See* Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 157 (2022) ("The right to equal protection was not so much a right of equal protection against the government, but a duty of the government to provide protection—including against private action—to the people as equals.").

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

11. *Id.* at 2767.

12. Bernick, *supra* note 1, at 53 (recognizing that the Equal Protection Clause "*does* impose a duty of protection").

Black Americans, liberated from bondage, "for that protection which we so much need, and for which freemen in all ages have contended."[13] Black people, yearning to be truly free, demanded the right to "appeal to the law for [their] equal rights" and decried that, without the assistance of the federal government, "we have no where to look for that protection which is essential for the safety of our persons or our property, our wives or our children."[14] Protection was equally concerned with equal rights under the law and with ensuring personal safety.

Today, all too often, equal protection no longer protects.[15] For decades, the Supreme Court has adopted a doctrine that hollows out the Fourteenth Amendment and turns a blind eye to the constitutional idea of protection. The Court's doctrine fails to address the fact that the text and history of the Equal Protection Clause was aimed at state failures to protect all persons equally, not simply discriminatory legislative classifications. In constructing a doctrinal framework centered around ending race-based and other invidious classifications, the Court has given short shrift to the Amendment's focus on ending all forms of unequal protection.

First, the Court's equal protection doctrine is intensely focused on the explicit classifications a law makes above all else.[16] When a law classifies based on a suspect or quasi-suspect characteristic, such as race, sex, or national origin, the Court imposes a very high burden of justification on the government to justify the use of that classification.[17] But if a law does not classify based on a ground the Court considers invidious, the Court applies a minimal form of scrutiny.[18] The upshot is that, most of the time, a fairly lenient form of scrutiny applies. Second, where a law is facially neutral, the Court's conservative majority requires plaintiffs to prove that the government acted with the express purpose of harming communities of color, women, or other marginalized groups.[19] In case after case, the Court has required plaintiffs to satisfy an exceedingly high burden of proof to establish purposeful discrimination, fashioning a requirement that is

13. PROCEEDINGS OF THE CONVENTION OF THE COLORED PEOPLE OF VA., HELD IN THE CITY OF ALEXANDRIA 9 (Cowing & Gillis 1865).

14. *Id.*

15. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1130 (1997).

16. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–56 (2011).

17. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 206–07 (2023) (applying strict scrutiny to race-based classifications) ; Sessions v. Morales-Santana, 582 U.S. 47, 57–59 (2017) (applying intermediate scrutiny to sex-based classifications); Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny to illegitimacy-based classifications); Bernal v. Fainter, 467 U.S. 216, 219–20 (1984) (applying strict scrutiny to alienage-based classifications); Hernandez v. Texas, 347 U.S. 475, 479–80 (1954) (holding unconstitutional to discrimination based on national origin).

18. *See* Armour v. City of Indianapolis, 566 U.S. 673, 680–81 (2012); Heller v. Doe, 509 U.S. 312, 319–21 (1993).

19. Siegel, *supra* note 15, at 1134–35; Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1833–35 (2012).

nearly impossible to meet without a smoking gun.[20] Consequently, as constitutional scholars have long noted, "prevailing constitutional doctrine effectively insulates countless decisions that actively harm structurally subordinated populations."[21] Third, the Court insists that the same framework applies to all types of state regulation, including governmental efforts to realize equal citizenship and to redress the long legacy of white supremacy in our nation's laws and practices.[22] As a result, the Court's doctrine effectively "equate[s] efforts to end white supremacy with efforts to preserve white supremacy."[23]

There is a vast amount of critical literature on the Court's anti-classification approach to equal protection, much of it driven by the idea that the Fourteenth Amendment is fundamentally about ending the legal subordination of Black Americans and other marginalized groups.[24] This large body of doctrinal literature, by and large, does not engage with the text and history of the Fourteenth Amendment or its constitutional command of protection. This Article fills the void. It examines the text and history of the Equal Protection Clause and the right to protection embedded in it. It demonstrates that, as a matter of text and history, the Court's doctrinal framework is badly flawed and should be replaced with one that takes seriously the two key concepts at the heart of the Equal Protection Clause: equality and protection.

The abuses that led to the Fourteenth Amendment were not limited to discriminatory classifications. The Fourteenth Amendment was a response to the concerted efforts of white-dominated southern state governments to strip Black Americans of all legal protection and reinstitute enslavement in all but name. The Framers of the Fourteenth Amendment were equally concerned about facially neutral measures designed to keep Black Americans in servitude and about state governments' failure to protect Black Americans from white supremacist violence and a host of other legal wrongs.[25] Under the Fourteenth Amendment, facially equal laws are not enough. States have a positive constitutional duty to protect the life, liberty, property, and happiness of their populace and to do so equally. Indeed, in framing the Fourteenth Amendment, the Thirty-Ninth Congress

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20. *See* Washington v. Davis, 426 U.S. 229, 239–40 (1976); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); McCleskey v. Kemp, 481 U.S. 279, 292–93, 297 (1987); United States v. Armstrong, 517 U.S. 456, 467, 469–70 (1996); Abbott v. Perez, 585 U.S. 579, 603–05 (2018); Alexander v. S.C. State Conf. of NAACP, 602 U.S. 1, 7–10 (2024).

21. Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: The Equality Amendment*, 129 YALE L.J. F. 343, 348 (2019).

22. *SFFA*, 600 U.S. at 206–07; Miller v. Johnson, 515 U.S. 900, 920–21 (1995); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 500 (1989).

23. Roberts, *supra* note 7, at 79.

24. *See, e.g.*, Siegel, *supra* note 15, at 1114; Haney-López, *supra* note 19, at 1783; Roberts, *supra* note 7, at 49–50; MacKinnon & Crenshaw, *supra* note 21, at 351–52; Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 125–27 (1976); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987).

25. *See infra* Section I.B.

explicitly considered the choice between a negative guarantee that would outlaw racial classifications in state laws and an affirmative command of equal protection.[26] It chose the latter, writing into the Constitution a positive constitutional safeguard of protection. The key word in the Equal Protection Clause—long ignored by the Supreme Court—is protection.

The Reconstruction Framers understood protection as a very broad concept. The major pieces of civil rights legislation enacted during Reconstruction, such as the Civil Rights Act of 1866, the Freedmen's Bureau Act of 1866, and the Ku Klux Klan Act of 1871, provide critically important insight on what protection meant to the authors of the Equal Protection Clause. In these landmark pieces of legislation, in the name of honoring the constitutional duty of protection, the Reconstruction Congress sought to safeguard equal enjoyment of basic fundamental rights, vindicate access to courts, ensure access to basic goods and services, including food, clothing, health care, and education, and stop white supremacist violence. Ensuring equal protection was just as much about attacking state neglect of the poor and marginalized as it was about preventing the use of discriminatory classifications. The throughline in the debates over these landmark statutes was Congress's responsibility to protect Black Americans' rights as equal citizens, a duty that at times demanded race-conscious measures to redress and repair slavery's legacy of racial subjugation, dehumanization, and violence.[27]

Taking the right to protection embedded in the Equal Protection Clause seriously offers transformative possibilities for combatting the systemic inequalities that make a mockery of the Constitution's promise of equal citizenship for all. Equal protection, read in light of the Fourteenth Amendment's text and history, requires states to protect the populace from violence, ensure access to courts, redress the deprivations of rights, and provide public goods and services on an equal basis. It is equally concerned with heavy-handed forms of discrimination as it is with state neglect. The radical promise of equal protection—that, in America, the government must protect everyone equally—remains more important than ever to redressing systemic inequalities in policing, education, criminal justice, public health, and to making our constitutional promise of equality real for all.

Indeed, the right to protection is likely to be incredibly important in combatting abuses in the second Trump administration. Since President Donald Trump took power earlier this year, we have seen an array of executive orders and other measures that refuse to enforce critical federal laws and turn a blind eye to violence experienced by vulnerable communities. These include (1) reassigning transgender women inmates to

26. *Id.*
27. *See infra* Part II.

prisons for men, where they are likely to be subjected to horrific violence;[28] (2) refusing to enforce, except in extraordinary circumstances, the Freedom of Access to Clinic Entrances Act designed to redress violence aimed at abortion providers and the patients they serve[29]; and (3) dismantling civil rights offices within the federal government and refusing to investigate civil rights claims brought by Black Americans, LGBTQ Americans, and others.[30] What links all these abuses together is a concerted refusal to protect the rights and basic safety of certain people apparently disfavored by this administration. Rather than taking care to enforce the law to protect the rights of *all* persons, the Trump administration is refusing to enforce the law impartially, sanctioning lawless conduct aimed at vulnerable populations that could subject people to violence and other serious harm. This is exactly what the constitutional guarantee of equal protection was meant to prevent.

This Article unfolds as follows. Part I examines the abolitionist conception of protection that was a powerful influence on the Framers of the Fourteenth Amendment. It then takes a close look at the text and history of the Equal Protection Clause, focusing on the Framers' decision to embed the right of protection into the Clause rather than to solely attack the problem of racial classifications. Part II examines three foundational landmark civil rights laws of the Reconstruction-era—the Civil Rights Act of 1866, the Freedmen's Bureau Act of 1866, and the Ku Klux Klan Act of 1871—to understand what protection meant at the time of Reconstruction. Part III considers the Amendment's phrase "of the laws" and shows that the Fourteenth Amendment requires states to guarantee equal protection of both protective state and federal laws, including constitutional guarantees. Part IV criticizes the Supreme Court's existing equal protection framework, detailing the ways the Court has erased protection from the Fourteenth Amendment and turned a blind eye to the text and history of the Equal Protection Clause, and offers preliminary suggestions about how to recover equal protection. A short conclusion follows.

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28. *See* Beth Schwartzapfel, *Trump's Order Takes Aim at Transgender People in Prison,* THE MARSHALL PROJECT (Jan. 23, 2025), https://www.themarshallproject.org/2025/01/23/trump-order-transgender-prison.

29. *See* Andrea González-Ramírez, *Trump Teases a New Era of Anti-Abortion Violence*, THE CUT (Feb. 3, 2025), https://www.thecut.com/article/trump-orders-threaten-a-new-era-of-anti-abortion-violence.html.

30. *See* Julian Mark, Hannah Natanson, & Danielle Abril, *Trump Officials Start Dismantling Civil Rights Offices, as Part of DOGE's Secret Plan*, WASH. POST. (Feb. 28, 2025), https://www.washingtonpost.com/nation/2025/02/28/doge-trump-civil-rights-office-closing-eeoc/; Abby Vesoulis, *Government Commission Halts Investigations of LGBTQ+ Workplace Discrimination*, MOTHER JONES (Feb. 6, 2025), https://www.motherjones.com/politics/2025/02/equal-opportunity-employment-commission-eeoc-halts-trans-sexual-orientation-lgbtq-dicrimination-cases-donald-trump-andrea-lucas/; Jennifer Smith Richards & Jodi S. Cohen, *Education Department "Lifting the Pause" on Some Civil Rights Probes, but Not for Race or Gender Cases*, PROPUBLICA (Feb. 20, 2025, 8:35 p.m.), https://www.propublica.org/article/department-education-civil-rights-investigations-disability-gender-race-discrimination.

I. PUTTING PROTECTION BACK INTO THE FOURTEENTH AMENDMENT

A. The Abolitionist Conception of Protection: Protection as an Affirmative Right

Most constitutional rights are negative rights, constraining the power of government to act in derogation of constitutional safeguards.[31] Indeed, the Supreme Court often insists the Constitution "confer[s] no affirmative right to governmental aid" and "imposes no affirmative obligation" on the government to safeguard basic rights.[32] This sweeping statement, however, ignores the fundamental character of the Equal Protection Clause, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[33] While it is framed as a prohibition on state action, it has a positive character that many other rights lack: it imposes an affirmative constitutional duty on the government to protect the life, liberty, property, and the pursuit of happiness of the residents of a state, and more importantly, it requires that protection be equal for all persons, no matter who they are.[34] In other words, the government must protect—meaning it must act affirmatively to safeguard individual rights and execute protective laws—and it must do so equally.[35]

In using the word protection, the Fourteenth Amendment built on a deeply rooted constitutional ideal that, in return for their allegiance, the government owes protection to its citizens. Allegiance and protection were "the essential elements of citizenship": "[u]pon whatever square foot of the earth's surface I owe allegiance to my country, there it owes me protection."[36] In American constitutionalism, the protection principle traces back to the Declaration of Independence, which both affirmed that government exists "to secure" our "unalienable Rights" to "Life, Liberty and the pursuit of Happiness" and charged that the King "has abdicated Government here, by declaring us out of his Protection."[37] Many of the first American state constitutions built upon these ideals when declaring that

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31. *See, e.g.*, Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 890 (1989) ("[E]verything we know about the purpose and structure of the federal Constitution reinforces the concept of a document aimed against government.").

32. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196–97 (1989).

33. U.S. CONST. amend. XIV, § 1.

34. *See* Hyman, *supra* note 4, at 120–21; Cummings v. Missouri, 71 U.S. 277, 321–22 (1866) ("The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness . . . and that in the protection of these rights all are equal before the law.").

35. For critiques of *DeShaney*, see Gans, *supra* note 4, at 226–27; Bernick, *supra* note 1, at 20–21; West, *supra* note 4, at 141–42; Heyman, *supra* note 1, at 508–10.

36. CONG. GLOBE, 39th Cong., 1st Sess. 570, 1263 (1866) (statements of Sen. Morrill and Rep. Broomall). As numerous speakers stressed, the reciprocal duties of allegiance and protection are foundational to citizenship. *Id.* at 1153, 1757, 1832, 2799.

37. THE DECLARATION OF INDEPENDENCE paras. 2, 25 (U.S. 1776).

"government is, or ought to be, instituted for the common benefit, protection, and security of the people."[38]

The abolitionist movement took these ideals and, over the course of its decades-long campaign, fashioned them into a frontal attack on the institution of slavery. Beginning in the 1830s, abolitionists vociferously charged that enslavement was predicated on a denial of the protection of the laws and urged Congress to use its plenary power over the District of Columbia to abolish chattel slavery there. For example, Henry Stanton's 1837 argument against enslavement in the District of Columbia included a section entitled "Slaves No Protection of Law."[39] According to Stanton, Congress denied to those held in slavery in the nation's capital "all protection of law as a man": "THERE IS NOT THE SHADOW OF LEGAL PROTECTION FOR THE FAMILY STATE AMONG THE SLAVES OF THE DISTRICT OF COLUMBIA . . . . Neither is there any real protection in law, for the limbs and lives of the slaves . . . ."[40] Stanton listed other fundamental aspects of bondage inconsistent with protection. "No slave can be a party before a judicial tribunal . . . in any species of action against any person, no matter how atrocious may have been the injury received. He is not known to the law as a person;–much less, a person having civil rights."[41] To Stanton, the protection of the law was a broad concept that required safeguarding fundamental rights, including rights to bodily and family integrity, access to courts, and protection from violence. He urged that "the slave should be legally protected in life and limb,–in his earnings, his family and social relations, and his conscience."[42]

Other abolitionists made similar arguments. Theodore Dwight Weld emphasized that enslaved persons were entitled to protection in return for their allegiance. In an 1838 pamphlet, Weld argued that "[*p]rotection is the* CONSTITUTIONAL RIGHT *of every human being under the exclusive legislation of Congress who has not forfeited it by crime.*"[43] He urged Congress to abolish human bondage in the nation's capital and "throw around the person, character, conscience, liberty, and domestic relations of the one, *the same law* that secures and blesses the other" and "prevent by legal restraints one class of men from seizing upon another class, and

38. *See* VA. DECL. OF RIGHTS, § 3 (1776); MASS CONST. of 1780, pt. I, art. VII; N.H. CONST. of 1784, art. X; PA. CONST. of 1776, Decl. Of Rts., art. V; R.I. ACT OF RENUNCIATION, 1776; VT. CONST. of 1777, pmbl. For further discussion, see Heyman, *supra* note 1, at 521–24; Bernick, *supra* note 1, at 24–25.

39. REMARKS OF HENRY B. STANTON, IN THE REPRESENTATIVES' HALL, ON THE 23RD AND 24TH OF FEBRUARY, BEFORE THE COMMITTEE OF THE HOUSE OF REPRESENTATIVES, OF MASSACHUSETTS, TO WHOM WAS REFERRED SUNDRY MEMORIALS ON THE SUBJECT OF SLAVERY 28 (Isaac Knapp 1837).

40. *Id.* (capitalization in original).

41. *Id.*

42. *Id.* at 34.

43. THEODORE DWIGHT WELD, THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA 43 (1838); *see also* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 182 (2011) ("We see in Weld the beginning of what will become a pattern: the equal protection of the laws is, first and foremost, about rendering *protection*.").

robbing them at pleasure of their earnings, their time, their liberty, their kindred, and the very use and ownership of their own persons."[44] In the ensuing decades, the demand for equal protection became a staple of the abolitionist argument. As constitutional scholar Brandon Hasbrouck has described it, "[t]o the abolitionists, . . . equal protection meant not just that the government had a duty to apply the law equally, but that the law *must* protect those subject to it."[45] And protection was broadly understood to include protection of life, liberty, property, and the pursuit of happiness, as well as access to courts and protection from violence and other wrongs.

Black Americans also invoked the right to protection to challenge racially discriminatory laws in northern states. Beginning as early as 1835, Black Conventions urged free Black Americans in the northern United States to petition Congress and their respective state legislatures "to be admitted to the rights and privileges of American citizens, and that we be protected in the same."[46] In the decades that followed, Black Conventions often invoked their right to protection when attacking discriminatory state laws. At an 1855 convention of Black Californians, one speaker demanded the right to testify and lambasted the state's discriminatory prohibition on Black Americans testifying as witnesses in criminal trials as a manifest denial of protection. "As it is, the law to us [is] a dead letter, a broken staff to lean upon. The oath that should protect life, liberty, and property, all that should throw the shield of law around ourselves and families, is denied us. Now we have no protection, and stand as nothing."[47] In 1857, Black Ohioans invoked the right to protection to challenge their exclusion from the State's Poor Fund and from public institutions designed to aid insane, blind, deaf and dumb persons.[48] They demanded the immediate repeal of the state's discriminatory laws "not as a favor, but as a right; for if you have a right to tax us for the benefit of the State, . . . we have a right to

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44. WELD, *supra* note 43, at 41.

45. Hasbrouck, *supra* note 9, at 132; for discussion of abolitionist arguments focused on protection, see TENBROEK, *supra* note 8, at 50–53, 117–19; Barnett, *supra* note 43, at 182–83, 209–10, 220–21, 230–31, 239–40; Bernick, *supra* note 1, at 25–29.

46. MINUTES OF THE FIFTH ANNUAL CONVENTION FOR THE IMPROVEMENT OF THE FREE PEOPLE OF COLOUR IN THE UNITED STATES, HELD BY ADJOURNMENTS, IN THE WESLEY CHURCH, PHILADELPHIA 9 (1835); *see also* James W. Fox, Jr., *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 U. PA. J. CON. L. 267, 287 (2021) (discussing the Convention's embrace of "protection as one of the central obligations of government").

47. PROCEEDINGS OF THE FIRST STATE CONVENTION OF THE COLORED CITIZENS OF THE STATE OF CALIFORNIA 13 (1855). Notably, this was not the first time that discriminatory restrictions on the right to testify were criticized as inconsistent with the protection due to all citizens. In 1830 debates in Congress over Georgia's oppressive Cherokee Codes, Senator Theodore Frelinghuysen attacked limits on Native American testimony in state courts as inconsistent with the promise of protection. These laws, he charged, "stripped these people of the protection of their government" and left them open to violent reprisals. 6 REG. DEB. 318 (1830). "[A] gang of lawless white men may break into the Cherokee country, plunder their habitations, murder the mother with the children, and all in the sight of the wretched husband and father, and no law of Georgia will reach the atrocity." *Id.* For a helpful discussion of how abuses involving the Cherokee helped shape the Fourteenth Amendment, see Gerard N. Magliocca, *Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875 (2003).

48. On the Ohio antiblack laws, see KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 87–89, 221–23 (2021).

demand of you protection, and if you deny us our plea, we say to you, 'fie upon your law.'"[49]

A few years later, in the midst of the Civil War, the right to protection played a key role in ensuring accountability for police officers who turned a blind eye to racial mob violence during the New York City draft riots of 1863, as recent work by legal historian Andrew Lanham has demonstrated.[50] In the wake of a week-long riot in which a rampaging white mob brutalized and killed Black New Yorkers, the New York City Board of Police Commissioners found that a police sergeant had acted wrongfully in ejecting a Black woman who had sought shelter from the mob at a precinct station house.[51] The ruling vindicated the idea that the police must provide "protection for every class of citizens—black or white, rich or poor, high or low," establishing a precedent for holding police officers accountable for turning a blind eye to the white supremacist violence Black Americans experienced.[52] This was, as press coverage described, a demand for "Equal Protection Under the Law."[53]

Finally, demands for equal protection marked Black Conventions held during the Civil War and in its immediate aftermath. In 1864, Black Americans gathering at a national convention in Syracuse, New York demanded an end to racially discriminatory laws, insisting that "in the matter of government, the object of which is the protection and security of human rights, prejudice should be allowed no voice whatever."[54] In Virginia, a Black Convention meeting in the summer of 1865 demanded protection for Black Americans' equal rights and physical security, observing that "we are left to the assaults of the vile and vicious to do with us as they please, and we are left without redress."[55] They demanded the right to vote as a necessary "safe-guard for our protection."[56] Black Americans in the nation's capital too emphasized that "[w]ithout the right of suffrage, we are without protection, and liable to Combinations of outrage."[57] Elsewhere, Black Americans attacked "denial of justice in our courts of law," observing that, without the right to testify, "[y]ou will be at the mercy of every scoundrel who has white skin and is disposed to swindle you . . . . You may be set upon, beaten into a jelly and murdered outright, and although fifty respectable colored persons might have seen it, you

49. PROCEEDINGS OF THE STATE CONVENTION OF THE COLORED MEN OF THE STATE OF OHIO, HELD IN THE CITY OF COLUMBUS, JANUARY 21ST, 22D, & 23D, 1857, at 17 (1857).

50. *See* Lanham, *supra* note 4, 1067–68.

51. *Id.* at 1069–71.

52. *Id.* at 1095.

53. *Id.*

54. PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN, HELD IN THE CITY OF SYRACUSE, N.Y., OCTOBER 4, 5, 6, AND 7, 1864, at 56 (1864).

55. PROCEEDINGS OF THE CONVENTION OF COLORED PEOPLE OF VA., *supra* note 13, at 9.

56. *Id.*

57. FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, SERIES NO. II: THE BLACK MILITARY EXPERIENCE 818 (Ira Berlin, Joseph P. Reidy, & Leslie S. Rowland eds., 1982).

would still be without redress."[58] Neither person nor property could be safe without equal protection.

This significant body of evidence shows that protection was understood as a broad concept— one that Black Americans and their abolitionist allies invoked to demand basic rights to life, liberty, property, the pursuit of happiness, equal access to justice, and protection from violence and other legal wrongs. Less commonly, it was also invoked to demand equal access to publicly funded and administered institutions. In its most sweeping formulation, ensuring equal protection meant the eradication of racially discriminatory laws and the guarantee of voting rights for Black Americans. The next Section turns to the framing of the Fourteenth Amendment and how its architects wrote the right to protection into our national charter.

B. Framing Equal Protection: Protection v. Classification

In drafting the Equal Protection Clause, the Framers of the Fourteenth Amendment faced a critical choice: whether to write a constitutional prohibition that would forbid laws that discriminated on the basis of race or to frame the Amendment in more universal, affirmative terms. The Framers, who were steeped in abolitionist demands for protection, chose the latter option, drawing on the "self-evident" legal principle that "protection by his Government is the right of every citizen."[59] As Eric Foner has observed, "[k]ey figures in the drafting of the Reconstruction [A]mendments . . . were veterans of antislavery politics" and they "carried ideas honed in the antislavery movement into the process of rewriting the Constitution after the Civil War."[60]

The Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, considered and rejected many proposals that would have limited the Fourteenth Amendment's equality guarantee to a prohibition on laws that discriminated based on race. In December 1865, even before the Joint Committee's deliberations had begun, Representative Thaddeus Stevens proposed a constitutional provision stating that "[a]ll national and [s]tate laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."[61] One month later, Representative Stevens proposed a similar ban on racial classifications, which would have provided that "[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race or color."[62] A sub-committee of the Joint Committee later rewrote Representative Stevens' January 1866 proposal to annul "all provisions in the

58. CONVENTION OF THE FREEDMEN OF NORTH CAROLINA, OFFICIAL PROCEEDINGS 8 (1865).
59. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866) (statement of Rep. Shellabarger).
60. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 12 (2019).
61. CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865) (statement of Rep. Stevens).
62. BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONG., 1865–1867, at 46 (1914).

Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed, or color," deeming such enactments "inoperative and void."[63] Stevens later proposed a narrower version that provided that "[n]o discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."[64] The records of the Joint Committee do not detail the debates over these proposals, but they reflect the Joint Committee's consistent refusal to propose language designed to limit racial classifications. Whether they were broadly worded or limited to racial discrimination in civil rights, Representative Stevens' efforts failed to persuade the Joint Committee to draft an amendment focused on the problem of racial classifications in legislation.

Instead, the Reconstruction Framers wrote the abolitionist demand for protection for all into the Fourteenth Amendment. While many aspects of the Fourteenth Amendment borrowed phrases found in the original Constitution, the Equal Protection Clause added a new, radical constitutional duty requiring the state to protect all persons in their rights to life, liberty, property, and the pursuit of happiness, and to do so equally.[65] The Fourteenth Amendment added an explicit guarantee to the Constitution that "the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land."[66] In other words, every person living in the United States, no matter their race, class, or beliefs, is entitled to the law's protection. And that protection has to be equal for all persons. Equal protection was necessary to vindicate the promises of the Declaration of Independence and ensure to all "equal rights of 'life, liberty, and the pursuit of happiness.'"[67] Indeed, even Democratic opponents of Reconstruction conceded the fundamental nature of protection and the necessity for "perfect protection in life, liberty, and the enjoyment and pursuit of happiness."[68] By adding this sweeping promise for equal persons, the Fourteenth Amendment's new constitutional guarantee underscored that "[a] true republic rests on the absolute equality of rights of the whole people, high and low, rich, and poor, white and black."[69]

Some conservative originalists, such as constitutional scholar Chris Green, have suggested that protection was a narrow concept limited to

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63. *Id.* at 50.
64. *Id.* at 83.
65. West, *supra* note 4, at 135 ("Protection is the nub of equal protection. The state must protect, and it must protect equally."); Evan D. Bernick, *Equal Protection Against Policing*, 25 U. PA. J. CONST. L. 1154, 1231 (2023) ("More radical than any positive right, however, was the explicit, unambiguous extension of that right to *all people*, and the provision that it be *equal*."); Hasbrouck, *supra* note 9, at 132 ("The concept of equal protection . . . arose from the notion that the duty of loyalty that citizens owed their country conferred upon the government a corresponding duty to protect the life, liberty, and property of those citizens.").
66. CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (statement of Rep. Wilson).
67. *Id.* at 2539 (statement of Rep. Farnsworth).
68. *Id.* at 392–93 (statement of Sen. McDougall).
69. *Id.* at 1159 (statement of Rep. Windom).

protection from violence and access to courts.[70] This view is at odds with the historical evidence. After all, key to the Fourteenth Amendment's promise of equality of rights was the fact that protection, consistent with its abolitionist usage, was a broad term that extended to a wide range of civil rights.[71] The leading legal dictionary of the day, written by John Bouvier, defined protection as follows: "PROTECTION, *government*. That benefit or safety which the government affords to the citizens."[72] This all-encompassing definition suggests that, in return for allegiance, citizens had a right to be protected in all their civil rights and liberties.[73] Republicans said as much. General James Brisbin, speaking at a rally on July 4, 1867, laid out a capacious understanding of protection: "It is a principle of nations that allegiance and protection go together . . . . As we claim allegiance from the blacks, we are bound to accord them full protection in all their rights as citizens, both civil and political."[74] Brisbin's comments were hardly atypical. Republicans regularly insisted Black Americans "need protection for their rights as men and women," insisting on the government's obligation to provide "the same protection for their rights, for their property, for their earnings, and for their personal safety as any other men and women in this country."[75] They stressed, as Brisbin did, that "protection must be in all the rights of citizens, civil and political."[76]

As the drafting history discussed above reflects, the Framers consciously wrote the Equal Protection Clause to center the twin concepts of equality and protection rather than to address the problem of racial classifications. There are a couple of reasons for this. First, the Fourteenth Amendment's Framers sought to write a constitutional guarantee of equality that protected every person residing in the United States. Indeed, they were not only concerned about protecting the rights of Black Americans; they were also worried about discrimination against white Unionists in the

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70. *See, e.g.*, Green, *supra* note 4, at 3 (arguing that the equal protection guarantee "imposes a duty on each state to protect all persons and property within its jurisdiction from violence and to enforce their rights through the court system"); Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. 885, 896 n.41 (2023) (arguing that the "protection of the laws" was "quite narrow, likely referring only to judicial remedies and protection against private violence"); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1449 (1992) ("Remedial laws clearly are part of protection. It is harder to say whether anything else is included.").

71. Bernick, *supra* note 65, at 1231 ("The Equal Protection Clause expressed what abolitionist constitutionalists had always believed and affirmed about the Constitution—that all people were entitled to enjoy those basic civil rights, the security of which legitimated government.").

72. JOHN BOUVIER, 2 A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION: WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW 396 (11th ed. 1864).

73. *See* Hyman, *supra* note 4, at 113 (suggesting that the term protection plausibly "refer[s] to all legal provisions that contribute to safeguarding a person's liberties and civil rights").

74. Brisbin's speech was widely reported, *see A Radical Speech*, CLEVELAND LEADER, July 24, 1867; *A Significant Extract from a Significant Speech*, STEUBENVILLE WEEKLY HERALD, July 26, 1867, and quoted with approval in Congress. *See* CONG. GLOBE, 40th Cong., 1st Sess. 632 (1867) (statement of Sen. Sumner).

75. *See Reconstruction. Equal Rights for All. Mr. Greeley's Address Before the C.S. Spencer Campaign Club*, N.Y. DAILY TRIB., Mar. 28, 1866, at 4.

76. *See The Republican Platform*, LANCASTER INTELLIGENCER, Oct. 10, 1866, at 2.

South and Chinese immigrants in the West.[77] Second, the Framers of the Fourteenth Amendment sought to redress unequal protection in whatever form it might take. Only the broader equal protection language targeted a broad range of state-sponsored inequality, whether it resulted from the use of an invidious legal classification, the oppressive impact of a broadly worded enactment, or other kinds of state acts or omissions.[78] And only the broader guarantee of equal protection imposed an affirmative duty on the states, heeding Black Americans' demands for the government to take affirmative action to protect them.[79] Protection lies at the core of the Fourteenth Amendment's universal safeguard for equality.

Conditions in the South made this universal guarantee of equal protection vital. In the wake of Civil War's bloody finish, white-dominated southern state governments enacted Black Codes that sought to reinstitute bondage in all but name and to strip Black Americans of virtually all fundamental rights.[80] At the same time, these new state governments refused to provide for Black Americans in any manner, "barr[ing] blacks from poor relief, orphanages, parks, schools, and other public facilities."[81] While many of these legislative measures to keep Black Americans in a state of virtual slavery were explicitly race-based, others were not. For example, the vagrancy proscriptions that were the centerpiece of the Black Codes,[82] "made no reference to race; instead, their oppressive racial impact depended on selective enforcement, customary caste relations, and private discrimination against blacks. The invidious quality of these laws lay in their *failure* to protect blacks from the white majority's efforts to maintain blacks as a servile class."[83] And legislative measures were only one part

77. CONG. GLOBE, 39th Cong., 1st Sess. 1093 (1866) (statement of Rep. Bingham) ("The adoption of this amendment is essential to the protection of the Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been in arms against them."); *id.* at 1090 (statement of Rep. Bingham) (demanding that "all persons, whether citizens or strangers, within this land . . . have equal protection in every State in this Union in the rights of life and liberty and property"). Indeed, the very first statute passed by Congress to enforce the Fourteenth Amendment extended virtually all the protections of the Civil Rights Act of 1866 to noncitizens, aiming to eradicate discrimination against Chinese immigrants in the western United States. *See* Enforcement Act of 1870, ch. 114, 16 Stat. 140, 144 (1871); CONG. GLOBE, 41st Cong., 2d Sess. 3657–58 (1870) (statement of Sen. Stewart) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . . let them be protected by all the laws and the same laws that other men are."); CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870) (statement of Rep. Bingham) (arguing that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws").

78. Bernick, *supra* note 1, at 55 (noting that "the Equal Protection Clause does not distinguish between state action and omission").

79. *See* Charles & Miller, *supra* note 4, at 1259–60 (noting that "the problem was not only, or even primarily, that freedmen were not getting *equal* protection from . . . violence; they were receiving *no* protection from private violence") (emphasis in original).

80. *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 368–69 (1979).

81. FONER, *supra* note 80, at 207.

82. *Id.* at 199–201.

83. Paul R. Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462,

of the effort to keep Black people in a state of servitude and subjugation. State governments also turned a blind eye to a torrent of white-supremacist violence aimed at Black Americans and at their Unionist allies, while combinations of white planters made private pacts to keep Black people "landless and homeless" and effectively "slaves of society."[84] These dire conditions, painstakingly documented in the Joint Committee on Reconstruction's report, made it essential to guarantee the equal protection of the laws to all persons. Amidst the violence and lawlessness sweeping the South, both equality and protection were vital to making the promise of freedom real.

In its report, the Joint Committee explained that a "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" and that Southern white people completely refused "to place the colored race . . . upon terms of civil equality" or to "tolerat[e] . . . any class of people friendly to the Union, be they white or black."[85] Without the protection of federal troops, the report continued, Black Americans "would not be permitted to labor at fair prices, and could hardly live in safety" and "Union men . . . would be obliged to abandon their homes."[86] As the extensive testimony taken by the Joint Committee showed, through Black Codes, concerted acts by powerful white landowners, and unending violence, the Southern white elite sought to keep Black Americans "landless, and as nearly in a condition of slavery as it is possible for them to do."[87] Witness after witness described in excruciating detail "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 the Freedmen's Bureau."[88] As one Freedmen's Bureau officer told the Joint Committee, "[o]f

474 (1982); *see* Gans, *supra* note 4, at 236, 244, 279 (discussing vagrancy laws); Aya Gruber, *Policing and "Bluelining,"* 58 HOUS. L. REV. 867, 876 (2021) ("[V]agrancy laws were facially neutral—indeed, some lawmakers characterized them as intended to protect the emancipated—but when enforced by the newly formed Southern police, they were indistinguishable from the prewar slave patrol regime.").

84. CONG. GLOBE, 39th Cong., 1st Sess. 39, 168 (1866) (statements of Sen. Wilson and Sen. Howe); *see also The Substitute for Slavery*, NAT'L ANTI-SLAVERY STANDARD, Sept. 18, 1865, *reprinted in* 1 THE BLACK WORKER: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 341 (Philip S. Foner & Ronald L. Lewis eds., 1978) ("When we have added to th[e Black Codes] the combination of the planters to pay no wages to the freedmen, or to pay them such wages as they see fit, and at their convenience, and to report any inhabitant who shall hire a negro without his master's permission . . . we shall have slavery re-established.").

85. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 39–30, at xvii (1866).

86. *Id.*

87. *Id.* at 101.

88. TENBROEK, *supra* note 8, at 203–04; 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."); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1354 (1964) (explaining that the Joint Committee's report documented "a pervasive pattern

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 . . . to redress any of these wrongs or to protect such persons."[89] In the South, Black Americans and their allies had as much chance of getting justice as "a rabbit would in a den of lions."[90] In sum, as one U.S. army officer describing the horrific conditions in post-war Mississippi put it, "all law that protects the freedmen . . . has been withheld from them. *They are absolutely without law.*"[91]

The Joint Committee's report made clear that ending race-based laws alone would not suffice. The guarantee of equal protection of the laws was necessary to combat what an 1865 South Carolina Black Convention called the "strong wall of prejudice,"[92] and to constrain the many ways public and private power worked together to leave Black Americans unprotected and unprovided for in every aspect of Southern society. The guarantee of equal protection was both universal in nature and broad enough to constrain both state-sponsored discrimination and state neglect.

