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David B. McNamee

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David B. McNamee

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ABSTRACT

In this Article, I argue that we should understand #BlackLivesMatter as a claim on the Constitution—a very special kind of constitutional claim, on the Constitution as *fundamental law*. It is a paradigmatic contemporary example of this category of constitutional law *for citizens*, one that reaches back past the roots of the American Revolution and underlies the logic of popular sovereignty at the core of our system. Section I develops a conceptual sketch of fundamental law and its features. Section II then turns to the content of “Black Lives Matter” as a constitutional principle and traces its position in the arc of Black constitutional thought, from the emancipatory protestantism of Frederick Douglass to the provocations of Judge Bruce Wright and beyond. Section III explains why this principle matches the features of fundamental law and why it matters—developing the idea of the “constitutional bases of respect” and exploring the consequences of “Black Lives Matter” as a mediating principle in several areas of constitutional doctrine.

AUTHOR’S NOTE

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I. INTRODUCTION

A few years ago, I lived in Brooklyn. Whenever I went to the grocery store, I would pass by the intersection of Fulton Street and Marcy Avenue, in the Bedford-Stuyvesant neighborhood. At the northeast corner, along Marcy Avenue, there was a large, breathtaking mural featuring the Preamble to the Constitution.¹ Though the mural is no longer there, I can still see it plainly in my mind's eye. Next to this ornate calligraphy of the Preamble are three figures, looking out proudly at the passers-by with the Pan-African flag flowing behind them. One is Thurgood Marshall, who led the NAACP's legal effort to topple racial segregation and served as the nation's first Black Supreme Court Justice.² To Justice Marshall's left, in a pin-striped suit, is Paul Robeson, an entertainer and activist who protested apartheid in the American South and in South Africa and was blacklisted for his socialist views.³ Closest to the Preamble is another black-robed figure, Judge Bruce Wright, whom I had never heard of before this mural seized my attention.

¹ 975 Marcy Ave – GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/2VYT-XP32>] (last visited Nov. 17, 2018) (enter “966 Marcy Avenue Brooklyn New York” into search); I have also reproduced a photograph (taken by the author) below; see also Beth Stebner, *The Murals on the Wall in Bed-Stuy: New Exhibition Examines Nabe's History Through Public Art*, N.Y. DAILY NEWS (Feb. 4, 2014), www.nydailynews.com/new-york/brooklyn/murals-walls-bed-stuy-exhibition-article-1.1602030 [<https://perma.cc/J2Z7-7ALX>]. Sadly, the mural was painted over sometime in the summer of 2016.

² Of course, Marshall's work continued in the wake of others' contributions. The architect of the NAACP's strategy was Charles Hamilton Houston, who oversaw the organization's transformation from first-responder to cases like the Scottsboro Boys trial to the legal vanguard in a comprehensive campaign against Jim Crow. For a thorough discussion of the evolution of this strategy, see MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (2005).

³ Robeson was perhaps most famous for his rendition of “Ol' Man River,” but his contributions as a public intellectual were especially significant on the political Left and in the African-American community during the middle of the twentieth century. For a collection of Robeson's works, letters, and speeches, see PAUL ROBESON SPEAKS (Philip S. Foner ed., 1978). Robeson graduated from Columbia Law School, and his undergraduate thesis in 1919 was an encomium to the Fourteenth Amendment's potential, borrowing Charles Sumner's words, as a “Sleeping Giant.” *Id.* at 53-62.

Atop the mural is a signature in white that reads “NY Justice Corps 2009,” a group that provides opportunities to young people released from prison. One component of this program is community service, which includes creating neighborhood murals such as this one.⁴ Just one block to the east along Tompkins Avenue, there is a similar mural that honors a train of deceased cultural icons, from Redd Foxx to the Notorious B.I.G. It is easy to imagine why a young adult might choose to depict these heroes as pillars of black culture and a testament to its impact on our nation. But one might wonder why this artist—whose life prospects will likely be forever burdened by the weighty racial disparities of the American criminal justice system—chose instead to celebrate the Constitution as a symbol of self-empowerment and a source of self-respect.



After the lofty language of the Preamble, Article I of the original Constitution apportioned Representatives according to “the whole number of free persons” and three-fifths of all “other persons”—the chattel slaves at the base of the South’s social and economic structures.⁵ Ta-Nehesi Coates evocatively traces the roots of mass

⁴ For discussion of the program, see Amelia Thompson & Debbie Mukamal, *NYC Justice Corps Making Difference*, RE-THINKING REENTRY, rethinkingreentry.blogspot.com/2009/12/nyc-justice-corps-making-difference.html [https://perma.cc/B3MH-LF39].

