PROTESTING, CASH BAIL, AND (UN)EQUAL PROTECTION: USING EMPIRICAL DATA TO PROVE EQUAL PROTECTION VIOLATIONS

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ABSTRACT

Despite considerable data demonstrating disparate government treatment of racially minoritized groups, recent race-based equal protection cases have met only measured success because courts often find statistical evidence of racial bias to be too attenuated. Without an explicitly racist statement, policy, or law made by government officials, many courts will not intervene in systems that have long, consistent histories of racially discriminatory impacts.

But this contradicts the purpose of the Equal Protection Clause: to prevent people of color—particularly Black people—from being discriminated against and kept in a functional caste system. Courts and scholars have consistently identified this purpose, and throughout equal protection's evolution, the heart of the doctrine has remained the same. Thus, when decades of data demonstrate disparate racial impacts in a system or government practice, we would expect that system to be found to violate the Equal Protection Clause.

This should include the protest policing and cash bail systems. Decades of research have consistently found racial discrimination and disparate impacts in both practices. Both systems give government officials significant, largely subjective discretion to determine who is "dangerous," which allows for invidious discrimination in otherwise neutral policies. Both practices police Black bodies and restrict their rights. Unsurprisingly, both systems have been challenged as equal protection violations.

Yet, equal protection claims against both systems have rarely been successful. If the purpose of the Equal Protection Clause is to allow an avenue for redress against racist structures, judicial precedent must allow a framework that can bare teeth to enforce that ideal. But apart from a few limited exceptions, courts have refused to act on the consistent, empirically driven scholarship that concludes people of color are not treated equally. Rather, the current framework allows for discrimination as long as government statements, policies, and laws are facially neutral. In the view of many courts, equal protection does not need to mean equal impact.

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It seems many courts will only find an equal protection violation if a statute explicitly says, "Mostly Black people will be subject to this law." In other words, absent an unmistakable "clear intent," de facto discrimination is effectively constitutional.

This Article proposes that a framework shift showing the interrelated nature of particular discriminatory systems would help courts include research on discriminatory practices to evidence an equal protection violation. As an example, this Article explores the intersection between protest policing and cash bail to show a uniquely intertwined connection that can help litigants prove a common thread of discrimination to satisfy the evidentiary requirements of their equal protection claims.

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INTRODUCTION

Equal protection litigation is very fickle. Theoretically, to make a successful claim, a litigant must show either discriminatory intent or discriminatory impact.[1] Because today's laws so rarely list an explicit discriminatory intent, most equal protection litigation now falls under the category of discriminatory impact.[2] If the discriminatory impact occurs in a consistent, anticipated pattern, that should be equivalent to a

1. *See* discussion *infra* Section I.C.
2. *See* discussion *infra* Section I.C.2.

discriminatory purpose.[3] Accordingly, decades of statistical research *should* give rise to successful equal protection claims.[4] However, even with substantial research demonstrating discriminatory impacts, courts manage to avoid finding equal protection violations.[5]

This is true for both protest policing and cash bail.[6] Many litigants have brought equal protection claims due to disproportionate, biased policing of protest activity.[7] Research regularly demonstrates that protest policing occurs more frequently and is often harsher when the protest consists primarily of people of color or is related to issues that primarily or disproportionately affect people of color.[8] Put differently, data on protests indicates that protest rights are not enjoyed equally because of how differently protesters of color are policed.[9] Yet, courts are unlikely to find equal protection violations in these cases because the policing is facially neutral and does not explicitly single out particular demographics.[10] Unless a law or policy explicitly states that "police should curtail any protests involving Black people," courts ignore the weight of consistent scholarship demonstrating that protest policing practices are in practice discriminatory.[11]

The story of cash bail[12] is similar, with several litigants bringing equal protection claims because the system disparately impacts people of color and people from lower socioeconomic statuses.[13] As in the protesting context, despite research firmly supporting this argument of an unequal system, courts have largely refused to make the connection.[14] Instead, courts disingenuously conclude that the bail system is not discriminatory because it is facially neutral and does not explicitly single out particular demographics.[15] Unless a law or policy explicitly states that "bail should

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3. *See* discussion *infra* Section I.C.2. As the Article will discuss, these include patterns where the discrimination is empirically documented and is foreseeable. The examples used here include protest policing and cash bail practices that both have significant disparate impacts to the point that the discrimination is almost expected. *See also* Alireza Nourani-Dargiri, *Bailing Out the Protester*, 14 COLUM. J. RACE & L. 977, 1002–04, 1006–08 (2024).

4. *See infra* Section I.C.2; *see, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 489 n.4, 494 n.11 (1954) (utilizing empirical research to hold segregated schools violates the Equal Protection Clause).

5. As the Article discusses, this is often due to courts not finding expressly discriminatory statements. *See infra* Section I.D.

6. *See* discussion *infra* Part II.

7. *See* discussion *infra* Section II.A.

8. *See* discussion *infra* Section II.A.

9. *See* discussion *infra* Section II.A.

10. *See* discussion *infra* Section II.A.

11. *See* discussion *infra* Section II.A.

12. As a preliminary note, this Article will only refer to cash bail but may use "cash bail" and "bail" interchangeably. While there are many different forms of bail—e.g., personal recognizance and property bond—cash bail is the most common form of pretrial release methods. Allie Preston & Rachael Eisenberg, *Profit Over People: Primer on U.S. Cash Bail Systems*, CTR. FOR AM. PROGRESS (July 6, 2022), https://www.americanprogress.org/article/profit-over-people-primer-on-u-s-cash-bail-systems/ ("Commercial bail is the most common form of pretrial release, accounting for 49 percent of all felony pretrial releases and nearly 80 percent of releases with monetary conditions in 2009, the last time these data were collected at the federal level.").

13. *See* discussion *infra* Section II.B.

14. *See* discussion *infra* Section II.B.

15. *See* discussion *infra* Section II.B.

adversely impact Black people the most," courts ignore the weight of consistent scholarship demonstrating that the bail system is discriminatory.[16]

This is maddening. There is little doubt about what the Equal Protection Clause was intended to do: stop the government from discriminating against Black people.[17] Accomplishing this goal necessarily requires reforming institutions that are facially neutral but replete with practical discrimination. Yet, even when scholarship demonstrates how certain populations are disproportionately impacted, most courts avoid fulfilling their role in delivering this promise.[18] Instead, they characterize this disproportionate treatment as a coincidence, believing nothing could be systematically wrong with the facially neutral systems.[19] As long as the law or policy doesn't explicitly single out particular demographics, it is generally not an equal protection concern, even if, in practice, a group experiences disparate impacts.[20] It seems that the Equal Protection Clause does not mean what most people think it does.[21]

Maybe this is a framework problem.[22] Equal protection cases largely look at how discriminatory treatment occurs at a micro level (looking only at a single right, like freedom of speech), not a broader macro level (considering multiple interconnected rights system-wide).[23] Because courts are reluctant to conclude what data has long found, perhaps the answer is to analyze how interrelated rights fit into a stark pattern of systematic oppression.[24] For example, rather than looking at equal protection in terms of how Black people are treated in protest policing separately, plaintiffs should raise the issues together and emphasize any common threads of

16. *See* discussion *infra* Section II.B.
17. *See* discussion *infra* Sections I.A, I.B.
18. *See, e.g.*, discussion *infra* Section I.D and Part II.
19. *See, e.g.*, discussion *infra* Section I.D and Part II.
20. *See, e.g.*, discussion *infra* Section I.D.
21. *See* discussion *infra* Section I.B.
22. Others have commented about changing the current framework in equal protection cases. *See, e.g.*, Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 3, 15, 91 (2013) (discussing the "divided equal protection framework that today governs claims of discrimination," restrictions on how courts use impact evidence, and what this means for the future); Danielle Stefanucci, *Shedding Tiers: A New Framework for Equal Protection Jurisprudence*, 93 ST. JOHN'S L. REV. 1235, 1235–36 (2019) (discussing the need to "reconsider the tiers of scrutiny framework that courts use to evaluate equal protection claims" particularly in light of scientific evolvements); Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 297 (2020) (discussing specifically balancing statistics and equality in the sense of pretrial detention). This article expands prior research to propose using multiple issues in a single claim to attack the entire system. The Equal Protection Clause was meant to prevent caste systems, but equal protection cases involving multiple instances of discrimination are evaluated separately. In many systems, discrimination is pervasive and ties these claims together (like protesting and bail); however, when evaluated separately these claims are difficult to prove. Accordingly, this Article argues that there needs to be a meaningful opportunity for plaintiffs to allege their second-caste status and analyzing issues together could help that occur.
23. *See* Siegel, *supra* note 22, at 18–19 (discussing how courts review laws of general application with deference, implying that successful suits must be incredibly specific); Stefanucci, *supra* note 22, at 1235–36 (discussing how even in specific suits, success is dependent on the tier of scrutiny, not necessarily by proving discrimination).
24. *See* discussion *infra* Part III.

discrimination.[25] While courts may decline to find racist treatment or demand that plaintiffs provide "other evidence"[26] when protest policing and bail claims are brought separately, there is something particularly compelling about exposing that the same groups are being discriminated against throughout related systems.[27] This thread of disenfranchisement would support finding the existence of deeply rooted discrimination in facially neutral systems that are designed to keep certain groups—particularly Black people—disenfranchised but give the impression of equality.[28] This is the exact sort of glaring pattern of discrimination against Black people that the Fourteenth Amendment sought to prevent.[29]

This Article explores how analyzing multiple systems together can bolster equal protection claims by revealing how stark the pattern of discriminatory impact is. Part I discusses the original intent and purpose for including the Equal Protection Clause to the Fourteenth Amendment and describes how courts evaluate alleged violations. Part II provides examples of equal protection litigation, focusing on challenges to protest policing and cash bail systems. Parts II.A and II.B describe the limited success these lawsuits have achieved and highlight how overwhelmingly difficult it is for litigants to prove their claims. Accordingly, Part III proposes a modified framework for equal protection claims. Again using protest policing and cash bail as examples, this Part argues that analyzing multiple systems together can help litigants build stronger cases to prove the pattern necessary to succeed on a discriminatory impact equal protection claim. Part III concludes by acknowledging that while this proposed framework provides an opportunity to shift the trajectory of equal protection jurisprudence, there are still many barriers to bringing a case that could initiate that change.

I. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution is explicit in its requirement that all people be *equally* protected.[30] This necessarily includes preventing and redressing disparate treatment based on race—whether a law or policy explicitly mentions race or not.[31] However, when pushed slightly, this promise crumbles. In theory, while the Clause evolved, its purpose has remained consistent. In practice, however, the current framework to bring an equal protection claim results in an uphill battle for litigants to overcome.

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25. *See* discussion *infra* Part III.
26. *See* discussion *infra* Section I.D and Part II.
27. In a separate article, I discuss in more depth how protest policing and cash bail are interconnected. *See generally* Nourani-Dargiri, *supra* note 3.
28. *See* discussion *infra* Part III.
29. *See* discussion *infra* Section I.B.
30. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").
31. *See* discussion *infra* Section I.C.

A. Equal Protection's Evolution

The Fourteenth Amendment to the U.S. Constitution promises that the government shall not "deny to any person within its jurisdiction the equal protection of the laws."[32] Importantly, this Equal Protection Clause applies to everyone in the country "without regard to any differences of race, of color, or of nationality; and the equal protection of the laws *is a pledge of the protection of equal laws*."[33] This is a clear, unambiguous promise that the government will ensure laws and policies do not result in either a de jure or a de facto caste system.

Since Congress ratified it in 1868,[34] the Fourteenth Amendment has purported to extend the full force of liberties and rights granted by the Bill of Rights to formerly enslaved people and their descendants.[35] This includes the rights to free speech, assembly, and protections against excessive bail and punishment.[36] From the beginning, it was clear that the Framers of the Fourteenth Amendment intended to prevent creating tiered rights based on race.[37] The Fourteenth Amendment "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty . . . but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights."[38] This includes "that all persons should be equally entitled to pursue their happiness . . . have like access to the courts of the country for the protection of their persons and property[,] . . . and that, in the administration of criminal justice no different or higher punishment should be imposed . . . ."[39]

Congressmen[40] understood the purpose of the Fourteenth Amendment's promises. Senator Jacob Howard, floor leader for the Fourteenth Amendment, summarized the Equal Protection Clause as "abolish[ing] all class legislation in the States and do[ing] away with the injustice of subjecting one caste of persons to a code not applicable to another . . . . It establishes equality before the law."[41] This included guaranteeing civil rights

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32. U.S. CONST. amend. XIV, § 1.

33. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (emphasis added).

34. Of note, it was passed by Congress in 1866. *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/14th-amendment (last visited July 22, 2025).

35. *Id.*

36. All of which are listed in the Bill of Rights. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed.").

37. Barbier v. Connolly, 113 U.S. 27, 31 (1885).

38. *Id.*

39. *Id.*

40. This term is used intentionally, as everyone in Congress at that time was, in fact, a man. It wasn't until 1917 that Jeannette Rankin became the first woman in Congress. *Jeannette Rankin's Historic Election: A Century of Women in Congress*, HIST., ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/WIC/Century-of-Women-Jeannette-Rankin/ (last visited July 22, 2025).

41. John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* WASH. U. L. Q. 421, 441 (1972).

protections.[42] The Fourteenth Amendment marked a large shift in American constitutionalism by imposing substantially more constitutional restrictions against the states in the wake of the Civil War and Reconstruction. The bounds of these dramatic changes needed to be tested.

Near the end of the nineteenth century, the Supreme Court started hearing cases about alleged violations of the new Fourteenth Amendment. Even in its early, somewhat halting decisions[43] in the *Slaughterhouse Cases*,[44] the Court still acknowledged the context in which the Amendment was passed: "In light of the history of these amendments, and the pervading purpose of them . . . it is not difficult to give a meaning to [the Equal Protection C]lause."[45] The discrimination faced by Black people as a class "was the evil to be remedied by this clause, and by it such laws are forbidden."[46] While the Court noted that the Fourteenth Amendment's Privileges and Immunities Clause only applied to the federal government,[47] it did not make any such note regarding the Equal Protection Clause. Rather, the Court suggests the opposite, identifying equal rights to assemble and the privilege of habeas corpus as privileges secured by the U.S. Constitution.[48] Explicitly, the Court noted that "[e]quality before the law is undoubtedly one of the privileges and immunities of every citizen."[49]

In *Strauder v. West Virginia*,[50] a West Virginia law explicitly barred Black people from jury service, so litigants argued the state law violated the Equal Protection Clause of the Fourteenth Amendment.[51] The Court agreed.[52] To deny citizens—a group that had grown to now include Black people—the ability to participate in the administration of justice solely on racial grounds "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[53]

For the next few years, the Court wrestled with what bounds the Amendment required to keep its equal protection promise. In *United States*

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42. *Id.* at 459.

