# POLICING PROTEST

The Post-Democratic State and
the Figure of Black Insurrection

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*Policing Protest*

BUY

**GLOBAL AND INSURGENT LEGALITIES**

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Cover art: Protesters in Washington, DC, demonstrate
against the death of George Floyd under the knee of
policeman Derek Chauvin on May 31, 2020, in Minneapolis.
Photo by Alex Wong/Getty Images.

*For Jodi, with my love*

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# Policing Protest and the Post-Democratic State

And protest begot reaction.
—SAMUEL WALKER, *Popular Justice* (1980)

THIS BOOK ADDRESSES NARROW QUESTIONS: Has the policing of protest become more aggressive and violent? If so, how did this happen? What does this mean? The answers to these narrow questions lead to disturbing conclusions with broad theoretical and normative importance. Yes, the policing of protest has become more hostile to protesters. Systematic abuse of those exercising their First Amendment rights points to the emergence of a distinctive state formation I call *neoliberal authoritarianism*. Neoliberal authoritarianism is a state formation that is post-democratic and postlegitimation. Those political subjects who are affectively attached to this state—who provide it political support—enjoy its expressive cruelties. The narrow question of policing protest provides an opening through which we can see that we have entered a new political era of government and political sensibility in the United States.

Protest policing has become more aggressive, violent, and cruel. On September 24, 2011, after a march to Union Square, a small group of women involved with Occupy Wall Street (OWS) protests were captured by the New York Police Department (NYPD) within orange police netting. They were then

cruelly, and unnecessarily, pepper sprayed by now-retired NYPD Deputy Inspector Anthony Bologna. As they fell to the ground in pain, *New York Daily News* reporters were nearby, and video of the attack went viral. Less visible were the vindictive NYPD beatings of Occupy activists in Zuccotti Park under cover of the night on Occupy's six-month anniversary, March 17, 2012. As they threw peaceful Occupy protesters to the ground and battered them, NYPD officers repeated, by rote, "Stop resisting!" Officers of the NYPD say, "Stop resisting," when they are beating someone and others are witnessing or videotaping their abuse of force. Between September 17, 2011, and September 17, 2012, the message of Occupy's demonstrations seeking to draw attention to deepening economic inequalities, and the capture of the state by oligarchs and corporations, became derailed by the persistently hostile protest policing of the NYPD.

Seven years earlier, protesters arrested when New York City hosted the 2004 Republican National Convention (RNC) were subjected to excessive, degrading, and in some cases torturous custody for "processing" after their arrest. Arrestees endured detentions lasting over twenty-four, thirty, forty, and, in some instances, over fifty hours. In one case, a woman on her way to purchase a milkshake was swept up in an indiscriminate NYPD arrest and spent over fifty hours in custody. Other arrests were clearly targeted based on police intelligence gathering. Conditions at Pier 57—the hastily constructed detention facility for RNC arrestees located in a former bus depot—were filthy, with grime and hazardous chemicals on the floor. Makeshift cells were fashioned from chain link fencing topped with razor wire. With insufficient and overflowing porta-potties, many detainees had no choice but to relieve themselves on the floor. No sanitary items were available for women. Police officers also subjected protesters and arrestees to verbal abuse. Over 1,800 were arrested during the RNC, and more than 90 percent had their charges dismissed or were acquitted.[1] But their time in custody after their arrest meant that the NYPD had already punished the protesters extrajudicially.

On the evening of December 4, and into the early morning hours of December 5, 2014, protesters expressed outrage at a Staten Island grand jury's failure to indict NYPD Officer Daniel Pantaleo for Eric Garner's death. In response, the NYPD deployed a Long Range Acoustic Device (LRAD) in close range against protesters, chasing after them and repeatedly engaging the weapon against them from just ten feet or even a car's width away. An LRAD is also known as a sound cannon. It is a weapon developed initially for the military, and it uses sound as a method of obtaining compliance through pain.

Over the last twenty years, the NYPD, in conjunction with the City of New York's other governmental bodies, denies large antiwar marches access to public streets and public parks, and denies union demonstrators access to plazas. If protesters refuse to be penned and insist on their rights to assemble in public parks, they face abuse and arrest, if not brutality and violence. If they comply with the NYPD's restrictive conditions for protests, they still risk abuse and arrest, if not brutality and violence.[2]

Scholarship on policing often underscores that in the United States, policing is decentralized. Is abusive protest policing unique to the NYPD? In Oakland, Scott Olsen, who survived two tours of duty in the Iraq war, was nearly killed participating in an Occupy protest when he was shot in the head by a bean bag round (a nylon bag filled with lead pellets fired from a shotgun). Police then fired a flashbang at those who tried to help him. He suffered a fractured skull, broken neck vertebrae, brain swelling, and permanent brain damage.[3] One night at Standing Rock Reservation in the Dakotas, police injured more than three hundred—with twenty-six people requiring hospitalization—when they shot those protesting the Dakota Access Pipeline with water cannons in freezing weather, and with projectiles such as rubber bullets.[4] Police at Standing Rock partnered with TigerSwan in their response to the protests (despite TigerSwan not being licensed to provide security services in the state of North Dakota at that time). TigerSwan is a Pentagon and State Department contractor and considered the protesters to be an insurgency requiring tactics that included infiltration, surveillance, counterpropaganda disseminated through media outlets, and force to suppress them.[5] During the uprising demonstrating outrage over the killing of black teenager Michael Brown by white police officer Darren Wilson, Ferguson, Missouri, looked like a battlefield in a war zone. From Oakland, California, to New York City, from North Dakota to Ferguson, Missouri, police departments engage in abusive protest policing. In other words, there appears to be a broad pattern of aggressive and violent protest policing in the United States that goes beyond any one police department.

