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## The Constitutional Ambition of Black Liberation

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**2023 ENLUND SCHOLAR-IN-RESIDENCE LECTURE:  
THE CONSTITUTIONAL AMBITION OF BLACK LIBERATION**

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## I. HISTORICAL BACKGROUND: CIVIL RIGHTS CASES AS EXEMPLAR OF ERASURE

In 1883, the Supreme Court decided a group of five cases that became known, somewhat ironically, as the Civil Rights Cases. These cases all concerned Black citizens who had been denied access to various public accommodations in violation of the Civil Rights Act of 1875. The Court struck the Act down, ruling 8-1 that Congress lacked the power under the Thirteenth or Fourteenth Amendments to prevent discrimination by private parties, over a dissent by Justice Harlan—one of the earliest of the opinions that earned him the sobriquet, the “Great Dissenter.” The Court’s opinion contained the following passage, which I will quote at length:

When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men’s rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens, yet no one at that time thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth

Amendment (which merely abolishes slavery), but by force of the Fourteenth and Fifteenth Amendments.<sup>1</sup>

There is a lot wrong with this passage. Doctrinally, it probably does not survive the Court's decision in *Jones v. Alfred H. Mayer Co.*,<sup>2</sup> though the Court there did not explicitly overrule it. In terms of overall approach and tone, it is an early and troubling example of what has come to be called "colorblind constitutionalism," in which the goal of the Reconstruction Amendments is understood to be limited to stopping explicit government discrimination on the basis of race and nothing else.<sup>3</sup> However, the flaw I want to focus on is quite different and appears in two separate places in the quoted material.

First, note how the opinion begins by placing Black Americans in a subservient position to whites. The shaking off of the concomitants of slavery occurred "by the aid of beneficent legislation"—that word "beneficent" represents freedom as some kind of gift from, I guess, the Radical Republicans in Congress. It erases the substantial Black contribution to the efforts to abolish the concomitants of slavery, for example, the organized demands by Freedpeople for land, the vote, and the protections of the Fourteenth

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<sup>1</sup> *Civil Rights Cases*, 109 U.S. 3, 29 (1883). The official text has "Thirteenth" rather than "Fourteenth" in the last sentence, however, this was likely a typesetter's error. See George Rutherglen, *Textual Corruption in the Civil Rights Cases*, 34 *Journal of Supreme Court History* 164 (2009).

<sup>2</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (upholding the Civil Rights Act of 1968, prohibiting private discrimination in housing, as a valid exercise of Congressional power under the Thirteenth Amendment). Arguably, *Jones* and the *Civil Rights Cases* could be reconciled with claims about the particular connection between lack of access to property and slavery insofar as housing discrimination is closer to the deprivation of property rights than the public accommodations at issue in the earlier case. The Court in *Jones* narrowly construed the *Civil Rights Cases*, see *Jones*, 392 U.S. at 420, n. 25.

<sup>3</sup> See generally Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 *Stan. L. Rev.* 1 (1991) (describing and criticizing the phenomenon of colorblind constitutionalism).

Amendment; going back further, the contributions of Black Americans to the war effort, including the almost 200,000 Black soldiers who fought in the Union Army<sup>4</sup> as well as the countless others who withheld their labor from the war machine of their enslavers; going back still further, it erases the organizing efforts of Black abolitionists; ultimately it also erases the efforts by organized Black voters in the South to bring about the ratification of the Fourteenth Amendment over serious opposition from whites seeking to restore as much of the slave system as they could get away with. In other words, it erases the role of Black Americans as active agents in their own liberation and in shaping the Constitutional and legislative framework to establish it.

