ESSAY

THE THIRTEENTH AMENDMENT AND SELF-DETERMINATION

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Slavery in the American South was a system of government that denied self-determination to Black communities. The Thirteenth Amendment to the U.S. Constitution promised that "[n]either slavery nor involuntary servitude . . . shall exist within the United States."[1] Today, Black communities and other subordinated communities are demanding self-determination and community control of the laws and policies that affect them. The Movement for Black Lives, for example, has demanded "a world where those most impacted in our communities control the laws, institutions, and policies that are meant to serve us."[2] The Movement's "intersectionally sensitive"[3] and "hyper-local"[4] platform "signals the

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1 U.S. CONST. amend. XIII, § 1.

2 THE MOVEMENT FOR BLACK LIVES, *Community Control*, https://policy.m4bl.org/about/ [https://www.perma.cc/S3H6-SPKH] (last accessed Jan. 26, 2019). The Movement for Black Lives was organized "[i]n response to the sustained and increasingly visible violence against Black communities in the U.S. and globally" and is a "collective of more than 50 organizations representing thousands of Black people from across [the United States]." THE MOVEMENT FOR BLACK LIVES, *Platform*, https://policy.m4bl.org/platform/ [https://www.perma.cc/2P45-PFYL] (last accessed Jan. 26, 2019); *see* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 408 (2018) ("The [Movement for Black Lives] is focused on shifting power into Black and other marginalized communities.").

3 Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1481 n.5 (2016).

4 Mark Winston Griffith, *Black Love Matters*, THE NATION (July 28, 2015), https://www.thenation.com/article/black-love-matters/

revitalization of alternative forms of participatory democracy"[5] that entail not simply rights or votes, but also powers to decide.

This Essay considers whether the Thirteenth Amendment might support or reflect this type of demand for collective self-determination. The Supreme Court has read the Thirteenth Amendment to the U.S. Constitution to abolish chattel slavery and other forms of compulsory labor that deny an individual right to liberty.[6] It has further held that Section 2 of the Amendment authorizes Congress to legislate to eliminate the "badges and incidents of slavery,"[7] which includes the authority to protect the right to buy and sell property against racial discrimination.[8] Whether the Thirteenth Amendment goes further still to protect collective self-determination is an open question.

My aim in this Essay is to explore a story of racial equality that connects demands for community control and collective self-determination with the Thirteenth Amendment's promise to abolish slavery.[9] Looking to the Thirteenth Amendment opens up possibilities not envisioned in the canonical *Carolene Products* approach to the Fourteenth Amendment's equal protection guarantee, which focuses upon judicial protection of the rights of "discrete and insular minorities,"[10] or, in modern parlance, "suspect" and "quasi-suspect" classes.[11]

This Essay does not attempt a complete exploration of the questions it raises. Rather, taking criminal justice as its primary example, this Essay sketches the Thirteenth Amendment's potential to support or at least reflect a "demosprudence"[12] of equality and self-determination.

[https://www.perma.cc/8JHY-EBF4].

5 *Cf.* Veryl Pow, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. REV. 1770, 1772 (2017) (discussing Black Lives Matter movements generally); Akbar, *supra* note 2, at 407 n.3 (noting that Movement for Black Lives includes chapter-based Black Lives Matter organization).

6 United States v. Kozminski, 487 U.S. 931, 942–44 (1988).

7 The Civil Rights Cases, 109 U.S. 3, 20 (1883).

8 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412, 421–22 (1968) (holding that Congress had constitutional authority to enact 42 U.S.C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property").

9 U.S. CONST. amend. XIII, § 1.

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

11 Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 164 n.89 (2016) ("Rather than refer to discrete and insular minorities, the Court now speaks of 'suspect' or 'quasi-suspect' classes.").

12 Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward A*

The following three Parts consider the possibility of—and some challenges to—this interpretation of the Thirteenth Amendment.[13] Part I discusses community control and collective self-determination as components of demands for racial equality. Part II connects this type of demand with the Thirteenth Amendment. Part III draws upon Kimberlé Crenshaw's work on intersectionality[14] and Angela Harris's work on essentialism[15] to identify some of the ways in which a Thirteenth Amendment analysis might take the complexities of collective self-determination into account by making visible myriad forms of domination.[16]

This Essay is concerned with *communities* in particular places and spaces rather than a singular *community*. It takes as a premise that the relationships among race, community, and identity are complex.[17] Regina Austin has argued that a

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Demosprudence of Law and Social Movements, 123 YALE L.J. 2740, 2749 (2014) ("Whereas jurisprudence examines the extent to which the rights of 'discrete and insular' minorities are protected by judges interpreting ordinary legal and constitutional doctrine, demosprudence explores the ways that political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems.")(footnote omitted).

13 The italicized reference is to Ava DuVernay's *13th*, a documentary that explores the Thirteenth Amendment's fraught relationship with mass incarceration in light of the Amendment's Exception Clause, which permits slavery or involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted." U.S. CONST. amend. XIII, § 2. *See* 13TH, Directed by Ava DuVernay (Netflix 2016), https://www.netflix.com/watch/80091741 [https://perma.cc/55NR-35L7]; *infra* Part III (discussing the Exceptions Clause).

14 *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) [hereinafter Crenshaw, *Margins*]; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

15 *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

16 *Cf.* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 108 (2004) ("The Thirteenth Amendment provides Congress with the power to end any private or state-sponsored domination that prevents individuals from participating in civil society as rational, autonomous agents."); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1470 (2012) (arguing that Thirteenth Amendment has been neglected because taking it seriously might mean "embarking on the project of ending domination in social life"); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and The Thirteenth Amendment*, 90 B.U. L. REV. 255, 268 (2010) (developing vision of Thirteenth Amendment that "takes into account the fact that racial, gender, and economic subordination are interconnected").

17 Race, as Ian Haney López has argued, "is in fact closely tied to the construction of personal identities and communities," but is nevertheless distinguishable from specific communities, "often geographically defined," that are based upon shared experiences and "can serve as mediums linking race to

singular "'black community' . . . is more of an idea, or an ideal, than a reality," while nevertheless seeking to revitalize the ideal of community as part of a pursuit of freedom for "real black communities."[18] Thus, while Parts I and II explore an idea of collective self-determination for communities, Part III acknowledges how this idea can make invisible "those at the margins" of communities.[19]

I
SELF-DETERMINATION AND RACIAL EQUALITY

Slavery in the American South denied individual self-determination to Black slaves and collective self-determination to Black communities. Today, Black communities continue to fight for a democratic system of government in which they have a say over the economies, healthcare systems, police, and schools that are supposed to serve them. These claims for collective self-determination are claims for racial equality, even if they do not conform to canonical conceptions of equal protection law. And this sort of claim may find support in the Thirteenth Amendment, or so this Essay will argue.

