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The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor

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11.1 INTRODUCTION

Recent social movements, such as Black Lives Matter, have forced racialized police violence into public view. While an entrenched problem for communities of color, police officers' use of excessive force that maims or kills people of color briefly became visible in the media and public discourse due to protest and public mourning. Nonetheless, the numbers remain staggering even after the massive outpouring of activism and discussion over the past few years. And the issue is not improving as time goes on.

The data that has been recently collected, along with the history of police engagement with communities of color, highlight how the problem of excessive force is an iteration of the racial subordination that these communities experience across a host of social, political, and economic issues. For example, researchers at Boston University School of Public Health developed a structural racism index that took into account "(1) residential segregation; and gaps in (2) incarceration rates; (3) educational attainment; (4) economic indicators; and (5) employment status."[1] They found that states with higher racial disparities in these areas also had greater Black/White disparities in fatal police shootings of unarmed victims. Thus, there is a link between the structural and environmental conditions that minorities experience and the ways in which these communities are policed. As Paul Butler notes in his book *Chokehold: Policing Black Men*, "what happens in places like Ferguson, Missouri, and Baltimore, Maryland – where police routinely harass and discriminate against African Americans – is not a flaw in the criminal justice system. Ferguson and Baltimore are examples of how the system is *supposed* to work."[2]

Yet, what is puzzling about the legal and public discourse on police violence is that it has largely been framed as a problem of individual "bad apples" – rogue officers who harbor animosity or fail to adhere to department regulations – or departmental shortcomings such as poor training or lack of clear policies. The primary narrative surrounding the issue of police excessive force appears to be one of differential legal and policy compliance: police enforce use of force

* Many thanks to Catherine Albiston, Khiara Bridges, and Tamara Rice Lave for reviewing earlier versions of this chapter. This chapter is an excerpt of an essay that originally appeared in the Northwestern University Law Review. *See* Osagie K. Obasogie and Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 Nw. U. L. Rev. 1465 (2018).

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policies and norms in a largely humane manner for Whites, and in more brutal ways for racial minorities.

This understanding of police brutality treats issues of race, racism, and differential compliance as matters that exist outside of the (presumably) otherwise benign legal structures that shape how police operate. However, this construction fails to acknowledge how our constitutional structures channel the issue of police excessive force into particular legal terrains while signaling that other terrains are not viable. The prescriptive power of the Supreme Court has entrenched a knowledge and discourse around police violence that confines it solely to the territory of what we term the *individualizing* Fourth Amendment, which is a constitutional terrain that stands in opposition to acknowledging the pervasive racialized tensions between police and racial minorities that underlie many violent police interactions.

Specifically, through the pivotal police excessive force case of Graham v. Connor, the Court made a particular and consequential choice by funneling the diverse means in which federal courts had been adjudicating excessive force claims into one singular avenue.[3] This holding dictated that, as a matter of legal doctrine, all matters of police violence and excessive force are to be adjudicated solely through the Fourth Amendment, which frames the issue of excessive police force as one between the state and aggrieved individuals and eschews other relevant constitutional avenues such as the Fourteenth Amendment – an avenue that has the *potential* to be more capable of dealing with group-based harms and structural forms of oppression.[4] By individualizing police violence and scaling it down from a structural matter steeped in centuries of racial tensions to an individual dispute between officer and citizen, the Fourth Amendment has been used to de-politicize, de-racialize, de-contextualize, and a-historicize a distinctive racial justice issue concerning the disproportionate use of force against people of color. This individualizing dynamic not only warps our understanding of the causes and consequences of police violence, but often leaves victims without any remedy.

With this chapter, we engage in an empirical examination of how Graham v. Connor led federal courts to have a reductionist understanding of police excessive force, and what this means for victims and plaintiffs. Section 11.1 briefly describes the history of the Fourth Amendment and how its individualist leanings were "baked in" by the founders. Section 11.2 outlines the Supreme Court case law concerning police violence and use of force, which positions *Graham* as a transformative case that filters all matters pertaining to excessive police force through a Fourth Amendment lens. Section 11.3 discusses our original qualitative study of federal police violence cases pre- and post-*Graham*. This suggests that, with *Graham*, the Court effectively cordoned off other areas of constitutional law that have the potential to take structural dynamics into account (e.g. the Equal Protection Clause), yet nonetheless suffer from their own limitations. In our conclusion, we contend that Graham v. Connor, in combination with key equal protection cases of the era – namely, Washington v. Davis[5] and McCleskey v. Kemp[6] – reflects a broader ideological shift toward constitutional individualism when adjudicating matters dealing with race and racism. A more thoughtful engagement with social science methods and data across constitutional spaces dealing with racial disparities may lead to jurisprudential reconsiderations that can provide relief in the areas of police excessive force and beyond.

11.2 A BRIEF HISTORY OF THE INDIVIDUALIZING FOURTH AMENDMENT

This Part briefly argues that the Fourth Amendment is an area of constitutional law that is conceptually agnostic toward racialized group harm – an evaluation that is necessary for

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comprehending police violence today. This argument proceeds in three parts: (a) the Fourth Amendment is part of the Bill of Rights, which is a rights-granting framework largely based on the conception of singular individuals being provided singular rights; (b) the history and language of the Fourth Amendment both suggest a lack of structural awareness and a tuning to individual needs instead of group harm; and (c) the language and frameworks used in key criminal procedure cases decided during the modern era indicates that the Court continues to consider these issues – including police excessive force – as a matter solely between an individual citizen and a state actor.

11.2.1 *The Bill of Rights Preserves and Prioritizes Individual Rights*

The framers mirrored the Bill of Rights on British attempts to "prescribe the individual rights of the citizenry."[7] In essence, the Bill of Rights – based on common law, the Magna Carta and other English law, as well as early colonial declarations discussing individual rights – provides citizens with individuated rights vis-à-vis the state.[8] Certainly, the Bill of Rights is aware of some group concerns, such as the freedoms afforded religious groups under the First Amendment. Nevertheless, the overall structure of the Bill of Rights deals largely with distinctively individualized concerns and speaks to the particular dynamic between an individual and the federal government.

Consistent with these early sources, the Fourth Amendment epitomizes the individual rights-focused nature of the Bill of Rights. Its inclusion as part of the Bill of Rights suggests that its provisions have an inherently limited scope, designed primarily to afford only atomized individuals – not groups – safeguards against federal power.[9] These individualized protections against the federal government were incorporated via the Fourteenth Amendment's due process clause to also offer protections against state governments.[10] In other terms, the Fourth Amendment, like the rest of the Bill of Rights, gives (in theory) "all" citizens *individuated* rights to be free from certain state conduct – i.e. a set of negative freedoms.[11]

11.2.2 *The Language and History of the Fourth Amendment Illustrate its Individualized Focus*

As a second point, the language and history of the Amendment points to an individualized right as well. The Fourth Amendment declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[12]

The Amendment guarantees a generalized right held by everyone (i.e. "the people") to individually be free from unreasonable searches and seizures in their singular "persons" and their singular private properties (e.g. "houses, papers, and effects").[13] Moreover, the Fourth Amendment arose, at least in part, as a response to certain searches and seizures practiced in colonial America, namely the "writ of assistance."[14] This history suggests that the Fourth Amendment evolved out of a particular desire to stop government searches and seizures of individual person and property conducted without a warrant or probable cause.[15] Thus, both the language of the amendment and its underlying historical rational suggest that its protections extend to an individual seeking legal shelter from undue governmental searches and seizures.