Second, consider the claim that “no one at that time thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.” Concerning this quote, we must ask: whose views are encompassed by no one? In reality, there is a substantial historical record of Black abolitionists, then Freedpeople, linking economic inclusion, political inclusion, and freedom from enslavement in a variety of ways that were critical to the campaign against slavery and its vestiges. For the most relevant example, in 1858, Frederick Douglass gave a speech against race

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<sup>4</sup>Eric Foner, the leading contemporary historian of the Civil War and Reconstruction, gives the number of Black soldiers in the Union Army as 180,000 and notes that this was “over one-fifth of the adult male black population of the United States below the age of forty-five.” Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. of Am. Hist. 863, 864 (1987).

discrimination in New York City's streetcars, in which he called it a part of "the cruel and malignant spirit of caste, which is at the foundation, and is the cause, as well as the effect of our American slave system."<sup>5</sup> In essence, the "no one" in the Court's opinion carries out a second erasure, this time of the views of Black Americans, as to their interpretations of what slavery amounted to—interpretations which, needless to say, are likely to have been much more accurate than those of whites.<sup>6</sup>

These two acts of erasure go together. One key reason Black Americans' perception of slavery matters for interpreting the Thirteenth and Fourteenth Amendments is that if we understand the framers of that Amendment to include Black abolitionists, then their conception of the nature of the thing they were abolishing is relevant to interpreting that act of constitutional lawmaking. Therefore, the Court made an interpretive legal error in erasing the contributions and understandings of Black Americans in the Civil Rights Cases.

## II. THE RULE OF LAW AND WHO DID IT

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<sup>5</sup> Frederick Douglass, "Citizenship and the Spirit of Caste," in *The Frederick Douglass Papers, Series One: Speeches, Debates, and Interviews*, vol. 3, 1855–65, ed. John W. Blassingame (New Haven, 1985), 208–12.

<sup>6</sup> Unsurprisingly, Douglass himself condemned the opinion in the *Civil Rights Cases*—and he did so on terms similar to those I advance here. In an 1883 speech on the case, he reiterated that his target was caste and identified that decision with the continuation of the caste system. He also criticized the case on legal grounds by claiming that it was inconsistent with the principle that legal interpretation is founded on the intention of its drafters, and that the Thirteenth and Fourteenth amendments were intended to complete the work of abolition and establish equal citizenship. Frederick Douglass, *The Civil Rights Case*, in Philip Sheldon Foner, ed., *Frederick Douglass: Selected Speeches and Writings 762-770* (1999).

In my last book, *The Rule of Law in the United States: An Unfinished Project of Black Liberation*,<sup>7</sup> I trace out the contributions of what I call the long movement for Black liberation—a movement spanning abolition, the struggle for democratic inclusion of the Freedpeople at the end of the 19th century, the anti-lynching efforts of the early 20th century, the Civil Rights Movement, Black Power, and the contemporary Movement for Black Lives—to the American rule of law.

The rule of law is perhaps America’s foundational constitutional value. Essentially, the idea of the rule of law is that the government does not use its power, its guns, police, and cages arbitrarily. Accordingly, the government follows its own laws, laws that treat people equally, and for that reason, those laws also do not authorize some people to exercise arbitrary power over others. When the rule of law is understood this way, the principle animates our most important constitutional provisions. For example, the Due Process Clause of the Fifth and Fourteenth Amendments, which traces its heritage back to the Magna Carta, essentially stands for the principle that the government cannot beat you up, lock you up, or steal your possessions unless it proves in court that you violated the law. The Equal Protection Clause of the Fourteenth Amendment captures the idea that the benefits of living under a system of law are to be shared equally, not, as Douglass might have said, reserved to a superior caste.

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<sup>7</sup> Paul Gowder, *The Rule of Law in the United States: An Unfinished Project of Black Liberation* (2021).



It should not be surprising, given what I have said so far, that the Fourteenth Amendment—a key achievement of the Black Liberation movement, through its earlier efforts for abolition, the demands of Black Northerners, and the vigorous political organizing of Freedpeople in the South necessary for its ratification—is the primary constitutional home of the American rule of law. After all, the Fourteenth Amendment was meant to complete the constitutional work of the Thirteenth Amendment and purge the taint of slavery from the American legal order. Slavery is the polar opposite of the rule of law—a system in which the law creates two classes of people, one of whom is completely unprotected by the law, and the other which has absolute power over the first. The quest for abolition is one to achieve the basic protection of the law and to overthrow legally authorized domination by another.

