U.C.L.A. Law Review

"Where There Is a Right (Against Excessive Force), There Is Also a Remedy": Redress for Police Violence Under the Equal Protection Clause

Arturo Peña Miranda

ABSTRACT

This Comment argues that the Equal Protection Clause compels the federal courts to create an implied damages remedy in excessive force cases. Implied constitutional remedies are disfavored today. Jurists believe that as tribunals of limited jurisdiction, federal courts may only issue a damages remedy when Congress so provides in the constitutional or statutory text. Further, even when the text provides a remedy, jurists will refuse to create a federal cause of action for damages when the plaintiff has alternative remedies, or when the remedial textual command is "judicially unadministrable" because it is broad and lacks specificity. None of these limitations apply to an equal protection damages remedy for excessive force violations.

The original meaning of the Equal Protection Clause ensures court remediation for police brutality victims. In its common law and Reconstruction-era sense, the equal protection of the laws was one of the primary duties of government, and failure to supply equal protection was just cause for revolution. Moreover, equal protection obliged the state to prevent violence before it occurred, as well as provide judicial remediation after it occurred. The postbellum Southern States steadfastly refused to comply with the mandates of equal protection, and by the early 1870s had acquiesced to untold levels of racial violence and to a systematic deprivation of remedies for racial violence victims. To ensure remediation for Freedmen and thereby salvage the United States's legitimacy, Congress stretched the contemporary bounds of federalism by vesting the federal courts with the remedial power of a common law tribunal—a power heretofore appropriate only for state courts—through enforcement legislation known today as 42 U.S.C. § 1983. The history of equal protection is strong evidence that, federalism and separation of powers concerns notwithstanding, the Equal Protection Clause originally meant that the state must provide police violence victims a court remedy.

Further, although the Equal Protection Clause's broad language appears judicially unadministrable at first sight, history and reason demonstrate that some of its aspects are justiciable and enforceable without prior congressional approval. The equal protection guarantee of appropriate remediation for violence victims falls squarely within justiciable territory. The quintessential, historical role of courts is to adjudicate individual rights violations. The right against battery, the common law equivalent of excessive force, is one of the most basic common law rights, and the judiciary has long

been in the business of providing redress to battery victims. Courts are therefore well prepared to craft judicial standards for assessing the adequacy of excessive force plaintiffs' remedies.

Finally, the current remedial scheme for excessive force victims is constitutionally insufficient. For various doctrinal reasons, including most prominently high burdens of proof and official immunities, all alternative remedies fail to provide adequate remediation to all victims of violence. The Equal Protection Clause requires that the federal courts rectify this inadequacy by inferring a cause of action for damages that will redress any and all excessive force violations.

AUTHOR

UCLA School of Law, J.D. 2018. I am indebted to Professors Cheryl Harris, Joanna Schwartz, and Richard Re, whose guidance has been invaluable throughout this writing process. More importantly, their teaching has alerted me to the need for police reform and has helped me understand some of constitutional remedies' biggest puzzles. Many thanks also to the editors of the *UCLA Law Review*. This Comment would be very different without the editors' superb feedback, patience, and flexibility. I owe special thanks to Sean Flores, without whose feedback and encouragement this Comment would not have been published.

TABLE OF CONTENTS


THE UNIVERSITY OF CALIFORNIA
UCLA
SCHOOL OF LAW

> [A]re we to alter the whole frame and structure of the laws, are we to overturn the whole Constitution, in order to get at a remedy for these people?[1]

INTRODUCTION

In the summer of 1865, whites throughout the South lived in constant fear of an African American insurrection.[2] The fears reached the high echelons of Southern governments, which, deeming amateur county patrols insufficient to protect against the imagined rebellion, revived state militias.[3] The militias "brutal[ly] suppress[ed]" the Freedmen, stealing their property and assaulting or murdering those who resisted.[4] State actions like these characterized the postbellum South. Many Southern state officers adhered to the unwritten codes of conduct of white supremacist groups, "pursuant to which [they] terrorized freedmen" and their allies.[5] The Freedmen, moreover, "faced rampant violence as well as unequal treatment by sheriffs, judges, and juries" in the years following the Civil War.[6]

Well over a century later, the shooting and death of African American teenager Michael Brown at the hands of police in Ferguson, Missouri prompted a Department of Justice investigation on the Ferguson Police Department (FPD).[7] The ensuing report found that "[t]he harms of Ferguson's police and court practices are borne disproportionately by African Americans."[8] Despite constituting 67 percent of the city's population,[9] almost 90 percent of the FPD's excessive force was directed at African Americans.[10] The neighboring St. Louis Metropolitan Police Department, moreover, has the highest rate of police

1. CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (Sen. Cowan).
2. GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 27–28 (1984).
3. *Id.*
4. *Id.* at 28.
5. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 20 (2000).
6. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, 245 (1988); *see also* Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 66 (2003) ("The source of that violence was . . . the southern governments themselves . . . .").
7. *See* DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 5 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/7572-9TM3].
8. *Id.* at 4.
9. *Id.*
10. *Id.* at 28. The force is sometimes employed in a "retaliatory and punitive" manner. *Id.* at 33.

killings per capita in the United States, with an average annual police homicide rate of 21.58 per 100,000 people.[11] The rate is nearly twice as high for blacks.[12] Racial animus is partly to blame for these discrepancies.[13]

One hundred and fifty years after the U.S. Congress first addressed the issue during Reconstruction, state-sanctioned racial violence remains a feature of American life.[14] The recent wave of movements, protests, and debates prompted by police killings of unarmed black men is in fact a reprise of other eras "of consciousness and anger over state violence."[15] As in these other stages of public awareness, the role of the federal judiciary in alleviating police violence is a subject of contention.[16]

Today, many believe federal courts should not take a major role in resolving the complex issue of police brutality.[17] It is judicial orthodoxy, for instance, that federalism and separation of powers require the federal courts to exercise restraint when issuing far-reaching remedies against state officers enforcing state criminal laws—even if the challenged state practice is deadly and inhumane.[18] Such issues are often treated as political issues, best addressed

11. *See Police Accountability Tool*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/compare-police-departments [https://perma.cc/3WSM-2BNJ].
12. *Id.*
13. *See* DEPARTMENT OF JUSTICE, *supra* note 7, at 2.
14. *See, e.g.*, Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 11 (2015) (pointing to studies showing that young black men are twenty-one times more likely to be shot dead than their white counterparts); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1184 n.1 (2017) ("Black men constitute about six percent of the U.S. population, but they represented about 40 percent of the unarmed men shot by police in 2015.").
15. *See* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1775 (2016).
16. *Compare* FONER, *supra* note 6, at 258 (stating that, during Reconstruction, "Congress placed great reliance on an activist federal judiciary for civil rights enforcement . . . ."), *with* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (arguing that the U.S. Supreme Court effectively validates a "'shoot first, think later' approach to policing" through its qualified immunity holdings).
17. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (holding that excessive force plaintiff lacked Article III standing to sue for an injunction against a police department in federal court, because the "proper balance between state and federal authority counsels restraint" in federal court intervention in the states' enforcement of their criminal laws); Rosenthal, *supra* note 6, at 76 ("In the law enforcement context in particular, courts are particularly eager to defer to the judgments of policymakers having what they view as greater expertise on how to best protect the public.").
18. *See Lyons*, 461 U.S. at 113 (Marshall, J., dissenting) (denouncing the Court's refusal to grant Article III standing to plaintiff challenging city's pattern of using life-threatening chokeholds); Younger v. Harris, 401 U.S. 37, 43–44 (1971) (refraining, based on federalism concerns, from enjoining state criminal prosecutions); Ronald T. Gerwatowski, *Standing and Injunctions: The Demise of Public Law Litigation and Other Effects of* Lyons, 25 B.C. L.

through a state's politically active citizenry.[19] Even relatively narrow remedies like money damages against individual officers are subject to limitations out of fear that they may have negative systematic repercussions on law enforcement.[20]

In hindering the federal judiciary's ability to issue remedies against law enforcement for excessive force violations, modern doctrine is in undeniable tension with the view that predominated during the enactment of the Fourteenth Amendment. The Reconstruction Congress believed that both "traditional methods of judicial enforcement"[21] and the federal judiciary were vital to the preservation of civil rights at a time of pervasive state violence.[22] In fact, the Reconstruction Congress believed courts were so important that, in view of the state courts' systematic refusal to provide remedies to injured African Americans, it stretched the bounds of federalism by vesting the federal courts with the remedial power of a common law tribunal[23]—a power appropriate only for state courts. The Reconstruction Congress effectively

REV. 765, 767–68 (1984) (describing how the *Lyons* decision has significantly impacted lower courts' willingness to grant standing to sue for an injunction).

19. *See Lyons*, 461 U.S. at 111–12 (stating that the city's excessive force pattern should be "taken seriously by local authorities" and should be a matter of public local debate, but declining to address the issue because "[a] federal court . . . is not the proper forum" unless the perquisites of standing and injunctive relief are met).

20. *See, e.g.*, Forrester v. White, 484 U.S. 219, 223 (1988); Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (declaring that "public officers" are sometimes immune from damages suits because such immunity is needed "to shield them from undue interference with their duties and from potentially disabling threats of liability").

21. GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 57 (2013); JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 161 (1951) (stating that the Civil Rights Act of 1866's guarantee of "the right 'to sue, be parties and give evidence'" ensured "access to the judiciary as the normal means of maintaining rights—that is, guarantees the protection of the courts").

22. Mitchum v. Foster, 407 U.S. 225, 239–42 (1972) ("The very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law."); RUTHERGLEN, *supra* note 21, at 57; FONER, *supra* note 6, at 258.

23. *See* Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 263 (1998) (describing the state common law power to "make law" and take on "a more active role" when redressing torts); *see also* Quern v. Jordan, 440 U.S. 332, 342 (1979) ("[T]he [Ku Klux Klan Act of 1871] ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States."). The Ku Klux Klan Act of 1871 gave federal courts the ability to remediate "deprivation[s] of . . . rights, privileges, or immunities secured by the Constitution" occurring under color of state law, through "any action at law, suit in equity, or other proper proceeding for redress." *See* Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871) (codified at 42 U.S.C. § 1983).

"alter[ed] the whole frame and structure" of the U.S. Constitution "in order to get at a remedy" for the Freedmen.[24]

This Comment considers the tension between the history of Reconstruction legislation and modern doctrine. It asks whether the current remediation scheme for excessive force violations is constitutionally sufficient under the Fourteenth Amendment and concludes that it is not. It argues that the Fourteenth Amendment therefore compels the creation of a federal cause of action for money damages to redress any and all excessive force violations. In so doing, it repeats the oft-told story of Reconstruction and its legislation, but emphasizes critical and sometimes overlooked historical facts relevant to the question of the constitutional remedies guaranteed by the Fourteenth Amendment's Equal Protection Clause.[25]

Although several commentators have argued for an expansion of federal damages remedies for excessive force victims in order to rectify modern doctrine's inconsistency with the values of Reconstruction-era amendments and civil rights legislation,[26] few works have contended that the Equal Protection Clause creates a cause of action independent of congressional enactments, or requires the remediation of all excessive force violations. Moreover, this Comment uniquely argues for a self-executing Fourteenth Amendment remedy using an originalist and conservative judicial methodology.[27]

24. CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (Sen. Cowan).

25. The Fourteenth Amendment's Equal Protection Clause declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

26. David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 499 (1992) [hereinafter Achtenberg, *Immunity*] (arguing that qualified immunity must be changed so that it "implement[s] the value structure of the 42nd Congress rather than the current Justices' own values"); *see also* Cover, *supra* note 15, at 1778–79.

27. *Cf.* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 303, 359 (1995) (arguing that suits against municipalities may be inferred from the Fourteenth Amendment itself without being limited by Section 1983, such that when those with "meritorious Fourteenth Amendment claims are left remediless under section 1983, they ought to be able to sue directly under the Constitution"). Academics arguing for a Fourteenth Amendment self-executing cause of action usually believe that the U.S. Constitution vests the federal judiciary with power to issue remedies for all constitutional violations. In other words, they believe that the self-executing nature of the Fourteenth Amendment arises from the judicial power of Article III, not from the Fourteenth Amendment's remedial history. *See id.* at 354 (arguing that "the Article III role of constitutional enforcement in the cases before the court" vests federal courts with the power to create self-executing remedies).

Any proposal to expand constitutional remedies entails a discussion of basic questions about the American constitutional system. The question of what remedies, if any, are required by the Constitution is extraordinarily rich, encompassing fundamental disagreements about, among other things, separation of powers, federalism, and constitutional interpretation.[28] While I cannot address all the questions raised by this Comment,[29] I do clarify its underlying assumptions.

Part I sets out to do just that. I briefly explain the two predominant views of constitutional remedies, specifically damages remedies. For purposes of this Comment, I identify these as the liberal and conservative views. The liberal view holds that federal courts have the power to create all kinds of remedies for constitutional violations pursuant to the judicial power of Article III.[30] By contrast, the conservative approach maintains that federal courts are courts of limited jurisdiction subject to Congress's jurisdictional control.[31] As such, federal courts may only issue damages remedies when provided by Congress in the constitutional or statutory text. Further, even when the text provides a remedy, conservative jurists will refuse to create a federal cause of action for damages when the plaintiff has alternative remedies, or when the remedial textual command is "judicially unadministrable" because it is broad and lacks specificity.[32] Part I clarifies that this Comment assumes the conservative views on remedies, with the caveat that whether a remedial text is judicially administrable is a context-specific determination. That is, the sheer fact that a remedial command is broad does not end the inquiry—a court must also determine whether there are aspects of the broad constitutional command that it is capable of enforcing.

The rest of the Comment sets out to prove that even under a conservative methodology, the Equal Protection Clause creates a cause of action for damages that is judicially enforceable without congressional approval. Part II contains the historical argument. It describes how in its common law and Reconstruction-era sense, the phrase "protection of the laws" has had two important meanings. First, the protection of the laws was an umbrella term referring to the rights that the state supplied the people in exchange for the

28. *Id.* at 292; John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857, 860–63 (2013).
29. *Cf.* Greabe, *supra* note 28, at 862 ("I cannot express opinions on [the basic fundamental disagreements raised by a constitutional remedies claim], and defend those opinions, without turning this paper into a book.").
30. *See, e.g.*, Bandes, *supra* note 27, at 354.
31. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017).
32. *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385 (2015).

people's allegiance.[33] Failure to provide the protection of the laws eliminated the state's legitimacy and was just cause for revolution.[34] Second, the right to be free from violence and the right to receive court remediation were the most prominent rights guaranteed by the protection of the laws.[35]

Thus, when white supremacist groups and state militias engaged in a systematic campaign of violence against the Freedmen and their allies in an attempt to retain the South's racial power structure in the advent of abolition, the Reconstruction Congress resorted to the concept of the protection of the laws. Congress reasoned that both the pervasive violence and state courts' systematic refusal to provide court remedies to victims of that violence constituted a deprivation of the protection of the laws.[36] In order to salvage the United States's legitimacy and prevent just cause for insurrection, Congress enacted the Equal Protection Clause, placing an affirmative duty on the federal government to rectify the states' deficiencies.[37] Therefore, because state courts

33. Achtenberg, *Immunity*, *supra* note 26, at 499–500; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 C.R. L.J. 1, 34–35 (2008) [hereinafter Green, *Pre-Enactment History*]; Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1835 (2009).

34. Hamburger, *supra* note 33, at 1837 ("[I]f the government failed to meet the first or third ideals of protection, the remedy lay in politics or revolution, not law.").

35. *See, e.g.*, Green, *Pre-Enactment History*, *supra* note 33, at 3 ("[T]he Equal Protection Clause . . . imposes a duty on each state to protect all persons and property within its jurisdiction from violence and to enforce their rights through the court system."); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 510 (1991) ("By the middle of the nineteenth century, th[e equal protection] duty was understood to include not only the enforcement of civil and criminal law with respect to injuries already committed, but also the responsibility to prevent violence before it occurred."); Rosenthal, *supra* note 6, at 70.

36. *See infra* Subparts II.B-II.C.

37. There is tension in the suggestion that the Fourteenth Amendment, which applies to states, imposes obligations on the federal government. This Comment assumes that the equal protection right to court remediation applies to the federal government through the doctrine of reverse incorporation, which holds that denial of equal protection sometimes violates the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("[I]t would be unthinkable that the same Constitution [that requires state compliance with equal protection] would impose a lesser duty on the Federal Government."). I would argue that because the Anglo-American tradition believed that equal protection legitimized the existence of government, *infra* Subpart II.A, it would be unthinkable that the framers of 1789 did not impose equal protection obligations on the federal government. *Cf.* Green, *Pre-Enactment History*, *supra* note 33, at 35 (stating that the American Revolution was premised on the Crown's denial of the protection of the laws); Hamburger, *supra* note 33, at 1843 (same). Just as "discrimination may be so unjustifiable as to be violative of due process," *Bolling*, 347 U.S. at 499, the denial of court relief can offend eighteenth-century notions of due process of law.

For the purpose of brevity, this Comment speaks as if the Fourteenth Amendment imposes obligations on the federal government, although technically the obligations arise under the Fifth Amendment's Due Process Clause.

failed to supply relief to victims of violence, the federal courts were forced to become their functional equivalent, appropriating state courts' broad remedial powers.[38] Congress implemented this change through what is known today as 42 U.S.C. § 1983, giving federal courts the power to remediate certain constitutional injuries in "an action at law, suit in equity, or other proper proceeding for redress."[39]

Part II also discusses the objection raised by common law immunities. This objection posits that the concept of equal protection could not have required the redress of all excessive force violations because the common law doctrines of sovereign immunity, municipal liability, and qualified immunity precluded remedies to excessive force victims in certain circumstances. The objection is incorrect because the common law provided no immunities to officers sued in their individual capacity, thereby ensuring excessive force victims at least one avenue for redress. Part II therefore concludes that, federalism and separation of powers concerns notwithstanding, the Equal Protection Clause originally meant that the government cannot deny excessive force victims a court remedy.

Part III responds to the three most significant conservative objections to judicially created constitutional remedies—lack of text, lack of judicial administrability, and available alternative remedies. First, it argues that the plain meaning of the Equal Protection Clause's text guarantees a remedy against all excessive force violations. Grounded in the abolitionist belief that every last member of society has a right to the redress of courts, the clause employs language securing equal protection for "any person." The Reconstruction Congress's legislative history confirms that the clause's use of "any person" was deliberate and that the language means what it says—that court redress must be provided to each and every victim of excessive force.

Second, Part III contends that although the Equal Protection Clause appears judicially unadministrable at first sight, history and reason demonstrate that there are certain aspects of the clause that federal courts may enforce without prior congressional approval. The equal protection guarantee of appropriate remediation for victims of violence falls squarely within justiciable territory. The quintessential, historical role of courts is to adjudicate individual rights violations. The right against battery, the common law equivalent of excessive force, is one of the most basic common law rights, and the judiciary has long been in the business of providing redress to battery

38. *See infra* Subpart II.C.
39. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871).

victims. Courts are therefore well prepared to craft judicial standards for assessing the adequacy of excessive force plaintiffs' remedies.