43. These cases were "halting" in the sense that while they held the Fourteenth Amendment banned states from depriving Black citizens equal rights, it did not extend the same treatment for equal economic privileges by the state. The Privileges and Immunities Clause were limited to areas controlled by the federal government.

44. 83 U.S. 36, 57, 60–61 (1873). Louisiana passed a law restricting slaughterhouse operations, and only one company received a charter to run a slaughterhouse, closing every other business. A group of butchers challenged the monopoly in part alleging violations to privileges and immunities, equal protection, and due process rights from the Fourteenth Amendment.

45. *Id.* at 81.

46. *Id.*

47. *Id.* at 79.

48. *Id.*

49. *Id.* at 118.

50. 100 U.S. 303 (1879).

51. *Id.* at 308–09.

52. *Id.* at 304, 310.

53. *Id.* at 308.

v. Harris,[54] the Court considered whether the Fourteenth Amendment would also apply to individual discriminatory acts.[55] Harris led an armed lynch mob into a Tennessee jail, captured four Black prisoners, and killed one of them.[56] The U.S. government brought criminal charges against Harris and two others under a federal statute that made it a crime for two or more persons to conspire for the purpose of depriving anyone of the equal protection of the laws.[57] While the Court ultimately held the statute unconstitutional, it was not because the Fourteenth Amendment did not promise equal protection for Black people.[58] Rather, the Court overturned the statute because "[i]t was never supposed that the [Fourteenth Amendment] conferred on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow-citizen."[59] Even after *Harris*, *government* action still had to comply with the Fourteenth Amendment's equal protection guarantee.

That same year, however, the Court took its first of many missteps in *Pace v. Alabama*,[60] where it upheld Alabama's anti-miscegenation statute.[61] Pace—a Black man—and a white woman were arrested and charged for being a white and Black person living together "in a state of adultery or fornication," violating Alabama's anti-miscegenation statute.[62] Pace argued that because the law penalized interracial relationships more severely than same-race relationships, the Alabama law violated the Equal Protection Clause.[63] But the Court disagreed.[64] The Court held that the criminalization of interracial, adulterous sex did not violate the Equal Protection Clause because white and non-white individuals were punished in equal measure.[65] While it is intuitively clear the law was aimed towards criminalizing relations with Black people and not white people, the Court upheld the anti-miscegenation statute because it did not explicitly focus on any particular race, but against the interracial nature of the offense.[66]

Cracks in the equal protection pledge started to grow, as can be seen in the *Civil Rights Cases*,[67] in which the Court allowed racial

54. 106 U.S. 629 (1883).
55. *Id.* at 638–39.
56. *Id.* at 629–32.
57. *Id.* at 631–32.
58. *Id.* at 638–39.
59. *Id.* at 644.
60. 106 U.S. 583 (1883).
61. *Id.* at 583 ("Section 4184 of the Code of Alabama provides that 'if any man and woman live together in adultery or fornication, each of them must, on the first conviction of the offense, be fined not less than $100, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months.'").
62. *Id.*
63. *Id.* at 584.
64. *Id.* at 585.
65. *Id.*
66. *Id.*
67. 109 U.S. 3, 4 (1883). This case consolidates several cases:

> Two of the cases, those against Stanley and Nichols, are indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against

discrimination in various places enjoyed by the public and subject to public regulation.[68] In each of the five joined cases, a Black person was denied the same accommodations as a white person, and those accommodations were subject to public, governmental regulation.[69] Accordingly, each litigant argued they were denied equal protection on the basis of their race.[70] But in all these situations, the Court disagreed.[71] The majority held that private acts of racial discrimination, even those subject to public regulation, are simply private wrongs that the government is powerless to correct.[72] Equal protection only applied to what the government affirmatively does, not what it oversees.[73] In a lone dissent, Justice John Marshall Harlan advocated for a broader interpretation of equal protection, noting the public function that private places of accommodation serve.[74] For instance, private railroads provide the government function of facilitating travel, blurring the line between public and private.[75] Justice Harlan, unlike the rest of the Court, recognized that in the absence of vigorous enforcement of the Clause it would be easy for the country to avoid the promises the Fourteenth Amendment made, and keep Black people as second-class citizens.[76] As Harlan noted, "[i]f the constitutional amendments be enforced, according to the intent with which . . . they were adopted, there cannot

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> Ryan and Singleton, are, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theater, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theater in San Francisco; and the indictment against Singleton being for denying to another person, whose color is not stated, the full enjoyment of the accommodations of the theater known as the Grand Opera House in New York, 'said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude.' The case of Robinson and wife against the Memphis & Charleston Railroad Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of $500 given by the second section of the act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits under a charge of the court, to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of Congress; and the principal point made by the exceptions was that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company.

68. *Id.* at 9–10. This included privately-owned businesses like hotels and inns, theaters, and places of public amusements. Because these private businesses performed public functions for the public, they were all subject to public regulation. *Id.* at 58–59 (Harlan, J., dissenting).

69. *Id.* at 9–10 (majority opinion).

70. *See id.*

71. *Id.* at 24–26.

72. The Civil Rights Cases, 109 U.S. 3, 24–26 (1883).

73. *Id.*

74. *See id.* at 26 (Harlan, J., dissenting).

75. *See id.* at 27.

76. *Id.* at 61–62.

be . . . any class of human beings in practical subjection to another class."[77]

The *Civil Rights Cases* opened the door for *Plessy v. Ferguson*,[78] which abrogated the Fourteenth Amendment's equal protection promises under the disingenuous guise of "separate but equal."[79] In *Plessy*, the Court considered whether Louisiana's Separate Car Act violated the Equal Protection Clause.[80] Louisiana law required passengers to sit in racially segregated train cars.[81] Homer Plessy—who was seven-eighths white and one-eighth Black—sat in the "whites only" car, refused to leave when asked, and was subsequently arrested.[82] Plessy argued that the law implied that Black people were inferior and must be separated from the superior white race.[83] But the Court held that the law racially segregating train cars did not violate the Equal Protection Clause.[84] Because the Fourteenth Amendment only intended to establish absolute equality for the races, not necessarily shared accommodations, separate but equal train cars were constitutional.[85] Again in dissent, Justice Harlan argued that this new separate but equal doctrine would create a caste system and that because all citizens should have equal access to civil rights, segregation should be per se unconstitutional.[86]

History showed that Justice Harlan was correct. The *Plessy* decision cemented into place racist Jim Crow-era laws that continue to have impacts today.[87] Under the guise of "separate but equal," Jim Crow laws effectively created a caste system in which Black people were second-class citizens.[88] In addition to restricting the rights and movement of Black people—in direct contradiction to the Fourteenth Amendment's guarantees—these laws sought to ensure that Black people were seen as inferior.[89] Black and white people could not eat together.[90] Black people could not

77. *Id.* at 62.
78. 163 U.S. 537 (1896).
79. *Id.* at 550–52.
80. *Id.* at 540.
81. *Id.*
82. *Id.* at 541–42.
83. *Id.* at 551.
84. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).
85. *Id.* at 550–52.
86. *Id.* at 559–60 (Harlan, J., dissenting).
87. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20–22, 27–29 (rev. ed. 2012) (discussing the rebirth of a racialized caste system in the United States, specifically as it relates to the criminal legal system. As discussed in the book, while Jim Crow laws are officially gone, Black people are still denied equal rights such as to vote, employment, education, and public benefits).
88. *What Was Jim Crow*, JIM CROW MUSEUM, https://jimcrowmuseum.ferris.edu/what.htm (last visited March 23, 2025).
89. MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, at 260–62 (2001).
90. *What Was Jim Crow*, *supra* note 88; *see also Example of Segregation Laws*, C.R. MOVEMENT ARCHIVE, https://www.crmvet.org/info/seglaws.htm (last visited March 23, 2025) (quoting specific Alabama law: "It shall be unlawful to conduct a restaurant or other place of the serving of food in the city at which white and colored people are served in the same room, unless such white and

shake hands with white people.[91] Black people could not show affection in front of white people.[92] The *Plessy* decision legitimized the proliferation of Jim Crow laws that undermined the protections the Fourteenth Amendment promised.

Plessy and the subsequent Jim Crow laws allowed remained the law of the land until 1954, silencing arguably the most important purpose of the Fourteenth Amendment. But, in *Brown v. Board of Education*,[93] the Court recognized its misstep and tried to reinvigorate the Fourteenth Amendment's Equal Protection Clause.[94] After the National Association for the Advancement of Colored People (NAACP) launched a sustained litigation campaign to expose segregation as inherently unequal,[95] *Brown* ultimately held that separate schools for white and non-white students violated the Equal Protection Clause.[96] While there had been cases involving the "separate but equal" doctrine in education,[97] "the validity of the doctrine itself was not challenged."[98] In *Brown*, the Court finally held that at least in "public education[,] the doctrine of 'separate but equal' has no place."[99] The Court unanimously held that separate but equal educational facilities for racial minorities are "inherently unequal."[100] The Court further noted that racially segregated public schools instill a sense of inferiority that has a detrimental effect on the academic and personal growth of Black children.[101] Notably, the Court reached its conclusion based not only on its own precedent but also on consistent social science research that demonstrated the negative effects of racial segregation in public education.[102]

Brown was a decisive turning point in a decades-long struggle to dismantle government-imposed segregation, but it was certainly not the end

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colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment.").

91. *What Was Jim Crow*, *supra* note 88.

92. *Id.*

93. 347 U.S. 483 (1954).

94. *Id.* at 494–95 ("Any language in Plessy v. Ferguson contrary to this finding is rejected."). Of note, this case is often referred to as "Brown I" because future cases would be necessary to put integration in motion.

95. *See, e.g.*, Walter F. Murphy, *Desegregation in Public Education–A Generation of Future Litigation*, 15 MD. L. REV. 221, 227–28 (1955); Leland B. Ware, *Setting the Stage for* Brown*: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930–1950*, 52 MERCER L. REV. 631, 631–33 (2001).

96. *Brown*, 347 U.S. at 495.

97. Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528 (1899); Berea Coll. v. Kentucky, 211 U.S. 45 (1908); Gong Lum v. Rice, 275 U.S. 78 (1927); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950). As noted in *Brown*, in "none of these cases was it necessary to re-examine the [equal protection] doctrine to grant relief." *Brown*, 347 U.S. at 492.

98. *Brown*, 347 U.S. at 491–92.

99. *Id.* at 495.

100. *Id.*

101. *Id.* at 494.

102. *Id.*

of the struggle to fulfill equal protection promises. For example, it was not until 1967 that the Supreme Court held that laws prohibiting interracial marriages violate equal protection.[103] In *Loving v. Virginia*,[104] an interracial couple married in Washington, D.C., and returned to Virginia shortly after.[105] Upon their arrival, the couple was charged with violating Virginia's anti-miscegenation statute, ultimately found guilty, and sentenced to a year in jail.[106] The couple argued that their marriage was criminalized solely based on their race, violating the Equal Protection Clause.[107] Virginia, however, noted that similar to the Court's reasoning in *Pace*, the punishment was the same regardless of the offender's race and "equally burdened" both Black and white people.[108] Unlike in *Pace*, the *Loving* Court unanimously held that any distinctions drawn according to race are generally "odious to a free people" and subject to "the most rigid scrutiny" under the Equal Protection Clause.[109] As the Court concluded, "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[110] The Court noted that the only purpose an anti-miscegenation statute could have is to discriminate, even if the law applies equally to different races.[111]

Brown and *Loving* signaled the Court's intent to fully enforce the Equal Protection Clause. The Court's subsequent decisions demonstrated that the Equal Protection Clause's promises went beyond school integration and interracial marriage.[112] It also included the qualifications for being appointed administrators of estates;[113] access to contraception;[114] military service benefits;[115] access to food stamps;[116] hiring practices;[117] access to alcohol based on gender;[118] zoning;[119] preventing states from forbidding protection due to sexual orientation;[120] recognizing equal protection claims

103. Loving v. Virginia, 388 U.S. 1, 12 (1967).
104. 388 U.S. 1 (1967).
105. *Id.* at 2.
106. *Id.* at 3.
107. *Id.*
108. *Id.* at 7–8.
109. *Id.* at 11.
110. Loving v. Virginia, 388 U.S. 1, 12 (1967).
111. *Id.* at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").
112. It did, of course, result in school integration and interracial marriage. *See also* Brown v. Board of Educ., 349 U.S. 294 (1955).
113. Reed v. Reed, 404 U.S. 71 (1971).
114. Eisenstadt v. Baird, 405 U.S. 438 (1972).
115. Frontiero v. Richardson, 411 U.S. 677 (1973).
116. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).
117. Washington v. Davis, 426 U.S. 229 (1976).
118. Craig v. Boren, 429 U.S. 190 (1976).
119. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).
120. Romer v. Evans, 517 U.S. 620 (1996).

brought by a "class of one";[121] ability to engage in "homosexual conduct";[122] and same-sex marriage.[123]

Unfortunately, the Court has recently taken several steps back, ushering in a new *Plessy*-like era that looks to further turn the Equal Protection Clause on its head.[124] In *Dobbs v. Jackson Women's Health Organization*,[125] the Court rejected arguments that the Fourteenth Amendment's Equal Protection Clause guarantees the right to an abortion.[126] Despite longstanding precedent protecting the right to an abortion[127] and amici discussing the numerous equal protection impacts involved,[128] the majority concluded that abortion restrictions are not sex-based classifications.[129] Even though the decision disproportionately impacts women, the Court held that abortion is "not subject to the 'heightened scrutiny' that applies to [sex-based] classifications."[130] While the dissent discussed how the pattern of the Court's cases over decades made the majority's opinion inconsistent with existing equal protection jurisprudence,[131] the Court's majority still went ahead with making that abrupt change.