The debates over the passage and ratification of the Equal Protection Clause confirm the broad sweep of the text's guarantee of equal protection. Introducing the Fourteenth Amendment in the Senate, Senator Jacob Howard explained that the Equal Protection Clause "establishes equality before the law, and . . . gives to the humblest, the poorest, the most despised of the race the same rights and same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[93] The Clause, he went on, "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . . It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."[94] "Without this principle of equal justice to all men and equal protection under the shield of the law," Senator Howard argued, "there is no republican government and none that is really worth maintaining."[95] Senator Timothy Howe emphasized that the Clause prohibited states from "deny[ing] to all classes of its citizens the protection of equal laws," while Senator Luke

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of private wrongs, motivated by popular prejudice and hostility, directed against Negroes primarily and to a lesser, but significant, degree against Northern whites and against those Southern whites who had been . . . loyal to the Union").

89. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 85, at 209.

90. *Id.* at 17.

91. *Id.* at 184 (emphasis in original).

92. PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, HELD IN ZION CHURCH, CHARLESTON 27 (1865); *see also* James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 729 (2016) (discussing how "white prejudice as both a legal *and* social barrier prevents access to . . . equal citizenship. The end of slavery does not mean the end of unfreedom, precisely because race prejudice—the social sentiment of race bias—operates as a powerful and encompassing force of oppression").

93. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

94. *Id.*

95. *Id.*

Poland observed that the guarantee of equal protection would "uproot and destroy . . . partial State legislation" that discriminated against Black Americans and other vulnerable communities.[96] As these comments reflect, the Black Codes, which stripped Black Americans of any legal protection for a host of fundamental rights, were very much front of mind for the Amendment's Framers.

Debates in the House reflected a similar focus. Representative Thaddeus Stevens emphasized 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. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.[97]

Stevens contrasted these guarantees with the "partial and oppressive laws" in the South's "present codes," clearly a reference to the odious Black Codes.[98] "Unless the Constitution should restrain them," Stevens argued, "those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen."[99] Moderate Republicans agreed. For example, Representative Henry Raymond, who had previously doubted Congress's power to enact civil rights legislation, celebrated that the Equal Protection Clause would "secur[e] an equality of rights to all citizens of the United States, and of all persons within their jurisdiction."[100] Going forward, the protecting shield of the law would safeguard all persons equally.

The debates over the ratification of the Fourteenth Amendment echoed this same theme. On the campaign trail, Representative John Bingham described the equal protection guarantee as a "sublime example of a great and powerful people" writing into their constitutive charter that "the humblest human being anywhere within their limits shall have the same protection of the law as the President himself."[101] The equal protection guarantee, Representative Bingham argued, meant that "Lazarus in his rags shall be as sacred before the majesty of the American law as the rich man clothed in purple and in fine linen."[102] He also discussed the horrific massacre of hundreds of Black Americans and their allies by local police and

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96. *Id.* at app. 219 (statement of Sen. Howe); CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (statement of Sen. Poland); *see also* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 294 (1997) (arguing that the Equal Protection Clause was understood to "nationalize the antebellum state constitutional doctrine against partial or special laws").

97. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens).

98. *Id.*

99. *Id.*

100. *Id.* at 2502 (statement of Rep. Raymond). As Raymond noted, he had opposed the Civil Rights Act of 1866, finding its constitutionality "very doubtful," but supported adding the Fourteenth Amendment to the Constitution to expressly authorize federal civil rights legislation such as the Act.

101. *Mr. Bingham's Speech*, WHEELING DAILY INTELLIGENCER, Sept. 5, 1866, at 2.

102. *Id.*

a white mob in New Orleans in the summer of 1866.[103] The equal protection guarantee, Bingham argued, would "fetter forever" such state-sanctioned "cruelty and carnage and murder."[104] In short, Bingham insisted, "every 'person' in every State shall have equal protection of the law, no matter whence he come, whether he be a stranger or citizen, wise or simple, rich or poor, strong or weak."[105]

Indiana Governor Oliver Morton argued that the Equal Protection Clause would "throw the equal protection of the law around every person who may be within the jurisdiction of any State, whether citizen or alien, and without regard to condition or residence, not only as to life and liberty, but also as to property."[106] This was necessary because "[i]t has happened in times past that several of the Southern States discriminated against the citizens of other States, by withholding the protection of the laws for life and liberty, and denying to them the ordinary remedies in the Courts for vindication of their civil rights."[107] As Morton's speech stressed, states now had a duty to protect the life, liberty, and property of their residents and to do so equally.

The Equal Protection Clause focused on unequal protection, not ending the use of improper classifications, and it did not end all race-based laws. Voting is perhaps the preeminent example. As many members of the Thirty-Ninth Congress stressed, the Fourteenth Amendment did not eradicate laws that denied Black Americans the right to vote on account of race.[108] Leading Republicans who had stressed the broad sweep of the equal protection guarantee vehemently insisted that "the first section of the proposed amendment does not give . . . the right of voting," arguing that the right to vote depended on "positive local law."[109] The Fifteenth Amendment was necessary to annul racial discrimination in voting and vindicate the arguments of Black Americans that the right to vote was essential to securing their protection.[110] But the Equal Protection Clause did add a broad new safeguard against state-sponsored discrimination and state neglect. States now had a duty to protect and to do so equally. Everyone, no matter how poor or marginalized, was entitled to the law's protection for their rights of life, liberty, property, and the pursuit of happiness. The Equal Protection Clause is concerned with state failures to protect, not the use of certain kinds of classifications. Protection was

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103. For discussion of the New Orleans massacre, see David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 283–84 (2021).

104. *Mr. Bingham's Speech*, *supra* note 101.

105. *The Great Issue*, WHEELING DAILY INTELLIGENCER, Oct. 15, 1866, at 1.

106. *Gov. Morton's Speech*, CINCINNATI COM., July 27, 1866, *reprinted in* SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA AND KENTUCKY 3 (1866).

107. *Id.*

108. *See* Bernick, *supra* note 1, at 32–35.

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

110. *See* Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039, 1144–45 (2024); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 939 (1998).

undoubtedly understood to be a broad concept. But how far did this duty of protection extend? The debates over the Fourteenth Amendment do not provide a precise answer. To shed more light on this question, we must look at congressional enforcement measures—passed both before and after the ratification of the Fourteenth Amendment—to see how Congress understood the meaning of protection. The next Part considers that question.

II. THE RECONSTRUCTION CONGRESS'S GLOSS ON PROTECTION

One of the most important aspects of the Reconstruction Amendments, was the explicit grant of broad enforcement power to Congress, which empowered Congress to enact federal civil rights legislation to enforce the Amendments.[111] As Senator Jacob Howard noted when describing the new power granted to Congress in Section 5 of the Fourteenth Amendment, "[h]ere is a direct affirmative delegation of power . . . to carry out all the principles of all these guarantees, a power not found in the Constitution."[112] Using this enforcement power, the Reconstruction Congress enacted a slew of foundational federal civil rights laws. Protection was at the heart of each one. This Part examines three of these laws—the Civil Rights Act of 1866, the Freedmen's Bureau Act of 1866, and the Ku Klux Klan Act of 1871—to understand what protection meant to those who wrote the constitutional guarantee of equal protection. These laws demonstrate that the constitutional duty of protection was broadly understood to include safeguarding fundamental rights, access to public benefits and privileges, such as public assistance and education, protection from violence and other legal wrongs, and access to the courts. Through these laws, the Congress provided a critical gloss on the concept of protection, insisting that Congress had a constitutional responsibility to protect basic civil rights, redress economic domination, ensure access to essential goods and services, safeguard access to courts, and stamp out white supremacist violence. The length of this list reflects the breadth of the constitutional ideal of protection.

A. The Civil Rights Act of 1866

Congress passed the nation's first federal civil rights law, the Civil Rights Act of 1866, to annul the oppressive Black Codes and guarantee a number of fundamental rights to Black Americans. The Act declared that persons "of every race and color" born in the United States are U.S. citizens entitled to "have the same right" throughout the United States "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of

111. U.S. CONST. amend. XIV, § 5; FONER, *supra* note 60, at 85 (observing that the grant of enforcement power "ensured that the process of defining Americans' rights would not end with ratification").

112. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

person and property, as is enjoyed by white citizens."[113] The Act also sought to prevent state courts from imposing discriminatory forms of punishment, demanding that Black Americans be subject only to "like punishment, pains, and penalties, and to none other."[114] Congress enacted the Act contemporaneously with the passage of the Fourteenth Amendment,[115] employing its power to enforce the Thirteenth Amendment and eradicate continuing badges and incidents of bondage that threatened to nullify the promise of freedom. Key Fourteenth Amendment ideas, including the duty of protection, lie at the Act's core. Controversy over the Act propelled Congress to add the Fourteenth Amendment and its guarantee of equal protection.[116]

Republicans insisted that the Act was necessary to protect Black Americans' fundamental rights. During the debates over the Civil Rights Act of 1866, Senator Lyman Trumbull, the Act's sponsor in the Senate, argued that "[t]hey being now free and citizens . . . they are entitled . . . to the great fundamental rights belonging to free citizens, and we have a right to protect them in the enjoyment of them."[117] Senator Trumbull insisted that "American citizenship would be little worth if it did not carry protection with it."[118]

In the House debates, Representative Henry Wilson insisted that "we must do our duty by supplying the protection which the States deny."[119] Representative Wilson urged his colleagues to pass the Act to "protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men."[120] He defended Congress's power to safeguard fundamental rights, insisting that "we must be invested with power to legislate for their protection or our Constitution fails in the first and most important office of government."[121] Representative John Broomall argued that the Act sought "to secure them the protection which every Government owes to its citizens," stressing that "[u]pon whatever square foot of the earth's surface I owe allegiance to my country, there it owes me protection."[122] Representative William Lawrence argued that the Civil Rights Act was necessary because "rebel masters" in control in the South were denying Black Americans "the benefit of all laws for the protection of their civil rights."[123] Representative Martin Thayer stressed the plight of Black Americans facing oppression and subjugation in the South: "To us they look for

113. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.
114. *Id.*
115. *See* FONER, *supra* note 60, at 63–71.
116. *See* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 204 (2005).
117. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).
118. *Id.* at 1757.
119. *Id.* at 1118.
120. *Id.*
121. *Id.*
122. CONG. GLOBE, 39th Cong., 1st Sess. 1262, 1263 (1866).
123. *Id.* at 1833.

protection . . . . We cannot . . . basely abandon[] to a miserable fate those who have a right to demand protection of your flag and the immunities guaranteed to every freeman by your Constitution."[124] Representative William Windom argued that the Act sought to provide "that protection of person and property without which liberty is a solemn mockery."[125] And he ticked off a long list of facts showing the abject failure of the states to protect the life, liberty, and property of Black Americans: "[I]f this be liberty, may none ever know what slavery is."[126]

Critically, Congress built protection into the Act's guarantees. The Act mandates that citizens of "every race and color" shall "have the same right" to make and enforce contracts, to own property, and to access the courts "as is enjoyed by white citizens" and commanded that states guarantee to Black Americans "full and equal benefit of all laws and proceedings for the security of person and property."[127] As is evident from its text, the Act is not written as a prohibition on intentional discrimination; rather, it uses the rights that white Americans take for granted as a baseline to protect a number of economic rights essential to equal citizenship for citizens of all races and colors.[128] Ensuring protection of basic civil rights, not ending racial classifications and governmental consideration of race, was the driving idea behind the Civil Rights Act of 1866. In short, non-discriminatory laws were not enough to satisfy the Act. The state had to protect and to do so equally.

Significantly, the Act was equally concerned with state-sponsored discrimination and state neglect. Congress understood that "a State may undertake to deprive citizens of the[ir] absolute, inherent, and inalienable rights . . . by a failure to protect any one of them."[129] The Act required states to provide equal protection of the fundamental civil rights set forth in the Act. Indeed, as Andrew Hyman has argued, "[i]t was common in 1866 for people to believe that the *only* purpose of the Civil Rights Act of 1866 was to guarantee equal protection."[130] States had to protect fundamental civil rights and to do so equally.