The book fills out this story a lot further by describing other key moments in the development of the legal doctrines that make up America's rule of law; how they were built, not exclusively, but substantially and in unrecognized ways, by Black Americans; and how the ways in which the United States today fails to maintain those ideals—for example, through unregulated police violence—are a betrayal of that legacy. However, for today, I would like to look forward to my next project, where I further develop the constitutional importance of these ideas and, with it, one kind of legal pathway to further the progress of Black Liberation in the future.

### III. DEMOCRATIC LEGITIMACY, THE IDEA OF A DEMOS, BLACK CONSTITUTIONAL AGENCY

The Constitution is *our* law—we recognize it as the basis of *our* system of government, and we revere at least some significant parts of it—think, for example, of the cultural salience of the First Amendment’s idea of free speech. But what makes it ours? Put differently, we also imagine that we are a democracy, but we did not get a vote on the Constitution. In many ways, the Constitution makes it harder to rule ourselves in the ways we might otherwise expect of a democracy—think of the Electoral College, which these days routinely puts presidents into office with a support of a minority of the population or the fact that Wyoming and Delaware and Rhode Island get as many senators as California and New York and Illinois. So how can we rationalize our efforts to rule ourselves by this document in a democracy?

As you might imagine, that question has occasioned thousands upon thousands of pages of scholarly debate that I cannot even begin to summarize here.<sup>8</sup> Still, here is one reasonably popular response. There is an entity called the American People, and that American People has a continuous identity across time and generations. My great-grandfather and I are both Americans, both members of the same American people, even though we did not live at the same time. We could borrow from the Greeks and call this People a *demos*. Now if

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<sup>8</sup> I have previously described some small portion of it in Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jurgen Habermas in Conversation*, 114 *Northwestern Univ. L. Rev.* 335 (2019); and in Paul Gowder, *Toward Public Identity Constitutionalism*, *Balkinization*, (January 20, 2023), <https://balkin.blogspot.com/2023/01/toward-public-identity-constitutionalism.html>.

we accept this idea of a *demos* as spanning across time, then we might—with a lot of additional argument added—count the work of America’s founding generation and the people who voted to ratify the Constitution as our work as well, and thereby understand ourselves as having democratically adopted the Constitution.

Many ideas in constitutional law implicitly depend on a story like this. Consider the notion of “originalism,” the idea that the correct way to interpret our constitution is, in a variety of more or less technical ways, to put ourselves in the place of the people of the founding generation and try to figure out what they would have thought it meant. For example, the Eighth Amendment prohibits cruel and unusual punishment. Well, how do we know what is cruel? Under an originalist interpretation, we must figure out what Americans in 1789 used the word “cruel” to mean. Note how this enterprise only makes moral sense, that is, it can only seem like a reasonable way to rule ourselves if we understand ourselves as in some meaningful sense to be part of the same enterprise as the American people of 1789.

Right now, many of you are probably shaking your head at me. You are thinking: “wait a minute, though, the people of 1789 look nothing like the people of 2023.” The founders would be horrified at the notion that at least half of the people in this room would get any say in the Constitution. This is a great big blinking hole in the idea of a *demos* with a continuous identity—at least if you also believe that underlying social groups also have a continuous identity, or at least continuous interests, that is, if you think that the exclusion of women,

the victims of racialized chattel slavery, Native Americans, and others at the founding continues to harm the interests of members of those groups today—and I will submit that this is true.<sup>9</sup>

Because of this problem of historical exclusion and the continuous identity and interests of many of us alive today with the people who were excluded at the founding, it might seem that the dream of having a *demos* with a continuous and inclusive identity—one in which every American citizen in this room today can understand ourselves as sharing a political identity with the people who ratified the Constitution—is dead on arrival. But not so fast! Earlier in this lecture, I proposed that Black people built the American rule of law—the central principle of the American Constitution. Given the constitutional agency of Black Americans, and of women, Native Americans, and a variety of people with intersectional and overlapping identities, the Constitution of 2023 does not look the same as the founders would have had it.