Those who study the policing of protest describe how, during the 1960s, protest policing was undisciplined and used force abusively. When police would encounter protesters, according to this model of policing protest known as escalated force, police would mobilize a show of force and expect protesters to back down and disperse. If protesters failed to disperse, then police would confront them and escalate their level of force until they did. Under the model of escalated force, protesters were not exercising First Amendment rights. They were a mob. According to studies of protest policing during this

era, escalated force tended to produce violent, disorderly outcomes as police aggression incited an aggressive response from protesters. One well-known example of the escalated force model is the 1968 Democratic National Convention (DNC) held in Chicago.[6] Old videos (now uploaded to YouTube) show police chasing protesters, trying to catch someone to beat. A high-level commander described the police during the event as "out of control."[7]

A number of vectors converged to transform the policing of protest away from the escalated force model. Supreme Court rulings on speech and assembly in a "public forum"—such as public sidewalks, parks, and streets— required police to respect the First Amendment rights of demonstrators, even if speech disturbed onlookers. Other Supreme Court rulings led to controls on police use of force. In 1967, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, more popularly known as the Kerner Commission, after its chair, Illinois Governor Otto Kerner, to study why the urban riots occurred and how to prevent them. The commission issued a report on civil disorders in urban areas during the 1960s that included trenchant critiques of ordinary police conduct. Other presidential commissions also established to study policing and violence during this period echoed many of these findings and criticized inflammatory overreactions by police to demonstrations. A startling percentage of police officers freely expressed themselves using racist language. Often, police were not merely verbally abusive, but physically abusive to city residents. They were poorly trained and few had been to college. Images in the media of civil rights marchers in Birmingham or Selma, Alabama, or protesters at the 1968 DNC being attacked by police, or antiwar demonstrators being killed by the National Guard at Kent State University, shocked the national conscience. The public reception of commission reports, and gradual support for reform by the International Association of Chiefs of Police, set in motion changes in policing to make police more accountable legally.[8] Police should function as a law enforcement agency, not a group of vigilantes who inflict arbitrary, on-the-spot, back-alley "justice" in lieu of an arrest. Training for policing demonstrations also changed by the early 1970s. These vectors converged to institutionalize a transformation of protest policing in a more tolerant direction.

Beginning in some cities in the 1970s, and through the 1980s and into the 1990s, the negotiated management model of protest policing became established as the dominant model for policing protest. Police should understand their role as helping to protect First Amendment rights. They should encourage demonstrators to apply for permits, and they should reach out

to political groups and establish lines of communication. They should even work with groups planning acts of civil disobedience as part of a demonstration, negotiating how arrests should be conducted. Police should expect and tolerate a certain amount of disruption to everyday routines when citizens exercise their First Amendment rights. Not only should police maintain lines of communication prior to events, they should engage in dialogue with protesters throughout a demonstration. During protests, police should avoid using force, and avoid making arrests except where absolutely necessary. When arrests occur, they should be conducted only after numerous warnings, and they should be conducted in as orderly a manner as possible to avoid unnecessary injury, or agitating protesters and onlookers, in order not to threaten public safety. After arrests, booking processes should be as efficient as possible.[9]

Negotiated management presents a stark contrast with contemporary protest policing. In the 1960s, Madison, Wisconsin, police looked like the military when they confronted student protesters. That changed when David Couper took over as police chief in 1973. Police should appear like human beings or fellow citizens at a protest; they should not appear like an occupying army. At a massive antinuclear protest in New York City during the early 1980s, there were more arrests than on any given day at the 2004 RNC, but arrestees were processed in a matter of a few hours, not days.[10] When Chicago hosted the 1996 DNC, protesters found it difficult to get arrested. One study of groups that used disruptive forms of civil disobedience in the mid-1990s reported that the use of force by police when encountering disruptive protest tactics was strikingly rare.[11]

Protest policing, as the contrast between the examples of contemporary abusive protest policing above and the description of negotiated management indicates, has changed again. The policing of protest no longer functions according to the tolerant norms of negotiated management. As I describe in this book, today police enjoy dressing aggressively to intimidate protesters while policing protests (they enjoy dressing in an intimidating manner for ordinary patrols as well). Police now arrest protesters for the most minor violations. They make preventative or proactive arrests—arrests that may lack a legal basis because they occur prior to a legal infraction and are based on police prejudging certain protesters to be lawless. Often, protesters may be just snatched from a group and arrested. Instead of a warning, a commander will point and an officer will snatch and arrest the demonstrator. There is no dialogue. There may, though, be verbal abuse from police directed toward protesters. Force may be used gratuitously, and some officers look forward

to an opportunity to beat protesters.[12] Custody incident to an arrest for processing is lengthy, if not punitive. Instead of order, police may actively create disorder to scare protesters by kettling them—by trapping a group so they cannot escape, and then arresting all those trapped in a mass arrest. Contemporary protest policing provides a dramatic contrast with the negotiated management model.

When did the shift from negotiated management to more aggressive and violent protest policing practices occur? This question is significant because its answer highlights or diminishes different forces. Almost by convention, many scholars point to the attacks of September 11, 2001, as causing more repressive practices in law and policing. Whether motivated by an unreflective 9/11 narrative device, or forcing a theory of unitary sovereign decisionism upon an institutionally plural and decentralized state structure, the attacks of September 11, 2001, did not cause the policing of protest to become more hostile.[13] The policing of protest in the United States was already becoming less tolerant of democratic practices, and more aggressive and violent, prior to the attacks of September 11, 2001. Reaction to those attacks amplified a transformation already in process, but it did not cause the change.

As is well known, the Seattle Police Department reacted forcefully to those protesting neoliberal globalization when Seattle hosted the World Trade Organization meetings in 1999. Perhaps less well known to those outside of New York City, the NYPD responded to the 1998 Million Youth March by riotously rushing the stage, with helicopters hovering from above, the instant time ran out on their permit. The NYPD also refused to negotiate with demonstrators, trampling them with horses instead, at the Matthew Shepard Emergency Demonstration, also in 1998.[14] So negotiated management was already unraveling before September 11, 2001. The security institutions, personnel, weaponry, and culture that have been built, hired, funded, and communicated in the aftermath of those attacks were not the beginning but the intensification of changes already proceeding in the United States. To grasp how protest policing in the United States has become increasingly inimical to democratic practices, we must not think reactively to an event or a decision, but explore more complex institutional and cultural transformations.[15] We need to understand the emergence of a distinctive state formation.

A range of forces converged to lead the policing of protest to become more legally accountable and accommodating to marches and demonstrations in the 1970s–1990s, and a range of reactionary vectors converged to lead protest policing to become less hospitable to mobilizations and assemblies of the

people by the late 1990s. These reactionary forces began to constellate in the 1960s and 1970s, and they were set in motion by three interrelated crises: a crisis of democracy, an urban fiscal crisis, and a crime crisis. The reactions to these crises set in motion transformations in political culture and law, urban political economy, and policing and punishment. These vectors of reaction became sufficiently institutionalized by the 1990s that a noticeably distinctive model of policing protest emerged—one that I am calling the security model of policing protest.

