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NO JUSTICE, NO PEACE: THE NEED FOR A STATE VERSION OF § 1983 IN RESPONSE TO THE MOVEMENT FOR BLACK LIVES

MADISON N. HECKEL

After the Civil War, violence raged across the South against Black Americans as an attempt by racist Confederates to refuse the racial equality guaranteed by the recent Constitutional Amendments. Congress recognized the lack of state action in enforcing the Reconstruction Amendments and passed the Ku Klux Klan Act in response, which allowed citizens to bring civil suit against government officials who violated their constitutional rights. Reborn under Monroe v. Pape *in 1961, § 1983 has become the primary vehicle for enforcing constitutional rights in the United States.*

The sixty years since Pape *have led to significant developments in the Supreme Court's understanding of what is and is not an appropriate suit under § 1983. The Court has heard numerous cases leading to a complex understanding, or lack thereof, of what acts by government officials qualify as constitutional violations. The system as it is currently designed cannot give Black Americans and their families the remedy they deserve. The Movement for Black Lives thus pushes for justice for the numerous Black Americans killed at the hands of police officers. This paper argues for a state alternative to § 1983, enabling states to develop their own jurisprudence and increase state Constitutional protections in excess of what is enumerated by the Federal Constitution.*

INTRODUCTION

On May 25, 2020, a convenience store employee called the police and reported that a Black man bought cigarettes with a counterfeit $20 bill.[1] Seventeen minutes after officers arrived, the man, George Floyd, was unconscious. Minneapolis Police Officer Derek Chauvin knelt on George Floyd's

[1] Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (updated Nov. 5, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

neck for nine minutes and 29 seconds.[2]

The video of Floyd's death began circulating on the internet the following day, resulting in massive protests across the nation, despite the COVID-19 pandemic.[3] Polls estimate that as many as 21 million adults attended protests related to the Black Lives Matter Movement or police brutality as of mid-June 2020.[4] Before these protests, the largest estimate for any American protest was the Women's March of 2017 at 4.6 million people.[5]

These staggering numbers are understandable when one views the footage of Floyd's death. The footage shows Floyd lying on the ground, repeating over twenty times that he cannot breathe, calling out for his mother, and pleading, "You're going to kill me, man."[6] Chauvin is seen kneeling on Floyd's neck, his face unphased and his hands casually in his pockets.[7] Even more chilling is that this footage was captured with Chauvin's knowledge – he made eye contact with the camera at one point as one of his fellow officers ensured passersby did not

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[2] Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer Than Initially Reported*, N.Y. Times (Mar. 30, 2021), https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html.
[3] Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020), https://time.com/5847967/george-floyd-protests-trump/.
[4] Elliot C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html.
[5] *Id.*
[6] *George Floyd: What Happened in the Final Moments of His Life*, BBC (July. 16, 2020), https://www.bbc.com/news/world-us-canada-52861726.
[7] *Id*.

interfere.[89]

The protests after Floyd's death focused on the concept of racial justice.[10] Many participants in these protests held signs reading, "I can't breathe," which were some of the final words of George Floyd and Eric Garner, both Black men killed at the hands of police.[11] Others held signs in reference to Breonna Taylor, a young Black woman killed a few months prior when police executed a no-knock warrant in the middle of the night.[12]

Approximately a thousand Americans are killed by law enforcement officers each year, but only 121 officers have been arrested for murder or manslaughter in these on-duty killings since 2005.[13] A study by Northeastern University found that while Black Americans represented only 12 percent of the population in the states observed, they made up 25 percent of the deaths in police shootings.[14] This racial disparity became more pronounced in cases where the

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[9] *Id*.
[10] Maanvi Singh & Nina Lakhani, *George Floyd Killing: Peaceful Protests Sweep America As Calls for Racial Justice Reach New Heights*, GUARDIAN (June 7, 2020), https://www.theguardian.com/us-news/2020/jun/06/protests-george-floyd-black-lives-matter-Saturday.
[11] Mark Morales et al., *Chants of 'I Can't Breathe!' Erupt as the Officer in the Eric Garner Case Won't Face Federal Charges*, CNN (July 17, 2019), https://www.cnn.com/2019/07/17/us/eric-garner-no-federal-charges-against-officer-reaction/index.html.
[12] Richard A. Oppel Jr., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/article/breonna-taylor-police.html.
[13] Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sep. 24, 2020), https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html.
[14] Ian Tomsen, *The Research is Clear: White People Are Not More Likely Than Black People to be Killed By Police*, NEWS AT NORTHEASTERN (July 16, 2020),

victims were unarmed or offered little to no threat to the police,[15] as was the case in the killing of 12-year-old Tamir Rice.[16]

This racially biased violence is similar to the excessive violence perpetrated against Black Americans prior to the Civil Rights Movement.[17] News of police officers killing Black Americans has sadly become normalized; these killings occur at a rate of more than one every other day.[18] Today, Black Americans injured by the police are often unable to obtain justice through a guilty verdict in the criminal justice system;[19] § 1983 allows civilians the opportunity to achieve justice through a civil claim of constitutional torts.[20] These cases are increasingly difficult for plaintiffs to win due to the Supreme Court's ever-changing standard for a § 1983 claim.[21] Now, over 200 years after the creation of § 1983, states are no longer preventing Americans from receiving their full Constitutional rights; rather, the federal government itself is the obstacle. It is now the states' turn to force equality under the law and create their own versions of §

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https://news.northeastern.edu/2020/07/16/the-research-is-clear-white-people-are-not-more-likely-than-black-people-to-be-killed-by-police/.

[15] *Id*.

[16] Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y.TIMES (Jan. 22, 2015), https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html.

[17] *See generally* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

[18] Alex Altman, *supra* note 3.

[19] Dewan, *supra* note 13.

[20] *See generally* Michael L. Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISSISSIPPI L.J. 157 (1998) (examining the use of § 1983 in constitutional tort cases and incorporating common law).

[21] Osagie K. Obasogie, *The Bad-Apple Myth of Policing*, ATLANTIC (Aug. 2, 2019), https://www.theatlantic.com/politics/archive/2019/08/how-courts-judge-police-use-force/594832/.

1983 to protect their Black citizens.

Part I of this paper will go over the history behind § 1983 and how it was established when states did not protect their citizens' rights. Part II will then examine the elements of a § 1983 claim and how the Supreme Court has made these claims more difficult to pursue since *Monroe v. Pape* first established it as remedy for those whose Constitutional rights were violated. Finally, Part III will discuss how states can expand protections to their citizens by creating a state version of § 1983.

