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The Unconstitutional Police

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The Unconstitutional Police

*Brandon Hasbrouck*¹

Most Fourth Amendment cases arise under a basic fact pattern. Police decide to do something—say, stop and frisk a suspect. They find some crime—say, a gun or drugs—they arrest the suspect, and the suspect is subsequently charged with a crime. The suspect—who is all too often Black—becomes a defendant and challenges the police officers’ initial decision as unconstitutional under the Fourth Amendment. The defendant seeks to suppress the evidence against them or perhaps to recover damages for serious injuries under 42 U.S.C. § 1983. The courts subsequently constitutionalize the police officers’ initial decision with little or no scrutiny. Effectively, the standards that the police—consciously or unconsciously—adopted for their own behavior are enshrined in law. Unlike legislators—constitutionally sanctioned lawmakers—police officers are usually unelected and are insulated from any democratic process. Yet police officers regularly make law by this process, fed in large part by racially discriminatory policing. No legislature could so precisely target Black people without running afoul of the Equal Protection Clause; yet police officers are protected by their status. No other executive could make laws absent an intelligible principle without violating the separation of powers. And no other executive could violate individual rights without prior legislative or judicial authorization and call it due process. This Article examines the methods of police lawmaking and its fundamental problems. Then, it explores why police lawmaking is unconstitutional on equal protection, separation of powers, and due process grounds. Police should not be able to act as both lawmaker and enforcer, let alone carry out both roles at the expense of Black people—our lives, humanity, and rights. The courts have a duty to rein in unconstitutional police lawmaking. Considering the courts’ historical indifference to Black Americans’ problems and deference to police, police lawmaking is likely to continue—unless the courts come to see that Black lives matter.

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“[T]he courthouse lawn was a very deliberate place for lynchings to happen because the lynchers, [often law enforcement], and the crowd meant to be saying something about who was in control of justice.”²

– Sherrilyn Ifill

INTRODUCTION

In March 2001, Coweta County, Georgia Deputy Timothy Scott ended a high-speed chase by ramming Victor Harris’s car from behind, causing it to crash and rendering Harris quadriplegic.³ Harris, a Black man, sued Scott, a white police officer, accusing him of using excessive force that resulted in an unreasonable seizure under the Fourth Amendment.⁴ The U.S. District Court for the Northern District of Georgia denied Scott’s motion for summary judgment based on qualified immunity, which the U.S. Court of Appeals for the Eleventh Circuit affirmed, concluding that existing law was clear enough to give Scott fair notice that such an action was unlawful.⁵ The Supreme Court reversed in *Scott v. Harris*, concluding that Scott did not violate the Fourth Amendment.⁶

² Josie Duffy Rice & Darnell Moore, *Justice in America Episode 25: Conversation with Sherrilyn Ifill*, THE APPEAL (Mar. 25, 2020), <https://theappeal.org/justice-in-america-episode-25-conversation-with-sherrilyn-ifill/>, archived at <https://perma.cc/3TJE-KGSX>.

³ *Scott v. Harris*, 550 U.S. 372, 374–75 (2007).

⁴ *Id.* at 375–76.

⁵ *Id.* at 376.

⁶ *Id.* at 381, 386.

In some respects, Victor Harris was among the more fortunate victims of American police departments' penchant for excessive force against Black people. He lived. Freddie Gray was not so lucky; yet prosecutors and juries determined that none of the officers who killed him had committed a crime.⁷ Nor were Timothy Russell and Malissa Williams; yet none of the officers who shot at them 137 times were convicted of any crime.⁸ Rekia Boyd was fatally shot by an off-duty police officer with an unregistered gun, yet the officer was acquitted of involuntary manslaughter in a directed verdict.⁹ Derek Chauvin's recent conviction for murdering George Floyd remains exceedingly rare.¹⁰ The lesson that police encounters can turn deadly is imparted to Black children at a young age.¹¹

This Blue-on-Black lawmaking pattern, as exemplified in *Scott v. Harris*, is all too common: police officers act along the fringes of the law—even in seeming violation of it—and find their actions constitutionalized by the courts.¹² Courts' near uniform post-hoc approval of police actions in the

⁷ Press Release, Dep't of Just., Federal Officials Decline Prosecution in the Death of Freddie Gray (Sept. 12, 2017), <https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray>, archived at <https://perma.cc/E5KJ-JWKG> (declining to bring federal criminal civil rights charges against any of the officers involved in Gray's death).

⁸ Evan MacDonald, *Ohio Supreme Court affirms appeals court can't hear East Cleveland's petition over trial of Cleveland police supervisor from '137 shots' case*, CLEVELAND.COM (May 28, 2020), <https://www.cleveland.com/court-justice/2020/05/ohio-supreme-court-affirms-appeals-court-cant-hear-east-clevelands-petition-over-trial-of-cleveland-police-supervisor-from-137-shots-case.html>, archived at <https://perma.cc/R6YQ-5SBV> (discussing a potentially terminal ruling in the dereliction of duty trial—the final charge pending after all other officers and supervisors were cleared—in the shooting of Timothy Russell and Malissa Williams).

⁹ Associated Press, *Chicago Police Detective Cleared of Manslaughter in Shooting Death*, N.Y. TIMES (Apr. 20, 2015), https://www.nytimes.com/2015/04/21/us/chicago-police-detective-cleared-of-manslaughter-in-shooting-death.html?_r=0, archived at <https://perma.cc/PT6W-VN5P> (“Judge Dennis J. Porter of Cook County Circuit Court, in a directed verdict, ruled that the state had failed to prove recklessness on the part of the officer, Dante Servin, 46, in the March 2012 shooting death of Rekia Boyd, 22.”).

¹⁰ See John Eligon et al., *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html>, archived at <https://perma.cc/X6HL-J9TV> (“Among the state's star witnesses was the chief of the Minneapolis police, Medaria Arradondo, who said Mr. Chauvin had 'absolutely' violated training, ethics and several department policies when he kept Mr. Floyd pinned facedown on the street long after he stopped breathing. It is exceedingly rare for a chief to testify against an officer from his own department.”); German Lopez, *Why Is It So Hard to Prosecute Police? It Starts with the Investigation*, VOX (Apr. 21, 2021), <https://www.vox.com/2021/4/21/22394134/derek-chauvin-george-floyd-trial-guilty-verdict-police-prosecution-investigation>, archived at <https://perma.cc/D4QX-L36T> (“But Stinson [commenting on the rate at which police killings are even prosecuted] said he's skeptical that the correct rate of justified [sic] shootings is really less than 2 percent: 'In my opinion, it's got to be that more of the fatal shootings are unjustified.'”).

¹¹ See *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”).

¹² See Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitu-*

field—if they perform any review whatsoever—makes every police officer a de facto lawmaker, which encourages abuses and erodes the legitimacy of policing.¹³ More than that, this Article will demonstrate that the courts' elevation of police officers to lawmakers is unconstitutional. Police lawmaking violates the Equal Protection Clause by encoding into law racially discriminatory police practices. As a form of lawmaking in the executive branch without a valid delegation from the legislative branch, and an invalid delegation of interpretation powers to executive agents and agencies, it violates separation of powers principles. Police lawmaking further violates separation of powers principles through courts' abdication of their role of judicial review of executive actions. Finally, police lawmaking violates the Due Process Clause by allowing executive officials to deprive people of life, liberty, and property without first receiving authorization from the legislature or prior judicial decisions.

The consequences of police lawmaking are dire, and all the more so when judicial deference to police becomes so complete as to subsume the powers and duties of the judiciary within police departments. This is no abstract hypothetical, though—it is precisely what happened in Ferguson.¹⁴ As enforcement priorities skewed toward revenue generation,¹⁵ the municipal court's docket exploded far beyond any meaningful review.¹⁶ Unsurprisingly, this rubber-stamp attitude carried over to internal investigations within the police department.¹⁷ The courts abdicated their duty to review racist policing,

tional Law, 104 CORNELL L. REV. 1281, 1289 (2019) (“Rather than conceptualizing excessive force as a deviation from externally imposed (i.e., ‘top-down’) constitutional rules that shape departmental policies on use of force, legal endogeneity theory characterizes the *structural and doctrinal pathways* through which the administrative preferences of police departments can become *constitutional law* in a ‘bottom-up’ fashion.”).

¹³ See Justin S. Conroy, “*Show Me Your Papers*”: *Race and Street Encounters*, 19 NAT'L BLACK L.J. 149, 166 (2005) (“The absence of bright line rules concerning the gray areas of reasonable suspicion allow for abuse of police authority.”); Ayesha Bell Hardaway, *The Supreme Court and the Illegitimacy of Lawless Fourth Amendment Policing*, 100 B.U. L. REV. 1193, 1198 (2020) (“However, the Court’s general reluctance to push for or examine law enforcement rulemaking in stop, search, and arrest cases calls into doubt the utility and value of such rules.”); see also Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 183 (2008) (emphasizing the lack of review that most decisions of police and prosecutors regarding citizens enjoy); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1168 (2004) (“For the half of all arrests that result in immediate disposition, either because prosecution is denied or more commonly, the case is resolved with a plea at arraignment, any police misconduct is rendered irrelevant and goes unreviewed.”).

¹⁴ See U.S. DEP'T. OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 8 (2015) (“Ferguson’s municipal court operates as part of the police department. The court is supervised by the Ferguson Chief of Police, is considered part of the police department for City organizational purposes, and is physically located within the police station. Court staff report directly to the Chief of Police.”).

¹⁵ See *id.* at 42 (“The Ferguson municipal court handles most charges brought by FPD, and does so not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue.”).

¹⁶ See *id.* at 9 (documenting the practice of routinely hearing cases for over 1200 violations in a three-hour court session).