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124. *Id.* at 1154.
125. *Id.* at 1159.
126. *Id.* at 1160.
127. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.
128. *See* Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421, 1447 (2021) ("The concern . . . is that white and nonwhite people should enjoy the same rights. Whether someone intentionally prevented nonwhite people from doing so is beside the point."); Kate Masur & Gregory Downs, *Designed to Ameliorate the Condition of People of Color: The Reconstruction Republicans and the Question of Affirmative Action*, 2 J. AM. CONST. HIST. 625, 640 (2024) ("Congress . . . recognized the power of white supremacy and sought to advance the prospects of non-white people, not merely to scrub references to race from the law").
129. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).
130. Hyman, *supra* note 4, at 112 & n.103 (collecting newspaper coverage of this point). To be sure, the Civil Rights Act also, in part, enforced the Privileges and Immunities Clause by guaranteeing certain basic fundamental rights, but there is no doubt that equal protection was basic to the 1866 Act. *See* Gans, *supra* note 4, at 251–52.

Congress made it a criminal offense for any person acting under color of law or custom to violate the Civil Rights Act of 1866,[131] putting the onus of enforcing the promise of equality on the government. Senator Lyman Trumbull called the penalty provision "the valuable section of the bill so far as protecting the rights of freedom is concerned."[132] He explained that "[w]hen it comes to be understood . . . that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease."[133] Trumbull's comments were unduly optimistic, but they reflected the idea that it was the federal government's duty to enforce the law and to make freedom real. Indeed, later during Congress's consideration of the Act, Republicans defeated a proposal to strip out the Act's criminal penalties and substitute an individual's right to sue for damages.[134] Representative James Wilson argued that taking out the Act's criminal penalties would shortchange the poor and marginalized—those most in need of the protection of the government. His argument was rooted in the constitutional duty of protection:

> This bill proposes that the humblest citizen shall have full and ample protection at the cost of the Government, whose duty is to protect him. The amendment . . . recognizes the principle involved, but it says that the citizen despoiled of his rights, instead of being properly protected by the Government, must press his own way through the courts and pay the bills attendant thereon. This may do for the rich, but to the poor, who need protection, this is a mockery.[135]

Wilson further explained that "[t]he highest obligation which the Government owes to the citizen . . . is to secure him in the protection of his rights . . . . [I]t is the duty of the Government of the United States to provide proper protection, and to pay the costs attendant on it."[136] By huge margins, Congress voted to retain the Act's criminal penalties and went on to pass the Civil Rights Act of 1866 over President Andrew Johnson's veto, acting to protect the equal civil rights of Black Americans and counteract the deep-seated prejudice that they faced.[137] As Senator Trumbull observed during the debates over whether to override Johnson's veto, the Act reflected the view that "[a]llegiance and protection are reciprocal rights" and that "American citizenship would be little worth if it did not carry protection with it."[138]

The Thirty-Ninth Congress also passed a second major piece of civil rights legislation contemporaneously with the Fourteenth Amendment—

131. § 2, 14 Stat. 27.
132. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).
133. *Id.*
134. *Id.* at 1295.
135. *Id.* (statement of Rep. Wilson).
136. *Id.*
137. *Id.* at 1296.
138. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Trumbull).

the Freedmen's Bureau Act of 1866. Protection was fundamental to that law as well, as the next Section discusses.

B. The Freedmen's Bureau Act of 1866

The Freedmen's Bureau Act created the nation's first national social services agency to provide a wide array of good and services to Black Americans freed from bondage and refugees experiencing the devastation wrought by the Civil War.[139] Instead of declaring and protecting rights, as the Civil Rights Act did, the Freedmen's Bureau Act created a new administrative agency and empowered it to protect Black Americans as they transitioned from their former state of bondage to their new status as equal citizens and to assist loyal white refugees seeking to remake their lives anew. The scope of this work was vast. Protecting freedom required safeguarding basic fundamental rights, providing access to basic necessities, such as food, clothing, health care, and education, redressing white supremacist violence, and attacking forms of economic domination.[140] The constitutional duty of protection required each of these measures. Like the Civil Rights Act, the Freedmen's Bureau Act of 1866 was enacted pursuant to Congress's Thirteenth Amendment enforcement power, but Fourteenth Amendment ideas pervaded the legislation.[141] Like the Civil Rights Act, the constitutionality of the Freedmen's Bureau Act of 1866, vigorously attacked at the time of its passage, was bolstered by the express grant of power to Congress to realize the promise of equal protection.[142]

As the Civil War was nearing its end in 1865, Congress created the Freedmen's Bureau and entrusted it with "the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel states" during "the present war of rebellion, and for one year thereafter."[143] From the start, relieving economic destitution was part of its central mandate.[144] Its responsibilities grew with the passage of the Second Freedmen's Bureau Act in 1866. Explicitly charging the Bureau with the duty to secure freedom and produce an independent citizenry, the revised Act charged the Bureau with the duty to provide aid and care "to all loyal refugees and freedmen" in order to "enable them as speedily as practicable to become self-supporting citizens of the United States, and to aid them in making the freedom conferred by the

139. MANISHA SINHA, THE RISE AND FALL OF THE SECOND AMERICAN REPUBLIC: RECONSTRUCTION, 1860–1920, at 138–39 (2024).

140. This Section relies heavily on the argument I developed in Gans, *supra* note 4, at 235–36.

141. *See* Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1373 (2016) (explaining that "[t]he Thirteenth Amendment . . . occupied the place of pride when Republicans provided constitutional foundations for the Second Freedmen's Bureau Bill").

142. *Id.* at 1362 ("Both measures were central to the Reconstruction effort. Both implemented the Thirteenth Amendment. Both were vigorously objected to by Democrats on constitutional grounds. The power to pass both was confirmed by the Fourteenth Amendment.").

143. Act of Mar. 3, 1865, ch. 90, § 1, 13 Stat. 507, 507.

144. *Id.* § 2, 13 Stat. at 508 (authorizing the Secretary of War to "direct such issues of provisions, clothing, and fuel" for "the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children").

proclamation of the commander-in-chief, by emancipation under the laws of the States, and by constitutional amendment, available to them and beneficial to the republic."[145] It also gave the Bureau new explicit responsibilities to provide access to health care[146] and education,[147] and to protect Black Americans' fundamental rights.[148]

The constitutional ideal of protection ran through the debates over the Freedmen's Bureau. The Reconstruction Framers recognized that "[h]aving made the slave a freedman," the "nation need[ed] some instrumentality which shall reach to every portion of the South and stand between the freedman and oppression" and "see that the gulf which separates servitude from freedom is bridged over."[149] Republicans were explicit in describing the work of the Bureau in terms of the reciprocal duties of allegiance and protection. As far back as 1864, Republicans argued that "[t]he proclamation of freedom has liberated men oppressed by a life-servitude. Those men are now subjects of the Government. They owe to it allegiance and are as such entitled to its protection."[150] The purpose of the Freedmen's Bureau was to supply that protection.

During the debates over the Second Freedmen's Bureau Act, Republicans repeatedly insisted that "it is our duty to protect" those freed from bondage.[151] In the Senate, Senator Henry Wilson insisted, "we want these freedmen protected; we mean to have them protected" and urged to that end "the strengthening of this bureau" and "the enlargement of its powers."[152] Likewise, Senator John Sherman urged that "we are bound to protect these freedmen against the public sentiment and the oppression that will undoubtedly be thrown upon them by the people of the southern States."[153] As Senator Sherman's language indicated, Congress was concerned with the ways that racial prejudice worked to subjugate Black Americans. Senator Lyman Trumbull, the bill's chief sponsor, insisted that

145. Act of July 16, 1866, ch. 200, § 2, 14 Stat. 173, 174.

146. *Id.* § 5, 14 Stat. at 174 (authorizing the Secretary of War "to issue . . . medical stores or other supplies and transportation," and "afford . . . medical or other aid" to those destitute or suffering and unable to obtain employment to "avoid such destitution, suffering, or dependence").

147. *Id.* § 12, 14 Stat. at 176 (authorizing the Bureau to use property "formerly held under color of title by the late so-called confederate states," or "appropriate the proceeds derived therefrom to the education of the freed people"); *id.* § 13, 13 Stat. at 176 (directing the Bureau to "hire or provide by lease buildings for [the] purposes of education" whenever private associations "provide suitable teachers and means of instruction"); *id.* (requiring the Bureau to "furnish such protection as may be required for the safe conduct of such schools").

148. § 14, 14 Stat. at 176–77 (requiring the Bureau to protect the fundamental rights laid out in the Civil Rights of 1866 to all citizens "without respect to race or color, or previous condition of slavery," and establishing "military protection" and "military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights" in states in which "the ordinary course of judicial proceedings has not been interrupted by the rebellion").

149. CONG. GLOBE, 39th Cong., 1st Sess. 585, 2779 (1866) (statements of Rep. Donnelly & Rep. Eliot).

150. CONG. GLOBE, 38th Cong., 1st Sess. 572 (1864) (statement of Rep. Eliot).

151. CONG. GLOBE, 39th Cong., 1st Sess. 516 (1866) (statement of Rep. Smith); *id.* at 654 ("[I]t is our duty now to protect these men whom we have emancipated and made freemen in our land.") (statement of Rep. McKee).

152. CONG. GLOBE, 39th Cong., 1st Sess. 341 (1866) (statement of Sen. Wilson).

153. *Id.* at 744 (statement of Sen. Sherman).

"some protection is necessary" to maintain Black people in their freedom and "that was the object of this bureau."[154] Congress, Trumbull insisted, had a "constitutional obligation . . . to pass the appropriate legislation to protect every man in the land in his freedom."[155]

In the House, Representative John Hubbard argued that the Act was "intended to cast the shield of protection over four million American citizens," insisting that "[t]hey need schools and protection" and that "[w]e owe them protection in return for their faithful allegiance."[156] "The words caste, race, [and] color," although "ever unknown to the Constitution," Hubbard continued, "are still potent for evil on the lips of men whose minds are swayed by prejudice or blinded by passion, and the freedmen need the protection of this bill."[157] Representative Thomas Eliot, the bill's House sponsor, argued that "the power to free [Black Americans] involved the duty to protect them, and for that protection Congress must provide, and every provision in this bill if fairly called for in order to protect them is thus justified."[158] Representative Samuel Moulton stressed that the Freedmen's Bureau was "absolutely necessary for the protection of the freedmen and refugees in the South" and essential "to protect these men in their civil rights against the damnable violence of the leading men in the southern States,"[159] while Representative Josiah Grinnell argued that it would be unconscionable to "leave these people where they are, landless, poor, unprotected."[160] Congressmen stressed that there was not a single state of the former Confederacy in which Black people enjoyed protection. As Representative Samuel McKee pointedly asked, "is there a single one of these States that has passed laws to give the freedmen full protection? In vain we wait an affirmative response. Until these states have done so . . . the Freedmen's Bureau is a necessity."[161]

Much of the constitutional scholarship on protection has paid short shrift to the Freedmen's Bureau Acts,[162] but grappling with the Freedmen's Bureau legislation is critical to understanding how the Reconstruction Congress refashioned the constitutional command of protection they took from abolitionist constitutional theories. First, the Freedmen's Bureau worked to protect Black Americans in a vast array of ways, some of which are consistent with narrower theories of protection, but some of which are not. Chris Green and others, for example, argue that protection is a narrow concept that only includes protection from violence and access

154. *Id.* at 941 (statement of Sen. Trumbull).
155. *Id.* at 942 (statement of Sen. Trumbull).
156. *Id.* at 630–31 (statement of Rep. Hubbard).
157. CONG. GLOBE, 39th Cong., 1st Sess. 630 (1866) (statement of Rep. Hubbard).
158. *Id.* at 656 (statement of Rep. Eliot); *id.* at 655 (statement of Rep. Raymond) ("We owe, as a duty to those who have been set free, the protection which this bill affords.").
159. *Id.* at 631 (statement of Rep. Moulton).
160. *Id.* at 652 (statement of Rep. Grinnell).
161. *Id.* at 653 (statement of Rep. McKee).
162. *See* Graber, *supra* note 141, at 1363 (critiquing the ways judges and scholars "give the place of pride to the Civil Rights Act of 1866 at the expense of the Second Freedmen's Bureau Bill").

to courts.[163] That crabbed view is hard to square with the evidence from the text and history of the Freedmen's Bureau legislation. As I argue in a recent article, "[a]lthough protection from violence and access to courts was plainly part of the duty of protection, the debates over the Freedmen's Bureau strongly suggest a broader conception of protection, which includes protection of the citizen's health, education, and welfare."[164] Indeed,

> [T]he Freedmen's Bureau legislation is particularly important in understanding how the constitutional concept of protection applied to public state privileges . . . . The Freedmen's Bureau Act protected access to public good and services, ensuring that Black people could obtain poor relief . . . and education in the face of the refusal of Southern states to treat Black Americans as equal citizens entitled to obtain tax-funded benefits.[165]

To the Thirty-Ninth Congress, providing basic necessities, such as food, clothing, and medical care, and ensuring access to education, were integral to the work of protecting freedom and making the promise of equal citizenship real.[166] Perhaps the Bureau's provision of essential services "lacked a tight connection to 'natural' rights,"[167] but to the Reconstruction Framers it was just as fundamental to protecting the promise of life, liberty, and property as the state's function of prosecuting wrongdoers. The Freedmen's Bureau was designed to be a temporary institution, but it demonstrated the breadth of the concept of protection as understood by those who wrote the constitutional guarantee of the equal protection of the laws.