### Crisis of Democracy

The crisis of democracy represents the reaction against democracy. Harvard University's Samuel Huntington argued, "Marginal social groups, as in the case of blacks, are now becoming full participants in the political system," creating a "danger of overloading the political system" with their demands.[16] Huntington added his voice to those who perceived in the protests of the 1960s a "crisis of democracy"—a crisis produced by too much democratic mobilization. American political culture was developing an exhaustion, if not an antipathy, toward democracy.

For those with more democratic sensibilities, the demonstrations of the Civil Rights movement and the urban riots of the 1960s engendered a sense that the United States faced a legitimation crisis.[17] The Kerner Commission's report expressed this orientation when it criticized policing in urban areas as inconsistent with the role of police in a democratic society. It urged that the gap between democratic norms of equality and the reality in major cities of material deprivation and symbolic degradation of black people be reduced. The Kerner Commission exemplified the orientation to social democracy that was hegemonic in the 1960s, and its report not only became the focus of serious discussion, it also became a best seller.[18] From this social democratic orientation, urban civil disorder represented a legitimation crisis.[19]

Richard Nixon splintered the hegemony of the Kerner Commission's more social democratic orientation with his successful campaign for the presidency in 1968. When the Kerner Commission's report was released, he complained that the report blamed everyone for the riots except those who rioted.[20] He accepted the Republican Party's nomination at the RNC on behalf of the "great majority of Americans, the forgotten Americans—the non-shouters; the non-demonstrators," who were "not guilty of the crime that plagues the land."[21]

Nixon projected the voice of conservatives who had railed against civil rights demonstrations like the 1964 March on Washington.[22] He also made them matter legally with his four appointments to the Supreme Court, including its new chief justice, Warren Burger. The Burger Court buried important legal doctrines holding that when there was a conflict between constitutional values like free speech and property rights or commerce, the First Amendment held a preferred position due to the constitutional commitment to democracy. The preferred position doctrine had guided the Court for decades in the middle of the twentieth century. Under the Burger Court, this hierarchy of constitutional values was upended and commerce was privileged over speech rights.

The Burger Court's post-democratic jurisprudence overturned earlier legal precedent that demonstrators should be able to express themselves in public spaces even if those public spaces were under private ownership. More compelling to the Burger Court than the value of public space for a democracy was extending the image of a homeowner's power to control what they chose to listen to in their own home by analogy to the owner of a shopping mall. By permitting the power of authoritarian government over privately owned public spaces like shopping malls, it enabled authoritarian government over a space that was becoming socially, geographically, and economically significant to American life in the 1970s and 1980s. Malls exercised their control over space for purposes of aesthetic governance to create environments that incited consumerism, subsuming and simulating the appearance of community by foreclosing the appearance of political antagonism.

In the late 1970s and through the 1980s, developers were introducing malls to cities as a component of urban regeneration. By the 1990s, the logic of the mall was guiding urban design. With most of their manufacturing jobs of the Fordist era gone (named after manufacturing pioneer Henry Ford), cities were being redeveloped according to post-Fordist forms of symbolic or cultural production and branded aesthetic experiences.

I argue in the first chapter that as significant as the privatization of space is, of perhaps greater importance is how public urban spaces have been governed since the 1990s. I look at how New Jersey, one of the few states to require malls to respect state constitutional speech rights, understands what those rights of expression mean in that state's shopping malls. The New Jersey State Supreme Court requires that the exercise of speech rights not be disruptive to commerce and speaks supportively about zoning speech to a "community booth." As cities redirect urban political economies to post-Fordist

aesthetic experiences, New Jersey's cramped model of speech rights like-
wise migrates from privately owned suburban malls to guide First Amend-
ment jurisprudence in urban public spaces. Some political theorists rightly
criticize the authoritarian governance of privately owned public spaces like
malls because of the detrimental normative consequences for democracy.[23]
As important as those insights are, I go further to argue that the limited
understanding of speech rights available to speakers in New Jersey shopping
malls supplies the juridical key for comprehending how the right to expres-
sion has been reformatted within cities engaged in neoliberal, post-Fordist
symbolic production. That is, authoritarian government introduced as a
model for control over privately owned public space is now the model for
government of urban public space under neoliberal, post-Fordist conditions
of political economy.

### Urban Fiscal Crisis

The second crisis of the 1960s and 1970s that set in motion forces of reaction
that shape the security model of protest policing was the urban fiscal crisis
of the 1970s. In 1975, New York City was unable to find purchasers for its
debt. The Ford administration made a national example of New York, and
only provided the city help on the condition that New York dismantle its
support for social reproduction and govern residents instead through social
austerity.[24] In the 1980s and 1990s, the administrations of Ronald Reagan
and George Herbert Walker Bush severely slashed federal funding for urban
programs, exposing cities directly to markets, forcing them to govern for
markets, and compelling cities to become market actors themselves. In other
words, urban governments were compelled—as New York was—to become
neoliberal: a practice of governing for markets and embedding market logics
within practices of government.[25]

In addition to creating favorable environments for the finance, insurance,
and real estate industries, cities began to reorient their infrastructures away
from residents and toward nonresidents who might visit the city.[26] Having
lost not only substantial numbers of manufacturing jobs but also residents,
cities like New York sought to bring those who lived in the suburbs—or other
tourists and conventions—back to the city as a source of revenue. The city was
now a place for visitors to shop, dine, patronize museums or the theater, enjoy
art galleries, visit an aquarium, and attend sports events. Urban political econ-
omy was becoming post-Fordist, and cities focused on producing aesthetic

environments conducive to cultural experiences and symbolic production. They branded themselves (I ♥ NY) and marketed themselves in competition with other cities seeking to do the same thing.[27]

Cities also compete to host mega-events to brand and market themselves. The most significant mega-events are classified as national special security events (NSSEs), the highest security classification in the United States. Examples of NSSEs are presidential inaugurations, presidential funerals, major international summits, major party conventions, the Olympics, and the Super Bowl. When a city wins a bid to host a mega-event classified as an NSSE, police executives will often visit a city that is presently hosting an NSSE to prepare for managing NSSE security in their own city. From the perspective of the host city's branding and marketing goals, success in producing the spectacle of a mega-event means that there can be no disruption to the event, whether the disruption is a terrorist attack, some other emergency or disaster, crime, or a protest. Protest is represented not as a democratic practice but as a threat equivalent to crime, or any other risk to the event that must be prevented. Mega-event and NSSE security planning materials reinforce the market-based calculations of entrepreneurial cities.[28]