I. BACKGROUND

Congress created § 1983 in post-Civil War America to protect Black Americans in a time when state governments refused to enforce the Constitution.[22] After *Monroe v. Pape*, § 1983 civil claims led litigation against state and local governments involved in constitutional violations.[23] To examine the need for state versions of § 1983, it is necessary to first analyze existing statutes and its usage in courts.

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[22] Hanna Rosen, *Racial Terror and Citizenship*, 24 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE: RACE 125, 126 (Thomas C, Holt, Laurie B. Green, & Charles Reagan Wilson eds., 2013); The Enforcement Acts of 1870 and 1871, United States Senate, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm (last visited Dec. 3, 2020)

[23] Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT MAGAZINE (2017), https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983.

A. *The Enforcement Acts*

The Reconstruction era was the nation's attempt to rebuild after the Civil War. Its focus was to determine both what the country would look like post-slavery and what role newly emancipated Black Americans would take.[24] While the law of the country changed to explicitly favor racial equality, it did little to encourage racist whites to view Black Americans as equal in status.[25] Angry racist white men throughout the South, often former Confederate soldiers, banded together to threaten and use violence against Black Americans and their white allies.[26] These groups formed the Ku Klux Klan, which proliferated rapidly from 1868 through 1871.[27] White men from all walks of life, including lawyers and ministers, made up the Klan.[28] The Klan was so popular that nearly the entire white male population of York County, South Carolina partook.[29] While the Klan never fully centralized its power, its violent presence was well-known across the South.[30] W.E.B. Du Bois estimated that the Klan committed approximately 197 murders and 548 aggravated assaults between 1866 and mid-1867 in North and

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[24] *Reconstruction*, U.S. HIST., https://www.ushistory.org/us/35.asp (last visited Dec. 3, 2020).
[25] THE ENFORCEMENT ACTS OF 1870 AND 1871, *supra* note 24.
[26] Elaine Frantz Parsons, Ku Klux Klan, Reconstruction-Era, 24 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE: RACE 229, 229 (Thomas C. Holt, Laurie B. Green & Charles Reagan Wilson eds., 2013).
[27] *Id*.
[28] EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR, 14 (3rd ed. 2017), https://eji.org/wp-content/uploads/2020/09/lynching-in-america-3d-ed-091620.pdf.
[29] *Id*.
[30] Parsons, *supra* note 26, at 230.

South Carolina alone.[31] An attempt to add voting rights for Black Louisianans to the Louisiana Constitution in 1866 was met with a mob killing and wounded nearly two hundred people.[32] In 1870, Guilford Coleman, a Black man, was abducted from his home, beaten to death, and thrown into a well for voting to nominate a gubernatorial candidate.[33] In total, nearly 6,500 documented lynchings took place during the Reconstruction era.[34]

The introduction of "Black Codes" across the South essentially authorized these extra-judicial violent acts.[35] Black Americans were arrested and jailed if found to be without "lawful employment," though the only employment they could legally have was as a domestic servant or agricultural laborer – jobs that paralleled pre-emancipation roles for Black Americans.[36] These racist laws were not limited to the South; Indiana, Illinois, and Oregon also limited the entrance of Black Americans through their state constitutions.[37] In 1866, L.E. Potts, a white

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[31] W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 674 (1935).
[32] Alex Fox, *Nearly 2,000 Black Americans Were Lynched During Reconstruction* (Jun. 18, 2020), SMITHSONIAN MAG., https://www.smithsonianmag.com/smart-news/nearly-2000-black-americans-were-lynched-during-reconstruction-180975120/.
[33] Campbell Robertson, *Over 2,000 Black People Were Lynched From 1865 to 1877, Study Finds* (updated June 29, 2020), N.Y. TIMES, https://www.nytimes.com/2020/06/16/us/reconstruction-violence-lynchings.html.
[34] N. Jamiyla Chisholm, *New Data Says: 6,500 Lynchings Occurred During Reconstruction* (June 15, 2020), COLORLINES, https://www.colorlines.com/articles/new-data-says-6500-lynchings-occurred-during-reconstruction; *History of Lynching in America*, NAACP, https://naacp.org/find-resources/history-explained/history-lynching-america. (Lynching is defined by the NAACP as the public killing of an individual who has not received due process.)
[35] Equal Just. Initiative, *supra* note 28, at 23.
[36] STEPHEN HUGGINS, AMERICA'S USE OF TERROR: FROM COLONIAL TIMES TO THE A-BOMB 178 (2019).
[37] *Id*.

woman from Paris, Texas, wrote President Andrew Johnson and asked him to respond to the widespread violence against local Black people, stating that white people were trying to "persecute [Black Americans] back into slavery," and that "[Black people] are often run down by blood hounds, and shot because they do not do precisely what the white man says."[38] Instead of listening, Johnson vetoed the Civil Rights Act of 1866.[39] Congress, however, being largely run by "Radical Republicans," favored equal rights for Black Americans, the establishment of public schools, and disenfranchisement of former Confederates.[40] These Republicans responded to the passage of the Black Codes by passing the Reconstruction Acts in 1867. The Reconstruction Acts created military districts throughout the South to serve as the acting government of the region while each state drafted a new state constitution.[41] Congress also passed the Fourteenth Amendment, which granted citizenship to Black Americans, and the Fifteenth Amendment, which prohibited states from using race as a bar to voting.[42] Radical Republicans intended for these measures to force Southern states to comply with emancipation.[43]

The continued growth of the Black Codes in the South, along with the

[38] Equal Just. Initiative, *supra* note 28, at 12 (citing *Mrs. L.E. Potts to Abraham Lincoln, June 1866,* in PHILLIP H. SHERIDAN PAPERS, Container 4 (Manuscript Division, Library of Congress)).
[39] PARSONS, *supra* note 26, at 230.
[40] John M. Matthews, *Radical Republicans,* 10 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE: LAW AND POLITICS 379, 380 (James W. Ely Jr. & Bradley G. Bond eds., 2008).
[41] HUGGINS, *supra* note 36, at 178.
[42] *Id*.
[43] *Id*.