The Freedmen's Bureau legislation is important for a second reason as well. It shows that the Reconstruction Framers understood that race-conscious measures were sometimes necessary to protect Black Americans in their new status as equal citizens. Republicans celebrated the Freedmen's Bureau Acts as landmark legislation necessary to protect Black Americans in their new constitutional status as equal citizens. "[N]ever before in the history of this Government," Senator Lyman Trumbull insisted, "have nearly four million people been emancipated from the most abject and degrading slavery ever imposed upon human beings; never before has the occasion arisen when it was necessary to provide for

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163. *See* Green, *supra* note 4, at 10, 49.

164. *See* Gans, *supra* note 4, at 263.

165. *Id.*

166. *See* Hasbrouck, *supra* note 9, at 135–36 ("[T]he provision of such goods and services . . . recalls the abolitionist concept of equal protection: that the law has a duty to ensure the protection of citizens."); James W. Fox, Jr., *Democratic Citizenship and Congressional Reconstruction: Defining and Implementing the Privileges and Immunities of Citizenship*, 13 TEMP. POL. & C.R. L. REV. 455, 469 (2004) ("The Bureau and the congressional reauthorization in 1866 established a fundamental connection between essential government services and concepts of free citizenship."); Graber, *supra* note 141, at 1396 (arguing that "[t]he proponents of the Second Freedmen's Bureau Bill regarded welfare as integral to constitutional civil rights policy").

167. Bernick, *supra* note 1, at 41.

such large numbers of people thrown upon the bounty of the Government, unprotected and unprovided for."[168] Congress had a duty to redress state neglect—the fact that those held in bondage were "unprotected" and "unprovided for" by white-dominated state governments. While Democratic opponents of the Act attacked it as a form of racial discrimination that "make[s] a distinction on account of color between the two races" and treats "freedmen" not as "equal before the law, but superior,"[169] Republicans understood that race-conscious measures were necessary to "break down the discrimination between whites and blacks" and "make real to these freedmen the liberty you have vouchsafed them."[170] The Freedmen's Bureau legislation gave the new agency such a sweeping role in protecting Black Americans in their new status as equal citizens because, as Representative Thomas Eliot pointedly observed, "we have done nothing to them, as a race, but injury."[171] Ensuring true equal protection required race-conscious measures to realize equal citizenship, combat state neglect, and attack white supremacy.[172]

Both the Civil Rights Act of 1866 and the Freedmen's Bureau Act of 1866 were enacted into law as Congress wrote and debated the Fourteenth Amendment. The next Section examines debates over one of the most important statutes Congress passed using its new Fourteenth Amendment powers—the Ku Klux Klan Act of 1871.

C. The Ku Klux Klan Act of 1871

Reconstruction marked the birth of multiracial democracy in this country, but this huge step forward in our arc of constitutional progress was met with a torrent of white supremacist violence.[173] The Ku Klux Klan and other white terrorist groups engaged in a systematic attempt to intimidate, brutalize, and murder Black Americans and their white allies to overthrow Reconstruction. The Ku Klux Klan Act of 1871 was Congress's response to the failure of state governments to prevent or redress white supremacist violence.[174] Passed to enforce the guarantee of equal protection, the Act made it a federal crime to conspire "for the purpose . . . of

168. CONG. GLOBE, 39th Cong., 1st Sess. 939 (1866) (statement of Sen. Trumbull).

169. *Id.* at 397, 544 (statements of Sen. Willey & Rep. Taylor). For a comprehensive discussion of this point, see Masur & Downs, *supra* note 128, at 645–57; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–75 (1985).

170. CONG. GLOBE, 39th Cong., 1st Sess. 632, 2779 (1866) (statements of Rep. Moulton & Rep. Eliot).

171. *Id.* at 2779.

172. *See* Masur & Downs, *supra* note 128, at 657 (arguing that the member of 39th Congress "went well beyond the repeal of discriminatory laws, recognizing that race-based subordination existed and that policy measures were needed to counteract it").

173. *See* EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR 1865–1876, at 42–55 (2020), https://eji.org/wp-content/uploads/2005/11/reconstruction-in-america-rev-111521.pdf.

174. CONG. GLOBE, 42d Cong., 1st Sess. 428 (1871) (statement of Rep. Beatty) ("[M]inisters of the Gospel . . . have been scourged because of their political opinions, . . . humble citizens . . . have been whipped and wounded for the same reason, . . . houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent.").

depriving any person or any class of persons of the equal protection of the laws" or "for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws."[175] It also gave the President the power to suppress conspiracies that aimed to "deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act," in cases in which "the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights."[176] "[S]uch facts," Congress decreed, "shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States."[177]

Republicans in Congress stressed that the Fourteenth Amendment secured a right to protection and that Congress could employ its enforcement power when states failed to protect their residents from criminal acts, whether from a malicious purpose or state neglect. All that mattered, Republicans emphasized, was whether the state provided equal protection or not. The Ku Klux Klan Act reflected Congress's view that "[a] systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection . . . and justifies . . . the active interference of the only power that can give it."[178] In response to the wave of Klan violence, Republicans insisted that "when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy."[179] "Unexecuted laws," they charged, "are no 'protection' . . . . Union men, white and black, are 'denied' the protection of the laws as completely as if the laws excepted . . . 'all cases of outrage by Ku Klux upon Republicans, white or colored.'"[180]

In making these points, Republicans made clear that the Fourteenth Amendment's guarantee of equal protection, particularly its prohibition on the denial of equal protection, swept broadly. They repeatedly argued that "[a] State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A State denies protection as effectually by not executing as by not making laws."[181] Representative Samuel Shellabarger argued that "[t]he laws must be, first, equal, in not abridging rights; and second, the States shall equally protect, under equal laws, all persons in them."[182] In short, Representative Shellabarger insisted, the

175. Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13, 13.
176. *Id.* § 3, 17 Stat. at 14.
177. *Id.*
178. CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871) (statement of Rep. Coburn).
179. *Id.* at 322 (statement of Rep. Stoughton).
180. *Id.* at app. 300 (statement of Rep. Stevenson).
181. *Id.* at 501 (statement of Sen. Frelinghuysen); *id.* at 459 (statement of Rep. Coburn) ("The failure to afford protection equally to all is a denial of it.").
182. CONG. GLOBE, 42d Cong., 1st Sess. app. 71 (1871).

Equal Protection Clause provides for "equal laws and protection for all; and whenever a States denies that protection Congress may by law enforce that protection."[183] Senator John Pool called the right to protection "the most valuable of all rights, without which all others are worthless" and contended that "[w]here any State, by commission, or omission, denies this right to the protection of the laws, Congress may . . . enforce and maintain it . . . . It must punish the offender against the rights of the citizen; for in no other way can protection of the laws be secured and its denial prevented."[184] Future U.S. President James Garfield captured the essence of the right to protection:

> [W]here the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them . . . the last clause of the first section empowers Congress to step in and provide . . . justice to those persons who are thus denied equal protection.[185]

In urging that a state had a constitutional duty to protect Black Americans and their allies from white supremacist violence, the Act's defenders often stressed that the Equal Protection Clause's broad sweep reached both state-sponsored discrimination and state neglect. Representative Horatio Burchard argued that the Clause's command that "protection must be extended equally to all citizens" was a "duty" that "must be performed through the legislative, executive, and judicial departments of its government."[186] Representative Burchard described state-sponsored discrimination against a group of citizens as an easy case: "If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection."[187] But he made clear that that was not the full extent of the guarantee of equal protection. He described two other circumstances in which "the State has not afforded to all of its citizens the equal protection of the laws" even when "the statutes show no discrimination."[188] Burchard argued that even if a state's laws were nondiscriminatory, a state would violate equal protection where "in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another."[189] And just as courts could

183. *Id.*; *see also* CONG. GLOBE, 42d Cong., 1st Sess. 334 (1871) (statement of Rep. Hoar) ("[I]t is an effectual denial . . . of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection."); *id.* at app. 251 (statement of Sen. Morton) ("It means to confer upon every person the right to such protection, and therefore gives to Congress the power to secure enjoyment of that right.").

184. CONG. GLOBE, 42d Cong., 1st Sess. 608 (1871).

185. *Id.* at app. 153.

186. *Id.* at app. 315.

187. *Id.*

188. *Id.*

189. *Id.*

neglect the promise of equal rights, so could the executive. Burchard argued that a state would also violate the equal protection guarantee where "secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order."[190] This was essentially what was happening in the states of the former Confederacy.[191]

Representative Burchard was not alone. In responding to Democratic arguments that the Equal Protection Clause only applied to discriminatory laws, Representative Jeremiah Wilson agreed that "[a] refusal to legislate equally for this protection of all would unquestionably be a denial" of equal protection.[192] But he also argued that there were other ways in which a State could violate the Clause's promise that "all citizens shall be equally protected."[193] Wilson maintained that "a refusal to execute" protective laws or a "failure to do so, through inability, equally with reference to all persons" was also a denial of equal protection.[194] Thus, he insisted that "[w]henever it appears that any State has failed to discharge this high constitutional obligation to all of its citizens, it is not only the power, but the solemn duty of Congress to enforce the protection which the State withholds."[195]

In the Senate, Senator Daniel Pratt argued that "Union people, particularly of the colored race, do not have the equal protection of the laws . . . . Though the laws do not in terms discriminate against them, still the fact is that they invoke their protection in vain in a great many localities, counties, and districts."[196] Senator Pratt explained that there was "such a condition of public sentiment that the[] [laws] cannot be executed" or "a complicity with their oppressors on the part of the officers who should, but do not, execute them."[197] Senator Pratt asked,

> [I]s not this state of things a practical denial of the equal protection of the laws? . . . . Is there not a positive duty imposed on the States by this language to see to it—not only that the laws are equal, affording protection to all alike, but that they are executed, enforced; that their protection is not withheld, but afforded affirmatively, positively, to all in equal degree.[198]

Pratt continued, "[i]s not th[e Equal Protection Clause] a guarantee, a solemn covenant of the people of the United States, of protection to every

190. CONG. GLOBE, 42d Cong., 1st Sess. app. 315 (1871).
191. *See supra* notes 80–91, 173–74 and accompanying text.
192. CONG. GLOBE, 42d Cong., 1st Sess. 482 (1871) (statement of Rep. Wilson).
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 506.
197. *Id.*
198. CONG. GLOBE, 42d Cong., 1st Sess. 506 (1871) (statement of Sen. Pratt).

person within the jurisdiction of the States, of protection of every right, privilege, and immunity?"[199]

As Pratt's rhetorical questions underscored, the constitutional guarantee of equal protection imposes a responsibility on the state: it requires the state to protect and to do so equally. It forbids state-sponsored discrimination, requires equal laws "affording protection to all alike" and forbids discriminatory enforcement of the laws, whether out of prejudice or state neglect.[200]

The statutes passed by the Reconstruction Congress provide crucial insight into the meaning of the constitutional guarantee of equal protection. First, these statutes indicate that protection was an expansive concept, covering an incredibly wide array of legal rights: (1) equality in civil rights; (2) equal access to courts and equal justice in the courts; (3) impartial enforcement of laws prohibiting violence and other wrongs; and (4) equality in the provision of public goods and services fundamental to equal citizenship, including education. Second, these statutes show that equal protection concerned equal rights. The government had to protect rights connected to life, liberty, property, and the pursuit of happiness and had to do so equally. It had to protect the poor and marginalized, not just the rich and the powerful. The concept of equal protection encompassed all state failures to protect—whether through state-sponsored discrimination or state neglect—and not solely the use of forbidden legal classifications. Indeed, none of these three landmark statutes targeted race-based laws per se; each targeted the denial of equality of rights. What mattered was whether a state denied equal protection of the laws. States had a constitutional duty of protection. Congress was concerned with whether they lived up to their constitutional responsibility.