⁵ U.S. CONST. art. I, § 2, cl. 3. Note that this three-fifths calculation enhanced and entrenched Southern power in the House and the Electoral College through the first half of the nineteenth century. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005).

incarceration to Article IV's original requirement that fugitive "[p]erson[s] held to Service or Labour" be rendered to slave states, so that "[b]lack criminality is literally written into the American Constitution."⁶ Even after emancipation under the Thirteenth Amendment,⁷ the Constitution appeared to remain compatible with a system of racial apartheid for almost a century. And even with the gains of the Civil Rights Revolution, the constitutional text itself has not stemmed the tide of America's continuing legacy of White Supremacy.⁸ The artist might well have wondered whether black citizens have ever been fully included in those three colossal words, "We the People."⁹

Around the same time I frequented this particular corner of Bed-Stuy, the country was roiled by a series of events that sparked protest in communities across the country. On November 25, 2014, a grand jury in Ferguson, Missouri declined to indict Officer Darren Wilson for the murder of Michael Brown, finding that there was insufficient evidence to question Wilson's testimony that he acted in self-defense.¹⁰ A later investigation by the Department of Justice would corroborate this finding, but it illuminated the context that generated such outrage, a pervasive pattern of egregiously discriminatory policing.¹¹ The following week, a Staten Island grand jury similarly refused to indict an officer for killing Eric Garner, despite a video recording of the breath leaving Garner's body as Officer Pantaleo held him by the neck and four other officers pinned him to the ground.

⁶ Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC MONTHLY (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [<https://perma.cc/8M2B-JKXE>].

⁷ U.S. CONST. amend. XIII.

⁸ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

⁹ U.S. CONST. pmb1.

¹⁰ For discussion of the events, see *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html [<http://perma.cc/4QAY-9H87>].

¹¹ See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *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://perma.cc/CLL3-JL8X>].

Ongoing demonstrations in Ferguson erupted in a wave of protest across the country, capturing a moment in the national consciousness with a simple, arresting phrase: “Black Lives Matter.”¹² Since then, we have uncovered the callous violence that killed Freddie Gray.¹³ We have witnessed the senseless murders of Walter Scott in North Charleston and Ronald Johnson in Chicago, burned into our public consciousness and etched into the permanent memory of the internet.¹⁴ We have engaged in a robust public debate about the lingering cancer of White Supremacy in our criminal justice system, mediated by this central claim that Black Lives—their lives—Matter.

These three resonant words do more than express indignation at the refusal to indict two police officers. They insist that we value a black person’s life the same as any other human life. They demand recognition of the *difference*¹⁵ in black lives, in the lived experience of structural discrimination and subordination. Pregnant in these three plaintive words—in their very need to be uttered—is the implication that our institutions *do not* treat black lives as though they matter equally. They bespeak the profound alienation of Black citizens from the criminal justice system. They underline its *injustices*. And, I want to suggest, these words and others like them can also be understood as

¹² A recent paper by Amna Akbar describes the Movement for Black Lives, detailing its founding events, formational conversations, and development of these urgent claims and demands into a coherent vision. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 417-19, 423-24, 427-32 (2018). Philosopher Chris Lebron has ably plumbed the conceptual foundations of the movement and its claims in CHRISTOPHER J. LEBRON, *THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA* (2017).

¹³ Peter Hermann & John Woodrow Cox, *A Freddy Gray Primer: Who Was He, How Did He Die, Why Is There so Much Anger?*, WASH. POST (Apr. 28, 2015), https://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer-who-was-he-how-did-he-why-is-there-so-much-anger/?noredirect=on&utm_term=.9a651fb19d53 [https://perma.cc/U2S9-X8A2].

¹⁴ *Id.*; see also Steve Schmadeke & Jason Meisner, *Ronald Johnson Shooting Death; Lawyer Blasts Decision*, CHI. TRIB. (Dec. 7, 2015), <https://www.chicagotribune.com/news/ct-ronald-johnson-video-20151207-story.html> [http://perma.cc/2M73-KDNS].

¹⁵ Cf. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 3 (1990) (arguing “that where social group differences exist and some groups are privileged while others are oppressed, social justice requires explicitly acknowledging and attending to those group differences in order to undermine oppression.”).

claims on the Constitution.¹⁶ In this paper, I argue that we should understand #BlackLivesMatter as a claim on the Constitution—a very special kind of constitutional claim, on the Constitution as *fundamental law*. It is a paradigmatic contemporary example of this category of constitutional law *for citizens*,¹⁷ one that reaches back past the roots of the American Revolution and underlies the logic of popular sovereignty at the core of our system. Section I develops a conceptual sketch of fundamental law and its features. Section II then turns to the content of “Black Lives Matter” as a constitutional principle. Section III explains why this principle matches the features of fundamental law and why it matters—developing the idea of the “constitutional bases of respect” and exploring the consequences of “Black Lives Matter” as a mediating principle in several areas of constitutional doctrine.