After *Dobbs*, the dominos started to fall. The following year, the Court furthered reneged on the Fourteenth Amendment's equal protection promises in *Students for Fair Admissions, Inc. v. President of Harvard* (*SFFA*).[132] The Court held that schools that simply consider race as part of their admissions process—a practice the Court previously determined to be important to achieve equality in admissions[133]—violate the Equal Protection Clause.[134] In a lengthy opinion, Chief Justice Roberts compared considering race as an aspect of an applicant's application to the racial discrimination the Fourteenth Amendment tried to prevent.[135] According to the majority, race-conscious admissions policies that are proven to

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121. This was to ensure everyone fell under the Fourteenth Amendment's protection, not just those who can fit into a specific box. Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000).

122. Lawrence v. Texas, 539 U.S. 558 (2003).

123. Obergefell v. Hodges, 576 U.S. 644 (2015).

124. Larry J. Pittman, *The Supreme Court's Erroneous Equal Protection Clause Analysis: Societal Discrimination, The* Harvard College *Decision as the New* Plessy v. Ferguson*-Lite, and the Thirteenth Amendment*, 57 CREIGHTON L. REV. 189, 189–90 (2024) (discussing how the Court is continuing "the racial caste system that has existed in this country since its founding," specifically through its Equal Protection Clause analysis.).

125. 597 U.S. 215 (2022).

126. *Id.* at 215–16.

127. *See* Roe v. Wade, 410 U.S. 113 (1973).

128. *Dobbs*, 597 U.S. at 236 (discussing amici's argument of an abortion right found in the Equal Protection Clause. At least one of these briefs argued abortion restrictions violate the Equal Protection Clause because it is sex-based discrimination that intertwines outdated stereotypes about women that do not advance equality interests).

129. *Id.*

130. *Id.*

131. *Id.* at 359, 363 (Kagan, J., dissenting).

132. 600 U.S. 181 (2023).

133. *E.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Fisher v. Univ. of Tex., 570 U.S. 297 (2013).

134. *Students for Fair Admissions*, 600 U.S. at 213.

135. *Id.* at 212–13.

diversify higher education[136] are equivalent to Jim Crow laws.[137] But as the dissent noted, "[t]he Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind."[138] The Equal Protection Clause was clear that its purpose was to put Black people on an equal footing with white people and provide an avenue for implicit and structural biases to be redressed.[139] Once again, the Court subverted the constitutional guarantee of equal protection to further entrench inequality.

In the 2024–2025 term, the Court seems poised to further press its foot on the neck of equal protection. In *United States v. Skrmetti*,[140] the Court will review Tennessee and Kentucky laws that restrict access to certain medical treatments for transgender minors and provide mechanisms for enforcement against healthcare providers.[141] Plaintiffs argue that the laws violate their equal protection rights because they discriminate based on an individual's sex.[142] While district courts initially granted injunctions against both laws, concluding that they likely violate the Equal Protection Clause, the Sixth Circuit stayed the injunctions and allowed the laws to go into effect.[143] The Supreme Court granted certiorari and appears likely to uphold the bans.[144] During oral argument, the Court's conservative majority seemed skeptical about the challenges to the bans, suggesting that legislatures, rather than judges, may be best suited to make determinations about what the Court saw as the complicated medical issues underlying the dispute[145]—statements similar to those the Court made in *Dobbs* during oral argument and its subsequent opinion.[146]

The Court is aggressively signaling an end to upholding the decades-long equal protection doctrine consensus.[147] Confusingly, despite the Court's decision to curtail its equal protection precedent, it has simultaneously upheld its language to maintain a consistent purpose.

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136. *E.g.*, Jane Nam, *Affirmative Action Statistics in College Admissions*, BESTCOLLEGES (July 3, 2023), https://www.bestcolleges.com/research/affirmative-action-statistics/.

137. *See Students for Fair Admissions*, 600 U.S. at 251.

138. *Id.* at 318 (Sotomayor, J., dissenting).

139. *Id.* at 336–37.

140. 144 S. Ct. 2679 (2024).

141. Petition for a Writ of Certiorari at 2, 13 n.5, United States v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477).

142. *Id.* at 16.

143. *Id.* at 2.

144. Amy Howe, *Supreme Court Appears Ready to Uphold Tennessee Ban on Youth Transgender Care*, SCOTUSBLOG (Dec. 4, 2024, 4:43 PM), https://www.scotusblog.com/2024/12/supreme-court-appears-ready-to-uphold-tennessee-ban-on-youth-transgender-care/.

145. *Id.* For example, Chief Justice Roberts asked, "doesn't that make a stronger case for us to leave those determinations to the legislative bodies rather than try to determine them for ourselves?" Transcript of Oral Argument at 10, United States v. Skrmetti, 144 S. Ct. 2679 (2023) (No. 23-477).

146. Howe, *supra* note 144; Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300 (2022) (writing that "courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'") (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

147. Scholars have been hinting at equal protection's fragility and the Court's recent turn away from its values. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).

B. Equal Protection's Consistent Purpose

While the Court's applications of the Equal Protection Clause have ebbed and flowed, its purpose—or at least its claimed purpose—has remained consistent: to prevent and combat discrimination and disparate treatment as it relates to socialized identities,[148] particularly race.[149]

Courts often reference the historical context in which the Equal Protection Clause was proposed, passed, and ratified. For instance, in *SFFA*, the majority, concurring, and dissenting opinions all discussed its ratification occurring "[i]n the wake of the Civil War"[150]—a war primarily fought about the issue of slavery and the treatment of Black people as lesser.[151] Each opinion emphasized how the Equal Protection Clause "represented a foundational principle—the absolute equality of all citizens of the United States politically and civilly."[152] Notably, the majority opinion—which overturned affirmative action and race-conscious admission policies—acknowledged that "[d]espite our early recognition of the broad sweep of the Equal Protection Clause, this Court . . . quickly failed to live up to the Clause's core commitments."[153] The majority explained how "equality" did not occur with *Plessy*'s "separate but equal" standard and even admonished the Court for playing "its own role in that ignoble history . . . that would come to deface much of America."[154] So even in recent cases that hamper the Fourteenth Amendment's ability to keep the promises it made, there still appears to be a consensus on the Court about the intention of the Equal Protection Clause.

This perspective is incredibly consistent and wide-reaching. Scholars have long held the same view and are deeply troubled by these recent decisions. While the Fourteenth Amendment intended to "build a more just and inclusive United States," the majority in *SFFA* uses "the Equal Protection Clause [to] exalt[] prohibiting racial classifications over providing equal protection to Black people and other historically marginalized groups."[155] As one scholar put it, rather than remedying historical wrongs, "[t]he majority's course primarily helps certain demographic groups the

148. *See generally* Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1616 (2015) (discussing how after the Fourteenth Amendment was passed, a group-based exclusionary nature of the law emerged and solidified the existence of social identities such as race, gender, and class).

149. *E.g.*, Brian T. Fitzpatrick & Theodore M. Shaw, *Interpretation & Debate: The Equal Protection Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702 (last visited July 22, 2025) ("Ratified as it was after the Civil War in 1868, there is little doubt what the Equal Protection Clause was intended to do: stop states from discriminating against [B]lacks.").

150. Students for Fair Admissions, Inc. v. President of Harv. Coll., 600 U.S. 181, 201, 231, 278–79, 283, 311, 323 (2023).

151. *See* Dred Scott v. Sandford, 60 U.S. 393, 406 (1857).

152. *Students for Fair Admissions*, 600 U.S. at 201 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 431 (1866) (statement of Rep. Bingham)).

153. *Id.* at 202–03.

154. *Id.* at 203.

155. Joel K. Goldstein, *The Supreme Court's Assault on History in* SFFA, 54 SETON HALL L. REV. 1353, 1355 (2024); *see also* Evan D. Bernick, *Equal Protection Against Policing*, 25 J. CONST. L. 1154, 1185–86 (2023).

law has long privileged and cements the benefits of those past preferences into the architecture of the present and future."[156] While it is commonly invoked in discussions on racial discrimination, the Equal Protection Clause directs that all persons "similarly situated" should be treated alike.[157] Of note, some scholars have noted disagreements as to the Clause's "original understanding"[158] and whether it guarantees both nondiscriminatory laws and nondiscriminatory law enforcement.[159] Additionally, many people have also debated whether the Court should expand its Fourteenth Amendment scope of protections to include other socialized identities such as religion.[160] Nevertheless, our understanding of the Clause's central premise has nonetheless remained the same to avoid discriminating against others and creating caste systems. As others have observed, if you "[a]sk anyone whether the Constitution permits discrimination . . . the response will undoubtedly be no."[161] Accordingly, we understand the Equal Protection Clause to "proscribe discrimination and authorize remedies to address discrimination-related inequality."[162]

Importantly, "[t]he Fourteenth Amendment's equal protection doctrine is the principal model for the U.S. anti-discrimination or legal equity framework."[163] This is why scholars worry that the recent evolution of Equal Protection Clause jurisprudence "undermines basic constitutional ideals, particularly the Fourteenth Amendment's project to build a more just and inclusive United States."[164] More specifically, authors have discussed the Court's recent "unwillingness to recognize" decades of equal protection precedent.[165] The Court's unwillingness "has systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress's capacity to protect groups through civil rights legislation."[166]

Despite these realities, courts continue to discuss the importance of the Equal Protection Clause, pretending it still has teeth and that the Court

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156. Goldstein, *supra* note 155, at 1355.

157. George B. Daniels & Rachel Pereira, *Equal Protection as a Vehicle for Equal Access and Opportunity: Constance Baker Motley and the Fourteenth Amendment in Education Cases*, 117 COLUM. L. REV. 1779, 1794, 1797 (2017) (providing examples for how courts analyze "similarly situated").

158. Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY. L.J. 69, 88 (2000) (noting the scope of the Equal Protection Clause is a matter of ongoing debate).

159. *See, e.g.*, Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L. J. 1, 3 (2021).

160. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause*, 65 FLA. L. REV. 909, 986 (2013).

161. *Id.* at 911 (discussing religious discrimination).

162. Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, U. CHI. LEGAL F. 95, 95 (2014).

163. Wilfred U. Codrington III, *The Benefits of Equity in the Constitutional Quest for Equality*, 43 HARBINGER 105, 106 (2019).

164. Goldstein, *supra* note 155, at 1355.

165. Reva B. Siegel, Serena Mayeri, & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 69 (2022).

166. Yoshino, *supra* note 147, at 748.

itself didn't pry them out. But as the next two Sections demonstrate, while courts have provided a framework to guide plaintiffs who want to bring equal protection cases, these plaintiffs face long odds indeed.

C. Equal Protection Claims Generally

Equal protection cases are brought to seek redress for unfair treatment based on a socialized identity such as race, national origin, gender, or socioeconomic status.[167] Generally, to show an equal protection violation, a claimant needs to either show a law is selectively or unevenly discriminates against a group of people.[168] Selective or uneven enforcement includes both when a law or policy is facially discriminatory and when discrimination and disparate treatment occur in accordance with facially neutral laws or policies.[169]

This means that the alleged discrimination can be based on an explicit discriminatory intent or purpose, or it can be based on a stark pattern of disparate impact.[170] The former requires a law or policy to explicitly discriminate against an individual based on a suspect classification[171]—i.e., race or national origin.[172] In contrast, discriminatory impact means that the policy or law is facially neutral but enforced in a way that disproportionately impacts members of a suspect class, indicating an implicit discriminatory intent or purpose.[173]

1. Express Discriminatory Intent or Purpose

Proving discriminatory intent or purpose requires direct evidence of a discriminatory motive, such as a state anti-miscegenation law criminalizing and voiding all marriages between a white person and a Black person.[174] In this example, the explicit mention of race is the direct proof that demonstrates a discriminatory motive.[175]

To be clear, discriminatory intent does not have to be written into the law. It can include the law or policy's historical background, the specific sequence of events that led its adoption, and statements the decision-makers made about it.[176] Express classifications are the clearest form of direct evidence, but surrounding circumstances can also evidence intent. Courts may find explicit discriminatory intent when the law or policy was adopted "'because of,' not merely 'in spite of,' its adverse effects upon an

167. *See, e.g.*, Fitzpatrick & Shaw, *supra* note 149 ("[T]here is little doubt what the Equal Protection Clause was intended to do: stop states from discriminating against [B]lacks.").
168. *Id.*
169. *Id.*
170. *See* discussion *infra* Sections I.C.1, I.C.2.
171. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").
172. *See* discussion *infra* Section I.C.1.
173. *See* discussion *infra* Section I.C.2.
174. Loving v. Virginia, 388 U.S. 1, 3 (1967).
175. *Id.* at 7–9 (discussing the statute as being "obviously an endorsement of the doctrine of White Supremacy.").
176. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

identifiable group."[177] This does not mean discrimination occurs *only* when the intentional use of an identity harms a group or individual defined by a characteristic.[178] Any intentional use of a suspect classification, whether for malicious or benign motives, is evidence of discriminatory intent.[179] The record need not contain evidence of "bad faith, ill will or any evil motive on the part of public officials" for a law or policy to violate the Equal Protection Clause.[180]

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[181] the Court discussed whether denying a zoning request necessary to create low-income housing violated the Equal Protection Clause.[182] In practice, this barred many families belonging to particular socio-economic and racial backgrounds from being able to live in Village's neighborhood.[183] In its analysis, the Court discussed whether the action intentionally discriminated against a certain race.[184] The Court looked at the ordinance's historical background, statements made by officials, and any disproportionate impact it had on a specific race.[185] Ultimately, the Court did not find any evidence of intentional discrimination, and the plaintiffs failed to connect how the potential for racially disproportionate impact evidenced deliberate intention.[186]

2. Patterns of Discriminatory Impact

Today, successful equal protection claims generally do not involve an express discriminatory intent or purpose but rather are based on the disparate impact of the law. Because even the most bigoted policymakers are circumspect enough to avoid making overtly discriminatory statements, demonstrating discrimination is now more complicated than just pointing to the language of a law or a quote from a decision-maker. Rather, to demonstrate the same level of intent or purpose through discriminatory impact, a plaintiff now needs to show (1) that a government official treated the plaintiff differently from similarly situated persons; and (2) that the government unequally applied laws for the purpose of discriminating against a social identity the plaintiff belongs to.[187]

