ARTICLES

Antisubjugation and the Equal Protection of the Laws

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INTRODUCTION

For nearly 150 years, the Supreme Court has held that the Fourteenth Amendment to the United States Constitution does not secure "positive" rights to governmental aid or apply to "private" action. This Article argues that neither of those things is true as a matter of the original meaning and purpose of the Equal Protection Clause. It then contends that constitutional doctrine should be reconstructed to realize the Constitution's promise of "the equal protection of the laws."[1]

The Court has articulated a general rule against judicial use of the Fourteenth Amendment's Due Process Clause to guarantee governmental protection against private violence.[2] It has also hindered Congress's efforts to provide civil remedies

1. U.S. CONST. amend. XIV, § 1.
2. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989).

for private violence.[3] At the same time, the Court has insisted that the Equal Protection Clause generally prohibits unjustified, intentional discrimination.[4]

Scholars have long questioned these features of Fourteenth Amendment law. One group of scholars—call them *protection theorists*—contends that the original meaning of "the equal protection of the laws"[5] only guarantees security against physical violence and possibly access to the courts.[6] Another group of scholars contends that the "state-action doctrine" is incoherent[7] and that the original meaning of the Fourteenth Amendment does guarantee positive rights to certain kinds of governmental aid, including protective services.[8]

This Article contends that the Equal Protection Clause guarantees both nondiscriminatory *law enforcement* and nondiscriminatory *laws*. The Clause also prohibits states from interfering with any protection provided by constitutionally proper federal laws. Under the Clause, state governments are:

(1) required to impartially execute nondiscriminatory state laws that protect life, liberty, and property;
(2) required to provide people with impartial access to the courts;
(3) prohibited from enacting discriminatory laws that unreasonably burden or benefit the life, liberty, and property of some people more than others;

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3. *See* United States v. Morrison, 529 U.S. 598, 626–27 (2000).

4. *See, e.g.*, Engquist v. Or. Dep't of Agric., 553 U.S. 591, 611 (2008) (Stevens, J., dissenting) ("[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (quoting Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000))); Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); Sweatt v. Painter, 339 U.S. 629, 635 (1950) ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948))).

5. U.S. CONST. amend. XIV, § 1.

6. *See, e.g.*, Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L.F. 385 (1966); Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1390–92 (1992); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1 (2008) [hereinafter Green, *Pre-Enactment History*]; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219 (2009) [hereinafter Green, *Subsequent Interpretation*]; WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 104–05 (2011) (contending on originalist grounds for narrow conceptions of equal protection that do not include a general nondiscrimination guarantee).

7. *See, e.g.*, Charles L. Black, Jr., *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 49–71 (1996); Cass R. Sunstein, *State Action is Always Present*, 3 CHI. J. INT'L L. 465 (2002) (criticizing the state action doctrine on nonoriginalist grounds).

8. *See, e.g.*, Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 129 (1991); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991) (arguing that the original meaning of the Fourteenth Amendment guarantees positive rights to protective services).

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

Part I summarizes the dominant theories of the equal protection of the laws and describes salient Fourteenth Amendment doctrines. Part II describes this Article's methodology for interpreting and enforcing the Equal Protection Clause.

Part III explores the original meaning of the Equal Protection Clause. First, it traces through Anglo-American history a duty of protection that governments were obliged to discharge. Second, it discusses how a basic guarantee of civil rights deemed necessary to secure "natural" rights to life, liberty, and property for all people was widely accepted during the antebellum period—particularly within the antislavery circles from which the Republican Party emerged. Third, it canvasses the framing and ratification of the Fourteenth Amendment by the Republican-dominated Thirty-Ninth Congress and documents the continued vitality of a positive right to protection in the postratification period.

Part IV moves from the "letter" of the Equal Protection Clause—its original meaning—to its "spirit"—its original purpose. It argues that the Clause's primary purpose is to prevent *subjugation*, understood as control by some person or group of people over the lives, bodies, and possessions of another person or group of people. It contends that Congress should implement the Clause's antisubjugation spirit through the enactment of remedies for state failure to protect life, liberty, and property. Because Section 5 of the Fourteenth Amendment specifically empowers Congress to act, judges should defer to good-faith, factually supported congressional enforcement.[9] Lastly, this Article proposes that the original Equal Protection Clause can shore up some of the Court's most controversial criminal-procedural doctrines, including *Gideon v. Wainwright* and *Miranda v. Arizona*, against originalist critiques and provide social movements with means of critiquing, transforming, and even dismantling laws, practices, and institutions that subjugate people. It suggests that the "Civil *Gideon*" movement and the Movement for Black Lives[10] might find constitutional resources in the letter and spirit of the Equal Protection Clause.

Part V responds to objections. It explains that the Court could abandon the state action doctrine in the equal protection realm and recognize a right to protection

9. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

10. This umbrella term covers scores of organizations including the originating Black Lives Matter organization created by Alicia Garza, Patrisse Cullors, and Opal Tometi. *See* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 407 n.3 (2018). I offer these historical resources in solidarity. *See* Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 50–51 (2019) (acknowledging that "the views of the white supremacists who gutted the Thirteenth and Fourteenth Amendments have gained greater prominence than have the views of the slavery abolitionists who inspired the constitutional amendments" but emphasizing "the potential for prison abolitionists to reclaim an abolition constitutionalism — or construct a new one — that facilitates rather than impedes the completion of the freedom struggle begun by their predecessors").

without upending current antidiscrimination law. It then addresses concerns about the effect of the proposed approach on the rights of women and on Black lives.[11]

A conclusion follows.

I. EQUAL PROTECTION THEORY AND DOCTRINE

Section 1 of the Fourteenth Amendment[12] is among the Constitution's most frequently litigated provisions, and the Equal Protection Clause alone has given rise to numerous theoretical genera. Although space does not permit a full taxonomy, this Part summarizes two genera, the first two of which includes two relevant species. It then discusses the Fourteenth Amendment doctrines I will challenge.

A. THEORY: ANTIDISCRIMINATION VERSUS PROTECTION

The dominant family of equal-protection theories holds that the Clause prohibits discrimination—unjustified state differentiation between people. Equal treatment by the government is the core right secured by the Clause. What kind of discrimination is prohibited divides adherents into anticlassification theories on the one hand and antisubordination theories on the other.

Originalists have been drawn to a view of equal protection that is in the minority among constitutional scholars. These protection theorists hold that the Clause does not forbid all unjustified differentiation. Instead, it guarantees equal *protection against violence* and—on some accounts—impartial access to court processes.

1. Antidiscrimination

a. Anticlassification

Anticlassification theories hold that the government ordinarily may not classify people on the basis of a forbidden category, such as race, sex, or national origin.[13] They condemn governmental differentiation that is explicitly based on forbidden categories and differentiation that targets people on the basis of such categories despite facial neutrality.[14]

The leading judicial articulation of an anticlassification theory is probably "Footnote Four" of the Supreme Court's decision in *United States v. Carolene Products Co.*[15] *Carolene Products* applied deferential rational basis review to

11. For the sake of clarity, consistency, and inclusivity I will use the term "Black" rather than "black" or "African-American" throughout to refer to the racial identity of people of African ancestry who understand themselves to be part of a community forming around that identity. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (selecting an upper-case "B" because "Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun").

12. U.S. CONST. amend. XIV, § 1.

13. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 10 (2003).

14. *See id.*

15. 304 U.S. 144 (1938).

federal legislation banning the interstate shipment of "filled milk"—essentially skimmed milk laced with vegetable oil.[16] In Footnote Four, however, the Court flagged the possibility that rational basis review might not be appropriate for statutes directed at religious, national, racial, and other "discrete and insular minorities."[17] Footnote Four provided the framework for an enduring two-tiered approach to evaluating purportedly discriminatory legislation—heightened scrutiny for legislation that relies upon suspect classifications and rational basis review for all other legislation.

In his 1980 book *Democracy and Distrust*, John Hart Ely offered an extended defense of Footnote Four's anticlassification theory.[18] Ely's concern with classification was downstream of his understanding of representative government—specifically, the idea that equal protection entails that a person's interests be adequately represented in the political process.[19] When the law classifies people, there is reason for concern that those classified have not been adequately represented and the law is intended to harm rather than benefit them.[20]

The anticlassification principle is vividly illustrated by a pair of decisions that apply judicial scrutiny to affirmative-action programs. In *City of Richmond v. J. A. Croson Co*.[21] and *Adarand Constructors, Inc. v. Pena*,[22] the Court did not consider whether race-conscious measures were designed to aggravate or eliminate the subordinate position of disadvantaged groups. That the measures were race-conscious was sufficient to trigger heightened scrutiny. The Court in *Adarand* insisted upon "consistency of treatment irrespective of the race of the *burdened* or benefited group."[23]

Concerns that the Court was unable to appreciate the normative importance of the difference between a no-trespassing sign and a welcome mat gave rise to a different family of equal-protection theories.[24] These antisubordination theories distinguished group-disadvantaging laws from laws that classify to remedy group disadvantage.

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16. *Id.* at 145–46.

17. *Id.* at 152 n.4.

18. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

19. *See id.* at 145.

20. *See id.* (describing suspect classifications and corresponding heightened scrutiny as a "handmaiden of motivation analysis").

21. *See* 488 U.S. 469, 493–95 (1989) (asserting that "[c]lassifications based on race carry a danger of stigmatic harm," and declining to adopt "a relaxed standard of review" for classifications "designed to further remedial goals" (quoting 488 U.S. at 535 (Marshall, J., dissenting))).

22. *See* 515 U.S. 200, 224 (1995) (holding that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

23. *Id.* at 227 (emphasis added).

24. *See id.* at 245 (Stevens, J., dissenting) (criticizing the Court's approach to affirmative action as "disregard[ing] the difference between a 'No Trespassing' sign and a welcome mat"). Stevens did not inspire antisubordination theory. But he expressed a concern with the Court's anticlassification approach that was shared by antisubordination theorists.

b. Antisubordination

Antisubordination as a formal theory can be traced to Owen Fiss's 1976 publication of *Groups and the Equal Protection Clause*.[25] The elaboration of what Fiss called the "group-disadvantaging principle"[26] by Catharine MacKinnon,[27] Charles Lawrence,[28] Derrick Bell,[29] Laurence Tribe,[30] Kenneth Karst,[31] Ruth Colker,[32] and Kimberlé Crenshaw,[33] among others, followed. But scholars have detected antisubordination themes in earlier sources—for example, in Justice John Marshall Harlan's canonical dissent in *Plessy v. Ferguson*.[34] Although Justice Harlan affirmed that the Constitution is "color-blind,"[35] we can glean a concern with subordination from his proclamation that "in view of the Constitution . . . there is in this country no superior, dominant, ruling class of citizens" and his condemnation of "state enactments, which . . . proceed on the ground that colored citizens are . . . inferior and degraded."[36]

Antisubordination scholars are concerned primarily with the effects of governmental actions on disadvantaged groups not with formally even-handed treatment. Sameness or difference in treatment is less important than whether the treatment constitutes or facilitates the dominance of one social group by another or instead attacks power disparities between groups.[37] Facially neutral treatment that effectively subordinates one group to another is constitutionally forbidden; measures that redress power disparities by distinguishing between men and women, whites and people of color, etc., may be constitutionally permitted.[38] Many antisubordination scholars consider Fourteenth Amendment doctrine's focus on discriminatory intentions to be misplaced, either because intentions are

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25. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107 (1976).

26. *Id.* at 147.

27. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) [hereinafter MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN].

28. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987).

29. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

30. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1043–52 (1978).

31. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

32. *See, e.g.,* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

33. *See, e.g.*, Crenshaw, *supra* note 11.

34. 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting). On antisubordination themes in Justice Harlan's dissent, see Balkin & Siegel, *supra* note 13, at 9–10.

35. 163 U.S. at 559 (Harlan, J., dissenting).

36. *Id.* at 559–60.

37. Balkin & Siegel, *supra* note 13, at 14.

38. *See* Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 14 (2017) (explaining that an antisubordination or anticaste theory of equal protection "could justify policies that discriminate on the basis of race if they are enacted to ameliorate conditions of racial inequality").

exceedingly difficult to discover or because they are less important than the impact of policies on disadvantaged groups.[39]

The leading originalist defense of antisubordination was provided by Melissa Saunders in her article *Equal Protection, Class Legislation, and Colorblindness*.[40] Saunders gathers evidence in support of leading Republican Senator Oliver Morton's 1872 description of equal protection as "the equal benefit of the law."[41] Her account relies heavily upon a Jacksonian tradition of hostility to partial or special laws.[42] She contends that the "basic evil to which the clause is directed" is the singling out of classes of people for burdens and benefits without legitimate public purpose, regardless of whether those targeted fall within one of Footnote Four's forbidden categories.[43]

2. Protection

Antidiscrimination's hegemony has not gone uncontested. Alfred Avins, Earl Maltz, John Harrison, and Christopher Green, among other originalists, have emphasized the "protection" in "equal protection of the laws."[44] Protection theorists do not dispute that the Clause is concerned with discrimination. But they do deny that the Clause encodes any *general* antidiscrimination principle.

Some protection theorists claim that the Equal Protection Clause protects *only* against physical violence. Alfred Avins contends that "protection of the law" meant protection "against crimes by other individuals" and that the Clause was a response to "physical violence and murder without redress by local authorities."[45] David Currie highlights the "background" failure of former rebel states to protect freed people against violence during Reconstruction and claims that "equal protection . . . mean[s] that the states must protect blacks to the same extent that they protect whites."[46] Similarly, Lawrence Rosenthal argues that the Clause "guarantee[s] that law enforcement w[ill] be equally *effective* against all threats to public peace and safety."[47]

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39. *See, e.g.*, Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J.F. 343, 348 (2019) (arguing that "prevailing constitutional doctrine effectively insulates countless decisions that actively harm structurally subordinated populations"); Lawrence III, *supra* note 28, at 322–23 (arguing that unconscious discrimination cannot be detected or remedied with an intent requirement); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 163 (2020) (criticizing the intent requirement because "[l]aw enforcement officials rarely admit to having acted for racial reasons").

40. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997).

41. *Id.* at 290 (quoting CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) (statement of Sen. Morton)).

42. For a summary of this tradition, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER-ERA POLICE POWERS JURISPRUDENCE 33–45 (1993).

43. Saunders, *supra* note 40, at 247–48.

44. *See* Avins, *supra* note 6; Maltz, *supra* note 6; Harrison, *supra* note 6, at 1433–51; Green, *Pre-Enactment History*, *supra* note 6; Green, *Subsequent Interpretation*, *supra* note 6; STUNTZ, *supra* note 6.

45. Avins, *supra* note 6, at 390, 426.

46. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 349 (1985).

47. Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 71 (2003).

Others, like Jacobus tenBroek, Frank Michelman, David Richards, Kenneth Karst, and Robin West, have taken a more expansive view of protection that encompasses a larger set of positive rights to government resources.[48] For example, West understands the Clause to prohibit a state from "deny[ing] to any citizen the protection of its criminal and civil law against private violence and private violation[s]."[49] She underscores that "protection against private violence is the central, minimal guarantee of the equal protection clause," but she maintains as well that the Clause prohibits certain kinds of *economic* deprivation.[50] Drawing upon constitutional arguments advanced by influential abolitionists, she writes that "the state has an obligation to protect citizens from abject subjection to the whims of others occasioned by extreme states of poverty, no less than to protect citizens from vulnerability to the threats of physical violence from others."[51] She finds in these abolitionist arguments "at least some support for the claim that the equal protection clause guarantees minimal welfare rights, not only to shelter, food, and clothing, but also to a livable minimum income or job."[52]

Between physical-protection-only and physical-and-economic-protection theories lie those of Maltz, Harrison, and Green. Like physical-protection-only theorists, they deny that the Clause generally bars discrimination. Unlike physical-protection-only theorists, they believe that the Clause secures certain rights that are not immediately necessary to preserve life and limb.

For instance, Green suggests that requiring defendants to pay fees for exercising the right to sue might deny people the equal protection of the laws,[53] and Maltz claims that equal protection guarantees a right to just compensation for property taken through eminent domain.[54] But neither claims that equal protection includes a right to government services not closely connected to anyone's "natural" rights—rights that people would be morally entitled to enjoy absent any government at all. "Positive" rights to state aid are not inconsistent with a natural-rights paradigm, but the aid must be designed to secure and enlarge the freedom that a person would be morally entitled to enjoy without government—think of the right to trial by jury, which requires state resources but protects people against wrongful deprivations of "negative," physical liberty. As Harrison writes: "A favorite theme of Abolitionists and Republicans was that the

48. *See, e.g.*, JACOBUS TENBROEK, EQUAL UNDER LAW (1965) (originally published as JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951)); Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); David A. J. Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973); Kenneth L. Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994).

49. WEST, *supra* note 48, at 23.

50. *Id.* at 33, 35.

51. *Id.* at 35.

52. *Id.*

53. *See* Green, *Subsequent Interpretation*, *supra* note 6, at 296.

54. *See* Maltz, *supra* note 6, at 526.

individual, who had surrendered the natural right of self-protection by giving allegiance to the state, was entitled in return to be protected by the government."[55]

B. DOCTRINE: DISCRIMINATORY INTENT, STATE ACTION, AND NEGATIVE RIGHTS

Like many areas of constitutional law, Fourteenth Amendment doctrine does not fit a grand unifying descriptive theory. But we can identify common themes and discrete doctrines. This Section describes one dominant theme and two key doctrines in equal protection jurisprudence.

1. Discriminatory Intent

Discriminatory intent is central to modern equal protection law. A plaintiff must show that the government sought to achieve a discriminatory purpose to have a viable equal protection claim.[56] Usually, evidence of disparate impact is insufficient to support an inference of discriminatory intent.[57]

Judges evaluate different forms of discrimination in different ways. "Suspect" classifications single out a group of people that have (1) historically suffered from discrimination; (2) lack political power; and (3) face discrimination by virtue of an immutable characteristic (4) that bears no relation to their ability to perform or contribute to society.[58] Race-, citizenship-, nationality-, and sex-based classifications trigger heightened scrutiny.[59] Other classifications receive deferential "rational basis" review.[60]

Scholars have criticized both the Court's focus on discriminatory intent and the tiers of scrutiny. The focus on discriminatory intent has been critiqued as an ineffective and conceptually confused means of identifying racial discrimination. It has been assailed as ineffective because most modern discrimination is a function of implicit biases against socially marginalized groups that can operate automatically and without conscious awareness;[61] it has been attacked as conceptually confused because discriminatory intent is not an "essential element of racial harm," making its "demonstrated failure to effectuate substantive racial

55. Harrison, *supra* note 6, at 1456.

56. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (quoting Akins v. Texas, 325 U.S. 398, 403–04 (1945)); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

57. *Vill. of Arlington Heights*, 429 U.S. at 266.

58. *See* Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014).

59. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

60. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (age); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (wealth).

61. *See, e.g.*, Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007); Lawrence III, *supra* note 28. Lawrence's article on the role of the unconscious in racial discrimination anticipated by some decades the emergence of social science that has undermined liberal assumptions about racial injustice being downstream of individual ill will. In a reflection upon his article's influence, however, Lawrence cautions that "cognitive psychology's focus on the workings of the individual mind may cause us to think of racism as a private concern, as if our private implicit biases do not implicate collective responsibility for racial subordination and the continued vitality of the ideology and material structures of white supremacy." Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 942 (2008).

justice" unsurprising.[62] The tiers of scrutiny have been attacked as predicated upon a mistaken account of what kinds of groups are likely to lack political power.[63]

2. The State Action Doctrine

The Supreme Court first declared that "[t]he provisions of the Fourteenth Amendment . . . all have reference to State action exclusively" in the 1880 case of *Virginia v. Rives*.[64] But it was not until the 1883 *Civil Rights Cases*[65] that the Court elaborated the premises and content of the state action doctrine, which holds that the Fourteenth Amendment ordinarily applies only to state action.

The *Civil Rights Cases* arose from a constitutional challenge to provisions of the Civil Rights Act of 1875 that forbade racial discrimination in places of public accommodation.[66] Writing for the Court, Justice Joseph Bradley determined that the first three words of the second sentence of Section 1 of the Fourteenth Amendment—"[n]o State shall"[67]—prohibits "State action of a particular character."[68] Bradley inferred:

> [U]ntil some State law has been passed, or some State action through its officers or agents has been taken . . . no legislation of the United States under [the Fourteenth] amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.[69]

The core constitutional problem with the Act was that "it ma[de] no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment

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62. *See, e.g.*, Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 968–69 (1993); *see also* George Rutherglen, Essay, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 117 (1995) (contending that the prevailing concept of discrimination in employment discrimination remains tied to discriminatory intent and is "at least incomplete and probably insufficient to remedy persistent forms of inequality in the workplace").

63. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 724 (1985) (contending that discrete, insular minorities can often prevail in the political process, whereas more-numerous, more-diffuse groups are often at a disadvantage). A further problem is that because identities (for example, race, gender, wealth, class, sexuality) overlap and intersect, *see* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150, suspect classifications may fail to capture the full extent of the discrimination that people face.

64. 100 U.S. 313, 318 (1880).

65. 109 U.S. 3 (1883). For a challenge to the standard reading of the *Civil Rights Cases* as hardening a state-action requirement, see PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 210–11 (2011). As Brandwein does not dispute that a state-action doctrine is associated with the decision and currently structures our Fourteenth Amendment law, evaluating this challenge is beyond the scope of this Article.

66. *See* 109 U.S. at 4.

67. U.S. CONST. amend. XIV, § 1.

68. 109 U.S. at 11.