But first, back to the mural for a moment. If we can understand “Black Lives Matter” as a claim of fundamental law—whereby Black citizens claim the Constitution for themselves—then we can solve the puzzle of the mural’s subject matter: why a formerly-incarcerated artist might celebrate the U.S. Constitution and the luminaries of Black constitutional thought who have shaped its meaning. This is not so puzzling after all: the Constitution depicted in the mural does not countenance the lingering institutions of White Supremacy. It is,

¹⁶ For a deeper doctrinal dive into the question of whether Black Lives Matter to the Constitution, see Bruce Miller, *Constitutional Law—Do Black Lives Matter to the Constitution?* 40 W. NEW ENG. L. REV. 459 (2018).

¹⁷ I mean to deploy the concept of “citizenship” broadly, to include all members of the political community. This more capacious definition will include, in principle, all adults with the capacity to participate in political life. The Fourteenth Amendment, of course, requires that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” U.S. CONST. amend. XIV, § 1. Beyond that floor, who may serve as a voter and a juror is largely a question of state law. A California Bill (ultimately vetoed in October 2013) would have extended jury service to noncitizens. See Andrew Guthrie Ferguson, *Why Restrict Jury Duty to Citizens?*, ATLANTIC (May 9, 2013), <https://www.theatlantic.com/national/archive/2013/05/why-restrict-jury-duty-to-citizens/275685/> [http://perma.cc/2Q69-ZZD4]. Other interpretive role responsibilities of citizenship, such as deliberative discussion or civil disobedience, are not a function of positive law but emanate instead from that more capacious and moral idea of membership in the political community. I believe this includes, although I do not argue for it here, undocumented immigrants.

instead, the Constitution *as claimed by Black citizens*—interpreted through a process of radical self-inclusion, dedicated to the Reconstruction of our polity. This interpretive approach, what I will call *emancipatory protestantism*, follows a trail first blazed by Frederick Douglass in effort to claim the Constitution and imbue it with justice.

The mural tells the story of successive interpreters who carried on Douglass's emancipatory protestantism, participating in a robust tradition of Black constitutional thought. The interpretive claims that have flourished in this tradition are at once radical and firmly grounded in the document's deepest aspirations of justice and inclusion. Together, these protestant claims form a rich tapestry, woven across the generations. And in advancing these claims, the artists of the mural and fellow citizen interpreters thereby claim the Constitution as their own. #BlackLivesMatter is only the latest such claim, and understanding it as a claim of fundamental law illustrates why that category of constitutional law for citizens is so vital.

The claim that Black Lives Matter sounds in a variety of registers: as a salvo against police brutality, an indictment of a broken criminal justice system, and a demand for recognition of Black Americans' basic human rights.¹⁸ Certainly, many members of the movement have intended those resonant meanings, and I do not wish to speak for them, condescend to them, or purport to explain what their claims *really* mean. The perspective from which I write is that of a citizen and a participant in the national conversation, one who seeks to take the claim that Black Lives Matter seriously. I argue that there is a parallel and complementary register in which, as citizens, we should understand the claim that Black Lives Matter as a claim on the Constitution.

Members of the Black Lives Matter movement might understandably wish to turn their backs to constitutional discourse. But, if my arguments are correct, they provide reasons not to simply reject the Constitution as composed of wrong-headed, judge-made law. The fundamental law of the Constitution belongs to its citizens, and by invoking its principles, they perform an act of radical self-inclusion. Our Constitution—the Constitution of today, rather than the document of 1789—was forged on the battlefields of the Civil War as much as a convention hall in Philadelphia. It is the precipitate of an ongoing

¹⁸ See discussion accompanying and sources cited *infra* notes 84-88.

project whereby citizens imbue the principles of their fundamental law with their conception of justice, and *that* Constitution is capacious enough to take aim at the structures of White Supremacy.

II. THE IDEA OF FUNDAMENTAL LAW

The notion of fundamental law—as mid-twentieth century historian and philosopher J.W. Gough defines it, law that “cannot be altered or repealed by ordinary legislative procedure”¹⁹—is quite an old idea. Gough traces the concept to historical antecedents in Lord Coke’s famous dictum in *Dr. Bonham’s Case* and the Levellers’ professions of popular sovereignty during the English Civil War.²⁰ Historians such as Larry Kramer and Gordon Wood detail the significant influence of these precedents over the American Revolution, as well as the American innovation of fundamental law as embodied in a written Constitution.²¹ For the purposes of this Article, which has as its aim to understand the kind of constitutional claim that “Black Lives Matter” might be, we can begin by identifying certain key features of fundamental law in hopes of developing a working notion of the concept.

A. Conceptual Sketch of Fundamental Law

Fundamental law is, in a sense, both *deeper than* and *prior to* its most salient contrast, ordinary law.²² Ranging from traffic ordinances to complex regulatory schemes, provisions of ordinary law seek to provide action-guidance for the parties bound by its rules. Ordinary

¹⁹ J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 2 (1955). Interestingly (and relatedly) Gough was also a scholar of Locke and other contemporaneous social contract theorists. Theoretical questions about American judicial review are very much in the background, with the book’s publication one year after *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁰ See GOUGH, *supra* note 19.