In chapter 2, I examine how the NYPD policed the 2004 RNC, and how it prepared for the 2004 RNC by hosting the 2002 World Economic Forum (WEF). I argue that when cities host mega-events, they are left with a security legacy that persists in the city after the event is over. This legacy can be armored vehicles, weapons, or security cameras that become embedded within the fabric of the urban environment. In the case of New York, hosting the 2002 WEF and the 2004 RNC would lead to a security legacy of institutional development in two areas: expanding the capacity of the NYPD's Intelligence Division and changing arrest policies linked to its mass arrest processing. Although the NYPD's 2004 RNC practices would be judicially legitimized at the time as necessary for the exceptional event of the 2004 RNC, politically motivated intelligence gathering and needlessly punitive arrest processing practices have become institutionalized as normal policing practices and have been redeployed, as I argue in later chapters, against Occupy Wall Street and #BlackLivesMatter protesters in New York.

Scholarly characterizations of protest policing at major events frame its practices as extensions of actuarial calculations for efficient risk management. This kind of efficient risk management calculation is central to portrayals of neoliberalism as coldly utilitarian in its minimization of costs. Because after-action assessments of the NYPD's WEF protest policing show how the NYPD enjoyed intimidating demonstrators, and because the NYPD's

harsh policing of the 2004 RNC led to the largest civil settlement arising out of abusive protest policing in U.S. history, representations of neoliberal protest policing as calculatingly, economically efficient are misplaced and may overlook sources of political support for the neoliberal state that enjoy its cruelties. Perhaps the neoliberal state's practices of protest policing—or police practices more generally—derive political support because of, and not despite, their abuses.

### The Crime Crisis

In the 1960s, conservatives fueled perceptions of a crime crisis by conflating, in their resistance to the Civil Rights movement, civil rights, crime, protest, and violence. Where supporters of the Civil Rights movement may have seen core First Amendment activities such as marches and demonstrations, or where supporters and participants may have seen citizens rightfully seeking access to public places and services guaranteed to them by the Constitution, conservatives saw violations of state segregation laws. In a word, they saw crime.[29] Nixon's Southern strategy to split the Democrats and win the White House echoed these ostensible law-and-order themes that likewise elided protest and political equality with crime and violence. His 1968 RNC speech discussed above valorized the "non-demonstrators" who were "not guilty of the crime that plagues the land."[30] The "crime" of the crime crisis was always more than ordinary crime. The forces mobilized by the crime crisis reacted against the crime of political equality, and the crime crisis supplied affective attachment to authoritarian policies of policing and punishment.

Though Nixon would announce a "war against criminal elements," the presidencies of Reagan, Bush, and Bill Clinton were the ones that fought this war with institution building, resources for state and municipal police, and political commitment. Crime was not merely racialized during the 1980s and 1990s, but politicized and militarized. Crime legislation passed in even-numbered—that is to say, election—years. The 1984 Crime Bill expanded "asset forfeiture," making it easier to seize assets thought to be associated with a crime, providing a source of revenue to police that could be used to purchase military-grade weaponry, vehicles, and uniforms.[31] Clinton expanded state and local police access to military surplus through the 1033 Program. Police became better armed and enacted a spectacle of shock and awe in the course of their normal duties.[32]

Police also began to target minor forms of disorder with zero tolerance in the 1990s. In 1982, George Kelling and James Q. Wilson's essay "Broken

Windows" provided the ideational template for this transformation of local police forces. Pushing back against the Kerner Commission's orientation to policing as law enforcement, the "Broken Windows" concept of policing urged police to go beyond law enforcement to target the disorder of the visibly poor. The authors quoted an officer who described how he policed public housing: "We kick ass."[33] When Rudy Giuliani won election to become New York City's mayor in 1993, he appointed "Broken Windows" adherent Bill Bratton to become the NYPD commissioner. Under Bratton, the "Broken Windows" concept of policing ruthlessly transformed the NYPD and became institutionalized.[34] Bratton and Giuliani spoke all over the United States and the world promoting the "Broken Windows" concept of policing.[35] Between these promotional efforts, and with high-level executives from the NYPD accepting positions with other major city police departments or work with private security firms, the "Broken Windows" concept of policing transformed policing all over the United States.

The transformation of policing in the direction of zero tolerance, quality of life, order maintenance policing—and enjoyment of "kicking ass"—was at odds with the principles of tolerance and restraint informing the negotiated management model of protest policing. It also injected an affective charge into policing much like patrolling in "battle dress uniforms" did. Within only a few years, negotiated management would erode under the pressure of order maintenance policing inspired by "Broken Windows." Mobilization motivated by the crime crisis set in motion transformations in policing that would lead to a more aggressive and violent model of protest policing.

In chapter 3, I describe how the NYPD's policing of OWS protests reacted excessively and dramatically to the most minor disorder. In this regard, I agree with other protest policing scholarship finding that NYPD protest policing is an extension of their commitment to the "Broken Windows" concept of policing.[36] I diverge from this scholarship insofar as its portrait of NYPD policing of protest presents a picture of a hyper-Weberian force that ruthlessly and dispassionately polices law to its letter. In contrast, I attend to the excesses in the NYPD's protest policing. Characterizing the NYPD as strictly enforcing the minutiae of legal regulations does not address the use of disproportionate force to conduct an arrest for something so minor as a protester briefly stepping into the street when police wanted the march to stay on the sidewalk. It cannot account for the NYPD's extralegal practices such as baseless arrests or kettling protesters to scare them. Nor can it account for the officer who screamed at an Occupier in custody, "You motherfucking

protesters, every time you come back to that park, we're going to kick your ass!" In other words, I underline affective attachment expressed by members of the NYPD to defeating and degrading OWS.

We see this NYPD institutional dedication to defeating OWS in the excessive lengths of custody Occupy arrestees suffered. We also see this dedication to defeating OWS with the NYPD's deployment of the Intelligence Division's resources against OWS. Both the mass arrest processing and the use of the Intelligence Division against nonviolent protesters built upon the NYPD's policing of 2004 RNC protesters. The NYPD not only criminalizes protesters like OWS, it seeks to defeat them. I refer to this institutional ambiguity in NYPD protest policing that goes beyond criminalizing protest, but stops short of war, as the security model of protest policing. This security model of protest policing is underwritten politically by subjects affectively attached to the defeat of protesters critical of neoliberal authoritarianism.