Finally, Part III makes the case that there are no existing adequate remedies available to all victims of excessive police force. It considers the adequacy of plaintiffs' damages relief against officers in their individual capacity[40] as well as municipalities[41] under Section 1983. It then assesses alternatives to existing federal damages causes of action, such as criminal,[42] equitable,[43] and state tort relief.[44] For various doctrinal reasons, including most prominently high burdens of proof and official immunities, all of these remedies fail to provide "roughly similar compensation" to all excessive force victims.[45] As such, they are inadequate. The Equal Protection Clause requires that federal courts rectify this inadequacy by inferring a cause of action for damages that will remediate any and all excessive force violations.[46]

I. CONSTITUTIONAL REMEDIES: AN INTRODUCTION

Few areas of law have the complexity and richness of constitutional remedies. The issue of what remedies are constitutionally mandated raises a host of questions about constitutional interpretation, state and federal power, and the proper role of courts vis-à-vis the political branches.[47] There is wide latitude of positions as to this topic, ranging from those who hold fast to the precept that a remedy must always follow a rights violation, to those who believe that the only constitutionally required remedy is the annulment of an unconstitutional law.[48] Moreover, many academics and jurists, including the current U.S. Supreme Court, distinguish between different kinds of remedies:

40. *See infra* Subpart III.B.1.a.
41. *See infra* Subpart III.B.1.b.
42. *See infra* Subpart III.B.3.a.
43. *See infra* Subpart III.B.3.b.
44. *See infra* Subpart III.B.2.
45. Minneci v. Pollard, 565 U.S. 118, 130 (2012); Wilkie v. Robbins, 551 U.S. 537, 553–54 (2007) (finding that available administrative and judicial proceedings were an insufficient remedy for plaintiff's tortious injuries to counsel against extending *Bivens*).
46. This Comment does not take a position as to whether the Equal Protection Clause creates a cause of action against officers in their individual capacity or municipalities on a vicarious liability theory. It could do either. The only requirements are that all meritorious plaintiffs receive redress for excessive force violations, and that the implied cause of action complies with the Eleventh Amendment's grant of sovereign immunity, which restricts suits against states.
47. *See* Bandes, *supra* note 27, at 292; Greabe, *supra* note 28, at 860–63.
48. Greabe, *supra* note 28, at 859; *see also* Bandes, *supra* note 27, at 361 (outlining three views about the federal court's power to fashion remedies).

negative or affirmative,[49] equitable or legal,[50] or prospective or retroactive.[51] Regardless of classification, money damages—the remedy advocated for excessive force victims in this Comment—is almost invariably disfavored.[52]

The rest of Part I provides a brief overview of constitutionally required remedies generally and damages remedies specifically by describing two prominent views on the issue. I first discuss the view of liberal academics and judges, who believe that the federal judiciary, as adjudicator of individual rights, has broad powers to remedy constitutional violations without congressional authorization. Thus, they think that federal courts may issue damages remedies if doing so would effectively redress the aggrieved person before the court. I then discuss the view of conservatives, who believe that the federal tribunals, as courts of limited jurisdiction, may only issue damages remedies when they are expressly contained within the legal text, the text is judicially administrable, and there are no alternative remedies. Finally, I clarify my own views on this question.

A. Liberal View

There was a period in Supreme Court history in which the mere existence of a constitutional prohibition was sufficient grounds for the creation of a

49. *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384–85 (2015) (constraining the federal court's ability to issue affirmative injunctive relief, but preserving *Ex parte Young*, 209 U.S. 123 (1908) and derivative case law, which suggests that federal courts have broad authority to issue negative injunctive relief); Leading Case, *Armstrong v. Exceptional Child Center, Inc.*, 129 HARV. L. REV. 211, 215 (2015) ("By unifying the treatment of statutory damages and affirmative injunctions while suggesting a more permissive approach for negative relief, *Armstrong* appears to trade one distinction for another."). Affirmative relief encompasses both damages and specific performance, whereas negative relief "seeks to nullify a challenged action or law and makes no demand 'other than to be let alone.'" *Id.* at 211 n.6.

50. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1786 (1991) (stating that there is a strong presumption in favor of the availability of constitutional remedies, but that there are "questions about the propriety or necessity of . . . [cases] in which money damages are sought"); Greabe, *supra* note 28, at 860 (arguing that substitutionary constitutional remedies such as damages "are individually contingent and susceptible of legislative or judicial expansion, contraction, or replacement as the perceived public interest dictates," but that specific relief cannot be constrained by the perceived public interest).

51. *See* Edelman v. Jordan, 415 U.S. 651, 664, 668 (1974) (distinguishing between permissible prospective injunctive relief, in which an official is "enjoined to conform his future conduct . . . to the requirement of the Fourteenth Amendment," and improper retrospective injunctive relief, which is practically "a form of compensation").

52. *See, e.g.*, *id.* at 668; Greabe, *supra* note 28, at 860; Fallon & Meltzer, *supra* note 50, at 1786.

remedy, even a damages remedy, without congressional authorization.[53] During this period the Court instructed lower federal courts that, absent contrary congressional command, they should "make the kind of remedial determination that is appropriate for a common-law tribunal."[54] Common law tribunals such as state courts have broad remedial powers and the power to "make law."[55] In emulating common law tribunals, federal courts were directed to "provide such remedies as are necessary to make effective" the statutory purpose[56] and "adjust their remedies so as to grant the necessary relief."[57] Damages remedies were therefore not disfavored or distinguished from other kinds of relief.[58]

The Court of this remedy-friendly era couched its constitutional remedies holdings in a language of restraint. When considering the appropriateness of a judicially created damages remedy, the Court assessed whether there were "special factors counseling hesitation in the absence of affirmative action by Congress," implying that Congress had the last word on the availability of a particular remedy.[59] However, several academics and judges have gone further than the Supreme Court of the 1970s, unapologetically embracing the common law maxim that "where there is a legal right, there is also a legal remedy."[60] That

53. Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (describing "the heady days in which th[e] Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition"); *see also* Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring). The paradigmatic example of an implied remedy in modern constitutional law is the *Bivens* remedy, named after the case *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Court held that the Fourth Amendment provided a cause of action and a damages remedy for unreasonable searches and seizures. *Id.* at 397.

54. *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 378 (1983).

55. Blanchard, *supra* note 23, at 263.

56. J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); *see also* Bell v. Hood, 327 U.S. 678, 684 (1946).

57. *Bivens*, 403 U.S. at 392 (quoting *Bell*, 327 U.S. at 684).

58. *See id.* (implying a cause of action for damages under the Fourth Amendment because "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available remedy* to make good the wrong done" (quoting *Bell*, 327 U.S. at 684) (emphasis added)).

59. *See Bivens*, 403 U.S. at 396; Bandes, *supra* note 27, at 296 ("Thus, even when the principle of judicial remediation was first announced, the seeds of deference to the judgment of the political branches were present.").

60. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Three relevant works on this view are Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987), Bandes, *supra* note 27, and Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987).

is, these academics proclaim that federal courts can remedy all constitutional injuries, even in the absence of congressional approval.

Those defending this more extreme view believe that the ability to infer remedies directly from the Constitution "derives from the Article III role of constitutional enforcement in the cases before the court."[61] There are two interconnected reasons as to why remedies derive from federal courts' adjudicative function under Article III.[62] First, the traditional role of courts is to adjudicate claims involving the rights of individuals.[63] As such, the "quintessential[] judicial" function is to provide a tailored remedy to make the aggrieved individual before the court whole again.[64] Moreover, rights without remedies are illusory. A right is a precept that places limits on the government's power vis-à-vis individuals.[65] Rights require remedies because, without them, the government's power to invade individual freedoms is effectively not limited.[66] In order to fulfill its role as adjudicator of individual rights, then, courts must be able to enforce rights through remedies. Second, courts serve the structural role of checking the power of the political branches.[67] The judiciary has the duty to enforce individual rights and the limits that they impose on state power.[68] These adjudicative duties cannot be fulfilled when courts allow the political branches to "set their own terms of accountability."[69]

In short, the liberal view of constitutional remediation is that courts have the remedial powers of common law tribunals and can adjust and create new remedies—even damages remedies—to remediate the injury before the court. Although the Supreme Court adopted a moderate version of this view, one that ultimately deferred to Congress, several academics defend the "rights require remedies" maxim on the basis of the federal judiciary's Article III power to adjudicate individual rights.

B. Conservative View

Those embracing a conservative view of constitutional remedies emphasize that, in contrast to common law tribunals, federal courts are courts

61. Bandes, *supra* note 27, at 354.
62. *Id.* at 303.
63. *Id.*
64. *Id.* at 304.
65. *Id.* at 307.
66. *Id.*
67. *Id.* at 303.
68. *Id.* at 311.
69. *Id.* at 303.

of limited jurisdiction.[70] Article III vests federal courts with the "judicial power" and provides that the judicial power of lower federal courts is subject to congressional control.[71] Given that the federal courts only have power to interpret and apply the law that Congress enacts,[72] their jurisdiction is delineated by the legal text, which for many conservative jurists comprises the entirety of the law.[73] A court that implies remedies not provided for in the legal text is, therefore, not interpreting the law, but making new law. When this occurs, courts "assum[e] . . . the legislative function"[74] and undermine Congress's "broad discretion" over the way in which its enumerated powers are enforced: Congress is forced, perhaps against its will, to enforce its powers through private causes of action.[75]

These structural concerns have led conservative jurists and the modern Supreme Court to adopt a Congress– and text-centric approach to remedies. Thus, the touchstone of the statutorily-implied cause of action inquiry today is whether Congress intended to create a private remedy.[76] "Without [congressional intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how

70. *See, e.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.").

71. *See* U.S. CONST. art. III, § 2 ("In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017) (stating that, in some circumstances, the federal judiciary's remedial powers should yield to Congress's ability to "determin[e] the nature and extent of federal-court jurisdiction under Article III"); Cannon v. Univ. of Chicago, 441 U.S. 677, 730 (1979) (Powell, J., dissenting) ("Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts.").

72. *See* Bandes, *supra* note 27, at 315–16 (describing the conservative "formalistic approach" to treat the federal judiciary's sole duty as that of "appl[ying] the law"); Blanchard, *supra* note 23, at 263.

73. *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("'The words of the statute, and not the intent of the drafters, are the 'law.'").

74. *See, e.g.*, *Cannon*, 441 U.S. at 732 (Powell, J., dissenting); *see also* Carlson v. Green, 446 U.S. 14, 35 (1979) (Rehnquist, J., dissenting) ("[T]he Court appears to be fashioning for itself a legislative role resembling that once thought to be the domain of Congress . . . .").

75. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1383–84 (2015); *see also* U.S. CONST. art. I, § 8, cl. 18 (granting Congress the ability to enact all laws "necessary and proper" for executing its enumerated powers).

76. Alexander v. Sandoval, 532 U.S. 275, 286 (2001); Gonzaga Univ. v. Doe, 536 U.S. 273, 291 (2002) (Breyer, J., concurring in the judgment) ("The ultimate question, in respect to whether private individuals may bring a lawsuit to enforce a federal statute, through 42 U.S.C. § 1983 or otherwise, is a question of congressional intent.").

compatible with the statute."[77] However, congressional intent is not ascertained through legislative history or legal context, but by interpreting the text.[78] Courts ought to look at the congressional "intent . . . manifested in . . . the text of the enrolled bill that became law."[79] This cautious, text-centric approach applies equally to the area of constitutionally implied causes of action, "where . . . an imagined 'implication' cannot even be repudiated by Congress."[80]

Arguably, negative remedies—remedies that "seek[] to nullify a challenged action or law and make[] no demand 'other than to be let alone'"[81]—may be issued by federal courts without congressional approval pursuant to their equitable powers.[82] But affirmative remedies, among which we find money damages, must comport with the congressional intent test just outlined.[83] Moreover, even when the relevant textual provision could plausibly be read as creating an affirmative remedy, such a reading will be discarded when the text is "judicially unadministrable [in] nature" or when there are alternative remedies available to the plaintiff.[84] A legal text is unadministrable in nature when it is broad and lacks specificity, such that a court is unfit to harmonize all of the statute's goals and values.[85] Alternative methods of enforcing a legal rule include all alternative remedies provided by Congress,

77. *Sandoval*, 532 U.S. at 286–87.
78. *Id.* at 288 ("In determining whether statutes create private rights of action . . . legal context matters only to the extent it clarifies text.").
79. Graham Cty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 559 U.S. 280, 302 (2010) (Scalia, J., concurring).
80. Minneci v. Pollard, 565 U.S. 118, 131 (2012) (Scalia, J., concurring); *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017) ("[T]he Court's expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself.").
81. Leading Case, *supra* note 49, at 211 n.6.
82. *See, e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384–85 (2015) ("What our cases demonstrate is that, 'in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.'") (quoting Carroll v. Safford, 44 U.S. 441, 463 (1845)); *Ex parte* Young, 209 U.S. 123 (1908) (allowing federal court injunctive relief against an individual state officer who planned to enforce unconstitutional law, sovereign immunity and lack of congressional cause of action notwithstanding).
83. *See Ziglar*, 137 S. Ct. at 1856 (stating that the caution with which the Court approaches implied statutory damages has been applied in the context of constitutional damages claims); *Armstrong*, 135 S. Ct. at 1385 (limiting federal courts' equitable powers for affirmative injunctions).
84. *Armstrong*, 135 S. Ct. at 1385 (quoting Alexander v. Sandoval, 532 U.S. 275, 290 (2001)); *see Ziglar*, 137 S. Ct. at 1863; Wilkie v. Robbins, 551 U.S. 537, 550 (2007).
85. *Armstrong*, 135 S. Ct. at 1385; Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in the judgment).

including, for example, agency review,[86] injunctions and habeas petitions,[87] and state tort law.[88] "[W]hen alternative methods of relief are available, a [damages] remedy usually is not."[89]

The conservative view of constitutional remedies, to conclude, is that the federal courts are tribunals of limited jurisdiction. Congress controls this limited jurisdiction, and only Congress, through statutory or constitutional text, is capable of creating private remedies. Even if the legal text may plausibly be interpreted to create a remedy, however, conservative jurists will refrain from enforcing an affirmative remedy when the text is judicially unadministrable in nature. Alternative remedies will also nearly always preclude the creation of a cause of action for damages.

C. The Author's View

This Comment adopts a conservative methodology on constitutional remedies. It does not assume that the federal courts have a general power under Article III to create remedies that are divorced from legal text. Rather, it proceeds under the assumption that federal courts are courts of limited jurisdiction, and as such, the question of remedies is ultimately a question of congressional intent as expressed both in the relevant legal text and the availability of alternative remedies. What this means for our purposes is that the Fourteenth Amendment's text must reflect the Reconstruction Congress's intent to create a private cause of action for excessive force violations, enforceable in federal court. Also, the propriety of inferring a damages remedy from the Fourteenth Amendment depends on the availability of alternative remedies for excessive force plaintiffs.

Nevertheless, this Comment does not agree with the view that the presence of what first appears to be "judicially unadministrable" text indicates definitively that Congress sought to exclude implied judicial remedies. "[M]ere breadth of . . . language does not require the Court to give up all hope of judicial enforcement—or, more important, to infer that Congress must have done so."[90]

86. *Armstrong*, 135 S. Ct. at 1385 (noting that the "withholding of Medicaid funds by the Secretary of Health and Human Services" is an alternative remedy weighing against the availability of private enforcement in federal court).
87. *Ziglar*, 137 S. Ct. at 1863, 1865.
88. Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 73–74 (2001).
89. *Ziglar*, 137 S. Ct. at 1863; *Wilkie*, 551 U.S. at 550 (declaring that "any alternative, existing process for protecting the [relevant] interest" can be "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages").
90. *Armstrong*, 135 S. Ct. at 1394–95.

A textual command may be broad and nonspecific in some of its aspects, but not others. Certain aspects of a textual provision may be fit for judicial enforcement, and others may not.[91] But sheer breadth of language is not synonymous with "unjusticiable." Whether a remedial constitutional provision is "judicially unadministrable" is a contextual determination[92] that should consider, among other things, the specificity of the remedial command, the complexity of the remedial command, and whether the judiciary is capable of developing manageable standards with which to assess whether remediation has occurred.[93]

---

91. *Compare* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40–41 (1973) (holding that equal protection analysis is not proper when there are a significant "interferences with the State's fiscal policies" because the court "lack[s] both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues"), *with* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregation in public schools "is a denial of the equal protection of the laws").

92. *See Armstrong*, 135 S. Ct. at 1388 (Breyer, J., concurring in part and concurring in the judgment) ("'[T]he statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer' courts 'more than general guidance.'" (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 291 (2002) (Breyer, J., concurring in the judgment))).

Many of the great remedies scholars advocate for a context-specific approach to remedies discussions. *See, e.g.*, Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 226–27 (1963) [hereinafter Jaffe, *Damages*] (arguing against "[m]any writers . . . [who] posit the general category of 'injury' with the inference that all injuries are equally worthy of compensation"); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1405 (2007) ("Much [of the appropriateness of money damages] depends on context, and attention to context is something that current doctrine seeks to suppress.").

93. For further elaboration on these factors, see Subpart III.A.2 below.

If the Court were confronted with the issue considered by this Comment, it would most likely apply the two-pronged test of *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The *Ziglar* Court determined that implied damages remedies are unavailable if (1) the case presents a "new context" and (2) there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 1857 (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)). A case presents a new context if it differs "in a meaningful way from previous *Bivens* cases." *Ziglar*, 137 S. Ct. at 1859. Moreover, the special factors inquiry "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857–58.

The *Ziglar* test is, in my view, too general, too new, and too dependent on precedent to be applied in this Comment. The Court's precedent seems to assume that deterrence and policy, not historical and textual analysis, is the touchstone of the remedies discussion. *See, e.g.*, *id.* at 1860 ("The purpose of *Bivens* is to deter the officer." (quoting FDIC v. Meyer, 510 U.S. 471, 485 (1994))). This Comment rejects that assumption, and therefore applies a more textual and historical approach. Moreover, this Comment does not assume that damages remedies are required to enforce the Equal Protection Clause. It rather argues that excessive force violations must be redressed, although not necessarily through damages remedies. See *infra* Subpart III.B for a discussion of all possible remedies.

This Comment also parts ways with the strict textualist view that legislative history is irrelevant for legal interpretation. Sure enough, the ultimate task of the legal interpreter is to interpret the words of the law, and legal text must be given primacy over lawmakers' idiosyncratic statements and beliefs. But legislative history can be essential to grasping the meaning of the old and vague language characteristic of the U.S. Constitution. Strict textualists themselves cannot avoid probing the debating history of ancient constitutional provisions.[94] Indeed, their purported aversion to legislative history in constitutional cases is a formality, because legislative history may "reflect the general understanding of . . . disputed terms"[95] and as such may clarify the context in which they were written and, ultimately, their meaning.[96] I therefore consider some of the legislative history of the Reconstruction era to elucidate the original meaning of equal protection. For the same reasons, I also consider the wider legal context, including Reconstruction-era and common law assumptions regarding courts, remedies, and immunities.[97]

Finally, this Comment assumes, along with virtually all commentators and jurists addressing the issue, that Congress cannot displace a constitutional

---

The *Ziglar* analysis would, in any event, consider the hard questions presented by an equal protection remedy—the breadth of language of the Equal Protection Clause and the potential difficulty of its judicial enforcement—but it would do so under the "special factors" prong. The rest of the analysis would be relatively straightforward. An equal protection damages remedy would certainly present a new context for *Bivens* purposes, for the sheer fact that an equal protection damages remedy entails the recognition of a new constitutional right determines the context's newness. *See id.* at 1860 (stating that if the "constitutional right at issue" differs from the rights recognized in previous *Bivens* cases, the case "might" present a new context). It would, however, not present special factors counseling hesitation. Congress has indeed affirmatively approved "action[s] at law," including damages actions, against police officers. *See* Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871). And an equal protection remedy for excessive force would challenge no more than "standard 'law enforcement operations,'" which the Court apparently believes is the least problematic context for the imposition of money damages. *See Ziglar*, 137 S. Ct. at 1861 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990)).

94. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 603–05 (2008) (opinion by Scalia, J.) (discussing drafting history of the Second Amendment); Printz v. United States, 521 U.S. 898, 918–24 (1997) (opinion by Scalia, J.) (relying in part on *The Federalist* to determine the meaning of the Tenth Amendment); Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism [https://perma.cc/K9PN-KS83] ("[W]hen [Justice Scalia] looks for the original meaning of eighteenth-century constitutional provisions . . . Scalia is doing legislative history.").