I believe this proposition can redeem the Constitution—maybe there is a unified *demos* across time after all, a *demos* built, not through the grace of the folks who had power at the beginning, but through the self-assertion of those who had previously been excluded, who demanded inclusion as a collective project and then put their—our—stamp on the Constitution.

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<sup>9</sup> It would take a more detailed argument than I can offer here to establish that connection, but I can say a word or two about it. Consider, for example, the persistence of residential racial segregation and concentrated disadvantage as a legacy of generations of legal discrimination running back to Jim Crow and, before that, slavery—or consider the empirical evidence that some scholars have discovered that voting patterns in the South still, to this day, follow patterns of enslavement. Avidit Acharya, et. al., *Deep Roots: How Slavery Still Shapes Southern Politics*, Princeton University Press 2018. A through-line clearly exists.

#### IV. PROPERTY RIGHTS, ECONOMIC INCLUSION AS AN EXAMPLE, BROAD IMPLICATIONS THEREOF

To summarize the argument thus far: if we imagine ourselves to be a democracy, then we do not have any particular reason to accept being governed under a constitution that we did not get to vote for unless we share a cross-generational political identity with the people who did get to vote for it. The only way to get at this cross-generational political identity is to understand there to have been a continuous project of constitution-building, which began with the founders, but continued through the work of later constitution-builders, including constitution-builders from groups excluded from the original framing enterprise, such as Black Americans as well, of course, as women, Native Americans, and many others.

There is, however, a catch. If we adopt that approach to justifying the Constitution, then we have to do it seriously—that is, we have to approach constitutional law based on the assumption that the framers are not just Madison and Jefferson but also all those subsequent more inclusive generations who put their own stamp on the Constitution. This includes all of our Black framers who have demanded and won the inclusion of the foundational rule of law principles in our law. “Originalism,” done honestly, needs to incorporate Fredrick Douglass’ understanding in addition to Alexander Hamilton’s.

In the words of Peggy Cooper Davis, who wrote about the neglect of Black authorship in the constitution decades ago:

The Supreme Court has been ahistorical and unjustifiably narrow in its approach to the close interpretive questions that determine the reach of Congressional power to enforce the Fourteenth Amendment. This is so because the Court has analyzed intent, history and tradition without regard for the intentions of African American participants in the lobbying and ratification processes that helped to produce the Fourteenth Amendment, the history of African American involvement in the Civil War and Reconstruction, and the broader egalitarian, federalist, and anti-racist traditions that African American political figures exemplify.<sup>10</sup>

And, I claim, rectifying the error that Davis identified blows the Constitution wide open—it makes it possible to use the Constitution as an instrument of justice in ways that we have not yet explored.

Think of the claims I noted at the beginning of this talk made by Black abolitionists about economic inclusion. Those claims continued throughout the Black Liberation movement. Freedpeople demanded forty acres to provide the material foundation of citizenship. The Welfare Rights movement, led by Black Americans, demanded a social safety net and was a key part of the victories leading to cases like *Goldberg v. Kelly*, protecting welfare benefits as a form of property under the Due Process Clause.<sup>11</sup> The full name of Dr. King’s March on Washington was the *March on Washington for Jobs and Freedom*. The Ten Point Program of the Black Panther Party also demanded jobs and reiterated the demand for forty acres.<sup>12</sup> Based on the arguments above, I think those demands

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<sup>10</sup> Peggy Cooper Davis, *Introducing Robert Smalls*, 69 *Fordham L. Rev.* 1695, 1701 (2001).