This Essay uses "collective self-determination" in a capacious sense to refer to claims of "social right theoretically distinct from . . . individual rights of personal autonomy"[20] that are aimed at empowering communities *as communities* to participate in, if not control, lawmaking and policymaking meant to serve them. Not all claims to collective self-determination receive recognition as legal rights, nor do they all entail the same histories, values, and concerns.[21] My focus

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identity and back again." Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 54 (1994).

18 Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1769, 1817 (1992).

19 *See* Robinson, *supra* note 11, at 211 (looking to "insights of intersectionality" in order "to make visible those at the margins of racial and sexual minority communities").

20 Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1520 (1997) (reviewing OWEN FISS, LIBERALSIM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996)).

21 International law, for example, has recognized rights to collective self-determination, which can take the form of the external self-determination of national groups or the form of internal self-determination of peoples within a particular state. *See* G.A. Res. 1514 (XV), ¶ 2, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, 67, U.N. Doc. A/4684 (1960), https://www.un.org/en/decolonization/declaration.shtml [https://www.perma.cc/CM4W-FDQG] (recognizing right of nations to "freely determine their political status and freely pursue their economic, social and

is on connecting claims for community control and collective self-determination in matters of local criminal justice and policing with the constitutional protections of the Thirteenth Amendment.[22]

Recent demands for criminal justice reform in the United States have connected racial equality on the one hand with community control of policing on the other. Consider, for example, the platform of the Movement for Black Lives, a

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cultural development"); G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 4 (Sept. 13, 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf [https://www.perma.cc/DV3C-4R5R] (recognizing right of Indigenous Peoples "to autonomy or self-government in matters relating to their internal and local affairs"); EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 60–61 (2016) (contrasting external self-determination with internal self-determination under international law). As Henry Richardson has explained, there are longstanding traditions of political and legal thought that connect self-determination under international law with racial equality for Black Americans. *See* HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW (2008); *see also* Natsu Taylor Saito, *All Peoples Have a Right to Self-Determination: Henry J. Richardson III's Liberatory Perspective on Racial Justice*, 31 TEMP. INT'L & COMP. L.J. 69, 70 (2017) (discussing Richardson's "situating of Black freedom struggles in the historical context of colonialism and his insistence that African Americans and other peoples 'encapsulated' within extant states have an internationally recognized right to self-determination")(footnote omitted); Aziz Rana, *Colonialism and Constitutional Memory*, 5 UC IRVINE L. REV. 263, 281 (2015) (discussing "longstanding black tradition of conceiving black identity in international rather than purely domestic terms"); Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42, 48 (1993) (arguing that Black Americans have "rights to self-determination [under international law], though those rights may not encompass the fullest extent of that doctrine"). This Essay's argument, by contrast, is focused not upon international law, but instead upon what the Thirteenth Amendment's prohibition upon slavery might mean for the governance of criminal justice and policing. For a recent argument that grounds Black community control over policing in international human rights law, see M Adams & Max Rameau, *Black Community Control Over Police*, 2016 WIS. L. REV. 515, 518–19.

22 My argument is consistent with scholarship that has traced the problems of contemporary police violence and mass incarceration to their historical roots in American slavery. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (discussing the use of mass incarceration as a tool to deny civil rights to Black Americans); Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 2024 (2018) (reviewing JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017)) (describing racial profiling and police violence against Black Americans as "a problem whose history is rooted in perhaps the most pernicious system of racial inequality — slavery"). It aims to contribute to that conversation by connecting the debates around democratic policing and governance of the police with the history of slavery as a police institution and interpretations of the Thirteenth Amendment that look to republican conceptions of slavery as arbitrary domination.

collective of organizations across the United States.[23] The Movement grew out of a meeting of 2,000 people in Cleveland in 2015, the year after Darren Wilson, a police offer in the Ferguson Police Department, shot and killed Michael Brown Jr. in Ferguson, Missouri.[24] In the wake of protests and a federal Department of Justice (DOJ) investigation and report, Ferguson became "notorious" for its systemic exploitation of its black residents through "onerous fees, fines, and collection practices."[25] Citing the "bravery of those in Ferguson and across the country," the Movement for Black Lives convened local and national organizations and surveyed communities to develop "a shared vision of the world we want to live in."[26] This shared vision includes "independent Black political power and Black self-determination in all areas of society," which would entail "a remaking of the current U.S. political system in order to create a real democracy where Black people and all marginalized people can effectively exercise full political power."[27]

Among the Movement for Black Lives' demands is a "world where those most impacted in our communities control the laws, institutions, and policies that are meant to serve us," including "[d]irect democratic community control of local, state, and federal law enforcement agencies."[28] In recent years, there has been a renewed interest in democracy and policing.[29] Some visions of democratic policing focus upon governing the police through familiar systems of democratic accountability in

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23 THE MOVEMENT FOR BLACK LIVES, *Platform*, *supra* note 2.

24 Samuel P. Jordan, *Federalism, Democracy, and the Challenge of Ferguson*, 59 ST. LOUIS U. L.J. 1103, 1103 (2015).

25 Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2285–86 (2018).

26 THE MOVEMENT FOR BLACK LIVES, *About Us*, *supra* note 2.

27 THE MOVEMENT FOR BLACK LIVES, *Political Power*, *supra* note 2.

28 THE MOVEMENT FOR BLACK LIVES, *Community Control*, *supra* note 2.

29 *See, e.g.*, DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 114–55 (2008) (discussing the impact of community participation on police departments); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1610 (2017) (arguing that "multiple layers of democratic exclusion [in the American criminal justice system] reinforce each other, reproducing and legitimizing an unequal, racialized system of justice"); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1827 (2015) (arguing in favor of requiring prior legislative authorization and public rulemaking for police policies); Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 566 (explaining how a "democracy-enhancing theory of criminal law and procedure" would reform the system through increased participation from "low-income and minority individuals and communities" in policy decisions).

America, including specific legislative authorization and public rulemaking.[30] Others have emphasized a more agonistic vision of democracy, one in which the state "should facilitate . . . the efforts of disenfranchised groups to participate in criminal justice," including through "community control of local criminal justice policies and priorities."[31] This Essay aims to connect the latter demand to the Thirteenth Amendment's prohibition on slavery.

This demand for community control of policing goes beyond familiar strategies of community policing,[32] including community consultation,[33] or civilian review boards.[34] M Adams and Max Rameau, for example, have argued that democracy demands civilian police control boards, comprised of residents of the police district, that would "identify[] creative and innovative ways in which a community police force can support and advance the interests of the community it serves."[35] Such demands for community control and collective self-determination in matters of criminal justice are contested, of course, not only in particular communities but also in the growing scholarship on democratizing criminal justice.