¹⁷ See *id.* at 40 (“Fourth, the failure of supervisors to investigate and the absence of analysis from their use-of-force reports frustrate review up the chain of command.”).

leading to widespread distrust of the police.¹⁸ While larger changes are also necessary,¹⁹ this Article calls attention to the role of courts in police lawmaking and their potential to end it.

Part I examines the process by which police officers make their own law, often at the expense of Black people. When police make their own law, it is our lives that are taken, our bodies dehumanized, and our constitutional rights violated. Part II contrasts this police-driven, court-sanctioned lawmaking with the traditional methods of legislation and agency regulation. Particularly, Part II examines the separation between police and democratic processes and the racist history of policing. Part III argues that police lawmaking is unconstitutional under the Equal Protection Clause, separation of powers principles, and the Due Process Clause. It contends that courts have a duty to rein in unconstitutional police lawmaking,²⁰ which requires courts to determine, as a threshold matter, whether Black lives matter.

I. POLICE OFFICERS MAKE LAW

Prior scholarship has addressed how police make law through discretionary enforcement decisions.²¹ While this process has been well attested, its relationship to formal and informal rulemaking remains underexamined.²²

¹⁸ See *id.* at 6 (“The confluence of policing to raise revenue and racial bias thus has resulted in practices that not only violate the Constitution and cause direct harm to the individuals whose rights are violated, but also undermine community trust, especially among many African Americans.”).

¹⁹ See generally Brandon Hasbrouck, *Abolishing Racist Policing With the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1111 (2020) (suggesting the removal of police from school discipline, domestic violence resolution, mental health, and regulation of unhoused people and people who use controlled substances).

²⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

²¹ See, e.g., Todd Haugh, *Sox on Fish: A New Harm of Overcriminalization*, 109 Nw. U. L. REV. 835, 841 (2015) (“Decisions about enforcement—the ‘criminal justice system’s real lawmak[ing]’—fall to prosecutors and police.”); David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 924 (2007) (“Absent clear statutory terms, police, prosecutors, judges, and juries make the law in the guise of enforcing it, confounding all the process rights designed to ensure a fair criminal justice system.”); Tamara R. Piety, *A Critique of Adjudication: Fin de Siècle: Confession Without Avoidance*, 22 CARDOZO L. REV. 947, 959 (2001) (“Police and prosecutors make the law too, insofar as they can enforce (or decline to enforce) existing laws and create new interpretations of them.”). But see John M. Rogers, *A Fresh Look at Agency “Discretion”*, 57 TUL. L. REV. 776, 797 (1983) (“[A] police officer is not making ‘law’ nearly so much when he decides whether to make a particular search or a particular arrest as is a United States Attorney in deciding to pursue a particular prosecution or an agency official in promulgating a particular substantive rule or regulation.”).

²² See Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1337–38 (2020) (“Formal and informal rules crafted outside of the courtroom by municipalities, police unions, and police departments had little place in the scholarly discourse surrounding and critiquing police misconduct. But, spurred by the rise of the Movement for Black Lives and greater public access to police union contracts, police unions and their collective bargaining agreements (CBAs) are becoming a bigger part of the conversation.”). Anthony Amsterdam addressed the dearth of formal guidance for police lawmaking over four decades ago and proposed a constitutional rule to guide it:

Even lawmaking by discretionary enforcement deviates from traditional views of proper police conduct and risks undermining the public's trust in police.²³ The current practice of sanctioning police discretionary conduct goes even farther: the Supreme Court's deferential approach to police policies and discretion has allowed the police's own understandings of force and reasonableness to become constitutional law.²⁴ The Court's farcical insistence on colorblind constitutionalism²⁵ has only exacerbated the consequences of police's inherent racial biases.

Police have at times made laws through more traditional means such as statutory authority. Some jurisdictions explicitly rely upon police officers to fulfill the duties of prosecutors.²⁶ An 1813 Louisiana law gave police juries explicit authority to make local laws for the control of the enslaved Black

(1) Unless a search or seizure is conducted pursuant to and in conformity with either legislation or police departmental rules and regulations, it is an unreasonable search and seizure prohibited by the fourth amendment. (2) The legislation or police-made rules must be reasonably particular in setting forth the nature of the searches and seizures and the circumstances under which they should be made. (3) The legislation or rules must, of course, be conformable with all additional requirements imposed by the fourth amendment upon searches and seizures of the sorts that they authorize.

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416–17 (1974).

²³ See Sarah A. Seo, *Democratic Policing Before the Due Process Revolution*, 128 YALE L.J. 1246, 1266 (2019) (“In [Jerome Hall’s] view [in his 1952 lectures], the American system of government did not empower police officers to make law, like legislators, or interpret law, like judges. Rather, their job was to enforce law—a task that, in Hall’s mind, did not involve exercising discretion.”); Gregory Howard Williams, *Police Discretion: The Institutional Dilemma—Who Is in Charge?*, 68 IOWA L. REV. 431, 492 (1983) (“Unilateral action by the police would risk evoking a negative reaction from a public suddenly faced with the fact that police make law enforcement policy choices without any outside control.”); Alexandra Klein, *Volunteering to Kill* (unpublished manuscript) (on file with author) (arguing that sanctioning police violence—by permitting police to take part of firing death squads—allows police to punish people without controls, which undermines trust in police).

²⁴ Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 434 (2019) (“The court essentially said that because he followed the policy, there was no Fourth Amendment violation, indicating a highly deferential attitude to the department’s policy. In these examples, we see how use of force policies can be used to endogenously structure the way that federal courts approach questions about excessive force. By eschewing external standards created by the judiciary and embracing the presence of force policies as evidence of compliance with the constitutional rule, legal endogeneity theory allows us to see how police perspectives on force usage become constitutional law.”).

²⁵ See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 247–48 (2010) (“Fourth Amendment jurisprudence includes a series of race cases in which race is rarely mentioned. These cases, in the current Court, are a stylized conversation between Justices Scalia, Thomas, Roberts, Alito, and Kennedy that resemble a word game in which the contestant has to guess the category from clues that can never include the category’s actual name.”).

²⁶ See Andrew Horowitz, *Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1306 (1998) (“The prosecution of criminal cases by police officers is a widespread practice in the lower state courts in this country. In one national survey published in 1981, twelve percent of the judges sitting in misdemeanor criminal courts indicated that a prosecuting attorney ‘infrequently’ or ‘never’ conducted the trial of misdemeanor defendants.”).

population.²⁷ Congress also authorized the Attorney General to delegate rulemaking authority under drug enforcement legislation to law enforcement agencies.²⁸ While police lawmaking under such statutory models is at least theoretically subjected to judicial review under general principles of administrative law,²⁹ review of endogenous police lawmaking is more elusive.³⁰

When the courts themselves take an expansive view of permissive police practices, officer judgment and department policy can become constitutional law. In their analysis of *Neiswonger v. Hennessey*,³¹ Osagie K. Obasogie and Zachary Newman observe, “[t]he court essentially said that because he followed the policy, there was no Fourth Amendment violation, indicating a highly deferential attitude to the department’s policy.”³² In *Neis-*

²⁷ Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803–1865*, 24 S.U. L. REV. 145, 161 n.111 (1997). In some ways, this was merely a more explicit version of the practice described in this Article—with statutory authorization. For a more detailed exploration of the origins of modern policing in its slave patrol antecedents, see Hasbrouck, *supra* note 19, at 1114–18. Police juries are parish-level legislatures in use in parts of Louisiana, which originally were explicitly tied to law enforcement duties. *Parish Government Structure*, POLICE JURY ASS’N OF LA., <https://www.lpgov.org/page/ParishGovStructure>, archived at <https://perma.cc/DLX3-X9BX> (last visited Apr. 24, 2021) (“In 1807, the Legislative Council and House of Representatives of the Territory of Orleans revised the parish form of government. A 12-member jury was created to serve with the parish judge and the justice of peace, both of the latter being appointive officials. This body was charged with responsibility for ‘execution of whatever concerns the interior and local police and for administration of the parish.’”).

²⁸ See E. P. Krauss, *Unchecked Powers: The Supreme Court and Administrative Law*, 75 MARQ. L. REV. 797, 802 (1992) (“Moreover, the Attorney General has the power to sub-delegate his authority, which he did in this instance by authorizing the Drug Enforcement Administration to exercise the power to temporarily schedule drugs. The net effect of this arrangement is that the public prosecutor is authorized to empower the police to make laws that together they will enforce.”).

²⁹ See *id.* at 801 (“In light of the Court’s deft analysis of the Sentencing Reform Act, one must wonder whether any act of legislation might not be sustained by an overly-facile conclusion that it contains adequate standards.”).

³⁰ Police are frequently aided in this project by their allies in prosecutors’ offices, who have enjoyed similarly broad deference for their own decisions. See, e.g., Darcy Costello & Tessa Duvall, *Breonna Taylor Grand Jury Recordings Reveal Chilling Scene of Chaos and Misinformation*, LOUISVILLE COURIER J. (Oct. 2, 2020), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/10/02/what-breonna-taylor-grand-jury-recordings-tell-us/5878170002/>, archived at <https://perma.cc/ER5E-MUC6> (“But no criminal charges were filed against the two officers whose bullets struck and killed Taylor . . . The prosecutors took that decision out of the grand jury’s hands.”); Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1154–55 (1998) (exploring the role of deference to prosecutorial discretion in the racially disparate application of the death penalty). This deference to prosecutorial discretion was on full display in *Gregg v. Georgia*, where the Court endorsed broad discretion for prosecutors to pursue or forgo capital punishment in cases where it was statutorily permissible. 428 U.S. 153, 199 (1976) (“At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.”). With courts so often unwilling to subject the actions of executive criminal justice officials to scrutiny, perhaps a statutory model defining standards for their review akin to the Administrative Procedure Act would be an appropriate remedy.