69. *Id.* at 13.

on the part of the States."[70] Instead, it "la[id] down rules for the conduct of individuals in society towards each other."[71]

Critics of the state action doctrine's coherence argue that the state "acts" by supplying "private" contract and property rights and institutions for enforcing the latter. Accordingly, they contend that there is no compelling reason to treat only state action that "interferes" with a *state-created* status quo as constitutionally salient.[72] Critics of the doctrine's constitutional basis include those who agree with Justice Harlan's dissent in the *Civil Rights Cases*, which pointed out that the Citizenship Clause of the Fourteenth Amendment lacks any state action requirement.[73] Other critics deny that the words "[n]o State shall" exclude the possibility of constitutional injuries arising from state omission.[74]

3. The Positive-Rights Exclusion

Related to the state action doctrine is what might be called the "positive-rights exclusion." The positive-rights exclusion insulates states and municipalities from constitutional liability for failing to supply people with services that would not exist absent government.

There are exceptions to the positive-rights exclusion. Most criminal-procedural rights are in some sense "positive," inasmuch as there are no courts, juries, or attorneys for indigent criminal defendants in the state of nature. But the exclusion has bite nonetheless; most pressingly, the exclusion releases states from any constitutional liability for failing to protect people against violence.

The leading modern right-to-protection decision is *DeShaney v. Winnebago County Department of Social Services*.[75] The details are disturbing but worth summarizing in order to appreciate the breadth of the Court's deference to states and localities concerning protection.

The Winnebago County Department of Social Services first learned that Randy DeShaney was physically abusing his son Joshua when Joshua was two years old.[76] Welfare staff made monthly visits to the DeShaney home during a six-month period after emergency-room personnel told a caseworker that Joshua had been treated for suspicious injuries.[77] The caseworker observed additional

70. *Id.* at 14.

71. *Id.*

72. *See, e.g.*, Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004) ("The state action doctrine is analytically incoherent because . . . state regulation of so-called private conduct is always present, as a matter of analytic necessity, within a legal order."). Variations of this criticism have been voiced for decades in countless articles. For a summary and response, see Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1774–815 (2010).

73. *See* 109 U.S. at 46–47 (Harlan, J., dissenting); *see, e.g.*, Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1814–15 (2010); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 324–26 (2000).

74. *See, e.g.*, Heyman, *supra* note 8, at 562.

75. 489 U.S. 189 (1989).

76. *Id.* at 192.

77. *Id.* at 192–93.

injuries and recorded her continuing suspicions that someone in the household was abusing Joshua.[78] Still, even after Joshua was again treated for injuries and emergency-room personnel again notified the Department that they believed Randy was abusing Joshua, the Department did not act to remove Joshua from his father's custody.[79] Randy DeShaney beat his son into a life-threatening coma three months later.[80]

Joshua's mother Melody sued the Department, alleging that the state deprived Joshua of his liberty by failing to provide him with adequate protection against his father's abuse.[81] The Supreme Court denied the claim, stating that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[82] The Court did acknowledge without endorsing the possibility of two exceptions: (1) affirmative obligations arising out of "'special relationships' created or assumed by the State with respect to particular individuals," such as prisoners; and (2) obligations arising from state-created dangers.[83]

DeShaney was litigated and decided as a due process case. In a footnote, the Court stated that "[t]he State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause" but noted that Melody had not advanced such an argument.[84] Lower courts do not apply *DeShaney* to cases involving *deliberate discrimination* in the allocation of law-enforcement resources.[85] But no court has interpreted *DeShaney* to permit the recognition of an equal-protection right to state protective resources.[86]

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78. *Id*. at 193.
79. *Id*.
80. *Id*.
81. *Id*. at 195.
82. *Id*. at 196 (citations omitted).
83. *Id*. at 197–98, 201–02.
84. *Id*. at 197 n.3 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
85. *See, e.g*., McKee v. City of Rockwall, 877 F.2d 409, 413 (5th Cir. 1989) (stating that a complaint arising from failure to arrest allegedly based on gender-discriminatory policy was not barred by *DeShaney*).
86. If *DeShaney* addressed only a due process argument, one might wonder how it can be said to have excluded positive rights from the Fourteenth Amendment's ambit. Perhaps there is an equal-protection way around *DeShaney*'s declination to recognize a positive right to protection against violence. But no lower court has recognized it—*DeShaney* has been construed to stand for the general proposition that "[t]he Constitution is, with immaterial exceptions, a charter of negative rather than positive liberties." Tuffendsam v. Dearborn Cnty. Bd. of Health, 385 F.3d 1124, 1126 (7th Cir. 2004) (citing *DeShaney*, 489 U.S. at 109).

This is the conventional reading of *DeShaney* in the scholarly literature. *See, e.g*., Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 860 (2016) ("Our Constitution is generally perceived as a negative constitution, protecting individuals from government intervention without recognizing any positive rights to government protection." (citing *DeShaney*, 489 U.S. at 204)); Jack M. Beermann, NFIB v. Sebelius *and the Right to Health Care: Government's Obligation to Provide for the Health, Safety, and Welfare of Its Citizens*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 277, 278 (2015) (discussing *DeShaney*, and stating that "there is no reason to believe that the Supreme Court would retreat from its hesitancy to recognize positive rights under the Constitution"); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1681 (2014)

DeShaney received a torrent of criticism when it was decided, and its reputation has not improved. Criticisms span the normative and methodological spectrums—some scholars condemn it as immoral,[87] others for its reliance on the state action doctrine,[88] and others for its inattention to historical evidence.[89]

Some examples of the third originalist criticism do not rest upon any particular constitutional provision. For instance, Stephen Heyman "challenges *DeShaney* on its own ground—the original understanding of the Fourteenth Amendment" by amassing materials from English and antebellum legal theory and practice, and from congressional debates between the Fourteenth Amendment's framers.[90] At one point, he suggests that the Due Process Clause might prohibit states from "refusing to protect a person in life, liberty, or property, thereby depriving him of security against the invasion of those rights by others."[91] At another, Heyman claims that "the principal source of substantive rights in the [Fourteenth] Amendment was the Privileges or Immunities Clause" and that "[p]rotection was clearly regarded as among the basic privileges of American citizenship."[92] Equal protection of the laws supplements these substantive guarantees by "requir[ing] that the protection given to all citizens be equal."[93]

This Article subjects the state action doctrine and positive-rights exclusion to scrutiny under only one clause of the Fourteenth Amendment: The Equal Protection Clause. We will see that, whatever the merits of the Court's interpretation of the Due Process Clause in *DeShaney*, these doctrines violate the original meaning and undermine the original function of the Equal Protection Clause.

II. METHODOLOGY OF THE ARTICLE

This Article seeks to ascertain the original meaning and function of the Equal Protection Clause of the Fourteenth Amendment. This is not the place for a comprehensive linguistic, legal, or moral defense of originalism. Originalism is a family of theories united by a commitment to two core propositions: (1) the meaning of a constitutional provision is fixed when it is ratified into law; and (2) fixed-at-ratification meaning should constrain constitutional decisionmaking today.[94] Nonoriginalists do not contest the legitimacy of recourse to original

("The federal Constitution—per the Court's interpretations—omits not only positive rights but also a requirement that the government take affirmative action to protect recognized *negative* rights." (citing *DeShaney*, 489 U.S. at 195–96)).

87. *See, e.g.*, Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 GEO. WASH. L. REV. 1513, 1514 (1989); Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95, 134 (1994).

88. *See, e.g.*, SEIDMAN & TUSHNET, *supra* note 7.

89. *See, e.g.*, Heyman, *supra* note 8, at 561–62.

90. *Id.* at 509.

91. *Id.* at 562.

92. *Id.* at 563.

93. *Id.*

94. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).

meaning;[95] instead, nonoriginalists differ from originalists primarily with respect to the weight that they assign to original meaning.[96] Nonoriginalists also include purpose or structure among the legitimate modalities of constitutional argumentation.[97] So long as one believes that original meaning and purpose contribute something of importance to the question of what our law is or ought to be respecting state action and positive rights, the original Equal Protection Clause ought to be of interest.

This Article will proceed in two analytical steps. The first step determines the *original public meaning* of the text of the Equal Protection Clause. The second step identifies the *original purpose* that the Clause was designed to perform—the normative goods that it was designed to capture.

A. THE LETTER: ORIGINAL MEANING

The ascendant view among originalists is that the object of constitutional interpretation—the thing being interpreted—is the original public meaning of the constitutional text.[98] "Original public meaning" refers to the publicly accessible concepts that most competent users of the English language originally associated with the Constitution's words, phrases, and symbols in the context in which they appear together.[99] Inquiry into public meaning is *objective*, in the sense that whether a particular meaning is the original public meaning of a given provision is determined by investigating social facts about prevailing use.[100]

Public-meaning originalists also distinguish between the original *meaning* of constitutional text and its *application* to particular entities, activities, and phenomena.[101] The text conveys conceptual criteria that determine whether, for

95. *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 32 (2009).

96. *See, e.g.*, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1794 (1997) (describing different methods to weigh competing sources of constitutional interpretation).

97. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982).

98. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 123 (2013) (describing public-meaning interpretation as "the predominant originalist theory").

99. The public meaning of a constitutional expression is a function of the meaning of its component parts. *See* Theo M.V. Janssen, *Compositionality*, *in* HANDBOOK OF LOGIC AND LANGUAGE 495, 495 (Johan van Benthem & Alice ter Meulen eds., 2d ed. 2011). For a direct application of the principle of compositionality to public meaning originalism, see Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1938 ("The principle of compositionality expresses the idea that part of the meaning of an utterance (e.g., a clause in the Constitution) is the product of the conventional semantic meaning of the words, and the regularities of syntax and grammar that combine them.").

100. *See* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) ("Although the objective meaning of words sometimes evolves, words have an objective social meaning at any given time that is independent of our opinions of that meaning, and this meaning can typically be discovered by empirical investigation."). It is fundamental to the "cognitive turn" in linguistics initiated by Noam Chomsky that language is a "mental reality underlying actual behavior"—language is not *constituted by* actual behavior. NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 2 (1965). Public meaning originalism is not committed to a behaviorist ontology of language, but it does take use to be compelling evidence of meaning even if it does not identify meaning with use.

101. *See, e.g.*, Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) ("While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.

instance, certain police conduct is a "search" that cannot be "unreasonable" to comply with the Fourth Amendment.[102] For example, suppose a physical intrusion into a constitutionally protected area, coupled with an effort to obtain information, are together sufficient for a "search" under the conceptual criteria. If the attachment of a GPS tracker to a car involves such an intrusion and effort, then attaching a GPS tracker to a car must not be unreasonable to be constitutional. The Court held thus in *United States v. Jones*.[103]

To identify conceptual criteria, public-meaning originalists look to patterns of word and phrase usage over extended periods of relevant time. So, the original public meaning of "search" is determined by the criteria that most members of the ratifying public used to identify searches.

Certainly, people may disregard the rules of a linguistic community's "language-games"[104] or err in applying those rules to particular facts. They may misspeak or misunderstand a "term of art" that carries a counterintuitive meaning within a community of specialists[105] (say, "dark matter," "rent-seeking," or "motion to compel discovery").

Still, use is an important epistemic aid. Descriptions of the specific criteria governing the application of a word or phrase may be particularly illuminating, but a builder can use the concept of "slab" at a construction site without articulating the essence of slab-ness. The builder provides evidence of the meaning of "slab" by repeatedly responding to prompts from a colleague to hand her a concrete block; one can infer that a concrete block is a slab from such consistent action.[106]

So 'money,' as used in this statute, must always mean a 'medium of exchange.' But what *qualifies* as a 'medium of exchange' may depend on the facts of the day.").

102. U.S. CONST. amend. IV.

103. *See* 565 U.S. 400, 404–05 (2012) (determining that "[t]he Government physically occupied private property for the purpose of obtaining information" and stating that "such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted"). The *Jones* Court declined to address the question of whether the search was reasonable because the government did not raise that argument below. *See id.* at 413.

104. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 65–67 (P. M. S. Hacker & Joachim Schulte eds., G. E. M. Anscombe et al. trans., Wiley-Blackwell rev. 4th ed. 2009) (1953) (characterizing the similarities between "games" as "family resemblances" on the ground that "the various resemblances between members of a family — build, features, colour of eyes . . . overlap and criss-cross in the same way"). "[L]anguage-games," in turn, consist of "language and the actions into which it is woven." *Id.* at § 7. These language-games may not yield words that denote concepts that are united by common properties. *See* Dennis M. Patterson, *Interpretation in Law—Toward a Reconstruction of the Current Debate*, 29 VILL. L. REV. 671, 684–85 (1984).

105. On terms of art, see Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 968 (2009) ("Consider the following example: an ordinary citizen reads the phrase 'letters of marque and reprisal,' and thinks, 'Hmm. I wonder what that means. . . . I should probably ask a lawyer.' . . . [O]rdinary citizens would . . . defer understanding of the term of art to those who were members of the relevant group and those who shared the understandings of the members of the relevant group.").

106. This example is borrowed from WITTGENSTEIN, *supra* note 104, at § 10 (offering the example of differing uses of the word "slab" in a building project to illustrate how language derives meaning from context).

Not all explanations and applications are equally illuminating. For example, bad-faith *mis*usage of language during lawmaking is a serious problem. Originalists who are skeptical of the reliability of legislative history when interpreting statutes have been criticized for focusing on "framing history"—statements made by the Constitution's Framers during the Philadelphia Convention and the Thirty-Ninth Congress.[107]

But even the most ardent opponents of judicial recourse to legislative history admit that it can sometimes yield probative evidence of word- and phrase-usage—and thus public meaning.[108] If the legislative record shows that a word or phrase is being used by members of different political coalitions in much the same way, that is different than crediting a single legislator's potentially self-serving floor statement concerning his potentially idiosyncratic understanding of that word or phrase. The same can be said concerning word and phrase usage by constitutional framers. Further, many legislative statements concerning the emerging Fourteenth Amendment were widely publicized and so may have shaped public meaning, despite being self-serving.

The most extensive discussion of the Equal Protection Clause took place *after* ratification. What this discussion lacks in quality, it more than makes up for in quantity, and less-reliable postratification evidence that contradicts more-reliable preratifaction evidence will be discounted. When the epistemic value of postratification evidence is particularly low, an explanation will be provided.

B. THE SPIRIT: ORIGINAL PURPOSE

The conceptual criteria that constitute the meaning of generic nouns are rarely so sharp as to preclude "borderline" cases. Borderline cases are those where even a perfectly knowledgeable actor applying the criteria under idealized conditions would not be epistemically justified in claiming that a particular "this" is an instance of a (conceptual) "that."[109] For example, whether an ambulance is a "vehicle" to which a "no-vehicles-in-the-park ordinance" applies is a hypothetical borderline case that has spawned generations of legal commentary.

Constitutional language is especially unlikely to carve the world at the joints. Its subject matter is complex. The language had to be endorsed by members of

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107. *See, e.g.*, William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011).

108. *E.g.*, The Honorable Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1616 (2012) (denying that Justice Scalia had any objection to "using legislative history as (mildly) informative rather than authoritative: 'the word can mean this because people sometimes use it that way, as the legislative debate shows,' rather than 'the word must mean this because that is what the drafters said it meant'"); *see also In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (Judge Easterbrook holding that "[l]egislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood").

109. *See* H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (distinguishing between "core" and "penumbral" applications of legal concepts).

multiple decisionmaking bodies with different interests, priorities, and expectations. It had to provide for future as well as present factual contingencies. Subject-matter complexity, transaction costs, and imperfect knowledge yield "incomplete" commercial contracts that do not resolve every question that might later arise under them; it is to be expected that the same factors will give rise to incomplete constitutions that underdetermine the answers to many legal questions.[110]

One approach to resolving such questions is termed "good-faith construction."[111] The distinction between interpretation—determining the original meaning of the "letter" of the constitutional text—and construction—enforcing or implementing that meaning, even when it is unclear—is an important feature of modern originalism. Within "the construction zone," understood here as the space left to constitutional decisionmakers by unclear text,[112] constitutional decisionmakers cannot rely solely on original meaning. Good-faith construction holds that decisionmakers should identify and guide their decisions by the *spirit* of the relevant text—the original purpose or purposes that it was designed to achieve.[113]

That the Constitution *was* designed to achieve particular purposes or perform particular functions ought not be controversial. Certain purposes are set forth in the Constitution's Preamble. Even absent such express statements, it seems absurd to deny that the Constitution's text and structure were designed in certain ways and not others in order to accomplish goals that were important to those who ratified them into law.

Efforts to identify the spirit of constitutional text are no less empirical than efforts to identify the meaning of the letter. We must look to constitutional discourse and practice, generalize on the basis of what we find, and update when we discover new information that supports a different generalization. We must

110. *See* THE FEDERALIST NO. 37, at 183 (James Madison) (George W. Carey & James McClellan eds., 2001) ("[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas."); DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 197–98 (1999) (documenting how the costs of political transactions lead legislators to delegate to future decisionmakers rather than to specify how difficult questions are to be resolved); Neil K. Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. REV. 191, 195 (1987) (observing that "[s]ince constitutions cover periods of indefinite length and the broadest and most complex of subject matters, it is not at all surprising that they leave much unresolved").

111. *See generally* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018) (defining and defending good-faith construction).

112. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013) (explaining that constitutional decisionmakers enter "the construction zone" when "the constitutional text does not provide determinate answers to constitutional questions").

113. *See* Barnett & Bernick, *supra* note 111, at 26. The ontological premise is that the Constitution is a deliberately constructed artifact—"something that necessarily owes its existence to human activities intended to create that artifact." Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 31 OXFORD J. LEGAL STUD. 663, 666 (2011)*; see also* LAW AS AN ARTIFACT, at vii (Luka Burazin et al. eds., 2018) (reporting that "[t]he idea that law is an artifact is commonly accepted among legal theorists"). For an extended discussion of the Constitution-as-artifact, see Barnett & Bernick, *supra* note 111, at 48–51.

examine explicit explanations of what clauses would do; trace the history of words like "commerce" and phrases like "unreasonable searches"; and study the settings in which words and phrases or their analogues were used, the goods associated with them by their users, and the evils that their designers sought to avoid.

Consider the Confrontation Clause of the Sixth Amendment. It provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[114] In *Crawford v. Washington*[115] and *Davis v. Washington*,[116] Justice Antonin Scalia, writing for the Court, repudiated decades of Confrontation Clause doctrine and replaced it with a freshly minted rule that he fashioned after investigating the meaning and function of the Clause's language. Whether or not his conclusions were correct,[117] his method was good-faith construction.

Justice Scalia began with the public meaning of the constitutional text. After sifting dictionary definitions—his go-to source for evidence of contemporaneous usage—he concluded that the word "witnesses" was ambiguous.[118] Accordingly, Justice Scalia turned to legal history that he concluded members of the ratifying public were aware of and associated with confrontation rights. This history included the great political trials of the sixteenth and seventeenth centuries—most notably, the trial of Sir Walter Raleigh—and controversial colonial examination practices.[119]

From this history Justice Scalia inferred that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[120] To thwart this evil, he formulated a rule: A statement made to prove some fact potentially relevant to a criminal prosecution is inadmissible against a defendant unless (1) the witness is unavailable and (2) the defendant has had a prior opportunity to cross-examine the witness.[121]

Accurately identifying the spirit of constitutional text is one thing; implementing that spirit via construction is another. Constructions are heuristics that simplify constitutional decisionmaking.[122] Like all heuristics, constructions can be "adaptive" when they position constitutional decisionmakers to make decisions

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114. U.S. CONST. amend. VI.

115. 541 U.S. 36 (2004).

116. 547 U.S. 813 (2006).

117. *Compare* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105 (2005) (arguing that they were not), *with* Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493 (2007) (defending Scalia's conclusions).

118. *See Crawford*, 541 U.S. at 42 ("The Constitution's text does not alone resolve this case.").

119. *See id.* at 43–50.

120. *Id.* at 50.

121. *Davis*, 547 U.S. at 821 (quoting *Crawford*, 541 U.S. at 53–54).

122. *See* Barnett & Bernick, *supra* note 111, at 16; *see also* Gerd Gigerenzer & Peter M. Todd, *Fast & Frugal Heuristics: The Adaptive Toolbox*, *in* SIMPLE HEURISTICS THAT MAKE US SMART 3, 14 (Stephen Stich ed., 1999) (explaining that "heuristics limit their search of objects or information using easily computable stopping rules, and they make their choices with easily computable decision rules").

more likely to track the law of the land than more complex strategies. They can also be "maladaptive" when they yield worse overall constitutional outcomes. Heuristics may become maladaptive because of changes in the decisionmaking environment or reveal themselves to be maladaptive through trial and repeated error.

Finally, the interpretation of the letter is both chronologically and lexically prior to the spirit. That means (1) textual analysis comes first, and (2) the public meaning of the text controls when it is clear. Not every constitutional decision requires entrance into the construction zone, and the construction zone is always bounded by original public meaning. Accordingly, this Article will begin with the letter and then proceed to the spirit of the Equal Protection Clause.

C. PRECEDENT

Almost all originalists accept that prior judicial decisions should be accorded some weight by judges.[123] Even Justice Clarence Thomas, whose approach to precedent is perhaps the least deferential of any Justice yet elevated to the Supreme Court, maintains that a precedent must be "demonstrably erroneous" to be discarded.[124]

To speak of *demonstrable* error is, of course, to invite questions concerning the quality and quantity of the evidence that must be adduced to defeat a presumption of correctness. In a concurring opinion in *Gamble v. United States*, Justice Thomas addressed quality but not quantity.[125]

Dissenting in *Gamble*, Justice Neil Gorsuch used several Founding-era treatises to demonstrate that the Double Jeopardy Clause prohibited prosecution by a state and by the federal government for the same offense.[126] Justice Thomas responded that he "d[id] not find these treatises conclusive without a stronger showing that they reflected the understanding of the Fifth Amendment at the time of ratification."[127] He stated that "the common law certainly had not coalesced around this view" and highlighted the absence of "contemporaneous judicial opinions or other evidence establishing that [the] view was widely shared."[128] He did not explore how to determine whether the common law had so coalesced, how many contemporaneous judicial opinions would suffice, and what other evidence could prove a widely shared view.