Demonstrating these impacts often involves using circumstantial evidence that, taken together, demonstrates a discriminatory purpose.[188] Circumstantial evidence can include "suspicious timing or inappropriate

177. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 258, 279 (1979).
178. *See id.* at 278–79.
179. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995).
180. Williams v. City of Dothan, 745 F.2d 1406, 1414 (11th Cir. 1984).
181. 429 U.S. 252 (1977).
182. *Id.* at 254–55.
183. *Id.* at 259–60.
184. *Id.* at 265.
185. *Id.* at 266–68.
186. *Id.* at 270–71.
187. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–66 (1977).
188. *Id.* at 266.

remarks, or comparative evidence of systematically more favorable treatment toward similarly situated [individuals] not sharing that protected characteristic."[189] For instance, in an employment context, a 100% sex-segregated workforce is suspicious and often alone sufficient to demonstrate discrimination.[190] Challenges to an expressly neutral practice that has an outsized effect on a larger class could prove a discriminatory purpose by providing circumstantial evidence to show discriminatory practices.[191] In every instance, the plaintiff must establish a robust causal connection between the specific challenged practice or policy and the demonstrated disparate impact.[192]

Plaintiffs seeking to demonstrate disparate impacts may also show that a statistically observable disparate impact exists and that a specific policy or practice caused that impact.[193] This is typically done through comparative statistical analysis of publicly available information or general population statistics to determine whether "[the practice] bears more heavily on one [group] than another."[194] For example, plaintiffs can use statistics to show that an ostensibly race-neutral action actually causes a pattern of discrimination, a racially disproportionate impact, or foreseeably discriminatory results.[195] While statistics are not required to demonstrate intentional discrimination, plaintiffs who use them are more likely to succeed on their claims.[196] At least theoretically, courts have claimed that demonstrating a consistent or stark pattern of disparate impacts on minoritized groups may raise an inference of discriminatory intent.[197]

If the plaintiff is unable to offer statistical evidence, they must allege sufficient factual details of discrete episodes to raise a plausible inference that the policy has a discriminatory impact on a minoritized group.[198] But showing disparate impact by itself will rarely support a showing of discriminatory intent.[199] Courts frequently reiterate that absent a stark pattern "impact alone is not determinative" and require plaintiffs to submit some other kind of evidence.[200] Unfortunately, this has also bled into courts'

189. Loyd v. Phillips Bros. Inc., 25 F.3d 518, 522 (7th Cir. 1994); *accord* Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994).

190. Babrocky v. Jewel Food Co., 773 F.2d 857, 867 (7th Cir. 1985); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 342 (1977).

191. *Arlington Heights*, 429 U.S. at 265 (discussing how disproportional impact is not solely conclusory but is evidence of discrimination).

192. *See id.*

193. *Id.* at 266 n.13 (discussing how even in instances without large statistical anomalies the Court has still been able to find discrimination).

194. Washington v. Davis, 426 U.S. 229, 242 (1976).

195. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979) (discussing courts analyzing discrimination in part by its foreseeable and anticipated disparate impacts); *see also* United States v. Brown, 561 F.3d 420, 433 (5th Cir. 2009) (noting that this foreseeability can also evidence discriminatory intent).

196. *E.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

197. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977); McMillan v. Escambia Cnty., 748 F.2d 1037, 1047 (5th Cir. 1984); *Brown*, 561 F.3d at 433.

198. Medeiros v. Wal-Mart, Inc., 434 F. Supp. 3d 395, 416 (W.D. Va. 2020).

199. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977).

200. Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 552 (9th Cir. 1982).

analyses of statistical data. Some courts believe "[i]t would be improper to posit a quantitative threshold above which statistical evidence of disparate racial impact is sufficient as a matter of law to infer discriminatory intent, and below which it is insufficient as a matter of law."[201] This means that no matter how devastating or reliable the statistics appear, litigants must also prove that some "invidious discriminatory purpose" is causing the disparate outcome.[202] So for instance, if a law firm has 90% white, male attorneys, that statistic by itself is not enough to satisfy an equal protection claim, other evidence must also be provided.

Courts will also inquire into whether the discriminatory impact of the challenged action was foreseeable.[203] Foreseeable actions that have "anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."[204] In turn, Courts use these foreseeable effects "as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn."[205] But still, "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence . . . is one factor among many others which may be considered.'"[206]

The National Collegiate Athletic Association (NCAA) was involved in a case that demonstrates how foreseeability of discrimination plays into equal protection claims.[207] A facially neutral NCAA rule raised the minimum academic requirements for incoming college athletes to qualify for athletic scholarships and compete in college sports.[208] Although the rule applied to all incoming college athletes, it had a statistically greater adverse impact on Black athletes.[209] In addition to that data, the plaintiffs provided evidence that the NCAA was aware that the impact of the proposed rule would likely reduce the number of Black athletes qualifying for athletic scholarships, but it still adopted the rule to promote higher academic standards among Black athletes.[210] In other words, the NCAA foresaw the rule's impact on Black athletes and affirmatively considered that impact when deciding to adopt the rule anyway.[211] Because of that, the court found it plausible that the NCAA had purposefully discriminated against Black athletes in violation of the Equal Protection Clause.[212]

Plaintiffs can use circumstantial and statistical evidence to establish widespread, systemic discrimination. In some cases, litigants have proved intentional discrimination through circumstantial evidence showing a

201. *Id.* at 551.
202. *Arlington Heights*, 429 U.S. at 266.
203. *E.g.*, Dowdell v. City of Apopka, 698 F.2d 1181, 1186 (11th Cir. 1983).
204. *Id.*; Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979).
205. *Penick*, 443 U.S. at 465.
206. *Id.*
207. Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 552 (3d Cir. 2002).
208. *Id.* at 555.
209. *Id.* at 556.
210. *Id.* at 564.
211. *Id.*
212. *Id.* at 570.

statistical disparity that affects a large number of individuals.[213] In *International Brotherhood of Teamsters v. United States*,[214] the Court held a company was unable to adequately rebut evidence "showing pervasive statistical disparities in line-driver positions between employment of the minorit[ized] members and whites."[215] A "pattern or practice" of discrimination can be used to demonstrate a systemic violation.[216] As some courts have noted, "[s]tatistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination."[217]

So, in theory, a viable framework for proving equal protection violations exists. Courts even regularly claim that the government has a heavy burden to overcome the assumption of discrimination when a plaintiff adduces evidence showing a pattern of discriminatory impact.[218] In practice, however, courts allow the government to hide behind scrutiny arguments[219] for otherwise clear discrimination and then conclude that clear discrimination is a nonissue.[220]

D. Uphill Battle for Equal Protection Claims

Despite the Fourteenth Amendment's promises,[221] widely understood purpose,[222] and case law creating a framework to allow equal protection claims,[223] these cases are incredibly, and suspiciously, difficult for plaintiffs to win. Even though courts themselves reiterate what attorneys, scholars, and the general public has said that the Equal Protection Clause is meant to put everyone on the same footing, and despite litigants regularly presenting statistical evidence that proves a group of people is being disparately impacted, courts still avoid finding inequality where it clearly exists.

This often is a result of courts' use of varying levels of constitutional scrutiny to skirt around providing equal protection.[224] In instances of discrimination based on race or national origin, the government must satisfy

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213. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 338 (1977).
214. 431 U.S. 324 (1977).
215. *Id.* at 325.
216. *Id.* at 361. *See generally* Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633, 681, 684 (2017) (discussing how algorithms can be used to show systemic discrimination including in areas that do not have existing datasets because "if discrimination is already systemic, new data will retain the discriminatory impact").
217. *Int'l Bhd. of Teamsters*, 431 U.S. at 339 n.20. This is especially true in an employment context. *See, e.g.*, United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971).
218. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979).
219. For example, governments will shrug their shoulders even when there is a pattern of discrimination because there is a rational basis for what they are doing. *See* discussion on cash bail *infra* Part II.
220. *See* discussion *infra* Part II.
221. *See* discussion *supra* Section I.A.
222. *See* discussion *supra* Section I.B.
223. *See* discussion *supra* Section I.C.
224. *See generally* Siegel, *supra* note 22, at 91–94; Stefanucci, *supra* note 22, at 1235–36; Yang & Dobbie, *supra* note 22, at 297.

strict scrutiny, meaning the law or policy must be justified by a compelling government interest and narrowly tailored to further that interest.[225] This is a heavy burden for the government to overcome,[226] but courts will often avoid a strict scrutiny analysis if the law or policy does not explicitly mention race or national origin.[227] Unless a plaintiff is able to provide evidence of expressive conduct such as a facially discriminatory law or a legislature's explicitly discriminatory comments, courts are reluctant to use strict scrutiny to analyze equal protection claims.[228] Essentially, courts are throwing their hands up in the air and surmising that it is just a coincidence that certain groups are being disparately impacted. More than one court has noted that "impact alone is not determinative."[229] Intuitively, that principle is illogical considering the purpose of the Equal Protection Clause.[230] The purpose of the Clause was to ensure that there was no legal caste system, so impact alone should be determinative. Nevertheless, because courts tend to avoid applying strict scrutiny, litigants must instead face a losing battle with rational basis review, which only requires the government to show some rational connection between its actions and a legitimate interest.[231] As one author noted, it is extraordinarily rare for governments to lose a rational basis argument.[232]

In practice, this means that any facially neutral state action can evade equal protection guarantees, "perpetuat[ing] the United States' legacy of segregation and racial inequality."[233] Confusingly, the U.S. Supreme Court has even acknowledged that "many [laws] affect certain groups unevenly,"[234] but it also claims that the "Fourteenth Amendment guarantees equal laws, not equal results."[235] It thus appears that the Court acknowledges the existence of racist laws and structures, yet it will not take action to address inequality unless a challenged law explicitly mentions a protected class, which today rarely if ever occurs.

This contradiction within the current framework makes it difficult for plaintiffs to succeed in any type of equal protection case. For instance, in

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225. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967). *But see generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (avoiding a discussion on scrutiny).

226. *See Loving*, 388 U.S. at 11.

227. *See generally* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 743–46 (2007) (indicating that even when there is not explicit mention of particular races, strict scrutiny is still applied if the law or policy has an underlying explicit impact on race).

228. *See* discussion *infra* Part II.

229. James v. Valtierra, 402 U.S. 137, 141–43 (1971); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 259, 266 (1977). However, the Court in *Arlington Heights* did note that patterns of discriminations found in cases like *Yick Wo v. Hopkins* could satisfy the burden.

230. Meaning impact alone should be determinative of a systemic discrimination involved, especially when it considers race.

231. *See generally* Joseph S. Diedrich, *Separation, Supremacy, and the Unconstitutional Rational Basis Test*, 66 VILL. L. REV. 249 (2021) (arguing that the rational basis test violates the structural separation of powers and the Supremacy Clause).

232. *Id.* at 255.

233. Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 518 (2019).

234. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–72 (1979).

235. *Id.* at 273.

McCleskey v. Kemp,[236] McCleskey used a statistical study to argue that his death sentence violated the Fourteenth Amendment.[237] Specifically, the study showed that the likelihood of the imposition of the death penalty in Georgia (where McCleskey was sentenced) depended to a significant extent on the race of the victim and the accused, finding that Black defendants convicted of killing white victims—as occurred in McCleskey's case—were most likely to receive death sentences.[238] Still, the Court refused to accept the statistical study as evidence of a pattern of discriminatory impact and held that McCleskey could not prove that the study demonstrated purposeful discrimination specifically directed at him.[239] The Court essentially admitted that some people have an easier time in courts than others and that just happens—sort of like a caste system.

But McCleskey's case was not an isolated incident—this story repeats across equal protection jurisprudence. Despite studies consistently demonstrating their discriminatory impact, stop and frisk policies have not been held to violate equal protection.[240] While scholarship has regularly demonstrated that Black people face discriminatory policing while driving, courts have failed to acknowledge this as evidence of discrimination.[241] Even in the recent *SFFA* case, the majority opinion discussed the existing equal protection framework and the Fourteenth Amendment's purpose accurately but failed to apply it in a way that gave the Equal Protection Clause its full meaning.[242] Instead, their line of reasoning to accurately describe the Clause's purpose, but refuse to apply statistics that would give its full meaning, "rests on the presumption that facially neutral evaluative tools produce racially neutral results"—a presumption thoroughly divorced from research and reality.[243]

Research has demonstrated that "colorblind" approaches result in exactly what the Equal Protection Clause is meant to prevent. As one scholar noted, empirical evidence from domains spanning employment, law

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236. 481 U.S. 279 (1987).

237. *Id.* at 286–87.

238. *Id.* at 286 (noting the study found "that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims.").

239. *Id.* at 296–97 (discussing how the study is insufficient because other cases using empirical data allowed the decisionmaker an opportunity to explain the statistical disparity).

240. Brando Simeo Starkey, *A Failure of the Fourth Amendment & Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131, 139–45 (2012). At best, efforts to find these policies unconstitutional are piecemeal. For instance, while Floyd v City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) held for the plaintiffs and included their studies on officer's racial bias, even this district court case was appealed multiple times, creating a complicated procedural history, and undermining any persuasive precedent it could have in other cases.

241. *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 645–57 (2021) (collecting relevant cases to demonstrate no clear way forward for plaintiffs to bring their claims).

242. *See generally* Students for Fair Admissions, Inc. v. President of Harv. Coll., 600 U.S. 181 (2023).

243. Feingold, *supra* note 233, at 528–29.

enforcement, and education suggest that "facially neutral evaluative tools—such as human judgment, standardized tests, and predictive algorithms—can systematically mismeasure" and negatively stereotype minoritized groups.[244] Laws are only as good as their enforcement mechanisms. That is, laws as written are frequently imperfect in ways that allow them to inherit prejudices of decision makers seeking to enforce certain policies, which is left unchecked.[245]

The current framework for proving equal protection violations leaves litigants who have legitimate equity concerns with no opportunity for redress, contradicting the purpose of the Equal Protection Clause. If the Clause's intention is to make sure that everyone has the same footing, access, and opportunity, litigants must have a meaningful avenue to make their case and get relief.