³¹ 89 F. Supp. 2d 766, 773–74 (N.D. W. Va. 2000) (holding that Officer Hennessey’s use of force was reasonable under the circumstances and in accordance with department policy).

³² Obasogie & Newman, *supra* note 24, at 434.

wonger, the court rejected analysis of alternative officer behavior as impermissible “second-guessing.”³³ Instead, the court confined its inquiry to whether the officer’s use of force was objectively reasonable in light of the circumstances and department policy.³⁴

Even when the policy itself is held to be unconstitutional, officers can enjoy the protection of qualified immunity so long as they follow the policy. In *Way v. County of Ventura*,³⁵ the Ninth Circuit found that the Ventura County Sheriff’s Department’s policy of strip-searching all persons arrested on misdemeanor drug charges was so broad as to include unreasonable searches in the absence of reasonable suspicion.³⁶ Because the court’s previous precedents did not provide sufficiently clear guidance that such a policy was unconstitutional, the Ninth Circuit overruled the trial court’s determination that the officer who conducted the search and the sheriff who instituted the policy were not entitled to qualified immunity.³⁷ Such precedents encourage police departments to seek forgiveness rather than permission with the understanding that they will usually receive it.

This process of deferential review, however, only affects police discretion when courts conduct any review at all. That is, police accumulate much lawmaking power by invisibility. Because the vast majority of low-level offenses never receive any review whatsoever, police lawmaking in such situations is as much a consequence of procedure as the doctrinal considerations that constitutionalize police conduct around more serious crimes.³⁸ Police departments are often left to review themselves, with predictable results.³⁹

³³ 89 F. Supp. 2d at 773.

³⁴ *Id.* at 774.

³⁵ 445 F.3d 1157 (9th Cir. 2006).

³⁶ *Id.* at 1162.

³⁷ *Id.* at 1163.

³⁸ See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 737–38 (1996) (“The day-to-day, minute-to-minute decisions by the police have never been reviewed by the court. Police decisions regarding which crimes to investigate, which persons to pursue, and which persons to arrest have come under judicial review only in the most egregious situations.”); see also Eric L. Muller, *Hang on to Your Hats! Terry into the Twenty-First Century*, 72 ST. JOHN’S L. REV. 1141, 1146 (1998) (“If *Terry* teaches us anything, it teaches us the value of opening our eyes to existing law enforcement practices that may not look like traditional searches or seizures, but that leave the police free to accomplish the results of traditional searches and seizures without any real strictures.”).

³⁹ This pattern has come under some scrutiny in recent years, particularly for its role in police-community relations in Ferguson:

Use of force is such a significant problem - and has been for so many years - that even some law enforcement officials are starting to call for mandatory reporting of all uses of force by police officers. Unfortunately, even when police officers create those reports, they are typically reviewed pro forma if at all. When the DOJ investigated the Ferguson Police Department (FPD), it summarized the department’s policies for reviewing officers’ use of force as “particularly ineffectual,” noting that supervisors assigned to review uses of force “do little to no investigation; either do not understand or choose not to follow FPD’s use-of-force policy in analyzing officer conduct; rarely correct officer misconduct when they find it; and do not see the patterns of abuse that are evident when viewing these incidents in the aggregate.”

The watchmen have been gently asked to watch themselves,⁴⁰ and the matter is far too often left at that.

Rather than simply serving as law enforcers, officers present themselves as “the law” itself.⁴¹ This synecdoche recalls Elizabeth Holzer’s description of refugees’ lack of recourse to courts in an encampment: “[t]he host police make the law, and that makes it *their* law.”⁴² When constitutional protections against police excess are subject to police interpretation, suspects and defendants can scarcely expect meaningful recourse to the courts. It is worth examining just how far police lawmaking deviates from established lawmaking under our constitutional order.

II. POLICE LAWMAKING FUNCTIONS OUTSIDE OF CONSTITUTIONAL LEGISLATIVE STRUCTURES

Police lawmaking is an aberration from our constitutional structure. Rather than originating in federal or state constitutions or legislatively authorized procedures, police lawmaking is entirely a creation of the courts.⁴³ Even more perniciously, it is driven by authoritarian behaviors deeply rooted in the racist origins of modern policing.⁴⁴ Section II.A explores how police lawmaking deviates from constitutionally and legislatively sanctioned forms of lawmaking. Section II.B then examines typical police lawmaking cases to show how police understandings of the appropriateness of use of force or searches during encounters with Black suspects are enshrined in constitutional law.

A. *Police Lack Authority to Make Law Under the Text of Constitutions and Statutes and Do So Outside of Democratic Processes*

The Constitution does not grant legislative powers to federal law enforcement agencies.⁴⁵ Nor do state constitutions vest lawmaking authority in

⁴⁰ See JUVENAL, SATIRE VI II. 347–48 (“Quis custodiet ipsos custodes?”).

⁴¹ See Tracey Maclin, *A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at Miranda v. Arizona*, 95 B.U. L. REV. 1387, 1391 (2015) (reviewing GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* (2012)) (“Just as a police officer may announce that he is the ‘law’ during a street encounter with a citizen, so too, during interrogation sessions, police detectives are the ‘law.’”); see also Andrew Guthrie Ferguson & Richard A. Leo, *The Miranda App: Metaphor and Machine*, 97 B.U. L. REV. 935, 976 (2017) (“Not only are the incentives skewed, but from the suspect’s perspective, the constitutional power also appears to be connected to the detective granting or withholding constitutional rights.”).

⁴² Elizabeth Holzer, *What Happens to Law in a Refugee Camp?*, 47 LAW & SOC’Y REV. 837, 860 (2013).

⁴³ See Obasogie & Newman, *supra* note 12, at 1288.

⁴⁴ See generally Hasbrouck, *supra* note 19, at 1111, 1113–18.

⁴⁵ U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

police.⁴⁶ Police, as instruments of the executive branch, are instead tasked with enforcing the laws.⁴⁷ The modern shape of the U.S. government includes an administrative apparatus within the executive branch. But administrative rulemaking is constrained, at least theoretically, by the principle that such agencies are creatures of statute—that they derive their rulemaking authority from, and are thus limited by, their organic statutes.⁴⁸ This modern concept of the administrative state displaced an older model in which administrative—rather than judicial—interpretation of the Constitution was the norm.⁴⁹ Police lawmaking through the judicial approval of officers' and departments' preferred interpretation of constitutional provisions meant to protect suspects, then, seems to follow this older, deprecated model.

This lawmaking procedure is particularly objectionable due to the undemocratic process of selecting police officers. While sheriffs are often elected officials, other heads of local law enforcement agencies are usually not, and their patrol officers and deputies—whose discretion is frequently at issue in use-of-force or search cases—tend to be hired employees ensconced in unions.⁵⁰ While some police lawmaking cases turn on matters of department policy set (sometimes) by democratic bodies,⁵¹ many also are contin-

⁴⁶ See, e.g., KAN. CONST. art. II, § 1 (“The legislative power of this state shall be vested in a house of representatives and senate.”); MONT. CONST. art. V, § 1 (“The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.”); N.Y. CONST. art. III, § 1 (“The legislative power of this state shall be vested in the senate and assembly.”); PA. CONST. art. II, § 1 (“The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.”); VA. CONST. art. IV, § 1 (“The legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates.”). The states uniformly contemplate lawmaking by elected legislative assemblies, with some, such as Montana, providing for additional avenues of lawmaking. None contemplate investing police with lawmaking authority.

⁴⁷ See U.S. CONST. art. II, § 3 (“[The president] shall take Care that the Laws be faithfully executed . . .”).

⁴⁸ In general, agency action is limited to delegations by Congress which provide an intelligible principle as guidance for agency decision making. Compare *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (finding that virtually unfettered administrative discretion to approve and prescribe regulatory codes for trade and industry was an unconstitutional delegation of administrative power), with *Whitman v. Am. Trucking Ass’n*, 513 U.S. 457, 474–75 (2001) (finding that a delegation to the EPA to set air quality standards at the level requisite to protect public health with an adequate margin of safety was a permissible degree of agency discretion).

⁴⁹ See Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 176 U. PA. L. REV. 1699, 1706 (2019) (“[A]dministrative constitutionalism may still be the most frequent form of constitutional governance, but it has grown, paradoxically, more suspect even as it has also become far more dependent on and deferential to judicial interpretations.”).

⁵⁰ See Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 811 (2010) (“Like trial judges, chief law enforcement officers at the local level in the United States hold office based on a mix of selection methods. Sheriffs serve as the chief law enforcement official in most locations outside of incorporated municipalities, and typically earn the office by winning an election. Police chiefs, however, are typically appointed by elected officials in the city.”).

⁵¹ See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1861–62 (2015) (documenting the rise in police rulemaking along the administrative

gent on the “reasonableness” of individual officer decisions.⁵² Even when cases turn on matters of policy set by democratic bodies, those bodies may be beholden to police interests through the outsized influence of police unions in their election.⁵³ The democratic deficiencies presented in police decisionmaking are only compounded when the “least democratic branch”⁵⁴ enshrines them in law.