It may be that original meaning does not answer such questions. If the language of Article III did not encode any widely accepted criteria governing when a presumption in favor of precedent should be displaced in favor of the all things considered best account of the meaning of the law, the construction of such criteria

123. Two notable exceptions are Gary Lawson and Michael Stokes Paulsen. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

124. *See* Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

125. *See id.* at 1981–89.

126. *Id.* at 2000–02 (Gorsuch, J., dissenting).

127. *Id.* at 1987 (Thomas, J., concurring).

128. *Id.*

would be left in the hands of subsequent decisionmakers. If evidence of determinate criteria comes to light, this Article's recommendations that constitutional decisionmakers revisit Fourteenth Amendment precedents should be modified accordingly.

At a higher level of generality, however, I am persuaded by Caleb Nelson's arguments that American judges and commentators applied a demonstrable-error rule from the Founding Era until the Civil War.[129] To the extent that more than one construction of a law was consistent with the law's language, any construction had to fall within the range of unclarity in order to be assigned weight by a subsequent decisionmaker.[130] If a construction did fall within that range, a subsequent decisionmaker might be bound to follow the construction even if the decisionmaker would have chosen a different construction in the first instance.[131]

The demonstrable-error rule described by Nelson supports a presumption against following an interpretation of the Constitution's original public meaning that contradicts the overwhelming weight of the available evidence. We will see that the evidence against the Supreme Court's interpretation of the Fourteenth Amendment as applying only to state action and conferring no positive rights is indeed overwhelming.[132]

III. THE LETTER OF THE EQUAL PROTECTION CLAUSE

Although the phrase "the equal protection of the laws" did not appear in the antebellum Constitution, the concept of equal protection was denoted by the phrase by the time the Fourteenth Amendment was framed and ratified. This Part will canvass the concept's origins and development and specify its likely contours at ratification.

A. ALLEGIANCE AND PROTECTION

The notion that the government owed a duty of protection to those subject to its authority can be traced back through centuries of Anglo-American political theory. This theory posited reciprocal duties of allegiance on the part of subjects (and later citizens) and protection by the government of its subjects and citizens. British subjects and citizens of the United States enjoyed a panoply of civil rights, some of which other people enjoyed only by government grace.

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129. *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

130. *See id*. at 13.

131. *See id*. at 13–14.

132. I have elsewhere argued that grave moral necessity may sometimes justify official actors in deliberately departing from the law, even under a legal regime that is overall morally legitimate. *See* Evan D. Bernick, *The Morality of the Presidential Oath*, 47 OHIO N. U. L. REV. 33, 88–95 (2021). For a similar argument, see Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1820 (2007) (arguing that judges should consciously subvert the law to prevent violations of "bedrock principles of international law" like norms that prohibit systematic racial discrimination and slavery). Although defending this proposition at any great length would take this Article far afield, morality and law seem to me to point in the same direction here—toward a right to protection.

The influence of Sir William Blackstone's *Commentaries on the Laws of England* upon the Founding generation is well documented. It is uncontroversial that "most American lawyers began their legal education with Blackstone and the common law."[133] At the same time, it is also clear that American jurists and lawyers sometimes departed from Blackstone, particularly when it came to his conception of Parliamentary supremacy.[134] Blackstone's extensive discussion of the "civil privileges" and "private immunities" of British subjects merits sensitive consideration in connection with the reciprocal duties of allegiance and protection.

Blackstone began his *Commentaries* by laying political-philosophical foundations. He detailed how the law of England secures to every English subject the "absolute rights of every Englishman."[135] He claimed that the rights are both "founded on nature and reason" *and* "coeval with our form of government."[136] In a particularly relevant passage, Blackstone wrote:

> The rights [of the people of England] . . . consist in a number of *private immunities*; which will appear, from what has been premised, to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those *civil privileges*, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.[137]

Blackstone thus posited an exchange in which English subjects surrendered some, but not all, of their natural rights or "immunities" in return for certain civil rights or "privileges" that provide more effective security for their "natural inherent right[s]" than they could enjoy "in a state of nature."[138]

Blackstone then "reduced" these civil rights to "three principal or primary articles[:] the right of personal security, the right of personal liberty, and the right of private property."[139] The preservation of these rights through civil law, Blackstone explained, "may justly be said to include the preservation of our *civil immunities* in their largest and most extensive sense."[140] Personal security "consist[ed] in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[141] Personal liberty encompassed "the power of locomotion, of changing situation, or moving one's person to whatsoever place

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133. Eric R. Claeys, *Blackstone's* Commentaries *and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777, 782 (2008) (quoting AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 169 (1998)).

134. *See* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1097 (2000).

135. 1 WILLIAM BLACKSTONE, COMMENTARIES *127.

136. *Id.*

137. *Id.* at *129 (emphases added and omitted).

138. *Id.* at *129–30.

139. *Id.* at *129.

140. *Id.* (emphasis added).

141. *Id.*

one's own inclination may direct, without imprisonment or restraint, unless by due course of law."[142] Finally, the right of property entailed "the free use, enjoyment, and disposal of all [one's] acquisitions, without any control or diminution, save only by the laws of the land" including "lands [and] goods"—that is, real and personal property.[143]

For Blackstone—who followed John Locke in this respect[144]—protection by the government followed from presumptive consent to be governed. Blackstone spoke of the "[n]atural allegiance" that is "due from all men born within the king's dominions immediately upon their birth."[145] But he made plain that this allegiance was "due" because protection had been provided since birth on the presumption of consent and that subjectship could be dissolved through "the united concurrence of the legislature."[146]

Citizenship did have its distinctive privileges, including certain landholding rights.[147] But law-abiding noncitizens were also presumed to have some allegiance and were certainly bearers of natural rights to life, liberty, and property. Accordingly, there was a tradition of guaranteeing the enjoyment of a smaller set of natural-rights-related *civil* rights to nonsubjects and noncitizens who were bound by the government's laws. The seed of a legal right to protection germinated in this tradition.

Perhaps the most famous legal expression of the idea that nonsubjects were entitled to the protection of British law was Lord Edward Coke's 1608 report in *Calvin's Case*.[148] The case arose from the conveyance of two English estates to a Scottish child named Robert "Calvin" in the pleadings.[149] Calvin's guardians, John and William Parkinson, sued in the King's Bench and in Chancery, claiming that Calvin had been forcibly dispossessed of both estates; the defendants, Nicholas and Robert Smith, responded that Calvin was an alien and therefore could not possess a freehold in England.[150]

Of the fourteen justices assembled for arguments in the case, all but two determined that Calvin was a natural-born subject who was qualified to inherit English land.[151] In his report, Coke wrote:

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142. *Id*. at *134.

143. *Id*. at *138.

144. *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 54 (1978).

145. BLACKSTONE, *supra* note 135, at *369.

146. *Id*. at *370.

147. *See* Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 157 (1999) (explaining that "aliens" did not enjoy the *same* property rights as did "subjects" at common law, thanks to a doctrine that tied certain rights to allegiance to the king); Green, *Subsequent Interpretation*, *supra* note 6, at 267 (observing that "[a]ntebellum discussions of the privileges of citizens regularly distinguished them from the rights of aliens, most frequently pointing to aliens' lack of full land-ownership rights").

148. *See* Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case (1608), 9 YALE J. L. & HUMANS. 73, 74 (1997).

149. The child's true name was Robert Colville. *Id*. at 81.

150. *Id*. at 81–82.

151. *Id*. at 82.

> [W]hen an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other.[152]

Coke distinguished this "local obedience or ligeance" from obedience "due by nature and birth-right" from full-fledged subjects; to be in the King's protection was not to be a full-fledged English subject.[153]

Nonetheless, local allegiance was worth a great deal. The children of noncitizens in amity could acquire birthright subjectship—as Coke put it, "if [a noncitizen in amity] hath issue here, that issue is a natural born subject."[154] Further—as we will see below—noncitizens in amity were entitled to due process of law and to benefit from laws that were designed to secure their natural rights to life, liberty, and property.

A dramatic example of how the right to protection operated during the Founding Era was provided in 1784 when a Frenchman named Charles Julian de Longchamps arrived in Philadelphia and promptly started a brawl with the French consul.[155] The French government demanded that Longchamps be returned to France for trial under the law of nations; Americans united in defense of Longchamps's right to the protection of Pennsylvania law.[156] Ultimately, Longchamps was sentenced by a Pennsylvania court for violating the law of nations as incorporated by the state—but he enjoyed the full measure of Pennsylvanian legal process beforehand.[157]

Founding-Era Americans believed that a government that denied protection to anyone subject to its laws risked dissolving any obligation of allegiance. The denial of protection could have collective and individual implications. The Declaration of Independence charged George III with "abdicat[ing] government here . . . [and] declaring us out of his protection, and waging war against us."[158]

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152. Calvin's Case (1608) 77 Eng. Rep. 377, 383; 7 Co. Rep. 1b, 5b.

153. *Id.*

154. *Id.* at 384, 7 Co. Rep. at 5b (enumeration omitted).

155. *See generally* G. S. Rowe & Alexander W. Knott, *Power, Justice, and Foreign Relations in the Confederation Period: The Marbois-Longchamps Affair, 1784–1786*, 104 PA. MAG. HIST. & BIOGRAPHY 275 (1980) (describing the affair).

156. *Id.* at 293.

157. *See id.* at 300, 304. Nineteenth-century international lawyers also emphasized that states were duty-bound to protect their nationals at home and abroad. *See, e.g.*, EMER DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 161 (Joseph Chitty ed., Philadelphia, T. & J. W. Johnson & Co. 1883) ("Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety."); *id.* at 275 ("[A citizen] lives under the protection of the laws; the magistrates are capable of defending or avenging him against those ungrateful or unprincipled wretches whom his indulgence might encourage to a repetition of the offence.").

158. THE DECLARATION OF INDEPENDENCE para. 23 (U.S. 1776).

Numerous revolutionary state constitutions affirmed the right to refuse allegiance upon the withdrawal of protection.[159]

Against whom were people protected? In his 1827 *Commentaries on American Law*, Chancellor James Kent affirmed that "the personal security of every citizen is protected from lawless violence, by the arm of government, and the terrors of the penal code."[160] He described "[the] duty of protecting every man's property, by means of just laws, promptly, uniformly, and impartially administered, [as] one of the strongest and most interesting of obligations on the part of government."[161] Besides protection against violence by private actors, Kent indicated that the right to protection included some protection against government. Specifically, it included the right to be free from "unequal and undue assessment[s]"[162] and to obtain just compensation for property seized for public use.[163]

A right-to-protection tradition persisted through the antebellum period. Throughout the early-to-mid-eighteenth century, abolitionists demanded the protection of the laws on the ground that governments had a duty to secure the life, liberty, and property of all people.

B. EQUAL PROTECTION IN ABOLITIONIST THOUGHT

Prior to the Civil War, abolitionists spoke often and vividly about how slavery denied the protection of the laws to Black Americans.[164] Henry Stanton's denunciation of slavery in the District of Columbia is a particularly compelling example:

> [An enslaved person's] labor is coerced . . . by laws passed by Congress:—No bargain is made, no wages given. His provender and covering are at the will of his owner. His domestic and social rights, are as entirely disregarded, in the eye of the law, as if Deity had never instituted the enduring relations of husband and wife, parent and child, brother and sister. THERE IS NOT THE SHADOW OF LEGAL PROTECTION FOR THE FAMILY STATE

159. *See* Green, *Pre-Enactment History*, *supra* note 6, at 35–38 (noting similar language in numerous state constitutions, including North Carolina, New Jersey, and Pennsylvania); *see, e.g.*, N.C. CONST. OF 1776, pmbl., https://avalon.law.yale.edu/18th_century/nc07.asp [https://perma.cc/FRM2-YAS8] ("[A]llegiance and protection are, in their nature, reciprocal, and the one should of right be refused when the other is withdrawn."); N.J. CONST. OF 1776, pmbl., https://avalon.law.yale.edu/18th_century/nj15.asp [https://perma.cc/9MEG-5HCR] ("[A]llegiance and protection are, in the nature of things, reciprocal ties; each equally depending upon the other, and liable to be dissolved by the others being refused or withdrawn."); PA. CONST. OF 1776, pmbl., https://avalon.law.yale.edu/18th_century/pa08.asp [https://perma.cc/4F5Y-VGSY] ("[T]he inhabitants of this commonwealth have in consideration of protection only, heretofore acknowledged allegiance to the king of Great Britain; and the said king has . . . withdrawn that protection . . . .").

160. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 11 (New York, O. Halsted 1827).

161. *Id.* at 270.

162. *Id.* at 268.

163. *Id.* at 275.

164. It should be emphasized that Black people were the prime movers behind abolitionism in the United States. For a comprehensive overview of abolitionism that ranges from the American Revolution to the pre-Civil War period and centers the contributions of slave resistance and Black antislavery activism, see generally MANISHA SINHA, THE SLAVE'S CAUSE: A HISTORY OF ABOLITION (2016).

> AMONG THE SLAVES OF THE DISTRICT OF COLUMBIA. . . . Neither is there any real protection in law, for the limbs and the lives of the slaves . . . .
>
> 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. . . . The master may murder by system, with complete legal immunity, if he perpetrates his deeds only in the presence of colored persons!
>
> . . . .
>
> . . . [T]he slave should be legally protected in life and limb,—in his earnings, his family and social relations, and his conscience.[165]

To be denied the protection of the laws was not merely to lack protection against violence. It was to not be "known to the law as a person" and thus to be at the mercy of the will of others—to be subjugated. Still, the lack of protection against violence—protection of "life and limb"—features prominently in the list of evils recited by Stanton.

Numerous conventions of free Black people complained of being denied the protection of the laws. A resolution adopted by an 1858 convention asserted that, if the Supreme Court had held correctly in *Dred Scott v. Sandford*[166] that Black people "have fewer rights in our own native country than aliens," it followed that "colored men [we]re absolved from all allegiance to a government which withdraws all protection."[167]

Black people repeatedly described protection against violence by, and subjugation to the will of, whites as entailments of the protection of the laws. In an 1856 convention at Sacramento, Black people complained that "the law, relating to our testimony . . . is but a shadow. *It affords no protection to our families or property*. I [ma]y see the assassin plunge his dagger to the vitals of my neighbor, yet, in the eyes of the law, I see it not."[168] That same year an Illinois convention began with a call to oppose laws that "denied the right to testify against a white man before a

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165. REMARKS OF HENRY B. STANTON, IN THE REPRESENTATIVE HALL, ON THE 23RD AND 24TH OF FEBRUARY, BEFORE THE COMMITTEE OF THE HOUSE OF REPRESENTATIVES, OF MASSACHUSETTS, TO WHOM WAS REFERRED SUNDRY MEMORIALS ON THE SUBJECT OF SLAVERY 28–29, 34 (Boston, Isaac Knapp 1837); Henry Brester Stanton, Remarks before the Committee of the House of Representatives of Massachusetts, *in* FORERUNNERS OF BLACK POWER: THE RHETORIC OF ABOLITION 56, 60–61, 63 (Ernest G. Bormann ed., 1971).

166. 60 U.S. 393 (1856).

167. PROCEEDINGS OF A CONVENTION OF THE COLORED MEN OF OHIO 5–7 (Cincinnati, Moore, Wilstach, Keys & Co. 1858), https://omeka.coloredconventions.org/items/show/254 [https://perma.cc/9KHK-D9C5].

168. PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE COLORED CITIZENS OF THE STATE OF CALIFORNIA, HELD IN THE CITY OF SACRAMENTO, DEC. 9TH, 10TH, 11TH, AND 12TH, 1856, at 137 (San Francisco, J.H. Udell & W. Randall 1856), https://omeka.coloredconventions.org/items/show/266 [https://perma.cc/X6Z3-JQDB] (emphasis added).

Court of Justice, thereby denying us all means of access to law to protect ourselves against designing men *to impose upon colored men at their will*."[169]

White abolitionists, too, demanded these protections for Black people and for themselves. In 1855 William Lloyd Garrison included "equal protection under the laws" among his demands for Black people and their allies together with his demand for their personal liberty, the right of locomotion, mental and moral culture, voluntary and remunerated labor, freedom of conscience, and freedom of speech.[170] Shortly before he was murdered by a mob in 1837, Elijah Lovejoy called for physical protection in an address delivered in Alton, Illinois:

> Have I, sir, been guilty of any infraction of the laws? Whose good name have I injured? When and where have I published any thing injurious to the reputation of Alton? . . . What, sir, I ask, has been my offence? Put your finger upon it —define it—and I stand ready to answer for it. If I have committed any crime, you can easily convict me. You have public sentiment in your favour. You have your juries, and you have your attorney . . . . [I]f I have been guilty of no violation of law, why am I hunted up and down continually like a partridge upon the mountains? Why am I threatened with the *tar-barrel*?Why am I waylaid every day, and from night to night, and my life in jeopardy every hour?
>
> . . . I plant myself, sir, down on my unquestionable *rights*, and the question to be decided is, whether I shall be protected in the exercise, and enjoyment of those rights . . . whether my property shall be protected, whether I shall be suffered to go home to my family at night without being assailed, and threatened with tar and feathers, and assassination; whether my afflicted wife, whose life has been in jeopardy, from continued alarm and excitement, shall night after night be driven from a sick bed into the garret to save her life from the brickbats and violence of the mobs . . . .[171]

The concept of equal protection also surfaced in more obscure sources. In 1838, when *The Enterprise and Vermonter* published a summary of Chancellor William Harper's pro-slavery tract, *Memoir on Slavery*, an indignant correspondent asked whether the "old blockhead" had "hear[d] of the Northern States, where *all* men are entitled to the equal protection of the laws, and where the ruffian who commits murder is responsible to those laws, no matter what may be the color of the witnesses?"[172] An editorial in the *Washington Telegraph* criticized the "miserable cry of *southern* rights" and urged the necessity of providing "equal

169. PROCEEDINGS OF THE STATE CONVENTION OF COLORED CITIZENS OF THE STATE OF ILLINOIS, PROCEEDINGS 3 (Chicago, Hays & Thompson, Book, Job & Ornamental 1856) (emphasis added), https://perma.cc/2998-2NS2.

170. Wm. Lloyd Garrison, *Second Anniversary of the Michigan Anti-Slavery Society*, ANTI-SLAVERY BUGLE, Oct. 27, 1855, at A1.

171. JOSEPH C. LOVEJOY & OWEN LOVEJOY, MEMOIR OF THE REV. ELIJAH P. LOVEJOY; WHO WAS MURDERED IN DEFENCE OF THE LIBERTY OF THE PRESS, AT ALTON, ILLINOIS, NOV. 7, 1837, at 279–80 (New York, John S. Taylor 1838).

172. *American Slavery*, ENTER. & VERMONTER, Mar. 15, 1837, at A1.

protection of the laws to every man in every State and territory of the Union for his life, his property and his religion."[173] Finally, an address drafted by Karl Marx, adopted by 6,000 working people in Manchester, England, and sent to President Abraham Lincoln in 1863 declared: "Justice demands for the black, no less than for the white, the protection of law, that his voice be heard in your courts."[174]

More capacious theories of protection that included security against *all* unjustified governmental discrimination—not just discrimination affecting natural rights—were articulated before and after the Civil War, particularly by Black people. An 1856 convention of free Black people in Columbus, Ohio, declared that Black people could not "*defend* and protect life, liberty, and property[.] . . . by any other than violent means" without access to the ballot.[175] The next year, a Columbus convention denounced the exclusion of Black people from "the benefit of the Poor Fund. . . . [A]ll the public institutions of the State for the benefit of the insane, blind, deaf and dumb," from juries, and from political office.[176] And it averred that "if you have a right to tax us for the benefit of the State . . . we have a right to demand of you protection."[177]

In 1865 Black people in Sacramento claimed that the rights listed in the Declaration of Independence would "become a nulity,[sic] [without] the protection of the laws,"[178] and Black people in Norfolk, Virginia affirmed the "necessity of the recognition of the right of suffrage for our own protection."[179] Finally, Black people on numerous occasions argued that the protection of the laws required removing the word "white" from the laws.[180]

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173. Editorial, WASH. TEL. (Wash., Ark.), Dec. 22, 1858, at A2. The reference to "religion" suggests that religious-liberty rights were understood to be among the civil rights secured by the equal protection of the laws. For useful discussions of the historical relationship between equal protection and religious liberty and its implications for modern constitutional doctrine, see generally Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275 (2006); Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295.

174. *Emancipation Meetings in England: The Workingmen of Manchester*, N.Y. TIMES, Jan. 15, 1863, at A2. For a summary of the lone exchange between Lincoln and Marx, see ALLAN KULIKOFF, ABRAHAM LINCOLN AND KARL MARX IN DIALOGUE 1 (2018).

175. PROCEEDINGS OF THE STATE CONVENTION OF COLORED MEN, HELD IN THE CITY OF COLUMBUS, OHIO, JAN. 16TH, 17TH & 18TH, 1856, at 5 (1856), https://omeka.coloredconventions.org/items/show/252 [https://perma.cc/6CEE-XJ6P].

176. 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 16–17 (Columbus, John Geary & Son 1857), https://omeka.coloredconventions.org/items/show/253 [https://perma.cc/MMW4-GCMZ].

177. *Id.* at 17.

178. PROCEEDINGS OF THE CALIFORNIA STATE CONVENTION OF COLORED CITIZENS, HELD IN SACRAMENTO ON THE 25TH, 26TH, 27TH AND 28TH OF OCTOBER, 1865, at 26 (San Francisco, The Elevator 1865), https://omeka.coloredconventions.org/items/show/268 [https://perma.cc/A7ZF-NDP9].

179. ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, VA., TO THE PEOPLE OF THE UNITED STATES 5 (New Bedford, E. Anthony & Sons 1865), https://omeka.coloredconventions.org/items/show/563 [https://perma.cc/6ZV7-JCFD].