anger and violence of the Klan, re-created slavery-era conditions and held Black Americans back from attaining full equality under the law.[44] An observer in 1865 said that the Old Confederacy "govern[ed] … by the pistol and the rifle;" similarly, the Alabama Union League lamented in 1869 that, "We are more slave today in the hand of the wicked than before."[45] Because they used intimidation and violence and some of their members were police officers themselves, the Klan held significant power over law enforcement officials.[46] A plea for action sent to the governor of South Carolina after a white moderate was murdered further exemplified the states' lack of action against this violence: "The colored citizens of Laurens county [are] under intimidation and without the least protection whatever, with our lives in jeopardy every day."[47] Republican-controlled Congress determined that the state and local governments were insufficient to protect Black Americans' civil rights and thus passed the Enforcement Acts.[48]

The Enforcement Acts were primarily intended to destroy the Klan.[49] These Acts allowed the federal government to oversee elections and arrest Klan members by making acts of violence or intimidation with the intent of hampering

[44] *Id*. at 182.
[45] *Id*. at 181.
[46] ROSEN, *supra* note 22, at 126.
[47] S. Misc. Doc. No. 548, 44th Cong., 2d Sess. (1877).
[48] ROSEN, *supra* note 22, at 162 (*The Enforcement Acts of 1870 and 1871.)*
[49] ROSEN, *supra* note 22, at 182; Stephen Cresswell, Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870-1890, 53 J. S. HIST. 421, 421–22 (1987).

voting federal offenses.[50] Included within the Enforcement Acts was the Ku Klux Force Act, passed in April 1871, which allowed the President to suspend writ of habeas corpus and send in troops, without invitation from the governor, to areas that were unable to control Klan violence.[51] This Act gave individuals the right to bring forth a claim when a state, or someone acting under the color of law, deprived them of their Fourteenth Amendment rights. [52] It provided individuals with a damages remedy against government officials, local governments, and state actors.[53] Just over 1,500 cases were brought under the Enforcement Acts, but the majority were in only two federal districts and occurred between 1871 and 1874.[54] The Act essentially fell dormant after 1884[55] but was eventually codified as 42 U.S.C. §§ 1983, 1985, and 1986.[56] It was not until 1951 that § 1983 was first considered by the Supreme Court.[57]

B. *The Development of § 1983 Litigation*

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[50] ROSEN, *supra* note 22, at 126.
[51] PARSONS, *supra* note 26, at 232; Monroe v. Pape, 81 S. Ct. 473, 475 (1961) (citing Cong. Globe, 42d Cong., 1st Sess., App. 68, 80, 83–85) (generally speaking, by passing the Act, Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of said Amendment).
[52] *Monroe v. Pape*, 81 S. Ct. 473, 476 (1961); Sheldon Nahmod, *Section 1983 is Born: The Interlocking Supreme Court Stories of Tenney and Monroe*, 17 LEWIS & CLARK L. REV. 1019, 1020 (2013).
[53] Nahmod, *supra* note 52 at 1020.
[54] Cresswell, *supra* note 49, at 423.
[55] *Id*.
[56] Alan W. Clarke, *The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct*, 7 SCHOLAR 151, 155 (2005).
[57] Nahmod, *supra* note 52, at 1091.

The Supreme Court first explicitly interpreted the language of § 1983 in *Tenney v. Brandhove*.[58] A First Amendment case, *Tenney* was brought forward when Brandhove, a self-described Communist, sued members of the California Senate's Fact-Finding Committee on Un-American Activities under § 1983 and sought $250,000 in damages for being summoned as a witness at a hearing on un-American activities.[59] The Court ultimately found that the language in § 1983 did not allow for legislators to be held civilly liable for acts within legislative proceedings.[60]

Ten years later, the Supreme Court heard the revolutionary *Monroe v. Pape* case.[61] James Monroe, a Black man, brought suit against 13 Chicago police officers after they broke into his family's home, "routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers," all while spewing racial insults.[62] Monroe was taken to the police station, detained for ten hours, interrogated about a murder, was not taken before a magistrate, was not allowed to call his family or attorney, and was eventually released with no charges brought against him.[63] The officers had no search or arrest warrants against him.[64] Monroe claimed the

[58] *Tenney v. Brandhove*, 71 S. Ct. 781, 788 (1951).
[59] Nahmod, *supra* note 52, at 1026.
[60] *Tenney*, 71 S. Ct. at 788-789.
[61] *Monroe*, 81 S. Ct. at 473.
[62] *Id*. at 474.
[63] *Id*.
[64] *Id*.

officers' actions violated his Fourth and Fourteenth Amendment rights.[65]

Monroe brought his civil claim under § 1983, claiming his family's warrantless search and arrest constituted a deprivation of their "rights, privileges, or immunities secured by the Constitution."[66] The District Court dismissed the case, holding that the City of Chicago could not be held liable under § 1983 for acts committed as part of its government functions, and the Court of Appeals for the Seventh Circuit affirmed.[67] To determine whether Monroe's claim could succeed, the Supreme Court turned to the legislative intent in the original Ku Klux Act of 1870.[68] The Court determined that the legislature intended for § 1983 to have three purposes: (1) to override certain state laws, (2) to provide a remedy where state law was inadequate, and (3) to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.[69] The Court had to determine if "under color of state law" included acts of officials who violated state law where the state already provides a remedy.[70] The Justices noted that the primary legislative concern was the Constitution's lack of

[65] Clarke, *supra* note 58, at 164.
[66] 42 U.S.C. § 1983 reads as such: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. *Monroe*, 81 S. Ct. at 474 (quoting 42 U.S.C. § 1983).
[67] *Monroe*, 81 S. Ct. at 475.
[68] *Id*. at 475.
[69] *Id*. at 477.
[70] Clarke, *supra* note 56, at 166.

enforcement, not its mere existence.[71] Thus, although legislators knew the Act may be redundant on paper they found that a citizen's right to sue abusive state officials superseded any redundancy.[72] Further, prior cases eroded the narrow construction of "under color of" state law because the Act ensured that all official actions were covered, regardless of whether they broke state law.[73] Therefore, the Supreme Court determined that Monroe's claim was valid since Congress intended to provide a remedy for such official misconduct.[74]

It is worth noting that *Monroe* was decided in 1961—in the middle of the Civil Rights Movement.[75] The Court had unanimously ruled to overturn *Plessy v. Ferguson* only a few years prior, holding that "separate educational facilities are inherently unequal"; that segregated schools violated the Fourteenth Amendment.[76] Black Americans across the South participated in sit-ins to protest segregation in public spaces, and the Montgomery Bus Boycott demonstrated the