By looking at how the NYPD policed the 2004 RNC in conjunction with how it policed OWS, we can understand how protest policing has become more hostile to public assemblies and demonstrations. The increasingly authoritarian policing of protest that has taken shape in the United States since the 1990s is the product of two institutional influences. On the one hand, it results from the vertical influence of protest policing knowledge, strategies, institutional supports, resources, and weaponry that are disseminated from federal sources when cities host NSSEs like the RNC. On the other hand, it results from the horizontal influence of the "Broken Windows" concept of policing that is disseminated by the circulation of police managers through different police forces and private security firms, and by its promotion from boosters in the 1990s and 2000s. Therefore, the aggressive policing of protest is overdetermined. New York is a city that is well known both for the mega-events that it hosts and for its commitment to the "Broken Windows" concept of policing, and the NYPD is exemplary for its aggressive protest policing.

## Communicative Production

Protest policing has become expressively aggressive and violent. Moreover, images of protesters being pepper sprayed or subjected to flashbangs, tear gas, LRADs, and water cannons, or being confronted by riot police dressed for battle, or by armored vehicles designed to withstand land mines while on patrol in Iraq, circulate widely in the news media, on social media, and on YouTube. If these images are so widely disseminated, then why do we not see

the nation's conscience shocked and a reform movement mobilized to rein in protest policing today like the reform of protest policing that took shape in the 1970s?

Capitalism in the United States—and globally—has become more communicatively productive. "Communicative capitalism" depicts how communication has become subsumed within capitalism.[37] Capitalism has become communicative and incorporates, mediates, arranges, and fragments virtually all spheres of life. By engendering a reflexive experience of communicative potential inciting new market niches to express subjective preferences, and by creating nonunified experiences for diverse users, communicative capitalism incites a disintegration of the disciplined, social democratic subject symbolically undergirding social welfare democracies in the 1960s.

The centrality of the political subject oriented to a social democratic horizon has been displaced and takes up a position of communicative equivalence alongside other subjective orientations. On the one hand, the reflexive experience of communicative multiplicity enables a subjectivity that enjoys interpretive pluralism and communicative multiplicity for its own sake. We can call this manner of subjectivity "whatever being."[38] Whatever being enjoys, and is flexibly open to, the communication of . . . whatever. On the other hand, whatever being has a doppelganger. Under conditions of reflexive, communicative multiplicity, the doppelganger's preferences are as good as anyone else's (since "everyone is biased"), but the doppelganger is not open to whatever. The doppelganger remains stuck within—or affectively attached to—the political coordinates of 1968. The doppelganger's enjoyment of its citizenship has been stolen by rioting black people and the liberal elites who coddle them at the doppelganger's expense (a psychic tax expressed in overt political discourse as "taxes"). In the election of 1968, Nixon (and George Wallace) provided a communicative space for these "forgotten Americans," and communicative capitalism provides a habitat enabling these forgotten Americans to enjoy communicating their resentment for having lost the enjoyment of their citizenship.

Under the conditions of communicative capitalism, these disintegrated subjectivities proliferate. Moreover, with the viral circulation of memes, the image of police violence is disintegrated. Indeed, the social itself is disintegrated by the circuits of communicative capitalism and the technologies of control they enable. Under these conditions of communicative capitalism, I argue in chapter 4, images of police abuse of protesters—like the viral circulation of protesters being pepper sprayed—fail to shock a social conscience. They become the opportunity for a meme. And maybe the meme is funny,

sort of. These images can be interpreted in a multitude of ways. Or, more disturbingly, they are enjoyed. They are not, however, understood as images of a wrong. Therefore, despite protest policing becoming more aggressive and violent, the circulation of these images of protesters being abusively policed fails to shock a hegemonic subject's conscience under conditions of communicative capitalism.

## The Haunting Figure of Black Insurrection

The erosion of negotiated management, a more tolerant and dialogic relation between protester and police, and the emergence of a more hostile form of protest policing I am calling the security model occurred due to a series of reactions to three crises of the 1960s and 1970s: a crime crisis, an urban fiscal crisis, and a crisis of democracy. The reaction to the crime crisis led to zero tolerance policing that targeted perceptions of disorder. This style of policing focused on aesthetic perceptions and affective encounters, such as fear of crime in the presence of the visibly poor. This aesthetic dimension to the "Broken Windows" concept of policing complemented transformations in urban political economy in response to the urban fiscal crisis of the 1970s that prioritized symbolic or cultural production. Not only did aesthetic government become an integral aspect of everyday urban post-Fordist production, it became vital for the controlled production of spectacle when cities hosted mega-events. The sense of antipathy toward political mobilization spurred by the crisis of democracy accommodated the institutional developments produced by the reactions to the crime crisis and the urban fiscal crisis.

The spectral figure of black insurrection haunts all three crises. The "crime" of the crime crisis is the crime of the Civil Rights movement—demonstrations claiming rights to political and civic equality. The response to the crime crisis also seeks to replace welfare, which reactionaries view as being for black people, with authoritarian policing and punishment. The attack on institutions providing for social reproduction is therefore also haunted by the spectral figure of black insurrection. The crisis of democracy, in turn, is a reaction against black political mobilization overloading the governmental system. In sum, the state of neoliberal authoritarianism is haunted by the spectral figure of black insurrection, and it is built upon the premise of repressing this haunting figure's appearance.

Perhaps we should not be surprised, then, that we can see all three crises intersecting with particular intensity in the policing of #BlackLivesMatter

(BLM). Simmering and long-standing anger at the institutionalized degradation ritual of stop and frisk garnered national attention and nationwide protests with the police killings of Eric Garner and Michael Brown. Reflecting the institutional developments reacting to the crime crisis, police in Ferguson, Missouri, responded with an excessively militarized mobilization. Police in New York engaged in pervasive surveillance and infiltration of BLM protests. As part of the reaction to the urban fiscal crisis, New York acquired two LRADs in its preparations to host the 2004 RNC. As part of the security legacy of having hosted that event, it still possessed LRADs in December 2014, when BLM protested a Staten Island grand jury decision not to indict NYPD Officer Pantaleo, whose chokehold on Eric Garner was responsible for Garner's death. Though justified in 2004 as a glorified public address system, the NYPD has only used LRADs at protests and routinized its LRAD use against BLM protests. Finally, the reaction to the crisis of democracy creates an accommodating political culture for the postlegitimation, post-democratic response of the Memphis Police Department (MPD) to BLM of politically targeted surveillance and blacklists in violation of a forty-year-old judicial consent decree forbidding such practices.