180. *See, e.g.*, PROCEEDINGS OF THE COLORED NATIONAL CONVENTION, HELD IN ROCHESTER, JULY 6TH, 7TH AND 8TH, 1853 (Rochester, Frederick Douglass' Paper 1853), https://omeka.coloredconventions.org/items/show/458 [https://perma.cc/H74D-JJV3]; *State Convention of the Colored Men of Alabama,*

The record is thus not free from contestation over the meaning of equal protection. To confirm that the duty-of-protection tradition informed the public meaning of the Equal Protection Clause, we must canvass the framing and ratification of the Fourteenth Amendment by antislavery Republicans. This will also enable us to identify the precise kinds of protection which the Clause was designed to secure.

C. FRAMING EQUAL PROTECTION

The words "equal protection" first became a focal point during the Thirty-Ninth Congress on February 26, 1866, when Representative John Bingham introduced his second draft of Section 1 of the Fourteenth Amendment.[181] That draft provided:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[182]

It is tempting to leap to the conclusion that this draft language was a precursor of the Equal Protection Clause and thus to read the latter as a guarantee of equal protection *of life, liberty, and property*. But "the laws" is absent from the draft, and the words "life, liberty, and property" appear in the Due Process Clause of the final amendment, not the Equal Protection Clause.

Unfortunately, we have no record of any extended discussion of the significance of the move to "equal protection of the laws," which took place as the Joint Committee on Reconstruction was deliberating over a plan put forward by Robert Dale Owen. Bingham proposed "equal protection of the laws" twice—first unsuccessfully, then successfully. His initial proposal was a proposed amendment to the Owen Plan, which provided that: "No 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."[183]

Bingham then moved for the following language to be added: "[N]or shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."[184]

Mobile, May 4, 1867, COLORED CONVENTIONS PROJECT, https://omeka.coloredconventions.org/items/show/565 [https://perma.cc/4JFK-ETCX] (last visited Aug. 26, 2021); PROCEEDINGS OF THE IOWA STATE COLORED CONVENTION, HELD IN THE CITY OF DES MOINES, WEDNESDAY AND THURSDAY, FEBRUARY 12TH AND 13TH, 1868, at 11 (Muscatine, Daily Journal Book and Job Printing House 1868), https://omeka.coloredconventions.org/items/show/567 [https://perma.cc/R765-66U7].

181. For a summary of the drafting process, see Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 512–18 (2019).

182. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

183. BENJ. B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867, at 83 (1914).

184. *Id*. at 85.

Bingham's initial proposal failed. After a series of votes, he proposed the following language as a replacement for, rather than an amendment to, the initial anti-racial-discrimination language of the Owen Plan:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[185]

This second proposal succeeded. From May 8 to May 10, a third draft of Section 1 was discussed by the House. The equal protection of the laws received comparatively little attention. But Bingham and Thaddeus Stevens did comment on this new language. Bingham's May 10 comments were brief and focused primarily upon the Privileges or Immunities Clause[186]:

> The necessity for the first section [is that] . . . . There was a want hitherto . . . . [Of] express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> . . . [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic . . . .[187]

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185. *Id.* at 106.

186. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

187. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham). Bingham affirmed that state officials were bound by their constitutional oaths to respect the rights that would be secured by the Fourteenth Amendment, but also said that the federal government was not empowered to enforce those rights. *Id.* at 1090. His statements here should not be read to imply that the Fourteenth Amendment would only empower *Congress* to enforce its guarantees but to express a widely held belief among Republicans that there was a particular need for congressional action to protect civil rights and to remove constitutional doubt about such intervention.

In an influential work, Raoul Berger did defend the proposition that the framers of the Fourteenth Amendment originally intended only Congress to enforce the Fourteenth Amendment. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 228 (1977). Berger's argument hinged upon a protest by Representative Giles Hotchkiss against Bingham's second draft of Section 1. Hotchkiss complained that this draft "le[ft] it to the caprice of Congress" whether rights of "life, liberty, and property" were protected. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss). Berger inferred from this complaint that *courts* could not act to protect life, liberty, and property rights. BERGER, *supra*.

As Michael Kent Curtis has shown, Berger mistakenly believed that Hotchkiss was talking about the final version of Section 1; in fact, the language of Bingham's draft was changed precisely to respond to Hotchkiss's objection. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 128–29 (1986). Because Hotchkiss's complaint would have applied to any version of Section 1 that left civil rights entirely in the hands of Congress, that neither he

Bingham distinguished between the protection of the "privileges and immunities of all . . . citizens" and the protection of the "inborn rights of every person"; between "deny[ing] to . . . freem[en] the equal protection of the laws" and "abridg[ing] the privileges or immunities of . . . citizen[s]. . . ."[188] All people were entitled to the equal protection of the laws, but only citizens were entitled to the privileges and immunities of citizenship.

Bingham did not precisely describe what basic protections all people were entitled to enjoy. He made plain that he considered these protections to be guaranteed by the Constitution as it stood.[189] But he also believed that the federal government lacked the power to ensure that all people *actually* enjoyed these protections.[190] Importantly, Bingham also went on to assure the House that "[t]he second section [of the proposed Fourteenth Amendment] excludes the conclusion that by the first section suffrage is subjected to congressional law. . . ." [191]

On May 8, Representative Thaddeus Stevens spoke at greater length about Section 1.[192] He stated that he could "hardly believe that any person can be found who will not admit that every one of these provisions is just."[193] He then claimed that those provisions were "all asserted, in some form or other, in our Declaration [of Independence] or organic law."[194]

Stevens said that the proposed amendment would "allow[] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all."[195] This appears to be a reference to the Equal Protection Clause, both because Stevens referred to equality and because he referred to "m[en]" rather than to citizens.[196] What followed tends to confirm this supposition:

> Whatever 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.[197]

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nor anyone else raised this objection to the final version renders arguments against judicial enforcement implausible.

188. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).
189. *See* discussion *supra* note 187.
190. *See* discussion *supra* note 187.
191. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).
192. *Id.* at 2459 (statement of Rep. Stevens).
193. *Id.*
194. *Id.* (emphasis omitted).
195. *Id.*
196. *Id.*
197. *Id.*

Melissa Saunders reads Stevens's statement as an endorsement of a general antidiscrimination principle.[198] If that is what Stevens meant, his statement would have implicated discriminatory laws denying ballot access to Black people. Stevens was himself an ardent proponent of equal suffrage rights. But on the ratification-campaign trail, he expressly denied that the ratification of the Fourteenth Amendment would ensure nondiscriminatory ballot access.[199] We should therefore read Stevens as claiming only that laws governing criminal punishment, testimony, and access to the courts should operate equally on all people and as leaving open the question of discrimination outside these settings.

Finally, there is Senator Jacob Howard's May 23 introduction of the Fourteenth Amendment to the Senate.[200] Howard devoted most of his floor time to the Privileges or Immunities Clause.[201] Like Stevens, he did not clearly differentiate between different Clauses:

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.[202]

The reference to class legislation seems to be a reference to the "Black Codes." Following the ratification of the Thirteenth Amendment, the former rebel states compelled Black people into constructive servitude by means of discriminatory laws that restricted travel, forbade marriage across the color line, forfeited wages if Black people broke yearly employment contracts that were forced upon them, and punished failure to show sufficient deference to whites.[203] Still, questions abound.

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198. Saunders, *supra* note 40, at 285 (offering Stevens's speech as evidence that "many of the Republicans who participated in the drafting and ratification process understood [the Equal Protection Clause] to . . . nationalize the antebellum state constitutional principle against partial or special laws").

199. *See* Representative Thaddeus Stevens, Speech of the Hon. Thaddeus Stevens, Delivered at Bedford, Penn., on Tuesday Evening, Sept. 4, 1866, *in* SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY 27, 27 (1866).

200. CONG. GLOBE, 39th Cong., 1st Sess. 2764–65 (1866) (statement of Sen. Howard).

201. *Id.* at 2765–66.

202. *Id.* at 2766.

203. On the Black Codes, see, for example, W. E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, at 149–70 (Henry Louis Gates, Jr. ed., Oxford University Press 2007) (1935); JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW 45–61 (2006); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 189–208 (1st ed. 1988).

What abolishes the Black Codes? The Due Process Clause? The Equal Protection Clause? Both together? Does prohibiting states from "subjecting one caste to a code not applicable to another" prevent them only from imposing discriminatory punishments, or does it prohibit them also from discriminating in providing access to the courts, as Stevens seemed to say?

Because Howard, like Bingham, went on to state that "the first section of the proposed amendment does not give . . . the right of voting," we cannot attribute to him the view that anything in Section 1 forbade *all* unjustified discrimination.[204] Had it even been arguable that either the Due Process Clause or the Equal Protection Clause guaranteed nondiscriminatory ballot access, why would not Howard deny that those Clauses did so?

Howard's May 28 proposal to add what would become the Citizenship Clause to the Fourteenth Amendment touched off a discussion that indirectly sheds light upon equal protection.[205] Senator Edward Cowan pressed Howard on the "length and breadth" of Howard's proposal.[206] After questioning what rights the children of Chinese immigrants and Gypsies would have under Howard's definition of citizenship, Cowan stated his understanding that:

> If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. You cannot murder him with impunity. It is murder to kill him, the same as it is to kill another man. You cannot commit an assault and battery on him, I apprehend. He has a right to the protection of the laws; but he is not a citizen in the ordinary acceptation of the word.
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> . . . .
>
> So far as the courts and the administration of the laws are concerned, I have supposed that every human being within their jurisdiction was in one sense of the word a citizen, that is, a person entitled to protection; but in so far as the right to hold property, particularly the right to acquire title to real estate, was concerned, that was a subject entirely within the control of the States.[207]

Cowan drew a distinction between the protection of the laws—enjoyed as of right by "every human being within [the] jurisdiction" of "the courts and the administration of the laws"—and rights that only citizens were entitled to enjoy.[208] This is consistent with Bingham's distinction between the privileges and immunities of citizens and the rights of all people. And Cowan was not contradicted by any of his colleagues concerning this distinction.

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

205. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

206. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Cowan).

207. *Id.*

208. *Id.*

D. RATIFICATION

During the ratification campaign, proponents of the Fourteenth Amendment expounded the Equal Protection Clause. Speaking to a crowd in Martinsville, Ohio, Bingham described "the abuse of powers hitherto exercised by States, in which they denied the equal protection of the laws, or any protection of the laws whatever, to some of the noblest men in the Republic."[209] By this, he meant that the life and liberty and property of supporters of the United States had been attacked for "the crime of fidelity to the flag and fidelity to the Constitution."[210]

Bingham then described a July 30, 1866 massacre of mostly Black Republicans by a white mob in New Orleans.[211] He emphasized that the massacre was organized by the mayor of New Orleans and carried out in part by Louisiana police.[212] He urged his audience "[t]o put a fetter forever on the power of a State to do that thing" by placing the Equal Protection Clause in the Constitution.[213] He stressed that every person—"no matter whence he comes, whether citizen or stranger, so long as he abides by the law, and comports himself well towards all other persons"—would be entitled under the Clause to the "same protection as the most distinguished member of the Commonwealth."[214]

Similarly, Indiana Governor (and eventual Senator) Oliver Morton stated in a July 18, 1866 message that the Equal Protection Clause would secure "every person who may be within the jurisdiction of any State, whether citizen or alien, and without regard to condition or residence, not only as to life and liberty, but also as to property."[215] He added that "[i]t has happened in times past that several of the Southern States discriminated against 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 the vindication of their civil rights. . . ."[216] Morton ridiculed Democrats' argument that Section 1 conferred voting rights, describing it as "one of the most flagrant and impudent attempts to practice a fraud on the public mind of which I have any knowledge."[217] Representative Schuyler Colfax spoke of the "equal protection of just laws" and "equal laws [that] could be invoked by the

209. *Mr. Bingham's Speech,* WHEELING DAILY INTELLIGENCER, Sept. 5, 1866, at 2. The precise identity of these men is not clear. Bingham praises "those men who were faithful through good and thorough evil report to the cause of the republic," suggesting that he means those who remained loyal to the United States. *Id.* He singles out "brave soldiers who have returned to their homes covered with glory," that is, Southerners who fought in the Union army for special approbation. *Id.* On Republican concerns with postbellum violations of the liberty of Southern Unionists, see CURTIS, *supra* note 187, at 55–56.

210. *Mr. Bingham's Speech*, *supra* note 209.

211. At least forty-eight people were murdered and over two hundred injured in this massacre, which is sometimes called the "New Orleans Riot." *See* JAMES G. HOLLANDSWORTH, JR., AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866, at 3 (2001).

212. *Mr. Bingham's Speech*, *supra* note 209.

213. *Id.*

214. *Id.*

215. *See* Governor Morton, Speech at New Albany (July 19, 1866), *in* CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA, AND KENTUCKY 3 (1866).

216. *Id.*

217. *Id.*

poor as well as the rich."[218] Like Morton, Colfax denied that Section 1 implicated voting rights.[219]

Among the most detailed accounts of the equal protection of the laws was provided by Representative Mann of Pennsylvania during his state's ratification debate in 1867:

> It supplies a deficiency which every man has felt; it makes every person equal before the law; it aims to make every court in the United States what justice is represented to be, blind to the personal standing of those who come before it. Its adoption will prohibit any judge in any State from looking at the wealth or poverty, the intelligence or ignorance, the condition and surroundings, or even the color of the skin, of any person coming before him. It will require the court to look solely at the merits of the claim which he presents, or the details of the crime with which he is charged; and that I submit, is a duty that ought to be required of every judicial tribunal.[220]

Mann did not say that the Equal Protection Clause guarantees *only* impartial adjudication, but he represented that the Clause would impose a duty of impartiality on "every judicial tribunal."[221] This duty of impartiality would extend beyond the context of race and require equal treatment regardless of socioeconomic status or intelligence.

To summarize: we have a wealth of evidence that the original meaning of "the equal protection of the laws" encompassed at least (1) impartial executive protection of life, liberty, and property and (2) equal access to the courts. While a general-antidiscrimination principle was in the air, it is unlikely that it was widely shared. Prominent supporters of the Fourteenth Amendment consistently linked equal protection to life, liberty, and property rights, and they denied that Section 1 implicated voting rights. An understanding of equal protection that forbade all arbitrary classifications would implicate voting rights as well as other positive rights of access to public goods—common schools, poverty relief, access to places of public accommodation—that either were or would in the course of time become associated with citizenship.

But preratification commentary on the Equal Protection Clause does not shed much light upon whether and how the duty of protection bound *legislatures*. Stevens and Howard talked of "codes" and "class legislation" that would be abolished, and Colfax spoke of "equal laws."[222] Other discussions, however, seem concerned only with the executive and judicial branches. To answer these questions,

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218. *Colfax and Turpie in Plymouth*, WKLY. REPUBLICAN (Plymouth, Ind.), Sept. 27, 1866, at A2; *see also Speech of the Honorable Jehu Baker of Illinois*, NASHVILLE J., July 26, 1886, at A1 (emphasizing that the "poor and the weak members of society" will no longer be "denied equal justice and equal protection at the hands of the law").

219. *Speech of the Honorable Jehu Baker of Illinois*, *supra* note 218.

220. James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 463 (1985) (citation omitted).

221. *Id.*

222. *See* sources cited *supra* notes 202, 218.

we must turn to the post-ratification period and study congressional enforcement of the Equal Protection Clause before and after the Court's critical 1873 decision in the *Slaughter-House Cases*.[223]

E. ENFORCEMENT

Republicans framed key components of Reconstruction policy as means of enforcing the Equal Protection Clause. They formed a united front against Democrats who insisted that Congress could not use its Section 5 powers to impose criminal penalties on non-state actors.

Republicans agreed that protection had been denied, not only by states that deliberately discriminated against particular classes of people when enforcing the laws, but by states that, for whatever reason, failed to adequately enforce the laws. Republicans also agreed that equal protection of the laws bound all three branches of government, not just the executive and judicial branches. Finally, numerous Republicans—including prominent framers—claimed that equal 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.

1. Before the *Slaughter-House Cases*

By the time the Fourteenth Amendment was ratified on July 28, 1868, there was dire need for its vigorous enforcement. At an April 1867 meeting in Nashville, Tennessee that was convened to plan a response to Reconstruction policy, the Ku Klux Klan began its transformation from a loose group of marauders into a tightly structured terrorist organization.[224] The Klan promoted white supremacy through whippings, rapes, and murders, and it effectively disabled law enforcement in several Southern states.[225]

Racist mob violence was rampant. For example, in its final report on the Fourteenth Amendment, the Joint Committee on Reconstruction described the dire circumstances that Black people faced in Memphis, where on May 1, 1866 an altercation between police and Black soldiers precipitated a three-day massacre in which whites killed scores of Black people and destroyed hundreds of homes, churches, and schools:

> [Black people] have had no protection from the law whatever. All the testimony [taken by the Joint Committee] shows that it was impossible for a colored man in Memphis to get justice against a white man. Such is the prejudice against the negro that it is almost impossible to punish a white man by the civil courts for any injury inflicted upon a negro.[226]

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223. 83 U.S. (16 Wall.) 36 (1873).

224. *See* WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 37–40 (1987).

225. *See, e.g.*, *id.* at 79 (discussing incidents of Klan violence and highlighting law enforcement complicity in many of those incidents).

226. H.R. REP. NO. 39-101, at 30 (1866).

Governors cried out for federal assistance; President Ulysses S. Grant responded, calling upon Congress to act to enforce the Fourteenth and Fifteenth Amendments (the latter of which was ratified in 1870).[227]

The Enforcement Acts of 1870 and 1871 both targeted private conduct threatening civil rights.[228] The 1870 Act—called the "Force Bill"—focused on voting rights. It declared that citizens otherwise qualified to vote could do so without regard to race, color, or previous condition of servitude and outlawed private interference with the right to vote.[229] And it made it a felony to conspire or ride the public highways to deprive any citizen of "any right or privilege granted or secured to him by the Constitution or laws of the United States."[230]

Like the Force Bill, the 1871 Act—also known as the "Ku Klux Klan Act"—prohibited conspiracies by private individuals to prevent any "persons" from "exercising any right or privilege of a citizen of the United States" because of racial or political prejudice.[231] The act targeted conspiracies "with intent to deny to any citizen of the United States the due and equal protection of the laws."[232] It also provided that if non-state violence (1) obstructed the execution of either state or federal laws (2) so as to deprive people of any of rights "named in the Constitution and secured by this act" and states (3) "from any cause" either "fail [ed]" or "refuse[d]" to protect them from that violence, "such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States."[233]

During debates over this legislation, Republicans reiterated that state failure to act to protect people—for any reason—could constitute a denial of the equal protection of the laws. Here are some representative examples:

> [T]he chief complaint is not that the laws of the State are unequal, but that even where 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.[234]

> By the first section of the fourteenth amendment a new right, so far as it depends on express constitutional provision, is conferred upon every citizen; it is the right to the protection of the laws. This is the most valuable of all rights, without which all others are worthless and all right and all liberty but an empty name. To deny this greatest of all rights is expressly prohibited to the States as a breach of that primary duty imposed upon them by the national Constitution. Where any State, by

227. CONG. GLOBE, 42d Cong., 1st. Sess. 236, 244 (1871); *see* Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 158 (1995).

228. Enforcement Act of 1870, Pub. L. No. 41-114, 16 Stat. 140; Ku Klux Klan Act, Pub. L. No. 42-22, 17 Stat. 13 (1871).

229. Enforcement Act of 1870 § 1.

230. *Id*. at § 6.

231. *See* Ku Klux Klan Act § 2.

232. *Id*.

233. *Id*. at § 3.

234. CONG. GLOBE, 42d Cong., 1st Sess. app. 153 (1871) (statement of Rep. Garfield).

> commission or omission, denies this right to the protection of the laws, Congress may, by appropriate legislation, enforce and maintain it.[235]
>
> It is argued that if infringements can be made by others than the State, and if the State merely permits but without giving active help in depriving of rights, Congress can do nothing. This argument defeats itself.
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> . . . .
>
> When a State is forbidden to "deny to any person within its jurisdiction the equal protection of the laws" the command is that no State shall fail to afford or withhold the equal protection of the laws.[236]
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> Admitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action? Are not laws preventive, as well as remedial and punitive? . . .Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?[237]

Republicans met Democratic arguments that the federal government could only intervene if state legislatures expressly discriminated against particular classes of people by emphasizing that the text of the Equal Protection Clause—unlike that of the Privileges or Immunities Clause—did not mention legislation at all. The Privileges or Immunities Clause specifically prohibited "mak[ing] or enforc[ing] any law" that abridged the rights of U.S. citizens, Senator George Edmunds pointed out.[238] He then said: "A Legislature acting directly does not afford to any person the protection of the law; it makes the law under which and through which, being executed by the functionaries appointed by the State for that purpose, citizens receive the protection of the law."[239]

Other Republicans, too, at points seemed to suggest that legislatures were not the primary focus of the Equal Protection Clause. Senator John Pool stated that the Clause "relates more particularly to the executive branch of the State governments."[240] Some averred that the duty of protection constrained courts, invoking Chapter 40 of the Magna Carta—"We will sell to no man, we will not deny or delay to any man right or justice."[241]

But it does not follow that the original meaning of the Equal Protection Clause leaves legislatures unconstrained. It is unsurprising that Republicans did not discuss this issue at any great length. Democrats did not deny that the Clause constrained legislatures—they contended that it *only* constrained legislatures! When they did discuss the issue, Republicans said that the Clause applied to legislatures—not as a general prohibition against unreasonable classifications but as a guarantee of equally protected life, liberty, and property rights.

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235. CONG. GLOBE, 42d Cong., 1st Sess. 608 (1871) (statement of Sen. Pool).
236. CONG. GLOBE, 42d Cong., Spec. Sess. app. 80 (1871) (statement of Rep. Perry).
237. *Id.* at 85 (statement of Rep. Bingham.)
238. CONG. GLOBE, 42d Cong., 1st. Sess. 697 (1871) (statement of Sen. Edmunds).
239. *Id.*
240. *Id.* at 608 (statement of Sen. Pool).
241. CONG. GLOBE, 42d Cong., Spec. Sess. app. 83 (1871) (statement of Rep. Bingham).