[71] *Monroe*, 81 S. Ct. at 478.
[72] Clarke, *supra* note 56
[73] *Monroe, 81 S. Ct. at 482 (citing States v. Classic, 61 S. Ct. 1031,1043 (1941); Screws v. United States, 65 S. Ct. 1031, 1038-41 (1945)).*
[74] *Monroe*, 81 S. Ct. at 484; Clarke, *supra* note 56, at 167; *Monell v. Department of Social Services*, 96 S. Ct. 2018 (1978) (Along with the Chicago Police Officers, Monroe had attempted to sue the City of Chicago in this case. The Court continues in *Monroe* to determine that a municipality does not qualify as a "person" under the language of § 1983. This was later overturned in *Monell v. Department of Social Services*, but it goes further than scope of this paper).
[75] *Monroe*, 81 S. Ct. at 473; *The Modern Civil Rights Movement, 1954-1964*, NAT'L PARK SERV., https://www.nps.gov/subjects/civilrights/modern-civil-rights-movement.htm (last visited Dec. 3, 2020).
[76] *Brown v. Bd. of Ed. Of Topeka*, Shawnee County, Kan., 74 S. Ct. 686, 692 (1954).

power of mass direct action.[77] Race issues were clearly on the minds of many Americans; Monroe's status as a Black man was not lost on the Justices.[78] The Justices' deep dive into § 1983's legislative history clarified the connection between the legislation and the goal of racial equality.[79]

The decision in *Monroe* expanded an individual's ability to sue local governments for violating constitutional rights.[80] *Monroe* determined that § 1983 was as broad as the Fourteenth Amendment in its Constitutional protections.[81] *Monroe* further found that state and local law enforcement officials were subject to federal liability.[82] After the *Monroe* decision, § 1983 became the primary vehicle for enforcing constitutional rights in the United States.[83] It is used today to challenge the use of excessive force by police, race-based patterns of stop and frisk, unconstitutional conditions of confinement, wrongful convictions, and other forms of state actor misconduct.[84] Private litigants file over 15,000 § 1983 claims each year, and prisoners file more than 30,000.[85] Many families of the Black Americans killed at the hands of police have filed § 1983 claims as an attempt to

[77] Kenneth R. Janken, *The Civil Rights Movement: 1919–1960s*, N'ATL HUMANS. CTR., http://nationalhumanitiescenter.org/tserve/freedom/1917beyond/essays/crm.htm.
[78] Nahmod, *supra* note 52, at 1061.
[79] *Monroe*, 81 S. Ct. at 475.
[80] Adelman, *supra* note 23.
[81] Nahmod, *supra* note 52, at 1059.
[82] Clark, *supra* note 56, at 164.
[83] Adelman, *supra* note 23
[84] *Id*.
[85] *Id*.

obtain justice.[86] A successful claim can result in a family receiving thousands, if not millions, of dollars for their loss.[87]

C. *Requirements for a § 1983 Claim*

To state a claim under § 1983, plaintiffs must allege a violation of their constitutional rights committed by someone acting under the color of law.[88] There are three elements for a constitutional tort claim under § 1983: (1) a deprivation of federally protected rights, (2) alleged causation by satisfying a type of proximate cause requirement, and (3) deprivation caused by a person acting "under the color of law."[89] While the causation element is heavily fact-dependent, the determination of who is acting under the color of law and what constitutional deprivations are covered by § 1983 are legal standards that have been clarified

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[86] *Id.*; *see generally Michael Brown's Family Received $1.5 Million Settlement With Ferguson*, NBC NEWS (Jun. 23, 2017), https://www.nbcnews.com/storyline/michael-brown-shooting/michael-brown-s-family-received-1-5-million-settlement-ferguson-n7759366; J. David Goodman, *Eric Garner Case Is Settled by New York City for $5.9 Million*, N.Y. TIMES (Jul. 13, 2015), https://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html (discussing settlements of § 1983 cases for the killings of Michael Brown and Eric Garner by police officers).

[87] *See generally* Nicole Chavez and Christina Carrega, *Breonna Taylor Settlement is Among Largest Payouts Linked to a Police Shooting*, CNN (Sept. 16, 2020), https://www.cnn.com/2020/09/16/us/police-shooting-lawsuits-breonna-taylor-settlement/index.html; Steve Karnowski and Amy Forliti, *Floyd Family Agrees to $27M Settlement Amidst Ex-Cop's Trial*, AP NEWS (Mar. 12, 2021), https://apnews.com/article/minneapolis-pay-27-million-settle-floyd-family-lawsuit-52a395f7716f52cf8d1fbeb411c831c7.

[88] *West v. Atkins*, 108 S. Ct. 2250, 2255 (1988).

[89] Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV. 525, 527 (2001) (It should be noted that this source identifies "the deprivation be caused by a 'person'" as separate from "acting under the color of law." For the purposes of this paper, it made sense for these elements to be combined, as the definition of person is not relevant to the topic of this paper).

over time.[90]

i. **"***Under the Color of Law"*

First and foremost, for a § 1983 claim to succeed, the action in question must be perpetrated by someone acting "under the color" of state law.[91] State actors are now bound to constitutional guidelines by § 1983.[92] The traditional definition of acting "under the color of law" required that the defendant exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[93] The Supreme Court's understanding of "under the color of law" stems from two cases: *United States v. Classic* and *Screws v. United States*.[94] The Court in *Classic* stated that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[95] This clarified that an actor works "under color of law" when their role by the state is what gives them power over another individual.[96] Likewise, the defendant in *Screws* was found to have acted "under color of law" since he was in

[90] *Id*.
[91] *West*, 108 S. Ct. at 2255.
[92] 91 S. Ct. 1999 (1971). (Actors working under the color of federal law that violate an individual's constitutional rights may be sued in civil court under the judicially created remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*)
[93] *Id.*, (citing *Classic*, 61 S. Ct. 1031, 1043 (1941)).
[94] *Screws*, 65 S. Ct. 1031 (1945); *Classic*, 61 S. Ct. 1031 (1941).
[95] *Classic*, 313 U.S. 299 (1941).
[96] Steve Libby, *When Off-Duty State Officials Act Under Color of State Law for the Purposes of Section 1983*, 22 MEM. ST. U. L. REV. 725, 725 (1992).

uniform arresting the decedent during the incident in question.[97]