²¹ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), who characterizes the category of as “political-legal;” see also SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990); SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* (1990); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843 (1978).

²² GOUGH, *supra* note 19, at 2.

law is specific, predictable, and firmly settled by authoritative institutions such as courts.²³ By contrast, the domain of fundamental law contains far more controversy—a function of citizens’ capacity to apprehend (and disagree about) its meaning through their common reason.

Fundamental law is an old idea, and its proponents have long drawn a distinction not just with ordinary law, but also with natural law—understood as a kind of universal reason whose principles are binding on all of humankind, without regard to the positive enactments of any particular jurisdiction.²⁴ Whereas natural law emanates from general reason and pure abstraction, claims of fundamental law apply to (and through) the extant institutions of positive law. Historian Suzanna Sherry thus aptly describes the concept of fundamental law in the pre-constitutional era as a kind of “custom mediated by reason.”²⁵

Basic principles of fundamental law are part of what *constitutes* a system of institutions.²⁶ Examples abound throughout our history.

²³ *Id.*

²⁴ In the debate over constitutional ratification, Antifederalist author Federal Farmer draws this same tripartite distinction in cataloguing different categories of rights. First are natural rights, “which even the people cannot deprive individuals.” By contrast, “constitutional or fundamental [rights] . . . cannot be altered or abolished by the ordinary laws; but the people, by express acts, may alter or abolish them—These, such as the trial by jury, the benefits of the writ of habeas corpus, &c. individuals claim under the solemn compacts of the people, as constitutions, or at least under laws so strengthened by long usage as not to be repealable by the ordinary legislature.” Letter from Federal Farmer No. 6 (Dec. 25, 1787), *in* HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST*, 1, at 261 (1981). Finally, ordinary law denotes “common or mere legal rights, that is, such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.” *Id.*

²⁵ Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1130 (1987).

²⁶ Gough quotes a memorable passage from an anonymous Leveller pamphleteer in 1643: “Fundamental laws are not (or at least need not be) any written agreement like meare-stones [boundary markers] between king and people, the king himself being a part (not party) in those Laws, and the Commonwealth not being like a corporation created by charter, but creating itself.” As such, *fundamental* laws cannot be “things of capitulation between king and people as if they were foreigners and strangers one to another” but rather “*things of constitution*, creating such a relation, and giving such an existence and being . . . to king and subjects, as head and members.” As a result, the fundamental law that gives rise to a constitutional system “is a law held forth with more evidence and written in the very heart of the Republique, far firmler than can be by pen

Long before the American Constitution, the Parliament issued the English Bill of Rights of 1689, “vindicating and asserting their ancient rights and liberties” by “declar[ing]” the fundamentals listed by Penn, as well as several other antecedents for Madison’s proposals.²⁷ Fundamental law also appeared in the courts, as with Lord Coke’s famous invocation of the principle in *Dr. Bonham’s Case*, that “no man can be judge in his own case.”²⁸ In 1761, colonial lawyer James Otis cited Lord Coke’s example for the proposition that “an Act of Parliament against common justice or common right is void,” condemning the Writs of Assistance as “against the fundamental principles of law” ensuring that “a man who is quiet is as secure in his house as a prince in his castle.”²⁹

In a diary entry from 1771, John Adams claimed that though the “general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known” to citizens in their capacity as jurors,³⁰ the fundamental law was even more palpably understood. “The great principles of the constitution are *intimately* known; they are sensibly felt by every Briton; it is scarcely extravagant to say they are drawn in and imbibed with the nurse’s milk and first air.”³¹ Though these principles are readily accessible, that very proximity to citizens’ common reason serves to invite and ignite ongoing interpretive argument. Indeed, the fundamental law of a constitution plays the distinctive role of grounding political disagreements. Founding era figure Joel Barlow, in his counsel to the French in the formation of their own constitution of 1791, stressed the

and paper.” GOUGH, *supra* note 19, at 100-02 (emphasis added) (quoting *Touching the Fundamental Laws* (1643)).

²⁷ See Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Eng.), http://avalon.law.yale.edu/17th_century/england.asp [<https://perma.cc/ZU7X-LKUC>]. For a fascinating visualization of the documents that informed the language of the Bill of Rights—both Madison’s proposals and in the various drafts along the way—, see *Writing Rights: The Bill of Rights*, NAT’L CONST. CTR., <http://constitutionalrights.constitutioncenter.org/app/home/writing> [<https://perma.cc/TW7J-LXRD>] (last visited Nov. 17, 2018).

²⁸ GOUGH, *supra* note 19, at 33.

²⁹ *Id.* at 192 & n.2; see also KRAMER, *supra* note 21, at 21-23 (discussing John Adams’ contemporaneous notes of Otis’s argument and their application to revolutionary-era constitutional debate).

³⁰ 2 THE WORKS OF JOHN ADAMS (Charles Francis Adams ed., 1850).