For instance, Representative Horatio Burchard described the Equal Protection Clause as "wide and general in its application" and claimed that it imposed a duty that "must be performed through the legislative, executive, and judicial departments of [the] government."[242] He detailed the ways in which each of these departments might "den[y] the enjoyment of the right":

> If the law-making power neglects to provide the necessary statute, or the judicial authorities wrongfully enforce the law so as to neutralize its beneficial provisions, or the executive allows it to be defied and disregarded, has not the State denied the enjoyment of the right?
>
> 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. But if the statutes show no discrimination, yet 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, or if 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, the State has not afforded to all its citizens the equal protection of the laws.[243]

Burchard evidently considered the first of these propositions to be uncontroversial—hence, "it will be admitted."[244] Similarly, Senator Henry Wilson took the Democrats to have "conceded" that "[a] refusal to legislate equally for the protection of all would unquestionably be a denial [of the equal protection of the laws]."[245] Should "one or the other of the coordinate branches of the State government" fail to afford equal protection, Wilson stated, "it is not only within the power, but it is the solemn duty of Congress to enforce the protection which the State withholds."[246]

One might assume from Burchard and Wilson's commentary that "the laws" by which people are entitled to be protected are whatever state laws happen to be on the books. Other Republicans, however, claimed otherwise. No 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.

In 1870, Bingham made a speech proposing to amend a bill that removed political disabilities from former rebels and cast his proposal as an "echo of the people's voice" expressed through the Equal Protection Clause.[247] After reciting the Clause, Bingham interpreted it not only to embrace state laws but "[all] laws, and above all other laws, . . . the law of the Republic, the Constitution itself, which is

242. *Id.* at 315 (statement of Rep. Burchard).
243. *Id.*
244. *Id.*
245. CONG. GLOBE, 42d Cong., 1st Sess. 482 (1871) (statement of Rep. Wilson).
246. *Id.*
247. CONG. GLOBE, 41st Cong., 3d Sess. 203 (1870) (statement of Rep. Bingham).

the supreme law of the land."[248] Bingham then repeated that the equal protection of the laws included "especially [the laws] of the Constitution and of all laws made in pursuance of it."[249]

When discussing the Ku Klux Klan Act, Bingham again claimed that the Equal Protection Clause guaranteed protection by the supreme law of the land.[250] He interpreted the Clause to "mean[] that no State shall deny to any person within its jurisdiction the equal protection of the Constitution of the United States, as that Constitution is the supreme law of the land."[251] He added "that no State should deny to any such person . . . any right secured to him either by the laws and treaties of the United States or of such State."[252]

Bingham also defended provisions of the Enforcement Act of 1870 that were designed to protect Chinese immigrants against discrimination.[253] He averred that "immigrants [were] persons within the express words of the fourteenth article of the constitutional amendments."[254] They were, therefore "entitled to the equal protection of the laws."[255] He emphasized that the equal protection of the laws did not merely guarantee protection of the laws "of the State itself, but of the Constitution of the United States as well."[256]

Bingham was not the only one who expressed such a "substantive" understanding of equal protection. Representative Pratt, responding to Democratic arguments that equal protection only entailed protection against discriminatory legislation, provided the following account of the conditions in the former rebel states:

> [T]he fact remains . . . that Union people, particularly of the colored race, do not have the equal protection of the laws in North Carolina and most of the other States engaged in the rebellion. . . . Though the laws do not in terms discriminate against them, still the fact is that they invoke their protection in vain . . . . There is either such a condition of public sentiment that they cannot be executed, or there is a complicity with their oppressors on the part of the officers who should, but do not, execute them.[257]

Pratt then posed a series of rhetorical questions:

> Now, sir, is not this state of things a practical denial of the equal protection of the laws? One of the definitions of the verb "deny" is "not to afford; to withhold." Now, can it with fairness be said this equal protection is not denied, when it is withheld, when it is not afforded? Is there not a positive duty imposed on the

248. *Id.*
249. *Id.*
250. CONG. GLOBE, 42d Cong., Spec. Sess. app. 83 (1871) (statement of Rep. Bingham).
251. *Id.*
252. *Id.*
253. CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870) (statement of Rep. Bingham).
254. *Id.*
255. *Id.*
256. *Id.*
257. CONG. GLOBE, 42d Cong., 1st Sess. 506 (1871) (statement of Rep. Pratt).

> 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. . . [?][258]

Note that on Pratt's account, protection required both equal laws and equal enforcement—it constrained legislation as well as execution. Pratt gave examples of failures of execution:

> [S]uppose the legislature of North Carolina provided a proper law and proper courts, but the Governor commissioned no judges or sheriffs; or suppose, having commissioned them, they should all resign or refuse to act . . . could it be maintained that the State had not denied protection? No, sir; the Constitution fairly interpreted means that this protection is to be exerted by a law, interpreted, applied, and executed inconformity [sic] with the constitution and laws of the State.[259]

In context, Pratt's reference to "proper law[s]" is a reference to laws that are at a minimum "equal, affording protection to all alike"—not just *any* state laws.[260] It would not make sense for him to affirm that the Equal Protection Clause required the execution of discriminatory laws, given that he previously stated that the Clause imposed "a positive duty . . . on the States" *not* to enact such legislation.[261]

It must be acknowledged that even before the *Slaughter-House Cases*, equal protection of the laws was sometimes discussed in connection with generally available government services that lacked a tight connection to "natural" rights. In 1870, *The New Era*, a weekly newspaper established in Washington, D.C. to serve formerly enslaved people and edited by Frederick Douglass, published an article that invoked the equal protection of the laws in discussing public education.[262] The article disclaimed any intent to seek "social or conventional advantages which we cannot fairly win."[263] But it declared that Black people would "submit to no legal disabilities in public places or institutions, merely to gratify the wealth and intelligence of the minority."[264] The article included a "demand" that all children enjoy "equal advantages in all the public institutions, and equal protection under all the laws of the State."[265]

When Congress in 1870 considered Mississippi's application for readmission to the United States, Republicans debated whether to condition the state's readmission upon its pledge never to amend its constitution to deprive any citizen or class of citizen from school rights and privileges secured by that constitution. Senator William Stewart contended that the condition was unnecessary because

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258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *The Public Schools and Governor Alcorn—No. 2*, NEW ERA, June 16, 1870, at 2.
263. *Id.*
264. *Id.*
265. *Id.*

Mississippi had already made "ample provision for common schools."[266] But, he said:

> [I]f the State of Mississippi should pass a law which would deprive the colored man of the same rights and privileges of schools that the white man has, or make any other discrimination which would deny him the equal protection and benefit of the laws, we have direct constitutional power to interfere . . . .[267]

Stewart thus apparently understood the Equal Protection Clause to provide that "[t]he States shall make no discrimination in their laws," full stop.[268]

In 1872, Senator Oliver Morton provided the most extensive pre-*Slaughter-House* articulation of a general-antidiscrimination theory of equal protection. Discussing what would eventually become the Civil Rights Act of 1875, Morton argued that provisions of the emerging Act that forbade states from excluding Black people from juries were justified by the Equal Protection Clause.[269] He contended that "the word 'protection,' . . . means not simply the protection of the person from violence, the protection of his property from destruction, but it is substantially in the sense of the equal benefit of the law."[270] He repeated the phrase "equal benefit of the law" and urged that the Equal Protection Clause was "intended to promote equality in the States, and to take from the States the power to make class legislation and to create inequality among their people."[271]

Notwithstanding these discussions, there are profound difficulties with interpreting the original meaning of the Equal Protection Clause to encode a general-antidiscrimination principle. First, the duty-of-protection tradition conceptualized protection of the laws in terms of the protection of basic life, liberty, and property rights. Second, as we will see, few of Morton's fellow Republicans expressly endorsed the general-antidiscrimination view until after the *Slaughter-House Cases*[272] made the Privileges or Immunities Clause a weak constitutional foundation for civil rights legislation—and these few did not unambiguously endorse that view.

Third, Morton himself connected the exclusion of Black people from jury boxes with the denial of natural rights. Thus, he asked "whether the colored men of North Carolina have the equal protection of the laws when the control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them."[273] He also acknowledged that equal protection of the laws did not require voting rights.[274] Had he understood the equal protection

266. CONG. GLOBE, 41st Cong., 2d Sess. 1329 (1870) (statement of Sen. Stewart).
267. *Id.*
268. *Id.*
269. CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) (statement of Sen. Morton).
270. *Id.*
271. *Id.*
272. 83 U.S. (16 Wall.) 36 (1873).
273. 3 CONG. REC. 1795 (1875) (statement of Sen. Morton).
274. *See id.* at 1796.

of the laws to express a general-antidiscrimination principle, it is hard to see how he could have conceded this much. If Morton indeed took the Clause to express a general-antidiscrimination principle, he did say so consistently enough for his constructions to be strongly probative of original meaning.

Fourth, Senator Matthew Carpenter's 1873 argument on behalf of his client Myra Bradwell, in favor of a woman's right to practice law, did not mention the Equal Protection Clause.[275] Christopher Green highlights this omission, which would be an inexplicable error on the part of one of the Senate's leading constitutional lawyers if the Clause was taken to generally forbid unjustified discrimination.[276] Indeed, Carpenter asserted:

> [T]he *only provision* in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that "no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen." And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female.[277]

Had Carpenter thought it plausible that the Equal Protection Clause might generally forbid discrimination, it is difficult to imagine why he would not have argued that the Clause protects every person and that Illinois' exclusion of women from the practice of law denied women the equal protection of the laws. He believed that the exclusion was unjustified discrimination—that was the thrust of his Privileges or Immunities argument. As a policy matter, he supported not only economic rights but suffrage rights for women—he said so.[278] Apparently, therefore, he did not think that the Equal Protection Clause generally forbade unjustified discrimination.

2. After the *Slaughter-House Cases*

Scholars have documented an evolution in Republican constitutional discourse after the Supreme Court's 1873 decision in the *Slaughter-House Cases*.[279] The decision arose from a challenge to a provision of a Louisiana statute that granted a monopoly on slaughtering animals in New Orleans to a single corporation, Crescent City Live-Stock Landing & Slaughter-House Co., that charged fixed

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275. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) was decided the same day as the *Slaughter-House Cases*. The Court made plain that the holding in the *Slaughter-House Cases* doomed Bradwell's cause. *See id.* at 139 ("The opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary. . . ." (footnote omitted)).

276. Green, *Subsequent Interpretation*, *supra* note 6, at 273–74.

277. *Id.* at 274 (alteration in original) (quoting *Bradwell*, 83 U.S. at 136); *see* John A. Lupton, *Myra Bradwell and the Profession of Law: Case Documents*, 36 J. SUP. CT. HIST. 236, 253 (2011) (quoting Carpenter as saying "I have more faith in female suffrage, to reform the abuses of our election system in the large cities, than I have in the penal election laws to be enforced by soldiers and marines" (citation omitted)).

278. Lupton, *supra* note 277.

279. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1003 (1995); Green, *Subsequent Interpretation*, *supra* note 6, at 255.

fees for slaughtering on its premises.[280] Butchers who were deprived of their own slaughterhouses argued that there existed a common law right, protected by the Thirteenth and Fourteenth Amendments, to labor in a legal trade without arbitrary interference.[281]Although the Court as a body had not evaluated the monopoly, one Justice—Justice Joseph Bradley—had done so while riding circuit. Along with Judge William Woods, Bradley had concluded that Crescent City's monopoly violated the Privileges or Immunities Clause.[282] In contrast, the Supreme Court upheld the monopoly grant by a vote of five to four.

Writing for the Court, Justice Samuel Miller distinguished between the privileges and immunities of *state* citizenship and the privileges and immunities of *national* citizenship, asserting that only the latter are protected by the Privileges or Immunities Clause.[283] The former category was capacious. The latter was confined to a narrow, idiosyncratic set of rights that seemed to have little to do with what Justice Miller identified as the "pervading purpose" of the Fourteenth Amendment: "[F]reedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[284] For instance, how the "right of free access to . . . subtreasuries" would prevent the oppression of formerly enslaved people went unexplained.[285]

Absent from Miller's list of the privileges and immunities of national citizenship were any rights of access to inns, places of public amusement, common carriers, and juries—all of which congressional Republicans sought to secure through what would become the Civil Rights Act of 1875.[286] Democrats who opposed the 1875 Act made immediate use of Justice Miller's opinion. They argued that the rights to be protected by the proposed legislation were *all* rights of state citizenship rather than national citizenship.[287] In response, Republicans sometimes repudiated the *Slaughter-House Cases* outright and sometimes attempted to argue that it did not address racial discrimination.[288] But they also invoked the Equal Protection Clause.

Thus, Representative William Lawrence said that "the word 'protection' must not be understood in any restricted sense, but must include every benefit to be derived from laws."[289] But Lawrence went on to say that Section 1 "deals with

280. *See* Randy E. Barnett, *The Three Narratives of the* Slaughter-House Cases, 41 J. SUP. CT. HIST. 295, 298 (2016).

281. *See id*. at 299.

282. *See* Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 653 (Bradley, Circuit Justice, C.C.D. La. 1870).

283. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873).

284. *Id*. at 71.

285. *See id*. at 79.

286. ch. 114, 18 Stat. 335.

287. *E.g*., 2 CONG. REC. 384–85 (1874) (statement of Rep. Mills); *id*. at 414–15 (statement of Rep. Bright); *id*. at 419–20 (statement of Rep. Herndon).

288. *E.g*., 3 CONG. REC. 1792 (1875) (statement of Sen. Boutwell); *id*. at 943 (statement of Rep. Lynch).

289. 2 CONG. REC. 412 (1874) (statement of Rep. Lawrence).

'the privileges' and the 'immunities of citizens'—not some privileges, but 'the privileges'—all privileges, and for all these the 'equal protection,' the equal benefit, of all laws is to be extended to all citizens."[290] In this way, Lawrence effectively substituted the Equal Protection Clause for the Privileges or Immunities Clause.

Similarly, Senator Frederick Frelinghuysen described the Equal Protection Clause as "a provision against all discrimination and in favor of perfect [e]quality before the law."[291] But he then paraphrased Justice Stephen Field's dissent in the *Slaughter-House Cases*:

> [A]s no State under the old Constitution could discriminate in law against a citizen of another State as to fundamental rights to any greater degree than it did against a citizen of its own State, of the same class, so now no State must discriminate against a citizen of the United States merely on account of his race.[292]

Again, equal protection was compensating for an effectively redacted Privileges or Immunities Clause.

Melissa Saunders notes that, before and after the *Slaughter-House Cases*, Senator Oliver Morton articulated a general-antidiscrimination understanding of equal protection.[293] But we have seen that Morton drew a connection between equal protection and life, liberty, and property while denying that the Fourteenth Amendment would implicate voting rights. Evidently, he did not understand equal protection to safeguard people against *all* unjustified discrimination.

Michael McConnell has shown that the language of the 1875 Act was revised in ways that indicate an effort to avoid conflict with the *Slaughter-House Cases* and to rely upon the Equal Protection Clause rather than the Privileges or Immunities Clause.[294] Senator Charles Sumner's initial bill—introduced before the *Slaughter-House Cases*—borrowed language from the Privileges or Immunities Clause, providing "[t]hat no citizen of the United States shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment" of specified rights.[295] But as reported by the Senate Judiciary Committee shortly after Sumner's death in 1874, the bill provided "[t]hat all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment" of specified rights.[296]

The epistemic value of post-*Slaughter-House* Republican claims about equal protection should not be discounted just because of their novelty. The reason that

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290. *Id.*

291. *Id.* at 3454 (statement of Sen. Freylinghuysen).

292. *Id.*

293. *See* Saunders, *supra* note 40, at 289–90. Morton first articulated this understanding in 1872. *See* CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) (statement of Sen. Morton).

294. *See* McConnell, *supra* note 279, at 1001–04.

295. 2 CONG. REC. 945 (1874).

296. Civil Rights Act of 1875, ch. 114, sec. 1, 18 Stat. 335, 336 (1875).

some of these claims do not appear to be probative of the Clause's original meaning is that it is not clear that Republicans were interpreting that original meaning at all. Republicans appear, rather, to have incorporated their interpretation of the original meaning of the Privileges or Immunities Clause into the Equal Protection Clause. As McConnell summarizes, they appear to have done so for the specific purpose of securing the constitutionality of civil rights legislation prohibiting discrimination in respect of rights that only citizens were deemed entitled to enjoy.[297]

Post-*Slaughter-House* Supreme Court decisions are even less probative of original meaning. In *Strauder v. West Virginia*, the Court upheld provisions of the 1875 Act that forbade racial discrimination in jury service.[298] In its opinion, the Court spoke of citizenship, civil rights, and "legal discriminations, implying inferiority in civil society," not of persons and the duty of protection.[299] Indeed, the Court emphasized that West Virginia singled out Black people "as jurors, because of their color, though they are citizens."[300]

The Court expressed:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.[301]

The Court, however, did not locate the source of this difficulty in the original meaning of the Equal Protection Clause. It did not, for example, articulate a theory of the Clause according to which all people are entitled to have their life, liberty, and property equally protected through the remedial processes of the courts. And it did not say that all similarly situated people are entitled to equal treatment by the law.

In *Ex Parte Virginia*, the Court characterized *Strauder* as holding that "the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color."[302] Again, the Court did not discuss the Equal Protection Clause at any length. It simply stated that "immunity from any such discrimination is one of the equal rights of all persons, and that any withholding it by a State is a denial of the equal protection of the laws, within the meaning of the amendment."[303]

297. *See* McConnell, *supra* note 279, at 1001.
298. *See* 100 U.S. 303, 308 (1880).
299. *Id.*
300. *Id.*
301. *Id.* at 309.
302. 100 U.S. 339, 345 (1880).
303. *Id.*

Finally, Justice Bradley's opinion for the Court in the *Civil Rights Cases*[304] is of little epistemic value to original meaning for methodological reasons. In this case, the Court held provisions of the Civil Rights Act of 1875 forbidding discrimination in places of public accommodation unconstitutional.[305] Bradley did not attempt to square with the duty-of-protection tradition his assertion that the Fourteenth Amendment—all of it—prohibited "State action of a particular character" and was only "intended to provide against . . . State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment."[306] Nor did he provide any analysis of the context in which the Fourteenth Amendment was framed and ratified. He did not investigate postratification enforcement by Congress either.[307]

* * *

In the opinion for the Seventh Circuit in *DeShaney* that was ultimately affirmed by the Supreme Court, Judge Richard Posner wrote that the "Constitution is a charter of negative rather than positive liberties" and "[t]he men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services."[308] Undeniably, those who framed the Fourteenth Amendment were not concerned about the absence of social services that did not exist in the nineteenth century. But the history surveyed here demonstrates that the framers were concerned with more than government oppression.

The Equal Protection Clause requires that states provide legislative, executive, and judicial services that secure natural rights to life, liberty, and property that all people possess by virtue of their humanity. Action or inaction on the part of any branch of a state government that results in a failure to secure those rights denies people the equal protection of the laws.

Of course, "[g]eneral propositions do not decide concrete cases."[309] To implement this language, constitutional decisionmakers must enter the construction zone. Identifying state failures of protection and evaluating federal legislation that is purportedly aimed at remedying such failures of protection are jobs that judges must perform. Performing them properly requires recourse to the spirit of the Clause.

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304. 109 U.S. 3 (1883).

305. *Id*. at 25.

306. *Id*. at 11, 23.

307. Bradley's precise motivations—the reasons for his methodological omissions—are the subject of considerable secondary literature and are beyond the scope of this Article. *Compare, e.g.*, John Anthony Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the* Slaughterhouse Cases *to the* Civil Rights Cases, 25 RUTGERS L. REV. 552, 564 (1971) (arguing that Bradley's 1883 opinion contradicted his earlier statements that private, race-based intimidation and outrages could be targeted by Congress), *with* BRANDWEIN, *supra* note 65, at 79 (arguing that Bradley maintained that "social rights" could not be federally enforced and considered public-accommodation rights to be among them).

308. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987).

309. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

IV. THE SPIRIT OF THE EQUAL PROTECTION CLAUSE

Identifying the spirit of the Equal Protection Clause requires us to confront a level-of-generality conundrum. We have seen that Republicans described the Clause as a means of:

1. Eradicating the Black Codes;[310]
2. Guaranteeing particular protective services and procedural rights that were associated with the protection of the laws in 1868;[311]
3. Protecting people against the control of their life, liberty, and property, whether by state or non-state actors;[312]
4. Dismantling racially discriminatory laws, full stop.[313]

How do we decide *which* of these ends best fits the Clause, if any?

Implementing the spirit of the Clause, in turn, presents institutional challenges. Judge Posner acknowledged that Joshua DeShaney was the victim of both his father's physical abuse and the "reckless failure" of local authorities to protect him from it.[314] But states cannot provide anyone with *absolute* security. How much are they constitutionally obliged to provide? How should courts evaluate congressional interventions in the event of state protective failures?

A. ANTISUBJUGATION

One way to identify the spirit of the Equal Protection Clause would be to identify the narrowest, most "administrable" of possible spirits. That is what Justice Scalia did in his opinion for the Court in *Michael H. v. Gerald D.*,[315] lauding the virtues of "consulting the most specific tradition available" when identifying historically rooted substantive due process rights.[316] It is *easier* to determine whether a state has enacted legislation that resembles the Black Codes, one might think, than to determine whether a municipality has acted consistently with the demands of equality in executing the laws.

But in light of the above evidence, this narrowest available end appears underinclusive. Why did Republicans say that the Clause would secure the rights of white supporters of the United States in the former rebel states?[317] Why did they say that travelers who came from "Ethiopia, from Australia, or from Great

310. *See, e.g.*, sources cited *supra* notes 203–04 (discussing the Black Codes).

311. *See, e.g.*, H.R. REP. NO. 39-101, at 30 (1866) (discussing the lack of protective services for freedmen and Unionists).