The most obvious example of one acting "under color of law" is an on-duty police officer, since officers are clearly perceived as members of the state.[98] The *Screws* Court expanded this standard to include acts of officers who "overstep[ped] the line of their authority," though it does not include officers pursuing their personal agendas.[99] Police officer actions taken pursuant to the authority vested in them by the state are considered "under the color of law," especially if those officers abuse that power and violate state law.[100]

ii. *Deprivation of Constitutional Rights*

Once it is established that an officer has acted under the color of law, a court must next determine whether those actions deprived the plaintiff of their constitutional rights.[101] Although § 1983 itself does not grant rights to plaintiffs, it does create a vehicle one can use to bring a claim.[102] The right in question can be any right normally derived from the federal Constitution.[103]

The leading Supreme Court decision regarding the deprivation of constitutional rights by a state actor is *Screws v. United States*.[104] The case

[97] *Screws*, 65 S. Ct. 1031, 1038 (1945)
[98] Libby, *supra* note 96, at 726.
[99] *Screws*, 65 S. Ct. 1031, 1040 (1945)
[100] Libby, *supra* note 96, at 730.
[101] Schwartz, *supra* note 89, at 527.
[102] Baker v. McCollan, 99 S. Ct. 2689, 2694 n.3 (1979).
[103] Schwartz, *supra* note 89, at 528.
[104] *Screws*, 325 U.S. 91 (1945).

involved Georgic police officers who beat and killed a Black man.[105] The officer was charged with willfully depriving the decedent of his rights under the Due Process Clause of the Constitution based on his race.[106] The officer claimed he was not acting "under color of any law" and argued that it is only a federal offense for a state officer to violate the law of *his* state under the color of law, as opposed to the law of the federal Constitution.[107] The Court countered by explaining,

> The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under 'color of any law.' … The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when *and only when* someone is deprived of a federal right by that action.[108]

Thus, for an officer to be acting "under the color of law," their actions need not explicitly be illegal.[109] The illegal act is depriving the victims of their constitutional rights while acting as a member of the state.[110]

Screws does not involve § 1983, since it was heard before *Monroe*.[111] However, *Screws* is based off of the similar statute of 18

[105] *Id.*
[106] *Id*. at 93.
[107] *Screws*, 325 U.S. at 107-108.
[108] *Id*. at 108 (emphasis added).
[109] *Id.*
[110] *Id*.
[111] *Id*. at 93.

U.S.C. § 242, which makes it a criminal offense for an official to willfully violate the constitutional rights of someone within the United States.[112] Although § 242 was created shortly before § 1983, it also states that any wrongdoing must be committed while acting "under the color of law."[113] As a criminal statute, however, it requires the defendant to have committed the crime "willfully."[114] The question therefore became what part of the defendant's actions had to be willful: the physical action—in this case, Screws' beating of the decedent—or the deprivation of the deceased's constitutional rights.[115] The Court used the example of an officer who acted based on a statute that was already deemed by a court to be an unconstitutional violation of the First Amendment.[116] It was not the officer's enforcement of the statute, but rather his knowledge that it violated the Constitution, that violated § 242.[117] The officer, the Court explained, would be "in no position to say that they had no adequate advance notice that they would be visited with punishment. … When they are convicted for so acting, they are not punished for violating an unknowable something."[118]

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[112] 18 U.S.C. 242.
[113] *Compare* 18 U.S.C. § 242 *with* 42 U.S.C. § 1983.
[114] 18 U.S.C. 242.
[115] *Screws*, 325 U.S. at 94.
[116] *Id*. at 104.
[117] *Id*. at 104-105.
[118] *Id*. at 105.

This logic in *Screws* was further utilized by the Court in *Pierson v. Ray*.[119] Officers arrested the petitioners in *Pierson* after they violated bus segregation rules through peaceful protest.[120] After their cases were eventually dropped, the petitioners filed a § 1983 claim regarding their false arrests and imprisonments.[121] The *Pierson* Court examined the role of immunity in § 1983 claims.[122] The Court looked to *Monroe*, where the Court stated the officers could have defended their case by arguing that their actions were completed in good faith.[123] Instead, the officers in *Pierson* chose not to because they knew their search was unreasonable.[124] The Court reasoned that the officers' convictions did not mean that the statute prohibited officers from the defense of good faith and probable cause.[125] The *Pierson* Court ultimately ruled in favor of the petitioners, but it relied on the same logic as *Screws* and determined that an officer's knowledge of what is and is not constitutional is an essential aspect in deciding if their actions "under the color of law" violated a defendant's constitutional rights.[126]

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[119] *See generally Pierson v. Ray*, 386 U.S. 547.
[120] *Id.* at 549.
[121] *Id*. at 550.
[122] *Id*. at 553-554.
[123] *Id.* at 555-56; *Monroe*, 365 U.S. 167 at 170.
[124] *Pierson*, 386 U.S. at 557.
[125] *Id.*
[126] *Id*. at 558.

II. DISCUSSION

Because police are rarely held accountable for their use of excessive force, it is much easier for plaintiffs to receive justice through a civil § 1983 suit.[127] However, police officers are often protected by qualified immunity, so these suits rarely make it to court.[128] Public outcry after the death of George Floyd led numerous politicians to discuss how this can be addressed at the state level to increase police accountability and justice for their victims.[129]

A. *Qualified Immunity and § 1983 Claims*

The Court's numerous examinations of § 1983 cases further complicate the analysis of when the statute applies.[130] The decision in *Pierson* created the concept of qualified immunity, which protects government defendants from financial burdens, and a suit altogether, if they acted in good faith and it is unclear if a constitutional violation occurred.[131] State actors can assert qualified, or "good

[127] Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1798 n.145 (2016).
[128] Marcus R. Nemeth, *How Was That Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B. C. L. REV. 989, 992 (2019).
[129] *See generally* Torey Van Oot & Briana Bierschbach, *Political Antagonists United By George Floyd's Death to Forge Deal on Police Reform*, STAR TRIBUNE (July 23, 2020), https://www.startribune.com/walz-signs-police-accountability-bill-sparked-by-floyd-s-death/571875822/; Christopher Keating, *Connecticut Senate Approves Police Accountability Bill in Wake of George Floyd's Death After Often-Emotional 10-Hour Debate*, HARTFORD COURANT (July 29, 2020), https://www.courant.com/politics/hc-pol-connecticut-police-accountability-20200729-jmvodtnfzvgsrf5ovbybupdecq-story.html.
[130] Anthony Stauber, *When is a Right Not a Right?: Qualified Immunity After Pearson*, 39 MITCHELL HAMLINE L. J. PUB. Pol'y & Prac. 125, 142 (2018).
[131] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 13 (2017).