Policing in Ferguson, Missouri provides an example of the type of racial subordination that might be redressed through empowering communities to control the laws and policies that are meant to serve them. In 2014–2015, the DOJ investigated[36] the Ferguson Police Department pursuant to 34

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30 *See, e.g.*, Friedman & Ponomarenko, *supra* note 29, at 1907 (arguing for use of "rulemaking requirements" in order to "force democratic deliberation over police tactics").

31 Simonson, *supra* note 29, at 1622 (footnote omitted).

32 *See, e.g.*, Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1593 (2002) ("Community policing is central to any conversation about the role of community in law and criminal justice.").

33 *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1047 (2004) ("'Community policing,' in which police devise local crime control strategies in collaboration with neighborhood groups, is now widely promoted.").

34 *See, e.g.*, Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1039 (2016) (noting reasons for "loss of faith in civilian review boards" and arguing for new strategies for "independent civilian oversight"). For discussion of the Movement for Black Lives' departure from familiar strategies for criminal justice reform, see Akbar, *supra* note 2, at 433–34.

35 Adams & Rameau, *supra* note 21, at 538 ("To be perfectly clear, this is not a call for some type of civilian investigative, oversight, or review board.").

36 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

U.S.C. § 12601, which authorizes the Attorney General to obtain equitable and declaratory relief to eliminate "a pattern or practice of conduct by law enforcement officers" that violates federal "rights, privileges, or immunities."[37] Enacted in 1994, 34 U.S.C. § 12601 has been a vital vehicle for reforming the structure of law enforcement departments that have engaged in widespread violations of constitutional rights, including in Ferguson.[38] The DOJ's report on Ferguson's law enforcement concluded that the City used aggressive and racialized enforcement of the municipal code to generate revenue.[39] Black communities in Ferguson, the report found, are treated "less as constituents" than as "sources of revenue."[40] This pattern of policing, the DOJ concluded, violated the First, Fourth, and Fourteenth Amendments.[41] To redress these wrongs, the DOJ recommended community policing reforms, among others.[42]

Critics of the DOJ's approach to reforming policing under 34 U.S.C. § 12601 have argued that the process does not adequately involve or empower those most affected, including community members.[43] The Movement for Black Lives' vision of "democratic community control" of police goes beyond the DOJ's recommendations in the Ferguson report; for example, it includes a demand that "communities most harmed by destructive policing have the power to hire and fire officers, determine disciplinary action, control budgets and policies, and subpoena relevant agency information."[44] While the Section 12601 process has been a crucial vehicle for reforming local police practices, it is not designed around empowering

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[https://www.perma.cc/ESN8-GH7S] [hereinafter DOJ Report].

37 The DOJ's authority under Section 12601 was originally codified at 42 U.S.C. § 14141. The DOJ also cited Title VI and the Safe Streets Act as authority for its investigation. *See* 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 3789d (Safe Streets Act).

38 Joshua Chanin, *Evaluating Section 14141: An Empirical Review of Pattern or Practice Police Misconduct Reform*, 14 OHIO ST. J. CRIM. L. 67, 68–69 (2016).

39 DOJ Report, *supra* note 36, at 2.

40 *Id.*

41 *Id.* at 16–28, 70–79.

42 *Id.* at 91.

43 *See* Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 489 (2008) ("[T]he current process excludes important stakeholders directly impacted by the reforms, including community members, who are the consumers of police services, and the rank-and-file police officers, whom the reforms may adversely impact.").

44 THE MOVEMENT FOR BLACK LIVES, *Community Control*, *supra* note 2; *see* Akbar, *supra* note 2, at 433 (discussing Movement's demand).

communities to protect themselves. The statute does not create a private right of action, but instead authorizes enforcement by the DOJ. Thus, when the DOJ adopts of policy of nonenforcement, Section 12601 leaves communities without a remedy.[45]

There are many possibilities for legal reform to empower communities to redress racially discriminatory policing. The Thirteenth Amendment might be interpreted broadly to support claims for affirmative relief to restructure local governance of police departments.[46] Congress might legislate to increase community participation in Section 12601 processes, or enact new statutory schemes aimed at fostering community control of policing.

Under current law, however, demands for affirmative restructuring of local governance to empower Black and other subordinated communities face substantial hurdles. The Fourteenth Amendment's Equal Protection Clause is the constitutional home of the law of racial equality. In particular, the Court's decision in *United States v. Carolene Products* introduced an approach to equality law that is debated to this day.[47] The Court's suggestion of more searching scrutiny of legislation burdening "discrete and insular minorities" has developed into a full structure of equal protection analysis with tiers of scrutiny depending upon whether the challenged government action targets a "suspect" or "quasi-suspect" class.[48]

Footnote four represents a way of thinking about equality and where and how equality law is made. Discrete and insular minorities may look to courts to protect their rights when

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45 *See* Memorandum from Attorney Gen. Jeffrey B. Sessions on Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities (Nov. 7, 2018) https://www.justice.gov/opa/press-release/file/1109621/download [https://www.perma.cc/S3RB-UPWY] (concluding that DOJ "should exercise special caution" in pursuing pattern-and-practice investigations and consent decrees involving local law enforcement agencies).

46 *See infra* Part II.B.

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

48 *See* Robinson, *supra* note 11, at 164 n.89 (explaining that the Court now uses the terms "suspect" and "quasi-suspect" to refer to classes that are especially protected under the Equal Protection Clause); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1077 (2011) (explaining that "familiar tiers of scrutiny" framework for equal protection analysis "can be traced back in concept, though not in [its] modern articulation, to the famous *Carolene Products* footnote").

legislative majorities violate them.[49] This way of thinking focuses upon courts and discrimination, not upon collective self-determination.[50]

The Fourteenth Amendment no doubt will continue to play an important role in litigation to reform criminal justice systems and to ensure racial equality. But as the Court "now closely scrutinizes [the] democratic victories" of "discrete and insular minorities" under the Equal Protection Clause,[51] might the Fourteenth Amendment be ill-fit for demands to empower communities to control criminal justice? If so, what role might the Thirteenth Amendment play in constitutional arguments about community control of policing and political self-determination?[52] The next Part turns to that question.

II
SLAVERY, SELF-DETERMINATION, AND THE THIRTEENTH AMENDMENT

In a nutshell, the Thirteenth Amendment's prohibition of slavery might play a role in constitutional arguments to the extent that the denial of community control and collective self-determination is a form of slavery or at least a badge or incident of it. That is not, of course, how the Court has described slavery in its Thirteenth Amendment jurisprudence. But defining slavery to encompass the wrongful denial of collective self-determination is as old as the American republic. Indeed, it is older than that.

This Part first argues that slavery in the American South involved the denial of Black self-determination. It then considers what the Thirteenth Amendment's prohibition of slavery might mean as a result, particularly in matters of criminal justice and policing. In so doing, this Part addresses

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49 *See, e.g.*, Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059, 1060 n.3 (1974) ("those who cannot defend themselves . . . are to be shielded by the courts").