<sup>11</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring the government to provide notice and an opportunity to be heard under the Due Process Clause of the Fourteenth Amendment before terminating welfare benefits).

<sup>12</sup> Black Panther Party, *What We Want Now! What We Believe*, reprinted in Joshua Bloom & Waldo E. Martin Jr., *Black Against Empire: The History and Politics of the Black Panther Party* (2016) at 70-73. Item 2 under “what we want” demands “full employment for our

in those contexts rise to the level of constitutional claims. That is, the constitutional authorship of the Black liberation movement should lead us to believe, at a bare minimum, that the Constitution permits—and possibly requires—positive efforts to promote economic inclusion, such as affirmative action, not on the corrupted theory of “diversity” which makes Black Americans’ inclusion in settings like education dependent on their presence offering a service to whites, but based on the recognition running throughout the Long Black liberation movement that political inclusion and economic inclusion are inseparable.<sup>13</sup>

Fully understanding the implications of the Black experience demanding inclusion also leads to a new case for a robust conception of family autonomy that could rebound to the benefit of all Americans as that autonomy is under attack after the overruling of *Roe*. To see this, consider the conjunction of three ideas.

- First, one of the key strategies of the fight for economic inclusion as political inclusion within the Black liberation movement has been

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people,” *Id.* at 71, while item 3 under “what we believe” declares that “now we are demanding the overdue debt of forty acres and two mules.” *Id.*

<sup>13</sup> Another Douglass speech can illustrate the point. In 1875, Douglass spoke before the centennial anniversary of the Philadelphia Society for Promoting the Abolition of Slavery. There, he made clear the through-line between emancipation and economic inclusion, pointing out that the Freedpeople had been freed into poverty and that Southern whites were using violence to resist Black education and Black suffrage. Frederick Douglass, “*Celebrating The Past: Anticipating the Future: An Address Delivered in Philadelphia, Pennsylvania, on 14 April 1875,*” in John W. Blassingame & John R. McGivigan, eds., *The Frederick Douglass Papers*, series 1, *Speeches, Debates, and Interviews*, vol. 4, 1864-80 407-414 (1991). To rectify this situation, he called for the continuation of the abolition movement: “we want this society to celebrate its second centennial, if need be.” *Id.* at 414. This illustrates that Douglass, at least, saw poverty, lack of education, and lack of suffrage as continuations of slavery.

contestation over what kinds of things count as property. Consider again the achievement of the welfare rights movement in *Goldberg v. Kelly*. Of course, the first achievement of the Black liberation movement was the recognition that persons cannot be property—Black abolitionists long understood the idea of property in people to be the foundation of the evils of slavery.

- But—and this is the second idea—there is one exception in the American tradition to the proposition that persons cannot be property, namely John Locke’s idea of self-ownership, which for Locke—a key founder of the liberal tradition in political philosophy at the heart of American capitalist ideology—is the root of property rights.
- Finally, the third idea is an observation of the historical fact that one of the most evil features of the ownership of other people in the slave system was that ownership of an enslaved woman also entailed ownership of her children. This incentivized enslavers to rape enslaved women and force them to give birth to more property for the enslaver. In response, as Peggy Cooper Davis has explained, a surprising number of enslaved women procured abortions as acts of resistance.<sup>14</sup>

Bringing those three ideas together, we begin to see how a case for a defense of abortion rights might be made: part of the meaning of the Thirteenth and Fourteenth Amendments was to establish that everyone in America can partake

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<sup>14</sup> Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 Harv. C.R.-C.L. L. Rev. 299, 374-375 (1993).



of the ideal of self-ownership, and with it, bodily autonomy and freedom from forced reproduction. Layering on top of that idea the well-known points about the way that childrearing can impair women’s capacity for economic inclusion or liberty under conditions of patriarchy, we can see how the understanding of the relationship between freedom, economy, and the family that abolition brings to the Thirteenth and Fourteenth Amendments puts the lie to Justice Alito’s absurd claim in the *Dobbs* case, that abortion rights are not deeply rooted in America’s history and traditions.<sup>15</sup>