³¹ *Id.* (emphasis added).

difference between a “constitutional code, and other occasional laws.”³² Like the American charter, they should strive to render the French constitution

*as simply expressed and easy to be understood as possible; for it ought to serve not only as a guide to the legislative body, but as a political grammar to all the citizens. The greatest service . . . [of] it is, that it should concentrate the maxims, and form the habits of thinking, for the whole community.*³³

The Constitution, as fundamental law, is the citizens’ document. As citizens continue to interpret and deliberate together about what it means, the Constitution endures. In James Wilson’s memorable phrase, for the sovereign people, the Constitution’s meaning is “clay in the hands of the potter.”³⁴

The prevailing literature discussing citizens’ role in interpreting fundamental law orbits around two particular clusters—the theory of “popular constitutionalism”³⁵ and accounts of social movements’ impact on constitutional law.³⁶ My contribution is distinctive in three respects. First, most of these accounts—especially the work of historians describing fundamental law in the seventeenth and eighteenth centuries—lack a coherent theory of the concept of

³² Joel Barlow, *A Letter to the National Convention of France on the Defects in the Constitution of 1791* (1792), in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 823 (Charles S. Hyneman & Donald S Lutz eds., 1983).

³³ *Id.*

³⁴ 1 COLLECTED WORKS OF JAMES WILSON 712 (Kermit L. Hall & Mark David Hall, eds., 2007). Despite famous skepticism about any particular *institution* standing in for the people-at-large, Publius also subscribes to the notion that the people themselves are not only capable of interpreting fundamental law, but uniquely so. See THE FEDERALIST NO. 49 (James Madison) (“the people themselves . . . can alone declare its true meaning, and enforce its observance”).

³⁵ See generally KRAMER, *supra* note 21.

³⁶ See DAVID COLE, ENGINES OF LIBERTY (2016); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740 (2014); Akbar, *supra* note 12.

fundamental law.³⁷ Second, my conception of fundamental law emphasizes the role responsibilities of individual citizens—as voters and jurors, deliberators and civil disobedients—not just as diffuse members of social movements and the body politic.³⁸ Finally, prevailing accounts of constitutional politics and popular constitutionalism understand citizens’ interpretive participation as merely engaging in bare-knuckle politics—and nothing more.³⁹ This conception of popular constitutionalism fails to register the Constitution’s status *as law*, and it cynically misperceives citizens’ genuine engagement in interpreting constitutional principles.

On my account, fundamental law is constitutional law that is primarily for citizens to interpret. It consists of shared principles, which are beyond the power of institutions to alter, that are efficacious in spite of disagreement over controversial application. We can say that a principle is efficacious when it is capable of robustly serving as a medium for (possibly competing) arguments that generate coherence in the body of legal materials and appeal to citizens’ common reason.

This Article is not the place to fully articulate a full theory of fundamental law, which I develop and defend elsewhere.⁴⁰ Instead, my aim is to provide an adequate sketch of the concept. We can then use

³⁷ See, e.g., KRAMER, *supra* note 21, at 14 (“Between its diverse sources, fluid nature, and the absence of any centralized forum for resolving conflict, fundamental law tended to be ‘whatever could be plausibly argued and forcibly maintained.’”) (quoting John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043, 1087 (1974)).

³⁸ David McNamee, *The Citizens’ Constitution* (unpublished manuscript) (on file with author).

³⁹ Mark Tushnet’s case for “taking the Constitution away from the courts” rests on a political calculation of cost and benefit. “Populist constitutional law returns constitutional law to the people, acting through politics,” and it does so by understanding the judiciary in an equally political light. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 186 (1999). “Judicial review in the United States is, by design, connected to ordinary politics.” Through the mobilization of interest groups and partisan contestation, “[t]he nomination and confirmation process is political to the very ground. . . . The effect is to bring judicial review into alignment with politics elsewhere.” *Id.* at 152. As a result, judicial review “cannot be defended except by seeing how it operates” — in other words, the resulting policy outcomes. *Id.* See also Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.- KENT L. REV. 991 (2006).

⁴⁰ See McNamee, *supra* note 38.

that theoretical scaffolding to achieve two purposes: first, to understand the claim that “Black Lives Matter” in a new light; and second, to illustrate the notion of principles of fundamental law by considering that urgent claim as a paradigm case. By working through this example and its historical antecedents, we can shed light on the values that fundamental law promotes—generating the constitutional bases of citizens’ respect and grounding their pervasive disagreements over political morality.