The policing of BLM protests exhibits the forward edge of contemporary protest policing. Today, protest policing is developing two postlegitimation, post-democratic tendencies. The first is an increasingly militarized response to protest, and the second is the increased deployment of postdisciplinary control technologies to monitor and manage protests.

The militaristic response to BLM in Ferguson and New York indicates how the spectral figure of black insurrection continues to haunt contemporary policing and American political culture. This militaristic response acknowledges the appearance of a political antagonism and a political subject. This political subject—BLM and its spectral evocation of the haunting figure of black insurrection—represents a relation of enmity to the state formation of neoliberal authoritarianism. The mobilization of forces by neoliberal authoritarianism to defeat this political subject acknowledges and responds to this political subject. This communication of mutual enmity has important theoretical significance.

For scholars like Frank Wilderson who work in the field of Afro-pessimism, the state, civil society, indeed, the Human, is constituted in a relation of ontological antagonism to Blackness. The practice of enslaving the Black established by negation a world; it constituted being through the nonbeing of the Black. From the perspective of Afro-pessimism, then, Blackness is not a social position but is outside social relationality as a "structural position

of non-communicability in the face of all other positions."[39] Ontologically structured as a position of social death or a human void, Blackness is "perpetually open to gratuitous violence."[40] The militarized response in Ferguson and New York would seem to confirm this ontological analysis.

In chapter 5, I argue that we understand the antagonistic relation between police departments and BLM better as a political antagonism, rather than as an ontological condition. The militarized response to BLM in Ferguson and New York exceeds normal responses to crime in civil society. As Carl Schmitt famously urges, the friend-enemy relation expresses the essence of politics, and it is the "most intense and extreme antagonism."[41] Participants in political relation must judge "whether the adversary intends to negate his opponent's way of life."[42] Rather than conceptualizing the relation of police and BLM as an ontological void of nonrelation, I contend that we do better to understand the antagonism between neoliberal authoritarianism and BLM as a political relation. The spectacular excesses of the police reactions in Ferguson and New York communicate—they communicate enmity. The intense political antagonism BLM forces to appear with its mobilization should not be displaced and depoliticized as an ontological condition of being.

Why address such deeply philosophical questions—the ontological claims made by Afro-pessimists—here? Understandably, concern with policing, police violence, and incarceration runs throughout the works of Afro-pessimists.[43] Afro-pessimism's ontological focus on being and its essential qualities, though, cannot explain periods when socioeconomic conditions have improved for black people, among others in American society, or why the violence of state practices may have become more constrained.[44] Such distinctive periods make apparent how political mobilization can result in improvements in social well-being or reductions in state violence, and how reactionary movements can cause social well-being to deteriorate and state violence to become more widespread or more intensely brutal. Therefore, political analyses do well to identify these differing historical periods and to make the best effort possible to comprehend why and how such changes occur—particularly if we seek to remedy our deepening exploitation, expropriation, and collective political disempowerment. In other words, the depoliticizing logic of ontological thinking, though currently prominent, hinders political understanding.[45]

The second tendency we see in contemporary protest policing is an increasing use of postdisciplinary control technologies. As theorized by philosopher Gilles Deleuze, control technologies "dividuate," fragment, divert, control points of access, manage or minimize risk to a system, create graduated stages of access or denial, or use aggregations of data produced by our participation

in communicative capitalism to calculate risk levels to systems. They create lines of association and reflexively construct possibilities and probabilities of threats.[46] Control technologies are postdisciplinary in the sense that they do not train subjects, normalize or socialize subjects, or correct subjects and seek their reintegration as productive members of society. By their dividuating or fragmenting tendencies, they function according to a logic of subjective and social disintegration—they prevent the formation of a political subject from appearing or assembling power. Or, by deploying technologies of control, police can monitor and manage protesters, and displace or disassemble the appearance of a political subject, which is what the MPD sought to do by deploying control technologies in its policing of BLM and those possibly associated with BLM.

Although a federal court ruling found the MPD to be in violation of a judicial decree limiting its political surveillance, Memphis argued, and not without reason, that their policing of social media represents a best practice in the field of policing. The plausibility of their claim is indicative of how protest policing has been transformed since the negotiated management era. This transformation, however, has deeply disturbing consequences for democratic practices and the power of the people.

Today, courts permit police and city governments to zone protesters to marginal locations, justifying their displacement from more publicly central locations—or their ability to stage an antagonism by confronting those with whom they have political grievance—on the grounds that modern communications, such as the internet, enable protesters to communicate even if no one is physically present to see or hear them. These judicial rulings force protesters to participate in the domains of communicative capitalism and to become present to technologies of control. Taken to its logical extreme, access to public space could be totally denied to protesters as long as Twitter or Facebook exist. More problematically, police have shut down internet and cellular communications to prevent protests from occurring within the Bay Area Rapid Transit system. The combinatory effects of law and policing compel protest to become subsumed within the circuits of communicative capitalism, where protest's communicative possibility is then conditioned upon the decisions of those who control access to communicative capitalism, and how police use control technologies. By considering how law works in relation to policing's use of control technologies, we can apprehend how a postlegitimation and post-democratic state formation is taking shape—the state of neoliberal authoritarianism.

Contemporary protest policing may be self-evidently post-democratic for its militarized efforts to defeat those seeking to raise grievances to government, or to prevent the assembly of a political subject that would make an apparent political grievance.[47] But how is it postlegitimation? The preemptory, politically targeted, and excessive dimensions of the security model of protest policing violate the most basic conditions of legitimation through discourse ethics, as theorized by Jürgen Habermas. By repressing the political participation of neoliberal authoritarianism's critics, contemporary protest policing violates the premise that only the force of better arguments rather than brute force is normatively acceptable for political discourse.[48] If legitimation is posited in terms of consent, then these methods of policing protest are determined efforts to prevent the appearance of a withholding of consent. Finally, in the most narrowly understood sense of liberal legalism, the security model of protest policing is postlegitimation because it polices in a non–legally discriminate manner. For example, the appearance of disorder is a legally arbitrary determination. The LRAD's logic of pain compliance is a non–legally authorized punishment for protesting. Additionally, anyone in an area is subjected to the pain of sound, not merely those allegedly in violation of a law. Similarly, control technologies function according to a logic of association, in violation of liberal legal principles of individualized guilt. Therefore, the security model fails not only rigorous standards of legitimation but the most minimal standards of normative legitimation.