50 See Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1332 (2005) (explaining that "the Warren Court . . . saw discrete and insular racial minorities essentially as objects of judicial solicitude, rather than as efficacious political actors in their own right").

51 Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1565 (2013).

52 To be sure, there is no reason to think that the current Supreme Court, given its approach to the Fourteenth Amendment, would embrace a reading of the Thirteenth Amendment that aims to empower racial minorities. One of the aims of this Essay, however, is to turn towards the Thirteenth Amendment to develop a counternarrative to the Court's Fourteenth Amendment jurisprudence.

some doctrinal challenges to Thirteenth Amendment arguments for Black collective self-determination.

A. Slavery and Self-Determination

Slavery in the American South aimed to deny individual self-determination to Black slaves and collective self-determination to Black communities. This subpart considers both forms of racial subordination, focusing upon the latter.

1. *Individual Self-Determination*

American slavery was a system of violent and racist subordination, supported by laws concerning property and personhood, that treated slaves as instruments of slaveowners' wills. "When he told me that I was made for his use, made to obey his command in *every* thing; that I was nothing but a slave, whose will must and should surrender to his, never before had my puny arm felt half so strong."[53] So wrote Harriet Jacobs of the wrongs of slavery in the American South, into which she was born in 1813, and which she described under the pseudonym Linda Brent. Slavery was a denial of individual self-determination, Jacobs wrote, one "terrible for men," but "far more terrible for women."[54] Slavery denied Black men and women control over their working lives, their education, and their freedom of movement.[55] It also denied Black women reproductive autonomy; as Pamela Bridgewater emphasized in her work on reparations for slavery, "a female slave did not have social or legal protection from rape," and a slave owner who "impregnated his female slave . . . simultaneously became the biological father and the legal owner of the child."[56] Against this backdrop, Bridgewater argued, the Thirteenth Amendment may be read to prohibit "modern reproductive abuses" that deny reproductive self-determination, such as criminal court orders requiring women to implant birth control

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53 LINDA BRENT (HARRIET JACOBS), THE DEEPER WRONG; OR, INCIDENTS IN THE LIFE OF A SLAVE GIRL 29 (1862).

54 *Id.* at 119; *cf.* Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 93 (2005) ("Those seeking to alleviate the sequelae of slavery must . . . . include both male and female experiences of slavery, and fully integrate women's issues into their analyses and strategies.").

55 *See, e.g.*, Bridgewater, *supra* note 54, at 113–14 (discussing the "unprecedented" manner in which slaves were denied control over virtually every aspect of their lives).

56 *Id.* at 117–18.

as a condition of probation.[57] Thus, the Thirteenth Amendment may have implications for criminal justice reform to protect individual autonomy.

2. *Collective Self-Determination*

The Thirteenth Amendment may also have implications for criminal justice reform to increase community control over policing. Slavery denied not only individual autonomy, but also collective self-determination. "If anyone wishes to be impressed with the soul-killing effects of slavery," Frederick Douglass wrote in his *Narrative of the Life*, "let him go to Colonel Lloyd's plantation and, on allowance-day, place himself in the deep pine woods, and there let him, in silence, analyze the sounds that shall pass through the chambers of his soul, — and if he is not thus impressed, it will only be because 'there is no flesh in his obdurate heart.'"[58] As Douglass would later describe it, Lloyd's plantation on the Eastern Shore of Maryland was "a little nation of its own, having its own language, its own rules, regulations and customs" — not to mention its own police.[59] There the overseer was "generally accuser, judge, jury, advocate and executioner."[60]

Slaveowners and their apologists did not shy away from saying as much. "Slavery," the Virginian lawyer George Fitzhugh wrote in 1857, "is an indispensable police institution."[61] The slaveholding South, he explained, was "governed just as those ancient republics," that is, "by a small class of adult male citizens, who assumed and exercised the government, without the consent of the governed."[62] Slavery, as Fitzhugh well understood, was not just coerced labor, though it was that. Nor was it simply the threat of arbitrary, absolute power, or the property laws that held one human

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57 Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 402–03 (2000).

58 FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE, *in* AUTOBIOGRAPHIES 24 (Henry Louis Gates, Jr., ed. 1994). Douglass was a slave on Lloyd's plantation. *See id.*

59 FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM, *in* AUTOBIOGRAPHIES, *supra* note 58, at 103, 160.

60 *Id.*

61 GEORGE FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS 97–98 (1857).

62 *Id.* at 354.

being could own another.[63] It also was a system of government that denied the collective self-determination of the enslaved.

We should, as Daniel Farbman has recently argued, see the plantation as the quintessential local government of the slaveholding South.[64] Plantation government "depended upon excluding black residents from the political community and creating an alternative method of governance to control them."[65] Slaveowners and their overseers investigated, prosecuted, and judged "crimes."[66] They "taxed" labor, dispensed "benefits," and built infrastructure.[67] Large plantation owners often codified their rules and regulations; in other words, they legislated.[68] And, of course, they policed.

Nineteenth-century slave narratives contain courageous tales of individual slaves determined to escape those police. Some are tales of families running to remain together. William and Ellen Craft's *Running a Thousand Miles for Freedom*, for instance, tells the story of how they escaped from Georgia to the Philadelphia as Ellen, who could pass for white, disguised herself as William's master so that they could travel freely.[69]

Self-emancipation was not simply an act of individual self-determination, however. Individual or familial acts of resistance collectively "beat[] against and beneath the walls of slavery."[70] In 1800, three brothers born into slavery in Virginia planned an uprising against slavery; one of them, a preacher named Martin, "told the people that 'their cause was similar to [the] Israelites'" who too fought for collective freedom.[71] A slave put on trial for insurrection in 1804, whose words were recorded but whose name has been lost to history, testified, "I have nothing more to offer than what George Washington would have had to offer, had he been taken by the British and

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63 Though it was those things too. *See* State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829) ("The power of the master must be absolute, to render the submission of the slave perfect.").

64 Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 426 (2017).

65 *Id.*

66 *Id.* at 428.

67 *Id.*

68 *Id.* at 428 n.37.

69 WILLIAM CRAFT & ELLEN CRAFT, RUNNING A THOUSAND MILES FOR FREEDOM, OR, THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY, *in* SLAVE NARRATIVES 677 (Henry Louis Gates, Jr., ed. 2000).

70 VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA 54–55 (1981).

71 *Id.* at 55.

put to trial by them. I have adventured my life in endeavoring to obtain the liberty of my countrymen."[72] Nat Turner's rebellion was originally planned for July 4, 1831,[73] fifty-years from the day the Continental Congress approved the wording of the Declaration of Independence.