B. Police Lawmaking is Driven by Racist Policing

Formal policing in the United States began with slave patrols.⁵⁵ These patrols had extraordinary powers of detention, search, and use of force in the service of controlling enslaved Black workers.⁵⁶ Modern police departments continue this tradition of using their official power to terrorize and control Black communities,⁵⁷ and racist attitudes are unsurprisingly common among officers.⁵⁸ Courts routinely dismiss equal protection claims based on racist

model beginning in the 1960s). *But see* Eric J. Miller, *Challenging Police Discretion*, 58 *How. L.J.* 521, 523 (2015) (identifying the problems, including distrust between police and the community and unequal distribution of policing, that result from police policy made without public input); Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 *CATH. U. L. REV.* 373, 403 (2010) (“Nevertheless, ‘unelected government officials’ make most regulatory policy, therefore giving rise to what Cary Coglianese terms a ‘democratic deficit.’ Officials involved in rulemaking decisions are not elected, and as a result, they are not publicly accountable.”).

⁵² *See, e.g., Investigation and Police Practices*, 36 *GEO. L.J. ANN. REV. CRIM. PROC.* 3, 75 (2007) (“A warrantless search may be conducted to preserve evidence if the police reasonably believe that unless they immediately conduct a warrantless search, the evidence is in imminent danger of being removed or destroyed If police reasonably believe that their safety or that of the general public is threatened, they may enter a dwelling and conduct a full warrantless search.”).

⁵³ Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 *Nw. U. L. REV.* 1, 55–56 (2019) (“[T]here are serious concerns about union influence—perhaps more so in the policing context given the degree of divergence between the policy preferences of police union leaders and the concerns of residents in heavily policed communities.”).

⁵⁴ Randall P. Bezanson, *Art and the Constitution*, 93 *IOWA L. REV.* 1593, 1606 (2008).

⁵⁵ *See* Hasbrouck, *supra* note 19, at 1114. In this article, I contend that racist policing should be abolished. “It is time to call modern policing what it is: a badge and incident of slavery that Congress should abolish under the Thirteenth Amendment.” *Id.* at 1108.

⁵⁶ *See* Connie Hassett-Walker, *The racist roots of American policing: From slave patrols to traffic stops*, *CONVERSATION* (June 4, 2019), <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816>, archived at <https://perma.cc/UZB5-8Q4M> (“[Slave patrols] located and returned enslaved people who had escaped, crushed uprisings led by enslaved people and punished enslaved workers found or believed to have violated plantation rules.”).

⁵⁷ *See id.* (“Policing’s institutional racism of decades and centuries ago still matters because policing culture has not changed as much as it could. For many African Americans, law enforcement represents a legacy of reinforced inequality in the justice system and resistance to advancement—even under pressure from the civil rights movement and its legacy.”).

⁵⁸ In aggregate, the Pew Research Center found vast differences between Black and white officers in their perception of race relations. *See* Rich Morin et al., *Behind the Badge*, *PEW RSCH. CTR.* (Jan. 11, 2017), <https://www.pewsocialtrends.org/2017/01/11/behind-the-badge/>, archived at <https://perma.cc/YH4E-CPQN> (“The racial divide looms equally large on other survey questions, particularly those that touch on race. When considered together, the frequency and sheer size of the differences between the views of black and white officers mark

policing, which all too often results in police practices developed in the service of systemic racism obtaining the force of law.⁵⁹

A survey of Supreme Court cases challenging police practices reveals the breadth of this phenomenon. Because the Court condoned their search of a Black man in *Terry v. Ohio*,⁶⁰ the police gained the authority to “stop and frisk” anyone they believed to be behaving suspiciously.⁶¹ The Court approved of following and questioning a Black woman in *United States v. Mendenhall*,⁶² and the police gained the authority to stop and question suspects without any Fourth Amendment protections prior to detention.⁶³ When the Court ruled that police did not seize a Black child they chased until they tackled him in *California v. Hodari D.*,⁶⁴ the police gained the ability to give chase with impunity.⁶⁵ When the Court approved of a warrantless search based on an informant’s tip against a Black driver in *Maryland v. Dyson*,⁶⁶ the police gained wide latitude to search vehicles based on information from confidential informants.⁶⁷ When the Court excused the improper execution of a search warrant for a Black man’s house in *Hudson v. Michigan*,⁶⁸ the

one of the singular findings of this survey.”). The Plain View Project examined officers’ social media postings, finding that around one in five made biased, violent, lawless, or dehumanizing posts. See Emily Hoerner & Rick Tulsy, *Cops Around the Country Are Posting Racist and Violent Comments on Facebook*, INJUSTICEWATCH (June 1, 2019), <https://www.injusticewatch.org/interactives/cops-troubling-facebook-posts-revealed/>, archived at <https://perma.cc/CES5-7WKR> (“‘Just another savage that needs to be exterminated,’ wrote Booker Smith Jr., a Dallas police sergeant, about a homicide at a Dollar General store . . . Reuben Carver III, a Phoenix officer, proclaimed in a stand-alone post, ‘Its [sic] a good day for a choke hold.’ . . . In Lake County, Florida, Sheriff’s Deputy Jason Williams shared a meme, along with the comment ‘love this!!!!!’ depicting a semitruck smeared with blood with the caption ‘JUST DROVE THROUGH ARIZONA/DIDN’T SEE ANY PROTESTERS.’”).

⁵⁹ See, e.g., *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002) (“[A] defendant seeking discovery on a selective enforcement claim must meet the same ‘ordinary equal protection standards’ that *Armstrong* outlines for selective prosecution claims.”); see also Allison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 Nw. U. L. REV. 987, 991 (2021) (“In practice, *Armstrong*’s discovery standard creates an abstract right without a remedy.”).

⁶⁰ 392 U.S. 1 (1968).

⁶¹ See *id.* at 17 n.15 (“Focusing the inquiry squarely on the dangers and demands of the particular situation also seems more likely to produce rules which are intelligible to the police and the public alike than requiring the officer in the heat of an unfolding encounter on the street to make a judgment as to which laws are ‘of limited public consequence.’”).

⁶² 446 U.S. 544 (1980).

⁶³ See *id.* at 554 (“Moreover, characterizing every street encounter between a citizen and the police as a ‘seizure,’ while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices.”).

⁶⁴ 499 U.S. 621 (1991).

⁶⁵ See *id.* at 627 (“Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply.”).

⁶⁶ 527 U.S. 465 (1999).

⁶⁷ See *id.* at 467 (“The holding of the Court of Special Appeals that the ‘automobile exception’ requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to our holdings in *Ross* and *Labron*.”).

⁶⁸ 547 U.S. 586 (2006).

police learned that any evidence they discovered after violating the “knock and announce” rule could still come in at trial.⁶⁹ And when the police rammed Victor Harris’s car off the road and thus paralyzed him, the Court told police that they were entitled to qualified immunity so long as they could portray their use of force as reasonable.⁷⁰ The police respond to a situation, the Court typically finds their behavior to be “reasonable,” and the police learn that their behavior was well within the Court’s formulation of the Fourth Amendment.⁷¹ When the initial police response is shaped by anti-Black racism—and it all too often is—the Court excuses that racism and increasingly enshrines it within the limits of constitutional protections.⁷² Police lawmaking is unusual both in its process and its racism, which reach constitutionally unsupportable extremes.

Justice Jackson’s dissent in *Brinegar v. United States*⁷³ was especially prescient as to the dangers of police lawmaking:

We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way the innocent citizen can invoke advance protection

But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court’s supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen’s choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.

⁶⁹ See *id.* at 590 (“If our *ex post* evaluation is subject to such calculations, it is unsurprising that, *ex ante*, police officers about to encounter someone who may try to harm them will be uncertain how long to wait.”).

⁷⁰ See *Scott v. Harris*, 550 U.S. 372, 383 (2007) (“Whether or not Scott’s actions constituted application of ‘deadly force,’ all that matters is whether Scott’s actions were reasonable.”).

⁷¹ See Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 622 (2014) (characterizing the Court’s shifting reasonableness analysis in Fourth Amendment cases as a one-way ratchet); see also Benjamin Buchwalter, *Return to “Reasonable” in Section 1983 Police Pursuit Excessive Force Litigation*, 65 HASTINGS L.J. 1665, 1668 (2014) (detailing how *Scott v. Harris* moved the goal posts for review of deadly force used against fleeing suspects from a case-by-case analysis to a presumption of reasonableness).

⁷² See Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk”*, 50 OKLA. L. REV. 451, 489 (1997) (“Issues of racism are ignored and the Court has fostered a tyranny of labels such as ‘reasonable person,’ ‘reasonableness,’ and ‘color blind constitutionalism.’”).

⁷³ 338 U.S. 160 (1949).

And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies.⁷⁴

Ruthless indeed. The police push, receive the Court's permission, and then push the boundary a bit further, receive permission, push the boundary further, receive permission, and so on. But even if the Court draws a hard line, the police will operate directly on that line. And still, Justice Jackson likely could not have imagined how police lawmaking would become a weapon to control and terrorize Black people, culminating in the War on Drugs and mass incarceration.⁷⁵

III. POLICE LAWMAKING IS UNCONSTITUTIONAL

Police lawmaking offends several constitutional principles, particularly equal protection under the law, separation of powers, and due process. The lack of constitutional or statutory delegation of lawmaking authority to police raises the question of whether police lawmaking is permissible at all. Even if it were, the arbitrary and racially discriminatory policing underlying police lawmaking would render the resulting laws unconstitutional. This Part discusses three separate constitutional attacks on police lawmaking. Section III.A analyzes police lawmaking under the Equal Protection Clause, exploring the possibility of utilizing statistical evidence in equal protection challenges to racially discriminatory police lawmaking after *Flowers v. Mississippi*.⁷⁶ Section III.B subjects police lawmaking to a separation of powers analysis, examining the unconstitutional delegation of lawmaking authority to police. Finally, Section III.C examines the due process violations inherent in the excessive discretionary action underlying police lawmaking.