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11.2.3 *Modern Criminal Procedure Doctrine Maintains the Individualized Focus of the Fourth Amendment*

Lastly, even when expanding rights in the criminal procedure realm, the Supreme Court has not deviated from this individualized framework in the context of search and seizure. Specifically, during the mid-century Warren Court era, when the Court stimulated a then-new constitutional discourse on police activity,[16] particularly regarding searching[17] and seizing[18] individual citizens, the constitutional discourse remained focused on cognizing Fourth Amendment protections as individuated. Put differently, even as the Fourth Amendment paradigm became one in which "courts use the Constitution as the primary means of regulating the police," the scope remained fixed on the individual person who had their rights violated and could bring an individuated claim for that violation.[19] Hence, while the Court expanded rights and remedies, it did not disrupt the overarching and inherent narrative of the individualized Fourth Amendment schema. These cases limited alternative means of addressing the group-based harm that fundamentally characterizes racialized police violence by ensuring that isolated criminal cases and civil suits are the only means to seek remedies.[20]

It is clear from these cases that the Fourth Amendment exists within an individualizing constitutional terrain that focuses primarily on whether a given search or seizure is a reasonable intrusion against the privacy interests of an individual, whether it be their person, their home, or their items.[21] The amendment deals with the relationship between an individual citizen and the state, delimiting the power of the state – via the police – to invade that person's privacy through a search or seizure, requiring protections like individualized suspicion and particularity in warrants that specify who the individual is that the state is acting upon.[22] It concerns a one-to-one dynamic between the state and a citizen that limits the matter solely to the protection and constitutional articulation of that singular citizen's individualized rights and remedies.[23] This individualized understanding of the Fourth Amendment, and its associated limitations, has been mapped onto police violence cases concerning use of force. The excessive force analyses now exist exclusively in the domain of the Fourth Amendment and, as a result, the individualized relationship between harmed civilian and the rights-violating state. According to this framework, deadly force constitutes a seizure for Fourth Amendment purposes and is therefore "subject to [its] reasonableness requirement."[24]

Consequently, Fourth Amendment jurisprudence, particularly as it relates to excessive force claims, presents a discursive and doctrinal limitation constraining the issue of police use of excessive force solely to individual rights as abridged by unwarranted state intervention. Due to this limitation, as an individualized constitutional doctrine, the Fourth Amendment is simply not designed to address the group inequalities and racial dynamics that characterize police violence today.

11.3 POLICE EXCESSIVE FORCE: SUPREME COURT CASE LAW

Tennessee v. Garner[25] and Graham v. Connor[26] represent the two foundational cases in this area. In *Garner*, the Court held that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[27] By saying that police could not use deadly force unless the person posed a threat of death or physical injury, the Court clearly stated that deadly force should not be used against a fleeing unarmed person.[28]

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Garner is praised by critics of the Court's Fourth Amendment jurisprudence as a case that actually created a bright-line rule designed to regulate fatal force.[29] However, *Garner*, via Justice O'Connor's dissent, also signaled a more limited future trajectory for how the Court would regard the problem of police violence. O'Connor's dissent set the stage for what was to come for police violence jurisprudence.[30] In her dissent, O'Connor began to sketch a different reasonableness standard: "[T]he reasonableness of Officer Hymon's conduct for purposes of the Fourth Amendment cannot be evaluated by what later appears to have been a preferable course of police action."[31] O'Connor contended that the Fourth Amendment does *not* prohibit an officer from using deadly force in such a scenario, in contrast to the majority.[32]

The *Graham* Court used this Fourth Amendment philosophy articulated in Justice O'Connor's dissent to push police excessive force doctrine in a more restricted direction that focused solely on reasonableness rather than bright-line rules that actually restrict police use of force, but the court did not explicitly overrule *Garner*.[33] The *Graham* case arose when Dethorne Graham – an African-American man and diabetic – attempted to get orange juice from a convenience store when a cop "became suspicious" because he saw Graham enter and leave the store quickly.[34] The officer cuffed Graham and continuously failed to respond to the fact that Graham was having an insulin reaction; Graham sustained multiple injuries during the encounter.[35] Graham filed suit under 42 U.S.C. § 1983, alleging that the police had used excessive force against him in violation of the Fourteenth Amendment.[36] The district court found for the police, applying a four-factor test from Johnson v. Glick.[37] The Court of Appeals affirmed the lower court ruling, with Graham arguing that it was error to require that excessive force must be "applied maliciously and sadistically to cause harm" in order to have a successful claim.[38]

The Supreme Court held that excessive force "claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard."[39] In vacating and remanding, the Court clarified that the *Glick* test should not be followed, and that the "objective reasonableness" standard should be used instead.[40] The "reasonableness" of use of force, to the Court, requires avoiding the "20/20 vision of hindsight" by looking at the events from the perspective of a "reasonable officer on the scene," while taking into account the fact that officers make "split-second judgments" in "circumstances that are tense, uncertain, and rapidly evolving."[41] In so doing, the Court solidified the Fourth Amendment "objective reasonableness" standard as the only way to evaluate police excessive force in the context of effectuating an arrest, while avoiding creating any bright-line rules to actually guide officers in using force.[42] In effect, *Graham* would get the Court out of the business of making any real decisions on what constitutes unconstitutional use of force, as it arguably did in *Garner*.

To the extent that *Graham* holds that matters concerning police use of force should be analyzed under the Fourth Amendment, we seek to understand the on-the-ground impact that *Graham* has had since the decision by comparing post-*Graham* data on federal courts' decision-making to a similar dataset comprised of cases decided before *Graham*'s doctrinal implementation. While the Supreme Court used *Graham* to push police excessive force analyses into the limited, individualized terrain of the Fourth Amendment – and scholars have remained largely silent on the potentiality of a different constitutional terrain – we seek to add to the existing literature by providing an empirical examination of what *Graham*'s doctrinal shift has meant for how federal courts understand and approach matters concerning police violence.

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11.4 QUALITATIVE ANALYSIS OF PRE- AND POST-*GRAHAM* POLICE EXCESSIVE FORCE CASE LAW

The preceding sections provide a historical, doctrinal, and scholarly context for our research questions: What impact did the Supreme Court's holding in *Graham* have on how federal courts approach excessive force claims? How did federal courts analyze these claims before *Graham*? Did *Graham* shift this jurisprudence, or did it merely restate an approach that was already in consensus among federal courts?

To have an empirical understanding of *Graham*'s impact in framing these adjudications, we conducted a qualitative study of federal case law twenty-six years prior to and after the 1989 *Graham* decision in order to capture how federal courts conceptualize matters pertaining to police excessive force and the legal claims they recognize and apply. Hence, with this qualitative study, we have developed an empirical sense of any shifts in how federal courts treat excessive force cases post-*Graham*, specifically in terms of the Fourth Amendment versus the Fourteenth Amendment, and equal protection therein.

11.4.1 Methods

We coded a random sample of 250 reported federal cases pertaining to police excessive force after *Graham*, from 1990 to 2016. We also coded a random sample of 250 cases before *Graham*, 1962 to 1988, in order to facilitate a qualitative comparison between the two time periods.[43] We identified a dataset of cases through a Westlaw database search and used a random number generator to select cases that were then subjected to inclusion criteria until we had a total of 500 qualifying cases.[44]

We read and coded each qualifying case. We used five main codes: whether ("yes" or "no") the Fourth Amendment, Section 1983,[45] the Fourteenth Amendment, Equal Protection Clause, or race of victim or officer were discussed in the case.[46] This provided us with a sense of the constitutional meta-narratives courts follow in this field, in terms of the frequency that each constitutional protection was mobilized. Regarding cases coded as "Fourteenth Amendment," it is important to note that these data pertain to the Fourteenth Amendment overall – both in terms of substantive due process claims and equal protection claims in the excessive force realm. In reviewing and coding the cases, not all plaintiffs were clear about which portion of the Fourteenth Amendment they used to support their claims. Similarly, courts did not always rearticulate plaintiffs' Fourteenth Amendment claims with specificity. It was important to identify and track when courts explicitly mentioned this portion of the Fourteenth Amendment, as equal protection speaks directly to issues of race and group inequality beyond individuals. By examining both the overarching discourse surrounding the Fourteenth Amendment as well as particular claims concerning equal protection, we could better understand the ways in which they have separately as well as jointly been discussed.