III. DEFINING "OF THE LAWS"

It is often assumed that the Equal Protection Clause requires states to guarantee equal protection of their own laws.[201] But in fact, there is strong evidence that the last three words of the Equal Protection Clause also requires states to provide equal protection of federal rights secured by the Constitution and federal law. As constitutional scholar Evan Bernick has observed, "[n]o Republican was more explicit that 'the laws' included protective *federal* laws than John Bingham—the man who, more than any other framer, shaped the language and publicly expounded the meaning of Section 1."[202]

In 1867, during debates over a bill to establish military rule over the states of the former Confederacy, Representative Bingham described the

199. *Id.*
200. *Id.*
201. Bernick, *supra* note 1, at 39 (discussing the "assum[ption] . . . that 'the laws' by which people are entitled to be protected are whatever state laws happen to be on the books").
202. *Id.*

Equal Protection Clause as guaranteeing that "no State shall deny to any mortal man the equal protection of the laws—not the laws of South Carolina alone, but of the laws national and State—and above all . . . of that great law, the Constitution of our own country."[203] In 1870, Representative Bingham repeated this view while urging passage of the Enforcement Act, which extended the protections of the Civil Rights Act of 1866 to noncitizens in order to combat discrimination against Chinese immigrants. Bingham argued that "immigrants [were] persons within the express words" of the Fourteenth Amendment and were "entitled to the equal protection of the laws, not simply of the State itself, but of the Constitution of the United States as well."[204] During the debates over the Ku Klux Klan Act, Bingham once again reiterated that the Fourteenth Amendment meant that "no State shall deny to any person . . . the equal protection of the Constitution of the United States, as that Constitution is the supreme law of the land."[205]

Representative John Bingham was not the only one to notice the broad wording of the last three words of the Equal Protection Clause. In 1868, Senator George Edmunds contrasted the language of the Fourteenth Amendment with a version that merely required a state to provide equal protection of its own laws.[206] Senator Edmunds stressed that, under the Equal Protection Clause, states were obliged to respect federal civil rights guarantees:

> What kind of a constitutional amendment would that be if Congress should propose . . . to the State of Mississippi, with her black code and unequal suffrage code, "You shall not deprive any person in the State of Mississippi of the equal protection of your laws;" that is to say, "you shall enforce your laws, just as the law themselves are required to be enforced, upon all your persons according to their respective conditions" . . . . Then she would be bound by such a constitutional provision to exclude the black man from the suffrage, to exclude him from the witness stand, and to hang him upon the testimony of any one white man who might choose to complain; whereas the United States, in order to overcome that very inequality of State laws, differing one from another as to the equal rights of persons, declared in the fourteenth amendment that the States should not deprive any person within their

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203. CONG. GLOBE, 39th Cong., 2d Sess. 1083 (1867).

204. CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870). Later that year, during consideration of an amnesty bill that would restore political rights to ex-rebels, Bingham, once again, insisted that the Equal Protection Clause guarantees equal protection of all laws, state and national. The text, Bingham stressed, demanded equal protection "[n]ot of its laws, but of the laws, . . . of the law of the Republic, the Constitution itself, which is the supreme law of the land." CONG. GLOBE, 41st Cong., 3d Sess. 203 (1870).

205. CONG. GLOBE, 42d Cong., 1st Sess. app. 83 (1871).

206. The occasion for Senator Edmund's remarks was the fact that Florida legislature had accidentally ratified a version of the Amendment that differed from the text proposed by Congress, requiring states to provide equal protection of its laws. CONG. GLOBE, 40th Cong., 2d Sess. 3602 (1868). Ultimately, Congress concluded that this error was inconsequential, "seeing as how an accurate text had been submitted to the states, and seeing as how ratification did not require any recitation of the amendment being ratified." Hyman, *supra* note 4, at 103.

> jurisdiction "of the equal protection of the laws." What laws? The laws of the land which the Constitution . . . declares to be the acts of Congress made pursuant of it. That is what Florida was not to deprive any person of within her jurisdiction—the civil rights bill, which was carried through this body by the honorable Senator from Illinois, [Mr. Trumbull].[207]

Senator Edmunds's speech underscored that the Equal Protection Clause requires equal laws and equal enforcement of both state and federal laws, including federal civil rights laws and constitutional provisions. This understanding of the guarantee of equal protection of the laws meant that a state's constitutional duty under the Fourteenth Amendment was an evolving one. As the Constitution and federal law affirmed new rights, states would have a duty to protect those rights equally for all.

IV. RECOVERING EQUAL PROTECTION

Modern equal protection doctrine is based on three main premises: (1) the guarantee of equal protection was designed to end race-based laws and other kinds of invidious legal classifications;[208] (2) absent an invidious classification, an equal protection claim requires proof of a discriminatory purpose, an incredibly demanding hurdle that requires a showing tantamount to malice;[209] and (3) the same framework applies equally to all types of governmental regulation, including efforts to redress our nation's long and tragic history of state-sponsored discrimination.[210]

Where do these rules come from? Certainly not from the text and history of the Fourteenth Amendment. The Framers of the Fourteenth Amendment crafted the Equal Protection Clause to center the constitutional command of protection. Between a protection model and an anticlassification model, they chose the universal safeguard of the equal protection of the laws, recognizing that an equality guarantee focused on protection would provide a crucial safeguard against a wide variety of forms of state-sponsored discrimination and state neglect. The idea that the equal protection guarantee is primarily a constraint on race-based and other invidious classifications is wrong. As discussed earlier, since its inception, equal protection was broader than that. It commanded that the state must protect everyone equally, not merely the powerful but the marginalized as

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207. CONG. GLOBE, 40th Cong., 2d Sess. 3604 (1868); *see also* Hyman, *supra* note 4, at 100–04 (discussing Edmunds's speech).

208. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 206–07 (2023) (race); Sessions v. Morales-Santana, 582 U.S. 47, 57–59 (2017) (sex); Clark v. Jeter, 486 U.S. 456, 461–62 (1988) (illegitimacy); Bernal v. Fainter, 467 U.S. 216, 219–20 (1984) (alienage); Hernandez v. Texas, 347 U.S. 475, 479–80 (1954) (national origin).

209. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239–40 (1976); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); McCleskey v. Kemp, 481 U.S. 279, 292–93, 297 (1987); United States v. Armstrong, 517 U.S. 456, 467–70 (1996); Abbott v. Perez, 585 U.S. 579, 603–05 (2018); Alexander v. S.C. State Conf. of NAACP, 602 U.S. 1, 7–10 (2024).

210. *SFFA*, 600 U.S. at 206–08; Miller v. Johnson, 515 U.S. 900, 920–21 (1995); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493, 500–01 (1989).

well. As legal theorist Robin West has written, "[p]rotection is the nub of equal protection. The state must protect, and it must protect equally."[211] In developing modern equal protection doctrine, the Supreme Court has betrayed this critical insight from the text and history of the Fourteenth Amendment.

First and foremost, by giving pride of place to anti-classification ideals and insisting that our Constitution is purely a charter of negative liberties, the Court has effectively erased the constitutional duty of protection—a duty that the Reconstruction Framers understood to impose positive duties on the government—out of the Constitution.[212] As a result, the Court has stripped away the critical concept of state neglect.[213] The Court has turned a blind eye to the fact that the constitutional guarantee of equal protection is just as concerned with state omissions as it is with state acts.

In short, the Reconstruction Framers wrote the Equal Protection Clause to attack a wide range of forms of unequal protection. Ending facially discriminatory laws that gave more rights to the powerful was necessary, but it was not sufficient. By developing a body of doctrine centered around ending or severely constraining certain invidious legislative classifications, the Court has neglected a key part of the equal protection guarantee.

Second, the Fourteenth Amendment was deeply concerned with public and private manifestations of prejudice and how they enabled a racialized power structure that subjugated and subordinated Black Americans.[214] Ignoring this aspect of text and history, the Court has imposed an incredibly high hurdle of proving discriminatory intent to challenge government action that does not classify based on an invidious ground,

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211. *See* West, *supra* note 4, at 135; *see also* Bernick, *supra* note 1, at 36 ("'[E]qual protection of 'the laws' did not merely guarantee impartial execution of states' protective laws and impartial state adjudication of violations of those laws. It required as well that states' protective laws be nondiscriminatory and that states comply with protective federal laws."). In a recent article offering a critique of *Washington v. Davis*, Chris Green captures the core idea of equal protection, observing that "states are required affirmatively to promote the interests of their citizens, not merely avoid targeting them for ill treatment." Christopher R. Green, *Citizenship and Solicitude: How to Overrule* Employment Division v. Smith *and* Washington v. Davis, 47 HARV. J. L. & PUB. POL'Y 465, 468 (2024). Marginalized groups, Green argues, are entitled to equal solicitude, not neglect. Green, however, roots this idea solely in the Privileges or Immunities Clause of the Fourteenth Amendment, sidelining the Equal Protection Clause through a crabbed reading of protection. *Id.* at 473; *see supra* text accompanying notes 163–65 (discussing Green's interpretation of equal protection).

212. *See* Bernick, *supra* note 1, at 21 (arguing that "the evidence against the Supreme Court's interpretation of the Fourteenth Amendment . . . conferring no positive rights is indeed overwhelming"); West, *supra* note 4, at 137 ("By removing the promise of protection from the equal protection clause, our modern constitutional interpreters have taken from that phrase . . . its specific, distinctive, and constitutional contribution to political debate.").

213. *See generally* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 28–59 (2011) (on state neglect); Lanham, *supra* note 4, at 1109–17; Bernick, *supra* note 1, at 47, 55–56; Balkin, *supra* note 88, at 1846–56.

214. *See supra* notes 85–92, 153–55 and accompanying text; *see also* Fox, *supra* note 46, at 347 ("[M]uch of the means of implementing segregation and the denial of freedom occurred in the nongovernmental public sphere. Achieving full citizenship and its respectability required addressing the sentiments of prejudice across civil society.").

defining it as akin to malice—a standard that has proven nearly impossible to meet. "Discriminatory purpose," the Court said in *Personnel Administrator of Massachusetts v. Feeney*,[215] "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[216] It is not enough that a state legislature enacted a law knowing that it would disadvantage the marginalized and powerless or perpetuate historical exclusions or structural forms of inequality.[217] The law effectively requires a showing akin to malice or a purposeful desire to harm.[218] This unforgiving test makes it almost impossible to root out prejudice and its continuing effects.[219]

More fundamentally, the Court's motive-based framework is impossible to square with the fact, stressed by Evan Bernick, that Reconstruction-era Republicans were concerned with whether states were denying the equal protection of the laws, not why. As Bernick has written, "Republicans implementing Reconstruction made plain that they did not consider it constitutionally important *why* the equal protection of the laws was being denied in southern states."[220] Intentions—whether good or bad—were irrelevant. What mattered was whether states were living up to their constitutional duty to protect all persons equally. Even well-intentioned state failures were just that—failures to provide equal protection. The discriminatory intent framework, particularly in the harsh form it has been applied, is deeply inconsistent with equal protection as a safeguard against state neglect.[221]

Third, in its affirmative action rulings culminating with *Students for Fair Admissions v. President & Fellows of Harvard College*,[222] the Court has blocked efforts to redress our nation's long and tragic history of racial subjugation and oppression and ensure pathways to leadership for all

215. 442 U.S. 256 (1979).

216. *Id.* at 279.