## V. CONCLUSION

I will close with one additional point on economic inclusion and Black liberation. Another of the key ways in which the movement has fought for the rule of law is in fighting for protection against arbitrary violence by the police. But, as we all know, that aspect of the movement has not, thus far, been successful.<sup>16</sup> And indeed, the rhetoric of property rights has facilitated police abuses—observe how commentators on the right wring their hands in horror at

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<sup>15</sup> *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228, 2242-3 (2022). There is much more that can be said along similar lines. Similar arguments about freedom and economic inclusion might also be deployed to defend gay marriage, for example, and even—drawing on the legacy of Henrietta Lacks and, more generally, the commodification of Black bodies and knowledge about Black people – property rights to control personal data.

<sup>16</sup> See NPR News, *A Decade of Watching Black People Die* (May 31, 2020), <https://www.npr.org/2020/05/29/865261916/a-decade-of-watching-black-people-die> (listing Black people killed by police); see Khaleda Rahman, *Full List of 229 Black People Killed by Police Since George Floyd’s Murder*, Newsweek (May 25, 2021), <https://www.newsweek.com/full-list-229-black-people-killed-police-since-george-floyds-murder-1594477> (listing 229 Black people killed by police in a single year). For an account of why this ought to be characterized as “arbitrary,” see Paul Gowder, *Is Criminal Law Unlawful?*, Mich. St. L. Rev. (forthcoming 2023). For examples of recent police departments gone rogue, see U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department*, (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf); U.S. Department of Justice, Civil Rights Division (2016), <https://www.justice.gov/opa/file/883366/download>.

the “property destruction” associated with protests that follow the seemingly endless murders of Black people by the police.

Here, again, the idea of property can be turned around. So much of racist policing is enabled by the compromise of traditional property rights in the context of class/race subordination. For example, police abuses and police killings after pretextual traffic stops also represent the deprecation of Black drivers’ property interests in their automobiles and the failure to respect the Fourth Amendment. No-knock warrants and nighttime police raids like the raid that killed Breonna Taylor represent the disregard for Black property interests in their own homes. The cooptation of landlord-tenant law to criminalize Black people, such as with the hyperregulation of public housing in segregated neighborhoods or the abuse of nuisance property ordinances to procure the eviction of families who generate too many police calls, represents the failure to respect a property interest in leaseholds. It seems to me that it is no coincidence that the Supreme Court has derived its protections against arrest and violence, such as they are, from the explicitly property-focused Fourth Amendment. What if we took that all the way and interpreted those protections as rooted in the idea of self-ownership? Could we defang the traditional polarity according to which police are empowered to protect property against persons by identifying the property interests of the targets of policing as well?<sup>17</sup>

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<sup>17</sup> This is not as strange a view in our constitutional tradition as it might otherwise seem. No less a figure than James Madison himself wrote a 1792 essay on property in which he claimed that the idea of property can be expanded to “everything to which a man may attach a value and have a right; and which leaves to everyone else the like advantage” including a person’s opinions and “the safety and liberty of his person.” James Madison, *Property*, in Philip B.

There are lots of constitutional reasons to resist racist homicidal policing that do not go through talk about property rights. However, I think it is worth articulating the property rights side of the argument too, because that is the point at which the traditions of Black Liberation claims-making about police and about economic inclusion come together, and moreover, come together with the core of American capitalist ideology. If we imagine the Constitution—warts and all—as a project of shared agency through generational history and across racial lines, then we cannot escape the fact that it is a capitalist constitution, however uncomfortable you or I might be with the capitalist way of seeing the world. But we can demand that this capitalist constitution reflect the agency and the property of Black Americans who have been demanded and continue to demand to be treated as equals in the market and in the forum.

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Kurland and Ralph Lerner, eds., *The Founders' Constitution* vol. 1, ch. 16, document 23 (1986), <https://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.