We also used an additional set of "subcodes" to understand what happened if and when the Fourteenth Amendment and equal protection were coded as "yes." In other words, just because the Fourteenth Amendment or equal protection were mentioned, it might have been in a negative fashion, and so we wanted to uncover the logic through which courts thought about these claims. Hence, if the Fourteenth Amendment was coded as "yes," we then noted how courts discussed it. If the Equal Protection Clause was coded as "yes," we similarly coded for the way courts discussed it. There were four possible subcodes: "rejected," "accepted," "not about race," and "about race." "Rejected" signifies that the court rejected the claim; "accepted" signifies

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Table 11.1 Codes and subcodes

If the Fourteenth Amendment was mentioned, how was it treated by court?	If the Equal Protection Clause was mentioned, what was the result?	If victim's race was mentioned, how was it identified?	If officer's race was mentioned, how was it identified?
• Plaintiff raises and court ignores or applies Fourth Amendment with no discussion • Plaintiff raises and court discusses and rejects – or doesn't reach Fourteenth Amendment question – in favor of Fourth Amendment • Plaintiff raises and court discusses and accepts but unfavorable to plaintiff • Plaintiff raises and dismissed or plaintiff raises and court ignores but doesn't apply Fourth Amendment either • Raised by court without plaintiff or raised by defendants without plaintiff • Plaintiff raises and court discusses and accepts and finds favorably for plaintiff	• Rejected • Accepted • Not about Race • About Race	• African American • White • Latino/a • Asian American • Native American	• African American • White • Latino/a • Asian American • Native American

that the court accepted the claim in some way; "not about race" means the plaintiff's equal protection claim was not about race (*e.g.* arguing victim of police violence was part of another protected class); and "about race" signifies it was an equal protection claim that was actually about race. Finally, we coded to see if courts mentioned the race of the victim or officer involved in the violent engagement. If either was mentioned, we coded for the racial identity as expressed by the court in that case.

This coding gives us a sense of each court's approach and rationale – particularly if the court includes or rejects claims beyond the Fourth Amendment. Table 11.1 provides a visual description for how this coding functioned, with the six subcodes for the Fourteenth Amendment, the four for the Equal Protection Clause, and the three for race.

11.4.2 *Findings and Discussion*

The findings indicate that before *Graham*, federal courts infrequently relied upon the Fourth Amendment in adjudicating the constitutionality of police use of force. Only 28% of the qualifying pre-*Graham* cases include a discussion of the Fourth Amendment. Moreover, this pre-*Graham* dataset (a) almost always discusses Section 1983 (96%); (b) sometimes discusses the

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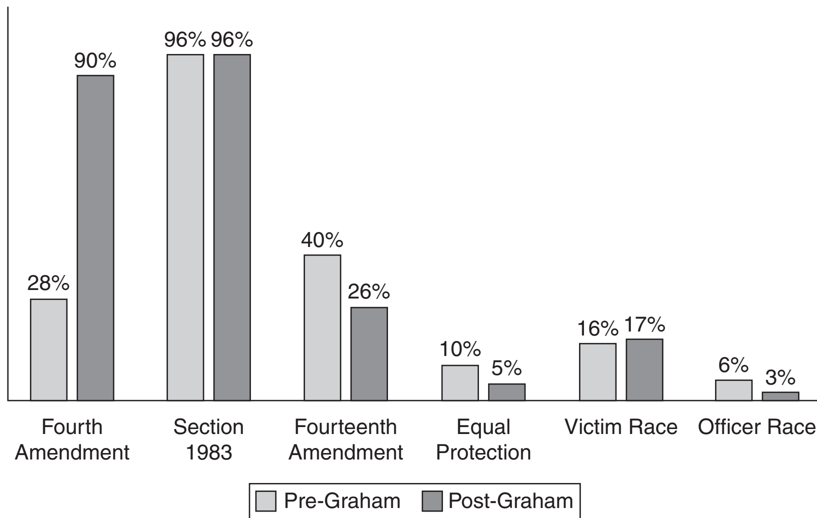

FIGURE 11.1 Federal court evaluations of police violence pre- and post-*Graham*

Fourteenth Amendment (40%); and (c) rarely discusses equal protection specifically (10.4%), the race of the victim (15.6%), or the race of the officer (6%). Thus, the pre-*Graham* data suggests that there was less emphasis on the Fourth Amendment during this time period.

The post-*Graham* findings moved in a different direction, where 90.4% of the cases in this dataset discussed the Fourth Amendment. As the cause of action for individuals to claim a constitutional violation, it is unsurprising that Section 1983 remained prominent (96.4%). The Fourteenth Amendment was mentioned in 25.6% of the cases while the Equal Protection Clause was specifically mentioned in 5.2%. Race of the victim was mentioned in 17.2% of the sampled cases while race of the officer was mentioned 2.8% of the time. The post-*Graham* data suggest a significant focus on the Fourth Amendment and less on other areas of the Constitution.[47] This is not surprising, given the holding in *Graham*.

Thus, the real surprise here is how seldom federal courts discussed the Fourth Amendment in relation to excessive force claims prior to *Graham*. These trends suggest that, post-*Graham*, the Supreme Court (a) effectively channeled police violence matters into the preexisting individualized constitutional terrain of the Fourth Amendment in a manner that substantially deviated from its pre-*Graham* jurisprudence (increasing from 28% of cases to 90.4%); (b) moved away from examining police violence matters through the Fourteenth Amendment (decreasing from 40% to 25.6%); and, finally, (3) further moved away from the group-sensitive potentiality of equal protection analyses (decreasing from 10.4% to 5.2%) as well as ongoing avoidance of explicitly acknowledging race of victims or officers across both time periods that further entrenched notions of "colorblindness"[48] in excessive force assessments (see Figure 11.1). Put another way, the Supreme Court's holding in *Graham produced rather than mirrored* any consensus or normative understanding regarding police excessive force claims being rendered as Fourth Amendment concerns. A more detailed discussion appears below.

Channeling Toward the Fourth Amendment

This post-*Graham* focus on the Fourth Amendment is not unexpected; plaintiffs likely thought it would not be useful to base excessive force claims on anything but the Fourth Amendment

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after the *Graham* Court's declarative statement.[49] However, what is important to keep in mind is the relatively low percentage of cases prior to *Graham* that discussed or referenced the Fourth Amendment. In other words this means that a discussion of the Fourth Amendment pre-*Graham* was not all that common. The shift from 28% to 90.4% reflects a tremendous imposition of the normative boundaries concerning constitutional claims regarding excessive force, and the Supreme Court's effort to channel this conversation toward the individualist Fourth Amendment discourse and away from Fourteenth Amendment and equal protection claims that were, according to our data, perceived as legitimate jurisprudential pathways to follow prior to *Graham*. Thus, the data suggest that the Supreme Court did not necessarily choose the Fourth Amendment terrain for understanding the constitutional boundaries of excessive force claims because it reflected the most common understanding among the federal courts. Instead, the data suggests that this path was chosen due to other ideological commitments concerning how we *ought* to conceive and bound the relationship between constitutional text and plaintiffs' rights to be free from state hyper-aggressions.

This discourse entrenching the primacy of the Fourth Amendment can be seen in the language used by the lower courts after the *Graham* decision. For example, in responding to a plaintiff's excessive force claim, a district court in Pennsylvania characterized the Court's holding in *Graham* as standing for the idea "that the *sole* source of constitutional protection against the use of force in the context of an arrest, investigatory stop or other type of seizure is the fourth amendment [sic]."[50] Similarly, a lower court in Alabama noted further that *Graham* stands as having "determined that the Fourth Amendment applies to *all* claims alleging a police officer used excessive force in the course of an arrest, investigatory stop or other 'seizure' of a free citizen."[51] Finally, the Seventh Circuit Court of Appeals wrote that "*Graham v. Connor* … held that *all* excessive force claims against law enforcement officers … *must* be analyzed under the Fourth Amendment's 'objective reasonableness' standard."[52]

Altogether, this language typifies the discourse through which courts declare the Fourth Amendment the sole constitutional right involved in matters concerning police excessive force. The fact that there is a more than sixty percentage point difference in how federal courts discuss the relevance of the Fourth Amendment to police excessive force claims highlights the extent to which, before *Graham*, lower courts deemphasized the Fourth Amendment in excessive force cases and were open to multiple ways of thinking through the constitutional standard.