217. MacKinnon & Crenshaw, *supra* note 21, at 349 ("*Feeney* spelled out with devastating clarity that decision-makers could comfortably rest disparity-producing preferences on the built-in inequalities created by myriad institutions—so long as they could plausibly deny a specific intent to harm women."); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 388 (2007) ("*Feeney* . . . is unresponsive to the structural aspects of inequality: the embeddedness of gender inequality in the social structure. The history of discrimination in the armed services, which helps to create the gender disparity of the veterans' preference, becomes irrelevant.").

218. *See* Siegel, *supra* note 15, at 1135 (describing the intent standard as requiring "a legislative state of mind akin to malice"); Haney-López, *supra* note 19, at 1833 ("*Feeney* defined 'intent' as acting not just in full awareness of impending harm but out of a desire to cause such harm.").

219. Haney-López, *supra* note 19, at 1783 ("In practice, . . . the requirement that malice be proved is so exacting that, since this test was announced in 1979, it has never been met—not even once.").

220. Bernick, *supra* note 65, at 1226–27.

221. *Id.* at 1226 (arguing that "neither the text or history of the Clause lends support" to the "notoriously demanding" discriminatory intent requirement).

222. 600 U.S. 181 (2023).

persons regardless of race.[223] This interpretation ignores the history of landmark race-conscious laws passed contemporaneously with the Fourteenth Amendment, such as the Freedmen's Bureau Act of 1866, which aimed to help realize equal citizenship and redress racial subordination and subjugation.[224] The Framers of the Fourteenth Amendment understood that the nation owed a debt to Black Americans who had been held in bondage, stripped of the fruits of their toil, and brutalized in horrific ways and that race-conscious measures would be necessary to make the radical promise of equal protection real. But rather than respecting this aspect of the Fourteenth Amendment's history, the Court has gone in the opposite direction, hamstringing the government's power to redress the long legacy of anti-Black discrimination and neglect.[225]

How did the Court go so badly astray? One reason is the Court's proclivity for announcing legal rules that broadly sanction systemic inequalities based on little more than the Justices' say-so, seemingly motivated by a fear of too much justice.[226] For example, why does proof of discriminatory intent require a heightened standard bordering on malice? The *Feeney* Court offered no reasoning on this score, simply insisting that the higher standard was called for.[227] Why is the government's power to redress past racial discrimination so crabbed? *SFFA* attempted to rely on precedent in insisting the government may consider race only for the purpose of "remediating specific, identified instances of past discrimination that violated the Constitution or a statute."[228] What principle justifies this limitation? The Court has insisted that redressing societal discrimination is too amorphous to count as a compelling state interest, but given the United States' history of centuries of racial oppression, why would it not count?[229] Here too, the Court has made up legal rules out of whole cloth, driven by their own conviction that the remedial use of race—even to redress centuries of

223. *See id.* at 206–08, 226–30; Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224–25 (1995); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493–95, 505–06 (1989); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298–99, 307–10 (1978) (opinion of Powell, J.).

224. Hasbrouck, *supra* note 9, at 158 ("The Reconstruction Congress understood the Fourteenth Amendment to not just permit but to support race-conscious remedies."); Masur & Downs, *supra* note 128, at 656 ("Many [Reconstruction Framers] supported race-conscious actions to counteract the oppressions of slavery and to combat anti-Black discrimination, and they did so particularly in the field of educational opportunities.").

225. *See generally* Olatunde C.A. Johnson, *The Remedial Rationale After* SFFA, 54 SETON HALL L. REV. 1279, 1283–95 (2024) (discussing constraints on racial remediation in *SFFA* and earlier caselaw).

226. *See* Roberts, *supra* note 7, at 90 (arguing that "[t]he Supreme Court's anti-abolitionist jurisprudence is . . . animated by a desire to avoid the radical change an abolition constitutionalism would require").

227. *See* Haney-López, *supra* note 19, at 1834 ("Perhaps simply . . . to preserve their hunch that no mistreatment of women occurred, the majority imposed an exacting definition of discriminatory purpose . . .").

228. *SFFA*, 600 U.S. at 207.

229. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307–10 (1978) (opinion of Powell, J.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 499, 505 (1989).

racial harms—must be sharply circumscribed.[230] The Court's reasoning turns a blind eye to the Framers' judgment that race-conscious measures were essential to vindicate the promise of equal protection for all.

In these ways, the Supreme Court has given us an incredibly cramped reading of the Equal Protection Clause that does violence to the Fourteenth Amendment's text and history. We cannot hope to recover the true meaning of equal protection without taking seriously the broad concept of protection. The text and history of the Fourteenth Amendment, together with the landmark Reconstruction-era enforcement legislation, demonstrate that the constitutional duty of protection includes protecting enjoyment of basic civil rights, securing access to and equal justice in the courts, safeguarding the health and welfare of the citizenry, ensuring access to education, and redressing private violence and other legal wrongs. Under the Fourteenth Amendment, that protection must be equal for all persons.

Taking account of this text and history can provide new ways of thinking about how courts and other actors can employ the Fourteenth Amendment to redress systemic inequalities that continue to plague our nation. Consider a number of areas where the Court's atextual and ahistorical approach to the Fourteenth Amendment has failed to dislodge engrained forms of unequal protection.

First, America's system of policing perpetrates extreme brutality and neglect in communities of color, while elsewhere police surveil, stop, and search people of color who seem out of place in white neighborhoods, propping up racial segregation in housing and producing a system rife with racial inequality.[231] Meanwhile, state-sanctioned vigilantism is on the rise, as states change their laws to empower private individuals to police others, all in the ways that, all too often, have tragic consequences for communities of color and other marginalized groups.[232] Second, our educational system typifies unequal protection, with wealthier white communities hoarding resources, while poorer communities, predominantly of color, experience concentrated disadvantage.[233] In some areas, Black children are forced to attend schools in environmentally unsafe facilities, such as in Louisiana's St. John the Baptist Parish, where until recently a public school serving a predominantly Black community was located close to a

230. Johnson, *supra* note 225, at 1286–88 (tracing development of the law limiting racial remediation).

231. *See* JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 7 (2015); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2017); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. Rev. 650, 687–729 (2020).

232. *See* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1198–1220 (2023); Charles & Miller, *supra* note 4, at 1213–37; Ekow N. Yankah, *Deputization and Privileged White Violence*, 77 STAN. L. REV. 703, 746–54 (2025).

233. *See* Sheryll Cashin, Brown v. Board of Education*: Enduring Caste and American Betrayal*, 4 AM J. L. & EQUAL. 141, 141 (2024); Derek W. Black, *Localism, Pretext, and the Color of School Dollars*, 107 MINN. L. REV. 1415, 1416–18 (2023).

chemical plant containing deadly carcinogens.[234] Education is hardly unique in this regard. Throughout America, systemic racial inequalities persist in access to a whole host of basic necessities and infrastructure.[235] Third, the American criminal adjudication system promises equal justice to all, but operates as a major driver of mass incarceration.[236] America's indigent defense systems are in crisis due to crushing caseloads and rampant underfunding.[237] Around the country, states are defaulting on their obligation to equally protect access to counsel for indigent defendants, often leaving the poorest defendants with inadequate representation.[238] In all these areas, an understanding of equal protection focused on state failures to protect all persons equally could have a real impact in addressing ongoing inequalities.

Whether or not the courts begin grappling with the textual promise of equal protection, Congress has its own express powers to effectuate the promise of equal protection for all. Congress can and should build off the example set by the landmark civil rights laws passed during Reconstruction and act to ensure the equal protection of all persons when states default on their constitutional duty of protection. The enforcement power expressly granted in the Fourteenth Amendment "was born of the conviction that Congress—no less than the courts—has the duty and the authority to interpret the Constitution."[239] The Supreme Court has often treated Congress's enforcement power with disdain, insisting that it must undertake a searching review of congressional enforcement legislation,[240] but this view is antithetical to the text and history of the Fourteenth Amendment.[241] Under a historical faithful understanding of the enforcement power, Congress

234. *See* Plantiffs' Memorandum in Support of Expedited Motion for Further Relief, Discovery, and an Evidentiary Hearing at 2, Harris v. St. John Baptist Parish Sch. Bd., No. 9-cv-01669 (E.D. La. June 12, 2024) (seeking closure of school).

235. *See* Deborah N. Archer & Joseph R. Schottenfeld, *Defending Home: Toward a Theory of Community Equity*, U. CHI. L. REV. (forthcoming 2025) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4971493 ("In different ways and across different geographies, Black communities are often subjected to neglect at the hands of majority-white government bodies that control access to fundamental infrastructure necessary for a healthy and thriving community, like water, sewer, and sanitation."); *see also* Deborah N. Archer & Yuvraj Joshi, *Infrastructure Equality*, 120 NW. UNIV. L. REV. (forthcoming 2025) (manuscript at 5) (urging an "infrastructure-focused" approach to equality that "highlights how racially discriminatory and inadequate infrastructure permeates entire communities, embedding inequality into both the built environment and seemingly neutral policies across interconnected sectors like education and housing").

236. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 11–12 (2010); RACHEL ELISE BARKOW, JUSTICE ABANDONED: HOW THE SUPREME COURT IGNORED THE CONSTITUTION AND ENABLED MASS INCARCERATION 3–4 (2025).

237. Radley Balko, *The Perpetual Crisis in Indigent Defense*, THE WATCH (Sep. 27, 2023), https://radleybalko.substack.com/p/the-perpetual-crisis-in-indigent.

238. *See* Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1201 (2013) (urging that "[c]ourts and legal reformers should refocus on the salience of equality in the access to justice context because of its doctrinal applicability to an underfunded justice system lacking substantive standards for indigent representation").

239. Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 183 (1997).

240. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365, 368–72 (2001); Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 553–54 (2013).

241. Balkin, *supra* note 88, at 1808–31; McConnell, *supra* note 239, at 170–95.

can and should act to ensure that all persons are fully protected in their basic rights—including the rights to bodily integrity that the Supreme Court has recently decimated[242]— eradicate deep-seated forms of prejudice that stand in the way of equal citizenship, and vindicate the foundational promise that everyone is entitled to the law's equal protection. By using its power to protect, Congress can renew the fundamental promise that, in return for their allegiance, the federal government owes protection to all persons.

CONCLUSION

The Equal Protection Clause centers two ideas: equality and protection. The Supreme Court has produced a crabbed equal protection jurisprudence because it has failed to meaningfully grapple with both. While the Court repeatedly invokes the textual promise of equal protection, its precedent repeatedly turns a blind eye to the constitutional command of protection and the idea that, in return for allegiance, the government owes its citizenry protection. Until the Supreme Court takes seriously the right to protection embedded in the Fourteenth Amendment, its jurisprudence will continue to be deeply flawed.

As the text and history laid out in this Article demonstrate, the Reconstruction Framers wrote a duty of protection into the Fourteenth Amendment, imposing on states an affirmative constitutional obligation to protect their people and to do so equally. And protection was understood to be a broad concept, reflecting the idea that the government has a wide array of affirmative duties that it owes to its citizenry. States must protect their people from violence and other legal wrongs; provide access to courts; protect rights essential to life, liberty, property, and the pursuit of happiness; and provide goods and services on an equal basis. When states fail to provide equal protection, Congress has the power—and the responsibility—to step in to secure the equal protection the Constitution demands. The Reconstruction Congress employed these powers to pass foundational civil rights statutes that protected fundamental rights essential to freedom; ensured access to education and other essential goods and services, such as food and health care; and sought to stamp out white supremacist violence. These statutes provide critical insight into what equal protection entailed. As the debates over these statutes reflect, Republicans repeatedly invoked the constitutional ideal of protection, insisting it was their duty to protect Black Americans free from bondage from subjugation and subordination at the hands of white southerners.

Protection represents a fundamental constitutional principle that, tragically, the Supreme Court has ignored for too long. It can be recovered,

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242. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022); *see also* David H. Gans, *Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion*, 75 S.M.U. L. REV. F. 191, 197–203 (2022) (discussing why bodily integrity is a fundamental right).

and equal protection can be the powerful safeguard it was meant to be. We cannot hope to recover it without engaging with the text and history of the Fourteenth Amendment and the abolitionist conception of protection that the Reconstruction Framers centered in the Equal Protection Clause.