There is no shortage of data on where laws and policies have fallen short, including in terms of protecting the essential freedoms Americans hold dear and possess naturally, regardless of the government.[246] But as the next Part demonstrates, even when decades of research and data support an equal protection claim based on discriminatory impacts to these freedoms, courts are still hesitant to find an equal protection violation.

II. PROTEST POLICING AND CASH BAIL

Because of recent precedent, equal protection claims present an unlikely path to success, even when the plaintiff can demonstrate discrimination impacting important issues such as protest and pretrial detention. These two topics have significant human and civil rights implications and thus merit close examination under the Equal Protection Clause.[247] Globally, both international law and individual countries recognize underlying inalienable rights as it relates to protesting and cash bail: freedom of speech and assembly, presumption of innocence, and upholding those rights "without interference."[248] This international consensus that these rights are held "supremely precious"[249] should mean that curtailing these rights should receive a close analysis to not gut their meaning.

People also face a heightened risk of discrimination in these two areas. Protest restrictions and bail determinations both rely on decision-makers who have significant enforcement discretion and can thus insert their

244. *Id.* at 516 (emphasis omitted).

245. *See generally* Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 673–74 (2016).

246. Which is also a recognized human right. *See* 999 U.N.T.S. 171.

247. People ex rel. Desgranges v. Anderson, 72 N.Y.S.3d 328, 331 (2018) ("Protection against discrimination is never more important than when a person's freedom is at stake."); Karen J. Pita Loor, *An Argument Against Unbounded Arrest Power: The Expressive Fourth Amendment and Protesting While Black*, 120 MICH. L. REV. 1581, 1582 (2022) ("Protesting is supposed to be revered in our democracy . . . .").

248. 999 U.N.T.S. 171.

249. NAACP v. Button, 371 U.S. 415, 433 (1963).

own prejudices into the process, resulting in disparate treatment.[250] Further, protests are typically directed against, and therefore disfavored by, the very government whose functionaries are tasked with using that enforcement discretion.[251] While cases challenging both protest policing and cash bail on equal protection grounds have been popping up, courts have largely rejected these claims because the laws and policies they challenge are facially neutral.[252] For protests, although studies consistently support plaintiff's claims of discriminatory policing resulting in larger police presence and arrests at demonstrations involving people of color, courts have largely avoided holding an equal protection violation because there is no explicitly stated discriminatory purpose.[253] Similarly, for cash bail, decades of data has demonstrated that people of color are disparately impacted by these systems, but courts have avoiding finding an equal protection violation because there is no explicitly stated, racially discriminatory purpose.

A. Survey of Equal Protection Cases Involving Protest Rights

Protesting is treated as a bedrock civil right, combining explicitly stated freedoms of speech, assembly, and petition.[254] Of particular note, courts claim to be protective of this right in the face of violations or unlawful restrictions, calling it "delicate and vulnerable, as well as supremely precious in our society."[255] In the event of restrictions, courts consistently conclude that governments may only regulate with narrow specificity found in strict scrutiny.[256] This would include any time, place, and manner restrictions are narrowly tailored to fit a government interest. Additionally, this narrowness includes ensuring that neutral laws and policies are enforced neutrally as well, in order to avoid tiered protest rights based on race. For instance, authorities must enforce neutral policies restricting time, place, and manner restrictions evenly, without curtailing the rights of a specific race.

In the event of disparate policing that impacts protest rights, courts have historically used the Equal Protection Clause.[257] The Equal Protection Clause requires that government policies for policing protests and demonstrations be equal. This means that plaintiffs claiming an equal protection violation must demonstrate that they were treated differently from similarly situated protesters. Such a claim would fail if the plaintiff cannot show that they are like those receiving preferred treatment in all relevant aspects except for their socialized identity.

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250. *See* discussion *infra* Sections II.A & II.B.

251. Often referred to as "public protest." *E.g.*, Timothy Zick, *Public Protest and Governmental Immunities*, 97 S. CAL. L. REV. 1583, 1590 (2024).

252. *See* discussion *infra* Sections II.A & II.B.

253. Zick, *supra* note 251, at 1593–97.

254. U.S. CONST. amend. I.

255. NAACP v. Button, 371 U.S. 415, 433 (1963).

256. Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940).

257. Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92, 94–95 (1972).

Discrimination in protest policing is established when a policy related to stopping protests is either (1) facially discriminatory or (2) facially neutral with both a discriminatory purpose and a discriminatory effect.[258] Throughout U.S. history, protest policing has fallen under both categories. For example, in *Police Department of Chicago v. Mosley*,[259] the Court held that an ordinance prohibiting all nonlabor picketing during school hours violated the Equal Protection Clause.[260] In that case, Mosley had been picketing near a public school protesting "Jones High School practic[ing] [B]lack discrimination" by having "a [B]lack quota."[261] The Court said the ordinance was facially discriminatory against particular speech, violating the Equal Protection Clause.[262]

Nowadays, protest-related policies are even more carefully written than the statute in *Mosley* to avoid being explicitly discriminatory, so recent cases often fall under the second category. The Supreme Court has recognized that selective enforcement of content-neutral laws may violate constitutional rights.[263] But courts now try to cabin the claims and treat interconnected issues separately to avoid finding discrimination. In *Wayte v. United States*,[264] for instance, when the plaintiffs challenged an enforcement policy on both First Amendment and equal protection grounds, the Court addressed the claims separately.[265] In protest, Wayte had written letters to various government officials stating that he did not register for Selective Service and did not intend to follow the proclamation requiring him to do so.[266] His letter was kept in a file of men who did similarly, but was indicted for a crime only after the Selective Service later adopted a policy to prosecute men who had reported they were not registering.[267] Wayte argued that this passive enforcement violated his First Amendment right and equal protection guarantees.[268] In its opinion, the Court first addressed the equal protection claim concluding that men who were reported by others for not registering but were not outspoken about it were treated similarly.[269] In turn, the Court found basis for the First Amendment restriction because it was during wartime and the government's proclamation passed strict scrutiny accordingly.[270]

Still, at least theoretically, these cases should be rather straightforward because the "guarantee of equal protection includes a prohibition on 'selective enforcement of the law' based on impermissible considerations

258. *See supra* Section I.C.
259. 408 U.S. 92 (1972).
260. *Id.* at 98–99.
261. *Id.* at 93.
262. *Id.* at 98; *see also* Carey v. Brown, 447 U.S. 455, 462–63 (1980).
263. Wayte v. United States, 470 U.S. 598, 610 (1985).
264. 470 U.S. 598 (1985).
265. *Id.* at 610.
266. *Id.* at 601.
267. *Id.* at 601–02.
268. *Id.* at 604.
269. *Id.* at 609–10.
270. Wayte v. United States, 470 U.S. 598, 611–14 (1985).

'such as race.'"[271] To succeed under a selective enforcement claim, plaintiffs have to satisfy what courts have described as "ordinary equal protection standards."[272] And as with the challenges to bail provisions discussed below, plaintiffs in protesting contexts are required to demonstrate purposeful discrimination in addition to discriminatory impact.[273] Protesters must "plausibly plead" that the enforcement of protest laws against them was rooted in animus against them or their viewpoint.[274]

But this does not make it clear where disparate protest policing falls, especially as it relates to policing Black protesters. As scholars have noted, "there is a long-standing history of police violence against protesters, particularly against Black Americans."[275] Much of the discriminatory policing of Black protesters is in response to the subject of the protest but explicitly avoids referencing the content of the protest demands. Police often cite other reasons unrelated to the message of the protesters' speech—especially public safety reasons—to justify stopping a protest.[276] For example, officers might assert that the protesters were about to incite a riot or were being dangerous.[277] These are subjective, vague determinations as to who is scary and who is not.[278] Data and reports consistently demonstrate that police view protesters of color as "dangerous" at a significantly higher rate than white protester.[279] As one author noted "[b]ecause police repress on the basis of their understanding of threat, it means that left-wing protesters, racialized protesters, protesters who are seen as ideological or irrational, are more likely to be arrested and have militarized tactics used against them.[280] So even if a protest regulation's text is content-neutral, that does not mean police always enforce that regulation in an unbiased way.[281]

There is a wealth of statistical data demonstrating how protest policing actually pans out. Research has consistently[282] "found that police show[] up more often and with more escalated presence" when most protesters are Black or when the protest is about issues primarily affecting

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271. Frederick Douglass Found., Inc. v. Dist. of Columbia, 82 F.4th 1122, 1147 (D.C. Cir. 2023) (quoting Whren v. United States, 517 U.S. 806, 813 (1996)).

272. United States v. Armstrong, 517 U.S. 456, 465 (1996) (citation omitted).

273. *Id.*

274. *See* SANDHYA KAJEEPETA & DANIEL K.N. JOHNSON, THURGOOD MARSHALL INST., POLICE AND PROTESTS: THE INEQUITY OF POLICE RESPONSES TO RACIAL JUSTICE DEMONSTRATIONS 3 (Nov. 2023).

275. *Id.*

276. *See* Lesley Wood, *Policing Counter-Protest*, 14 SOCIO. COMPASS, Nov. 2020, at 1, 2.

277. *Id.* at 4.

278. *Id.*

279. *Id.* at 2, 6.

280. Richard Allen Greene, *Police Respond Differently When It's a Left-Wing Protest, Study Finds*, CNN (Jan. 16, 2021), https://www.cnn.com/2021/01/15/us/protest-disparity-study-trnd/index.html (discussing Lesley Wood's research).

281. Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2415–16 (2003).

282. *E.g.*, Karl S. Coplan, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. 144 (1984).

Black people.[283] More specifically, once police show up at a protest, they are more likely to make arrests, use projectiles, and use chemical weapons if the protesters are Black or if the protest is about issues that largely impact Black people.[284] These race-based differences in police presence and tactics persist even after controlling for differences in protester behaviors, crowd size, time of day, and police department use-of-force policies.[285]

Every year, this pattern remains the same.[286] Protesters of color are disproportionately censored and policed.[287] Intuitively, this should mean that protesters are not treated equally, so protest rights are not equal. All individuals arguably have an equal *opportunity* to engage in protest expression, but it is disingenuous to conclude that everyone experiences the same access to rights when research demonstrates otherwise.[288] Protesters face an unequal set of risks—especially the risk of arrest—based on their race. But although a large body of scholarship notes that "Black individuals enjoy[] an unequal (in)ability to express and practice dissent,"[289] change in the courts has only crawled along.

Courts have at least hinted that they recognize in practice not everyone has equal protest rights because of disparate policing. Relatively recently, plaintiffs have brought protest-related equal protection challenges involving government attempts to suppress Black Lives Matter messages,[290] ranging from criminalizing otherwise lawful conduct to using overly heavy-handed measures to break up the protest and deter future protests.[291] Specifically, these tactics not only include a disproportionate use of chemical irritants on protesters of color,[292] but also proposing bills to restrict the use of sidewalks in response to protests.[293] While the data supports the conclusion that police discriminate against protesters based on race, most courts avoid making that finding likely because there is not

283. KAJEEPETA & JOHNSON, *supra* note 274; *see also* Christian Davenport, Sarah A. Soule, & David A. Armstrong II, *Protesting While Black?: The Differential Policing of American Activisms, 1960 to 1990*, 76 AM. SOCIO. REV. 152, 153, 163, 166 (2011); Karen J. Pita Loor, *An Argument Against Unbounded Arrest Power: The Expressive Fourth Amendment and Protesting While Black*, 120 MICH. L. REV. 1581, 1605–06 (2022).

284. Davenport et al., *supra* note 283, at 166–67; Loor, *supra* note 283, at 1606–07.

285. Among many other factors. KAJEEPETA & JOHNSON, *supra* note 274, at 6.

286. *See* Brian L. Owsley, *Protesting While Black*, 15 ALA. C.R. & C.L. L. REV. 1, 1–18 (2024) (discussing civil rights violations as they relate to Black protesters).

287. *See* Joel Simon & Katy Glenn Bass, *First Step in Police Reform: Protect the First Amendment*, KNIGHT FIRST AMEND. INST. (June 27, 2023), https://knightcolumbia.org/blog/first-step-in-police-reform-protect-the-first-amendment.

288. *See e.g.*, Loor, *supra* note 283, at 1605–07.

289. *Id.* at 1613.

290. A lot of modern protest cases focus on 2020 protest movements with Black Lives Matter at the forefront of the litigation.

291. Jennifer M. Kinsley, *Black Speech Matters*, 59 U. LOUISVILLE L. REV. 1, 3–4 (2020).

292. *See, e.g.*, Conor Morris, *Akron Police, Mayor Stand by Officers' Use of Chemical Irritants During Jayland Walker Protest*, IDEASTREAM PUB. MEDIA (April 22, 2023, 6:43 PM), https://www.ideastream.org/law-justice/2023-04-22/akron-police-mayor-stand-by-officersuse-of-chemical-irritants-during-jayland-walker-protest.

293. *See, e.g.*, H.B. 8005, 111th Gen. Assemb., 2d Extraordinary Sess. (Tenn. 2020).

an explicit discriminatory intent in the relevant protest restrictions.[294] This also includes direct evidence. For example, in *Epps v. City of Denver*,[295] the court largely did not appreciate evidence of biased policing—indicated through text messages, emails, and testimony—to conclude selective enforcement during protests in Colorado.[296] Throughout their case, the plaintiffs provided written evidence that would be a ban on protests regarding George Floyd's murder.[297] One such message indicated that a curfew "is only to be used in relation to protest activity" and that the individual must be engaged in "protest-related behavior."[298] At the summary judgment stage, the court simply held that whether there was an equal protection violation amounted to a "factual dispute" for the jury to decide.[299] While the jury ultimately found for the plaintiffs and awarded them $14 million, the court did not analyze any data to hold that the connection was even plausible. At the very least, the jury's finding supports a universal understanding as to what the Equal Protection Clause means and how discriminatory impact findings should be made.