95. *Heller*, 554 U.S at 605.

96. William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1302 (1998).

97. *See* Alexander v. Sandoval, 532 U.S. 275, 288 (2001) (stating that legal context may "clarif[y] text").

remedy required by the constitutional text. Our federal system has long allowed constitutional wrongs to go unredressed in various circumstances,[98] but failure to provide a remedy mandated by the Constitution's text is not one of them. Commentators recognize only two instances in which the Constitution "refers explicitly to remedies": the Takings Clause and the Suspension Clause.[99] This Comment argues that the Equal Protection Clause is a third.[100]

II. "EQUAL PROTECTION OF THE LAWS" AND ITS CONSTITUTIONAL REVOLUTION

This Part provides a historical account of the Fourteenth Amendment's ratification and seeks to prove two things. First, I show that the Fourteenth Amendment's equal protection guarantee requires that victims of private and public violence receive some kind of court remediation. Second, I demonstrate that equal protection imposes a duty on the federal government to supply the right of court remediation when the states fail to do so. This account proceeds in four Subparts. The first describes the common law origins of the equal protection concept, the second describes how the concept was constitutionalized and legalized during the Reconstruction Era, and the third describes how Section 1983 would be used to secure it. Finally, I rebut the contention that the wider legal context of immunities recognized at common

98. *See, e.g.*, Castellano v. Fragozo, 352 F.3d 939, 962 (5th Cir. 2003) ("Where there is a right, there may not be a federal law remedy."); Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784 (2004) ("[At the time of the Founding], [u]bi jus, ibi remedium was not a black letter legal doctrine; it was merely a platitude."); Fallon & Meltzer, *supra* note 50, at 1778 ("*Marbury*'s apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not always attained."); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) ("[The right-remedy gap] is probably inevitable in constitutional law and is in any event deeply embedded in current doctrine . . . .").

99. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 719 (6th ed. 2009).

100. *See infra* Subpart III.A.1. Granted, the Equal Protection Clause is less explicit than either the Suspension or Takings Clause about both the fact that it requires a remedy and the kind of remedy it requires. However, the Takings Clause merely demands that "just compensation" follow a taking of property "for public use." *See* U.S. CONST. amend. V. A determination of what constitutes "just compensation" seems analogous to a general determination about whether a plaintiff has received adequate redress. *See supra* notes 54–57 and accompanying text (describing common law courts' power to craft appropriate relief). A general determination of adequate redress, I hold, is what the Equal Protection Clause requires in the context of excessive force claims. *See infra* Subpart III.A.2.a.ii.

law and Reconstruction demonstrates that denying relief to some plaintiffs is consistent with equal protection.

A. The Common Law Origins of "Equal Protection of the Laws"

The concept of protection of the laws is one of the fundamental ideas of the Anglo-American legal tradition.[101] The idea was extremely influential to the framers of the Reconstruction Amendments as well as the framers of the original Constitution.[102] When the legitimacy of the Crown dwindled after the English Civil War, English political philosophy found in social contract theory a new justification for the existence of the state.[103] Social contract theory proposed that persons originally lived in the state of nature, a state in which they were naturally endowed with and enjoyed the rights of life, liberty and property.[104] But since the "state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security."[105] That is, persons would limit their natural freedom and swear allegiance to the state; in exchange the state would provide them the protection of the laws.[106] Protection of the inalienable rights of persons was therefore the "first and most basic concept" of the protection of the laws.[107] However, the phrase

101. The phrases "protection of the laws" and "equal protection of the laws" are synonymous. TENBROEK, *supra* note 21, at 27 ("Protection and equal protection are . . . words for the same thing."). However, the "equal protection of the laws" carries with it the new dimension of racial equality that Reconstruction imposed on that phrase. *See infra* notes 134–136.

102. Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 3 (1954) ("[Our ancestors] were disciples of John Locke, that sturdy theorist of the 'Glorious English Revolution' of 1688 whose 'natural rights' theories were re-employed in the next century to justify the American Revolution.").

103. *See Glorious Revolution*, ENCYCLOPÆDIA BRITANNICA (2017), https://www.britannica.com/event/Glorious-Revolution [https://perma.cc/7SL3-ZZ2T] (stating that the Glorious Revolution of 1688, which "permanently established Parliament" as opposed to the King "as the ruling power of England," "lent support to . . . [the] contention that government was in the nature of a social contract between the king and his people represented in Parliament").

104. Obergefell v. Hodges, 135 S. Ct. 2584, 2634 (2015) (Thomas J., dissenting) (quoting JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, § 4 (1689)).

105. *Id.*

106. Achtenberg, *Immunity*, *supra* note 26, at 499–500; Green, *Pre-Enactment History*, *supra* note 33, at 34–35 ("A long tradition in English and American political thought views government as an exchange of allegiance for protection."); Hamburger, *supra* note 33, at 1835 (stating that "protection was reciprocal with allegiance"); TENBROEK, *supra* note 21, at 177. Thus, William Blackstone speaks of property as "derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters in social communities." WILLIAM BLACKSTONE, COMMENTARIES 299.

107. Hamburger, *supra* note 33, at 1835.

sometimes emphasized a particular kind of government function, such as the government's remedial or enforcement functions.[108]

The remedial sense of "protection of the laws" stressed the role of courts in vindicating rights and deprivations of government privileges guaranteed by law.[109] Government remediation was considered part and parcel of the security the state guaranteed in social contract theory. John Locke, an eminent social contract theorist who influenced the formation of the U.S. government, asserted that whenever a transgression of the law occurs, "there is commonly injury done to some person or other, and some other man receives damage by his transgression." In this case, "he who hath received any damage, has . . . a particular right to seek reparation . . . ."[110]

This understanding of protection was echoed in subsequent legal treaties and opinions of the common law era.[111] For instance, William Blackstone declared that without a "method of recovering and asserting . . . rights, when wrongly withheld or invaded," rights would exist in vain.[112] "This," he says, "is what we mean properly, when we speak of the protection of the law."[113] A few decades later and across the Atlantic, Chief Justice Marshall, in his celebrated *Marbury* opinion, reasoned that Plaintiff William Marbury was entitled to some kind of court relief because "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[114] In short, the right to vindicate violated rights in court was unambiguously guaranteed by the protection of the laws.

The role of the state as protector against violence also lies at the heart of the protection of the laws.[115] After all, social contract theory holds that effective protection against physical threats was the primary reason that humankind

108. *Id.* at 1835–38; Green, *Pre-Enactment History*, *supra* note 33, at 43.
109. Green, *Pre-Enactment History*, *supra* note 33, at 43; TENBROEK, *supra* note 21, at 161; Hamburger, *supra* note 33, at 1836 ("[A]ll legal rights had the protection of the law in the sense that they could not be taken away contrary to law or without judicial process.").
110. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. II, § 10 (1689).
111. *See* Green, *Pre-Enactment History*, *supra* note 33, at 13 ("A great many writers . . . and a large number of legal treatises at the time of the Amendment, use 'protection of the laws' or variants to refer specifically to the enforcement and remedial functions of law . . . .").
112. 1 BLACKSTONE, COMMENTARIES 37.
113. *Id.*; *see also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 348 (2d ed. 1832) (stating that "every invasion" of animals considered qualified property "is redressed in the same manner").
114. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
115. Green, *Pre-Enactment History*, *supra* note 33, at 48–50; Hamburger, *supra* note 33, at 1837; Rosenthal, *supra* note 6, at 70 (arguing that "a principal purpose of the [Equal Protection] Clause was to secure equal governmental protection against private lawbreakers").

founded governments.[116] Thus, "[t]he paradigmatic instance [of the protection of the laws] was the government's duty to protect individuals against violence,"[117] and failure of the state to supply this positive right was just cause for revolution.[118] This view emphasized the role of the executive in providing the most active kind of protection, requiring the state to "prevent violence before it occurred"[119] by ordering its "executive officers [to] take action to prevent or punish injury."[120] The urgency with which this aspect of protection was treated during Reconstruction reflects this reality and helps further illuminate the law enforcement aspect of protection.[121] Further discussion on this topic awaits in Subparts II.B–II.C.

In sum, the phrase "protection of the laws" at common law captured one multifaceted concept composed of three related elements. It primarily referred to the protection of natural rights generally. However, it sometimes emphasized particular rights, like the right to obtain court remediation and the right to be free from violence. How this common law concept was expressed and revitalized in the amendments, legislation, and debates following the Civil War is the issue to which we now turn.

B. Reconstruction Materializes Equal Protection Theory and the Federalist Revolution

Legislation during the Reconstruction Era exemplified Congress's efforts to grant Freedmen the equal protection of the laws of natural liberty, including the right to court relief and bodily integrity. Although abolitionist congressmen interpreted the Thirteenth Amendment's grant of liberty as an implicit guarantee of the rights of citizenship, the amendment's language generated opposition to this view. Subsequent legislation like the Civil Rights Act of 1866 and, eventually, the Fourteenth Amendment, were necessary to

116. Obergefell v. Hodges, 135 S. Ct. 2584, 2634 (2015) (Thomas J., dissenting); Rosenthal, *supra* note 6, at 68 (stating that the nineteenth-century belief that "one of the basic obligations that the government owed its people was to protect their persons and property" was "a consequence of the social contract theory that was widely thought to be implicit in the antebellum constitution").

117. Heyman, *supra* note 35, at 510.

118. Hamburger, *supra* note 33, at 1837 (arguing that when government fails to provide protection of the laws the remedy lays "in politics or revolution").

119. Heyman, *supra* note 35, at 510.

120. Hamburger, *supra* note 33, at 1837; *see also* Green, *Pre-Enactment History*, *supra* note 33, at 47 (stating that protection of the laws "refers to a particular discrete entitlement . . . to be secure against violence").

121. *See, e.g.*, Heyman, *supra* note 35, at 510; Rosenthal, *supra* note 6, at 68.

resolve the issues of the rights and status of newly freed slaves. In resolving the meaning of the right to protection of the laws, Congress altered the federalist structure of the Constitution forever.

1. The Thirteenth Amendment

The Thirteenth Amendment was ratified by Congress and the states shortly after the end of the Civil War on December 18, 1865.[122] In relevant part, it read: "Neither 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."[123] The text of the amendment did not, in so many words, secure the protection of the laws of natural liberty. Thus, it appears that Congress was "content with abolition, without addressing the status of the newly freed slaves as citizens."[124] This view suggests that the Thirteenth Amendment left the federalist structure of the Constitution largely untouched. Congress would have no power over the states except to enforce the prohibition on slavery. Some congressmen explicitly took this narrow view. One of the coauthors of the Thirteenth Amendment announced that in passing the amendment Congress gave African Americans "no right except [their] freedom, and left the rest to the States."[125]

There is some reason to question this narrow view of freedom, as explained below.[126] However, even this restricted interpretation raised vigorous states' rights opposition. Dissenters argued that the amendment would destroy the Constitution as originally enacted.[127] There was a sense in which this criticism was undoubtedly true: The Thirteenth Amendment's prohibition on private conduct "took over the role of state law, which traditionally had involved direct regulation of private activity."[128] In the end,

122. Thirteenth Amendment, 13 Stat. 774–75.
123. U.S. CONST. amend. XIII, § 1.
124. RUTHERGLEN, *supra* note 21, at 29.
125. CONG. GLOBE, 38th Cong., 1st Sess. 1465 (1864) (statement of Sen. Henderson) ("So in passing [the Thirteenth A]mendment we do not confer upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States.").
126. *See infra* notes 134–135 and accompanying text.
127. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864) (statement of Sen. Powell) (arguing against the Thirteenth Amendment on the ground that "[w]e were told by the Government in every form in which it could speak, at the beginning of this revolution, that whatever might be the result, the institutions of the States would remain as they were"); *id.* at 1365 (Sen. Saulsbury) (arguing against the Thirteenth Amendment on the ground that the constitutional compromises struck around slavery are essential to the Constitution and the Union).
128. RUTHERGLEN, *supra* note 21, at 34.

the Thirteenth Amendment's failure to resolve the question of the rights and status of Freedmen is perhaps best understood as a kind of compromise.[129] But however narrow, the Thirteenth Amendment sowed the seeds for more abrasive federal action. The open-ended language of Section 2, which gave Congress the power to enforce Section 1, became an invitation to deal with these unsolved questions.[130]

2. Civil Rights Act of 1866

The Civil Rights Act of 1866 was the first and most important enforcement legislation of the period between the ratification of the Thirteenth and Fourteenth Amendments.[131] The Act is important for three reasons. First, it begins to expose the main trend of Reconstruction: Since the states had systematically deprived the Freedmen from the equal protection of the laws, the federal government had the duty to make up for these violations.[132] Second, the Act dealt with "[t]he same topics . . . [that] were being considered in framing the [Fourteenth Amendment] . . . . Thus much that was said on the Civil Rights Bill proves meaningful in a study of the understanding on which the Fourteenth Amendment was based."[133] Third, the Act demonstrates the centrality of the federal courts for the Reconstruction Congress's project to restore the protection of the laws.

The common law tradition often used the ideas of liberty and rights almost interchangeably.[134] Thus, antislavery congressmen pressed the semantic bounds of Section 1 of the Thirteenth Amendment by defining liberty not merely as freedom from restraint but in terms of rights and equal citizenship.[135]

129. For instance, some drafts of the Thirteenth Amendment declared "[a]ll persons equal before the law." CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864). These drafts were rejected in favor of the territorial-based language of the Northwest Ordinance, which abolished slavery in the Northwest Territory under the Articles of the Confederation. *See* Northwest Ordinance § 14, art. 6 (1787).

130. RUTHERGLEN, *supra* note 21, at 34.

131. *Id.* at 39, 71 (averring that, in contrast to the Freedmen's Bureau Act, "the 1866 Act was always meant to be permanent"); TENBROEK, *supra* note 21, at 160 (stating that the Civil Rights Act was the "heart of the Republican legislative program").

132. *See* FONER, *supra* note 6, at 259 ("Only if state governments failed to protect citizens' rights would federal action be necessary.").

133. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 8 (1949).

134. *See id.* at 41–42 (stating that Blackstone's idea of civil rights is "ambigu[ous]," and that he "sometimes equates 'liberties' with 'rights'").

135. *See id.* at 41–42; *see also* TENBROEK, *supra* note 21, at 172 ("But what is freedom? Freedom is the possession of those rights which were denied to the slave, i.e., natural or civil rights.").

The abolitionist congressional efforts crystallized the concept of civil rights, which during Reconstruction became a term of art used to denote rights of citizenship so fundamental that they could not be taken away by discrimination on the basis of race.[136] Of course, the concept of civil rights bore a close connection to equal protection. The concept of protection of the laws primarily denoted the government's obligation to protect certain rights, whereas the concept of civil rights clarified what these rights were.[137]

The Civil Rights Act listed the rights it sought to protect with a declaration in Section 1.[138] Although not a comprehensive list,[139] the declaration explicitly guaranteed the right to the "equal benefit of all laws and proceedings for the security of person,"[140] which bore an obvious connection to the physical protection guaranteed by the state under social contract theory. The declaration also included the right "to sue, be parties, and give evidence,"[141] which resonates with the remedial guarantee of the equal protection of the laws. In fact, this right ensured "access to the judiciary as the normal means of maintaining rights" and "the protection of the courts."[142]

The Act's structure and enforcement mechanisms further elucidate how Congress intended to rely on the federal judiciary to achieve the guarantee of protection. Section 1 declares the rights to be protected, Sections 2 and 3 provide criminal penalties for deprivations of these rights and federal jurisdiction for cases involving these deprivations, and the rest of the Act enhances federal courts' capacity to hear these cases.[143] Thus, the Act emphatically relied on "traditional methods of judicial enforcement" to achieve

136. RUTHERGLEN, *supra* note 21, at 41 (stating that the Act "adopted the traditional understanding of civil rights—the rights among citizens at common law—and gave them a new meaning based on racial equality—basic rights protected against racial discrimination"); Jennifer Mason McAward, Mcculloch *and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769, 1789–90 (2012) (highlighting congressional acts that promoted the Thirteenth Amendment's promise to be free from slavery in all forms, including deprivations of civil rights in Black Codes).

137. Several congressmen during the Act's debates emphasized this parallel understanding of equal protection and civil rights. *See* TENBROEK, *supra* note 21, at 172–80.

138. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 § 1 (1866). The amended version of the Freedmen's Bureau Act contained the same declaration of rights. *See* An Act to Continue in Force and to Amend An Act to Establish a Bureau for the Relief of Freedmen and Refugees, and for Other Purposes, 14 Stat. 173, 176–77 (1866).

139. *See* TENBROEK, *supra* note 21, at 172 ("The Radicals differed as to the length of the list of natural rights but they agreed that it was at least as long as that presented in Section One of the Civil Rights and Section Seven of the Freedmen's Bureau bills.").

140. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 § 1 (1866).

141. *Id.*

142. TENBROEK, *supra* note 21, at 161.

143. RUTHERGLEN, *supra* note 21, at 57.

its goal of equal citizenship,[144] declining to solve the South's problems through military intervention in order to "honor[] the traditional presumption that the primary responsibility for law enforcement lay with the states."[145] However, the burden on the federal judiciary was both "unprecedented" and "unrealistic," not least because Congress believed that the greatest problem for blacks in the South were discriminatory state laws.[146] In truth, their greatest problem was the "rampant violence" and "unequal treatment" of the law enforcement and legal proceedings to which they were subjected.[147] These issues, especially the issue of violence, would only come to the forefront of Congress's attention years later.[148]

Beyond its invaluable insight into civil rights and the role of federal courts, the Act illustrates the manner in which the Reconstruction project would alter the original Constitution's balance of state and federal power. The Act's listed rights are essentially the common law rights that the states were entrusted to protect under the original Constitution: property, contract, and tort.[149] The Act's grant of federal jurisdiction for violations of these rights meant that federal courts could now supplement state courts if they failed to protect quintessential state law rights.[150] Additionally, the Act interfered with states' ability to enforce their criminal laws—laws that are generally regarded as an expression of state sovereignty, well beyond the reach of federal intervention[151]—by declaring "all persons born in the United States . . . subject to like punishment, pains, and penalties."[152] Although Reconstruction's federalist transformation was only beginning, these were clear indications that more radical change was forthcoming.

144. *Id.* (stating that the Act "depende[d] on judicial enforcement to the nearly complete exclusion of alternatives"); FONER, *supra* note 6, at 245.
145. FONER, *supra* note 6, at 245.
146. *Id.*
147. *Id.*
148. *See infra* notes 164–183, and 188–190, and accompanying text.
149. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 1 (1866) ("[All American citizens] shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.").
150. *Id.* § 2.
151. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 43–44 (1971) (holding that federal courts should almost always refrain from enjoining state criminal prosecutions because criminal law enforcement is one of the core powers of state sovereignty).
152. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 1 (1866).