Forty-five years after his escape from slavery, Frederick Douglass too reimagined the self-evident truths of the American Revolution.[74] In an 1883 address to the National Convention of Colored Men in Louisville, Kentucky, Douglass echoed the Declaration of Independence: "We hold it to be self-evident that no class or color should be the exclusive rulers of this country."[75] Slavery, of course, had been precisely contrary to that self-evident truth, as was the federal government's failure to make good on the promise of Reconstruction, a failure against which Douglass aimed his reimagined Declaration.[76]

The Declaration of Independence reflected a tradition of political thought in which the denial of political self-determination is a form of slavery. In its *Address to the People of Great Britain*, drafted in September 1774, the First Continental Congress defined political domination as a form of slavery.[77] The occasion for this complaint was the Quebec Act, which, among other things, eliminated religious tests for public office and sought to prevent further American encroachment upon Indigenous lands in parts of what is now Illinois, Indiana, Michigan, Ohio, Wisconsin, and Minnesota.[78] As the Continental Congress saw it, the Act had transformed Canada into a "fit instrument[] in the hands of power to reduce the ancient, free, Protestant colonies to the same state of slavery with themselves."[79]

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72 Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.-C.L. L. REV. 299, 390–91 (1993).

73 *See* John W. Cromwell, *The Aftermath of Nat Turner's Insurrection*, 5 J. NEGRO HIST. 208, 209 (1920).

74 *See* DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 645–46 (2018) (internal quotation marks omitted).

75 *Id.*

76 *See id.* (explaining that Douglass "ultimately directed this jeremiad at Republicans and at the federal government").

77 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 81 (W. Ford ed. 1904) (Address to the People of Great Britain, Oct. 21, 1774) [hereinafter Address]. The First Continental Congress was a convention of fifty-six delegates from twelve of the American colonies. *E.g.*, RALPH C. CHANDLER ET AL., CONSTITUTIONAL LAW DESKBOOK § 1:8 (2018).

78 *See* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 74 (2010).

79 *See* Address, *supra* note 77, at 87–88; RANA, *supra* note 78, at 78

Examples of this sort of rhetoric are easily multiplied from both sides of the Atlantic. Richard Price, the British moral philosopher who, along with George Washington, received an honorary Doctor of Laws degree in 1781 from Yale College,[80] wrote in support of the American revolutionaries, arguing that the denial of political self-determination was a worse form of slavery than "any slavery of private men to one another."[81] Parliament had "usurped Power," one Bostonian complained in 1773, and thus had put the colonies in a "State of Slavery."[82] In *Common Sense*, the most widely-read pamphlet of the American Revolution and one of the best-selling pieces of American literature,[83] Thomas Paine warned readers that "[t]he nearer any government approaches to a republic, the less business there is a for a king," but "when republican virtue fails, slavery ensues."[84]

Slavery, in short, "was a central concept in eighteenth-century political discourse."[85] To be governed without one's consent was to be a slave.[86] Free nations, by contrast, were governed "according to their own mind."[87] The American revolutionaries who fought for the right to make their own laws and be ruled by them drew upon this widespread republican tradition.

In an 1845 address, Douglass drew upon this political tradition when he condemned American slavery to an audience in Limerick, Ireland.[88] American slavery, Douglass argued,

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(discussing and quoting Continental Congress's address).

80 *See* YALE UNIVERSITY, *Honorary Degrees Since 1702*, https://secretary.yale.edu/programs-services/honorary-degrees/since-1702?field_degrees_value=All&field_year_value=1781&keys= [https://perma.cc/PT56-S7LL] (last accessed Jan. 25, 2018).

81 *Quoted in* RANA, *supra* note 788, at 89. As Price put it, "a country that is subject to the legislature of another country in which it has no voice, and over which it has no control, cannot be said to be governed by its own will. Such a country, therefore, is in a state of slavery." *Id.*

82 *Quoted in* Balkin & Levinson, *supra* note 16, at 1481 (internal quotation marks and emphasis omitted).

83 HARVEY J. KAYE, THOMAS PAINE AND THE PROMISE OF AMERICA 43 (2005).

84 THOMAS PAINE, *Common Sense*, *in* LIFE AND WRITINGS OF THOMAS PAINE 27 (David Edwin Wheeler, ed., 1908).

85 BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 232 (1992); *see* Balkin & Levinson, *supra* note 16, at 1481 (discussing and quoting Bailyn's work).

86 *See* Balkin & Levinson, *supra* note 16, at 1483.

87 *Id.* at 1484 (quoting ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT § 21, at 349 (London, A. Millar 3d ed. 1751)).

88 Frederick Douglass, *Slavery and America's Bastard Republicanism: An Address Delivered in Limerick, Ireland, on 10 November 1845*, *in* THE FREDERICK

involved a denial of individual self-determination. A slave in America

> had no power to exercise his will—his master decided for him not only what he should eat and what he should drink, what he should wear, when and to whom he should speak, how much he should work, how much and by whom he is to be punished—he not only decided all these things, but what is morally right and wrong.[89]

And slavery was also a collective wrong: The United States, Douglass pointed out, was "not a true democracy, but a bastard republicanism that enslaved one-sixth of the population."[90]

Contemporary republican political theory takes slavery as a paradigmatic example of unjust domination. Slavery involves instrumentalization, of course, in which one human being treats another as a means to satisfy their own ends.[91] And slavery violates what political theorists call the principle of noninterference: a slaveowner and his agents interfere with a slave's free choices on a daily and violent basis. But, as republicans argue, slavery involves wrongful domination even when it does not involve actual interference but simply the threat of an arbitrary exercise of absolute power. "*Everything must be absolute here*," Douglass wrote of the plantation where he was enslaved, and "[t]he very presence of [the overseer] Gore was painful."[92] Domination exists when one person has the capacity to exert such arbitrary power over another, even if the power is not exercised on any particular day or in any particular instance.[93]

Slavery involves a wrong, however, even to the extent that

DOUGLASS SPEECHES, 1841-1846, YALE UNIVERSITY, https://glc.yale.edu/slavery-and-americas-bastard-republicanism [https://perma.cc/6E2Z-BDT3] (last accessed Jan. 25, 2019).

89 *Id.*

90 *Id.*

91 *See* Seth Davis, *Pluralism and the Public Trust, in* FIDUCIARY GOVERNMENT 281, 285, 285 n.17 (Evan J. Criddle et al., eds. 2018) (discussing instrumentalization) (citing IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 45–47 (Allen W. Wood ed., trans., 2002) (1785)).