To that end, I will now simply list several conceptual formulations of the idea of fundamental law. I take the following statements to be roughly equivalent, building upon one another:

Several Formulations of Fundamental Law:

1. “constitutional law for citizens to continue to argue about”
2. “the most vital provisions and principles of the Constitution”
3. “basic constitutional principles accessible to citizens’ common reason”
4. “the basis for public reason about shared constitutional values, grounding disagreements”
5. “a contestatory resource for citizens to vindicate their rights and challenge injustice, by claiming the Constitution”

Formulation (1) is perhaps the most elementary: fundamental law is *for citizens* to interpret, in the first instance as well as in the last. Unlike ordinary law, the fully-particularized meaning of its principles cannot be settled, at least in any final sense, by authoritative institutions. Formulation (2) stresses that fundamental law does not include *all* of the Constitution—not, for example, its mechanical rules or the accretion of intricate and technical doctrine. Rather, fundamental law makes up the *most vital* provisions and principles of constitutional law: its accessible text, its animating structure, and the landmark cases that fill the terrain of our constitutional history. Formulations (3) through (5) explain *why* these provisions and principles are what matter most. Citizens may reason about them, not only as individuals, but together as participants in a common enterprise. And in so doing, they lay claim to the Constitution and take

responsibility for it, for the justice it seeks⁴¹ and the grievous failures that demand redemption.⁴²

B. Provisions and Principles of Fundamental Law

Many constitutional provisions are open-textured and lack specificity, invoking abstract principles.⁴³ Some examples include the Eighth Amendment's provision against "cruel and unusual punishment," the standard of "high crimes and misdemeanors" governing impeachment, and the Fourth Amendment's guarantee against excessive or "unreasonable" force. They also encompass the unifying purposes of the Preamble that pervade our political discourse. Determining the proper meaning and application of these provisions requires substantial interpretive argument and moral disagreement.

Of course, this does not mean that the Constitution settles nothing at all or that it avoids specific language entirely. Unmistakably, many other provisions are hard-wired rules, such as the equal representation of states in the Senate, the fixed qualifications for who may serve as a Representative, or the procedures for the Electoral College. As Christopher Eisgruber observes, establishing institutions for democratic self-government requires some degree of specificity, detail, and settlement.⁴⁴ Otherwise, "[i]f a polity is consumed with endless debates about how to structure its basic [] institutions, it will be unable to formulate policy" or govern itself in any way.⁴⁵ This is a powerful democratic argument for constitutional entrenchment. By answering these procedural questions and removing them from the domain of political argument, constitutional specificity makes democratic decision making possible.

⁴¹ See LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004).

⁴² See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* (2010).

⁴³ See RONALD DWORKIN, *FREEDOM'S LAW* 7-12 (2005); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 2-3, 35, 40-42 (Harvard Univ. Press ed. 2007). See also JACK M. BALKIN, *LIVING ORIGINALISM* 256-73 (2011) (discussing the relationship between constitutional text, at varying levels of generality and abstraction, and constitutional principles as an argumentative resource); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 246-51 (2011) (distinguishing between "the Constitution of Conversation" and "the Constitution of Settlement").

⁴⁴ EISGRUBER, *supra* note 43, at 12-35.

⁴⁵ *Id.* at 13.

But there is an important corollary here. Eisgruber notes that the fixed, entrenched nature of these specific provisions means that they cannot (and, as we have just seen, do not) exhaust all that there is to the constitutional text. Constitutions must *also* include broader provisions and abstract concepts that adapt to different circumstances and whose meaning in those circumstances remains open for debate. Otherwise, constitutional self-government would freeze in brittle, crystalline form.⁴⁶ The result is that the more general provisions and abstract principles of the Constitution are not there by coincidence—they necessarily mark out our most important commitments and aspirations as a people. Whatever else is settled by the Constitution, the proper application of these abstract principles must remain an open question for ongoing interpretive argument.⁴⁷ That is what makes these principles the most *fundamental* provisions and features of the Constitution.

Many sophisticated adherents of originalism also accept this distinction between the Constitution's abstract clauses and its more concrete provisions.⁴⁸ For the abstract clauses, Jack Balkin distinguishes between constitutional meaning and the "original expected application" of that meaning. In this way, Balkin aims to reconcile originalism with living constitutionalism, creating theoretical

⁴⁶ *Id.* at 35 ("[O]ne benefit of inflexible amendment procedures is that they provide reformers with an incentive to refrain from constitutionalizing too many specific judgments. And although it seems obvious that citizens can never get down to the business of policy-making if they are always arguing about how to count the votes, it is far from clear that there is any comparable disadvantage to an ongoing, durable argument about (for example) what equality requires. On the contrary, sustained public argument about the meaning of equality and other ideals might plausibly be regarded as the essence of democracy."). One objection to this line of argument is to distinguish procedure from substance; see, for example, the brief tour of the Constitution in JOHN HART ELY, *DEMOCRACY AND DISTRUST* 88 (2002). But this maneuver invariably fails—procedural phrases are also necessarily abstract, and they ultimately rest on substantive ideas.

⁴⁷ Eisgruber agrees. EISGRUBER, *supra* note 43, at 40 ("[W]e should interpret the Constitution's ambiguous moral and political concepts as requiring Americans to exercise their own best judgment about the matters to which those concepts refer."). Eisgruber's defense of judicial review (with which I am sympathetic) is that, by representing the people on matters of principle, it facilitates this enterprise. *See id.* at 42. But, like Dworkin, his account is too court-focused.