A. Racist Police Lawmaking Violates the Equal Protection Clause

The racist origins of modern policing and the degree to which racism influences officers' discretionary actions put police lawmaking at odds with the Equal Protection Clause. That is not to say that the modern Supreme Court would necessarily find that police lawmaking violates the Equal Pro-

⁷⁴ *Id.* at 182 (Jackson, J., dissenting).

⁷⁵ See Scott Holmes, *Resisting Arrest and Racism—The Crime of “Disrespect”*, 85 UMKC L. REV. 625, 636 (2017) (“The ‘War on Drugs’ and the resulting mass incarceration of poor people of color have continued the pattern of using the power of the criminal justice system to target and control poor people of color with increasingly militarized police who limit mobility, demand submission, and ‘serve and protect’ affluent people by keeping poor Black people in segregated neighborhoods or in jail.”).

⁷⁶ 139 S. Ct. 2228 (2019).

tection Clause,⁷⁷ but rather, that a properly historical understanding of the Equal Protection Clause is at odds with modern policing.⁷⁸ A critical originalist⁷⁹ approach reveals the radically anti-racist application of the Fourteenth Amendment to police lawmaking.⁸⁰ The Reconstruction Congress unequivocally considered equal treatment in matters of criminal law to be a matter of civil rights.⁸¹ The feedback loop of racist policing and lawmaking through deference to police discretion disproportionately harms Black people in a clear violation of the underlying principles of equal protection under the law.⁸²

The problematic interpretation of the Equal Protection Clause is complicated by the limited perspective admitted in historical analyses of the origins of the Reconstruction Amendments. Originalist scholarship of the Reconstruction Amendments too often focuses on white congressional interpretations, even though Black writers of the time also had a well-developed view of rights.⁸³ This vision was often communal as well as individual.⁸⁴ To

⁷⁷ Equal protection challenges have traditionally met with difficulty because of the requirement to prove both racially disparate outcomes and racially discriminatory intent. See *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (requiring a plaintiff in an equal protection case to demonstrate that an adverse treatment of an identifiable group caused rather than merely failed to stop a decisionmaker's discriminatory act); see also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (“[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”). Yet recent cases such as *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), and *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), demonstrate the possibility of proving discriminatory intent despite the procedural barriers in prior caselaw.

⁷⁸ See Hasbrouck, *supra* note 19, at 205–12 (exploring the foundational racism of policing).

⁷⁹ See Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 841 (2014) (“Critical Originalism is the melding of anti-subordination deconstruction principles of Critical Race Theory with the interpretive methodology of Originalism Theory.”).

⁸⁰ See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 955 (1995) (“To understand how Congress went about enforcing the Fourteenth Amendment is to gain insight into many doctrinal issues of importance today, including state action; the extent of congressional enforcement authority; the relevance of intent and effect; the meaning of ‘equality’ as a matter of formally equal treatment or of racial subordination; the relation between due process, equal protection, and privileges and immunities; and many more.”).

⁸¹ See *id.* at 1027 (“At a minimum, we may be confident that the category of civil rights comprised the rights protected by the Civil Rights Act of 1866: the rights to make and enforce contracts; to buy, lease, inherit, hold and convey property; to sue and be sued and to give evidence in court; to legal protections for the security of person and property; and to equal treatment under the criminal law.”).

⁸² See, e.g., Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 331, 377 (1998) (“[W]hen police target minority motorists for pretextual traffic stops, probable cause is an insufficient check against unreasonable seizures. Rather than protect motorists, in this context, probable cause acts as a lever to initiate an arbitrary seizure, and then insulates the decision from judicial review.”).

⁸³ See James W. Fox, Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 707–08 (2016) (examining the ways constitutional scholars have overlooked the communal vision of rights held by Black writers during Reconstruction, such as in the list of rights and privileges set forth by the South Carolina Black Convention of 1865).

those whose rights were newly protected, the Reconstruction Amendments were a guarantee not simply of legal protections, which then existed for white citizens, but of a commitment to fighting prejudice and the racialized power structure it supported.⁸⁵ When police lawmaking originates in officer biases, the resulting legal structures are precisely the sort of harm that the Reconstruction Amendments were drafted to remedy.

The departure of equal protection jurisprudence from its radically anti-racist origins⁸⁶ has instead resulted in the modern requirement that a challenge to a facially neutral law demonstrate that it was enacted with discriminatory intent.⁸⁷ This demonstration is both highly speculative⁸⁸ and notoriously difficult to prove.⁸⁹ The irregular mechanisms of police lawmaking lack the sort of legislative process that might be scrutinized for discriminatory intent. However, policing itself is the product of discriminatory intent.⁹⁰ Policing evolved as a means of controlling Black people, and its further developments continue to serve that end. When courts give force to racial animus, they run afoul of the Equal Protection Clause.⁹¹ Courts may prove reluctant to evaluate the foundational racism in such a core government institution as policing, but they have developed the tools to do so.

NAACP v. McCrory provides a framework for evaluating lawmaking motivated by racial animus. The Fourth Circuit began by invoking North Carolina's "history of pernicious discrimination."⁹² Spurred on by Black voters' resilience in overcoming obstacles to exercising the franchise, the North Carolina legislature enacted its voter ID law.⁹³ The voter ID law was rushed through the legislature in three days and quickly signed into law,

⁸⁴ *Id.* at 707.

⁸⁵ *See id.* at 724.

⁸⁶ *See* Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 999 (2020) ("The context, key political figures, and legislative history leading up to the [Fourteenth] Amendment's passage shed light on the framers' intent to extend the equal protection of the laws to Black people, specifically those victimized by crime.").

⁸⁷ *See* David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 952 (1989) ("Not only was a showing of discriminatory intent sufficient to establish a violation, it was also (in the absence of an explicit classification) necessary.").

⁸⁸ *See id.* at 975–76 (exploring the speculative nature of the discriminatory intent standard through the difficulty of applying it to "state action" cases).

⁸⁹ *See* Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 437 (2017) ("While intentional racial discrimination is clearly prohibited, discriminatory intent is especially difficult to prove.").

⁹⁰ *See* Hasbrouck, *supra* note 19, at 1114, 1116.

⁹¹ *See* *Shelley v. Kramer*, 334 U.S. 1, 20 (1948) (rejecting the supposed neutrality of enforcing racially discriminatory property covenants).

⁹² *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 223 (4th Cir. 2016). Between 1980 and 2013, North Carolina proposed fifty election law changes that the Department of Justice—using its authority under § 5 of the Voting Rights Act—ultimately objected to on the ground that the changes were racially discriminatory. *Id.* at 224. The North Carolina legislature repeatedly drew state and federal electoral districts to disenfranchise minority voters. *Id.* at 224–25.

⁹³ *Id.* at 225–26.

reducing the opportunity for public scrutiny.⁹⁴ The legislature's list of acceptable forms of identification excluded those "held disproportionately by African Americans" but included those "disproportionately held by whites."⁹⁵ The legislature relied upon data on comparative ownership of different forms of identification and utilization of different methods of voting by race in crafting its bill.⁹⁶ The legislature had a long history of racial discrimination, acted in a rushed and irregular fashion, and focused its attention disproportionately on Black communities. While none of these facts alone could demonstrate discriminatory intent, the court found them compelling when considered together and impermissible as a basis for lawmaking.⁹⁷

Similarly, *Flowers* demonstrated that the tools exist for evaluating discriminatory executive branch behavior in the criminal justice context. The Court clarified that while establishing a historical pattern of racially discriminatory peremptory strikes was not required under *Batson*,⁹⁸ such evidence was both permissible and compelling.⁹⁹ In *Flowers*'s first four trials, the prosecutor either attempted to use peremptory strikes on each Black prospective juror or used every available peremptory strike against Black prospective jurors.¹⁰⁰ In *Flowers*'s sixth trial, the prosecutor used peremptory strikes on all but one Black juror.¹⁰¹ The state engaged in disparate questioning of white and Black prospective jurors in the sixth trial.¹⁰² The state gave several factually incorrect answers when asked to justify its strikes in a *Batson* hearing.¹⁰³ Perhaps most damningly, the state subjected one Black potential juror to intense questioning before striking her, while ignoring those lines of questioning with several white prospective jurors whose answers to the group questioning had been substantially similar.¹⁰⁴ The Court did not base its reversal on any of these facts alone but instead considered them in aggregate.¹⁰⁵ Again, a history of discriminatory practices combined with current discriminatory behavior proved sufficient to support an equal protection claim.

Policing—both historically and today—is fraught with discrimination. A challenge to police lawmaking on equal protection grounds, though, would face evidentiary hurdles in demonstrating that this behavior proved a discriminatory intent. These potential litigation difficulties, however, do not

⁹⁴ *Id.* at 228.

⁹⁵ *Id.* at 229.

⁹⁶ *Id.* at 230.

⁹⁷ *See id.* at 229–31.

⁹⁸ *Batson v. Kentucky*, 476 U.S. 79, 95–97 (1986).

⁹⁹ *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244–45 (2019).

¹⁰⁰ *Id.* at 2245–46. The Court lacked information on the race of prospective jurors at *Flowers*'s fifth trial. *Id.* at 2245.

¹⁰¹ *Id.* at 2246.

¹⁰² *Id.*

¹⁰³ *Id.* at 2250.

¹⁰⁴ *Id.* at 2249–50.

¹⁰⁵ *Id.* at 2251.

change the clear conflict between modern police lawmaking and both the legislative history and the original public understandings of equal protection.