3. The Fourteenth Amendment

Like the Thirteenth Amendment, the Civil Rights Act was vigorously opposed on federalism grounds and as being beyond Congress's legislative power to create enforcement provisions.[153] These objections "proved so powerful that they soon led Congress to adopt some provisions of the act in the Fourteenth Amendment and to pass the act again after the amendment was ratified."[154] Congress ratified the Fourteenth Amendment on July 28, 1868.[155] In relevant part, the amendment declared:

> Section 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. 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.[156]

The text of the amendment, opening with its declaration that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States" suggests that it was enacted to ensure that the civil rights of citizenship protected by the Civil Rights Act of 1866 would be constitutionalized. As discussed above, these rights included the right to court protection and personal security.[157] "[T]he principle of equal civil rights was now so widely accepted . . . and had already been so fully discussed, that . . . the first section inspired relatively little discussion."[158] That Congress sought to constitutionalize civil rights is a point "which historians of the Fourteenth Amendment agree, and, indeed, which the evidence places beyond cavil."[159]

However, the Fourteenth Amendment is not merely civil rights legislation. The language of U.S. Congressman Thaddeus Stevens's rejected

153. RUTHERGLEN, *supra* note 21, at 60–61 (stating that challenges to enforcement provisions were framed as defenses against federal usurpation of State power).
154. *Id.* at 62.
155. Fourteenth Amendment, 15 Stat. 708–11 (1868).
156. U.S. CONST. amend. XIV, § 1.
157. *See supra* notes 140–142 and accompanying text; *see also* Rosenthal, *supra* note 6, at 63; RUTHERGLEN, *supra* note 21, at 70 (stating that the Civil Rights Act is the "predecessor and model of the amendment").
158. FONER, *supra* note 6, at 257.
159. TENBROEK, *supra* note 21, at 183; *see also id.* at 185 (stating that the Fourteenth Amendment would incorporate "the substantive provisions" of the Civil Rights Act's statutory plan); Rosenthal, *supra* note 6, at 63 (explaining the "conventional account" of the Fourteenth Amendment as one where the civil rights secured by the Act would achieve the status of constitutional protection).

proposal, for instance, is important because his proposed version of Section 1 would have been limited to the protection of civil rights.[160] The section would have read: "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."[161] The preference for broader language seemed intentional and intended to capture more than an antidiscrimination civil rights provision.[162] Thus, when introducing what would become the Fourteenth Amendment before the House of Representatives, Congressman Bingham emphasized not only the states' deprivation of rights but also the absence of remedies for those deprivations.[163]

The context in which the Fourteenth Amendment was enacted, one of unspeakable racial violence,[164] also belies the claim that it should be treated as coextensive with the Civil Rights Act of 1866. In the Civil War's aftermath, whites used violence of "staggering proportions" as a way of perpetuating the social status quo that preceded abolition:[165]

> Probably the largest number of violent acts stemmed from disputes arising from black efforts to assert their freedom from control by their former masters. Freedmen were assaulted and murdered for attempting to leave plantations, disputing contract settlements, not laboring in the manner desired by their employers, attempting to buy or rent land, and resisting whippings.[166]

In conjunction with disputes between former slaves and masters, white supremacist "marauders and desperados preyed on blacks . . . whipping, hanging[,] . . . murdering" and driving them from their homes without

160. *See* Rosenthal, *supra* note 6, at 65–66.
161. *See* Journal of the Joint Comm. on Reconstruction, 39th Cong., 1st Sess., S. Doc. No. 711, 63d Cong., 3d Sess. 32 (1915).
162. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60 (1955) ("Thus, section I of the fourteenth amendment, on its face, deals not only with racial discrimination, but also with discrimination whether or not based on color. This cannot have been accidental, since the alternative considered by the Joint Committee, the civil rights formula, did apply only to racial discrimination."); Rosenthal, *supra* note 6, at 65–66.
163. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham) ("No State ever had the right . . . to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, *and that without remedy*." (emphasis added)).
164. *See* FONER, *supra* note 6, at 119.
165. *See id.* at 119–21; Rosenthal, *supra* note 6, at 66.
166. FONER, *supra* note 6, at 121.

provocation.[167] Southern civil society "remained silent" with respect to these atrocities and failed to hold whites accountable for their racial crimes.[168]

Evidently, violence by private actors such as the Ku Klux Klan was the greatest problem confronting blacks in the advent of abolition, and such violence is rightly and commonly underscored within the context of equal protection.[169] But state violence was, equally if not more clearly, a violation of equal protection.[170] For the Reconstruction Congress, the state's raison d'être was to provide the people with the security that the state of nature could not guarantee.[171] Unhinged private violence was deemed anathema to the protection of the laws because it returned the people to the vulnerable state of nature. How much more, then, would the Reconstruction Congress have deemed the protection of the laws violated when the state itself is the source of that violence? A government that unjustifiably batters and kills its citizens exacerbates the problem that, according to Reconstruction-era political theory, it exists to correct.

167. RABLE, *supra* note 2, at 28.

168. FONER, *supra* note 6, at 121; *see also* Rosenthal, *supra* note 6, at 66 ("State and local officials provided no effective redress against this epidemic of violence.").

169. *See, e.g.*, Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 969 (1998) ("[The Equal Protection Clause] appears to have been directed at discriminatory law enforcement, such as the failure of the police in the South to protect blacks from private violence."); Rosenthal, *supra* note 6, at 69 ("[T]he phrase 'equal protection' . . . referr[ed] to the 'protection' that all persons . . . were entitled to receive from the law against private violence."); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 131 (1991) ("[T]he phrase 'equal protection of the law' . . . [meant] that the state must . . . protect each citizen against the threat of both private violence and private violation.").

170. Alfred Avins, *Equal Protection against Unnecessary Police Violence and the Original Understanding of the Fourteenth Amendment: A Comment*, 19 BUFF. L. REV. 599, 600–01 (1970) [hereinafter Avins, *Equal Protection*] ("According to the original understanding of the fourteenth amendment, toleration by state or local authorities of police brutality is a violation of the equal protection clause. Protection against violence was one of the chief aims of the framers."); Michael Stokes Paulsen, *Killing Terri Schiavo*, 22 CONST. COMMENT. 585, 587 (2005) ("The very core of the Equal Protection Clause is that the state may not withdraw from its protection against the private violence of others (and certainly that should equally include the public violence of state actors) certain classes of individuals."); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 821–22 (1993) ("It should be recalled here that the Equal Protection Clause was originally conceived as an effort to counteract the disproportionate subjection of black people to private and public violence.").

171. Obergefell v. Hodges, 135 S. Ct. 2584, 2634 (2015) (Thomas, J., dissenting) (citing JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, § 4 (1689)).

Thus, a case of state-ordered violence had important symbolic significance to the Congress that enacted the Fourteenth Amendment.[172] In 1844, Massachusetts's emissary Samuel Hoard was driven out of South Carolina by force after the state legislature ordered him banished.[173] In introducing a precursor to the Equal Protection Clause, Congressman John Bingham made reference to the Hoard case as a quintessential deprivation of the foundational constitutional principle of "equality . . . before the law" and asserted that his proposed amendment would enforce this principle.[174] The phrase "equality before the law" was often employed synonymously with "equal protection of the laws."[175] As such, the Hoard case is clear evidence of the connection between state violence and the original meaning of equal protection.

History, moreover, suggests that state violence was a significant problem during Reconstruction, and that, on occasion, "[t]he source of . . . violence was . . . the southern governments themselves."[176] A great many Southern governors revived state militias to "quell possible [African American] insurrections."[177] Like their private counterparts, the militias' activities sought to preserve white supremacy, specifically by forcing blacks to enter into labor contracts and by reinstating the patrol system that characterized the slavery era.[178] "Many militia companies marched through the countryside and illegally seized arms, offering the excuse that they were preventing a rebellion . . . . Militiamen engaged in personal vendettas, robbed Negroes of their private property, and shot freedmen who attempted to stop these depredations."[179] Reconstruction-era reports by federal officers contain similar descriptions of state officials "actively participat[ing] in the assaults" against the Freedmen.[180]

172. *See* ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 246–47 (2006); *see also* Avins, *Equal Protection*, *supra* note 170, at 600.
173. TASLITZ, *supra* note 172, at 246–47; Avins, *Equal Protection*, *supra* note 170, at 600.
174. TASLITZ, *supra* note 172, at 247.
175. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 342 (1865–66) (Sen. Cowan) ("[Equality means that if a person] is assailed by one stronger than himself the Government will protect him *to punish the assailant*. It means that if a man owes another money *the Government will provide a means by which the debtor shall be compelled to pay, . . . that if an intruder and trespasser gets upon his land he shall have a remedy to recover it*. That is what I understand by equality before the law." (emphases added)).
176. Rosenthal, *supra* note 6, at 66.
177. RABLE, *supra* note 2, at 27–28.
178. *Id.* at 28.
179. *Id.*
180. Gilles, *supra* note 5, at 55.

As a result, the Thirty-Ninth Congress heard "extensive testimony on conditions in the South, providing vivid documentation of the extent of the violence against newly freed slaves and Union sympathizers."[181] The testimony proceedings powerfully described the aforementioned barbarities, and emphasized "the impossibility of redress or protection except through the United States Army and the Freedmen's Bureau."[182] The Joint Committee tasked with hearing the evidence ultimately recommended the adoption of the Fourteenth Amendment.[183]

Given that the rampant violence and impunity against Freedmen in the South did not cease with the Fourteenth Amendment's enactment, the law enforcement aspect of the protection of the laws was also a driving force of a lot of post–Fourteenth Amendment enforcement legislation. Initially reluctant to push the federalist transformation too far,[184] Congress, driven by the Klan's "campaign of terror," seriously undermined the federalist identity of the original Constitution with enforcement acts in 1870 and 1871.[185] With this wave of legislation, "[t]he old, vexed question whether this was really a national Union or merely a disjointed confederation . . . [was] settled forever."[186]

C. Section 1983 Exemplifies the Federalist Equal Protection Revolution

After ratifying the Fourteenth Amendment, Congress continued its abolitionist crusade enacting the Fifteenth Amendment and reenacting the provisions of the Civil Rights Act of 1866 in the Civil Rights Act of 1870.[187] Even though the 1870 Act authorized some use of federal military force, it became increasingly apparent that Southern terrorism could not be curbed and that further legislation was needed. The violence experienced from 1868 to 1871 "lacks a counterpart either in the American experience or in that of the other Western Hemisphere societies that abolished slavery in the nineteenth century."[188] By 1870, white supremacist organizations, in their attempt to reverse the sociopolitical changes ushered by Reconstruction, became "deeply

181. Rosenthal, *supra* note 6, at 67.
182. JACOBUS TENBROEK, EQUAL UNDER LAW 203–04 (1965).
183. Rosenthal, *supra* note 6, at 67.
184. *See* FONER, *supra* note 6, at 259–60.
185. *See id.* at 454–55.
186. *Id.* at 455.
187. Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1353 (1977).
188. FONER, *supra* note 6, at 425.

entrenched in nearly every Southern state."[189] The president and Republican lawmakers thus requested "additional legislation to curb violence in the South."[190] In response, the Forty-Second Congress passed the Ku Klux Klan Act of 1871.

The Act can be divided into two parts: The first, what is known today as Section 1983, created a private cause of action for state deprivations of federal rights, and the second enacted a prohibition on conspiracies, including private ones, intended to thwart federal activity or deprive persons of certain enumerated rights.[191] The first part of the Act is relevant to this Comment. As enacted in 1871, in relevant part, Section 1 declares the following:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in, any action at law, suit in equity, or other proper proceeding for redress . . . .[192]

The language and structure of Section 1 are clearly modeled on the criminal provisions of the Civil Rights Act of 1866.[193] Like the Civil Rights Act of 1866,[194] Section 1983 exclusively concerned the actions of state officials acting under color of state law.[195] Some tension exists in the historical accounts of Section 1983, which usually highlight the Klan's violence as its principal instigator.[196] It is hard to see how civil liability for state officials would curb

189. *Id.*; *see also* Ava Duvernay, *13th: From Slave to Criminal With One Amendment* (Kandoo Films) (2016).
190. Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light in State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331, 332 (1967) [hereinafter Avins, *Ku Klux Klan*].
191. *See* RUTHERGLEN, *supra* note 21, at 83.
192. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871).
193. RUTHERGLEN, *supra* note 21, at 168; Gilles, *supra* note 5, at 52 ("[T]he 1866 Act . . . served as a textual model for . . . § 1983 . . . .").
194. FONER, *supra* note 6, at 245 ("[T]he Civil Rights Bill was primarily directed against public, not private, acts of injustice.").
195. *Compare* Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 2 (1866) (stating that "any person who, under color of . . . law" deprives persons of any right protected by the act is "guilty of a misdemeanor"), *with* Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871) (holding "any person who[] under color of . . . law" causes a deprivation of federal rights "liable to the party injured").
196. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261, 276–77 (1985) (stating, after a description of the Klan's atrocities and the Klan's centrality to the Civil Rights Act of 1871, that "Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement" in Section 1983); Sarah E. Ricks, *Why the History of Section 1983 Helps to*

private acts of violence. The more plausible explanation is that "the postbellum Congresses[] underst[ood] that pervasive practices by local law enforcement threatened to undermine the ideals of equality and citizenship inherent in the Thirteenth Amendment."[197] Congress believed that state violence and other acts of official lawlessness were a significant problem around the time of Section 1983's enactment, and that these violations did not receive proper remediation in state courts.

Recall also that the Civil Rights Act of 1866 made it a crime to deny any person the rights it enumerated in Section 1 "on account of such person having at any time been held in a condition of slavery or involuntary servitude . . . or by reason of his color or race . . . ."[198] Section 1983 went further, declining to adopt the Act's discriminatory "on account of race" limitation, and instead provided a remedy for all deprivations of "rights, privileges or immunities secured by the Constitution."[199] The removal of the "on account of race" limitation is significant, for it had previously been a stumbling block in the way of federal court enforcement by requiring some form of state discrimination.[200] Its removal is an indication that equal protection is not limited to ensuring equal treatment, but requires full and fair remediation, regardless of discrimination.[201]

Finally, the remedies provided by Section 1983 are themselves proof of the centrality of court remediation to Congress's interpretation of the Equal Protection Clause. These remedies stressed the bounds of federalism beyond anything provided by its 1866 predecessor. Section 1983 provided injured parties the ability to sue both "in an action at law" and "suit in equity."[202] Actions at law and suits in equity represent the great historical divide between law and equity

Understand "Black Lives Matter", A.B.A. (Mar. 20, 2017), https://www.americanbar.org/groups/litigation/committees/civil-rights/articles/2017/why-the-history-of-section-1983-helps-to-understand-black-lives-matter.html [https://perma.cc/TR2B-95AZ] ("The legislators who enacted the Ku Klux Klan Act of which section 1983 was one part 'were concerned about a widespread outbreak of violence, principally fostered by an organization of marauders . . . .'").

197. Gilles, *supra* note 5, at 53.

198. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 2 (1866).

199. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871).

200. FONER, *supra* note 6, at 245 ("Once states enacted color-blind laws, these courts, despite their expanded jurisdiction, would probably find it difficult to prove discrimination by local officials.").

201. *See, e.g.*, Gilles, *supra* note 5, at 58–59 ("[M]any of the [Section 1983] bill's supporters argued that the equal protection clause of the Fourteenth Amendment was not a mere prohibition against discrimination, but a requirement of protective enforcement.").

202. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871).

courts.[203] The reference to law and equity, as well as "other proper proceeding for redress,"[204] indicates the impressive breadth of the remedies provided by the statute. It is no exaggeration to suggest that the remedial powers provided by Section 1983 approximate the general common law powers of state courts to fashion appropriate relief.[205] In an important sense then, Section 1983 made federal courts the functional equivalent of state courts.

The core premise of Section 1983—that federal courts should have the power to vindicate federal rights—further illustrates this point. The statute restructured the manner in which constitutional rights had up until that point been vindicated. "Before the Civil War, suits for damages against government officials were not litigated directly as constitutional torts. Rather, constitutional claims emerged as part of a suit to enforce general common-law rights," which were enforced exclusively in state court.[206] For instance, the celebrated suits that established the principles of the Fourth Amendment were suits for property violations and torts including false imprisonment and torts for personal security.[207] Section 1983 revolutionized this framework through the creation of a federal direct cause of action for constitutional violations.[208]

In conclusion, Section 1983 embodies the general trend that we have identified throughout our study of Reconstruction: that equal protection imposed an affirmative duty on the U.S. government to supply the protection of the laws, including particularly the right to court remediation, even at the expense of the Constitution's federalist character.[209] From a historical perspective, there can be little doubt that "Congress intended Section 1983 to offer victims of official violence a complete legal remedy."[210]

203. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 6 (4th ed. 2010).
204. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871).
205. In contrast to federal courts, which are courts of limited jurisdiction, state courts are common law tribunals with the power to make law and can take on a more active role when solving tort disputes. *See* Blanchard, *supra* note 23, at 263.
206. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 51 (2018) [hereinafter Baude, *Qualified Immunity*].
207. William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1839 (2016).
208. Baude, *Qualified Immunity*, *supra* note 206, at 51–52.
209. *See* Quern v. Jordan, 440 U.S. 332, 342 (1979) ("There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States.").
210. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 506 (1993).

D. Immunities?

Some argue that despite the remedial history of Reconstruction, Congress could not have understood equal protection to require the redress of any and all excessive force violations because the common law immunized state actors from liability in various circumstances, including some excessive force cases. Plaintiffs seeking money damages for a constitutional injury may demand compensation from at least three entities: the state, the municipality that employs the officer, and the officer himself in his individual capacity. As we shall see, while there are reasons to believe that states and municipalities were not subject to damages suits for police violence at common law, the same is not true of individual-capacity suits. The point here is that, consistent with my proposed understanding of equal protection, the common law provided all excessive force victims with at least one avenue for damages relief.

States' liability at common law is the best established of the doctrines. In general, sovereign immunity protected states from suits to which they have not consented.[211] Sovereign immunity was derived from the English belief that "[t]he King cannot be sued without his consent," although in England the axiom was little more than a formality because the Crown's consent was liberally granted.[212] But by "magnificent irony," upon the abolition of the Crown, American courts severely constrained relief against the state by concluding that only the legislature could supply the requisite consent.[213] Although most commentators believe that sovereign immunity is, with the exception of the Eleventh Amendment,[214] without constitutional basis,[215] it is impossible to dispute its pervasiveness as an American rule of procedure.[216]

The doctrine of municipal liability at common law is far more confounding, and a detailed account of its contours is well beyond the scope of this Comment.[217] For our purposes, the key issue is vicarious liability: that is,

211. Hans v. Louisiana, 134 U.S. 1, 17, 20–21 (1890).
212. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1–2 (1963) [hereinafter Jaffe, *Sovereign*].
213. *Id.* at 2.
214. The Eleventh Amendment prohibits federal court suits against states "by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.
215. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 1 (2017) [hereinafter Baude, *Sovereign Immunity*].
216. *See, e.g.*, Jaffe, *Sovereign*, *supra* note 212, at 19 (noting the "powerful resistance of the states to being sued on their debts").
217. For a thorough account of municipal liability at common law, see David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2191 (2005) [hereinafter Achtenberg, *History*].

whether plaintiffs could sue municipalities for any and all excessive force violations occurring within city limits, or whether the common law required a showing of wrongdoing on the municipality's part. The Supreme Court has vigorously debated this question without producing a satisfactory answer.[218] The best reconstruction of the evidence seems to be that, while municipalities were indeed held vicariously liable for their employees' torts, the common law did not consider police officers municipal employees.[219] As a result, excessive force victims could not recover against cities at common law.

Individual-capacity suits, however, were different. Some jurists and commentators contend that police officers were protected by a common law variant of qualified immunity in individual-capacity suits. They insist on a freestanding immunity that shielded officers when sued for any kind of constitutional violation.[220] Alternatively, they argue that the common law recognized an immunity specific to excessive force violations. I address both possibilities.

Far from enjoying a general grant of immunity in the commission of all kinds of torts, the immunities enjoyed by officers at common law were specific to particular causes of action.[221] In fact, "immunity" in this context is a misnomer; common law courts considered an officer's good faith in some constitutional cases because malice was an element of the specific common law tort cause of action.[222] Subjective considerations mattered only to the extent that they were required for success on the merits, and the merits of many common law torts required no showing of malice or flagrancy. Objective considerations, such as the legal reasonableness of the officer's conduct, never

218. *See, e.g.*, City of Oklahoma City v. Tuttle, 471 U.S. 808, 835–38 (1985) (Stevens, J., dissenting) (arguing that municipalities were invariably held liable for employee torts at common law); *id.* at 819 n.5 (plurality opinion) ("[C]ertain rather complicated municipal tort immunities existed at the time § 1983 was enacted . . . .").