⁴⁸ *See supra* discussion accompanying note 43.

space for the ongoing political project of constitutional construction.⁴⁹ Ronald Dworkin also makes a similar move at several points in his defense of a “moral reading” of the Constitution.⁵⁰ He suggests that interpreters should pay particular attention to the deliberate selection of general and abstract terms, especially as they invite moral judgment about citizens’ basic rights.⁵¹ Eisgruber extends Dworkin’s argument in his proceduralist defense of judicial review, suggesting that judges with life tenure are particularly well-suited to represent the people on these matters of moral principle.⁵²

But there is a kind of lacuna here, especially with regard to the proponents of Dworkinian judicial review. Each of these views correctly traces the distinct category of fundamental law, but the emphasis quickly pivots to the role of courts in interpreting these abstract moral clauses.⁵³ And, of course, judges must play that role—but to place this responsibility with judges first and foremost misunderstands the conceptual foundations of our constitutional order. In my account of fundamental law, I aim to draw attention to the critical role that *citizens* must play in interpreting these provisions, as well as the value of their interpretive participation. Indeed, this notion is implicit in Dworkin’s view. The Citizens’ Constitution widens the scope of Dworkin’s “forum of principle,” for the very reasons that he prizes the democratic role of the judiciary: that their public articulation

⁴⁹ See BALKIN, *supra* note 43, as a reconciliation between originalism and living constitutionalism. See also William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (discussing “inclusive originalism”); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Papers Series, Working Paper No. 07-24).

⁵⁰ See DWORKIN, *supra* note 43.

⁵¹ *Id.*; McNamee, *supra* note 38. Chapter 1 also articulates a substantive conception of democracy as securing the basic rights of free and equal citizenship, contra the “majoritarian premise.” *Id.*

⁵² EISGRUBER, *supra* note 43, at 3-4.

⁵³ This is less so for Balkin, who clearly appreciates the central role of constitutional citizenship, even if their role remains somewhat passive. The theory still trains significant focus on the “legitimizing” function of the judiciary. See BALKIN, *supra* note 42. Dworkin frequently pays lip service to the idea of citizen interpretation, but this discussion is often divorced from the Constitution. The notable exception is his discussion of civil disobedience grounded in protestant constitutional interpretation. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 206-22 (1978). But even there, Dworkin’s focus remains fixed on the official decisions of whether to prosecute civil disobedience.

of principles will elevate constitutional discourse for *every* participant in the legal system. As Dworkin says, the forum of principle “holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice.”⁵⁴ On my view, this is the promise that fundamental law (at least our fundamental law) holds out—for *all* of us, as self-governing citizens. And this explains, in a way that Dworkin never quite did, why a Constitution predicated on popular sovereignty is special.

So much for the Constitution’s abstract provisions—what do I mean by including “principles” as well? Again, we can see the connection to fundamental law’s vital accessibility. Fundamental law also includes principles that operate outside the text, perhaps even some that constrain its otherwise plain meaning. Akhil Amar gives the example of the Vice President presiding over the Senate in her own impeachment trial.⁵⁵ Surely we must rule out this absurd conclusion, but we may only do so by drawing on the implicit principle that no one should be the judge in her own case. Indeed, this is the very principle of fundamental law that Lord Coke invokes in *Dr. Bonham’s Case*.⁵⁶ But it is not simply the historical pedigree of this principle that denotes it as fundamental law. Rather, it is the power of the principle to account for our intuitions in a wide range of cases—a fact that is readily apparent upon considered reflection. From this example, we can see that the basic principles of fundamental law are so vital precisely *because* they are accessible to citizens’ common reason.

This same logic illuminates the *McCulloch* Principle, one of the more famous sentences in the American constitutional canon. In *McCulloch v. Maryland*, Chief Justice Marshall upheld the National Bank under a broad reading of Congressional power.⁵⁷ He argued that

⁵⁴ RONALD DWORKIN, A MATTER OF PRINCIPLE 71 (1985).

⁵⁵ See AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION 11-14 (2012). Cf. U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

⁵⁶ J.W. Gough discusses the case and its application to fundamental law in FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY. GOUGH, *supra* note 19, at 31-38.