Smith v. City of Philadelphia[300] also concerned excessive and unwarranted police presence and use of force during a peaceful protest.[301] The complaint argued this was a systematic use of force directed against a predominantly Black community in, violating the Equal Protection Clause.[302] This case, however, settled before any court could acknowledge or rule on the allegations of discrimination.[303] Notably, in other cases where the discrimination is also rather clear like *Smith v. City of New York*,[304] courts do not have the opportunity to consider the relevance of statistics because the case will almost certainly settle.[305] Smith, who is Black, was attacked by an officer during a protest.[306] The officer confronted Smith, forcibly removed his mask, and sprayed him in the face with pepper spray.[307] The officer did not, however, confront or forcibly remove the masks of white protesters near Smith.[308] That case, again, reached a settlement.[309]

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294. *But see* Joint Temporary Stipulated Order, Akron Bail Fund v. City of Akron, No. 5:23-cv-837 (N.D. Ohio April 21, 2023) (issuing an injunction, prohibiting the use of chemical agents on protesters, but not finding an explicit, discriminatory intent for doing so).

295. 588 F. Supp. 3d 1164 (D. Colo. 2022).

296. *Id.* at 1171–72, 1174.

297. *Id.* at 1172–74.

298. *Id.* at 1172.

299. *Id.* at 1174.

300. Complaint, No. 2:20-cv-03431 (E.D. Pa. July 14, 2020).

301. *Id.* at 2–4.

302. *Id.* at 36–38.

303. Consent Order at 1–2, Smith v. City of Philadelphia, No. 2:20-cv-03431 (E.D. Pa. Mar. 20, 2023).

304. Complaint at 2, 6–8, No. 1:21-cv-03096 (E.D.N.Y. June 1, 2021).

305. *Id.* at 10–15.

306. *Id.* at 2, 6–8.

307. *Id.*

308. *Id.* at 8.

309. *LDF, Co-Counsel Reach Settlement in Case of Black Protestor Pepper Sprayed by NYPD Officers*, LEGAL DEF. FUND, https://www.naacpldf.org/press-release/ldf-co-counsel-reach-settlement-in-case-of-black-protestor-pepper-sprayed-by-nypd-officers/.

This has led to many questions and uncertainty as to how these cases can proceed. There is much tension between individual rights, because an equal protection protesting case has to also bring in First Amendment balances.[310] However, as in *Mosley*, courts have traditionally not separated the First Amendment from equal protection analysis; yet, that seems to be the current trend now.[311] This changes the formula for what litigants need for upholding the Fourteenth Amendment's equal protection promises. While courts might acknowledge that individual Black protesters were policed strictly, they appear hesitant to conclude that the protesters were discriminated against based on their race, leaving the issues of racial discrimination and equal protection unlitigated and unresolved. This "hierarchical, discretionary, largely legally unaccountable form of governance" [312] impacts rights we cherish and are inalienably ours and leaves plaintiffs no meaningful opportunity for redress.

B. Survey of Equal Protection Cases Involving Bail

Cash bail is the most common form of pretrial release.[313] Cash bail is a collateral guarantee that a defendant pays a sum of money to be released pretrial which is eventually returned after they make all necessary court appearances. Bail is generally set when the court is concerned about the defendant's flight risk, and/or the risk the defendant poses to the public.[314] In practice, a higher bail amount means that the defendant poses a higher risk in one or both of these regards.[315]

But the "bail setting process can often be hard to comprehend."[316] Technically, judges have discretion to raise, lower, deny, or waive bail by evaluating risks, taking into account factors such as the severity of the crime, the defendant's connections to the jurisdiction, and the defendant's criminal history.[317] But these factors apply differently to each judge. Some jurisdictions use bail schedules that impose a standard bail amount correlating to particular offenses.[318] Some jurisdictions also use modern technology that incorporates relevant factors to determine an "appropriate"

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310. KAJEEPETA & JOHNSON, *supra* note 274, at 4–5.

311. Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92, 101–03 (1972) (Blackmun, J. &. Burger, J., concurring).

312. Bernick, *supra* note 155, at 1157.

313. Preston & Eisenberg, *supra* note 12 ("Commercial bail is the most common form of pretrial release, accounting for 49 percent of all felony pretrial releases and nearly 80 percent of releases with monetary conditions in 2009, the last time these data were collected at the federal level.").

314. SANDRA SUSAN SMITH, ARNOLD VENTURES, PRETRIAL DETENTION, PRETRIAL RELEASE, & PUBLIC SAFETY 4 (2022).

315. *Id.* at 4–5.

316. *How Judges Calculate and Set Bail*, ALL CITY BAIL BONDS, https://www.allcitybailbonds.com/2017/12/judges-calculate-set-bail/.

317. Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-only Bail on Indigent Defendants in America's Money Bail System*, 36 BUFF. PUB. INT. L.J. 29, 31 (2019).

318. *See, e.g.*, *Warren County Court and Municipal Courts of Warren County, Ohio: Uniform Bond Schedule*, WARREN CNTY. CT. (April 4, 2023), https://www.co.warren.oh.us/countycourt/forms/BondSchedule.pdf.

bail amount.[319] Some jurisdictions rely heavily on the recommendations of Bail Commissioners.

As a result, there is no uniform bail practice and release pretrial can vary simply by what judge a person is assigned. For instance, a 2017 study in New York demonstrated that not only did each county vary in its bail determinations, but each judge within respective counties also varies.[320] This includes decisions to both require cash bail, as well as how much that bail amount should be set at.[321] This held true even after controlling the factors involved.[322]

Unfortunately, research has consistently demonstrated how cash bail systems disparately impacts people of color and people from lower-income statuses.[323] Of the over 400,000 people currently detained in United States jails, 60% are detained pretrial.[324] Of that population, over half were in jail simply because they could not afford their bail amount.[325] As a U.S. Commission on Civil Rights report found, "Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants."[326] As a result, the jail populations are disproportionately Black and poor.[327]

As such, bail is not devoid of discriminatory practices. Bail, too, can only be classified as discriminatory if it is either (1) imposed pursuant to a facially discriminatory policy or (2) imposed in a facially neutral way but has both a discriminatory purpose and effect.[328] Theoretically, bail could satisfy both: bail is (1) facially discriminatory because it classifies people into groups based on socioeconomic status;[329] and (2) while facially neutral, bail routinely disproportionately impacts people of color, which could demonstrate a discriminatory purpose and effect.[330] But these observations fail to resolve the question of which level of scrutiny would apply

319. Ric Simmons, *Big Data, Machine Judges, and the Legitimacy of the Criminal Justice System*, 52 U.C. DAVIS L. REV. 1067, 1069–70 (2018) (discussing the increasing use of predictive algorithms to assist in bail hearings); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1364 (2014) (suggesting electronic monitoring as an alternative to pretrial detention and the bail system).

320. Anna Maria Barry-Jester, *You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend on Your Judge*, FIVETHIRTYEIGHT (June 19, 2018), https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-itmay-all-depend-on-your-judge/.

321. *Id.*

322. *Id.*

323. Preston & Eisenberg, *supra* note 12.

324. U.S. COMM'N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 2 (2022), https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf.

325. *Id.* at 32.

326. *Id.* at 33–34.

327. *Id.* at 123–25.

328. *See supra* Section I.C.

329. In other words, imposing a bail amount automatically creates a division between those who can pay the amount and those who cannot.

330. In other words, nothing in the law explicitly states race or poverty, but the impact is disproportionate for both demographics.

to an equal protection challenge against a bail policy. Strict scrutiny is the most demanding level but only applies to discrimination based on race or national origin.[331] Intermediate scrutiny only applies to classifications based on sex.[332] Rational basis review, the least demanding level of scrutiny, is a catch-all test for any classification that does not receive heightened scrutiny[333]—including poverty.[334]

So where does this leave challenges to bail policies? Statistics have long demonstrated the disparate use of more restrictive bail conditions on people of color, meaning they are more likely to be imposed a cash bail amount, at higher amounts, and be incarcerated pretrial because of their bail determinations.[335] But no bail policies explicitly mention race and many are explicitly race-neutral.[336] However, because bail policies inherently classify people based on socioeconomic status separating those who have access to financial resources from those who do not,[337] plaintiffs could argue that these policies are facially discriminatory[338]—but that argument would only result in rational basis review. Because the Court has not yet treated poverty under heightened scrutiny, scholars continue to note that making an equal protection claim based on wealth will almost certainly be judged under rational basis.[339] The government can easily pass that hurdle, regardless of how pervasively it discriminates against impoverished people,[340] by asserting that bail promotes public safety and ensures defendants show up to their hearings.[341] Plaintiffs admittedly have had some success challenging the imposition of bail in individual cases, but not because bail policies are discriminatory.[342] Rather, in each of those cases, the judge who imposed bail did not consider the defendant's indigency—which they are required to do—and that resulted in an equal protection violation.[343] Importantly, the courts did not find that the system itself is skewed to unfairly impact poor people, even though decades of

331. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 61 (1973).
332. Clark v. Jeter, 486 U.S. 456, 461 (1988).
333. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 44.
334. *Id.* at 25.
335. *E.g.*, Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html; Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.
336. *See* Sawyer, *supra* note 335.
337. Steven B. Dow, *An Illusory Choice for the Poor: The Rise of Heightened Judicial Scrutiny in Equal Protection Challenges to Money Bail*, 55 CRIM. L. BULL. ART. 1 (2019).
338. *Id.*
339. *Id.*
340. *Id.*
341. Shima Baradaran Baughman, *Taming Dangerousness*, 112 GEO. L.J. 215, 232 (2023).
342. *See* Booth v. Galveston Cnty., 352 F. Supp. 3d 718, 724 (S.D. Tex. 2019).
343. *See, e.g.*, *id.* at 747 (concluding the use of the bail schedule without analyzing the other factors violated constitutional rights).

research has concluded that that is true.[344] In each of those cases, the jurisdiction's bail system remained intact.[345]

But courts are also unlikely to apply strict scrutiny in race-based disparate impact bail cases because bail provisions do not explicitly mention race as a consideration for imposing bail. At best, that forces litigants to demonstrate that even though bail policies are facially neutral, they in actual practice result in a stark pattern of discrimination against people of color.[346] Research has regularly backed up that claim.[347] Several studies have found that people of color are more likely to receive higher bail amounts, and bail amounts they cannot pay, than white people charged with the same crimes.[348] This results in the overrepresentation of people of color in pretrial incarceration populations.[349]

Every year for the past few decades, the story has remained the same.[350] This fact alone should set off alarm bells that the bail system is inherently unequal. There is a clear, stark pattern of how the bail system disparately impacts people based on race.[351] While most pretrial detainees technically have an equal *opportunity* to post bail, that does not mean they all have equal access to the resources required to actually do so.[352] And because government officials[353] generally have discretion in setting bail amounts, pretrial detainees accused of the same crimes often do not receive the same bail amount.[354] It would be disingenuous to conclude that bail systems treat everyone fairly when data consistently demonstrate otherwise.

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344. *Compare id.*, *with* Rabuy & Kopf, *supra* note 335, *and* Sawyer, *supra* note 335 (demonstrating that courts often avoid analyzing the overwhelming weight of evidence of a broader problem. In this case, the court decided to close its eyes when research—such as publications by the Prison Policy Initiative—have reiterated consistent disparate impacts).

345. For example, in Williams v. Illinois, 399 U.S. 235, 240–41 (1970), the Court held that if a person cannot afford to pay a fine, it violates the Equal Protection Clause to convert that unpaid fine into jail time to extend a person's incarceration beyond a statutory maximum. This was not, however, an acknowledgement that the bail system is wrought with systematic inequalities. *See also* People ex rel. Desgranges v. Anderson, 72 N.Y.S.3d 328, 328 (N.Y. Sup. Ct. 2018) ("While imposing bail under appropriate circumstances clearly serves an important and perhaps even compelling governmental objective . . . the failure to consider a defendant's financial situation when imposing bail violates that defendant's right to equal protection."); Tate v. Short, 401 U.S. 395, 397–99 (1971) (holding that limiting punishment to payment of a fine for those who are able to pay it, but converting the fine to imprisonment for those who are unable to pay was a denial of equal protection); *see* Bearden v. Georgia, 461 U.S. 660, 667–70 (1983) (holding that a person can only be jailed for not paying a fine if it can be shown that they could have paid it but chose not to. People do not choose to be too poor to pay their bail amount).

346. *See supra* Sections I.C, I.D.

347. Rabuy & Kopf, *supra* note 335; Sawyer, *supra* note 335.

348. David Arnold, Will Dobbie, & Peter Hull, *Measuring Racial Discrimination in Bail Decisions*, 112 AM. ECON. REV. 2992, 2992, 2999 (2022).

349. *Id.* at 2993.

350. *See* Rabuy & Kopf, *supra* note 335; Sawyer, *supra* note 335.

351. Rabuy & Kopf, *supra* note 335; Sawyer, *supra* note 335.

352. Rabuy & Kopf, *supra* note 335; Sawyer, *supra* note 335.

353. The judge is supposed to make the final determination but is influenced by recommendations from other officials such as prosecutors and Bail Commissioners.

354. Barry-Jester, *supra* note 320.

This is not a novel observation.[355] Litigants have been bringing these inequities to courts' attention in cases challenging both decisions to deny bail and bail amounts imposed.[356] A report by the National Conference of State Legislatures indicated that at least twenty-three states throughout the country have held that there is a state constitutional right to bail, meaning that judges in those states cannot deny bail[357] except in "expressly stated and narrow exceptions."[358] But the "constitutional right to bail" does not solve all discriminatory decisions, that just means that judges are not supposed to deny bail, nothing prevents them from imposing impossibly high bail amounts. Such a situation happened in Colorado in 2022.[359] A decision by the Colorado Supreme Court in 2023 held that a judge could not deny bail, making more judges rely on monetary decisions to determine pretrial release.[360] At least in part because such a system makes pretrial release available based on a person's financial resources, a 2024 ballot initiative passed to allow judges to deny bail in very limited circumstances.[361] At the very least, Colorado's situation implies that we generally expect "a meaningful opportunity for release," but if release would endanger the public, determinations to incarcerate should not be made based on the defendant's wealth.

But in practice, release is not the default.[362] Even in states where courts have held that bail is a right in their state's constitution, discriminatory bail systems still incarcerate people too poor to post bail.[363] There is no functional difference between having your bail request denied and being too poor to pay your bail amount. In both situations, the bail determination aims to protect public safety and ensure the defendant attends their court dates, with purportedly only extreme situations—certain crimes that society views as particularly egregious—resulting in pretrial

355. Patrick J. Duffy, III, *The Bail System and Equal Protection*, 2 LOY. L.A. L. REV. 71, 71 (1969); Matthew Clair & Alix S. Winter, *How Judges Can Reduce Racial Disparities in the Criminal-Justice System*, 53 CT. REV. J. AM. JUDGES ASS'N 158, 158 (2017); Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 701 (2018).