219. *See* Achtenberg, *History*, *supra* note 217, at 2227–28.

220. This was, indeed, the Court's view for many years. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967) (holding that the good faith defense is available to officers under Section 1983 false arrest and imprisonment actions, because at common law "a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved"); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (extending the historical good faith defense to all executive actions).

221. Baude, *Qualified Immunity*, *supra* note 206, at 58–59 ("Even to the extent that these [good faith defense] cases could be imported to the cause of action under Section 1983, they generally do not describe a freestanding common-law defense, like state sovereign immunity.").

222. *Id.*

featured in the immunities question.[223] As such, the concept of a freestanding official immunity covering all constitutional torts is foreign to the common law.

The common law instead established a "strict rule of personal official liability"[224] in which "officers of the Crown . . . were . . . 'to be mulcted in damages for their errors of judgment.'"[225] At least as early as Blackstone, courts exonerated officers acting on good faith in criminal cases, but left them "answerable in damages for all the consequences" of their offenses.[226] For instance, in the 1804 case of *Little v. Barreme*,[227] a suit against a commander of a U.S. ship of war, Chief Justice Marshall recognized the common law rule of personal official liability for domestic violations, even though his initial inclination was to exonerate the officer.[228] The widespread acceptance of this rule was such that "[p]rior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts."[229] Predictably then, no constitutional cases contemporary to Section 1983 discuss a good faith defense.[230] The U.S. Supreme Court in fact specifically rejected the good faith defense in a 1915 voting case brought under Section 1983,[231] upholding a lower court decision that deemed officials liable in damages "by the simple act of enforcing a void law to the injury of the plaintiff."[232] Put succinctly, courts at common law and during the Reconstruction era recognized no freestanding qualified immunity for state officials.

223. *See* Anderson v. Creighton, 483 U.S. 635, 645 (1987) (asserting that in replacing the subjective malice standard with the objective reasonableness standard, "the Court completely reformulated qualified immunity along principles not at all embodied in the common law").
224. David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 19 (1972).
225. Baldwin v. City of Estherville, 915 N.W.2d 259, 285 (Iowa 2018) (quoting Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 987 (2014)); Jaffe, *Damages*, *supra* note 92, at 221–22 (describing that common law sheriffs and officers were liable in damages for their illegal conduct, including negligence, regardless of whether they acted in an official capacity).
226. 1 BLACKSTONE, COMMENTARIES 354 n.17. Despite the somewhat ambiguous nature of the quoted phrase, Blackstone's broader discussion establishes that he intended to distinguish between the relevance of good faith in civil and criminal cases. Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 963 (2014).
227. 6 U.S. (2 Cranch) 170 (1804).
228. *Id.* at 179.
229. Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927).
230. Baude, *Qualified Immunity*, *supra* note 206, at 55.
231. *See* Myers v. Anderson, 238 U.S. 368, 378–79 (1915).
232. Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910).

Searching for common law immunities specific to excessive force violations is equally fruitless.[233] The earliest common law battery cases against officers, despite their brevity, show no signs of immunities.[234] They seem to have observed a standard akin to the Fourth Amendment's "reasonableness" inquiry for excessive force.[235] The earliest cases required, for instance, that officers justify their use of force while conducting arrests by showing that the plaintiff resisted, "and so the defendant was compelled to beat him."[236] A Founding-era case from Connecticut, while containing no holding on the merits of the excessive force issue, included a court reporter statement suggesting that the standard was one of "necessary" force.[237]

Nineteenth-century cases offer greater detail. I summarize *Hager v. Danforth*,[238] but there are other nineteenth-century cases treating excessive force claims in the same manner.[239] In *Danforth*, the New York Supreme Court assessed a sheriff's agent's civil liability in damages for battery and assault. Danforth, the agent, went to the plaintiff's residence to serve him a subpoena.[240] Upon entering the house he encountered the plaintiff's wife, Mrs. Hager, who ordered him to leave.[241] Danforth insisted on serving the plaintiff, but Mrs. Hager resisted. Danforth then "choked her and threw her back against the catch of a door."[242] The court determined that "[i]f [Danforth] used more force than was necessary to enable him to accomplish his purpose, to that extent he is liable as a wrongdoer."[243] *Danforth* thus illustrates that the touchstones of the common law's excessive force inquiry were not subjective considerations, but necessity and reasonableness.

There are admittedly at least two nineteenth-century cases—both from the Supreme Court of North Carolina—employing a hybrid standard, assessing

233. For a comprehensive review of the common law's treatment of immunities in excessive force cases, see Wurman, *supra* note 226, at 963–72.
234. *Id.* at 963–64.
235. *See* Graham v. Connor, 490 U.S. 386, 394 (1989) (establishing Fourth Amendment test for excessive force).
236. Wurman, *supra* note 226, at 964 (quoting Truscott v. Carpenter & Man, (1697) 91 Eng. Rep. 1050, 1051 (K.B.), 1 Lord Raymond 229).
237. *Id.* at 966–67 ("Gilbert peremptorily refused to go any other way; his obstinacy obliged the officer to bind him, and compel him to go by force; he used no greater force than was necessary." (quoting Gilbert v. Rider, 1 Kirby 180, 181 (Conn. Super. Ct. 1786))).
238. 20 Barb. 16 (N.Y. Gen. Term 1854).
239. *See* Wurman, *supra* note 226, at 967–72.
240. *Hager*, 20 Barb. at 17.
241. *Id.*
242. *Id.* at 16.
243. *Id.* at 17.

both subjective and objective considerations.[244] These cases exonerated officers for acting on good faith.[245] However, both cases involved criminal prosecutions.[246] Since the common law accorded differential treatment to criminal and civil cases with respect to immunities,[247] the cases are likely not indicative of the common law's treatment of civil battery suits.

Therefore, while the common law restricted suits against the state and did not hold municipalities liable for the torts of their officers, it virtually always applied a strict rule of personal liability in individual-capacity suits. There is no evidence that this rule varied in the context of excessive force. Neither is there evidence to support the notion that the Reconstruction Congress intended to change the common law rule. Consistent with the idea that equal protection requires the redress of every excessive force violation, courts have historically provided excessive force victims the possibility of damages relief through individual-capacity suits.

III. FINDING A CONSTITUTIONALLY REQUIRED REMEDY FOR EXCESSIVE FORCE VICTIMS

The history of Reconstruction strongly suggests that Congress intended to ensure a remedy for victims of state violence through the Fourteenth Amendment. The critical questions to consider now are whether this right to remediation is enshrined in the constitutional text, whether federal courts are fit to enforce this right and, if so, whether excessive force victims have an adequate remedy in state or federal court. Subpart III.A explains that the remedial aspect of the Equal Protection Clause is enshrined in its text, and is fully justiciable and enforceable in federal court. Subpart III.B explains that some excessive force victims lack adequate alternative remedies to a federal cause of action for damages. Under these circumstances, I argue, the Equal Protection Clause creates a self-executing cause of action, enforceable without prior congressional approval.

244. *See* State v. McNinch, 90 N.C. 695 (1884); State v. Stalcup, 24 N.C. (2 Ired.) 50 (1841).

245. *See* Stalcup, 24 N.C. at 52 ("[T]here was an abuse of authority, if . . . the officer did not act honestly in the performance of duty according to his sense of right, but, under the pretext of duty, was gratifying his malice—but if they were not so convinced, he did not abuse his authority.").

246. *See McNinch*, 90 N.C. at 696 (discussing an "indictment for an assault tried at Spring Term, 1883"); *Stalcup*, 24 N.C. at 50 ("The defendants were indicted for an assault and battery on the prosecutor.").

247. *See supra* note 226 and accompanying text (describing Blackstone's views on immunities in criminal and civil cases).

A. Congress Intended to Supply a Remedy for Excessive Force Victims Through the Equal Protection Clause

As previously discussed, conservative judicial methodology holds that federal courts must refrain from issuing remedies unless Congress intended to supply a remedy, as reflected in the legal text, and unless the remedy is judicially administrable.[248] This Comment agrees with this methodology, with the caveat that whether the legal text is judicially administrable should be a context-specific determination.[249] This Comment also assumes that strict textualism, to the extent that it rejects inquiries into legislative intent and broader legal principles, is mistaken.[250] Finally, this Comment assumes that Congress cannot displace a remedy contained within the constitutional text.[251] We assess whether the text of the Equal Protection Clause reflects congressional intent to constitutionalize a remedy for all excessive force violations. We then assess whether the Equal Protection Clause is judicially administrable.

1. The Equal Protection Clause's Text Enshrines a Remedy for All Excessive Force Violations

Much of what we have discussed in our historical segment above is relevant to the question of the relationship between court remedies and the text of the Fourteenth Amendment. The obvious difficulty is that, despite this well-established remedial history, the Equal Protection Clause's text does not appear to "in so many words provide for its enforcement by an award of money damages for the consequences of its violation."[252] It reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[253] The critical issues are whether a denial of redress for violence is a deprivation of "equal protection of the laws," and, if so, whether the clause's term "any person" indicates that any and all excessive force violations must receive redress. Each question is addressed in turn.

248. *See supra* Subpart I.B.
249. *See supra* Subpart I.C.
250. *See supra* Subpart I.C.
251. *See supra* Subpart I.C.
252. *Cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971) (admitting same in the context of the Fourth Amendment).
253. U.S. CONST. amend. XIV, § 1.

a. The Meaning of "Equal Protection of the Laws"

As argued above at length, despite its succinctness, the phrase "equal protection of the laws" has a well-established original meaning.[254] The clause does not, for instance, spell out that the state has an affirmative obligation to prevent violence. Yet at the time of its enactment, everyone—even "the humblest, citizen in the land"—would have taken the clause's words to mean precisely that.[255] The "plainest possible meaning" of those five critical words, "equal protection of the laws," is that laws against violence must be enforced.[256]

If "equal protection of the laws" was originally understood as a law enforcement obligation, it also stood for a duty to redress wrongs in court. The common law recognized the intimate connection between these obligations.[257] More pertinently, Reconstruction-era lawmakers regarded the duties of law enforcement and court redress as two sides of the same coin. Congress's floor debates reflect a "remedial-and-law-enforcement reading of 'protection of the laws.'"[258] Others have thoroughly analyzed these statements.[259] For our purposes, two examples suffice. While debating the Ku Klux Klan Act of 1871, Congressman John Beatty denounced states' law enforcement deficiencies by proclaiming that "humble citizens" had been "whipped and wounded" and therefore denied equal protection.[260] He then promptly asserted that the states lacked the means to remediate wrongs in court, for they failed "to bring the guilty to punishment or afford protection or redress to the outraged and innocent."[261] Like Congressman Beatty, Senator Morton proclaimed that the "universal[] prevalen[ce]" of violence and lawlessness, coupled with the state court system's "notorious[] powerless[ness] to protect life, person, and property," constituted a clear denial of the protection of the laws.[262]

254. *See supra* Part II.
255. *See* CONG. GLOBE, 42d Cong., 1st Sess. 697 (1871) (Sen. Edmunds).
256. Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 129 (1991); *see also* Cass Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 708 & n.15 (2005) ("The very idea of 'equal protection of the laws,' in its oldest and most literal sense, attests to the importance of enforcing the criminal and civil law so as to safeguard the potential victims of private violence.").
257. *See supra* Subpart II.A.
258. Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 C.R. L.J. 219, 248 (2009) [hereinafter Green, *Subsequent Interpretation*].
259. *See id.* at 242–48.
260. CONG. GLOBE, 42d Cong., 1st Sess. 428 (Rep. Beatty).
261. *Id.*
262. *Id.* at 322 (statements of Sen. Morton).

If, as indeed it must,[263] the Equal Protection Clause "cements [a guarantee of law enforcement] within the constitutional text,"[264] the same must be true with regard to an obligation to redress violence in court. The duties of law enforcement and court remediation were for the Reconstruction Congress not two distinct duties, but a single twin obligation encompassed under the words "equal protection of the laws."

b. The Meaning of "Any Person"

Two aspects of the Reconstruction era's wider legal context informs our understanding of whether the Equal Protection Clause's text requires the redress of each and every excessive force violation.[265] First, as argued above at length, the protection of the laws was a central precept of the Anglo-American conception of government, so much so that its denial was considered just cause for revolution.[266] We must assume, therefore, that the Reconstruction Congress took any deprivation of equal protection rights with utmost seriousness. This begins to make sense of, but does not fully explain, the Equal Protection Clause's categorical prohibition of equal protection denials against "any person."

Second, many Reconstruction-era legislators assumed that equal protection was a promise of universal reach, protecting every last member of society. Their universalistic ambitions find their roots in the abolitionist movement, which was "deeply committed to the principle that all human beings had 'inalienable rights,' and that equality was both part of these natural rights and a necessary condition to enjoying them."[267] Thus, abolitionist congressmen grounded their understanding of the equal protection duty to supply redress on Chapter 40 of the Magna Charta,[268] which provides: "To no one will we sell, to no one deny or delay, right or justice."

263. *See* Green, *Pre-Enactment History*, *supra* note 33, at 7–9 (mentioning dozens of commentators holding that the Equal Protection Clause imposes a law enforcement obligation on the state).
264. Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of "Higher" Law*, 3 TEX. REV. L. & POL. 225, 266 (1999).
265. *See* Alexander v. Sandoval, 532 U.S. 275, 288 (2001) (asserting that widely-held assumptions about remedies around the time of enactment can "clarif[y] text").
266. *See supra* note 118 and accompanying text.
267. Lucinda M. Finley, *Putting "Protection" Back in the Equal Protection Clause: Lessons from Nineteenth Century Women's Rights Activists' Understandings of Equality*, 13 TEMP. POL. & CIV. RTS. L. REV. 429, 438 (2004).
268. Green, *Subsequent Interpretation*, *supra* note 258, at 245 ("They equated the duty to supply a remedy with the Magna Charta's duty to supply justice.").

When introducing the Fourteenth Amendment, for instance, Senator Howard asserted that the Equal Protection and Due Process Clauses "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."[269] Senator Howard intimates that the word choice "person" (as opposed to "citizen") is purposeful and reflects the reality that equal protection is a right to which every single individual is entitled. He also follows the "any person" language of the Equal Protection and Due Process Clauses with "whoever he may be," implying that he understood the term "any person" to mean exactly what its plain meaning suggests—that the clauses protect every person, without limitation.[270] Howard continues with a statement that confirms our interpretation: The amendment "establishes equality before the law, and it gives to the humblest, the poorest, and most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[271] Howard believed that everyone, from the least to the greatest, is entitled to equal protection. Paralleling Howard, Congressman Farnsworth advocated for the Equal Protection Clause's enactment by asking: "Is it not the undeniable right of *every subject of the Government* to receive 'equal protection of the laws' *with every other subject*?"[272]

The floor debates of the Ku Klux Klan Act of 1871 proceeded, equally if not more clearly, under the assumption that every person is entitled to the redress guaranteed by equal protection. Congressman Bingham, author of the Equal Protection Clause, proclaimed that the aim of the bill was "the enforcement . . . of the Constitution *on behalf of every individual citizen* of the Republic."[273] That Bingham understood his words to mean that equal protection covered each and every American citizen cannot be reasonably questioned. He believed that the bill would be used to redress any and all constitutional wrongs.[274] Presuming that a single unredressed violent act

269. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (emphasis added).
270. The Equal Protection Clause does limit the scope of its protection to persons within the jurisdiction of a state. *See* U.S. CONST. amend. XIV, § 1. However, this limitation does not arise from the "any person" term.
271. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).
272. *Id.* at 2539 (statement of Rep. Farnsworth) (emphasis added).
273. APPENDIX TO THE CONG. GLOBE, 42d Cong., 1st Sess. 81 (1871) (statement of Rep. Bingham) (emphasis added).
274. Baldwin v. City of Estherville, 915 N.W.2d 259, 289 (Iowa 2018) (stating Bingham believed that the bill adopted "Justice Harlan's one-to-one relationship between rights and remedies").

denied a person of equal protection, Congressman Henry D. McHenry echoed Bingham's embrace of the "one-to-one relationship between rights and remedies,"[275] stating: "How can a government protect a man who has been murdered? It can punish the murderer. It can protect the man who has been assaulted and beaten *only by giving him a pecuniary consideration for the injury done him*."[276] The italicized language, especially McHenry's use of "only," manifests the belief that a state must supply a battered person a damages remedy—otherwise, he is denied "protection." Finally, Senator Edmunds declared that a state's commission of any of the wrongs mentioned in the act "deprive[s] citizens of the United States *and every one else* upon whom they are committed of the protection of the law, unless the criminal who shall commit those offenses is punished and the person who suffers receives . . . redress."[277]

The statements of these congressmen evince that a single unredressed violation of the rights protected by the Equal Protection Clause, including particularly the right against violence, is itself a denial of equal protection proscribed by the clause. Perhaps it can be argued that these statements should not be given much weight, for they represent interpretations of the most ardent abolitionists. Perhaps their views are unrepresentative of those held by the average member of Congress. But even if true, the text of the Equal Protection Clause emphatically sides with the ardent abolitionists. The text's use of "any" in "any person" denotes that the provision applies to every individual without restriction.[278] To the extent that most in Congress did not agree that all equal protection violations require redress, they did a poor job at making it known in the constitutional text.

Absent some other means of redress, therefore, immunities protecting state actors from damages in police violence suits are prohibited by the Equal Protection Clause. Even if, for instance, qualified immunity denies relief to a very small portion of plaintiffs,[279] it may still violate the Equal Protection Clause's textual requirement that "any person" suffering a violent wrong obtain redress. While Congress can "enforce"[280] the Equal Protection Clause, it cannot

275. *Id.*
276. CONG. GLOBE, 42d Cong., 1st Sess. 431 (1871) (statement of Rep. McHenry) (emphasis added).
277. *Id.* at 697 (statement of Sen. Edmunds) (emphasis added).
278. *See Any*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/any [https://perma.cc/G8GU-D7BE] (defining "any" as a term "used to indicate one selected without restriction").
279. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9–10 (2017).
280. U.S. CONST. amend. XIV, § 5.

contradict its plain meaning.[281] Whatever equal protection means, the clause stipulates that it cannot be withheld from anyone. As such, Congress cannot fashion immunities if doing so completely denies relief to any one excessive force victim.

The Equal Protection Clause is one of those rare constitutional provisions that make a remedy not only "an indispensable . . . dimension of the underlying guarantee,"[282] but the guarantee itself.[283] To borrow Justice Scalia's words, a court issuing an equal protection remedy is not "decreeing [the remedy] to be 'implied' by the mere existence of a . . . constitutional prohibition"[284] but complying with the prohibition. "Equal protection of the laws" requires the prevention of acts of violence as well as their proper redress.

2. The Equal Protection Clause Is Justiciable and Judicially Administrable

The letter of the Equal Protection Clause enshrines a remedy for every excessive force violation. But as noted previously, this is not the end of the analysis.[285] Congress can signal its intent for courts to refrain from issuing private remedies by enacting language that is "judicially unadministrable [in] nature."[286] Text is judicially unadministrable when it lacks specificity, rendering courts unable to integrate all its values and fulfill all its goals.[287] We have stipulated that whether a legal text is administrable is context-specific. Assessing a text's administrability entails a consideration of, among other things, the specificity of the remedial command, the complexity of the remedial command, and whether the judiciary is capable of developing manageable

281. *See* City of Boerne v. Flores, 521 U.S. 507 (1997). There is legitimate dispute as to how much power Congress possesses over the substantive dimensions of the Fourteenth Amendment. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822–27 (1999) [hereinafter Amar, *Intratextualism*]. However, I believe it is uncontroversial that the word "enforce" cannot be plausibly interpreted as giving Congress authority to contradict the Fourteenth Amendment's textual meaning.

282. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 24 (1975).

283. *Cf. supra* notes 99–100 and accompanying text (briefly discussing the Suspension Clause and Takings Clause).

284. Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

285. *See supra* Subpart I.C.

286. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384–85 (2015).

287. *Id.* at 1385; Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in the judgment).

standards with which to assess whether remediation has occurred.[288] Due to the overlap between these factors, we assess some of them together.

a. The Nature of the Remedial Command and the Possibility of Judicial Enforcement

The Court has routinely declined to issue private remedies when dealing with broad language that would likely escape judicial enforcement in the statutory context. Presumably, it would apply a similar approach in the constitutional context.[289] *Armstrong v. Exceptional Child*[290] offers a particularly clear example of a judicially unadministrable congressional directive. There, the statute at issue demanded reasonable Medicaid rates. The law required that state Medicaid plans "assure that payments are consistent with efficiency, economy, and quality of care" while "safeguard[ing] against unnecessary utilization of . . . care and services."[291] Justice Breyer, in concurrence, elaborated on the complexities of the rate-setting process. Rate-setting entails "subsidiary determinations of . . . the actual cost of providing quality services, including personnel and total operating expenses; changes in public expectations . . . inflation; a comparison of rates paid in neighboring States for comparable services; and a comparison of any rates paid for comparable services in other public or private capacities."[292] Further, the rate-setting decision is wide reaching, covering reimbursements for millions of doctors serving dozens of millions of patients.[293] The Court determined that the "sheer complexity" of enforcing the "judgment-laden" remedial command, as well as its breadth, counted strongly against private remedies and private enforcement.[294]

Let us consider then, the specificity, complexity, and the judiciary's competence to enforce the Equal Protection Clause's remedial directive.

---

288. *See supra* Subpart I.C.
289. *See Armstrong*, 135 S. Ct. at 1383–84 (assessing, under an originalist and textual methodology, whether the Supremacy Clause creates a cause of action for injunctive relief); *see also* Minneci v. Pollard, 565 U.S. 118, 131 (2012) (Scalia, J., concurring). *But see* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017). For a comparison between the test adopted by this Comment and that adopted by the *Ziglar* Court, see *supra* note 93.
290. 135 S. Ct. 1378 (2015).
291. *Armstrong*, 135 S. Ct. at 1382 (quoting 42 U.S.C. § 1396a(a)(30)(A)).
292. *Id.* at 1388 (Breyer, J., concurring in part and concurring in the judgment).
293. *Id.* at 1388–89.
294. *Id.* at 1385 (majority opinion).

i. Specificity of the Remedial Command

As a "majestic" example of constitutional composition,[295] the language employed by Section 1 of the Fourteenth Amendment could hardly be more general:

> 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.[296]

Section 1 is a "broad statement of principle" that, "in language that transcended race and region," resolved America's greatest national crisis.[297] The Equal Protection Clause thus appears a prototypical judicially unadministrable congressional instruction.

However analyzed, the text of the Equal Protection Clause is broad, and that is one indication that Congress did not envision a self-executing constitutional provision. But we need not give up hope of judicial enforcement for lack of a sufficiently concrete directive. The justiciability inquiry must be "broken down into manageable analytic bites" by identifying the particular rights claimed.[298] This context-specific approach is needed to analyze a provision as diverse as the Equal Protection Clause, whose commands oscillate between the enforceable and unenforceable. Some of its directives entail an appraisal of myriad factors, not unlike those the Court deemed too indeterminate to enforce in *San Antonio Independent School District v. Rodriguez*,[299] while others, such as its prohibition on segregation, require more straightforward determinations of fact.[300]

The equal protection right to redress falls in the latter category. The text of the Equal Protection Clause is clear in this respect, and it demands no less than the full remediation of excessive force violations.[301] Although the inquiry of

295. Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143 (1992).
296. U.S. CONST. amend. XIV, § 1.
297. FONER, *supra* note 6, at 257.
298. *Cf.* Blessing v. Freestone, 520 U.S. 329, 342 (1997) (adopting this context-specific approach in determining whether Title IV-D of the Social Security Act creates judicially enforceable rights).
299. *See* 411 U.S. 1, 40–44 (1973).
300. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").
301. *See supra* Subpart III.A.1(discussing the text of the Equal Protection Clause).

proper remediation lacks rule-like precision, courts have long been able to fashion common sense doctrines to narrow its otherwise broad scope. Historically, for instance, there has been a strong presumption in favor of injunctive relief to redress property violations.[302] In tort, fully realized wrongs are redressed through damages and not injunctions, which require a showing of imminent future harm.[303] It thus seems difficult to equate the adequate remediation standard with the completely amorphous standard involved in, say, setting reasonable Medicaid rates. The remedial command of the Equal Protection Clause is sufficiently precise for judicial enforcement when viewed in light of the extensive repertoire of common law remedy rules.

ii. Complexity of the Remedial Command and Judicially Manageable Standards

Judicial enforcement of some aspects of equal protection can be extremely complex. The federal courts, for instance, have rightfully declined to enforce the law enforcement dimension of the Equal Protection Clause because their limited institutional capacity makes it unlikely that they can "fashion a remedy that will ensure . . . protection is truly equal" in the policing context.[304] Furthermore, the Supreme Court has declined to recognize an equal protection right to equal educational opportunity, at least in part because the "complexity of the problems of financing and managing a statewide public school system" makes it impossible to gauge educational opportunity through a practicable judicial standard.[305]

A remedial Equal Protection Clause could involve similar complications. When enacting the Fourteenth Amendment and enforcing equal protection through the Ku Klux Klan Act of 1871, Congress engaged in extensive legislative findings on the conditions of violence and court process in the

302. *See* David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 547–48 (1986) ("The majority of the early writ of prohibition cases in the common law courts concerned wrongs to property or property right."). The connection between property and injunctions is such that injunctions are sometimes called "property rules." *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (describing the property rule).

303. *E.g.*, Jeffries & Rutherglen, *supra* note 92, at 1395; Jaffe, *Damages*, *supra* note 92, at 214 ("[T]here are injuries (accrued losses) arising out of official misconduct or the ultra vires exercise of power for which prospective declaration affords inadequate relief.").

304. Rosenthal, *supra* note 6, at 75–76.

305. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42–43 (1973).

South.[306] Congress appointed a Joint Committee on Reconstruction, tasked with the specific duty of investigating the state of the South.[307] Prior to adopting the Fourteenth Amendment, the committee's fact-finding process carried on for months in which it "heard extensive testimony . . . providing vivid documentation of the extent of the violence against newly freed slaves and Union sympathizers."[308] The Joint Committee on Reconstruction likewise recommended the bill that became the Ku Klux Klan Act of 1871 following what was, in all likelihood, an equally thorough investigation prompted by President Grant.[309]

Federal court enforcement of the remedial dimensions of equal protection could thus entail an estimation of each state's compliance with the clause's remedial dictates. Like the Joint Committee on Reconstruction, federal courts would have to determine the prevalence of excessive force violations within a state, as well as the rate at which these receive adequate remediation. They would have to establish what constitutes adequate remediation as well as an acceptable quantum of remediation of police brutality incidents. This in turn requires the delineation of the proper balance between the vindication of individual rights and the need to preserve vigorous enforcement of the law.[310] Therefore, it appears that enforcing a remedial equal protection mandate raises a host of complexities that can only be resolved through the "expertise, uniformity, [and] wide-spread consultation"[311] of a legislature.

This argument hinges on the assumption that the Equal Protection Clause was enacted to set a general standard of compliance. If the clause is merely a "yardstick" to measure the states' "*systemwide* performance"[312] in law enforcement and court redress, then any assessment of compliance—judicial or otherwise—necessitates investigations such as those of the Joint Committee on

306. *See* Rosenthal, *supra* note 6, at 67–68; *see also generally* Avins, *Ku Klux Klan*, *supra* note 190.
307. Rosenthal, *supra* note 6, at 67.
308. *Id.* & n.66 (describing the "volume of testimony" found in the pages of the Joint Committee Report as "enormous").
309. Avins, *Ku Klux Klan*, *supra* note 190, at 332. The floor debates give us every reason to believe that the bill was the result of a similarly arduous fact-finding task. *See, e.g.*, *id.* at 332–37 (describing the House of Representative's extensive discussion on Southern conditions).
310. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).
311. Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in the judgment).
312. Blessing v. Freestone, 520 U.S. 329, 343 (1997).

Reconstruction. This kind of inquiry is, by and large, beyond the competence of the courts.[313]

But the Equal Protection Clause by itself cannot explain the Reconstruction Congress's appraisal of the states' systematic deficiencies in equal protection. As argued above at some length, the clause constitutionalized a right that abolitionist congressmen believed belonged to all individual persons.[314] The text of the clause reflects the individualized nature of the entitlement, for it secures the right of "any person" to equal protection.[315] This word choice is hardly coincidental. The Bill of Rights sometimes reserves for "the People" what appear to be collective rights and powers, as those protected by the Ninth and Tenth Amendments.[316] The drafters of the Equal Protection Clause therefore had at their disposition a core term of American legal parlance—"the People"—to denote equal protection's collective nature. Yet, they employed "person," a term inexorably associated with individual rights.[317]

In no way, then, is a comprehensive appraisal of an entire state's compliance with equal protection required for the Equal Protection Clause's judicial enforcement. The judiciary enforces the clause by ensuring that each individual receives redress for violence. Congress on the other hand, pursuant to its enforcement power,[318] makes certain that systemwide deficiencies in state compliance with equal protection do not reach levels that strip the government of its legitimacy and establish just cause for revolution.[319]

Since the Equal Protection Clause enshrines an individual right to court remediation, the inquiry for the courts is quintessentially judicial in nature.[320]

313. Courts are possibly competent to make smaller assessments of systematic compliance, such as when confronting municipal liability claims against particular police departments. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (holding city liable in damages on the basis of exhaustive findings of fact suggesting that "[t]he City acted with deliberate indifference toward the [police department's] practice of making unconstitutional stops and conducting unconstitutional frisks").

314. *See supra* Subpart III.A.1.b (arguing that the Equal Protection Clause supplies an individual right for redress in all excessive force cases).

315. *See* U.S. CONST. amend. XIV, § 1.

316. *See The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078, 1078 (2013).

317. *See, e.g.*, U.S. CONST. amend. V (using the word "person" when conferring manifestly individual rights such as the right to due process and grand jury proceedings, and against self-incrimination, double jeopardy).

318. *See id.* § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

319. This delineation of judicial and congressional enforcement of the Equal Protection Clause reflects the common law belief that some aspects of equal protection are justiciable and others are not. *See infra* notes 349–353 and accompanying text.

320. *See* Bandes, *supra* note 27, at 304.

Courts in the Anglo-American legal tradition have long been in the business of redressing wrongs against individuals. The individual liberty interests protected by the common law in fact originated in judicial proceedings, such that "it is difficult even to understand legal rights apart from the institutions set up to enforce them."[321] At least in our tradition's infancy, a directive would obtain the status of law only if it were justiciable. Remediation, in turn, was deemed an "essential attribute" of justiciability.[322] There is therefore a long pedigree of tribunals protecting individual liberty interests through judicial redress.[323]

The judiciary's competence in this field is further manifested by the specific liberty interest at issue in equal protection—bodily integrity. The common law rectified violations of bodily harm through trespass for battery suits.[324] Such suits are one of the most ancient and widespread civil causes of action.[325] As such, courts have been historically amenable to redressing personal injuries. As one commentator argued long ago, courts' historical preference for particular suits is hardly coincidental.[326] The preference likely reflects the reality that the right is more susceptible to judicial remediation than others and more deserving of compensation, that its violation is "more easily evaluated," and that the interests of defendants are insufficiently countervailing.[327]

This is certainly the case for battery. It is hard to imagine a more straightforward remediation scenario. A person that has been physically hurt goes to court seeking a remedy to "return [her] to her rightful position—the position she would have been in but for the . . . wrong."[328] Upon a successful

321. Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1137 (1989); Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1, 11–12 (1968).

322. *See* Nichol, *supra* note 321, at 1137 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

323. *Cf.* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1388–89 (2015) (Breyer, J., concurring in part and concurring in the judgment) (declining to permit federal court injunction against state officers who violated or planned to violate the Medicaid Act because "[t]he history of ratemaking demonstrates that administrative agencies are far better suited to th[e rate-setting] task than judges").

324. RESTATEMENT (SECOND) OF TORTS § 13 cmt. a (AM. LAW INST. 1965); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 517 (2003) ("A writ of trespass for battery . . . alleged the wrong of one citizen beating or inappropriately touching another.").

325. *See* THEODORE FRANK THOMAS PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 460 (1956) (describing the prevalence of battery actions in the thirteenth century).

326. Jaffe, *Damages*, *supra* note 92, at 225.

327. *Id.*

328. Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 725 (2001) (describing the general purpose of a remedy).

showing on the merits, the jury determines actual damages and compensates the plaintiff for pain and suffering, disabilities, medical expenses, and lost wages.[329] The plaintiff could also ask for other remedies, although this is unlikely because damages are the conventional remedy for "invasion[s] of personal interests in liberty."[330] Every determination involved in a typical battery case falls squarely within the judiciary's capabilities.

Of course, the constitutional context incorporates the additional complexity of a state actor defendant. Defendants in excessive force cases are officers of the law, and the imposition of certain remedies can have systemic, negative consequences on policing.[331] But large-scale concerns did not historically prevent courts from fashioning strict standards of liability against state actors sued for excessive force.[332] The common law's wholesale authorization of individual-capacity suits against law enforcement reflects the fact that the danger of far-reaching repercussions is at its lowest when, as in police brutality, legal claims challenge no "more than standard 'law enforcement operations.'"[333]

Common law courts have, therefore, always been capable of assessing whether a personal injury like battery has received proper redress. Even in cases involving state official defendants, these tribunals have almost always granted damages to vindicate such wrongs. The federal judiciary is capable of emulating, although not exactly replicating, the common law courts in administering the remedial mandate of the Equal Protection Clause. In enforcing equal protection, the federal courts should adopt the following standard: They should "make the kind of remedial determination that is appropriate for a common-law tribunal,"[334] but, recognizing their limited jurisdiction, be forced to substitute the traditional damages remedy for any

329. 8 Am. Jur. Pl. & Pr. Forms Damages § 3; *id.* § 31.50. It is certainly possible, and Congress may choose, to remedy excessive force violations through a remedy other than damages. This discussion is simply an illustration of a run-of-the-mill battery scenario.

330. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971). This common-sense preference for damages in battery suits was shared by the Reconstruction Congress. *See* CONG. GLOBE, 42d Cong., 1st Sess. 431 (1871) (statement of Rep. McHenry) ("[A Government] can protect the man who has been assaulted and beaten only by giving him a pecuniary consideration for the injury done him.").

331. *E.g.*, Forrester v. White, 484 U.S. 219, 223 (1988); Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

332. *See supra* Subpart II.D (discussing the common law rule of no immunities for individual-capacity suits).

333. *Cf.* Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990)) (declining to extend *Bivens* remedy when doing so "requir[ed] an inquiry into sensitive issues of national security").

334. *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 378 (1983).

adequate alternative remedy provided by Congress. The standard may at first blush appear weak-kneed; it urges federal courts to assume common law powers while concurrently encourages them to defer to Congress. But if the Equal Protection Clause compels the redress of all excessive force violations, the federal courts must ensure that each successful plaintiff obtains a remedy. If Congress has supplied the remedy, the federal judiciary should stay its hand. But if Congress has not, equal protection requires that it assume common law powers to make up for the deficiency.

b. Other Factors Suggesting Nonjusticiability: Congress's Enforcement Power

We turn to consider any remaining factors indicating that the Equal Protection Clause is not justiciable. Some commentators argue that the Fourteenth Amendment's structure establishes the Equal Protection Clause's nonjusticiable nature. Section 5 gives Congress the power to enforce the Fourteenth Amendment through "appropriate legislation."[335] Under this view, Congress intended enforcement legislation to set the "outer bounds" for the judiciary's administration of equal protection.[336] An equal protection claim is nonjusticiable unless and until Congress enacts a pertinent enforcement statute.[337] Section 1983 appears to lend support to this proposition.[338] If the Equal Protection Clause clearly supplied a self-executing remedy, for instance, an enforcement statute providing comprehensive relief seems superfluous and duplicative.[339]

There are various historical problems with this view. The most fundamental of these is that the authors of the Fourteenth Amendment rejected a proposed version that would have clearly made equal protection rights nonjusticiable.[340] The rejected proposal read: "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

335. U.S. CONST. amend. XIV, § 5.
336. Andrew T. Hyman, *The Substantive Role of Congress Under the Equal Protection Clause*, 42 S.U. L. REV. 79, 82 (2014).
337. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 221–29 (1977) (arguing that section 5 dictates the sole method of enforcing the Fourteenth Amendment); Hyman, *supra* note 316, at 82–83 ("Purportedly unequal state laws are not supposed to be struck down under the EPC unless . . . courts can find pertinent equality principles within current federal statutes . . . .").
338. Bandes, *supra* note 27, at 356.
339. *Id.*
340. *See* FONER, *supra* note 6, at 258.

all persons in the several States equal protection in the rights of life, liberty, and property."[341] The proposal limited itself to a declaration about Congress's power. Had this proposal been accepted, the Fourteenth Amendment would have been nothing more than a channel for civil rights legislation. However, a justiciable Fourteenth Amendment granted Republicans, who controlled Congress at this time and favored the Freedmen's interests, the advantage of securing enforcement of certain rights regardless of later changes in political tides.[342] In the political context of Reconstruction, this was important, for a mere Democratic majority in the House or Senate would have rendered the amendment "a dead letter."[343] Thus, the Fourteenth Amendment's eventual enumeration of rights in Section 1 was purposeful. It reflects Congress's intent to utilize the federal courts for enforcement of certain rights that were independent of political will.[344]

Furthermore, the Enforcement Clause can hardly be taken as evidence of congressional intent to set the "outer bounds" of judicial enforcement. Section 2 of the Thirteenth Amendment is illuminating.[345] It contains identical language to the Fourteenth Amendment's fifth section, and the two provisions were drafted three years apart by congresses addressing the same issues and sharing virtually the same goals. If enforcement clauses were somehow thought to strip the judiciary's ability to enforce rights, courts must have declined to directly enforce the Thirteenth Amendment's proscription of slavery. But in one of the earliest Thirteenth Amendment cases, the Supreme Court explicitly rejected this possibility: "This amendment . . . is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force it abolished slavery, and established universal freedom."[346] The Court in fact declared, although in passing, that the Fourteenth Amendment was like the Thirteenth in this regard.[347]

The inclusion of an enforcement clause cannot, equally, be taken as evidence of nonjusticiability in the Fourteenth Amendment itself. For instance, it is hard to insist that the due process rights secured by Section 1 cannot be

341. CONG. GLOBE, 39th Cong., 1st Sess. 806 (1866).
342. *See* FONER, *supra* note 6, at 258.
343. *Id.*
344. *Id.*
345. *See* Amar, *Intratextualism*, *supra* note 281, at 822–27 (analyzing the history of the Thirteenth Amendment's second section to determine the scope of Congress's enforcement power under the Fourteenth Amendment's fifth section).
346. Civil Rights Cases, 109 U.S. 3, 20 (1883).
347. *Id.*

enforced in the absence of enforcement legislation. At its heart, due process of law is and always has been about curbing executive power to take away life, liberty, and property through long established judicial procedures.[348] Due process is therefore fundamentally judicial in nature, and has never depended on a legislature. It would be unthinkable that Congress intended that federal courts refrain from ensuring adequate process unless and until legislation was passed. Insisting on the nonjusticiability of the Equal Protection Clause thus creates an odd asymmetry whereby some of the rights enshrined in Section 1 are justiciable, and others are not.