faith," immunity when they are being sued for violating constitutional rights.[132] Qualified immunity applies in all situations where the official operated "under the color of law", unless (1) the official violated the plaintiff's constitutional rights, and (2) the right the official violated was clearly established.[133] If both prongs of this test are satisfied, then the official is not protected by qualified immunity and can be sued in their individual capacity.[134] The order in which these questions must be answered, however, has wavered over time.[135]

The Supreme Court initially held in *Saucier v. Katz* that, in qualified immunity cases, a court must first determine whether a defendant violated a plaintiff's constitutional rights before determining whether they were working "under the color of law."[136] This allowed courts to elaborate on the constitutional question at hand.[137] A few years later, however, in *Pearson v. Callahan*, the Court reversed, holding that the *Saucier* process was not mandatory and that courts could examine the elements of a § 1983 claim in the order they preferred.[138] Justice Alito said the *Saucier* process, which required a court to do both if one element would not be met, was overly burdensome.[139] The decision in *Callahan*

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[132] Michael Silverstein, *Rebalancing Harlow: A New Approach to Qualified Immunity in the Fourth Amendment*, 68 CASE W. RES. L. REV. 495, 500 (2017).
[133] *Id.* at 499-500; *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
[134] *Harlow*, 457 U.S. at 818-9.
[135] *See Saucier v. Katz,* 533 U.S. 194, 201 (2001); *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). [hereinafter *Callahan*].
[136] *Saucier*, 533 U.S. at 201.
[137] *Id*.
[138] *Callahan*, 555 U.S. at 236.
[139] *Id*.

provided courts with the discretion to dismiss a claim if the right was not clearly established.[140]

As a result, the *Callahan* decision created a dramatic hindrance for future § 1983 claims.[141] The judicial system is failing in its notice-giving function by allowing courts to dismiss cases involving qualified immunity without determining whether a constitutional right even exists.[142] The "clearly established" prong of qualified immunity is supposed to protect officers from punishment for an act they did not realize was unconstitutional.[143] By providing other courts with discretion to not rule on constitutional questions, the Court is, in essence, allowing unconstitutional behavior to continue unnoticed.[144]

The Court made an example from *Screws* of an officer enforcing an unconstitutional statute.[145] That officer only knew his enforcement was a violation of the First Amendment because a court had already determined it to be.[146] For an officer to not receive qualified immunity, that officer must have notice of the constitutional violation.[147] If a case is dismissed before the court addresses the alleged constitutional violation, there is a possibility that a violation existed but

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[140] *Id*.; Colin Rolfs, *Qualified Immunity After Pearson v. Callahan*, 59 UCLA L. REV. 468, 473 (2011).
[141] Jack M. Beermann*, Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 141 (2009).
[142] Stauber, *supra* note 130, at 143.
[143] *Id*. at 142.
[144] *Id*.; Beermann, *supra* note 141, at 141.
[145] *Screws*, 325 U.S. at 104.
[146] *Id*.
[147] Beermann, *supra* note 141, at 141.

was not yet addressed by the courts.[148] While the case would fail because the right was not yet established, the right would *continue* to remain unestablished, making future claims for the same officer action unsuccessful.[149]

A further issue with determining what constitutes a "well-established" constitutional violation depends upon *when* that law was considered well-established. While many scholars assume well-established law is recognized in contemporary law and equity principles,[150] the Supreme Court instead looks to traditional common law, meaning the law that was well established in 1871 when § 1983 was enacted.[151]

These issues are only the tip of the iceberg regarding the complexity of qualified immunity jurisprudence.[152] However, they illustrate the difficulties in bringing forward a § 1983 case that can successfully make it to trial, let alone prevail before a judge or jury.

B. *Police Reform after the Killing of George Floyd*

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[148] *Id*.
[149] *Id*.
[150] Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 53 (1989).
[151] *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993)(*quoting Pierson v. Ray*, 386 U.S. 547, 554 (1967)); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 54 (2018). (It is worth noting that there is debate about the appropriateness of this citation, though it is considered the Court's current understanding).
[152] *See generally* Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L. J. 185 (2008) (describing the evolution of the relationship between qualified immunity and interlocutory appeals); Silverstein, *supra* note 132 (examining qualified immunity after the Court removed the subjective prong to its former two-pronged test).

Because politicians and activists knew that the system heavily favors police officers, they used the momentum after Floyd's death as an attempt to provoke reform. Officer Derek Chauvin was charged with unintentional second-degree murder, third-degree murder, and second-degree manslaughter in April 2021.[153] The city of Minneapolis awaited the verdict with bated breath and prepared for possible protests by calling in thousands of National Guard members and a heavy military presence.[154] Many worried that "the city [would] burn" if Chauvin was acquitted.[155] Tensions heightened after another Black man, Daunte Wright, was killed during a traffic stop in a Minneapolis suburb only a week prior to the end of Chauvin's trial.[156] People celebrated in the streets as each guilty verdict was read, chanting, "All three counts! All three counts!"[157] While people celebrated the verdict across the country, many also recognized the continued need for change and reform to prevent future police killings.[158]

i. *Minor and Possible Changes*

[153] Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR (Apr. 20, 2021), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial.
[154] Janelle Griffith and Deon J. Hampton, *Derek Chauvin Trial: Minneapolis and a Nation Anxiously Await Verdict*, NBC NEWS (Apr. 20, 2021), https://www.nbcnews.com/news/us-news/derek-chauvin-trial-minneapolis-nation-anxiously-await-verdict-n1264582.
[155] *Id*.
[156] Becky Sullivan, *Protests Grow in Minnesota and Around U.S. Over Death of Daunte Wright*, MPR NEWS (Apr. 13, 2021), https://www.mprnews.org/story/2021/04/13/npr-protests-grow-in-minnesota-and-around-u-s-over-death-of-daunte-wright.
[157] Shaila Dewan and Julie Bosman, *'We Matter': A Moment of Catharsis After the Derek Chauvin Verdict*, NEW YORK TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/us/verdict-reaction-chauvin-trial.html.
[158] *Id*.