In addition, while the Fourth Amendment became centralized, what remained constant was the role of Section 1983. Of the cases surveyed post-*Graham*, 96.4% discussed Section 1983, which means that most of the time if a Fourth Amendment claim was being made, it was being made alongside Section 1983. Similarly, 96% of pre-*Graham* cases featured Section 1983. Thus, while Section 1983 had a primary role in pre-*Graham* cases as compared to the Fourth Amendment, the Fourth Amendment rose to prominence after *Graham* to operate in conjunction with Section 1983 as the key mechanisms for bringing police violence cases. This is consistent with the language in *Graham*, which identified a trend at the time where "many courts … seemed to assume, as did the courts below in this case, that there is a generic 'right' to be free from excessive force, grounded not in any particular constitutional provision but rather in 'basic principles' of § 1983."[53] The *Graham* court rejected this view, stating that "§ 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred'"[54] – thus largely bootstrapping the *method* for seeking a private remedy – Section 1983 – to the Fourth Amendment as the standard for what constitutes a violation of one's constitutional rights.[55]

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Impeding the Fourteenth Amendment

The Fourteenth Amendment provides an interesting framework from which to think about excessive force by police. As part of the post-Civil War Reconstruction Amendments, it reflects a constitutional moment where law formally became cognizant of how differential group status can lead to inequality. This sensibility is reflected through claims of substantive due process protecting fundamental rights that arise, at least in part, out of the Fourteenth Amendment as well as the Amendment's Equal Protection Clause, which is a more direct gesture toward concerns regarding group inequities.[56]

The data indicates that the Fourteenth Amendment had legitimate traction prior to *Graham*; appearing in 40% of the cases, it can be seen as part of the suite of mechanisms federal courts used to think through constitutional standards pertaining to excessive force. After *Graham*, there is a drop off in the prevalence of the Fourteenth Amendment while the Fourth Amendment rose to prominence. However, the fact that Fourteenth Amendment claims *appeared* 25.6% of the time in the post-*Graham* dataset is only half of the story. Of the times it did appear, in the vast majority of those instances (82.8%), the claim was ultimately unsuccessful in some way. Thus, Fourteenth Amendment claims were *not* received well when brought to courts: Of the instances where such a claim was included, only 10.9% of the time did the court actually discuss it, accept that the Fourteenth Amendment applied, and then find at least somewhat favorably for the plaintiff.[57] The following section describes how courts treated Fourteenth Amendment claims when they did appear and how courts treated these claims in a mostly negative fashion.

BLOCKING FOURTEENTH AMENDMENT CLAIMS POST-*GRAHAM*

There were two primary ways that a court would get rid of the post-*Graham* Fourteenth Amendment claim when it was included: (1) ignoring the claim by not engaging with it (23.4%) or (2) discussing but rejecting the premise of the claim (i.e. that the Fourteenth Amendment is not relevant in the police violence context) without actually reaching the merits of the claim (42.2%). Hence, the court ignored *or* discussed but rejected the claim 65.6% of the time. This means that most of the time the court did not engage the Fourteenth Amendment claim fully, but disposed of it either implicitly or explicitly. Furthermore, 12.5% of the time the court would actually engage with and accept the Fourteenth Amendment claim, but subsequently come to an unfavorable decision.

Hence, even if the court accepted that perhaps the Fourteenth Amendment was applicable, it might still proceed to just reject the claim itself. Accordingly, 82.8% of the time the Fourteenth Amendment was met with resistance in one of these ways: the Fourteenth Amendment was not addressed or explicitly rejected in favor of the Fourth Amendment (65.6%); the court found unfavorably for the plaintiff even though it accepted the claim's viability (12.5%); or the claim was dismissed by the plaintiff herself or the court did not address it *nor* the Fourth Amendment (4.7%).[58]

Ignoring the Claim First, in those cases where the courts ignored or did not mention the claim (23.4%), the case would often consist of the plaintiff asserting the claim and the court just not addressing it, and merely applying the Fourth Amendment following *Graham*.[59] For example, in one case from the District Court for the Southern District of Alabama, the court characterized the plaintiff's claim as follows: "The Plaintiff has alleged the Defendants violated his rights to be secure in his person and free of excessive force under the Fourth and Fourteenth Amendments."[60] The court went on to immediately cite the Fourth Amendment and then *Graham*, as holding that "the Supreme Court determined that the Fourth Amendment applies to *all* claims alleging

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a police officer used excessive force in the course of an arrest, investigatory stop or other 'seizure' of a free citizen."[61] The court concluded that, "[t]herefore, the Plaintiff's claim of unreasonable or excessive force *must* be analyzed under the Fourth Amendment."[62] Thus, this is one way that a court could get rid of a Fourteenth Amendment claim, by merely not engaging with it and, instead, just using the Fourth Amendment and *Graham* to evaluate the suit.

Rejecting the Claim Second, for those cases where courts engage to a degree with the Fourteenth Amendment claim but ultimately reject it (42.2%), the courts would generally note that the plaintiff filed a Section 1983 claim for violation of constitutional rights under the Fourth and Fourteenth Amendments in using excessive force. In doing so, the courts would respond to a motion from the defendants, usually a motion for summary judgment, and then proceed to state that the Fourth Amendment – not the Fourteenth – is the applicable standard for a police violence matter.

For example, in a case from the Northern District of Ohio, the plaintiff brought suit against the police for using deadly force in violation of the decedent's Fourth and Fourteenth Amendment rights.[63] The court wrote that the applicable standard is the Fourth Amendment: "A claim that the government used excessive force during the course of a seizure is analyzed under the Fourth Amendment's 'objective reasonableness' standard."[64] The court goes on to say that, while the plaintiff brings a Fourteenth Amendment claim as well as the Fourth Amendment claim, "[i]n the context of the right to be free from excessive force, however, the Sixth Circuit applies a Fourth Amendment seizure analysis to the claims."[65] The court, thus, held that the Fourteenth Amendment did not have a role in the suit, just the Fourth Amendment.

In another example, a case from the Northern District of Illinois, the plaintiff brought a Section 1983 claim against the police for excessive use of force under the Fourth and Fourteenth Amendments.[66] Defendant officers argued that the plaintiff's allegations under the Fourteenth Amendment must be dismissed because excessive force is "governed *solely*" by the Fourth Amendment.[67] The court agreed with the defendants, writing that "[f]ollowing Graham v. Connor … it is clear that an excessive force claim … is 'properly analyzed under the Fourth Amendment … rather than under a substantive due process standard.'"[68] As a result, the court decided to "strike [plaintiff's] Fourteenth Amendment claims."[69] Consequently, we see the court here explicitly rejecting plaintiff's Fourteenth Amendment claim in favor of the Fourth.

Last, in a case from the Western District of Tennessee, in his Section 1983 suit for excessive force, the plaintiff made both Fourth and Fourteenth Amendment claims.[70] The defendant argued that the Fourteenth Amendment was inapposite, and the court proceeded to simply dismiss the claims the plaintiff brought under that Amendment.[71] After dismissing the Fourteenth Amendment claim, the court then, citing *Graham*, applied the Fourth Amendment reasonableness test.[72]

In these examples, the courts overtly state that the Fourth Amendment is to be used, and not the Fourteenth, referring to *Graham* as precedent for this doctrinal move. Hence, what we see here is the way in which courts solidify a doctrine that exclusively handles police excessive force cases with the Fourth Amendment through both omission of the Fourteenth Amendment as well as explicit pronouncement of the dominion of the Fourth Amendment at the expense of the Fourteenth.