Far and away the best method to make sense of Section 5's relationship to the Equal Protection Clause is to hearken back to the common law. At common law, equal protection encompassed three different meanings.[349] Equal protection stood for the general protection of all laws of natural liberty, as well as the more specific law enforcement and remedial guarantees that were prominently featured in Reconstruction debates.[350] Of these, only the remedial guarantee was judicially enforceable.[351] The other two aspects of protection were "moral or political commitment[s] . . . rather than . . . legally binding dut[ies]."[352] Thus, the state's failure to meet equal protection in the law enforcement or natural liberty sense was remedied through "politics or revolution, not law."[353] The Fourteenth Amendment's structure suggests that the Reconstruction Congress had a similar compartmentalization in mind. Section 5 expands Congress's power to make laws, and as such its concerns are political in nature. By contrast, the Equal Protection Clause's emphasis on "any person" denotes the individualized, and hence judicial, nature of the Section 1 guarantee. Under Congress's compartmentalized scheme, Congress would prevent large-scale deficiencies in equal protection through its Section 5 powers. It would preserve the United States's legitimacy and prevent just cause for revolution. Meanwhile, courts were to directly apply Section 1 and vindicate its individualized mandate.

Why, then, did Congress enact an apparently duplicative Section 1983? After explaining the self-executing nature of the Thirteenth Amendment in the

348. *See* § 2.4(b) The original meaning of due process, 1 Crim. Proc. § 2.4(b) (4th ed.) (stating that the Magna Charta's analog of due process of law, the law of the land principle, "impos[es] . . . a 'separation of powers concept against unlicensed executive action.'").
349. Hamburger, *supra* note 33, 1836–37.
350. *Id.*; For a discussion of the Reconstruction debates on the executive and remedial failures of the South, see *supra* Subparts II.B–II.C.
351. Hamburger, *supra* note 33, at 1837.
352. *Id.*
353. *Id.*

quote discussed above, the Supreme Court offered the enlightening clarification that despite the amendment's justiciability "legislation may [still] be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit."[354] Section 1983 thus served to expand the "mode of redress" of the Equal Protection Clause. Although the expansive remedies provided by Section 1983 are essentially the same as those that the Equal Protection Clause, in my view, provides,[355] Section 1983 also gave civil rights plaintiffs "the same rights of appeal, review upon error, and other remedies" provided in the Civil Rights Act of 1866.[356] Section 1983 thus refined equal protection actions, giving them powers of appeal and review that the Equal Protection Clause itself did not provide.

Additionally, Section 1983 was far broader than the Equal Protection Clause or any other clause in Section 1 of the Fourteenth Amendment. Section 1983 remedied not only excessive force violations, but also "deprivation[s] of any rights, privileges, or immunities secured by the Constitution of the United States."[357] Although this phrase brings to mind the Privileges or Immunities Clause, that clause makes no mention of "rights," and limits its protection to American citizens.[358] Section 1983, by contrast, protected every single constitutional right, even those considered neither a privilege nor an immunity of citizenship, and even those held by persons as opposed to citizens. Section 1983, therefore, does not merely codify Section 1 of the Fourteenth Amendment into statute but was intended to be more expansive and invasive of states' rights.

Finally, Section 1983 could have served a declarative function during Reconstruction. Southern courts were slow to redress acts of violence after the Equal Protection Clause's enactment.[359] Section 1983 could have been intended to end Southern courts' narrow interpretations of the Equal Protection Clause and given them no excuse but to enforce its true meaning.

354. Civil Rights Cases, 109 U.S. 3, 20 (1883).
355. I believe that the Equal Protection Clause vests federal courts with the broad common law powers of state courts, but only in the narrow context of excessive force actions. *See supra* note 334 and accompanying text.
356. *See* Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871).
357. *Id.*
358. *See* 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 . . . .").
359. *See* Gilles, *supra* note 5, at 56 (stating that "courts refused to entertain civil rights cases brought by the freedmen against their white persecutors").

3. Summary

To conclude, the text of the Equal Protection Clause establishes two things. First, a denial of court redress for violence deprives a person of "equal protection of the laws." Second, in light of the abolitionist belief that all persons are entitled to equal protection, the clause's use of "any person" establishes that every single excessive force violation must receive redress. Moreover, despite the Equal Protection Clause's breadth, its remedial directive is sufficiently concrete when considered against the backdrop of common law remedies rules. Additionally, courts are capable of enforcing the equal protection remedial directive, as they have long been in the business of redressing battery violations.

Finally, Congress's enforcement power is no indication of the Equal Protection Clause's nonjusticiability. Congress's explicit rejection of a proposal that would have rendered the clause nonjusticiable, coupled with the Thirteenth Amendment's self-executing nature, the history of equal protection at common law, and the fact that Section 1983 is not duplicative, points to the fact that Congress intended a self-executing Equal Protection Clause.

B. Excessive Force Victims Lack an Adequate Alternative Remedy

We proceed to consider the availability and adequacy of alternatives to a damages suit arising under the Equal Protection Clause. The existence of adequate alternative remedies is one way in which Congress can signal its desire that the federal courts refrain from fashioning new remedies.[360] An adequate alternative remedy is one that provides "roughly similar compensation to victims of violations."[361] We first consider alternative sources of damages, and then consider potential non-damages remedies, such as criminal prosecutions and injunctions. Echoing the conclusions of several other commentators, this Subpart reinforces the notion that under current doctrine, damages are the only effective and feasible court remedy for victims of police violence.[362] However,

360. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017); Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

361. Minneci v. Pollard, 565 U.S. 118, 130 (2012); *Wilkie*, 551 U.S. at 553–54 (finding that available administrative and judicial proceedings were an insufficient remedy for plaintiff's tortious injuries to counsel against extending *Bivens*).

362. Cover, *supra* note 15, at 1776 (stating that, in the context of excessive force, "[a]lternative judicial remedies" to economic relief "are likely to prove lacking"); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 135–36 (2009) ("Under current law, the most (nearly) plausible redress for excessive force is the award of money damages."); Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-

no source of damages ensures relief for all meritorious excessive force plaintiffs, raising the need for an implied constitutional remedy.

1. Damages Recovery Under Section 1983

Currently, plaintiffs must sue under Section 1983 to obtain federal relief from police violence.[363] Section 1983 does not permit suits against the state[364] but allows suits against officers in their individual capacity as well as municipalities.[365] I assess both.

a. Section 1983 Suits Against Officers in Their Individual Capacity

Section 1983 suits against officers in their individual capacity are subject to modern qualified immunity.[366] Officers assert qualified immunity as a defense after being sued.[367] The defense will be successful, even if the officer committed an egregious constitutional violation, so long as the officer acted in an objectively reasonable manner.[368] An officer acts reasonably if he does not violate clearly established law "of which a reasonable person would have known."[369] If there is "not already a case where a court has held that an officer's identical or near-identical conduct rose to the level of a constitutional violation," the officer will avoid liability.[370]

---

court-protects-bad-cops.html ("Taken together, [the qualified immunity] rulings have a powerful effect. They mean that the officer who shot Michael Brown and the City of Ferguson will most likely never be held accountable in court.").

363. Federal common law supplies the analogue cause of action for violations committed by federal officers. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The Court uses precisely the same qualified immunity scheme in *Bivens* actions. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999).

364. *See* Quern v. Jordan, 440 U.S. 332, 342 (1979) (holding that Congress failed to express unequivocal intent under Section 1983 to abrogate state sovereign immunity).

365. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978).

366. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (declaring that public officers are sometimes immune from damages liability).

367. *See* Stacey Hawks Felkner, *Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers*, 59 AM. JURIS. PROOF OF FACTS 3D 291, 300 (2017) ("Qualified immunity is a judicially created affirmative defense which protects state or local officials sued in their individual capacity under 42 U.S.C.A. § 1983.").

368. *See Harlow*, 457 U.S. at 817–18 (changing the qualified immunity standard into an objective one). The Court has stated that this standard immunizes "all but the plainly incompetent or those who knowingly violate the law." Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

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

370. Sam Wright, *Want to Fight Police Misconduct? Reform Qualified Immunity*, ABOVE THE LAW (Nov. 3, 2015, 2:05 PM), https://abovethelaw.com/2015/11/want-to-fight-police-misconduct-reform-qualified-immunity [https://perma.cc/Q63N-BPJX]; *see also* Amanda

Qualified immunity imposes significant constraints on excessive force plaintiffs' ability to recover. As a substantive matter, the constitutional standard for unwarranted police force is assessed under the reasonableness clause of the Fourth Amendment, which provides a nearly identical test to qualified immunity: "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them."[371] The Fourth Amendment reasonableness inquiry "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" and "be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[372] Thus, excessive force claims are subject to two reasonableness tests, both of which embody policy considerations that make them favorable to police officers.[373]

The Court's demand that clearly established law not be defined at a "high level of generality" is especially burdensome when, as in excessive force cases, holdings are extremely fact-specific.[374] "Far from being precise and rule-like, th[e] standard for excessive force is inevitably judgmental and irreducibly vague. It follows that qualified immunity covers a correspondingly broad range of borderline misconduct."[375] The result is that if the officer is presented with one novel circumstance, even a seemingly inconsequential one, he will almost invariably be insulated from liability.[376] This approach has left police weapons

K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 680 (2004) ("[T]he court will deny qualified immunity only when prior case law has articulated plaintiff's constitutional rights in a nearly identical factual situation.").

371. Graham v. Connor, 490 U.S. 386, 397 (1989).

372. *Id.* at 396–97.

373. Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 119 (2009) [hereinafter Hassel, *Excessive*] (stating that qualified immunity and Fourth Amendment law has created a "nearly insurmountable barrier to recovery" and until that "is somehow relieved, civil actions based on the Fourth Amendment will not effectively deter police violence"); *see also* Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMP. L. REV. 61, 105–09 (1989) (arguing that the double reasonableness standard is unjustly tilted in favor of defendants).

374. *See* Scott v. Harris, 550 U.S. 372, 383 (2007) (refusing to adopt an easy-to-apply legal test in the context of a Fourth Amendment excessive force claim, because "in the end we must still slosh our way through the factbound morass of 'reasonableness'"); Young v. Cty. of Los Angeles, 655 F.3d 1156, 1163 (9th Cir. 2011) ("The facts and circumstances of every excessive force case will vary widely." (quoting Forrester v. City of San Diego, 25 F.3d 804, 806 n.2 (9th Cir. 1994))).

375. Jeffries & Rutherglen, *supra* note 92, at 1417.

376. *See* White v. Pauly, 137 S. Ct. 548, 552 (2017) (stating that defendant Officer White's late arrival on the scene should, by itself, have triggered qualified immunity).

and tactics as widespread as pressure point techniques and Tasers without a clearly established legal corpus.[377]

It is almost general knowledge that these unfair doctrinal features constitute a nearly insurmountable bar to recovery in excessive force violations in practice.[378] Although empirical results about the actual rate of dismissals based on qualified immunity are more nuanced and complex than commonly believed,[379] what matters for our purposes is that modern qualified immunity unquestionably leaves some victims of police brutality without damages relief. Since the text and history of the Equal Protection Clause warrant the remediation of all meritorious excessive force claims,[380] we proceed to assess whether those denied damages under Section 1983 individual-capacity suits are entitled to a different form of redress.

377. *See, e.g.*, Jennings v. Pare, No. 03-572-T, 2005 WL 2043945, (D.R.I. Aug. 24, 2005) (granting judgment as a matter of law in favor of officer because, although he broke plaintiff Jenning's ankle, "Jennings [was] unable to cite any case . . . that holds use of the ankle turn control technique, or any similar technique, in arresting an uncooperative subject to be unconstitutional"), *vacated sub nom.* Jennings v. Jones, 479 F.3d 110 (1st Cir. 2007), *reh'g granted*, 499 F.3d 1, 1 (1st Cir. 2007), *and vacated*, 499 F.3d 2, 20–21 (1st Cir. 2007); Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285, 325 (2012) (discussing the "unclear and different laws across the jurisdictions" with regard to Tasers, which "result[s] in an effective bar on recovery for individuals whose Fourth Amendment rights were violated because the law will not, and cannot, be clearly established").

378. Chemerinsky, *supra* note 362 ("When the police kill or injure innocent people, the victims rarely have recourse."); Hassel, *Excessive*, *supra* note 373, at 118 (declaring that the double-reasonableness standard "has created a nearly impenetrable defense to excessive force claims"); Wurman, *supra* note 226, at 939 (stating that "excessive force . . . plaintiffs often cannot recover" due to the qualified immunity barrier); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1523 (2016) ("Combining qualified immunity with indemnification creates a world in which plaintiffs rarely win cases against police officers . . . ."); Marshall Heins II, Note, *Absolutely Qualified: Supreme Court Transforms the Doctrine of Qualified Immunity Into Absolute Immunity for Police Officers*, 8 HLRE: OFF THE RECORD 1, 2–3 (2017).

379. *Compare* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 692 (2009) (finding qualified immunity was granted in federal courts between seventy and eighty percent of the time), *with* Schwartz, *supra* note 279, 9–10 (finding, on the basis of "the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation," that district court cases were dismissed on qualified immunity grounds only 3.9 percent of the time).

380. *See supra* Subpart III.A.1.b (arguing for the right of "any person" victimized by state violence to court redress under the Equal Protection Clause); *see also supra* Subpart II.D (arguing that no common law immunities protected officers sued for excessive force).

b. Section 1983 Suits Against Municipalities

Section 1983 also creates a cause of action for money suits against municipalities,[381] and qualified immunity does not protect them.[382] If successful, municipal liability suits for damages—also called *Monell* claims[383]—remediate the injuries of excessive force victims. Nevertheless, there are important reasons to reject the notion that *Monell* claims are an adequate and feasible alternative remedy in the vast majority of cases. Municipal liability cannot redress all or even most excessive force violations occurring within city limits. Section 1983 does not allow plaintiffs to recover against municipalities on a theory of vicarious liability—that is, merely because one of its employees committed a constitutional tort.[384] To recover, the municipality itself must have somehow been at fault, usually through the issuance of "official municipal policy of some nature [that] caused a constitutional tort."[385] Constitutional violations are a necessary, but never sufficient, cause for remediation.[386] At the most fundamental level, municipal liability cannot be a substitute for an equal protection damages remedy, for it leaves all constitutional deprivations occurring without municipal fault unredressed.

Moreover, the prospect of success of *Monell* claims is exceedingly low,[387] and pursuing them "entail[s] a substantial involvement of time, effort, and resources."[388] The Supreme Court has created a confusing labyrinth of

381. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978).
382. *See* Owen v. City of Indep., 445 U.S. 622 (1980).
383. *Monell* is the case that established municipal liability under Section 1983.
384. *Monell*, 436 U.S. at 691.
385. *Id.* at 690–91.
386. *See* Collins v. City of Harker Heights, 503 U.S. 115, 120 (1992).
387. *See, e.g.*, Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 916–17 (2015); Cover, *supra* note 15, at 1776–77 ("Litigants also have had little success in bringing § 1983 claims against municipalities given the Court's near-impossible standards for proving abuse was caused by policy, custom or widespread practices, or failure to train or discipline."); Matthew J. Cron, Arash Jahanian, Qusair Mohamedbhai, & Siddhartha H. Rathod, *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. U. L. REV. 583, 604 (2014) ("[The Court's] high standards have resulted in a scarcity of successful municipal liability claims in the federal courts.").
388. G. Flint Taylor, *Municipal Liability Litigation in Police Misconduct Cases from* Monroe *to* Praprotnik *and Beyond*, 19 CUMB. L. REV. 447, 464 (1989); Colbert, *supra* note 210, at 569 ("In a lot of my cases, I do not raise *Monell* because it is not what my client wants. When *Monell* is included, the case becomes a much more complicated litigation, which may not advance the client's desire.").

requirements for claims against cities.[389] Plaintiffs must prove that "the municipality had an unconstitutional policy or custom of unconstitutional violations, or that it failed to properly hire, train, or supervise its employees."[390] Additionally, there must be a showing that the city's "inadequacy [was] so obvious and so likely to result in constitutional harm that [its] policymakers were 'deliberately indifferent.'"[391] By way of comparison, the standard for granting punitive damages against employers in the private context is more lenient.[392]

Predictably, it is common knowledge among civil rights attorneys that the Court's perplexing requirements result in the dismissal of the "vast majority" of municipal liability claims at the summary judgment or directed verdict stage.[393] A study conducted by three civil rights attorneys on municipal liability cases reaching the Tenth Circuit Court of Appeals found that, out of thirty-six studied cases, only four were successful at the district court, and of these only two were affirmed on appeal.[394] Further cementing the notion that successful *Monell* claims are exceedingly scarce, available insurance records on lawsuits against sheriffs and counties from 1974 to 1984 suggest that the creation of municipal liability claims in 1978 did not significantly expand plaintiffs' rate of success for money damages against cities, even if the frequency of excessive and deadly force suits did increase.[395]

Monell claims, in summary, are not a feasible alternative remedy to damages relief under the Equal Protection Clause. *Monell* claims cannot and

389. *See* Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 430 (1997) (Breyer, J., dissenting) (stating that the Court's policy or custom requirement "has produced a highly complex body of interpretive law"); Blum, *supra* note 387, at 914.

390. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 896 (2014) [hereinafter Schwartz, *Police Indemnification*].

391. Aaron Belzer & Nancy Leong, *Enforcing Rights*, 62 UCLA L. REV. 306, 330 (2015); Schwartz, *Police Indemnification*, *supra* note 390, at 896.

392. Achtenberg, *History*, *supra* note 217, at 2191.

393. *See* Report or Affidavit of Patrick Thomas Driscoll, Jr., Esq., Fox v. Admiral Ins. Co., No. 12 CV 8740, 2016 WL 6476461 (N.D.Ill. Nov. 2, 2016), ECF No. 181-1, 2014 WL 12713177; Blum, *supra* note 387, at 916–17; Cover, *supra* note 15, at 1776–77; Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 SUFFOLK U. L. REV. 831, 850 (2005) (reporting that interviews "indicated that city attorneys were concerned that acknowledging respondent superior liability may open the door to many weaker claims against the city").

394. Cron, Jahanian & Mohamedbhai, *supra* note 387, at 610 n.8.

395. Candace McCoy, How Civil Rights Lawsuits Have Improved American Policing 171, 175–77 (unpublished manuscript) https://web.law.columbia.edu/sites/default/files/microsites/contract-economic-organization/files/McCoy_Impact%20of%20Police%20Litigation%202011.pdf [https://perma.cc/3LQU-9D8F].

were never intended to provide relief for every act of officer misconduct. And the stringent requirements on plaintiffs make successful *Monell* claims a rarity.