356. *See, e.g.*, People v. Smith, 531 P.3d 1051, 1054 (Colo. 2023).

357. In some instances, this is an absolute prohibition against denying bail. *See, e.g.*, *id.* at 1055.

358. *Pretrial Release: State Constitutional Right to Bail*, NAT'L CONF. STATE LEGIS. (Feb. 14, 2025), https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-state-constitutional-right-to-bail; *Smith*, 531 P.3d at 1055, 1058.

359. *Smith*, 531 P.3d at 1053.

360. *Id.* at 1059.

361. Olivia Prentzel, *Amendment I Passes: Colorado Judges Can Deny Bail to People Charged with First-Degree Murder*, COLO. SUN (Nov. 5, 2024, 8:49 PM), https://coloradosun.com/2024/11/05/amendment-i-results-colorado-bail/.

362. Preston & Eisenberg, *supra* note 12.

363. *Compare Pretrial Release: State Constitutional Right to Bail*, *supra* note 358, *with* Preston & Eisenberg, *supra* note 12 (demonstrating that right-to-bail provisions have expanded preventative detentions because defendants are detained for their inability to meet conditions for their release. Those conditions largely come in the form of a cash sum that poorer defendants cannot pay).

incarceration.[364] Theoretically, the default for should be release.[365] But, for both situations where bail is denied or someone is too poor to pay their bail amount, those determinations are plagued with subjective decision-making that results in racially disparate pretrial incarceration rates.[366] If the bail system is truly equal for all, then statistics should show that people of color are more dangerous and less likely to show up to court than white people. But no court or attorney would explicitly state that conclusion, meaning that even with overwhelming data, plaintiffs are not likely to succeed to find bail systems violate the Equal Protection Clause. Many courts even automatically foreclose strict scrutiny analysis because there is no explicitly race-based classification in the policy.[367] At least one author argued that there is precedent supporting the idea that wealth-based processes—systems that treat you differently based on your access to financial resources—violate equal protection principles, but that precedent is haphazard and makeshift at best.[368] Others have noted that even efforts to argue that poverty-based classifications merit heightened scrutiny, courts have not applied heightened scrutiny uniformly, resulting in at most a circuit split.[369]

Despite courts not reaching consistent conclusions on equal protection, federal and state governments are on notice of the discriminatory impact of their existing bail systems and are choosing to maintain those systems anyway. The U.S. Commission on Civil Rights, a bipartisan, fact-finding federal agency, has released reports on the civil rights implications of the bail system.[370] These reports—which represent the official views of the agency[371]—present Commission findings that reach the same conclusions as decades of nongovernmental research: "[T]here were stark disparities with regards to race."[372] These reports also conclude that people of color are not only imposed cash bail amounts more often, but also at higher amounts for the same alleged offense.[373]

Even in the few cases that have explicitly concluded that a given bail system violates the Equal Protection Clause, the holdings have been incredibly narrow. In *O'Donnell v. Harris County*,[374] for instance, a federal district court relied on a study regarding pretrial practices to conclude that

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364. *See, e.g.*, *Smith*, 531 P.3d at 1052.

365. *See, e.g.*, Arnav Shah & Shanoor Seervai, *How the Cash Bail System Endangers the Health of Black Americans*, COMMONWEALTH FUND (June 17, 2020), https://www.commonwealthfund.org/blog/2020/how-cash-bail-system-endangers-health-black-americans.

366. Baughman, *supra* note 341, at 218–19.

367. Liza Batkin, *Wealth-Based Equal Process and Cash Bail*, 96 N.Y.U. L. REV. 1549, 1573–74 (2021).

368. *Id.* at 1553.

369. Cassidy Heiserman, *Punishing Indigency: Why Cash Bail is Unconstitutional Under the Equal Protection Clause*, DREXEL L. REV. BLOG (Sept. 9, 2020), https://drexel.edu/law/lawreview/blog/overview/2020/September/cash-bail/ (collecting cases to note the absence of uniformity).

370. U.S. COMM'N ON C.R., *supra* note 324.

371. *Id.* at ii–iii.

372. *Id.* at ii.

373. *Id.* at 3–4.

374. 892 F.3d 147 (5th Cir. 2018) [hereinafter O'Donnell II].

the Harris County, Texas bail policy and practice "violate[d] the Equal Protection and Due Process Clauses of the United States Constitution."[375] While judges have discretion on bail determinations, the court found that there was a lack of individualized assessments in the vast majority of cases and noted how this system specifically targets poor arrestees.[376] The court also noted a study that found only 45% of Black defendants were able to secure pretrial release compared to 52% of Latinx defendants and 70% of white defendants.[377] Observing existing data and literature, the court found the practices used for bail determinations exacerbated racial disparities within the pretrial incarceration population.[378] Moreover, while the *O'Donnell* court did find an equal protection violation, it did not indicate the jurisdiction's bail practice was fundamentally unconstitutional. Instead, it instituted a consent decree to monitor the jurisdiction's bail practices.[379] And to be fair, that consent decree has led to some meaningful change, but patterns of discrimination still exist, albeit to a slightly lesser extent.[380]

In another recent case, the Nevada Supreme Court acknowledged that a challenged bail provision was unfair but declined to conclude that it was discriminatory. In *Valdez-Jimenez v. Eighth Judicial District*,[381] Valdez-Jimenez was indicted in 2018 and assigned a money bail amount of $40,000, which he could not afford.[382] He argued that the high bail amount constituted an unconstitutional detention, violating his equal protection rights.[383] In April 2020, the Nevada Supreme Court held that every arrested person has exacting due process rights when they are incarcerated before their trial.[384] This requires judicial consideration of certain factors set forth in Nevada law, including "the defendant's financial resources."[385] However, as in *O'Donnell*, the Nevada Supreme Court did not abolish the bail system nor acknowledge its disparate impacts.[386]

Regardless of their relative success, cases like *O'Donnell* and *Valdez-Jimenez* are by far the exception and not the rule in bail-related equal protection cases, and their rulings only impact their individual

375. O'Donnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1060 (S.D. Tex. 2017).
376. *O'Donnell II*, 892 F.3d at 154.
377. *O'Donnell*, 251 F. Supp. 3d at 1122.
378. *Id.*
379. *See* ODONNELL MONITOR, https://sites.law.duke.edu/odonnellmonitor/ (last visited March 28, 2025); Consent Decree at 11, O'Donnell v. Harris Cnty., 892 F.3d 147 (5th Cir. 2018) (No. 4:16-cv-01414) (intending to "remedy the systemic and longstanding constitutional violations found by the Court in this litigation").
380. The Consent Decree publishes a report on its findings every six months until the end of its mandate in 2027. *See* ODONNELL MONITOR, *supra* note 379. Harris County also publishes its current jail population. *See Current Jail Population*, HARRIS CNTY. TEX., https://charts.hctx.net/jail-pop/App/JailPopCurrent (last visited March 25, 2025).
381. 460 P.3d 976 (2020).
382. *Id.* at 980–81.
383. *Id.*
384. *Id.* at 980.
385. *Id.*
386. *Id.* at 988.

jurisdictions.[387] True, some jurisdictions like Illinois have abolished cash bail altogether, which has been successful at avoiding many of the discriminatory impacts the cash bail system is plagued with.[388] However, that kind of progressive change has not been replicated broadly; rather, the overwhelming majority of jurisdictions still have a cash bail systems. While some jurisdictions have gotten rid of bail schedules—automatic bail determinations based on the alleged offense—they have otherwise legitimized cash bail systems.[389] Courts continue to gaslight litigants by acknowledging pervasive disparate impacts but failing to find an equal protection violation.[390] Under the slogan of "equal protection does not mean equal impact," courts seem unwilling to conclude that the disparate impact of bail is anything more than a coincidence, and they often do not even discuss racial disparities.

III. BAIL'S APPLICATION TO PROTESTERS VIOLATES EQUAL PROTECTION

Jim Crow laws persisted under the myth that laws apply equally as long as they do not explicitly provide for disenfranchisement by race.[391] Of course, in hindsight it is clear that that principle was nothing but a fallacy and that facially neutral laws can still create discriminatory caste systems.[392] A key reason why *Brown v. Board of Education* came out the way it did was that the Court finally recognized that facially "equal" policies that result in statistically proven unequal outcomes abrogate the Fourteenth Amendment's equal protection pledge.[393] At that time, the Court did what was necessary when presented with consistent research demonstrating discriminatory impacts against a specific population.[394] There, the Court leaned heavily on social science research to demonstrate the disparate impacts segregation had on Black children.[395]

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387. Pierce v. City of Velda City, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015) had the potential to significantly reform the entire cash bail system because of its clear racial biases, but the case was mooted by reaching a settlement. The terms of the settlement, however, used vague terms, such as the City would use non-monetary release for all individuals that were not deemed dangers to the community. This is no different than current situations where Black people are seen by judges to be more dangerous than white people. *See* Baughman, *supra* note 341, at 215.

388. Bryce Covert, *Illinois Has Put an End to the Injustice of Cash Bail*, THE NATION (Dec. 2, 2024), https://www.thenation.com/article/society/cash-bail-reform-illinois/.

389. Jones v. City of Clanton, No. 2:15cv34, 2015 WL 5387219, at *2–4 (M.D. Ala. Sept. 14, 2015).

390. *E.g.*, Walker v. City of Calhoun, 901 F.3d 1245, 1251 (11th Cir. 2018) ("We must decide what process the Constitution requires in setting bail for indigent arrestees.") Notably, the court did not craft the question in terms of if the bail system upholds constitutional guarantees—like equal protection—for arrestees.

391. David Pilgrim, *What Was Jim Crow*, JIM CROW MUSEUM (2012), https://jimcrowmuseum.ferris.edu/what.htm; MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, at 245–47 (2001).

392. Pilgrim, *supra* note 391; PERMAN, *supra* note 391, at 245–47.

393. Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954).

394. *Id.* at 492–95.

395. Appendix to Appellants' Briefs, The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10).

But the current Court is ignoring these ideals and seems keen on allowing a new Jim Crow era to begin unimpeded, disingenuously holding that facially neutral systems will in practice affect all people the same so impact does not matter, a notion consistently disproven by data.[396] Similarly, data also demonstrates that facially neutral systems for both protest policing and bail do not impact people the same.[397] Although research indicates both systems are filled with racial bias against Black people, courts vaguely require "other evidence" before they will confirm the occurrence of an equal protection violation and take action to correct it.[398] It is a tall task to require plaintiffs to not only provide overwhelming research data, but also expect them to come up with discriminatory statements made by the government officials, reconstruct histories of discrimination relating to that specific claim, and be able to provide a sequence of events that would support their claim of discrimination. Especially in the contexts where subjective bias is common—as is with protest policing and cash bail determinations—being able to come up with any documented evidence other than empirical research is nearly impossible. The current framework is broken.

One way forward is to challenge systems broadly, using a related issue of discrimination as the requisite "other evidence."[399] As an example, both protesting and bail have decades of empirical research that prove predictable, foreseeable, and anticipated disparate impacts.[400] If a new protest movement begins tomorrow, we could anticipate a continuation of this familiar pattern.[401] Protest events heavily attended by Black people would experience a larger and more aggressive police response.[402] Black people would be disproportionately arrested for engaging in protected activity.[403] Of those arrested, Black people would be more likely to have to pay bail to be released—and would have to pay higher bail amounts—than white people charged with the same crime.[404] Meaning that Black people would continue to be overrepresented in the pretrial incarceration populations, largely for being too poor to post their bail.[405] In turn, that pretrial incarceration can have disastrous long-term consequences such as an increased conviction rate, impacts to health, and even threats to immigration statuses.[406] Starting from the decision to protest until pretrial incarceration,

396. *See* Pittman, *supra* note 124, at 190–92; Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 513–17 (2019); Starkey, *supra* note 240, at 136–38.
397. *See supra* Part II.
398. *See supra* Part II.
399. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).
400. *See supra* Part II.
401. *See supra* Section II.A.
402. *See supra* Section II.A.
403. *See supra* Section II.A.
404. *See supra* Section II.B; *see also* Nourani-Dargiri, *supra* note 3, at 977–78.
405. *See supra* Section II.B; *see also* Nourani-Dargiri, *supra* note 3, at 977–78.
406. Amairini Sanchez, Michele Cadigan, Dayo Abels-Sullivan, & Bryan L. Skyes, *Punishing Immigrants: The Consequences of Monetary Sanctions in the Crimmigration System*, 8 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 76, 90–91 (2022).

consistent threads of discrimination are present that could give rise to a success equal protection claim.

A. What Makes This Intersection Unique?

Perhaps more than other systems, this intersection is unique because of how many similarities there are between the bail system and protest policing. In both, government officials have significant discretion to balance individual liberties and public safety.[407] While there are some guidelines in both systems intended to restrain the worst excesses of this discretion, it nevertheless largely goes unchecked and unaccounted for, especially when governments rationalize decisions as being for public safety.[408] Subjective bias can be easily incorporated into both protest policing and cash bail determinations, but documented evidence of discrimination outside of statistical studies is difficult to find.

This is not to say that other intersections are impossible. Regrettably, data also demonstrates that Black people experience disparate impacts in many areas of policing such as Stop-and-Frisk policies, disciplinary measures used in public schools, and even disproportionate police surveillance in majority-Black neighborhoods. Additionally, people of color continue to face disparate impacts in various areas of the criminal legal system including discriminatory sentencing structures, bind-over decisions for children, and even ways attorneys acquire evidence relating to defendants.[409] In theory, there are threads of relation in many of these topics.

But protest policing and bail are often more connected and involve many civil rights outside of First Amendment and criminal legal system protections. Protesting is held particularly dearly because of its impact that it can have on society.[410] As one researcher noted, protesting is at least just as impactful as voting is and can often be more accessible.[411] American culture often celebrates these protests. But while protests are treated as an integral part of American society, they do not occur without controversy, particularly from governments, resulting in arrests. Even those same protest movements American society celebrates were filled with reports of arrests.[412] Those arrests bring bail.[413] Bail, however, can dramatically impact the rights and livelihood of the people it is imposed on.[414] Of note, bail doesn't just impact pretrial detention, it can have long-term

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407. *See supra* Part II.