The excesses of contemporary protest policing presented here shed new light on the neoliberal state. Conventionally, theorists like Wendy Brown conceptualize neoliberalism in terms of "economizing" approaches to public policy neglectful of nonmarket values in its cost-benefit analyses—a governmental rationality that is a "steroidally charged form of Weberian instrumental rationality."[49] The neoliberal state, therefore, is one that "will eschew *excessive* uses of violence or extraconstitutional conduct."[50] The chapters that follow are filled with examples of excessive violence and extraconstitutional conduct that are increasingly integral to contemporary protest policing. Moreover, the numerous and repeated settlements resulting from civil rights litigation do not indicate an economizing disposition on the part of the neoliberal state either. In contrast, I argue that the excesses increasingly apparent in contemporary protest policing are indicative of affective attachment to the neoliberal state's practices.[51] That is, the neoliberal state's cruelties are practices of affective enjoyment by and for the neoliberal state's political subjects. I contend we fail to grasp political support for the neoliberal state if

we neglect how its political subjects are attached to seeing these cruelties expressed and enacted. In sum, narrow questions regarding the policing of protest provide an opening through which the contours of a distinctive state formation, the postlegitimation, post-democratic state of neoliberal authoritarianism, become apparent.

On May 25, 2020, Minneapolis police officer Derek Chauvin, aided by three other officers, Thomas Lane, Tou Thao, and J. Alexander Kueng, arrested George Floyd, a black male, and forced him face down onto the pavement. Chauvin placed his knee on the back of Floyd's neck for almost nine minutes, killing Floyd. Like Eric Garner, Floyd repeatedly called out in his last moments of life, "I can't breathe. . . ."[52]

As video recordings of the Minneapolis police officers killing Floyd circulated, massive protests erupted in Minneapolis and around the country. Protests linked recent police and vigilante killings of black people including Ahmaud Arbery, Breonna Taylor, Elijah McClain, and Daniel Prude to the killing of Floyd. The protests continued through the summer and into the fall of 2020, fueled by needless police shootings of black people. Jacob Blake was shot in the back by police in Kenosha, Wisconsin, on August 23 as he walked away from police and was opening the door to his car. Walter Wallace Jr. was suffering a mental health crisis when he was shot by Philadelphia police on October 26. By the summer of 2020, the *New York Times* considered the uprising protesting police and vigilante killings of black people to be the largest movement in U.S. history. On June 6, over half a million people demonstrated in 550 places around the country. By July, polling found that between 15 million and 26 million people had participated in these protests.[53] More than 93 percent of the protests were peaceful.[54]

Some protests, though, were marred by violence. Members of the right-wing group seeking to ignite a second civil war, the Boogaloo Bois, were charged with inciting violence in Minneapolis. The charges included firing into a police station and setting the building ablaze.[55] Kyle Rittenhouse, a seventeen-year-old Blue Lives Matter enthusiast, traveled to Kenosha from Illinois and associated himself with militia members. Shortly after the group received bottles of water and words of appreciation from police operating an armored vehicle, he shot three BLM protesters, killing two.[56] Most of the violence during the uprising of 2020, however, was perpetrated by police themselves. On the evening of June 3, NYPD riot police kettled protesters in Brooklyn's Cadman Plaza. According to reports, for the

next twenty minutes, "officers swinging batons turned a demonstration that had been largely peaceful into a scene of chaos."[57] During the late spring and early summer of 2020, the *New York Times* collected and published video that captured NYPD officers picking up and body slamming a protester into the street; an officer who pushed a woman so hard that she fell backward onto the pavement; multiple officers who caught a man running from the police to swarm him and beat him with batons (and when a high-level "white shirt" joined the melee, he "stepped on the man's neck"); officers who hit people "walking away from them"; officers who "grabbed people from behind"; officers who "attacked people who had their hands up"; officers who "repeatedly pummeled people who were already on the ground"; and officers who "responded to words with punches and pepper spray." Many of the police attacks "were led by high-ranking officers" and were "not warranted."[58] The NYPD's excessive response to protests was the cause of violence and disorder on New York City streets, sidewalks, and plazas.[59] In addition to high-ranking officers' concerning role in the abuse of force was the disturbing fact that gratuitous police violence against protesters occurred while police had to have known they were being watched and video recorded as they reacted against protests of police abuse of force. This suggests that the police violence against protesters had an expressive element—the police response expressed opposition to BLM, to democratic assemblies, and to the claim that police should be legally accountable. They were responding to political antagonism.

The NYPD and its policing of the 2020 uprising represented a more general institutionalization of a post-democratic, postlegitimation state as police in numerous cities responded with excessive force to the protests. In Washington, D.C., on June 1, 2020, during the early evening, police from multiple agencies, supported militarily by the National Guard, physically brutalized peaceful demonstrators in Lafayette Square. If there was a warning to disperse, it went unheard by protesters and reporters. Police in riot gear used shields and batons and fired flash and smoke grenades, as well as chemical irritants, to attack the protesters and drive them out of the square. Reporters for the *New York Times* described the "scene of mayhem" as one "more commonly associated with authoritarian countries." The attack on the peaceful protesters was purposeless from a public-safety perspective; its purpose was to remove the protesters from Lafayette Square so President Trump could be photographed holding a bible in front of a church located by the square, "demonstrating toughness."[60] Later that evening, military helicopters flown by the National Guard conducted shows of force against protesters by flying low and shining searchlights directly on demonstrators. The

tactic is one used by the military "in combat zones to scatter insurgents."[61] The force of the wind generated by the helicopter propellers snapped tree limbs and tore signs from buildings, while the noise caused by the force of air generated by the propellers was characterized as "deafening."[62] One of the helicopters engaged in the maneuvers bore a Red Cross emblem, the misuse of which violates the Geneva Conventions.[63] The attack on peaceful protesters by multiple police, security, and military forces on June 1, 2020, exemplifies how protest policing in the United States is a hybrid of policing and military actions, which I describe as the security model of protest policing.