312. *See, e.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) (statement of Sen. Morton).

313. *See, e.g.*, CONG. GLOBE, 42d Cong., Spec. Sess. app. 83 (1871) (statement of Rep. Bingham).

314. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 812 F.2d 298, 299 (7th Cir. 1987).

315. 491 U.S. 110 (1989).

316. *Id.* at 127 n.6.

317. *See* CONG. GLOBE, 42d Cong., 1st Sess. 506 (1870) (statement of Rep. Pratt).

Britain" were entitled to the protection of the laws?[318] There is too much here that the narrowest of ends cannot explain.

The broadest, general-racial-equality spirit also seems a poor fit for the available evidence. If the Clause was designed to guarantee equality across the board, why did Republicans choose language that was associated with a particular tradition of "protection" against natural-rights-related subjugation? How were they able to provide assurances that voting rights were not implicated by the Clause's language?

To treat the Equal Protection Clause as a general-equality clause would invite the very sort of voting-related outcomes that Republicans publicly denied would immediately follow ratification.[319] The Equal Protection Clause is certainly concerned with equality. But all operative provisions of Section 1 are concerned with equality, whether the equal enjoyment of civil rights or equal access to judicial review of legislative acts that deprive people of life, liberty, or property.[320] The Equal Protection Clause adds to the equality protected by the other clauses by securing equality of a particular kind.[321]

What about the remaining options? Republicans did identify particular rights that would be protected by the Clause, such as the right to testify.[322] But there is little evidence that the Clause was designed to fix a closed set of rights in constitutional amber. We have seen that Republicans frequently spoke in general terms of rights to impartial civil and criminal laws, adequate law enforcement, and adequate civil and criminal remedies for rights-violations, but precisely what states were required to do by way of providing reasonable protection for civil rights was not fully specified.[323] Indeed, these requirements were presented in terms that suggested that they were in some sense contingent upon state practice.

Take Stevens's May 8, 1866, speech as an example. Recall that Stevens stated that "[w]hatever means of redress is afforded to [a white person] shall be afforded to all."[324] There is no suggestion here that the particular means of redress afforded

318. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Cowan).

319. *See, e.g.*, CONG. GLOBE, 43d Cong., 2d Sess. 1796 (1875) (statement of Sen. Morton).

320. On equal civil rights, see generally CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015). On equal freedom from arbitrary state deprivations of life, liberty, and property, see generally Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

321. Might voting have been specifically excluded and the Clause meant to cover all *other* forms of governmental discrimination? This seems unlikely because of the connection that Republicans consistently drew between equal protection and life, liberty, and property rights that fit a Blackstonian, natural-rights-infused mold up until a crucial postratification juncture. Only in the wake of a disappointing decision that they denounced as improperly narrowing the scope of the Privileges or Immunities Clause did Republicans converge upon arguments about the Equal Protection Clause that covered civic-equality rights unconnected to Blackstonian rights. *See* McConnell, *supra* note 279.

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

323. *See* Soifer, *supra* note 87, at 1525 (observing that postratification enforcement discussions "did not specify what rights were covered, what degree of state abdication would make a federal case, nor to what extent coverage was to be truly national, rather than merely aimed at . . . the South").

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

by the states would be fixed by the Fourteenth Amendment. "Whatever" suggests that the Equal Protection Clause will require different things of states, depending upon the remedial process that states decide to provide. Construing the Equal Protection Clause to guarantee only a fixed set of 1868 rights would permit inequalities in the distribution of rights that were later recognized by states.

That takes us to the third contender—the prevention of the control over life, liberty, and property that Black people and their white allies experienced in the former rebel states even after the ratification of the Thirteenth Amendment. I will term this control "subjugation."[325] The most extensive form of subjugation was, of course, enslavement itself, which Frederick Douglass described in these searing terms to an audience in Limerick, Ireland:

> [An enslaved person] had no power to exercise his will—his master decided for him not only what he should eat and what he should drink, what he should wear, when and to whom he should speak, how much he should work, how much and by whom he is to be punished—he not only decided all these things, but what is morally right and wrong.[326]

The abolition of slavery did not put an end to control of Black lives, liberties, and property, thanks in large part to an exception that Southern states promptly used to nullify the rule. Section 1 of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[327] Infamously, Southern states responded to the Thirteenth Amendment by enacting codes that were designed to perpetuate slavery in everything but name. James Pope[328] and Dorothy Roberts[329] have noted that Republicans vociferously objected to the system of convict leasing that Southern planters, industrialists, and government officials used to

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325. I do not claim that the word "subjugation" appears at salient points in the historical record. Neither does "anticlassification" or "antisubordination," however. If readers prefer a term that more precisely tracks language used during the relevant period, that does not concern me. I am concerned here with the concept denoted by the term—that of control over life, liberty, and property—which unifies phenomena that were part of the context of constitutional communication and thus constituted a publicly available purpose of the Equal Protection Clause.

326. Frederick Douglass, *Slavery and America's Bastard Republicanism*, YALE UNIV., https://glc.yale.edu/slavery-and-americas-bastard-republicanism [https://perma.cc/WF2B-YWXB] (last visited Aug. 25, 2021); *see also* 1 FREDERICK DOUGLASS, *American Slavery, American Religion, and the Free Church of Scotland: An Address Delivered in London, England on 22 May 1846*, *in* THE FREDERICK DOUGLASS PAPERS: SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS 269, 273 (John W. Blassingame ed., 1979) (describing slavery as "the granting of that power by which one man exercises and enforces a right of property in the body and soul of another"); FREDERICK DOUGLASS, *My Bondage and My Freedom*, *in* FREDERICK DOUGLAS: AUTOBIOGRAPHIES 103, 203 (Henry Louis Gates, Jr. ed., 1994) ("I speak advisedly when I say this,—that killing a slave, or any colored person, in Talbot county, Maryland, is not treated as a crime, either by the courts or the community.").

327. U.S. CONST. amend. XIII, § 1.

328. *See* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1478–79 (2019).

329. *See* Roberts, *supra* note 10, at 67.

imprison and extract forced labor from Black people who had been "duly convicted"[330] of what Illinois Representative Burton Cook described as "crimes of the slightest magnitude," such as simple unemployment.[331] But as Roberts has written, even if these Republicans had the better of the constitutional argument, the Amendment ultimately "provided insufficient protection to black citizens from being exploited, tortured, and killed."[332]

Recall Morton's query whether "the colored men of North Carolina have the equal protection of the laws when the control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them."[333] This is a comparatively late expression of a theme that was sounded by abolitionists—most vividly by Black abolitionists like Douglass who had themselves been enslaved;[334] articulated in conventions of free Black people;[335] expressed on the ratification campaign trail by Republicans who detailed how the lawless conditions in Southern states exposed Black people and their white allies, if not to enslavement, then to conditions of analogous vulnerability to domination;[336] and documented in the Report of the Joint Committee on Reconstruction.[337]

Why the term "antisubjugation" as distinguished from the more familiar "antisubordination"? In Fourteenth Amendment literature, antisubordination is associated with theories of "group-disadvantaging"[338] and the "maintenance of an underclass."[339] These theories are not wrong—but they are too narrow to capture the duty-of-protection tradition or discourse surrounding the Equal Protection Clause. The broad language of the Clause and discourse surrounding it evinces a

330. U.S. CONST. amend. XIII, § 1.

331. CONG. GLOBE, 39th Cong., 1st Sess. 1123 (1866) (statement of Rep. Cook); *see also* ANGELA Y. DAVIS, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System*, *in* THE ANGELA Y. DAVIS READER 74, 76 (Joy James ed., 1998) ("The racialization of specific crimes meant that, according to state law, there were crimes for which only black people could be 'duly convicted.'"). For the leading account of these leasing programs, see generally DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

332. Roberts, *supra* note 10, at 70.

333. 3 CONG. REC., 1795 (1875) (statement of Sen. Morton).

334. *See* sources cited *supra* note 326.

335. *See* sources cited *supra* notes 167–69, 176–80.

336. *See, e.g.*, Representative Columbus Delano, Speech of Hon. Columbus Delano, at Coshocton Ohio, Aug. 28, 1866, *in* SPEECHES OF THE CAMPAIGN OF 1866: IN THE STATES OF OHIO, INDIANA AND KENTUCKY 23, 23 (1866) (stating that freed people "needed the protection of law for their property, for their contracts and their personal security" because without it they would be "sold out by the laws of some of the Southern States into a condition equal to slavery, for the payment of [their] debts").

337. *See, e.g.*, H.R. REP. NO. 39-101, at 30 (1866) (describing witness testimony to the effect that freed people were subject to "acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish"); *see also* DU BOIS, *supra* note 203, at 155 ("[A]fter the war they were still not free; they were still practically slaves, and how was their freedom to be made a fact? It could be done in only one way. They must have the protection of law; and back of law must stand physical force.").

338. Fiss, *supra* note 25, at 157 (capitalization omitted).

339. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 27, at 117.

spirit that condemns *all* state and non-state conduct that enables some to control the lives, bodies, and possessions of others, whether historically or recently oppressed, and whether or not they are members of what the Court would later describe as a "discrete and insular minorit[y]."[340] That conduct does, however, need to implicate civil rights that secure freedoms that all people are capable of enjoying absent government—even if their insecurity absent government justifies its creation.

One way to appreciate what makes antisubjugation distinctive is to compare it to the concept of "nondomination." Nondomination is emergent from a republican tradition that has been systematically articulated and developed by political philosophers.[341] Republican freedom-as-nondomination is contrasted with slavery, understood as subjection to another's arbitrary will.[342] But this freedom is more than slavery's absence.

Thus, Philip Pettit characterizes freedom as a "social status" that is preserved by the state not merely through force but through expression such as symbols that affirm the equal status of all people and through the allocation of resources to members of the community that enable them to avoid dominating relationships with others.[343] Like nondomination, antisubjugation is incompatible with slavery. But it regards the security of natural-rights-related civil rights from violation by others as both necessary and sufficient, meaning that antisubjugation is compatible with a much more minimal state than nondomination.

Does antisubjugation's exclusive concern with natural-rights-adjacent civil rights make it too narrow? Recall that Robin West argues that the Equal Protection Clause is directed against "material deprivation occasioned by isolation from the cooperative economic life of the community through which individual livelihoods could be fashioned."[344] It is distressingly easy to think of material deprivation for which no one person or group is responsible and which do not violate natural-rights-adjacent civil rights.

It is true that the Fourteenth Amendment was enacted in part to integrate people—most particularly, formerly enslaved people—into the economic life of the national community.[345] But West does not grapple with the subjugation-

340. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

341. *See, e.g.*, PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997); Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY 83 (Cécile Laborde & John Maynor eds., 2008); K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 CONTEMP. POL. THEORY 41 (2017); ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY (2015); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010).

342. *See, e.g.*, PETTIT, *supra* note 341, at 52 (defining domination as "a power of interference on an arbitrary basis").

343. *See id.* at 87.

344. WEST, *supra* note 48, at 32.

345. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 111–39 (1970) (describing Republican stress on free labor in the territories and the Lockean conception of the right to property). For an incisive examination of

focused tradition *of protection*, which is distinctly concerned with affording security against natural-rights violations. And we have seen that only late in the day—post-*Slaughter-House Cases*—did Republicans invoke the *Equal Protection Clause* as authority for civil rights legislation that went beyond protection against natural-rights-related subjugation. And when Republicans did so, they spoke as if the Privileges or Immunities Clause was the proper source of authority for such legislation.

West correctly criticized *DeShaney* for effectively denying "the right to the state's protection against the subjugating effects of private violence" and neglecting to recognize state *inaction* as an equal protection problem.[346] However, she fails to justify her claim that "the state has an obligation to protect citizens from abject subjection to the whims of others occasioned by extreme states of poverty, no less than to protect citizens from vulnerability to the threats of physical violence from others."[347] The "no less" proposition is unsupported by the duty-of-protection tradition that informed "the equal protection of the laws."

B. CONGRESSIONAL CONSTRUCTION

The Supreme Court has denied that states are generally under any constitutional duty to protect people against violence. The evidence presented strongly suggests that the Court is wrong. But precisely what ought the Court do differently?

The same institutional judgment about the limits of judicial competence that appears to have animated *DeShaney* warrants deference to Congress when it enacts good-faith protective legislation. Equal protection's antisubjugation spirit and Section 5's Congress-empowering spirit are best furthered by honoring that judgment. Accordingly, the Court should expressly (1) acknowledge that the Equal Protection Clause *does* impose a duty of protection and (2) permit Congress to exercise its constitutionally acknowledged discretion in this space.

Ideally, the Court would discard the state action doctrine and the positive-rights exclusion and construct doctrine that would equip judges to evaluate duty-of-protection claims. The new doctrine would account for well-documented administrative pathologies, such as the desire to minimize workload and interest-group capture.[348] It would address the ways that governmental institutions—whether legislatures, administrative agencies, or police departments—can fail to respond effectively to protection problems. Admittedly, the judiciary is itself a governmental institution with pathologies of its own. Yet, it is one that is well-positioned to treat some of the symptoms of enforcement failure, if not the underlying diseases, owing to its relative insulation from local politics.[349]

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conceptual contestation within this tradition, see generally William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767.

346. WEST, *supra* note 48, at 33.

347. *Id*. at 35.

348. *See* Jack M. Beermann, Essay, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. 1078, 1101–04 (discussing these pathologies).

349. *See id*. at 1101.

But it is unrealistic to expect that the Court will engage in such an overhaul anytime soon. Its most recent word on failures to protect was *Town of Castle Rock v. Gonzales*,[350] which involved a law that required police officers to enforce a restraining order when they had probable cause to believe that it had been violated.[351] As in *DeShaney*, the Court acknowledged that the facts of *Castle Rock* were "undeniably tragic."[352] The Castle Rock Police Department's decision not to arrest Jessica Gonzales's husband for taking her three children in violation of a restraining order gave the husband the opportunity to murder Jessica's children.[353] As in *DeShaney*, the Court wrung its hands. But as in *DeShaney,* the Court concluded that its hands were constitutionally tied. It determined that Colorado's mandatory-arrest law did not confer upon Jessica a "property interest" in enforcement of the restraining order that implicated the Due Process Clause.[354]

Section 5 of the Fourteenth Amendment singles out Congress, empowering it "to enforce, by appropriate legislation, the provisions of this article."[355] The choice of the word "appropriate" appears to have been deliberately made to track the language of *McCulloch v. Maryland*.[356] A strong presumption of congressional good faith would honor Republicans' choice of language and the institutional understanding that appears to have informed that choice.

In the wake of *Dred Scott v. Sandford*,[357] Republican confidence in the courts remained at a low ebb for many years. John Bingham went so far as to advocate limiting the Court's power to void legislation by requiring a two-thirds majority of the Court to hold an act of Congress unconstitutional.[358] Oliver Morton explained that the "remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts."[359] To propose—unsuccessfully—that the Court's capacity to void congressional legislation be limited or to state that the task of remedying constitutional violations is not "left to the courts" is not, of course, to say that courts ought be forced to abdicate their traditional duty of determining whether the law of the land has been violated. Republicans were sensitive to

350. 545 U.S. 748 (2005).

351. *Id.* at 756.

352. *Id.* at 755 (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191 (1989)).

353. *See id.* at 752–54.

354. *See id.* at 764.

355. U.S. CONST. amend. XIV, § 5.

356. 17 U.S. (4 Wheat.) 316 (1819); *see, e.g.*, Balkin, *supra* note 73; REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 54 (2006); Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 200–03 (2005); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822–27 (1999); Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 178 n.153 (1997).

357. 60 U.S. (19 How.) 393 (1857).

358. CONG. GLOBE, 40th Cong., 2d Sess. 483 (1868) (statement of Rep. Bingham).

359. CONG. GLOBE, 42d Cong., 2d Sess. 525 (1872) (statement of Sen. Morton).

perceived limits on congressional power.[360] They did not, however, rely upon the Court to vindicate civil rights and relied primarily upon their own understanding of those limits in drafting civil rights legislation rather than taking cues from the judiciary.[361]

But the Supreme Court, in evaluating efforts to enforce the Fourteenth Amendment, has been reluctant to defer to Congress. In *United States v. Morrison*,[362] the Court held unconstitutional the Violence Against Women Act's (VAWA) civil remedy for gender-motivated crimes of violence.[363] The Court acknowledged that Congress had produced a "voluminous" record indicating that "many participants in state justice systems are perpetuating an array of erroneous stereotypes" and that "Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime."[364] But that record was not enough, *Morrison* held, because VAWA's civil remedy targeted non-state actors.[365]

The Court stressed that under VAWA *any person* who committed a gender-motivated crime of violence could be investigated and prosecuted.[366] So even if states were unwilling or unable to protect people against gender-motivated violence, Congress could not simply fill the enforcement gap. It had to fill the enforcement gap *by regulating particular state actors*. Pivotal to *Morrison* was "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."[367]

We have seen that the Equal Protection Clause does not distinguish between state action and omission.[368] Accordingly, nothing in the Clause prevents Congress from targeting non-state actors. The only question is the *McCulloch* question: Is the means appropriately tailored to the end (here, protection), or is it

360. *See* Barnett & Bernick, *supra* note 181, at 514–16 (discussing federalism-centered Republican debate over Bingham's first draft of Section 1).

361. *See* Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & C.R. L. REV. 485, 498 (2004) ("Many Republican members of Congress contested the [Supreme] Court's role in constitutional interpretation and asserted alternative interpretations of the Constitution on what they believed were the most crucial issues of the day.").

362. 529 U.S. 598 (2000).

363. *See id.* at 627; 42 U.S.C. § 13981. This constitutional discussion should not be taken as a general endorsement of VAWA, including its myriad funding provisions that incentivize state and local police departments to aggressively pursue domestic violence claims through the criminal legal system. These aspects of VAWA have been criticized by intersectional feminists as contributing to subjugation, particularly of people of color. For an overview of the debate between carceral and intersectional feminists over VAWA's empowerment of police, prosecutors, and other state agents, see generally Nancy Whittier, *Carceral and Intersectional Feminism in Congress: The Violence Against Women Act, Discourse, and Policy*, 30 GENDER & SOC'Y 791 (2016). For a history of carceral feminism that includes a discussion of VAWA, see AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 148–49 (2020). Gruber observes that the Court in *Morrison* held unconstitutional a "clearly noncriminal provision." *Id.* at 148.

364. *Morrison*, 529 U.S. at 620.

365. *Id.* at 626.

366. *Id.*

367. *Id.* at 621.

368. *See supra* notes 233–35 and accompanying text.

a mere pretext for achieving a substantive outcome that exceeds the bounds of the Equal Protection Clause?

The record on which Congress relied in designing VAWA warranted a presumption of good faith that was not rebutted. Congress heard years' worth of testimony from victims, law professors, and participants in state justice systems; received task force reports on gender bias from twenty-one states; and found not only that state laws discriminated based on gender but that gender-neutral laws were enforced unequally.[369] Providing federal civil remedies for such discrimination seems eminently "appropriate."

Neither the state action doctrine nor the positive-rights exclusion finds a foothold in the Equal Protection Clause. The Court should say so and give Congress the constitutional space to fill enforcement gaps.

C. LEGITIMATING THE CRIMINAL-PROCEDURAL REVOLUTION

The benefits of restoring the original Equal Protection Clause are not limited to upholding Congress's Section 5 power to provide alternatives to inadequate state protective regimes. The recognition of a duty of protection and attention to the Clause's antisubjugation spirit could shore up against originalist criticism some of the Court's seminal criminal-procedural decisions.

Recall that the original meaning of equal protection includes the provision of equal access to the courts.[370] Recall as well the Republican insistence that justice be blind to socioeconomic status.[371]

When the Court in *Griffin v. Illinois*,[372] *Burns v. Ohio*,[373] and *Douglas v. California*[374] recognized limits on filing and transcript fees for indigent criminal defendants, it relied upon general equal-justice principles without investigating the history of the Equal Protection Clause.[375] In so doing, it exposed itself to Justice Harlan's criticism that "[t]he State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford."[376] We have seen that when it comes to the duty to afford equal access to the courts, Harlan was wrong.[377]

Of more pressing relevance, it is clear that at least two sitting Justices doubt whether there is any originalist case to be made for *Gideon v. Wainwright*, in which the Court held that states are required to provide counsel to indigent

369. Kermit Roosevelt III, *Bait and Switch: Why* United States v. Morrison *is Wrong About Section 5*, 100 CORNELL L. REV. 603, 621 (2015).

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

371. *See* Bond, *supra* note 220.

372. 351 U.S. 12 (1956).

373. 360 U.S. 252 (1959).

374. 372 U.S. 353 (1963).

375. *See, e.g.*, *Griffin*, 351 U.S. at 17 (stating that "the central aim of our entire judicial system" is that "all people charged with [a] crime must . . . 'stand on an equality before the bar of justice in every American court'" (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940))).

376. *Douglas*, 372 U.S. at 362 (Harlan, J., dissenting).

377. *See supra* note 202 and accompanying text.

criminal defendants who face possible prison sentences.[378] Dissenting in *Garza v. Idaho*,[379] Justice Thomas (writing for himself and Justice Gorsuch) stated that "the Sixth Amendment appears to have been understood at the time of ratification as a rejection of the English common-law rule that prohibited counsel, not as a guarantee of government-funded counsel."[380] The dissent does not mention the Fourteenth Amendment, let alone the Equal Protection Clause.

This omission is not really surprising. Justice Hugo Black's opinion for the Court in *Gideon* does not discuss equal protection. But in dicta, Justice Black made the following observation:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[381]

These appeals to history are imprecise and do not focus on the critical time period for determining the original meaning or purpose of the Equal Protection Clause. But they are consistent with Republican concerns about the partial justice doled out in tribunals in formerly rebel states. It may be that *Gideon* has not effectively implemented the Equal Protection Clause—that it is a maladaptive heuristic.[382] Still, the absence of any recognized right to appointed counsel circa 1868—much less 1791—would not foreclose *Gideon* as a good-faith construction of the constitutional text, and the connection between the right and the original function of the Equal Protection Clause is sufficiently tight to justify *Gideon* as a good-faith construction.