Less than two weeks after George Floyd's death, Karen Bass, a House Representative from California, introduced H.R. 7120, the George Floyd Justice in Policing Act of 2020, into Congress.[159] The Act has passed in the House, but has yet to be voted on in the Senate.[160] If passed, the Bill will lower the criminal intent standard from "willful" to "knowing or reckless," limit qualified immunity, and authorize the Department of Justice to issue subpoenas in investigations of police departments for patterns or practices of discrimination.[161] However, the Bill has been stalled by a bipartisan Senate negotiations team with no future discussions in the works.[162]

Between May 25, 2020 and May 21, 2021, 25 state governments enacted legislation regarding police use of force; policy duty for officers to intervene, report, or render medical aid in instances of police misconduct; or policies relating to law enforcement misconduct reporting and decertification.[163] In addition, numerous states, cities, and governors have reduced police usage of chokeholds and tasers, increased body camera usage, and required transparency

[159] George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).
[160] *Id*.; George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).
[161] *Id*.
[162] Stacy M. Brown, *Senators Fail to Reach Deal on George Floyd Justice in Policing Act*, MINNESOTA SPOKESMAN RECORDER (Sept. 23, 2021), https://spokesman-recorder.com/2021/09/23/senators-fail-to-reach-deal-on-george-floyd-justice-in-policing-act/.
[163] Ram Subramanian and Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CENTER FOR JUSTICE (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder.

between police and the government.[164]

ii. *The Enhance Law Enforcement Integrity Act of Colorado*

On June 13, 2020, the Colorado General Assembly passed a groundbreaking police reform bill: S.B. 217.[165] This Act, known as the Enhance Law Enforcement Integrity Act, increases body camera usage, bans chokeholds, requires officers to intervene when other officers are using excessive force, and more.[166] S.B. 217 is unique because it is the first piece of state legislation that enables civilians to sue officers under state law – essentially making it a state version of § 1983.[167] The legislation explicitly states that "[q]ualified immunity is not a defense to liability pursuant to this section."[168] It also caps personal liability for police at $25,000, making it an easier pill for Colorado police to swallow.[169] The law does not take effect until July 1, 2023.[170]

III. ANALYSIS

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[164] Orion Rummier, *The Major Police Reforms Enacted Since George Floyd's Death*, AXIOS (updated Oct. 1, 2020), https://www.axios.com/police-reform-george-floyd-protest-2150b2dd-a6dc-4a0c-a1fb-62c2e999a03a.html.
[165] S.B.20-217, 72nd Gen. Assemb., Reg. Sess. (Colo. 2020); Russell Berman, *The State Where Protests Have Already Forced Major Police Reform*, ATLANTIC (Jul. 17, 2020), https://www.theatlantic.com/politics/archive/2020/07/police-reform-law-colorado/614269/.
[166] S.B.20-217, 72nd Gen. Assemb., Reg. Sess. (Colo. 2020); Saja Hindi, *Here's What Colorado's Police Reform Bill Does*, DENVER POST (Jun. 13, 2020), https://www.denverpost.com/2020/06/13/colorado-police-accountability-reform-bill/.
[167] Berman, *supra* note 165.
[168] S.B.20-217 § 13-21-131(2)(b), 72nd Gen. Assemb., Reg. Sess. (Colo. 2020).
[169] S.B.20-217 § 13-21-131(4), 72nd Gen. Assemb., Reg. Sess. (Colo. 2020).
[170] S.B.20-217, 72nd Gen. Assemb., Reg. Sess. (Colo. 2020); *Enhance Law Enforcement Integrity*, COLORADO GENERAL ASSEMBLY, https://leg.colorado.gov/bills/sb20-217 (last visited Dec. 3, 2020).

Colorado's S.B. 217 is leading the way in police reform legislation by forming a state alternative to § 1983[171] and removing the complications of qualified immunity.[172] Through S.B. 217, Colorado's citizens will have the ability to sue police officers in Colorado state court for violating the rights granted to them by the Colorado Constitution, the same way § 1983 allows U.S. citizens to sue police officers in federal court for violating the rights granted to them by the U.S. Constitution.[173] Because S.B. 217 has yet to take effect, it is unclear how this legislation will impact individuals who have had their rights violated by a government officer.[174] However, S.B. 217's state alternative is a necessary step toward protecting Colorado's citizens and other states should quickly follow suit. The legislature created § 1983 in response to Black Americans being killed extrajudicially, and S.B. 217 was created for the same purpose over 200 years later.[175] Further, state constitutions can protect Americans in other ways, as state constitutions can protect rights beyond what the federal Constitution requires.[176] Other states across the country should evaluate how their own legislatures can pioneer a form of justice that the federal judicial system simply cannot provide.

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[171] Berman, *supra* note 165.
[172] *Id*.; S.B.20-217 § 13-21-131(2)(b), 72nd Gen. Assemb., Reg. Sess. (Colo. 2020).
[173] Berman, *supra* note 165.
[174] *Id*.
[175] *Id*.; Cresswell, *supra* note 49.
[176] Jodi A. Jerich, *Considerations of the Arizona Legislature: The Effects of State Constitutionalism*, 35-DEC ARIZ. ATT'Y 30, 31 (1998) ("Additionally, some state declarations of rights include protections that have no explicit federal companion.").

A. *History Guides the Future*

The history behind § 1983's creation indicates that its purpose is to further racial justice.[177] Black Americans in the Reconstruction era were denied their newly found constitutional rights, and they had no redress available to them.[178] The South's lack of response to the rise of the Ku Klux Klan and its violence lead directly to the creation of § 1983.[179] Labelled as one of the Enforcement Acts, the Klan Act was created to promote and ensure equal protection for all Americans.[180] Congress created § 1983 as a response to states failing to protect their own citizens.[181] Although § 1983 did not grant any new rights to Americans, it does provid Americans with the ability to bring claims in court when state actors violated their rights.[182]

The relationship between Black Americans and the federal government during the Reconstruction era is paralleled today.[183] Two-thirds of Black Americans do not trust the police to treat them equally to white Americans. Considering that police kill Black men and boys at almost two and a half times

[177] Rosen, *supra* note 22, at 182; Cresswell, *supra* note 49.
[178] Rosen, *supra* note 24, at 126.
[179] Cresswell, *supra* note 49.
[180] *Monroe*, 81 S. Ct. at 475 (1961) (citing Cong. Globe, 42d Cong., 1st Sess., App. 68, 80, 83–85).
[181] Nahmod, *supra* note 54, at 1020.
[182] *Monroe*, 81 S. Ct. 73, 476 (1961); Nahmod, *supra* note 54, at 1020.
[183] Henry Louis Gates Jr., *How Reconstruction Still Shapes American Racism*, TIME (Apr. 2, 2019), https://time.com/5562869/reconstruction-history/.

the rate at which they kill white men and boys, that is understandable.[184] Furthermore, when these deaths occur, prosecutors very rarely bring charges against the perpetrators.[185] During the Reconstruction era, states did not protect the rights of Black Americans, so the federal government had to create an alternative route for justice. Now, over 200 years later, the federal government's option of § 1983 is no longer effective due to the complications of qualified immunity. Therefore, it is time for the states to create their own routes for justice.