B. Police Lawmaking Supersedes the Roles of Both Legislatures and Courts

The separation of powers, while relaxed enough to allow for lawmaking outside the legislative process, still constrains non-legislative lawmaking through the nondelegation doctrine. “The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.”¹⁰⁶ This principle can abide unusual structures¹⁰⁷ and vast delegations of authority so long as they are governed by an intelligible principle provided by Congress.¹⁰⁸ Because the Court has refused to recognize that police are exercising legislative authority, it has not subjected them to the constraints it has imposed on other executive agencies.¹⁰⁹ An examination of the caselaw and underlying principles, however, reveals that such constraints should apply with full force to police lawmaking. Nor have the courts performed their proper duty of judicial review when they allow the police to determine what the law is.¹¹⁰ In the absence of constraint by another branch of government, police establish standards that allow them to act out their worst impulses and biases, subjecting Black people to physical brutality, prosecution, and mass incarceration. This violence is precisely the sort of abuse of authority that the separation of powers is intended to prevent.

1. Police Lawmaking Violates the Separation of Powers Through its Lack of an Intelligible Principle to Guide a Delegation of Legislative Authority

The nondelegation doctrine, while in decline following the Supreme Court’s overreach during the New Deal era, retains utility as an outer limit on executive action.¹¹¹ “[T]he most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and stan-

¹⁰⁶ *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (holding that Congress’s delegation of the task of formulating sentencing guidelines to judicial branch experts was constitutional).

¹⁰⁷ *See id.* at 412 (concluding that the hybrid structure and authority of the Sentencing Commission were unusual, but permissible).

¹⁰⁸ *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

¹⁰⁹ *See* Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 122 (2016) (“[P]olice agencies have for the most part remained immune from the formal strictures of administrative statutes.”).

¹¹⁰ *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

¹¹¹ *See Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) (“We ought not to shy away from our judicial duty to invalidate

dards that animate the law, leaving the agency to refine those standards, ‘fill in the blanks,’ or apply the standards to particular cases.”¹¹² The policy similarly applies in state law, where state courts have required legislatively-determined principles to guide agency rulemaking.¹¹³ The doctrine remains a check against delegations of lawmaking authority that are “virtually unfettered.”¹¹⁴ Separation of powers is not violated by a delegation of lawmaking authority “so long as [the legislature] provides an administrative agency with standards guiding its actions such that a court could ‘ascertain whether the will of [the legislature] has been obeyed.’”¹¹⁵ Even in the context of an administrative delegation, “private rights are protected by access to the courts to test the application of the policy in the light of the[] legislative declarations.”¹¹⁶ What remains of the nondelegation doctrine, then, is a check that the delegation originates in legislatures and that legislatures have provided both a general policy and standards to follow in applying the law.¹¹⁷

Police lawmaking fails even this lax standard. Neither Congress nor state legislatures have authorized police forces to craft rules delimiting the

unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era.”)

¹¹² *Id.* at 675.

¹¹³ *See, e.g.,* *Askev v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978) (“Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.”); *People v. Turmon*, 340 N.W.2d 620, 623 (Mich. 1983) (requiring delegations of administrative authority to be discretionary rather than arbitrary and reasonably precise within the context of the whole act); *City of Richfield v. Local No. 1215, Int’l Ass’n of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979) (“[W]here a law embodies a reasonably clear policy or standard to guide and control administrative officers, so that the law takes effect by its own terms when the facts are ascertained by the officers and not according to their whim, then the delegation of power will be constitutional.”); *In re Initiative Petition No. 366*, 46 P.3d 123, 129 (Okla. 2002) (“The non-delegation doctrine prevents the Legislature from abdicating its policy-making role by delegating its authority to an agency.”); *Protz v. Workers Comp. Appeal Bd.*, 161 A.3d 827, 833–34 (Pa. 2017) (“When the General Assembly [assigns administrative authority and discretion] . . . [it] must make ‘the basic policy choices,’ and . . . the legislation must include ‘adequate standards which will guide and restrain the exercise of the delegated administrative functions.’” (quoting *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 418 (Pa. 2005))).

¹¹⁴ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

¹¹⁵ *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Mistretta v. United States*, 488 U.S. 361, 379 (1989)).

¹¹⁶ *Id.* at 219 (quoting *Am. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 105 (1946)).

¹¹⁷ The modern practice of nondelegation analysis occurs largely through a framework of “nondelegation canons” such as the rule that agencies are not free to interpret statutes in a way that raises serious constitutional doubts, the canon against retroactive application, the canon against extraterritoriality, and the narrow construction of tax exemptions. *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 339 (2000) (comparing the nondelegation canons to the basic constitutional design of linking individual rights to institutions).

rights of suspects to be protected from unreasonable searches and seizures.¹¹⁸ The practice is a whole-cloth creation of the courts—effectively, the courts have delegated a lawmaking power supposedly vested in Congress to police, and they have done it in ways Congress could not.

Even to the degree that police lawmaking rests on the actions of federal law enforcement officers, the nondelegation framework cannot begin to support police lawmaking because Congress has not attempted to authorize it. The Court's current jurisprudence on police practices crafts a standard for executive action that it would reject if Congress had authored it.¹¹⁹ To the extent that the Court has enunciated a principle to guide police lawmaking, it is that police decisions must be reasonable in light of the exigencies of the case.¹²⁰ This principle allows officer biases to dominate police decisionmaking so much that it becomes policy and fails under the vagueness standard. A vague principle of "reasonableness" is insufficiently intelligible to survive under even the modern nondelegation doctrine. This broad discretion to operate beyond the bounds of established law in a wide variety of circumstances is ripe for abuse.¹²¹ Even a federal-state cooperative regulatory regime on the model of the Clean Water Act¹²² would fail to support police lawmaking, as state legislatures lack any authority to define the limits of federal constitutional rights. Police lawmaking fails to satisfy either of the requirements of a valid delegation because the authority given to executive

¹¹⁸ Most police forces operate under the authority of the states, and their authority must be considered under state nondelegation doctrines. *See generally* Alexandra L. Klein, *Nondelegating Death*, 81 OHIO ST. L.J. 923 (2020) (examining state nondelegation doctrines as they apply to decisions about methods of execution). Congress cannot directly delegate its lawmaking powers to state police forces, and state legislatures lack the authority to specify how federal constitutional rights should be interpreted—though they sometimes have the power to grant *greater* protections as a matter of state law.

¹¹⁹ *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

¹²⁰ *See, e.g., Terry v. Ohio*, 392 U.S. 1, 17 n.15 (1968) ("[T]he Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, *in light of all the exigencies of the case*, a central element in the analysis of *reasonableness*." (emphasis added)); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (noting that searches of automobiles do not require any additional finding of exigency); *United States v. Banks*, 540 U.S. 31, 36–37 (2003) ("[E]ven when executing a warrant silent about that, if circumstances support a *reasonable suspicion of exigency* when the officers arrive at the door, they may go straight in." (emphasis added)); *Scott v. Harris*, 550 U.S. 372, 383 (2007) ("Thus, in judging whether Scott's actions were *reasonable*, we must consider the *risk of bodily harm* that Scott's actions posed to respondent *in light of the threat to the public* that Scott was trying to eliminate." (emphasis added)).

¹²¹ *See* Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENV'T L. REV. 257, 287 (2010) (describing the tension between the specificity of guiding standards and the breadth of authority regarding other laws in constitutionally permissible delegations of authority).

¹²² The Clean Water Act provides for the establishment of national standards for administering point source discharges in the absence of state standards while allowing states to adopt their own regulatory regimes in a system of cooperative federalism. *See* 33 U.S.C. § 1342.

actors lies beyond the authority of legislatures and the delegation lacks a sufficient guiding principle.

2. *Courts Abdicate Their Judicial Responsibilities by Failing to Restrain Police Lawmaking*

The separation-of-powers concerns raised by police lawmaking go beyond the comparatively simple problem of insufficient legislative guidance, as police lawmaking involves a delegation of the judicial branch's inherent powers and responsibilities.¹²³ Even if Congress were to craft the sort of complex statutory scheme that would allow for delegation to state agencies,¹²⁴ it would be stymied in this pursuit by the inability of state legislatures to delegate the interpretation of federal constitutional rights to their own agencies.¹²⁵ Interpretation of the limits of federal constitutional rights rests with the courts, and neither Congress nor state legislatures have any authority to delegate that interpretation to executive agencies.¹²⁶ Attempting to support police lawmaking through some notion that congressional inaction on the matter implied consent would be an undue reliance on what Congress has failed to say.¹²⁷ When courts defer so readily to police departments to determine the limits of constitutional rights, they abdicate their fundamental

¹²³ For an extreme example of how this sort of delegation of judicial authority is practiced in criminal courts on a daily basis, see John D. King, *The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence*, 54 GA. L. REV. 927, 936 (2020) ("The court was not only physically located within the Ferguson Police Station but was also overseen by the Ferguson Chief of Police, who acted as the direct supervisor of court staff. . . . The court clerk was granted the authority to accept guilty pleas and set bond.").

¹²⁴ See, e.g., 33 U.S.C. § 1342(b) (providing for states to seek approval of their water pollution programs, which may then supplant the National Pollutant Discharge Elimination System permit system established in § 1342(a)).

¹²⁵ See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) ("Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy.").

¹²⁶ But see Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 229 n.58 (2006) (book review) ("The argument for extra-judicial interpretation of constitutions seems stronger at the state level than at the federal level, to the extent that state constitutions are more readily and frequently amended through referenda or by scheduled constitutional conventions.").