Finally, there is *Miranda v. Arizona*[383]—for many originalists, part of the anticanon of judicial activism. Central to the Court's analysis is a concern with subjugation, not only in the form of the "third degree"—the deliberate infliction of physical or mental pain, commonly through beatings with fists or rubber

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378. 372 U.S. 335, 344–45 (1963).

379. 139 S. Ct. 738 (2019).

380. *Id.* at 757 (Thomas, J., dissenting).

381. *Gideon*, 372 U.S. at 344.

382. Paul Butler has argued that a dramatic expansion of incarceration and a corresponding increase in racial disparities quickly "overwhelm[ed] any benefits that *Gideon* provided to low-income accused persons." Paul D. Butler, *Poor People Lose*: Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2181 (2013). Still, more strongly, he has contended that *Gideon contributed* to those developments by "legitimating" and "diffusing political resistance to them." *Id.* at 2178. If so, *Gideon* may be a maladaptive construction that does more harm than good.

Fully evaluating *Gideon* from the standpoint of antisubjugation would require a reckoning with its long-run costs and benefits—a reckoning that is beyond the scope of this Article. This abbreviated discussion should not be understood as an unqualified endorsement of *Gideon*-as-construction but a conditional constitutional case for the decision and its rule: If *Gideon* still does what it purported to do, what it does is consistent with the antisubjugation function of the Equal Protection Clause and it is a good-faith constitutional construction.

383. 384 U.S. 436 (1966).

hoses[384]—but of the engineering of the interrogatory environment to coerce people into incriminating themselves.[385] The Court's rule was designed to deter police violence that was discriminatorily deployed by requiring police to inform *all* people in custody that they have access to the courts and lawyers, despite their indigency. And a key passage in *Miranda* links the rule to *Gideon* and thereby to access to justice:

> The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel. While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in Gideon *v.* Wainwright, 372 U.S. 335 (1963), and Douglas *v.* California, 372 U.S. 353 (1963).[386]

The empirical literature on *Miranda* is voluminous and conflicting.[387] The concrete protections of suspect's rights flowing from *Miranda* may not be worthy of the high cultural esteem in which the decision is held.[388] Moreover, given that it is a rule of construction rather than an interpretation of original meaning, Congress could hold hearings, gather evidence on *Miranda*'s costs and benefits with regard to the subjugation of suspects, and choose to displace its rule with appropriate legislation.[389] But—as with *Gideon*—there is more to be said for

384. The extensive use of the third degree by police in the United States was documented by the Wickersham Commission, which was appointed by President Herbert Hoover in 1929 to survey law enforcement across the country. Charles S. Potts, *The Preliminary Examination and "The Third Degree*," 2 BAYLOR L. REV. 131, 135 (1950). *Miranda* cited the Commission's report, noting that "instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination." *Miranda*, 384 U.S. at 445 n.5. For an early summary and discussion of the Commission's findings, see Potts, *supra*, at 135–39.

385. *See Miranda*, 384 U.S. at 445.

386. *Id.* at 472–73 (footnotes omitted).

387. *Compare, e.g.*, Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment,* 90 NW. U. L. REV. 387 (1996) (arguing that *Miranda* has significantly harmed law enforcement efforts and its social costs are unacceptably high), *with* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) (arguing that the benefits of *Miranda* substantially outweigh the costs).

388. *See* Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 745–46 (1992) (pointing out that "[i]n the quarter century since *Miranda*, the Court has reversed only two convictions on the ground that post-*Miranda* custodial interrogation produced an involuntary statement" and contending that *Miranda* "traded the promise of substantial reform implicit in prior doctrine for a political symbol" that is largely useless).

389. In an almost immediate response to *Miranda*, Congress enacted 18 U.S.C. § 3501, which provided that a confession shall be admissible in a federal criminal prosecution if voluntary and that "[t]he trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession." 18 U.S.C. § 3501(b). For a discussion of the legislative history of this attempt to displace *Miranda*, see Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda*?*, 85 CORNELL L. REV. 883, 887–906 (2000). Kamisar persuasively argues that

Miranda from an originalist standpoint than has traditionally been thought, owing to historical connections to the Equal Protection Clause's antisubjugation function that the *Miranda* Court, opting instead to tie its rule to modern developments in policing, did not draw.[390]

The antisubjugation function of the Equal Protection Clause also provides a basis for criticizing the Court's conceptualization of *Miranda* (expressed in *Chavez v. Martinez*) as a "prophylactic rule[]" designed only to prevent witnesses from being forced to give incriminating testimony *at trial*.[391] As Thomas Davies explains, this conceptualization allows public officials to abusively interrogate suspects without facing liability under § 1983 for a violation of the Fifth Amendment right against self-incrimination.[392] That is because "the Court has previously created absolute or qualified immunities that would attach to each of the actors involved in the actual admission of a compelled statement or fruits of such a statement at trial."[393] Unless abusive interrogation *itself* can be said to violate a constitutional right, *Miranda* can do little to deter police subjugation. Conceptualizing *Miranda* instead as a rule of construction designed to implement the Equal Protection Clause by preventing subjugation would lend originalist support to its application at any stage of the criminal legal process where life, liberty, or property is at stake. Thus conceptualized, *Miranda* could be expanded, strengthened, and legitimized.

D. SOCIAL MOVEMENT CONSTRUCTION

Even when judges may have little or no role in enforcing the Equal Protection Clause, recognizing that the Clause requires adequate protection and is directed at subjugation could lend support to social movement construction—the pursuit by social movements of projects that are within the Clause's spirit, though not required by its text.

Such social movements are all around us. First, there is "Civil *Gideon*." Although the Court has shown no recent interest in recognizing rights to counsel

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"the much-vaunted superior fact-finding capacity of Congress was little in evidence" and thus did not warrant deference. *Id.* at 906.

390. *See Miranda*, 384 U.S. at 483 (praising the FBI's "exemplary record of effective law enforcement" and highlighting its use of what would become known as *Miranda* warnings).

391. *See* Chavez v. Martinez, 538 U.S. 760, 767 (2003) ("Statements compelled by police interrogations of course may not be used against a defendant at trial but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs." (citations omitted)); *id.* at 772 (stating that "violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person," and describing *Miranda* as "a prophylactic measure to prevent . . . the admission into evidence in a criminal case of confessions obtained through coercive custodial questioning" (citation omitted)).

392. *See* 42 U.S.C. § 1983 (authorizing civil suits against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws"); Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 995 (2003).

393. Davies, *supra* note 392, at 995 & n.52; s*ee Chavez*, 538 U.S. at 776 (holding that an officer's failure to read *Miranda* warnings to a suspect, without more, cannot ground a § 1983 action).

in civil cases, the choice by Congress to require the appointment of counsel in certain civil settings would be consistent with the Equal Protection Clause's focus on equal access to the courts.[394] Take, for example, appointing counsel to assist indigent homeowners and renters who face foreclosure, civil forfeiture, and eviction proceedings. Although it might seem at first that no subjugation is involved when a house is foreclosed upon or a car is forfeited, the result of an adverse ruling is a deprivation of property that—if the decision is incorrect—is a natural-rights violation.[395]

Much the same can be said about the creation of "community bail funds," which use a revolving pool of money to secure the pretrial freedom of indigent defendants.[396] It would be thoroughly unrealistic to expect the Court to expressly endorse such collective action against wealth-based jailing. But it does not need to do so. Community bail funds are consistent with the Equal Protection Clause, which (as we have seen) guarantees that justice be blind to socioeconomic status. For that matter, congressional action to create bail funds or abolish cash bail completely would also be consistent with the Clause.

Finally, the twenty-first century Movement for Black Lives (M4BL) can be understood in part as a mass movement against unequal police protection—one that is responsive to systematic constitutional violations, even if it does not center the Constitution in its discourse. Although its demands have attained particularly broad visibility in the wake of George Floyd's murder, M4BL has long

394. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981) (stating that in general "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty"); Turner v. Rogers, 564 U.S. 431, 449 (2011) (holding that there is no categorical right to counsel in civil contempt proceedings). For criticisms of these decisions, see, for example, Stan Keillor, James H. Cohen & Mercy Changwesha, *The Inevitable, if Untrumpeted, March Toward "Civil* Gideon," 64 SYRACUSE L. REV. 469, 483–86 (2014); Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing* Lassiter v. Department of Social Services, 59 CATH. U. L. REV. 1057 (2010).

395. An adverse, incorrect ruling against a landlord would also be a natural-rights violation, and landlords are not always themselves wealthy. Civil *Gideon* rests upon the premise that there is a particularly high risk of injustice to tenants because they are especially unlikely to be able to retain adequate counsel, and landlords are more likely to be represented by counsel. *See, e.g.*, CMTY. TRAINING & RES. CTR. & CITY-WIDE TASK FORCE ON HOUS. CT., INC., HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL 13 (1993), https://cdn2.hubspot.net/hubfs/4408380/PDF/Cost-Benefit-Impact-Studies/Housing%20Court%20Evictions%20and%20Homelessness%20the%20Costs%20and.pdf [https://perma.cc/S34N-XNDZ] (finding that only twelve percent of New York tenants are able to afford counsel whereas ninety-eight percent of landlords are represented); KAREN DORAN, JOHN GUZZARDO, KEVIN HILL, NEAL KITTERLIN, WENGFENG LI & RYAN LIEBL, NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 13 (2003), https://perma.cc/5DPZ-J6UX (finding that five percent of Chicago tenants were represented, while fifty-three percent of landlords had an attorney); Matthew Desmond, Opinion, *Tipping the Scales in Housing Court*, N.Y. TIMES (Nov. 29, 2012), https://www.nytimes.com/2012/11/30/opinion/tipping-the-scales-in-housing-court.html (stating that ninety percent of landlords nationally are represented by counsel, while ten percent of tenants are represented).

396. For a discussion and defense, see generally Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).

condemned racialized police violence and worked to end it.[397] Activists stood together before a police force in Ferguson, Missouri, following the killing of Michael Brown by Officer Darren Wilson;[398] they protested after Freddie Gray's killing by Baltimore police officers;[399] they took to the streets in the wake of the killings of Eric Garner,[400] Tamir Rice,[401] Walter Scott,[402] Breonna Taylor,[403] and many others.[404] M4BL has called for large-scale divestment from federal, state, and local policing, and the reallocation of resources to education, restorative-justice services, and employment programs.[405] Many activists demand the outright abolition of policing, although no consensus exists on this goal.[406]

Scholars in conversation with M4BL have emphasized that M4BL's transformative ambitions cannot be reduced to demands for constitutional rights.[407] Nonetheless, activists who reasonably perceive more policing to mean *less* protection for Black lives can legitimately invoke the Equal Protection Clause in the

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397. *See* Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, FEMINIST WIRE (Oct. 7, 2014), https://thefeministwire.com/2014/10/blacklivesmatter-2/ [https://perma.cc/9CHW-5N7U]; Jonathan Capehart, *From Trayvon Martin to "Black Lives Matter,"* WASH. POST: POST PARTISAN (Feb. 27, 2015, 12:39 PM), https://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter/.

398. *See* Trymaine Lee, *2014: The Year of Michael Brown*, MSNBC (Dec. 29, 2014, 11:02 AM), http://www.msnbc.com/msnbc/2014-michael-brown-ferguson [https://perma.cc/PMZ4-ZDYB].

399. *See* Peter Hermann & John Woodrow Cox, *A Freddie Gray Primer: Who Was He, How Did He Die, Why Is There So Much Anger?*, WASH. POST (Apr. 28, 2015, 12:15 AM), https://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer-who-was-he-how-did-he-why-is-there-so-much-anger/.

400. *See* J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html.

401. *See Tamir Rice Protesters Take to Streets in Cleveland*, USA TODAY (Dec. 30, 2015, 11:53 PM), https://www.usatoday.com/story/news/nation-now/2015/12/30/tamir-rice-cleveland-protest/78100024/.

402. *See* Dana Ford, *South Carolina Ex-Police Officer Indicted in Walter Scott Killing*, CNN (June 8, 2015, 5:30 PM), http://www.cnn.com/2015/06/08/us/south-carolina-slager-indictment-walter-scott [https://perma.cc/5WK5-H8HK].

403. *See* Josh Wood, *Breonna Taylor Killing: Call for Justice Intensifies After Months of Frustration*, GUARDIAN, (July 26, 2020, 6:45 AM), https://www.theguardian.com/us-news/2020/jul/26/breonna-taylor-killing-justice-louisville-kentucky [https://perma.cc/FQX6-D6MJ].

404. *See* Vanita Saleema Snow, *From the Dark Tower: Unbridled Civil Asset Forfeiture*, 10 DREXEL L. REV. 69, 71 n.7 (2017) ("The names of unarmed black men and women who have died in police custody are numerous. Although some are commonly known to the general public, the names of others are limited to their circle of family and friends who remember the incidents of police abuse."); Editorial, *A Very Abbreviated History of Police Officers Killing Black People*, L.A. TIMES (June 4, 2020, 5:00 AM), https://www.latimes.com/opinion/story/2020-06-04/police-killings-black-victims.

405. *See* MOVEMENT FOR BLACK LIVES, A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM, & JUSTICE, http://whitesforracialequity.org/wp-content/uploads/2017/07/BLM-vision-booklet.pdf [https://perma.cc/7MMX-LST9].

406. For a summary of the debates between activists, see Charlotte Alter, *Black Lives Matter Activists Want to End Police Violence. But They Disagree on How to Do It*, TIME (June 5, 2020, 3:54 PM), https://time.com/5848318/black-lives-matter-activists-tactics/.

407. *See* Akbar, *supra* note 10, at 446 (arguing that M4BL's policy platform is "altogether skeptical about rights"). *But see* Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 143–44 (2019) (responding that M4BL has a "positive outlook on rights" in certain areas, including rights to social and political equality).

service of defunding arguments; arguments for community control of the hiring and firing of officers, disciplinary action, and other matters of institutional policy;[408] and the development of non-state alternatives to police protection.[409] The state cannot abdicate its duty to ensure that a baseline level of protection is provided; it does not follow that it is obliged to provide that protection through policing.[410]

V. OBJECTIONS

The most obvious objection to this Article's proposal is that it seems to require significant, disruptive changes in our Fourteenth Amendment law. Other pressing

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408. *See, e.g.*, *Community Control*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/community-control/ [https://perma.cc/3DLW-W77Z] (last visited May 17, 2021) (calling for "[d]irect democratic community control" of policing practices like hiring and firing, disciplinary action, and budgets); MYA HUNTER, MARK-ANTHONY JOHNSON, M ADAMS, ANDREA J. RITCHIE & MARBRE STAHLY-BUTTS, DEMOCRATIC COMMUNITY CONTROL OF LOCAL, STATE, AND FEDERAL LAW ENFORCEMENT AGENCIES, ENSURING THAT COMMUNITIES MOST HARMED BY DESTRUCTIVE POLICING HAVE THE POWER TO HIRE AND FIRE OFFICERS, DETERMINE DISCIPLINARY ACTION, CONTROL BUDGETS AND POLICIES, AND SUBPOENA RELEVANT AGENCY INFORMATION, https://m4bl.org/wp-content/uploads/2020/05/CommControlofLawEnforcement-OnePager.pdf [https://perma.cc/UER6-EWXS]; M Adams & Max Rameau, *Black Community Control Over Police*, 2016 WIS. L. REV. 515; K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 (2020).

Demands for community control take inspiration from calls by the Black Panthers and other radical activists of color in the 1960s. *See* Rahman & Simonson, *supra*, at 703; ROBYN C. SPENCER, THE REVOLUTION HAS COME: BLACK POWER, GENDER, AND THE BLACK PANTHER PARTY IN OAKLAND 3 (2016). For a Thirteenth Amendment based argument for community control of the police, see generally Seth Davis, Essay, *The Thirteenth Amendment and Self-Determination*, 104 CORNELL L. REV. ONLINE 88 (2019). Amongst prison-industrial-complex abolitionists, the community-control demand is controversial—skeptics worry that it may legitimize a fundamentally racist system. *See, e.g.*, BETH RICHIE, DYLAN RODRÍGUEZ, MARIAME KABA, MELISSA BURCH, RACHEL HERZING & SHANA AGID, PROBLEMS WITH COMMUNITY CONTROL OF POLICE AND PROPOSALS FOR ALTERNATIVES, https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/6008c586b43eee58a4c4b73e/1611187590375/Problems+with+Community+Control.pdf [https://perma.cc/N496-9WF9] ("[E]ven in best case scenarios, the institution of policing cannot be reformed . . . ."); Carl Williams & Christian Williams, *Community Control Won't Fix What's Wrong with Cops*, IN THESE TIMES: VIEWPOINT (Aug. 25, 2020), https://www.inthesetimes.com/article/carl-christian-williams-police-control-abolition [https://perma.cc/RVV6-MNFB] ("[The] police system has served as the country's primary engine to uphold white supremacy by destroying the lives of Black people. . . . Any policy that does not directly move us toward abolition should be viewed with suspicion, including proposals (popular even on the Left) for community control over police."). For a skeptical treatment of calls for the democratization of the criminal legal process, see generally John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).

The possibility of pro-policing constructions of the right to protection must be taken seriously. Naomi Murakawa has shown that the language of "the right to safety," first deployed by liberals against racist mob violence and racial prejudice in the criminal legal system, was later used by both liberals and conservatives to defend the development of the present-day carceral state. *See generally* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014). A future work will consider in greater detail the costs and benefits to advocates of transformative changes in law enforcement of using the language of protection.

409. For a discussion of alternative protective institutions, see Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1605 (2017).

410. *See, e.g.*, Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. (forthcoming 2021) (arguing that little of what police do involves protection and proposing that police functions like issuing tickets for moving violations should be allocated to other actors).

objections must be addressed as well. Women did not have a role in drafting the Fourteenth Amendment, and the discourse surrounding its ratification did not often touch upon their interests. Might the enforcement of the original Equal Protection Clause result in fewer rights for women?

I am also mindful that this project took shape in the midst of a nationwide uprising following the murder of George Floyd, a 46-year-old Black man, by former Minneapolis police officer Derek Chauvin.[411] As a white male, I am implicated by though not centered in an ongoing effort to protect Black lives.[412] Calling for the recognition of a constitutional duty on the part of the state to exercise its monopoly on lawful violence might seem like the last thing that Black people need. Accordingly, I will explain why I do not believe that my proposal endangers Black lives.

A. DOCTRINAL IMPACT

1. On Antidiscrimination

This Article has argued that the original meaning of the Equal Protection Clause does not contain a general antidiscrimination principle. But under present doctrinal conditions, it would be a terrible idea—by originalist lights as well as by others—for the Supreme Court to *hold* that the Equal Protection Clause does not generally forbid discrimination.

Here is why: Originalism is committed to approximating as nearly as possible the constitutional truth claims generated by original meaning. That commitment makes the choice between (a) an Equal Protection Clause that is interpreted to protect rights secured by the original meaning of a different clause and (b) no constitutional protection for those rights. This is an easy choice to make. To claim that originalism is neutral between (a) and (b) would be much like claiming that nine is equal to one because both are less than twelve. And decoupling antidiscrimination from the Equal Protection Clause without immediately shifting antidiscrimination work to another constitutional provision would amount to choosing (b).

There is another constitutional provision available to do antidiscrimination work. A forthcoming book will show that the original meaning of the Privileges or Immunities Clause secures all U.S. citizens—white or of color; gay, straight, or nonbinary; transgender or cisgender—equally against arbitrary discrimination

411. *See* Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Mar. 18, 2021), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

412. *See* Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2252 (1992) (arguing that legal academics all speak from a "positioned perspective" and ought to "recognize[] the impossibility of distance and impartiality in the observation of a play in which the observers must also be actors"); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 879 (2021) (calling upon movement scholars who hold normative commitments to social movements and seek to contribute to them through their scholarship to "be mindful and engaged about how our professional and other identities, including race, gender, class, sexuality, and disability, may impact how one shows up in movement spaces, and how those identities shape what it means to engage in solidarity").

with respect to their civil rights.[413] This includes not only natural rights but civic-equality rights such as rights of access to public institutions like schools, hotels, and banks. With respect to citizens, the Privileges or Immunities Clause can easily do most of the work of preventing discrimination that does not implicate natural rights, owing to the Clause's concern with civic equality. Further, the Due Process Clause guarantees equal access to a judicial tribunal in which a government action that deprives a person of her life, liberty, or property can be assessed to determine whether it is arbitrary.[414] Finally, nothing in the Constitution bars the extension to noncitizens (through the political process) of privileges that only citizens are constitutionally entitled to enjoy.

Still, the Equal Protection Clause's general-antidiscrimination principle *should not be tampered with unless and until the Court revitalizes the Privileges or Immunities Clause*. The Court has declined invitations to do so.[415] If it is not prepared to change course, antidiscrimination law should be left alone.

2. On Discriminatory Intent and the Tiers of Scrutiny

If the Equal Protection Clause requires states to impartially protect people against violations of their life, liberty, and property rights by state and non-state actors, it might seem that the tiers of scrutiny must collapse and disparate impact analysis must replace discriminatory intent analysis. Not so.

These entrenched doctrines might be justified as heuristics that economize on adjudicative costs by simplifying judicial decisionmaking. Absolute equality being impossible to achieve as well as beyond the ambit of the Equal Protection Clause's original meaning and purpose, the tiers of scrutiny might focus attention on those forms of unconstitutional discrimination that are most constitutionally salient and easiest for judges to identify.[416] If the net effect is that judges make fewer constitutional errors, these heuristics may be adaptive—that is, well-suited to the goals of constitutional decisionmaking. Likewise, the current focus on intentional discrimination might be justified on the ground that state distinctions or resource allocations for which there is evidence of discriminatory intent are more likely to be unconstitutional.