2. State Tort Law

States have traditionally been in charge of remediating injuries, including constitutional violations. In fact, before the creation of Section 1983, "constitutional claims emerged as part of a suit to enforce general common-law rights."[396] States still protect many of these common law rights, and they often supply their own remedies through legislation or case law. The common law equivalent of an excessive force claim is a trespass for battery suit, which redressed bodily hurts.[397] The vast majority of states, if not all, still protect this common law equivalent of excessive force, giving police violence plaintiffs the option of pursuing damages under both federal and state law.[398] For excessive force victims, damages granted pursuant to state battery statutes is an effective alternative form of relief.[399]

We turn then to consider the availability of state damages remedies against police violence. Before doing so, however, a few things must be clarified. First, the conclusions of this Subpart are based on a survey of state qualified immunity law in the American South. The survey's findings may be found in the Appendix below.[400] The purpose of the survey is not to provide a sense of state qualified immunity law nationwide. The American South is presumably a region that by and large favors the interests of police over that of plaintiffs, and the same may not be true of other regions. The intent of the survey, rather, is to show that there are many, many states that deny relief to meritorious police violence plaintiffs in individual-capacity suits. Second, the

396. Baude, *Qualified Immunity*, *supra* note 206, at 51.
397. RESTATEMENT (SECOND) OF TORTS § 13 cmt. a (1965).
398. *See* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2479 (2015) (Scalia, J., dissenting) ("There is an immense body of state statutory and common law under which individuals abused by state officials can seek relief."); 15 AM. JUR. TRIALS 555 (Originally published in 1968) ("[T]here may be two remedies available to counsel in any given case involving police misconduct—one under federal law, and one under state law. They are not mutually exclusive.").
399. *See* Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 73–74 (2001); *cf.* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 393–94 (1971) (implying a cause of action for damages under the Fourth Amendment because, inter alia, state remedies for Fourth Amendment search and seizure violations were "inconsistent or even hostile").
400. *See infra* App. 1.

survey does not consider other potential sources of damages under state law.[401] It does not survey waivers of state sovereign immunity, which permit plaintiffs to sue and recover directly from the state. It also fails to consider the possibility of state municipal liability suits. For purposes of this Comment, it suffices to note that "[s]tate waivers of the Eleventh Amendment are rare"[402] and that, in some circumstances, states must waive their sovereign immunity for a state municipal liability suit to proceed.[403] Having addressed these caveats, we proceed to discuss the survey's findings.

Commentators assume that many states have adopted qualified immunity under their own laws.[404] My survey reveals that, in the American South at least, these commentators are generally correct. The kinds of immunities supplied by Southern state statutes may be divided into four kinds: (1) an objective immunity that mirrors the federal qualified immunity standard; (2) a subjective good faith immunity; (3) a gross negligence immunity; and (4) hybrid standards. There is, moreover, a group of states that provide no immunity, for their battery standards mirror the constitutional Fourth Amendment standard.[405] This group eliminates the "double reasonableness" problem of Section 1983 excessive force claims[406] and only considers whether the plaintiff has established an excessive force violation under the Constitution. These states thus provide all victims of state violence "roughly similar compensation"[407] to an equal protection damages remedy.

Plaintiffs bringing actions in the rest of South, however, are not so fortunate. States adopting the subjective good faith standard place peculiarly onerous burdens on plaintiffs. Good faith immunity commonly requires a showing of "malicious intention to cause . . . [an] injury."[408] Prying into the minds of "officials performing discretionary functions" entails extensive

401. For an evaluation of non-damages remedies at state and federal law, see *infra* Subpart III.B.3.

402. STEVEN H. STEINGLASS, 1 SECTION 1983 LITIGATION IN STATE COURTS § 15:19; *see also* Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 558 n.451 (1984) (same).

403. *See* Suits against state entities, 3 Emp. Discrim. Coord. Analysis of Federal Law § 118:10 ("A state entity that, by the nature of its responsibilities, functions as an arm or 'alter ego' of the state is protected by the state's Eleventh Amendment immunity.").

404. *See, e.g.*, Wurman, *supra* note 226, at 939.

405. As described above, the Fourth Amendment and common law rules imposed liability if the seizure was objectively unreasonable. These standards recognized "no immunities beyond those the jury was willing to grant." *Id.* at 972; *see supra* Subpart II.D.

406. *See supra* notes 371–373 and accompanying text.

407. Minneci v. Pollard, 565 U.S. 118, 130 (2012).

408. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (describing the former federal good faith standard).

litigation costs and time-consuming discovery,[409] and plaintiffs are usually not capable of assessing whether they have a viable chance of success until after filing the lawsuit.[410] Gross negligence raises comparable problems of subjective intent, for it generally requires "an element either of malice or willfulness" in the defendant's actions.[411] Finally, state laws employing immunities that mirror federal qualified immunity present, evidently, the same problems as individual-capacity suits under Section 1983.[412]

Of the sixteen studied states, only Mississippi, Oklahoma, North Carolina, South Carolina, and Virginia provide their officers no immunity.[413] This means that only five of sixteen state battery statutes comply with the demands of equal protection in police violence cases. Over two-thirds of Southern plaintiffs have their recovery constrained by some form of state qualified immunity. Absent alternative non-damages remedies or a waiver of sovereign immunity, these numerous meritorious plaintiffs are denied relief under state battery law and Section 1983.

3. Non-Damages Remedies

a. Criminal Prosecutions

The Reconstruction Congress seemed to assume that criminal prosecutions and convictions for deprivation of rights could restore the protection of the laws in the absence of civil redress.[414] We consider, then, the feasibility of this remedy for victims of police violence. A claim of excessive force may give rise to criminal battery[415] and, if death occurs, murder or manslaughter.[416] Evidently, not every instance of excessive force leads to an

409. *Id.* at 816–17.
410. *Id.*; *see also* Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring) (asserting that a good faith immunity determination "almost invariably results" in discovery related to official deliberations and officials' "intimate thought processes and communications").
411. *E.g.*, Phelps v. Louisville Water Co., 103 S.W.3d 46, 51–52 (Ky. 2003).
412. For a description of these problems, see *supra* Subpart III.B.1.a.
413. *See infra* App. 1.
414. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 428 (Rep. Beatty) (stating that the states denied the equal protection of the laws when they "made no successful effort to bring the guilty to punishment *or* afford . . . redress to the outraged and innocent" (emphasis added)).
415. Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452, 455 (1987).
416. Ian Simpson, *Prosecution of U.S. Police for Killings Surges to Highest in Decade*, REUTERS (Oct. 26, 2015, 4:08 AM), https://www.reuters.com/article/us-usa-police/prosecution-of-u-s-police-for-killings-surges-to-highest-in-decade-idUSKCN0SK17L20151026 [https://perma.cc/6VNV-95MA].

investigation, much less a conviction. Prosecutors have limited resources and have discretion over which cases to pursue. For numerous reasons, including the close ties between local prosecutors and police officers in everyday tasks, police are almost never prosecuted.[417] Moreover, prosecutions that do take place are but a "small fraction" of the homicides committed by American police.[418] Despite estimates suggesting that police killed nearly 1000 people in 2015, only a dozen officers faced murder or manslaughter charges.[419]

Prosecutions also face a dearth of evidence due to police departments' policy of concealing the identities of officers involved in shootings, as well as an unofficial "code of silence" that prevents officers from inculpating colleagues.[420] To make matters worse, police departments are sometimes tasked with investigating their own officers, generating significant conflicts of interest.[421] Thus, of the approximately 796 victims shot dead by police in 2015,[422] 210 were killed by police officers that as of April 2016 "ha[d] not been publicly identified by their departments."[423]

Finally, even cases mustering strong evidence will likely confront juries exhibiting partiality towards officers.[424] There is a general tendency among juries to find police testimony more credible than that of a civilian,[425] and be sympathetic to officers facing potentially dangerous circumstances.[426] "From all that appears, [juries] bend over backwards to exonerate officers from liability for seriously flawed decisions, perhaps because of fear that they could not do better and still do their job."[427] Studies have found that police officers are acquitted at a rate that doubles that of an average member of the public.[428] They

417. John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803 (2000); *Police Shootings and Brutality in the US: 9 Things You Should Know*, VOX (May 6, 2017, 1:23 AM), https://www.vox.com/cards/police-brutality-shootings-us/police-use-of-force-convictions [https://perma.cc/9LWZ-6FAZ] ("Police are very rarely prosecuted for shootings.").
418. Simpson, *supra* note 416.
419. *Id.*
420. *Id.*; Jeffries & Rutherglen, *supra* note 92, at 1418; John Sullivan et al., *In Fatal Shootings by Police, 1 in 5 Officers' Names Go Undisclosed*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-ea10-11e5-b0fd-073d5930a7b7_story.html?noredirect=on&utm_term=.608eeb4c3726 [https://perma.cc/6VTF-FLSF].
421. Jacobi, *supra* note 417, at 803.
422. Simpson, *supra* note 416.
423. Sullivan et al., *supra* note 420.
424. VOX, *supra* note 417.
425. *See* Carbado, *supra* note 378, at 36.
426. Jeffries & Rutherglen, *supra* note 92, at 1418.
427. *Id.*
428. VOX, *supra* note 417.

are convicted a mere 33 percent of the time.[429] For murder and manslaughter charges, the likelihood of conviction for police is an even lower one-in-five chance.[430]

In summary, due to their close connection with local prosecutors, police officers are rarely charged with crimes. When they are, prosecutors looking for evidence face an uphill battle against codes of silence and policies that protect unlawful police actors. And if prosecutors are capable of sorting through these hurdles, juries rarely convict. Criminal prosecutions, put simply, cannot provide redress to the vast majority of state violence victims. If the equal protection rights of these injured parties are to be respected, remedies must be found outside the criminal justice system.

b. Injunctions

Section 1983 permits plaintiffs to request equitable remedies such as injunctive relief against police departments.[431] State courts can also issue injunctions pursuant to their equitable powers.[432] The Supreme Court has clarified that, when it comes to correcting "large-scale policy decisions," injunctive relief is an alternative and preferable remedy to money damages.[433] However, the Court has also said that injunctive relief is inadequate when the wrong has been fully realized and has already ceased—that is, when injunctive relief would be moot.[434] Although the Court spoke in the context of federal law, the point is rather straightforward and applies, equally, to injunctive relief in state court. A plaintiff that has already been brutalized by police does not profit from a court order directing officers to refrain from similar conduct in the future. His past injuries go without redress. Thus, "[s]ome risk of future violation is necessary for prospective relief."[435]

429. *Id.*
430. Simpson, *supra* note 416.
431. *See* 42 U.S.C. § 1983 (2012) (allowing "suit[s] in equity").
432. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." (citing Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956))).
433. Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017).
434. *See* Davis v. Passman, 442 U.S. 228, 245 (1979) ("[S]ince respondent is no longer a Congressman, equitable relief in the form of reinstatement would be unavailing.").
435. Jeffries & Rutherglen, *supra* note 92, at 1395; *Ziglar*, 137 S. Ct. at 1858 ("[I]f equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations."); Jaffe, *Damages*, *supra* note 92, at 214 ("[T]here are injuries

Injunctive relief's inability to redress fully realized wrongs is reflected in elemental equity doctrine. It is black letter law that injunctions will only issue if the plaintiff has suffered or will suffer irreparable harm.[436] "Irreparable harm is that which cannot be compensated adequately with money damages."[437] There is fundamental misunderstanding, therefore, in the idea that injunctions can properly redress excessive force violations. Like other liberty interests, bodily integrity has long been protected in actions for damages.[438]

Federal constitutional and equity doctrine further illustrate the point. It almost invariably precludes individuals from obtaining injunctions against police for excessive force violations.[439] For one thing, both private and public parties generally lack Article III standing to sue police for injunctive relief.[440] Standing demands that the plaintiff demonstrate a high likelihood of injury of the kind that he seeks to enjoin.[441] In cities, this is essentially impossible to prove.[442] The requirement recognizes no exceptions, and even suffering the most inhumane forms of police abuse will not suffice to fulfill it.[443]

The substantive requirements for obtaining a federal injunction are similarly harsh. They require a showing of "likelihood of substantial and immediate irreparable injury."[444] The test resembles that of municipal liability. There must be an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [municipal officials]—express or otherwise—showing their authorization or

(accrued losses) arising out of official misconduct or the ultra vires exercise of power for which prospective declaration affords inadequate relief.").

436. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must . . . demonstrate . . . [he] has suffered an irreparable injury.").

437. David McGowan, *Irreparable Harm*, 14 LEWIS & CLARK L. REV. 577, 578 (2010).

438. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

439. Cover, *supra* note 15, at 1776; Achtenberg, *History*, *supra* note 217, at 2191 (describing a "*de facto* prohibition on injunctions in police abuse cases").

440. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1346–47 (2015).

441. City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

442. *Id.* at 106 (stating that the plaintiff lacked standing unless he made the "incredible assertion" that all police in Los Angeles always used chokeholds in encounters with citizens, or that he showed the city authorized such a practice).

443. *See id.* at 113 (Marshall, J., dissenting) ("[N]o one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy."); Ronald T. Gerwatowski, *Standing and Injunctions: The Demise of Public Law Litigation and Other Effects of* Lyons, 25 B.C. L. REV. 765, 767–68 (1984) (describing how the *Lyons* decision has significantly impacted lower courts' willingness to grant standing to sue for an injunction).

444. *Lyons*, 461 U.S. at 111 (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

approval of such misconduct."[445] The plan or policy condition makes it quite difficult for plaintiffs to prevail when, as in excessive force cases, they sue on the basis of officers' ordinary, street-level misconduct.[446]

Injunctive relief is an improper remedy to vindicate wholly realized wrongs. As a consequence, basic equity law, as well as federal law, always precludes police brutality victims from obtaining injunctions against departments.

4. Summary

Excessive force plaintiffs do not have an adequate alternative remedy to an equal protection constitutional damages claim. Injunctive relief, by its forward-looking nature, cannot redress fully realized wrongs. Criminal prosecutions are a rarity, and criminal convictions even more so. As a result, of traditional remedies, only damages are capable of redressing the injuries of those battered by police. However, neither Section 1983 nor state tort law provides remedies to all injured victims. Section 1983 municipal liability suits are intrinsically incapable of redressing every excessive force violation, because municipalities are not vicariously liable for officers' actions. Section 1983 individual-capacity suits exonerate officers through qualified immunity when they act in an objectively reasonable manner. Finally, a great number of states have similarly immunized officers when they act with diminished fault.

CONCLUSION

American police unjustifiably injure and kill hundreds, if not thousands, every year. The solutions to the problem of state violence lie primarily in politics. But according to the legislators that addressed the most egregious wave of violence this country has ever seen, the judiciary has a significant role to play in ameliorating the issue. That role is the vindication of individual rights through judicial means. Consistent with this understanding, the Equal Protection Clause imposes a duty on courts to ensure the adequacy of state violence victims' relief.

Adequate redress for police violence plaintiffs cannot be taken for granted today. There is a concerning tendency among state courts to constrain constitutional remedies.[447] While this kind of restraint may be fitting for

445. Rizzo v. Goode, 423 U.S. 362, 371 (1976).
446. Jeffries & Rutherglen, *supra* note 92, at 1416.
447. *See supra* Subpart III.B.2.

tribunals of limited jurisdiction like the federal courts, it is utterly inappropriate for state courts, whose exercise of broad remedial powers is essential for the proper functioning of our federalist system. Even if this Comment ultimately fails to prove that the Equal Protection Clause vests the federal judiciary with powers commonly reserved for state courts, the extensive remedial history of the clause, its text, and its judicially administrable remedial instruction should prompt state judiciaries to rectify deficiencies in the redress available to victims of state violence.

I submit, however, that the Reconstruction Congress deemed court redress so paramount that it partially reworked the federalist system as to ensure police violence victims' adequate relief. As such, in the many states that currently deny remedies to its battered citizens, the Equal Protection Clause compels a federal cause of action for damages.

APPENDIX

Qualified Immunity Status	States
Federal qualified immunity standard	Arkansas,[448] Louisiana,[449] and Texas[450]
No immunity	Mississippi,[451] North Carolina,[452] South Carolina,[453] Virginia,[454] and Oklahoma[455]
Subjective good faith standard	Florida,[456] Maryland,[457] Georgia,[458] and Tennessee[459]

448. Martin v. Hallum, 2010 Ark. App. 193, 9, 374 S.W.3d 152, 158 (2010) ("[Q]ualified immunity under Arkansas law is akin to its federal counterpart and rests on the same principles as federal law.").
449. Davis v. E. Baton Rouge Sheriff's Office, No. CV 08-00708-BAJ-EWD, 2016 WL 2347893, at *6 (M.D. La. May 2, 2016) ("Plaintiff's assault and battery claims [under Louisiana law] mirror his § 1983 excessive force claim . . . .").
450. Meadours v. Ermel, 483 F.3d 417, 424 (5th Cir. 2007) ("The 'good faith' test applied by Texas law in determining official immunity is evaluated under substantially the same standard used for qualified immunity determinations in § 1983 actions.").
451. Hunter v. Town of Edwards, 871 F. Supp. 2d 558, 565–67 & n.4 (S.D. Miss. 2012) (making an excessive force determination in assessing whether plaintiff's Mississippi Tort Claims Act action against police officer should be dismissed).
452. Johnson v. City of Fayetteville, 91 F. Supp. 3d 775, 815 (E.D.N.C. 2015) ("North Carolina law recognizes that an assault and battery by a law enforcement office may provide the basis for a civil action for damages so long as the plaintiff can show that the force used was excessive under the circumstances.").
453. Roberts v. City of Forest Acres, 902 F. Supp. 662, 671 n.2 (D.S.C. 1995) ("Of course, if a police officer uses excessive force, or 'force greater than is reasonably necessary under the circumstances,' he may be liable for assault or battery." (quoting Moody v. Ferguson, 732 F. Supp. 627, 632 (D.S.C. 1989))).
454. Ware v. James City Cty., 652 F. Supp. 2d 693, 712 (E.D. Va. 2009) ("A plaintiff's assault or battery claim can be defeated by a legal justification for the act, . . . and Virginia law recognizes that police officers are legally justified in using reasonable force to execute their lawful duties." (citation omitted)).
455. Oklahoma's standard is a technically a "necessary force" standard. Hensley v. City of Nichols Hills, No. 17-CV-827-R, 2017 WL 4683971, at *6 (W.D. Okla. Oct. 18, 2017) (stating that officers are immune under state battery when they employ force "necessarily committed . . . in the performance of [a] legal duty" (inner quotations omitted) (quoting Thetford v. Hoehner, No. 05-CV-0405-CVE-FHM, 2006 WL 964754, at *6 (N.D. Okla. Apr. 12, 2006))). However, the standard in practice resembles the Fourth Amendment excessive force standard. *See id.*
456. Fla. Stat. § 768.28(9)(a) ("No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort . . . unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.").
457. Thacker v. City of Hyattsville, 135 Md. App. 268, 290 (2000).

Qualified Immunity Status	States
Hybrid between subjective and objective good faith	West Virginia,[460] Alabama,[461] and Kentucky[462]
Hybrid between subjective good faith and gross and wanton negligence	Delaware[463]

458. Hoyt v. Cooks, 672 F.3d 972, 981 (11th Cir. 2012) ("Under the Constitution of Georgia, [officers] will have official immunity for their discretionary acts unless they acted with 'actual malice.'").
459. Rogers v. Gooding, 84 F. App'x 473, 477 (6th Cir. 2003) ("Tennessee authority . . . applies qualified or good faith immunity to state law torts.").
460. Pegg v. Herrnberger, 845 F.3d 112, 121 (4th Cir. 2017) ("Under West Virginia law, a police officer is not entitled to qualified immunity when his or her conduct results in a clearly established constitutional or statutory violation. A police officer is also not entitled to qualified immunity under West Virginia law if his or her conduct is 'fraudulent, malicious, or otherwise oppressive.'").
461. Brown v. City of Huntsville, 608 F.3d 724, 740–41 (11th Cir. 2010) (stating that state qualified immunity "bars suit against law enforcement officers effecting arrests, except to the extent the officer acted willfully, maliciously, fraudulently, in bad faith, beyond his legal authority, or under a mistaken interpretation of law, or if the Constitution or laws of the United States or Alabama require otherwise").
462. Yanero v. Davis, 65 S.W.3d 510, 523 (Ky. 2001) ("[I]n the context of qualified official immunity, 'bad faith' can be predicated on . . . objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive.").
463. Jordan v. Bellinger, No. Civ. A. 98-230-GMS, 2000 WL 1456297, at *1 (D. Del. Sept. 21, 2000) (declaring Delaware law immunizes officers "if their conduct (i) arose out of and in connection with the performance of an official duty which involved the exercise of discretion, (ii) was undertaken in good faith and with the belief that the public interest would best be served by their actions and (iii) was performed without gross or wanton negligence").