PRE-*GRAHAM* FOURTEENTH AMENDMENT CLAIMS

Prior to *Graham*, there was at least some room to make a cognizable claim with the Fourteenth Amendment and substantive due process as opposed to only the Fourth Amendment.[73] Whether ultimately successful or not, this could take different forms. For example, in a 1984 case from

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Pennsylvania, the plaintiff brought a Section 1983 claim after being beaten by officers.[74] Having determined that the claim was based on excessive use of force, "the court construe[d] plaintiff's complaint as claiming a deprivation of a liberty interest. Having determined that a liberty interest is involved, the court [had to then] decide whether plaintiff was deprived of that interest without due process of law in violation of the Fourteenth Amendment."[75] However, because the court determined the plaintiff had adequate state law remedies, the court dismissed his Section 1983 claim.[76] Therefore, while unsuccessful in this Fourteenth Amendment claim, there was at least some engagement with it by the court.

In a 1982 case from the Northern District of Ohio, the plaintiff brought suit against the local police department in Canton, Ohio, after police hit him in the head with a "billy club."[77] Here, the court found in favor of the plaintiff, noting that it could not find that the officer "acted in a 'good faith' belief that it was necessary to use force to effect [plaintiff] Taylor's arrest, when neither [the police officer] nor anyone else ever even attempted to arrest [the victim]."[78] The court further recognized that the officer's "actions were totally without provocation, justification, or probable cause, and they constitute an infringement by him of [the victim's] constitutional rights in violation of the Fourteenth Amendment and 42 U.S.C. § 1983."[79] Finally, in a case from the Northern District of New York in 1984, one of the plaintiffs was struck with a "five-cell, foot long metal flashlight."[80]

In examining the excessive force claim brought under Section 1983 by the plaintiff, the court declared: "Application of undue force by law enforcement officers deprives an individual of the fourteenth amendment right to be secure in his person and thus represents a deprivation of liberty without due process of law."[81] The plaintiff received compensatory damages but no punitive damages against the officer.[82]

What these data and examples show is that before *Graham*, lower courts were at least somewhat more able – or willing – to engage in an analysis of the Fourteenth Amendment and due process in evaluating excessive force claims and, in this way, offered a meaningful alternative to the limitations of the Fourth Amendment.[83] While the pre-*Graham* engagement with the Fourteenth Amendment offers an important point of comparison, we do not contend that this time period was ideal by any means. To be sure, substantive due process and fundamental rights analyses often reflect a form of constitutional individualism not unlike the Fourth Amendment context. Nevertheless, this data provides a glimpse into how courts approached these issues before *Graham* mandated that police violence cases would solely be addressed by the Fourth Amendment and "objective reasonableness." By rejecting the premise that the Fourteenth Amendment might apply to excessive force claims through various means, the courts after *Graham* have clearly demarcated the permissible bounds of a police excessive force claim as solely being within the terrain of the Fourth Amendment, not the Fourteenth.[84]

Foreclosing Equal Protection and Propagating Colorblindness

Specific discussion of the Equal Protection Clause arose in 13 of the 250 cases (5.2%) surveyed post-*Graham*. This means that, after *Graham*, explicit involvement of equal protection claims in this area of constitutional law is rare.[85] Moreover, even if litigants did raise the claim, it was most often rejected. Of this 5.2% where there is a specific discussion of the Equal Protection Clause, 12 out of 13 (92.3%) of the claims were rejected in some way by the court.[86] Further, not all of these equal protection claims were "about race," meaning that while an equal protection claim was being made, it may have been in furtherance of a claim based on another protected class or may have been a claim included without any actual support. Of the 13 cases discussing equal protection, only six (46.2%) of these equal protection claims were specifically equal protection claims *about race*.

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EQUAL PROTECTION CLAIMS ABOUT RACE

Five of the six cases that made explicit equal protection claims about race were ultimately *rejected*.[87] These claims were not accepted for various reasons. The reasons included the following:

- After being assaulted during a traffic stop, the plaintiff's equal protection claim failed because "the officers did not make any sort of racist remarks";[88]
- When a mentally ill African-American man was shot with a stun gun and brought a suit under the Fourth Amendment and Equal Protection Clause, the court found that his "equal protection claim warrant[ed] summary adjudication in favor of Defendants because he … presented no evidence that similarly situated individuals were treated differently or that Defendants pursued a course of action because of his race or mental illness";[89]
- After an African-American man was fatally shot in his home, his estate brought suit, including an Equal Protection Clause claim, but the court found that the plaintiff needed to show that the officer, under the same or similar conditions, did not use force against white people in the same way;[90]
- An African-American man brought suit for excessive force with an equal protection claim, but according to the court, because "none of the officers made any derogatory racial remarks to Plaintiff" his claim failed.[91]

Just *one* case included a race-based equal protection claim that a court accepted (to a degree).[92] This case represents less than one percent of all of the post-*Graham* police violence cases surveyed.[93] Put differently, in only one case did the plaintiff actually try to mobilize the Equal Protection Clause to argue for a racialized component of the use of excessive force in the context of a police interaction and have any success at all by surviving summary judgment.[94]

In this case, Hardy v. Emery from the District Court for Maine, three African-American women brought suit regarding an altercation with a police officer in which one of the women – Andrea Hardy – sustained injuries when handcuffed.[95] While handcuffing Hardy, the officer called another woman nearby – Quiana Harvey – a "nigger bitch" and other racist terms.[96] In response, the court actually held that this kind of language – along with the officer's excessive actions – was sufficient for the plaintiffs' case to survive summary judgment.[97]

The constitutional terrain exemplified by *Hardy* serves as an imperfect example of where constitutional thought on police violence could go, from one restricted by the Fourth Amendment alone to one in which equal protection can potentially provide a deeper, group-based protection that recognizes the racialized dimensions of police violence. Procedurally, this may look as it did in this case, with a plaintiff being able to bring an excessive force claim under the Fourth Amendment paired with an equal protection claim, the combination of which could actually contemplate the fact that the force incident is intertwined with harm to a protected class. But, as can be seen in these data, this is exceedingly rare in the current constitutional moment.

Finally, in looking at both the unsuccessful and (relatively) successful equal protection claims, what we see is some kind of requirement for *overt* racist behavior, such as language used by the officer in *Hardy*. The issue is that this case featured a situation where evidence clearly demonstrated a racial animus coinciding with the force. The problem with this is it remains within the bounds of uncovering the smoking gun of overt racist intent and is, thereby, another doctrinal hurdle as it stays within the individualized "bad apple" calculus and not the structural one we contend is necessary for comprehending this racialized phenomenon.

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COLORBLINDNESS

Our finding that only 17.2% of cases after *Graham* discuss the race of the plaintiff(s) or victim(s) and 2.8% discuss the race of the officer(s) highlights the deracialized nature of excessive force cases. There is a praxis of constitutional colorblindness evinced by how rarely race is discussed. While 15.6% of pre-*Graham* cases discussed race of victims (6% mention the race of the officer), the post-Graham numbers are still incredibly low, such that we still see the further entrenchment of a de-racialization in excessive force claims that often have race at their center.

By deracializing police use of force cases, the Court has effectively stripped the excessive force inquiry of its racialized component, which is a form of institutional colorblindness that ultimately perpetuates structural violence on communities of color by precluding the acknowledgment of racially disparate results and, thereby, structurally and racially aware remedies. It is important to note how hampering equal protection and supporting colorblindness helps to maintain status quo racial inequalities. A discourse of colorblindness and jurisprudentially blocking equal protection both serve to create a socio-legal climate that bars access to substantive remedies for group-based harm while simultaneously mythologizing formal equality in a purportedly post-civil rights, post-racial moment.