This security model of protest policing was evident in Oregon, where Portland police and federal agents used batons and fired projectiles—often containing chemical irritants—against passive protesters. Evidence suggests they targeted medics providing medical aid to the injured, in violation of international human rights principles.[64] Protesters in Portland were abducted by unidentified federal agents and taken away in unmarked vans.[65] Patrolling Portland streets wearing camouflage and tactical gear blocks away from any federal building they might have been justified legally in guarding, federal agents arrested dozens of protesters on federal charges.[66] Among the federal agents deployed to Portland was a group known as BORTAC, a Border Control unit that some compare to a SWAT team and others compare to a special forces unit within one of the armed services.[67] According to Mary McCord, a professor at Georgetown Law and a former national security official at the Department of Justice, "This is the kind of thing we see in authoritarian regimes."[68]

As the response to the uprising of 2020 indicated, the security model of protest policing is one dimension of post-democratic state formation. Expressing a post-democratic political culture, on a conference call about BLM protests, U.S. Attorney General William Barr told governors to "dominate the streets."[69] Secretary of Defense Mark Esper represented policing protest as a "battlespace" to be controlled.[70] Trump asserted, "You have to dominate," and, expressing a postlegitimation orientation to state power, "You have to do retribution." Summing up the post-democratic orientation to political culture, as well as an attachment to repressing the spectral figure of black insurrection, Trump referred repeatedly to protesters as "terrorists."[71]

Marching under BLM banners, protester chants and speeches were not limited to the memories of those whom police had killed. Protesters condemned police abuse of force and called for police accountability. They also called for defunding the police so governments could fund programs responsive to a plethora of human needs and social well-being. Protesters called most obviously for improvements in mental health services: when police

are those who respond first to persons suffering mental health crises, the results can be deadly for the person suffering the crisis, as Daniel Prude's death—caused by Rochester, New York, police—illustrates. Free the People Roc, which has organized the main demonstrations against the conduct of Rochester Police and Rochester's Mayor Lovely Warren since the disclosure of Prude's death, has called for healthcare and improving mental healthcare capacity, improving education, enriching the lives of young people, valuing the lives of LGBTQ+ people, redressing the injustices of the carceral state, abolishing the death penalty, providing access to housing, providing local jobs and fair wages, enacting programs to prevent evictions, ameliorating poverty, evaluating government budgets in terms of principles of justice, and putting people before profit.

Free the People Roc represents a fundamental challenge to neoliberal authoritarianism by calling for a response to the crisis of social reproduction. Their political program does not receive adequate political representation through either of the two main political parties in the U.S.—certainly not in comparison to the competition by major party candidates for endorsements of police, police associations, and police unions. This highlights the political significance of protest and the uprising of 2020, and it highlights the significance of the abusive response to this uprising expressed by the increasingly militarized security model of protest policing. This confrontation on streets across the country represented key dimensions of political antagonism that cannot be redressed without taking on the institutional structures of the post-democratic, postlegitimation state shaped by neoliberal authoritarianism and haunted by the figure of black insurrection.

Fifty years ago, social scientists documented that when police initiate a confrontation with protesters by aggressively escalating their level of force toward a demonstration, this manner of policing protest produces disorderly, if not violent, outcomes, is contrary to public safety, and contradicts First Amendment values. Police responses during the uprising of 2020 seeking to "dominate" protesters with excessive exercises of force produced similar and predictable outcomes. Such protest policing escalates violence and is counterproductive in terms of building either consent or legitimacy for state institutions or policies. The policing of protest during the uprising of 2020 indicates the institutionalization of the security model of protest policing, and it points to an affective attachment to dominating protesters expressed by state actors and political subjects. *Policing Protest* analyzes the institutional developments in law and political culture, urban political economy, and policing and punishment that have brought state practices and politics in the U.S. to this point.

Notes

Introduction

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## Chapter One. Aesthetic Government

Early versions of parts of chapter 1 were published as "The Governmentality of Consumption," *Interventions* 6, no. 3 (2004) and "Policing Protest in the Post-Fordist City," *Amsterdam Law Forum* 2, no. 1 (2009).

1  Kohn, *Brave New Neighborhoods*, 3.

2  Samantha Hea provided useful background for this example.

3  The Streets at SouthGlenn, "Leasing," accessed July 26, 2019, https://www.shopsouthglenn.com; "The Streets at SouthGlenn FAQs," accessed November 27, 2020, https://www.centennialco.gov/Government /Departments/Economic-Development/The-Streets-at-SouthGlenn/The -Streets-at-SouthGlenn-FAQs.

4  On post-Fordism, see Amin, *Post-Fordism*; on communicative capitalism, see Dean, "Networked Empire," 265–88; Dean, *Democracy and Other Neoliberal Fantasies*; Passavant, "Political Subjectivity"; on semio- and cognitive capitalism, see Berardi, *Soul at Work*; Berardi, *Precarious Rhapsody*; on immaterial labor and capital, see Gorz, *Immaterial*; on the affective and communicative nature of much labor today, see Hardt and Negri, *Empire*; on the communicative mode of production, see Marazzi, *Capital and Affects*.

5  A "social democratic" state recognizes how social inequalities can deny the promise of formally equal legal rights and seeks to ameliorate social or economic inequalities as inconsistent with the democratic principle of equality more broadly. On social rights, see Marshall, "Citizenship and Social Class"; on the relation between social welfare capitalism and democracy, see Habermas, *Legitimation Crisis*. On neoliberalism, see Foucault, *Birth of Biopolitics*; Brown, *Undoing the Demos*; Passavant, "Strong Neo-liberal State."

6  Crouch, *Post-Democracy*.

7  Lochner v. New York, 198 U.S. 45 (1905), Holmes dissenting.

8  United States v. Carolene Products, 304 U.S. 144 (1938), footnote 4.

9  Pritchett, *American Constitution*, 305–8; Marsh v. Alabama, 326 U.S. 501 (1946), 509, footnotes 1 and 7; Jones v. Opelika, 316 U.S. 584 (1942), Stone dissenting; Murdock v. Pennsylvania, 319 U.S. 105 (1943) (vacating Jones v. Opelika).

10  South Carolina v. Katzenbach, 383 U.S. 301 (1966); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Reynolds v. Sims, 377 U.S. 533 (1964).