408. *See supra* Part II.

409. Especially in terms of *Miranda* violations.

410. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interests Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 565, 576–77 (2014).

411. *Id.* at 565, 577.

412. Clint Smith, *Martin Luther King Jr. Was Bailed out by a Millionaire*, THE ATLANTIC (Mar. 21, 2018), https://www.theatlantic.com/magazine/archive/2018/02/clint-smith-freedom-aint-free/552506/.

413. *See id.*

414. Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.

consequences.[415] Research indicates that people incarcerated pretrial for inability to post bail are significantly more likely to be convicted of their alleged crime, even if they did not commit it.[416] Some reports have discussed how prosecutors have used bail determinations as leverage for garnering plea deals, promising shorter incarceration timelines for those who plea.[417] However, despite being released earlier than their trial date, people making this impossible decision will enter a world more difficult than they left it, now having a significantly harder time to find jobs, housing, and even vote.[418]

This intersection also involves government determinations on "dangerousness." In both protest policing and bail, exercises of this substantial discretion also follow a specific pattern of racial discrimination.[419] People of color are more likely to be viewed as subjectively dangerous compared to white people who engage in the same conduct.[420] During protests, that subjective view leads to disparate use of law enforcement against Black protesters, which results in disproportionate arrest rates.[421] This restricts people of color's right to engage in otherwise lawful First Amendment conduct.[422] For bail, the subjective view of Black people as dangerous leads to in disparately high bail amounts required for release, resulting in disproportionate rates of pretrial incarceration and statistically worse litigation outcomes.[423] This restricts people of color's physical freedom and forces many of them to take plea deals even when they are innocent.[424]

The disparate impacts on Black people in both systems has understandably led to equal protection litigation.[425] But as mentioned above, plaintiffs do not have a clear path to success in these cases because the discrimination in both areas does not result from any explicitly stated purpose or intent.[426] This has moved the goalpost for upholding the promises made in the Equal Protection Clause. Despite the existence of statistical data to demonstrate patterns of discrimination, they are treated as being too attenuated. At best, claims challenging protest policing and bail have only had mixed success because courts are reluctant to give legal

415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.*
419. *See supra* Part II.
420. *See supra* Section II.A.
421. *See supra* Section II.A.
422. *See supra* Section II.A; *see also* Nourani-Dargiri, *supra* note 3, at 1011.
423. *See supra* Section II.B; *see also* Nourani-Dargiri, *supra* note 3, at 1019; TERRY-ANN CRAIGIE, AMES GRAWERT, CAMERON KIMBLE, & JOSEPH E. STIGLITZ, BRENNAN CTR. FOR JUST., CONVICTION, IMPRISONMENT, AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY 12 (2020).
424. Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/.
425. *See supra* Part II.
426. *See supra* Part II.

significance to the overwhelming weight of empirical research demonstrating a stark pattern of discrimination.

Unfortunately, the current equal protection framework falls short of ensuring equality under law guaranteed by the Fourteenth Amendment. While the Equal Protection Clause should allow some flexibility as to what kind of claims are discriminatory, it should not be nearly impossible to make a case for discrimination using statistical data. A claim supported by decades of research does more than merely make an attenuated connection. Courts should not require additional evidence when the evidence provided already reveals a significant discriminatory impact. Nevertheless, exposing the compounding discriminatory impacts that occur at the intersection of protest policing and bail can demonstrate a common thread of discrimination that should trigger strict scrutiny because it would show a stark pattern of race-based discrimination across both cases.[427]

Some courts do seem willing to use statistics in their analysis. For example, in *United States v. Moore*,[428] Moore moved to dismiss his indictment arguing that police selectively stop Black people and that selective enforcement led to his charges.[429] A U.S. District Court agreed.[430] In evaluating the claim of Driving While Black[431] the court explained that Moore needed to prove that the police department's "process has a discriminatory effect and was motivated by a discriminatory purpose."[432] Importantly, because there was no explicitly racist policy, however, the court noted that "Moore can use statistics to establish his claim."[433] In its opinion, the court almost solely used that data and acknowledged studies that found "officers stop Black drivers five times more frequently than white drivers."[434] After scrutinizing those studies[435] alongside evidence of the jurisdiction's history of discrimination,[436] the court concluded that the data did reveal an underlying discriminatory purpose.[437]

B. What does This Intersection Demonstrate?

While no laws explicitly say that protest policing bail systems are meant to work together to disenfranchise Black people, that is the eventual result.[438] Taken together, the consistency of the data finding racially discriminatory impacts in protest policing and bail decisions coupled with the country's history of discrimination could provide strong evidence that these systems are designed and implemented specifically to keep people

427. *See supra* Part II.
428. 716 F. Supp. 3d 415 (E.D. Va. 2024).
429. *Id.* at 419.
430. *Id.*
431. *Id.* at 420.
432. *Id.* at 421.
433. *Id.* at 420–21.
434. United States v. Moore, 716 F. Supp. 3d 415, 418 (E.D. Va. 2024).
435. *Id.* at 422–25.
436. *Id.* at 427.
437. *Id.* at 432.
438. *See supra* Part II.

of color in a lower caste. These systems, and many other systems, largely do not have documented evidence that courts looked at in the twentieth century such as an explicitly discriminatory history, statements by officials, and events leading up to the claim. Accordingly, the empirical evidence should be able to take the lead and be evaluated.[439]

Policing protests and making bail decisions both involve governmental discretion that allows a facially neutral law or policy to be soiled with officials' own prejudices.[440] It takes discretion to determine what kind of protesters are dangerous enough to monitor and arrest.[441] It takes discretion to determine who is too dangerous to release pretrial and what bail amounts should be imposed on those who can be safely released.[442] Because outcomes in both of these systems are determined by the exercise of discretion by actors who often don't have to explain or justify their actions, any specifically discriminatory purposes will be harder to detect. Thus, this discretion creates a pattern of disenfranchisement which could then be used to describe a discriminatory purpose.[443] As I have written previously, this intersection also makes the argument that cash bail could be used to dissuade people of color from freely exercising their protest rights.[444]

C. Creating a New Framework

Courts must develop a new framework for equal protection claims to uphold the Fourteenth Amendment's promises, especially because societal norms no longer include explicit, documentable discriminatory statements. Only in rare occasions are modern-day litigants able to provide evidence of discriminatory purpose outside of providing statistical data to show racial biases. The new equal protection claim framework should allow space for empirical research to support claims. Because explicit discriminatory statements are no longer present, interrelated issues that also have accompanying empirical research demonstrating disparate impact should be allowed to account for the "other evidence."

But this requires some kind of legal formula or test for courts to employ. Social science has demonstrated that the disparate impacts of government officials' discretionary decisions can be measured and can provide those guideposts.[445] But equal protection bounds isn't an amorphous definition. Scholarship has demonstrated that it is possible to draw on empirical analysis, analyzing existing equal protection precedent and not

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439. Some cases have held that historical evidence is not enough to justify discrimination based on race and litigants must point to local evidence of historical discrimination. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499–501 (1989). In every local jurisdiction, however, the equal protection issues involved with protest policing and cash bail are apparent, and data can be collected for each respectively.

440. Barocas & Selbst, *supra* note 245, at 673–74.

441. Baughman, *supra* note 341, at 236–37.

442. *Id.* at 237.

443. *See* United States v. Moore, 716 F. Supp. 3d 415, 432 (E.D. Va. 2024).

444. Nourani-Dargiri, *supra* note 3, at 1008–11.

445. Arnold, Dobbie, & Hull, *supra* note 348, at 3036.

alternative understandings, to measure when racial discrimination is in play.[446] In these findings, researchers found that discriminatory decisions "can be measured, regardless of [their] source, using observational comparisons of [w]hite and Black" populations.[447] For example, data scientists are able to analyze a judge's bail determinations to account for racial bias and discrimination that can help not only judges make more fair bail determinations, but also help inform appropriate policy responses.[448]

This is similar to the framework that the courts used in *Brown v. Board of Education* and *United States v. Moore*.[449] In both cases, the courts heavily relied on research findings, using statistics as a key component of their conclusions that the challenged practice violated the Equal Protection Clause.[450] Both of these cases analyzed observational comparisons between white and Black populations.[451] Both cases, decided approximately seventy years apart, also demonstrate that there is precedent for the use of a framework of interrelated discussions informed by data and that some courts still seem willing to uphold equal protection values.

But bringing a case with interconnected claims would still be a big uphill battle. First, even assuming a court would choose to analyze the claims together, it would first need to be presented with a case that involves equal protection challenges to both protest policing and bail. The claims must also be linked closely enough that a court would not find them to be completely distinct and sever them. Specifically, the case would need to be based on discriminatory policing during a protest that led to discriminatory imposition or denial of bail. But this is not impossible or even unrealistic. Multiple studies have revealed patterns of Black protesters getting arrested and having excessively high bail amounts imposed.[452] Some bail funds have even faced legal prosecution for helping pay the bail of arrested protesters.[453] Nevertheless, a court will not insert an issue where one is not present, so for a court to adopt this framework, a case must properly raise both issues.

This doesn't mean that court will uniformly follow suit. Data consistently show a thread of discrimination from protest policing to pretrial

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446. *Id.* at 2996–97.

447. *Id.* at 3036; *see also* David Arnold, Will Dobbie, & Peter Hull, *Measuring Racial Discrimination in Algorithms*, 111 AEA PAPERS AND PROCS. 49, 53 (2021).

448. Arnold, Dobbie, & Hull, *supra* note 348, at 3036.

449. Brown v. Bd. of Educ., 347 U.S. 483, 491–92, 494–95 (1954); United States v. Moore, 716 F. Supp. 3d 415, 430, 432 (E.D. Va. 2024).

450. *Brown*, 347 U.S. at 491–92, 494–95; *Moore*, 716 F. Supp. 3d at 430, 432.

451. *Compare Brown*, 347 U.S. at 494, *and Moore*, 716 F. Supp. 3d at 419 (E.D. Va. 2024), *with* Arnold, Dobbie, & Hull, *supra* note 348, at 3036, *and* Arnold, Dobbie, & Hull, *supra* note 447, at 53 (demonstrating that similar statistical processes are still possible both in specific instances involving discrimination in bail decisions as well as racial discrimination more generally).

452. *E.g.*, Libby Doyle & Colette Marcellin, *How Bail Reform Can Protect Protestors and Address System Injustices*, URBAN INST. (June 17, 2020), https://www.urban.org/urban-wire/how-bail-reform-can-protect-protestors-and-address-system-injustices.

453. Some of these charges were ultimately dropped. Timothy Pratt, *Money-Laundering Charges Dropped Against Bail Fund in Cop City Protest Case*, THE GUARDIAN (Sept. 19, 2024, 10:18 AM), https://www.theguardian.com/us-news/2024/sep/19/cop-city-protest-case.

incarceration. Yet because policies that limit protest activity and authorize the imposition of bail are facially neutral, courts may still refuse to find any discriminatory intent or purpose. Alternatively, a court may decide to avoid acknowledging that common thread by looking at the two issues as unrelated. Finally, the reality is that even with the right case and client, a strong argument, and a receptive court, the case might settle and thus create no useful precedent. While settling might accomplish the plaintiff's goals, it does not further the development of favorable jurisprudence for future plaintiffs.

This is a sobering reality of litigation that explains why advocates are hesitant to attempt to create change through the courts. Even so, arguing equal protection cases using this modified framework provides an opportunity to at least disrupt how courts view the cases brought before them, possibly preventing them from continuing to bury their heads in the sand based on the dubious mantra that "equal protection does not necessarily mean equal impact."

CONCLUSION

If the purpose of the Equal Protection Clause is to give people equal access and opportunity, then litigants should have a clear method by which to vindicate their rights. Precedent says that the key to succeeding on an equal protection challenge is to show a pattern of discrimination.

But the locks keep changing. Equal protection is undergoing an evolution that continues to dilute the Fourteenth Amendment's original purpose. The current equal protection framework should not rely as heavily as it does on express discriminatory statements as a precursor to determining that a government action violated equal protection. Equal protection claims don't involve arguing semantics and splitting hairs for the sake of creating a dispute. Data consistently proves that in many systems, the very population that the Fourteenth Amendment was meant to provide equality for, continues to be disparately impacted. However, because those systems are built on facially neutral policies, courts avoid looking at them any closer.

The Equal Protection Clause's purpose to dismantle disparate impacts that would result in a caste system should include important applying those considerations to free speech rights and pretrial incarceration protections. This frustrating phenomenon occurs in both protesting and cash bail contexts. Although there is plenty of data about both protest policing and cash bail to support the conclusion that underlying discriminatory practices are causing disparate impacts, courts continue to heavily weigh whether the text of a policy is facially neutral. Even though some courts acknowledge the existence of damning data, they often conclude that there can be disparate impacts without equal protection violations because the "impact itself is not determinative."

Data about discriminatory impacts should be allowed in the courtroom and incorporated into courts' decision-making. One way to begin bringing more data into equal protection analysis is updating the framework to treat multiple kinds of discrimination together. In some cases, like bail and protests, there is enough overlap that discrimination can be demonstrated through a common thread of subjective decisions that lead to a disparate impact. Admittedly, these cases will be hard to bring and harder to win. Indeed, there is plenty of data and a sufficient overlap that the cases would not necessarily need to be severed. But a claim like this has so many hoops and hurdles that could make precedential impact difficult. It is as if you are asking someone to climb Mount Everest while walking on their hands—doable, but incredibly difficult to the point that most people would not even want to try.

Novel ways of bringing equal protection claims should make their way in order to bring meaningful change. As the NAACP did in *Brown* by providing social science research, there is no shortage of data available that the Fourteenth Amendment promises are not fulfilled. We need to use that data. Particularly in the current state of U.S. politics that attacks anything DEI-related, equity based solutions may be difficult to pass through legislatures. But, the data exists, discriminatory impact is alive and well, and the Fourteenth Amendment's purpose is more important than ever.