In sum, these data draw attention to the rather significant shift ushered in by the Court's holding in *Graham* by making the Fourth Amendment the primary – if not sole – vehicle for constitutionally cognizable excessive force claims. The Court's holdings on the Fourth Amendment and police violence have limited the excessive force doctrinal discussion, such that the Equal Protection Clause is viewed as having basically no place in excessive force jurisprudence. Thereby, the Court was able to build a firewall against more critical, structural engagements with the Fourteenth Amendment and the Equal Protection Clause by valorizing the Fourth Amendment. Hence, the dominant narrative has become that excessive violence by the police is simply a matter of rogue or poorly trained individual officers and not a function of the racial injustices that occur throughout the criminal justice system. It is only from this standpoint that it becomes possible to think that equal protection does not apply.

11.5 CONCLUSION

We have argued that the primary constitutional mechanism used to protect citizens from excessive use of force by the police – the Fourth Amendment, as interpreted by *Graham* – actually produces racialized police violence by failing to engage the racialized group dynamics that underlie police violence in communities of color. The doctrinal insistence that excessive force exists as an isolated and individual dynamic apart from broader racial inequalities renders the Fourth Amendment a relatively futile constitutional terrain from which to adjudicate these matters, allowing police excessive force to fester and reproduce without any check from the judiciary. The Fourth Amendment, as interpreted post-*Graham*, simply operates at the wrong level; its individualist nature cannot address a fundamentally structural problem. For this reason, the existing jurisprudence does more harm than good by standing as a proxy of protection and remediation while ultimately providing little to communities of color.

The "futile" Fourth Amendment is just the beginning for understanding the problem of excessive force by the police. A full social, legal, political and ethical engagement with the problem of police brutality and excessive force requires interventions at multiple levels beyond Supreme Court decisions. But the issues this chapter explores and the empirical findings herein are consequential in that they highlight how constitutional framings from the outset can be a legal determinant for injustice on the ground, and the health disparities that often result from

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the injuries that stem from these violent encounters. Thus, we hope that these data can be the beginning of a broader conversation concerning police violence as a social and legal determinant of health and how police reform can improve minority health outcomes.

Throughout this chapter, we have suggested that the Fourteenth Amendment and its greater conceptual sensitivity to and awareness of group dynamics (as opposed to the Fourth Amendment's one-dimensional individual rights framework) might be a more appropriate vehicle through which to adjudicate matters concerning excessive police force. While other scholars have suggested that aspects of the Fourteenth Amendment might be more appropriate than the Fourth Amendment in examining criminal procedure matters such as "stop and frisk," our empirical contribution is to demonstrate (1) the indeterminacy of the constitutional standard before *Graham* (where the Fourth Amendment did not play a prominent role in shaping excessive force doctrine) and (2) the radical and exclusive shift toward individualism facilitated by *Graham*. This suggests that a more group-conscious framework aligned with the Fourteenth Amendment might be more appropriate in both remedying individual violations and creating the conditions for reform. Our hope is that this chapter will stimulate a conversation that can produce models that draw upon Fourteenth Amendment sensibilities that highlight the role of racial inequality and structural racism in precipitating excessive force by the police.

Yet, we also understand how the current jurisprudence surrounding the Fourteenth Amendment, and specifically equal protection, is not unproblematic. Namely, the existing emphasis in equal protection doctrine on individual discriminatory intent instead of disparate impact or group harm – arising from Washington v. Davis,[98] and exemplified by McCleskey v. Kemp[99] – prevents this richer understanding of racialized phenomena like police violence. To be sure, *Graham*'s positioning of police excessive force as an individualistic matter is troublesome unto itself. Yet, there is an interaction effect above and beyond jurisprudential silos of the Fourth and Fourteenth Amendments when we read *Graham* alongside the individualist, intent-driven equal protection cases.

As they currently stand, the individualism embedded in *Graham*, *Davis*, and *McCleskey* creates a doctrinal triad that precludes any kind of structural analysis of race and disparate impact, in police excessive force cases and beyond. Thus, the problem lies in the Court's conceptualization of race and racism as well as the diminished role of social science evidence in helping us understand patterns and mechanisms of discrimination. We must be attentive to how the Court established its approach to police excessive force in *Graham* as being within the sole domain of the individualist Fourth Amendment and "objective reasonableness" *at the same post-civil rights moment*[100] that it revised how race and equal protection were to be addressed with *Davis* and *McCleskey*.[101] This suggests a deeper ideological and political shift in how the Court thinks about race, racism, and state culpability.

Finally, it must be noted that, while constitutional law can seem lofty and abstract, it has real, material consequences that implicate everyday interactions between police and citizens. Police excessive force is a life or death area of the law, dictated by the constitutional standards discussed in this article and materialized through the interpretations of that law by police every day when interacting with communities. *Graham* and the contemporary constitutional law framework for police violence is part of the web of law, custom, and culture that enables police violence to remain an ingrained and routinized form of structural harm that communities of color are subjected to. Specifically, flawed constitutional law is an important determinant of health.[102] By enabling normalized police violence and framing it as a series of disconnected individual disputes, constitutional law is liable for the broken bodies; loss of life and premature

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death; stress, anxiety, and depression; and community fragmentation that results from police excessive force.[103] Thus, defective constitutional law – including the futile Fourth Amendment – combined with use of force policies developed by police departments that implement it, enables the violence done to individuals, communities, and public health.

In sum, the constitutional matrix surrounding racialized police violence – which includes the Court's conceptions of race and racism as well as Fourth Amendment jurisprudence – actively produces and perpetuates this violence by avoiding the structural nature of this problem and permitting, from a data perspective, police excessive force and killings to persist despite social movement and media attention. In order to address police violence – and all of the harms it creates – we must simultaneously critique *Davis* and *McCleskey*, while critically attending to *Graham* to render these constitutional individualisms an unsustainable terrain from which to understand such deeply racialized problems.

NOTES

1 Aldina Mesic et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. Natl. Med. Assoc. 8 106–16 (2018). The authors note:

> Among the state racism measure, racial residential segregation was the most robust indicator associated with state-level racial disparities in police shootings of unarmed victims. Many previous studies have shown that racial residential segregation is associated with a series of adverse health outcomes. Racial residential segregation is the primary basis for a range of social, economic, employment, educational, criminal justice and political inequalities between Blacks and Whites. Therefore, racial residential segregation may be the most fundamental indicator of longstanding structural racism, which could explain our finding that this measure was single best predictor of the racial disparity in fatal police shootings of unarmed victims. *Id.* at 113.

2 Paul Butler, Chokehold: Policing Black Men 6 (2017).

3 490 U.S. 386, 388 (1989)

> This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person. We hold that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard.

4 Here, we emphasize the word "potential," as the Fourteenth Amendment, and equal protection in particular, currently has significant limitations that prevent it from being used in the liberating manner that we signal. This is discussed further in Part V.

5 426 U.S. 229 (1976).

6 481 U.S. 279 (1987).

7 Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 How. L.J. 43, 45 (1993).

8 § 1:2. Origin and purpose of the Fourth Amendment, Cal. Search and Seizure § 1:2.

9 Louise I. Capen and D. Montfort Melchior, My Worth to the World: Studies in Citizenship 469 (1935) ("The first ten [Amendments] – commonly called the Bill of Rights – guarantee certain rights to the individual.").

10 In the Fourth Amendment context, see Mapp v. Ohio, 367 U.S. 643 (1961).

11 Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 Geo. Wash. L. Rev. 359, 360 (1994) ("[M]uch of the amendment's jurisprudence centers on the courts' efforts to regulate law enforcement activity that intrudes upon protected rights of privacy and liberty."); *see, e.g.*, Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (classically framing it as the "right to be let alone").

12 U.S. Const. amend. iv.

13 Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1177 (1991) ("Even more important, in the Fourth Amendment, as nowhere else in the Constitution, the collective-sounding phrase 'the people' is immediately qualified by the use and subsequent repetition of the more individualistic language of 'persons.'").