Or these doctrines might not be justified. The critical literature on the tiers of scrutiny and discriminatory intent is dense.[417] And there is no justification for any

413. *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (forthcoming 2021).

414. *See* Barnett & Bernick, *supra* note 320.

415. *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (incorporating enumerated rights against the states via substantive due process, despite arguments for incorporation via the Privileges or Immunities Clause); *see also* McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) ("[T]he question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause.").

416. *See* Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 72–74 (1990); Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 709–10 (1988) (discussing without endorsing these rationales).

417. *See* sources cited *supra* notes 62–63.

claim that original meaning requires either doctrine. Both doctrines are judicially created and revisable rules of construction that might or might not be the best way to apply the original meaning of the text. In view of the institutional judgment expressed in Section 5,[418] it is constitutionally improper for the Court to foreclose Congress from enforcing the Clause in ways that the Court concludes that the judiciary is incapable of doing.

Given the outsize role that the Supreme Court plays in our constitutional culture, it should prophylactically affirm that it is "under-enforcing" a provision for institutional reasons whenever it chooses to do so. Otherwise, other institutional actors—like Congress—may assume that *they* cannot act on their belief that the equal protection of the laws requires much more than the courts are prepared to enforce. And the public may share in that assumption. Congress can and does sometimes challenge constitutional decisions; but, for example, victims of gender-motivated violence cannot avail themselves of the remedy held unconstitutional in *Morrison*.

The above is also responsive to the objection that no doctrinal changes are necessary because the Court's decisions do not stand in the way of social movements achieving through the political process what the Court is unwilling to do. This objection underrates the discursive power of rights-talk and the capacity of litigation to aid *some* social movements.[419] For instance, *Gideon* was the fruit of

418. U.S. CONST. amend. XIV, § 5.

419. There is voluminous literature on rights-talk that I cannot engage here. I do, however, want to emphasize that rights-talk has been especially important to Black freedom struggles in the United States. *See* Crenshaw, *supra* note 11, at 1364–66 (contending that the language of rights was an "organizing feature of the civil rights movement"); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987) ("To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before."); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 306–07 (1987) (criticizing white critical legal scholars for depicting rights as "oppressive, alienating and mystifying" when they have proven to be for minorities "invigorating cloaks of safety that unite us in a common bond" and "minimize many forms of coercion"); Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761 (1997); *see also* Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335, 411 (2019) ("No matter what the Supreme Court does in the next few years, no matter how many civil rights it manages to strike down, so long as America's constitutional text and history are remembered, lawyers and activists will always be able to point to the clearer articulation of the principles of freedom and equality that Black soldiers helped write into the Constitution, and, to the history of antidiscrimination law and affirmative inclusion that Black activists helped write into its interpretative principles—even if only for a time."). For a pathbreaking account of how abolitionist lawyers were far more effective than is conventionally thought, both in respect of securing their clients' freedom and in using their practice to build political opposition to slavery, as well as a thoughtful consideration of this history's relevance to present-day litigation for radical change, see generally Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019).

Neither the original meaning nor the original function of the Equal Protection Clause is solely concerned with Black freedom. But equal protection of the laws began as a demand by what became a mass political movement dedicated to Black freedom, and Black people were to be the Clause's primary beneficiaries. Those roots counsel in favor of particular caution when denying that the Fourteenth Amendment creates a given set of judicially enforceable rights. Black people do not need to be told by

decades of union and antiracist organizing that led to all but eight states adopting a right to counsel—the Court in *Gideon* itself acknowledged this state-level consensus.[420] And rare is the successful American social movement that does not make effective use of constitutional discourse, even if such discourse comes with costs as well as benefits.[421]

3. On Voting Rights

In a series of pivotal decisions in the 1960s, the Supreme Court struck down on equal protection grounds arbitrary conditions on ballot access.[422] It also articulated an enduring "one person, one vote"[423] principle that requires states to design state legislative districts with equal populations and "regularly reapportion districts to prevent malapportionment."[424] If the Equal Protection Clause only secures natural rights to life, liberty, and property, what happens to voting rights?

We have seen that the architects of the Fourteenth Amendment, including John Bingham and Jacob Howard, repeatedly and publicly denied that the ratification of the Fourteenth Amendment would secure voting rights.[425] Equal protection arguments for voting rights were unusual. Still, they were not unheard of. Frederick Douglass saw the ballot box as a necessary means of ensuring the *safety* of Black people:

> From the first I saw no chance of bettering the condition of the freedman, until he should cease to be merely a freedman, and should become a citizen. I insisted that there was no safety for him, nor for anybody else in America, outside the American Government: that to guard, protect, and maintain his liberty, the freedman should have the ballot; that the liberties of the American people were dependent upon the Ballot-box, the Jury-box, and the Cartridgebox, that without these no class of people could live and flourish in this country. . . .[426]

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the Court that they have rights in order to insist upon their recognition; the concern is rather that *others* will be more reluctant to recognize those rights if the Court does not.

420. Gideon v. Wainwright, 372 U.S. 335, 345 (1963); *see* ROBIN D. G. KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION 78–79 (1990) (describing how the litigation efforts of the International Labor Defense, the legal wing of the Community Party, aided by a mass-mobilization campaign, culminated in *Powell v. Alabama*, 287 U.S. 45 (1932), upon which *Gideon* relied).

421. *See* Crenshaw, *supra* note 11, at 1364–66; Williams, *supra* note 419; Roberts, *supra* note 10, at 113 (detailing how the prisoner-rights movement's constitutional claims have served as "both a pragmatic use of legal tools to win release or change carceral conditions and an empowering rhetorical demand for legal recognition"); William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115, 1128 (2011) ("Workers' rights to associate, assemble, organize, and strike constituted First, Thirteenth, and Fourteenth Amendment and Guarantee Clause claims repeatedly spurned by the courts that labor brought again and again to Congress and state legislatures.").

422. *See* Carrington v. Rash, 380 U.S. 89, 96 (1965); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969).

423. *See* Reynolds v. Sims, 377 U.S. 533, 559 (1964).

424. Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016).

425. *See, e.g.*, *supra* note 204 and accompanying text.

426. FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS, FROM 1817 TO 1882, at 332–33 (John Lobb ed., 1882). *But see* DAVIS, *supra* note 331, at 85 (arguing that Douglass's "confidence in the law," which animated his commitment to securing the legal right to vote, "blinded

Several months after the ratification of the Fifteenth Amendment, women's rights activist Victoria Woodhull submitted a memorial to Congress in which she argued that denying women the right to vote violated the Privileges or Immunities and Equal Protection Clauses.[427] The House Judiciary Committee concluded that, because the Privileges or Immunities Clause did not recognize *any* right to vote, it followed that the Clause did not protect the rights of women to vote. [428] It did not even address the Equal Protection Clause.[429]

Responding to the report at a February 16, 1871 lecture, Woodhull maintained that citizenship entailed voting rights for all "who [were] responsible, taxed and who contribute[d] to the maintenance of an organized government."[430] Women had demonstrated that they were no longer "an unassuming, acquiescent part of society."[431] Rather, women were "so *much* individualized as to demand the full and unrestrained exercise of *all* the rights which can be predicated of a people constructing a government based on individual sovereignty."[432] Woodhull contended that "the right to self-government [was] possessed equally by all" and without the ballot, women would continue to endure "arbitrary rule."[433]

Experience proved Douglass and Woodhull right. Restrictions on Black voting rights in the aftermath of Reconstruction facilitated the continued violation of the civil rights of Black people, whether by preventing Black people from opposing laws that stripped them of their firearms or denied them access to labor markets, or by preventing Black people from replacing officials who were indifferent at best to racial terrorism.[434] Denied the franchise, women remained subject to what the Declaration of Sentiments, prepared by Elizabeth Cady Stanton and adopted by suffragists at Seneca Falls in 1848, described as the "absolute tyranny" of men.[435]

In my view, the strongest originalist case for a constitutional right to vote is a Privileges-or-Immunities-based case that is elaborated elsewhere. [436] This case is contingent upon developments—specifically, the ratification of the Fifteenth and Nineteenth Amendments and the expansion of the franchise in the states—that

him to ways in which black people were constructed, precisely through law"—such as through the convict-lease system—"as only fit for slavery").

427. S. Misc. Doc. No. 41-16 (1870).

428. H.R. REP. NO. 41-22, at 1 (1871).

429. *Id.*

430. VICTORIA C. WOODHULL, A LECTURE ON CONSTITUTIONAL EQUALITY, DELIVERED AT LINCOLN HALL, WASHINGTON, D.C., THURSDAY, FEBRUARY 16, 1871, at 17 (New York, Journeymen Printer's Co-Operative Ass'n 1871), https://www.loc.gov/resource/rbnawsa.n1569/?st=gallery [https://perma.cc/2P2K-6RNF].

431. *Id.* at 12.

432. *Id.*

433. *Id.* at 7.

434. *See* James Thomas Tucker, *Affirmative Action and (Mis)Representation: Part I – Reclaiming the Civil Rights Vision of the Right to Vote*, 43 HOWARD L.J. 343, 391 (2000).

435. REPORT OF THE WOMAN'S RIGHTS CONVENTION, HELD AT SENECA FALLS, N.Y., JULY 19TH AND 20TH, 1848, at 8 (Rochester, John Dick1848).

436. *See* BARNETT & BERNICK, *supra* note 413.

took place long after the time period surveyed in this Article.[437] But just as nothing in my equal-protection proposal requires or even suggests that the Court ought to discard antidiscrimination precedents because it has hooked them on the wrong clause, so too with its voting-rights precedents. Using the Equal Protection Clause to protect antidiscrimination and voting rights gets us closer to the original constitutional baseline than if the Court used nothing in the Amendment to protect those rights.

B. WOMEN'S RIGHTS

There is a consistent theme in the Fourteenth Amendment cases discussed in this Article: Women lose. Myra Bradwell lost; Jessica Gonzales lost in *Castle Rock*; victims of gender-motivated violence everywhere lost in *Morrison*.[438] This depressing record lends credence to an enduring concern about Fourteenth Amendment originalism[439]: Would full enforcement of the original Fourteenth Amendment leave women worse off?

It might seem as if the history of the Fourteenth Amendment offers little to women. It is difficult to stomach Justice Bradley's infamous concurrence in *Bradwell*, decided only five years after the Amendment was ratified.[440] But as a description of the factual and normative claims that legitimized female subjugation, the concurrence is illuminating:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.[441]

Bradley was constitutionally comfortable with an indefensibly discriminatory practice and alluded to countless common law maxims that are similarly odious.[442] What comfort could the original Fourteenth Amendment provide to women, if a learned judge like Bradley thought such maxims constitutionally unproblematic so soon after ratification?

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437. *See id.*

438. The greatest losers in *Castle Rock* were Jessica Gonzales's murdered children. I write specifically about women's rights because of the way in which the history recounted here implicates longstanding concerns about the regressive valence of original meaning.

439. *See, e.g.*, Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 431–32 (2014) ("[T]he Framers of both the original Constitution and the post-Civil War Amendments were quite conscious of their interests in preserving their male prerogatives in law."). For candid acknowledgements of and proposals for reckoning with originalism's race and gender problems, see generally Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379 (2018) and Annaleigh E. Curtis, *Why Originalism Needs Critical Theory: Democracy, Language, and Social Power*, 38 HARV. J.L. & GENDER 437 (2015).

440. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873) (Bradley, J., concurring).

441. *Id.* at 141.

442. *See id.*

Before confronting that question, we must ask another one: Just *why* did Bradley think the discrimination suffered by Bradwell was unproblematic? He claimed that it was "within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex."[443] Although he acknowledged that "many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state," he reasoned that "the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."[444] Suppose that Bradley were presented with compelling evidence that his factual assumptions about female incapacity were false. Suppose further that the common law's treatment of women changed, such that what was exceptional in 1873 became common. It is not at all clear how his constitutional reasoning would be affected.

Further, Bradley did not discuss the Equal Protection Clause or closely examine common law rules that exposed women to violence. Take the martial-rape exemption, which denied women protection against violent crimes on the basis of their gender and marital status.[445] In none of the records canvassed in this Article is the equal-protection language applied to the marital-rape exemption. There was, however, general agreement that equal protection entailed nondiscriminatory protective law and no claim that women were not entitled to equal protection.

Accordingly, constitutional decisionmakers today must determine without aid from Joseph Bradley whether such laws unreasonably leave women less protected than other people against violence. Many of them do so—as Robin West has detailed, "a more obvious denial of equal protection [than the martial-rape exemption] is difficult to imagine."[446] Bradley's misogyny does not tell us anything useful about the original letter or spirit of the Equal Protection Clause.

West and Tuerkheimer have drawn upon the history of the duty of protection to argue for congressional intervention to protect what West called "the rights of citizens to be free, minimally, of the subordinating, enslaving violence of other citizens."[447] Tuerkheimer has focused in particular on investigations by the Department of Justice (DOJ) into discriminatory law-enforcement practices related to protection, such as the practices of declining to investigate rape cases involving non-strangers and shelving rape kits.[448]

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443. *Id.* at 142.

444. *Id.* at 141–42.

445. *See* Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1255–58 (1986) (summarizing the exemption's history).

446. West, *supra* note 416, at 45.

447. West, *supra* note 8, at 143.

448. *See* Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1294–96 (2016).

Tuerkheimer accurately identifies these DOJ investigations as consistent with "what the 39th Congress intended . . . to redress."[449] But pattern-and-practice investigations must target patterns and practices of violating the Constitution. And what constitutes a constitutional violation is in turn defined (for many practical purposes) by the Court's equal-protection doctrine which—as we have seen—underenforces the constitutional text by demanding state action and denying any positive right to protection.

The recognition that state inaction resulting in a failure to protect women against violence constitutes an equal protection violation would afford Congress and the DOJ more discretion to draft protective legislation and investigate failures to protect women. It would make decisions like *Morrison* less likely.

I do not mean to understate "the degree to which women's injuries still are trivialized and rendered invisible by a pervasively misogynist legal, political, and social culture."[450] Nor am I suggesting that this proposal will prove a panacea, particularly for women who suffer from intersecting, overlapping forms of violence because of multiple racial, class, and sexual identities.[451] The original meaning and function of the Equal Protection Clause will, however, give Congress more constitutional space than is presently available to secure women's civil rights.

C. BLACK LIVES

Black people have been subjugated by American police for centuries. The origins of policing in the United States have been traced through pre-Civil War slave patrols;[452] the Fugitive Slave Act of 1850 authorized federal police to reclaim "fugitives from service or labor" from anywhere in the nation, including free states, after summary proceedings that were heavily stacked against alleged escapees.[453] Free Black people and their white allies disobeyed the Act, organizing self-defense groups and teaming up to rescue Black people from federal custody by force of arms.[454] Many abolitionists saw violent resistance as a legitimate response to police violence. Thus did Frederick Douglass tell a Free Soil Party

449. *Id.* at 1292.

450. West, *supra* note 416, at 45.

451. Crenshaw, *supra* note 63, at 149.

452. *See* ALEX S. VITALE, THE END OF POLICING 45–48 (2018); HUBERT WILLIAMS & PATRICK V. MURPHY, U.S. DEP'T OF JUST., THE EVOLVING STRATEGY OF POLICING: A MINORITY VIEW 3 (1990); SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM 3–6 (1977); s*ee also* BRYAN WAGNER, DISTURBING THE PEACE: BLACK CULTURE AND THE POLICE POWER AFTER SLAVERY 59 (2009) ("[H]istorians have started asking why our standard narratives of modern law enforcement begin in Boston and New York when Southern cities used fully equipped police patrols long before they appeared in the northeast, in some cases as early as the 1780s."). *See generally* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001) (detailing the early development in Southern cities of police patrols that resemble modern law enforcement).

453. *See* Fugitive Slave Act of 1850, ch. 60, sec. 8, 9 Stat. 462, 464 (repealed 1864).

454. *See* STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 50–51 (2010); James Oliver Horton & Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850*, 68 CHI.-KENT. L. REV. 1179, 1194 (1993).

convention that "[t]he only way to make the Fugitive Slave Law a dead letter is to make half a dozen or more dead kidnappers."[455]

The story of the post-War policing of Black Americans is also devastating. Following the ratification of the Thirteenth Amendment, the former rebel states enacted the Black Codes, which were designed to re-subjugate Black people.[456] The primary means through which the Codes operated was the "police" offense of vagrancy[457]—those caught by or on the roads without proof of employment were arrested, imprisoned, and forced to labor in mines and lumber camps pursuant to convict leasing programs.[458]

Today, Black Americans are more likely than whites to encounter police,[459] to be stopped by police,[460] and to be fatally wounded by police.[461] In effect, a tax is extracted from Black people who would avoid encounters with, stops by, and violent deaths at the hands of police.[462] The tax is paid in the form of heightened attention to dress and demeanor, altered traveling habits, decisions not to reside in all-white residential areas, and other costly forms of conformity to societal expectations concerning where one ought to be and act while Black.[463]

Owing to this history and lived experience of subjugation, Black communities today suffer from what Monica Bell has conceptualized as a "legal estrangement" from the police.[464] The avowed, legitimating function of the police is protection—but many Black Americans do not "experienc[e] policing as a protective benefit,"[465] thanks to a "cumulative, collective experience of procedural and substantive injustice."[466]

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455. Horton & Horton, *supra* note 454, at 1193 (quoting 2 FREDERICK DOUGLASS, *Let All Soil Be Free Soil*, *in* THE FREDERICK DOUGLASS PAPERS: SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS 388, 390 (John W. Blassingame ed., 1982)). For an overview of abolitionists' general embrace of the moral legitimacy of violent resistance in the wake of the 1850 Act, see DAVID S. REYNOLDS, JOHN BROWN, ABOLITIONIST: THE MAN WHO KILLED SLAVERY, SPARKED THE CIVIL WAR, AND SEEDED CIVIL RIGHTS 121 (2005). For a broader examination of the role of violent resistance in Black abolitionism, see generally KELLIE CARTER JACKSON, FORCE AND FREEDOM: BLACK ABOLITIONISTS AND THE POLITICS OF VIOLENCE (2019).

456. *See supra* note 203 and accompanying text.

457. On vagrancy as a "police offense"—one that entrenched social hierarchies by conferring upon some people discretionary, legally unaccountable power over other people—see MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 130 (2005).

458. *See* BLACKMON, *supra* note 331.

459. *See, e.g.*, Robert D. Crutchfield, Martie L. Skinner, Kevin P. Haggerty, Anne McGlynn & Richard F. Catalano, *Racial Disparity in Police Contacts*, 2 RACE & JUST. 179 (2012).

460. *See, e.g.*, Richard J. Lundman & Robert L. Kaufman, *Driving While Black: Effects of Race, Ethnicity, and Gender on Citizen Self-Reports of Traffic Stops and Police Actions*, 41 CRIMINOLOGY 195 (2003).

461. *See* FRANKLIN E. ZIMRING, WHEN POLICE KILL 46 (2017).

462. The idea of a "racial tax" is borrowed from Randall Kennedy. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 161 (1997) (characterizing racial profiling as a "racial tax").

463. *See* Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 SANTA CLARA L. REV. 721, 756 (2016).

464. Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054, 2066–67 (2017) (emphasis omitted).

465. *Id.* at 2149.

466. *Id.* at 2105.

It is therefore critical to emphasize that my proposal does not envision federal judges ordering states and municipalities to devote more resources towards policing. Nor does it recommend that states and municipalities do so on their own initiative.

My proposal *does* envision Congress having more constitutional space to remedy state denials of protection to Black people. The post-Civil War record of congressional action on behalf of Black people provides reason for guarded optimism. Congress was the primary enforcer of civil rights during Reconstruction, and Reconstruction screeched to a halt in part because of the Supreme Court's narrow readings of the Fourteenth Amendment.[467] Many scholars also accept that Congress did more than the courts to secure Black freedom from discrimination during the Second Reconstruction—the civil rights movement.[468] This record suggests that more harm to Black people may come from *denying* Congress its delegated Section 5 power to protect people from racial subjugation than by permitting Congress to exercise it.

CONCLUSION

Equal Protection law has produced some of the Supreme Court's most universally and justly beloved constitutional decisions. The purpose of this Article has not been to tear down these moral and cultural landmarks. Rather, it has been to show that, for all its virtues, Equal Protection law still fails to deliver on critically important constitutional promises and to offer tools for reconstruction.

Perhaps judicial underenforcement of the right to protection is inevitable. Perhaps, as Lawrence Rosenthal has argued, "institutional concerns would counsel strongly toward deference even if a court were persuaded that the Equal Protection Clause contains an affirmative guarantee of equally effective protection from lawbreakers."[469] It is also true that to acknowledge limited judicial competence to vindicate a constitutional guarantee is not to deny that the guarantee exists.[470]

Without abandoning its apparent commitment to a limited judicial role in evaluating state protection, the Court could qualify its more sweeping pronouncements about the Constitution's indifference to private violence and state inaction. The Court could do much better by the Equal Protection Clause—and by those for whom security from subjugation remains a constitutional promise unfulfilled—without doing much.

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467. *See* MacKinnon & Crenshaw, *supra* note 39, at 346–47, 347 n.9 (highlighting congressional efforts to "deinstitutionalize Jim Crow," and contending that those efforts were thwarted by the Supreme Court).

468. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Benjamin I. Page ed., 1991); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Rebecca E. Zietlow, *To Secure these Rights: Congress, Courts and the 1964 Civil Rights Act*., 57 RUTGERS L. REV. 945 (2005).

469. Rosenthal, *supra* note 47, at 77.

470. *See id.*

But neither Congress nor state legislators nor social movements need be given permission to construct equal protection where it is lacking. Neither the abolitionists nor the Republicans who explicitly wrote abolitionist constitutionalism into the law of the land saw the judiciary as the sole legitimate means of resisting subjugation; indeed, they rejected legal orthodoxy and court-centered constitutionalism in favor of empowering political institutions to realize their liberatory constitutional vision. Resisting subjugation today requires a democratic constitutionalism that is no less radical.