¹²⁷ See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) ("Needless to say, I also disagree with the Court's reliance on things that the sponsors and floor managers of the 1995 amendment failed to say."). Even Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* recognizes only the ability of the executive branch to rely upon its own independent powers. 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The authority to determine the limits of constitutional rights, however, is not a power of the executive branch. See *Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the Judicial Department to say what the law is.").

responsibilities, effectively delegating an authority that they have no constitutional power to delegate.¹²⁸

Determination of constitutional rights is fundamentally an exercise of the judicial power, which executive and legislative actors cannot usurp.¹²⁹ Even when a judge's authority is constrained to the orderly operation of the court and determination of the law,¹³⁰ that authority still extends to considerable oversight of the jury.¹³¹ Despite the extent of the judicial power within the courtroom, the judiciary is already by design the weakest branch, yet plays a critical role in defending the rights of the people against the other two.¹³² The non-delegation of judicial authority is essential to prevent the concentration of power in the executive branch.¹³³ Delegation to executive actors of the authority to consider the scope of constitutional rights—a fundamental species of judicial power—concentrates the powers of the “sword” and “judgment” in a single entity, eschewing the careful balance of mutual reliance and discretion at the root of our tripartite system of government.¹³⁴

Even if this power of constitutional interpretation were within the scope of powers the Court *could* delegate, the particular delegation the Court has made violates even the Court's own lax standards for delegations of legislative authority, let alone the stricter standards for judicial delegations. The Court has focused its Fourth Amendment jurisprudence on a nominal standard of reasonableness yet carves out large enough exceptions to avoid seri-

¹²⁸ See Mark Thomson, Note, *Who Are They to Judge?: The Constitutionality of Delegations by Courts to Probation Officers*, 96 MINN. L. REV. 306, 311–16 (2011) (exploring the two major tests for improper delegations of judicial authority: whether the court has delegated a core judicial function or whether it has delegated its ultimate authority).

¹²⁹ See *Crowell v. Benson*, 285 U.S. 22, 60–61 (1932) (rejecting the argument that Congress could invest an executive actor with fact-finding power in a matter involving constitutional rights).

¹³⁰ See *Herron v. S. Pac. Co.*, 283 U.S. 91, 95 (1931) (“In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.”).

¹³¹ See *Cap. Traction Co. v. Hof*, 174 U.S. 1, 13–14 (1899) (“[A] judge [is] empowered to instruct [the jury] on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence.”).

¹³² See THE FEDERALIST NO. 78 (Alexander Hamilton) (“[T]he judiciary is beyond comparison the weakest of the three departments of power [T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.”); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1148 (2000) (“The system of separation of powers is intended to prevent a single governmental institution from possessing and exercising too much power.”).

¹³³ See Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201, 246 (2012) (“[A]ggrandizement of other branches seems ultimately to be the fundamental separation of powers concern”).

¹³⁴ See THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the judiciary's reliance on the “sword” of the executive to carry out its pronouncements and the judicial power of constitutional review over the acts of other branches).

ous inquiry into the underlying reasonableness of the search.¹³⁵ This judicially-created principle is effectively a grant of discretion so broad that, had Congress created it, it would fail under the nondelegation doctrine's close cousin, vagueness.¹³⁶ Under the vagueness doctrine, penal statutes must provide sufficiently clear guidance to prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."¹³⁷ The principle of reasonableness under the particular exigencies of the case does not provide such clarity. Officers can—and regularly do—present the facts of a case through the lens of their own biases.¹³⁸ Giving

¹³⁵ See Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 747 (2011) ("Under this approach to the good faith exception, well settled law permitting a particular police practice (search or seizure) could take on a sort of stone-tablets character—qualified immunity would prevent a successful civil action, and settled expectations and reasonable officer reliance would also preclude exclusion, thus rendering a merits decision unnecessary in both domains.").

¹³⁶ Justice Gorsuch recently illuminated the connection between the two doctrines:

We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names [O]ur doctrine prohibiting vague laws is an outgrowth and "corollary of the separation of powers." It's easy to see, too, how most any challenge to a legislative delegation can be reframed as a vagueness complaint: A statute that does not contain "sufficiently definite and precise" standards "to enable Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens. And it seems little coincidence that our void-for-vagueness cases became much more common soon after the Court began relaxing its approach to legislative delegations.

Gundy v. United States, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting) (citing *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) ("[T]he [void-for-vagueness] doctrine is a corollary of the separation of powers.")). The relationship between vagueness and non-delegation is especially clear when considering the *Chevron* analysis, which is predicated upon a degree of ambiguity—administrative lawmaking must thread the needle between too little ambiguity and so much as to constitute a lack of standards. See Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 708 (2020) (elaborating upon Justice Gorsuch's concurring opinion in *Dimaya*); see also Travis H. Mallen, Note, *Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory*, 81 NOTRE DAME L. REV. 419, 424–25 (2005) (exploring the historical relationship between the intelligible principle requirement of delegation and the problem of vagueness). Vagueness possesses elements of both separation of powers, as discussed here, and due process concerns, addressed in the following section. See Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1141–44 (2016) (addressing the twin rationales of insufficient notice and unfettered discretion the Court has presented under the banner of "vagueness").

¹³⁷ *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

¹³⁸ See Michael D. Pepson & John N. Sharifi, *Lego v. Twomey: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1191 (2010) ("[P]olice officers' testimony at suppression hearings is regularly tainted with bias."); see also Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*, 73 U. MIAMI L. REV. 1, 29 (2018) ("Economists Decio Coviello and Nicola Persico looked at the NYPD stop and frisk data used in the *Floyd* case and concluded the following: (1) police stopped blacks much more frequently than whites and (2) arrest rates of blacks and whites who were stopped are virtually identical."); Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1351 (2015) ("[I]mplicit bias against racial minorities is at least as strong, if not stronger,

them the benefit of the doubt that they do not thereby perjure themselves, police likely also evaluate exigencies and reasonableness through this lens in the field.

The judicial delegation of both legislative and judicial authority to executive actors at the heart of police lawmaking presents a plethora of separation of powers problems. A judicially created delegation of lawmaking authority cannot constitute a valid delegation of discretion from the legislature to an executive agency, and the interpretive powers—a core judicial function¹³⁹—are inherent in police lawmaking. This sort of delegation is the kind of judicial deference that lacks a democratic pedigree.¹⁴⁰ For all of these reasons, police lawmaking as authorized by the courts cannot withstand constitutional scrutiny under the nondelegation doctrine.

C. *Police Lawmaking Without Prior Authorization Violates the Due Process Clause*

The procedural abnormalities of police lawmaking also infringe due process rights. Police lawmaking violates due process when a police officer acting outside of the proper scope of such a government agent's authority deprives someone of life, liberty, or property.¹⁴¹ Police, as executive actors, have traditionally seen the boundaries of their authority delineated by what is required to enforce and uphold law.¹⁴² Yet judicial deference to police decision making has led to the effective addition of a legislative component

among police officers.”); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 293 (2017) (“We know that police officers choose to over-police neighborhoods in black and brown communities and stop and arrest people of color at much higher rates than they do whites.”). See generally Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 237–38 (2019) (“At the beginning of every prosecution, prosecutors should investigate the officers involved This would mean examining their social media accounts and monitoring their emails and texts for key words that could be suggestive of racial animus.”) (discussing potential method for how to address the issue of racial bias).

¹³⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 n.2 (1792) (“[B]y the Constitution, neither the Secretary at War nor any other Executive officer, nor even the legislature, is authorized to sit as a court of errors on the judicial acts or opinions of this court.”).

¹⁴⁰ See Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 42 (2010) (discussing how the countermajoritarian concern decreases when courts strike down policies adopted without legislative guidance or oversight).

¹⁴¹ See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1723 (2012) (“If Congress is forbidden to pass laws authorizing a deprivation of life, liberty, or property without due process, and the other branches are limited to executing and interpreting the law, then the Constitution secures individual liberties against all three branches.”).

¹⁴² See Laurie A. Buckenburger, *Pretextual Arrests: In United States v. Scopo the Second Circuit Raises the Price of a Traffic Ticket (Considerably)*, 61 BROOK. L. REV. 453, 462 (1995) (cautioning that the *Belton* rule against reviewing the scope of a post-arrest search of a vehicle raises the concern that “police officers might use the power to arrest for the purpose of conducting a search and not for the purpose of enforcing law.”).

to police authority.¹⁴³ To satisfy due process, executive actors cannot deprive an individual of life, liberty, or property “without prior authorization by a legislature or a court.”¹⁴⁴ The discretionary decision making underlying police lawmaking is not sufficiently guided by principles set forth by the legislature—or the courts—to remain within the constitutionally authorized scope of executive action.¹⁴⁵

Furthermore, the vagueness inherent in police lawmaking also implicates due process concerns.¹⁴⁶ “The requirements of due process change depending on the restriction at issue: more process is due—i.e., more precision is required and less vagueness tolerated—as the deprivation becomes more serious.”¹⁴⁷ The fundamental liberty interests protected by the Fourth Amendment are precisely the sort that require strict application of the due process vagueness doctrine.

The irregularities leading to police lawmaking violating due process can also be subtle. While the courts could very well have used common law processes to authorize many of the police behaviors that have been legalized through police lawmaking, courts instead defer to police discretion after behaviors are contested.¹⁴⁸ These authorizations sometimes occur even as the Court denies that it has granted such; consider how *Terry v. Ohio*¹⁴⁹ effectively constitutionalized police stops on hunches, even as it explicitly forbade the practice.¹⁵⁰ In *Town of Castle Rock v. Gonzales*,¹⁵¹ police were granted deference for the decision not to enforce a restraining order, despite

¹⁴³ See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2036 (2017) (“Beginning in the late 1950s, these courts invoked the officer’s unique criminological insight to loosen constitutional scrutiny of police enforcement actions, and they specifically relied on formal *training* to broaden the scope of police authority.”).

¹⁴⁴ Chapman & McConnell, *supra* note 141, at 1680.