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14 George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 Tex. Tech L. Rev. 199, 206 (2010) ("The history is clear that the colonists were hostile to British searches under the infamous writs of assistance. These searches required neither a warrant nor probable cause.").

15 *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 463 (1928) ("The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will."); Thomas, *supra* note 23, at 206.

16 Rachel A. Harmon, *The Problem of Policing*, 110 Mich. L. Rev. 761, 765 (2012) ("By expanding constitutional rights, the Court brought constitutional law to bear directly on police officers and departments. By augmenting constitutional remedies, the Court facilitated court challenges to police conduct. And by justifying its sweeping action on the ground that local and state governments had failed to prevent police misconduct, the Court established the primacy of constitutional adjudication for regulating the police.").

17 *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961) ("Our decision, founded on reason and truth, gives to the *individual* no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.") (emphasis added).

18 *See* Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)) ("'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every *individual* to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'") (emphasis added).

19 Harmon, *supra* note 16, at 765.

20 *Id.* at 765–67; Dan M. Kahan and Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 Geo. L.J. 1153, 1157–58 (1998) ("Rather than meet racism head on, the Court began to fight it indirectly through general constitutional standards that did not explicitly address race but that were nonetheless calculated to constrain racially motivated policies.").

21 Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 Tex. Tech L. Rev. 255, 256 (2010) ("For most of the history of the United States, the view that the Fourth Amendment served to protect individual security – that it was an individual right – was so patently obvious that it needed no support.").

22 Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. Rev. 905, 921–22 (2010) ("The Fourth Amendment was thus adopted for the purpose of checking discretionary police authority, and that historical purpose should be kept in mind.").

23 *See* Clancy, *supra* note 23 at 255 ("[T]he Amendment has been traditionally interpreted to safeguard the rights of *individuals* in *atomistic* spheres of interests.") (emphasis added).

24 Tennessee v. Garner, 471 U.S. 1, 7 (1985).

25 471 U.S. 1 (1985).

26 490 U.S. 386 (1989).

27 471 U.S.at 11–12; *see* Franklin E. Zimring, When Police Kill 19 (2017) ("As a matter of constitutional principle, the *Garner* case was a decisive rejection of generalized law enforcement authority to use force as also a justification for killings by police.").

28 *Garner*, 471 U.S. at 3, 11 ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.").

29 Brandon Garrett and Seth Stoughton, *A Tactical Fourth Amendment*, 103 Va. L. Rev. 211, 216 (2017) (calling *Garner* "a high-water mark" for police violence case law).

30 *Garner*, 471 U.S. at 29 (O'Connor, J., dissenting); Garrett and Stoughton, *supra* note 42, at 217 (describing how the flexible "totality of the circumstances" standard, including the discussion of "split-second" decisions from *Graham*, "originat[ed] in Justice Sandra Day O'Conner's dissent in *Garner*, has animated the Court's excessive-force case law ever since").

31 *Garner*, 471 U.S. at 29 (O'Connor, J., dissenting).

32 *Id.* at 23 (O'Connor, J., dissenting)

> By disregarding the serious and dangerous nature of residential burglaries and the longstanding practice of many States, the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee

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unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape. I do not believe that the Fourth Amendment supports such a right, and I accordingly dissent.

33 Marcus, *supra* note 44, at 82–83 (describing the progression of police violence case law from *Garner* through Scott v. Harris in 2007 as never actually abrogating or overruling *Garner*).
34 Graham v. Connor, 490 U.S. 386 (1989).
35 *Id.*
36 *Id.* at 390.
37 *Id.*; Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (The test used in *Glick* noted: "In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."), *overruled by* Graham, 490 U.S. 386.
38 490 U.S. at 386.
39 *Id.* at 388. The Court notes that in excessive force claims made in response to an arrest, the Fourth Amendment is the exclusive mechanism. For excessive force claims made by someone who is incarcerated, the Eight Amendment applies. *See id.* at 394.
40 *Id.* at 399.
41 *Id.* at 396.
42 Scott v. Harris in 2007 only furthered this trend. 550 U.S. 372, 383 (2007) ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.' Whether or not Scott's actions constituted application of 'deadly force,' *all that matters is whether Scott's actions were reasonable*.") (emphasis added). *See* Garrett and Stoughton, *supra* note 48, at 217 ("The turn away from *Garner* was cemented by the Court's 2007 decision in Scott v. Harris, which reinforced the approach in *Graham* by holding that there are no clearly impermissible uses of deadly force.").
43 The Court decided Graham v. Connor on May 15, 1989. Since this was a midyear decision, we excluded 1989 from our search to facilitate a more precise understanding of how courts approached police violence matters before and after the decision.
44 We randomly sampled 500 qualifying cases during this period in order to have a reasonable number of cases from which to draw inferences about the entire dataset. For the dataset of cases decided before *Graham*, we searched for "police," "police officer," and "excessive force or excessive use of force" for the given time period for reported federal cases, resulting in 1,029 hits. For the dataset comprised of cases decided after *Graham*, we conducted the same search, and it resulted in 2,708 hits. We chose to use the term "excessive force" for both time periods for continuity. Finally, for each time period, cases that did not have to do with police use of force in the context in which we are discussing it were excluded. Specifically, cases involving subjects like pretrial detention in jail or incarceration in prison or a medical facility were excluded because – in terms of the temporality of the criminal justice process – there are different constitutional analyses that arise that would affect our research question, which is solely focused on police use of force during their everyday patrols.
45 Section 1983 provides a civil right of enforcement for a violation of a constitutional right. It is generally held to not confer any substantive rights, but rather is a "method for vindicating federal rights elsewhere conferred." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). However, as the Court in *Graham* observed, "many courts have seemed to assume, as did the courts below in this case, that there is a generic 'right' to be free from excessive force, grounded not in any particular constitutional provision but rather in 'basic principles of § 1983 jurisprudence.'" Graham v. Connor, 490 U.S. 386, 393 (1989) (quoting Justice v. Dennis, 834 F. 2d 380, 382 (4th Cir. 1987), *vacated*, 490 U.S. 1087 (1989) (remanding the case in light of *Graham*)). The *Graham* court explicitly rejects this approach in favor of funneling all excessive force claims through the Fourth Amendment standard. *Id.* at 393–94. However, given that Section 1983 was one of the many ways in which federal courts understood the boundaries of these claims, we coded for it.
46 These codes were used because they are the concepts that we are interested in comparing between the pre- and post-*Graham* datasets.
47 In evaluating excessive force claims, 79.6% of the cases mention *Graham* in some fashion.

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48 *See* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 183–84 (2012) ("Our understanding of racism is therefore shaped by the most extreme expressions of individual bigotry, not by the way in which it functions naturally, almost invisibly (and sometimes with genuinely benign intent), when it is embedded in the structure of a social system."); Eduardo Bonilla-Silva, Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America 2 (4th ed. 2014) (describing the "ideology" of "color-blind racism" as explaining "contemporary racial inequality as the outcome of nonracial dynamics").

49 The *Graham* Court noted:

> Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

Graham v. Connor, 490 U.S. 386, 395 (1989).

50 Janicsko v. Pellman, 774 F. Supp. 331, 341 (M.D. Pa. 1991) (emphasis added).

51 Hamilton v. City of Jackson, 508 F. Supp. 2d 1045, 1053 (S.D. Ala. 2007) (emphasis added).

52 McDonald v. Haskins, 966 F.2d 292, 293 (7th Cir. 1992) (emphasis added); *see also* Hancock v. Dodson, 958 F.2d 1367, 1374 (6th Cir. 1992) ("Claims of excessive force under section 1983 are properly analyzed under the fourth amendment's [sic]prohibition against unreasonable seizures of the person, and its corresponding reasonableness standard.").

53 *Graham*, 490 U.S. at 393.

54 *Id.* at 393–94 (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

55

> In addressing an excessive force claim brought under Section 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force … In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primacy sources of constitutional protection against physically abusive government conduct. *Id.* at 394.