92 DOUGLASS, MY BONDAGE AND MY FREEDOM, *in* AUTOBIOGRAPHIES, *supra* note 58, at 200.

93 *See*, *e.g.*, Davis, *supra* note 91, at 286 (discussing PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 56 (1997)); QUENTIN SKINNER, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY 83, 84–86 (Cécile Laborde & John Maynor eds., 2008) (discussing the importance of freedom from subjection to the arbitrary power of another individual).

the law limits threats of the exercise of arbitrary power. Southern states' laws may have purported to place limits on slaveowners' power in order to protect slaves' lives.[94] But a slave may be "recognised as a person" under the law and still remain a slave from whom the law usurps "the compulsory power of directing and receiving the fruits of his labor."[95]

Wrongful usurpation involves the displacement of another's activity and the imposition of one's own upon them. As Patchen Markell has argued, slavery entails usurpation: "Slaves are dominated to the extent that they are subject to a power of arbitrary interference by their masters; they are usurped to the extent that their involvement in this or that activity is interrupted or displaced."[96] And just as individual slaves in the American South were usurped of the power to direct their own labor, so too were enslaved communities usurped of the power of collective self-determination.

B. Collective Self-Determination and the Thirteenth Amendment

Against this backdrop, there are several ways in which the Thirteenth Amendment might support constitutional arguments concerning Black communities' claims of collective self-determination. One argument is that Section 1 of the Amendment supports such claims of its own force. This argument faces substantial hurdles under current jurisprudence, which focuses upon literal slavery and similar forms of coerced labor. But this Essay does not focus upon the courts.[97] A second possibility is that Congress might legislate under Section 2 of the Amendment to support Black self-determination in order to abolish all badges and incidents of slavery. This argument, which is directed towards the political branches, has particular force with respect to criminal justice and policing of Black communities. Finally, we might

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94 *See, e.g.*, State v. Hoover, 20 N.C. 500, 503, 4 Dev. & Bat. 365, 368 (1839) ("[T]he master's authority is not altogether unlimited. He must not kill."). *But see* DOUGLASS, AUTOBIOGRAPHIES, *supra* note 58, at 203 ("I speak advisedly when I say this, —that killing a slave, or any colored person, in Talbot county, Maryland, is not treated as a crime, either by the courts or the community.").

95 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 624–25 (1857) (Curtis, J., dissenting).

96 Patchen Markell, *The Insufficiency of Non-Domination*, 36 POL. THEORY 9, 27 (2008).

97 As Lani Guinier and Gerald Torres have argued, "political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems." Guinier & Torres, *supra* note 12, at 2749.

focus upon communities and social movements themselves by looking to the Thirteenth Amendment to support or at least reflect demands for the empowerment of Black and other subordinated communities.

This Section argues that, at a minimum, there is a powerful argument that the sort of denial of community control and self-determination on display in Ferguson's Police Department is a "badge or incident of slavery." It therefore may be redressed under the Thirteenth Amendment. Section 1 of the Amendment arguably reaches some badges and incidents of slavery. But even if Section 1 does not, Section 2 empowers Congress to legislate to eliminate those badges and incidents.

Section 1 of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[98] The Court's narrow interpretation of Section 1 of the Thirteenth Amendment has focused upon a "prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion."[99] Though the Supreme Court has never held as much, lower courts have assumed that Section 1 abolished chattel slavery and not much more.[100] Thus, as a matter of doctrine, federal courts have not recognized what both Douglass and Fitzhugh understood about slavery.

One reason to question this narrow interpretation of Section 1 is that the Court has interpreted the Fourteenth Amendment broadly. The Fourteenth Amendment was aimed at eliminating the Black Codes, legislation designed to subordinate Black Americans in the South following the Civil War.[101] But the Fourteenth Amendment's contemporary reach goes far beyond this form of race-based legislation. The Court has interpreted the Amendment to reach various forms of

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98 U.S. CONST. amend. XIII, § 1.

99 United States v. Kozminski, 487 U.S. 931, 944 (1988).

100 *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1315 (2007)[hereinafter Carter, *Race*]("In the absence of a definitive statement from the Court, lower courts have uniformly held that the judicial power to enforce the Amendment is limited to conditions of literal slavery or involuntary servitude.").

101 *See* Bell v. Maryland, 378 U.S. 226, 303 (1964) (Goldberg, J., concurring) ("The Framers of the Fourteenth Amendment, reacting against the Black Codes, made certain that the States could not frustrate the guaranteed equality by enacting discriminatory legislation or by sanctioning discriminatory treatment.")(footnote omitted).

discrimination based upon gender and sexual orientation, to name but two examples.[102] In so doing, the Court has extended the underlying values of the Equal Protection Clause and drawn various analogies among groups and practices of discrimination.[103]

It is not difficult to imagine a similar approach to the Thirteenth Amendment that would have implications for the political subordination of racial minorities and other marginalized groups. As a starting premise, one need only take seriously the Founders own republican rhetoric, which argued that the British Crown had reduced Americans to the status of slaves by denying the principle of consent of the governed. Taking this premise seriously would mean asking whether the Thirteenth Amendment's prohibition on slavery requires abolishing all forms of political subordination. One need not go that far, however, to develop an argument that Black communities in particular have a claim to collective self-determination under the Thirteenth Amendment. Given that American slavery was a "police institution"[104] not just figuratively, but also literally, that claim has particular force with respect to contemporary forms of policing that rest upon and perpetuate the political subordination of Black Americans.

There is debate among Thirteenth Amendment scholars, which this Essay does not aim to resolve, about how broadly to interpret the Amendment's reach. Some scholars treat the Thirteenth Amendment as our republican amendment. On this view, the Amendment prohibits (or at least authorizes Congress to address) various forms of domination and subordination, ranging from anti-abortion laws to child abuse and sexual harassment.[105] Other scholars have objected to reading the Amendment this broadly. One objection rests on originalist grounds, the other on doctrinal and normative

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102 *See* United States v. Virginia, 518 U.S. 515, 519, 532 (1996) (gender discrimination); Romer v. Evans, 517 U.S. 620, 635 (1996) (sexual orientation discrimination).

103 *See* Balkin & Levinson, *supra* note 16, at 1461.

104 FITZHUGH, *supra* note 61, at 97–98.

105 *See* Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1733–34 (2012) (citing Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359 (1992) (child abuse), Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J.L. & SOC. PROBS. 519 (1995) (sexual harassment), and Andrew Koppleman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990)(anti-abortion laws)).

grounds.

The originalist objection is that the framers of the Thirteenth Amendment intended to abolish chattel slavery and to address forms of racial subordination that are traceable to slavery or mimic it. Perhaps the most powerful evidence in support of this interpretation is that abolitionists pushing for a constitutional amendment offered a limited definition of slavery in response to political opposition.[106] When opponents of the proposed Thirteenth Amendment thundered about its potential to undermine traditional gender roles, proponents of the Amendment insisted that it would do no such thing. Some proponents also argued that the Amendment would not enfranchise Black Americans,[107] an interpretation that cuts against a reading that find support for collective self-determination in the Amendment.