B. *Embracing the Constitutional Floor*

States have started to recognize that they have a greater influence on police reform than the federal government does, as shown by the number of bills introduced following the mass racial justice protests of 2020.[186] A federal attempt at solving a local issue, § 1983 is unique.[187] Police departments are often run by cities or municipalities with little federal oversight.[188] Why, then, do the courts

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[184] Laura Santhanam, *Two-Thirds of Black Americans Don't' Trust the Police to Treat Them Equally. Most White Americans Do*, PBS (Jun. 5, 2020), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do.

[185] Madison Park, *Police Shootings: Trials, Convictions are Rare for Officers*, CNN (Oct. 3, 2018), https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html ("One researcher reported that there are about 1,000 police shootings each year in the United States. Between 2005 and April 2017, 80 officers had been arrested on murder or manslaughter charges for on-duty shootings.").

[186] *See* Sarah A. Seo & Daniel Richman, *Police Reform Won't Work Unless It Involves Federal and State Governments*, WASH. POST (Jul. 7, 2020), https://www.washingtonpost.com/outlook/2020/07/07/police-reform-wont-work-unless-it-involves-federal-state-governments/.

[187] Parsons, *supra* note 26, at 232.

[188] Gary Potter, *The Organizing of Policing*, E. KENT. U. POLICE STUDIES ONLINE (May 28, 2013), https://plsonline.eku.edu/insidelook/organization-policing.

rely on federal law to bring relief when a state official violates one's constitutional rights?[189] It seems more logical to look to the states' constitutions rather than to the federal Constitution.

It is fairly well established in American constitutional law that the federal Constitution and its interpretations by the Supreme Court are a "floor" for personal liberties and that states cannot go beneath that floor in their own legislations or constitutions.[190] However, state constitutions can raise protections well above the federal Constitution's floor. [191] Therefore, a claim under a state version of § 1983 would grant a state's citizens more protection than a § 1983 claim could in federal court. This approach is seen as somewhat controversial, particularly when the state constitution's provisions are similar to that of the federal Constitution's provisions.[192] State constitutional interpretation, however, is drastically different than federal Constitutional interpretation, if only due to the ease of amending and revising state constitutions.[193] State constitutions cover a larger number of topics, including more "policy-oriented" matters like education

[189] Seo & Richman, *supra* note 186.
[190] Marc L. Miller & Ronald F Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 227 (2008) (though this article argues that there are statutes in Arizona that go below the federal Constitutional limit, it still examines the legal understanding of the Supremacy Clause and its effects on state constitutions).
[191] *See e.g.,* Minnesota v. Hershberger, 444 N.W.2d 282 (Minn. 1989) (in which the Supreme Court of Minnesota determined that the Minnesota constitution's protection of the freedom of religion surpassed that of the federal Constitution).
[192] Scott L. Kafker, *America's Other Constitutions: Book Review of the Law of American State Constitutions*, 45 NEW ENG. L. REV. 835, 842 (2011).
[193] Kafker, *supra* note 192, at 852.

and the environment, and are overall more "democratic" in their creations.[194] These differences between state and federal Constitutional interpretations have led to an increased variance of state constitutional interpretations across the country, particularly in criminal law.[195]

The numerous protests after George Floyd's killing proved that a large portion of the population is advocating for police reform.[196] Although § 1983 was once the main piece of legislation behind civil cases against police officers, it is now unable to effectively grant justice due to the increasing complexities of its interpretation in federal courts. The Colorado General Assembly determined that § 1983 no longer guaranteed sufficient protection for Coloradoans, so it decided to give its constituents the ability to bring civil charges in state court without the qualified immunity defense.[197] If more states choose to follow suit and create their own forms of § 1983, state legislatures will be able to ensure their constituents are protected to the fullest extent of their state constitutions, which may be in excess of the federal Constitution can provide.[198] The guarantees of the Fourteenth Amendment are broad enough to force state courts to interpret what particular

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[194] *Id*. at 839.
[195] Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1156 (1985).
[196] Steve Crabtree, *Most Americans Say Policing Needs 'Major Changes'*, GALLUP (Jul. 22, 2020), https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx.
[197] S.B.20-217, 72nd Gen. Assemb., Reg. Sess. (Colo. 2020).
[198] Kafker, *supra* note 192, at 842.

rights are covered by it.[199] Similarly, states with stricter, more explicit protections written into their constitutions can use a state version of § 1983 to enforce these protections rather than needing to rely on the federal Constitution's floor.[200] The federal Constitution and §1983 are no longer sufficiently protecting Black Americans from police.[201] Therefore, it is time states take the same action Congress took in 1871 and pass legislation to enforce the protections granted by their individual state constitutions.

IV. CONCLUSION

Congress created § 1983 to protect citizens from having their constitutional rights violated by states that either refused to or were not able to sufficiently protect their citizens. Since its enactment and its implementation as a method for civil suits, § 1983 became the main vehicle for citizens to find justice after experiencing abuse at the hands of government officials. The complexities of the federal system, however, have made § 1983 an inadequate method for justice because it often prevents claims of constitutional violations from being heard in court. However, federalism allows states to act on their own and within their own

[199] Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L. J. 441, 513 (2000) (explaining how the Court's understanding of the Fourteenth Amendment drastically shifts with the evolving social norms).
[200] Kafker, *supra* note 192, at 842.
[201] *UN Experts Condemn Modern-Day Racial Terror Lynchings in US and Call for Systemic Reform and Justice*, UNITED NATIONS: HUMAN RIGHTS (Jun. 5, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25933.

boundaries. States can add their own protections that are greater than what Congress and the federal Constitution can provide. It is time for more states to join Colorado in creating their own versions of § 1983 and to give their citizens the power to achieve the justice that the federal system cannot offer. In doing so, states can follow the example of Reconstruction-era Congress by ensuring their constituents are fully protected.