The court goes on to state that the Fourth Amendment is applicable to claims of excessive force when police are trying to make an arrest, while the Eighth Amendment applies to excessive force claims made by a person who is incarcerated. *Id.* at 389–91.

56 *See infra* Section III.B.3.

57 Of all 250 cases, this only occurred 2.8% of the time.

58 A further 6.3% accounted for when the court or the defendant(s) brought up the Fourteenth Amendment without the plaintiff doing so. In addition, to clarify the 4.7% statistic, this code included the situation wherein the court would not address the Fourteenth Amendment claim, but would not end up explicitly applying the Fourth Amendment either. For this reason, we separately coded for this instance.

59 *See, e.g.*, Estate of Lopez *ex rel.* Lopez v. Torres, 105 F. Supp. 3d 1148, 1155 (S.D. Cal. 2015) ("Excessive force claims relating to police conduct during an arrest *must* be analyzed under the Fourth Amendment and its reasonableness standard.") (emphasis added); Stevens v. Metro. Transp. Auth. Police Dep't, 293 F. Supp. 2d 415, 420 (S.D.N.Y. 2003) (while the case included the Fourteenth Amendment, it stated: "[plaintiff] Stevens's claim that the police officers used excessive force to effect his arrest is analyzed under the Fourth Amendment's prohibition against unreasonable seizures of the person").

60 Hamilton v. City of Jackson, 508 F. Supp. 2d 1045, 1053 (S.D. Ala. 2007).

61 *Id.* (emphasis added).

62 *Id.* (emphasis added).

63 Chappell v. City of Cleveland, 584 F. Supp. 2d 974, 976, 989 (N.D. Ohio 2008).

64 *Id.* at 989–90.

65 *Id.* at 976 n.1.

66 Green v. Saenz, 812 F. Supp. 798, 801 (N.D. Ill. 1992).

67 *Id.*

68 *Id.* (quoting Graham v. Connor, 490 U.S. 386, 388 (1989)).

69 *Id.*

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70 Phebus v. City of Memphis, 340 F. Supp. 2d 874, 882 (W.D. Tenn. 2004).
71 *Id.*
72 *Id.* at 882–83.
73 *See, e.g.*, Robins v. Harum, 773 F.2d 1004, 1007 (9th Cir. 1985) ("The Robinses argue that the right to be free from excessive use of force by the police is a substantive due process right protected by the Fourteenth Amendment …"); United Steelworkers of Am. v. Milstead, 705 F. Supp. 1426, 1436 (D. Ariz. 1988) ("A claim of excessive use of force in making an arrest is actionable under § 1983 as a violation of the Fourteenth Amendment right to substantive due process …" (citation omitted)); Kedra v. City of Philadelphia, 454 F. Supp. 652, 666 (E.D. Penn. 1978) ("Another recurring aspect of the complaint is the repeated allegation of physical beatings. Such conduct is actionable as a civil rights violation since it deprives a person of his liberty interest in personal security without due process of law.") (citation omitted); Campbell v. Buckles, 448 F. Supp. 288, 290 (E.D. Tenn. 1976) ("The use of an excessive and unreasonable amount of force by state law enforcement officers in effectuating an arrest is a violation of the victim's right to due process of law, Constitution, Fourteenth Amendment.") (citation omitted).
74 Dobson v. Green, 596 F. Supp. 122, 124 (E.D. Penn. 1984).
75 *Id.*; *see also* Reed v. Phila. Hous. Auth., 372 F. Supp. 686, 689 (E.D. Penn. 1974)

> This right [to be free from intentional and unprovoked assault by a police officer] is thought to arise from the due process clause of the Fourteenth Amendment, a right to be secure in one's person which stands separate and apart from any specific right found in the Bill of Rights. Application of undue force by law enforcement officers thus deprives the individual of liberty without due process of law (citation omitted).

76 *Dobson*, 596 F. Supp. at 125.
77 Taylor v. Canton, Ohio Police Dept., 544 F. Supp. 783, 785 (N.D. Ohio 1982).
78 *Id.* at 788.
79 *Id.*
80 Keyes v. City of Albany, 594 F. Supp. 1147, 1151 (N.D. N.Y. 1984).
81 *Id.* at 1154 (citation omitted).
82 *Id.* at 1155.
83 *See, e.g.*, Hornung v. Vill. of Park Forest, 634 F. Supp. 540, 544 (N.D. Ill. 1986) ("Claims of excessive force during arrest are cognizable under § 1983, and are generally analyzed as fourteenth amendment claims wherein the use of force is considered a potential deprivation of liberty without due process of law.") (citation omitted); Starstead v. City of Superior, 533 F. Supp. 1365, 1368 (W.D. Wis, 1982) ("[W]hile the alleged facts do not appear sufficient to sustain a cause of action arising out of the Eighth Amendment … they are sufficient to sustain a finding of a Fourteenth Amendment violation.") (citation omitted).
84 *See supra* Section III.B.2.a.
85 While equal protection claims were not exactly common before *Graham* (10.4%), the point here is to show the rarity of equal protection after *Graham* regardless of how often these claims were made pre-*Graham*. By increasing the prominence of the Fourth Amendment, the Court impeded the viability of the Equal Protection Clause as part of the Fourteenth Amendment.
86 This means that the plaintiff did not necessarily win, but the court did not outright reject the claim at that stage.
87 *See, e.g.*, Lockett v. New Orleans City, 607 F.3d 992 (5th Cir. 2010); McElroy v. City of Birmingham, 903 F. Supp. 2d 1228 (N.D. Ala. 2012); Pryor v. City of Clearlake, 877 F. Supp. 2d 929 (N.D. Cal. 2012); Loharsingh v. City and County of San Francisco, 696 F. Supp. 2d 1080 (N.D. Cal. 2010); Jackson v. City of Pittsburgh, 688 F. Supp. 2d 379, 395 (W.D. Pa. 2010).
88 *Jackson*, 688 F. Supp. 2d at 395.
89 *Pryor*, 877 F. Supp. 2d at 935, 950.
90 *McElroy*, 903 F. Supp. 2d at 1231, 1254.
91 Loharsingh v. City of San Francisco, 696 F. Supp. 2d 1080, 1106 (N.D. Cal. 2010). The fifth case: Lockett v. New Orleans City, 607 F.3d 992, 1002 (5th Cir. 2010) ("We conclude that he has not demonstrated facts sufficient to demonstrate a conspiracy to deprive him of equal protection and the required act in furtherance of the conspiracy that caused injury or deprivation of any right.")
92 Hardy v. Emery, 241 F. Supp. 2d 38, 49–50 (D. Me. 2003) (survived summary judgment).
93 *Id.*

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94 *Id*.
95 *Id*. at 42–43.
96 *Id*. at 43.
97 *Id*. at 48–49.
98 426 U.S. 229 (1976). The intent doctrine creates an extremely truncated paradigm of how race and racism function in the present. For a discussion of its doctrinal evolution, see Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779 (2012).
99 McCleskey v. Kemp, 481 U.S. 279 (1987).
100 For a discussion of post-civil rights racial backlash and its impact on the federal courts, see Ian Haney López, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 Stan. L. Rev. 985 (2006).
101 In a genealogy of these decisions, an ideological pattern emerges: *Graham* was decided just two years after *McCleskey*. Chief Justice Rehnquist – joined by Justice O'Connor – delivered the opinion in *Graham* (1989); joined Justice Powell in the opinion in *McCleskey* (1987); joined Justice O'Connor's dissent in *Garner* (1985); and joined Justice White in Washington v. Davis (1976).
102 *See* Osagie K. Obasogie and Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 Am. J. L. and Med. 179 (2017) (contending that use of force policies are an important site in disrupting police violence because they are the main domain for police departments to articulate and reify the constitutional law standards, and that this process has profound implications for public health).
103 *See* Sirry Alang et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, 107 Am. J. Pub. Health 662 (2017).

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