The picture of original intent is not so plain as that, however. Black proponents of the Amendment, "who spoke for a majority of the population in three southern states as well as substantial minorities in several others," argued that the "abolition of slavery necessarily entailed . . . eliminating each and every element of the slave system."[108] And James Ashley, "the Amendment's floor leader in the House, proclaimed that it would provide '[the] constitutional guarantee of the government to protect the rights of all and secure the liberty and equality of its people.'"[109]

The second objection to reading the Thirteenth Amendment as a broad prohibition upon domination is more explicitly normative. William Carter has argued that the broad reading favored by some scholars "ignore[s] enslavement itself" and "weaken[s] the Amendment's potential as an effective legal remedy for the claims that it does encompass."[110] In his view, the Thirteenth Amendment must be interpreted "with specific regard to the experience of the victims of human bondage in the United States (i.e., African Americans) and the destructive effects that the system of slavery had upon American society,

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106 *See* Balkin & Levinson, *supra* note 16, at 1489.

107 *See* James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 434 (2018).

108 *Id.* at 435.

109 *Id.* at 434 (alteration added) (quoting REBECCA ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 79 (2018)).

110 Carter, *Race*, *supra* note 100, at 1317.

laws, and customs."[111]

On this reading, there is still a powerful case that the Thirteenth Amendment supports community control and collective self-determination for Black communities in areas such as criminal justice and policing. As a "police institution," American slavery involved race-based policing and the denial of community control and collective self-determination for enslaved communities. Contemporary denials of community control of policing that result in racial subordination, such as that on display in Ferguson, would seem at a minimum to qualify as "badges and incidents" of slavery.

Scholars have debated whether Section 1 reaches any badges and incidents of slavery of its own force. The working assumption of judges and many scholars is that Section 1 does not, but rather leaves to Congress the authority under Section 2 to redress the badges and incidents of slavery.[112] This approach might be justified not only on interpretive grounds, but also based upon comparative institutional competence and political accountability.[113] But there is a powerful argument that Congress's authority under Section 2 should not "raise the negative inference that courts are essentially powerless under Section 1."[114] For my purposes, it is enough to point out that if Section 1 is interpreted to address badges and incidents of chattel slavery of its own force, then the Amendment itself would directly support claims to reorder the governance of local police institutions where they result in racial subordination of Blacks.

Another objection to reading Section 1 as supporting such a claim looks to the Fifteenth Amendment. That Amendment, it might be argued, addressed Black Americans' political power by protecting the individual right to vote.[115] The Thirteenth Amendment should not therefore be read to support claims to

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111 *Id.* at 1312 (emphases omitted); *cf.* Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811, 1837 (2012) ("'[S]lavery' is a word debased by hyperbole.").

112 *See* Pope, *supra* note 107, at 435.

113 *See, e.g.*, Miller, *supra* note 111, at 1840 (arguing that a "fairly narrow[]" conception of slavery and Section 1 would be a "'focal point' around which agreements on common law judicial enforcement may coalesce") (quoting David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 910–16 (1996)).

114 William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 86 (2004)[hereinafter Carter, *Framework*].

115 U.S. CONST. amend. XV.

collective self-determination, which also address questions of political power.[116] But there is another way to view the relationship between the two Amendments, under which they work together to address deprivations of political power that perpetuate the vestiges of slavery, with the Thirteenth Amendment playing a role in addressing the structure of the political system.[117] Even if, however, Section 1 of the Amendment does not itself support judicial action, Section 2 may be read to authorize Congress to address policing institutions that perpetuate the subordination of Black communities.

In any event, there is no reason to be optimistic that the Court will broaden its interpretation of Section 1 of the Thirteenth Amendment.[118] But the Thirteenth Amendment's promise need not stop with the Court. Congress has authority under Section 2 of the Amendment "to enforce this article by appropriate legislation."[119] The Supreme Court has interpreted Section 2 to authorize Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[120]

Focusing upon Congress's Section 2 authority raises the important question of whether collective self-determination should be viewed as a Thirteenth Amendment *remedy*, but not as a Thirteenth Amendment *right*. In light of the history of American slavery, I have argued that the Thirteenth Amendment should be understood to protect a right to collective self-determination where its denial would be analogous to the racial and political subordination that characterized American slavery. More specifically, the strong version of my argument is that the Thirteenth Amendment

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116 *Cf.* Washington v. Finlay, 664 F.2d 913, 927 (4th Cir. 1981) ("In the realm of voting, we think the [T]hirteenth [A]mendment offers no protections not already provided under the [F]ourteenth or [F]ifteenth [A]mendments.").

117 *See* Patricia Okonta, Note, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 286 (2018) ("A deprivation of the political power of blacks, as realized through some forms of racial gerrymandering, is a badge and incident of slavery.").

118 *See* Greene, *supra* note 105, at 1735–37 (defining "Thirteenth Amendment optimism" as practice of "arguing that the Amendment prohibits in its own terms, or should be read by Congress to prohibit, practices that one opposes but that do not in any obvious way constitute either chattel slavery or involuntary servitude" and arguing that such optimism is "almost uniformly unlikely to persuade a court or anyone who supports the challenged practice").

119 U.S. CONST. amend. XIII, § 2.

120 The Civil Rights Cases, 109 U.S. 3, 20 (1883).

recognizes a collective right to democratic policing for Black communities.

A weaker version of my argument would focus upon the Thirteenth Amendment's remedial implications for racially discriminatory policing. Carter has argued, for example, that "race-based policing [is] a Thirteenth Amendment issue."[121] On that view, the DOJ's Ferguson report should have pointed not only to the First, Fourth, and Fourteenth Amendment, but also to the Thirteenth Amendment. And on that view, congressional legislation under the Thirteenth Amendment could play an important role in affirmatively requiring democratic policing as a remedy for race-based policing.[122]

The promise of the Thirteenth Amendment need not stop with congressional legislation. Social movements, as Amna Akbar has recently argued, have much to teach lawyers and legal scholars about legal and social reform.[123] This Part has argued that taking seriously demands for community control and self-determination in matters of policing teaches us to trace the through-line from slavery as a "police institution" that denied the consent of the governed to policing that does the same today.

III
THE COMPLEXITIES OF COLLECTIVE SELF-DETERMINATION AND THE THIRTEENTH AMENDMENT

The ideal of the consent of the governed is reflected in the Preamble to the Constitution, which begins in the voice of "We the People . . . ."[124] As Angela Harris has reminded us, that voice "does not speak for everyone."[125] Just as there is a danger of essentializing one "We the People," so too is there a danger of essentializing one "unified community,"[126] a point

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121 William M. Carter, Jr., Whren*'s Flawed Assumptions Regarding Race, History, and Unconscious Bias*, 66 CASE W. RES. L. REV. 947, 955 (2016).