¹⁴⁵ See *id.* at 1681 (“In modern parlance, due process has always been the insistence that the executive—the branch of government that wields force against the people—deprive persons of rights only in accordance with settled rules independent of executive will, in accordance with a judgment by an independent magistrate.”).

¹⁴⁶ See Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 709, 733 (2018) (noting the greater application of the vagueness principle in criminal matters, where penalties are not merely financial, but implicate liberty and social stigma).

¹⁴⁷ Kelsey McCowan Heilman, *Why Vague Sentencing Guidelines Violate the Due Process Clause*, 95 OR. L. REV. 53, 58 (2016).

¹⁴⁸ See, e.g., *Del Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 913 (7th Cir. 2012) (applying a presumption of constitutionality to police actions that have not violated a previously recognized fundamental right); *Llerando-Phipps v. City of New York*, 390 F. Supp. 2d 372, 382 (S.D.N.Y. 2005) (“Defendants accurately note that a single incident of unconstitutional activity is insufficient to impose municipal liability, unless plaintiff demonstrates that the incident resulted from an unconstitutional municipal policy.”).

¹⁴⁹ 392 U.S. 1 (1968).

¹⁵⁰ See Jeffrey Fagan, *Terry’s Original Sin*, 2016 U. CHI. LEGAL F. 43, 66 (2016) (“*Terry*’s original sin was forgoing a probable cause standard for investigative stops and substituting an inchoate standard, a standard that is inherently subjective and prone to cognitive distortion, bias and error.”).

¹⁵¹ 545 U.S. 748 (2005).

the governing statute's apparently mandatory language.¹⁵² This grant of authority allows the police to disregard explicit legislative instructions when they would prove inconvenient, compounded by the problem that this authorization originates in a judicial abdication.¹⁵³

The extension of the *Armstrong*¹⁵⁴ standard to police investigations¹⁵⁵ only compounds the difficulty of proving that police abused their overly broad discretion.¹⁵⁶ With the odds in any given challenge to police behavior stacked against defendants, police routinely are allowed to enshrine discriminatory practices into law.¹⁵⁷ Thus, police routinely are allowed to deprive suspects of their rights first and gain approval later, inverting the order required by due process.¹⁵⁸ In this way, police lawmaking violates the right to due process under the Fifth and Fourteenth Amendments.¹⁵⁹

* * * * *

The three constitutional theories undercutting police lawmaking are intertwined. The lack of a discernable standard governing judicial delegations of lawmaking authority to police is itself an outgrowth of the courts' reluctance to grant equal protection under the law to Black defendants. Due pro-

¹⁵² See *id.* at 761 ("Against that backdrop, a true mandate of police action would require some stronger indication from the Colorado Legislature than 'shall use every reasonable means to enforce a restraining order' (or even 'shall arrest . . . or . . . seek a warrant') . . .").

¹⁵³ See *supra* Section III.B.2.

¹⁵⁴ *United States v. Armstrong*, 517 U.S. 456, 458 (1996) (holding that a defendant is required to show that the government failed to prosecute similarly situated defendants in order to advance a selective-prosecution claim).

¹⁵⁵ See, e.g., *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1167 (10th Cir. 2003) (applying the *Armstrong* standard of prosecutorial discretion to the police decision to conduct a traffic stop).

¹⁵⁶ See Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1531 (2007) ("[I]dentifying an illegitimate motivation is complicated when a greater number of legitimate factors may enter a decision and when the decisionmaker has greater flexibility regarding the weight accorded to each factor.").

¹⁵⁷ See Haugh, *supra* note 21 ("The inevitable result of prosecutor and police lawmaking is selective, arbitrary, and discriminatory application of the criminal code."); see also *supra* Part I.

¹⁵⁸ See Chapman & McConnell, *supra* note 141, at 1782 ("The first, central, and largely uncontroversial meaning of 'due process of law,' the meaning established in Magna Charta and applied vigorously by Coke against the first two Stuart Kings, was that the executive may not seize the property or restrain the liberty of a person within the realm without legal authority arising either from *established common law* or from statute." (emphasis added)).

¹⁵⁹ Much of police lawmaking occurs when state actors violate rights incorporated against the states through the Fourteenth Amendment's Due Process Clause, though plenty involves federal law enforcement. The analysis under these two amendments is generally taken to be identical. See Robert E. Riggs, *Substantive Due Process in 1791, 1990* WIS. L. REV. 941, 943 n.12 ("[T]here is general agreement that fourteenth amendment due process was intended to mirror fifth amendment due process."). But see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 416 (2010) ("Between 1791 and 1868, when the Fourteenth Amendment was ratified, due process concepts evolved dramatically through judicial elaboration of due process and similar provisions in state constitutions, and through invocations of substantive due process arguments by both proslavery and abolitionist forces in connection with debates concerning the expansion of slavery in the federal territories.").

cess violations arise in large part because the courts have abandoned the separation of powers principle in challenges to police misconduct. Police lawmaking is rooted in discriminatory behaviors encouraged by the lack of due process. The combination of all three renders police lawmaking constitutionally aberrant.

CONCLUSION

*I am the law!*¹⁶⁰

—Judge Dredd

To Black people, America is, in many respects, Mega-City One.¹⁶¹ Police are simultaneously judge, jury, and executioner.¹⁶² Too often, judicial deference to police discretion results in police acting as both legislators and executives, pushing courts to the forgone conclusion of approving their decisions. The consequences to Black people are grave: occupation by a gendarmerie that believes Black lives do not matter.¹⁶³ The courts have created

¹⁶⁰ JUDGE DREDD (Hollywood Pictures 1995).

¹⁶¹ In the year 2139 of the film (and the comic books from which it was adapted), law enforcement is entrusted to “Street Judges” who combine the functions of police officer, judge, jury, and executioner. *See id.*

¹⁶² Jelani Jefferson Exum calls this “the death penalty on the streets.” Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987, 987 (2015); *see also* John W. Whitehead, *Killer Instincts: When Police Become Judge, Jury, and Executioner*, COUNTERPUNCH (Aug. 10, 2016), <https://www.counterpunch.org/2016/08/10/killer-instincts-when-police-become-judge-jury-and-executioner/>, archived at <https://perma.cc/W3BL-253W> (“And when an officer fires a killing shot at a fellow citizen not once or twice but three and four and five times, he is no longer a guardian of the people but is acting as a paid assassin.”); Samantha Michaels, *Breonna Taylor is One of a Shocking Number of Black People to See Armed Police Barge into Their Homes*, MOTHER JONES (May 20, 2020), <https://www.motherjones.com/crime-justice/2020/05/breonna-taylor-is-one-of-a-shocking-number-of-black-people-to-see-armed-police-barge-into-their-homes/>, archived at <https://perma.cc/W9EL-BSTA> (“In mid-March, police officers barged into Breonna Taylor’s home in Louisville, Kentucky, in the middle of the night and discharged a spray of bullets that struck and killed the 26-year-old EMT.”).

¹⁶³ Judge Carlton W. Reeves recently addressed the dangers Black people face from police while going about their lives in America:

Clarence Jamison wasn’t jaywalking.
 He wasn’t outside playing with a toy gun.
 He didn’t look like a “suspicious person.”
 He wasn’t suspected of “selling loose, untaxed cigarettes.”
 He wasn’t suspected of passing a counterfeit \$20 bill.
 He didn’t look like anyone suspected of a crime.
 He wasn’t mentally ill and in need of help.
 He wasn’t assisting an autistic patient who had wandered away from a group home.
 He wasn’t walking home from an after-school job.
 He wasn’t walking back from a restaurant.
 He wasn’t hanging out on a college campus.
 He wasn’t standing outside of his apartment.
 He wasn’t inside his apartment eating ice cream.
 He wasn’t sleeping in his bed.

this unconstitutional monstrosity and have a responsibility to end it; but in the interim, prosecutors have the power to sap its strength.¹⁶⁴ Until they do, “the law” will continue to build its arsenal of abuses on the backs of Black people, sending forth visions of their constitutionality through the gate of ivory.¹⁶⁵

He wasn't sleeping in his car.
 He didn't make an “improper lane change.”
 He didn't have a broken tail light.
 He wasn't driving over the speed limit.
 He wasn't driving under the speed limit.

No, Clarence Jamison was a Black man driving a Mercedes convertible. As he made his way home to South Carolina from a vacation in Arizona, Jamison was pulled over and subjected to one hundred and ten minutes of an armed police officer badgering him, pressuring him, lying to him, and then searching his car top-to-bottom for drugs.

Nothing was found. Jamison isn't a drug courier. He's a welder. Unsatisfied, the officer then brought out a canine to sniff the car. The dog found nothing. So nearly two hours after it started, the officer left Jamison by the side of the road to put his car back together.

Thankfully, Jamison left the stop with his life. Too many others have not.

Jamison v. McClendon, 476 F. Supp. 3d 386, 390–91 (S.D. Miss. 2020); *see also* United States v. Curry, 965 F.3d 313, 334 (4th Cir. 2020) (Gregory, C.J., concurring) (“[W]e must remind law enforcement that the Fourth Amendment protects against unreasonable searches and seizures, and that those protections extend to all people in all communities.” (quotations omitted)).

¹⁶⁴ *See* Brandon Hasbrouck, *The Just Prosecutor*, 98 WASH. U. L. REV. (forthcoming 2021) (describing the authority of prosecutors committed to liberation justice, constitutionalism, and originalism to utilize prosecutorial discretion to uphold the rights of defendants).

¹⁶⁵ *See* VIRGIL, *THE AENEID* 242 (John Dryden trans., 1697):

Two gates the silent house of Sleep adorn;
 Of polish'd iv'ry this, that of transparent horn:
 True visions thro' transparent horn arise;
 Thro' polish'd ivory pass deluding lies.