122 The Court has interpreted Section 2 to afford Congress extensive authority to remedy racial discrimination resulting from both state and private action, without regard to its connections to interstate commerce. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438–39 (1968).

123 *See* Akbar, *supra* note 2, at 407–08 (arguing that Movement for Black Lives "was having a far richer and more imaginative conversation about law reform than lawyers and law faculty").

124 U.S. CONST. pmbl.

125 Harris, *supra* note 15, at 582–83.

126 *See* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1801 (2005) (criticizing scholarship on democratic policing that places "faith in a coherent, unified public will" and therefore "disregard[s] questions about the structure of democratic decisionmaking").

underscored by James Forman's work on mass incarceration and Black communities.[127]

How might the Thirteenth Amendment make visible the complexities of community in discussions of democratic policing and collective self-determination? One answer is apparent from the Amendment itself. On its face, the Thirteenth Amendment excludes those convicted of crimes from the Amendment's protections. In full, Section 1 of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[128] Though often ignored, the Exception Clause should temper "optimism"[129] about the Amendment's potential to transform the criminal justice system. At the same time, this "neglected clause"[130] underscores the danger of eliding intragroup differences, particularly when it comes to criminal justice reform.

The Movement for Black Lives' platform itself makes visible the complexities of collective self-determination in its recognition of the ways in which multiple aspects of a person's identity shape their vulnerability to discrimination.[131] As Kimberlé Crenshaw famously argued, analyses that elide one dimension of identity, such as race or gender, may "preclude[] the development of a political discourse that more fully empowers women of color."[132] Nor is the problem limited to race and gender. Subsequent work has explored how class, sexual orientation, and other aspects of identity intersect to constitute who we are and the extent and nature of our experiences of discrimination.[133] Recognition of the political dimensions of intersectionality focuses upon the ways in which

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127 *See* FORMAN, *supra* note 22, at 13 (arguing that "class dynamics [within Black communities] drove elected officials toward a tough-on-crime stance in some predictable ways" between the 1940s and 1980s).

128 U.S. CONST. amend. XIII, § 1 (emphasis added).

129 Greene, *supra* note 105, at 1733–35 (coining the term "Thirteenth Amendment optimism").

130 Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 983 (2009).

131 *See* Akbar, *supra* note 2, at 405 (describing Movement as a "leading example of a contemporary racial justice movement with an intersectional politics including feminist and anti-capitalist commitments").

132 Crenshaw, *Margins*, *supra* note 14, at 1252.

133 *See, e.g.*, Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 706–07 (2001).

political agendas may empower those most privileged within a group.[134] Instead of placing "faith in a coherent, unified public will,"[135] a politics of collective self-determination centered in intersectionality attends to the ways in which "differences [may] find expression in constructing group politics."[136]

Perhaps the Thirteenth Amendment, read for all it might be worth, "puts too many features of society into question, ranging from the way that markets and government actually work to the way that family life is structured."[137] It is, however, precisely those interconnected structures that an intersectional analysis of discrimination seeks to make visible and to address. Priscilla Ocen and Rebecca Zietlow have argued that the history of the Thirteenth Amendment evinces a concern with intersectional forms of subordination, particularly in terms of race, gender, and class.[138] Read "as a moral compass,"[139] to borrow a phrase from Darrell A.H. Miller, the Thirteenth Amendment may point towards transforming myriad structures of domination. And understood thus, the Thirteenth Amendment would support demands for collective self-determination while making visible the complexities of such demands.

This interpretation of the Thirteenth Amendment would go beyond rights or votes as ways of addressing policing that perpetuates the police institution that was slavery. It would look instead to empower communities in the governance of policing, while paying close attention to the structure of democratic decision making and looking beyond traditional

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134 *See id.* at 708–09; Crenshaw, *Margins*, *supra* note 14, at 1252.

135 Sklansky, *supra* note 126, at 1801.

136 Crenshaw, *Margins*, *supra* note 14, at 1299.

137 Balkin & Levinson, *supra* note 16, at 1470.

138 Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1248–49 (2012) (drawing upon Justice Harlan's reading of the Thirteenth Amendment to argue for an interpretation of the Eighth Amendment that would "disrupt racialized practices that animate the punitive practices that impact all incarcerated women"); Zietlow, *Free at Last!*, *supra* note 16, at 268 (arguing that Congress has "adopted an anti-subordinating approach to racial, gender, and economic inequality" under the Thirteenth Amendment); Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1698 (2012) (arguing that James Ashley, who helped secure the Amendment's passage, held a "theory [of the Amendment] that addressed the intersectionality of racial and class-based oppression"). *But see* Pamela Brandwein, *The "Labor Vision" of the Thirteenth Amendment, Revisited*, 15 GEO. J.L. & PUB. POL'Y 13, 49 (2017) (disputing Zietlow's interpretation of Thirteenth Amendment).

139 Darrell A.H. Miller, *The Thirteenth Amendment, Disparate Impact, and Empathy Deficits*, 39 SEATTLE U. L. REV. 847, 856 (2016).

frameworks for deciding matters of local criminal justice.[140] The possibilities for change may seem radical.[141] But so too did the Thirteenth Amendment when it was enacted.[142]

CONCLUSION

A familiar vision of equality law focuses upon courts and discrimination, not upon collective self-determination. In this vision, "those who cannot defend themselves . . . are to be shielded by the courts."[143] The federal courts are not, however, the only characters in the story of equality law. Nor is it clear that judicial protection of the "powerless" is "a way to recur to the originating vision"[144] of the Founding.

Reconsider, for instance, Douglass's reimagining of the self-evident truth of the Declaration of Independence: "We hold it to be self-evident that no class or color should be the exclusive rulers of this country."[145] To recur to the originating vision, on this account, is to create "a genuine 'community of consent'"[146] by transforming relations of power and powerlessness, not to trust some of the powerful to protect the powerless. The Thirteenth Amendment's prohibition on slavery may play a role in constituting communities of consent, or so this Essay has argued.

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140 *See* Sklansky, *supra* note 126, at 1801–02 (calling for greater attention to the structure of democratic decision making in studies of policing).

141 *See* Adams & Rameau, *supra* note 21, at 530–33 (discussing the model of "Civilian Police Control Board").

142 *See* Carter, *Framework*, *supra* note 114, at 47 (arguing that "courts have lost sight of the Amendment's truly broad and radical purposes").

143 Ball, *supra* note 49, at 1059 n.3.

144 *Id.* at 1070–71 (arguing that "one of the components of the act of founding was recognition of the need to nourish minorities" and, therefore, that "[t]o protect the powerless is . . . a way to recur to the originating vision").

145 *Quoted in* BLIGHT, *supra* note 74, at 645 (internal quotation marks omitted)(quoting Frederick Douglass, Address to the National Convention of Colored Men (Sept. 24, 1883)).

146 Guinier & Torres, *supra* note 12, at 2744.