⁵⁷ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

the power to incorporate a bank is implicit in the other provisions of Article I, such as the power to tax, to spend, to borrow, to regulate commerce, and to defend the nation.⁵⁸ These sweeping grants of authority also give Congress power over the necessary means to carry them out, even without express enumeration.⁵⁹ Marshall argues that this broad reading of implied powers is required by the very nature of our Constitution. If, in order “to contain an accurate detail of all the subdivisions of which its great powers will admit,” the Constitution needed to fully specify “all the means by which they may be carried into execution,” the locus of our popular sovereignty could no longer serve its core purposes.⁶⁰ Instead the Constitution “would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public.”⁶¹ Marshall concludes by once again emphasizing that “we must never forget that it is a *Constitution* we are expounding.”⁶² A constitution, in other words, must *constitute* us as a people—creating an enduring enterprise of self-government that spans generations. The participants in this enterprise *must* be able to apprehend its meaning, even as they (and Congress, and the courts) continue to argue over how its general provisions apply in new circumstances. This same sentiment appears a century later in President Franklin Roosevelt’s pronouncement that the Constitution is “a layman’s document, not a lawyer’s contract.”⁶³

The *McCulloch* Principle also cuts in another temporal direction. It counsels us to conceive of the Constitution as a transgenerational project—a project that must not only endure, projecting forward in time, but also one that serves as a bridge to the past. When citizens apply these fundamental provisions and principles of the Constitution to particular circumstances, mediated by particular roles, they must invariably make judgments of political morality. What do the Constitution’s abstract principles and purposes *mean*—how do they apply—in this particular instance? And this is not simply a matter of citizens acquitting their personal responsibilities. Forming these

⁵⁸ U.S. CONST. art. I, § 8.

⁵⁹ *See id.*

⁶⁰ *McCulloch*, 17 U.S. at 407.

⁶¹ *Id.*

⁶² *Id.*

⁶³ President Franklin Delano Roosevelt, Address on Constitution Day (Sept. 17, 1937).

considered judgments of political morality also connects citizens to the moral arc of constitutional history, to its commitments and aspirations, its achievements and failures.

III. THE CONTENT OF “BLACK LIVES MATTER” AS A CONSTITUTIONAL PRINCIPLE

Fundamental law is made up of the most vital provisions and principles of the Constitution, whose general terms and concepts are accessible to democratic citizens’ common reason. Indeed, it is this very property that elevates their importance, inviting citizens to engage in public deliberation about political morality, grounding those very disagreements. Fundamental law is constitutional law for citizens in the first instance, rather than judges or officials. It is what makes the Constitution *theirs*.

But this is all very abstract. In this Section, I will develop a concrete example to clarify my account of fundamental law and why it matters. In particular, I will look to the kinds of claims that citizens make in politics, as members of social movements, as respondents to them, or otherwise. When these claims are pitched at a high level of principle, it behooves us to attempt to understand them as claims on the Constitution as well. Even if these claims never appear themselves in an appellate brief or an oral argument,⁶⁴ they may well contribute to the legal content of the Constitution—to the best interpretation of what the Constitution means.

Here I consider the urgent claim that “Black Lives Matter” is a claim on the Constitution, one that serves as a mediating constitutional principle. If we can understand this claim as both drawing on and shaping our fundamental law, at least in part, we may come to appreciate it in an important and distinctive light. “Black Lives Matter” is a paradigmatic instance of a contemporary claim of fundamental law: law for citizens to interpret, the content of which is accessible to their common reason, which both informs and grounds their ongoing arguments about basic constitutional values, which permits them to claim the Constitution as a contestatory resource to counter injustice.

⁶⁴ Though they might well appear alongside instances of civil disobedience.

A. “Black Lives Matter” as a Mediating Principle

When I say that the claim that Black Lives Matter is a claim on the Constitution, I mean that it operates as what Owen Fiss has called a “mediating principle.”⁶⁵ These principles are “mediating because they ‘stand between’ the courts and the Constitution—to give meaning and content to an ideal embodied in the text.”⁶⁶ Indeed, these principles are so pivotal that they “give the provision its *only* meaning as a guide for decision.”⁶⁷ As Fiss notes, these principles are “only a judicial gloss, open to revaluation and redefinition in a way that the text of the Constitution is not.”⁶⁸ Other interpretive decision makers must invariably draw on mediating principles as well, in precisely the same way.

Mediating principles bring particularity to the abstract provisions of the Constitution in order to breathe life into them. Fundamental law provisions, because they are general and abstract, invite this sort of particularizing function whenever they bubble up in constitutional

⁶⁵ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108 (1976).

⁶⁶ *Id.* at 107.

⁶⁷ *Id.* at 108 (emphasis added).

⁶⁸ *Id.* As Fiss explains in a later article, he initially developed the concept of mediating principles in order to explain a disagreement about how to interpret and apply the Equal Protection Clause. See Owen M. Fiss, *Why The State?*, 100 HARV. L. REV. 781, 784 (1987). Fiss also provides another example from First Amendment jurisprudence, the notion that free speech promotes the value of self-governance and requires robust public debate. Fiss anchors this “public debate principle” in Justice Brennan’s canonical statement from the landmark case of *New York Times v. Sullivan*, emphasizing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). A final example can be found in Cary Franklin’s work on the “anti-stereotyping principle” in sex discrimination law. Franklin argues that, while a concern for gender stereotypes is an imperfect gloss of the core purposes of the Equal Protection Clause (like Fiss, she subscribes to an anti-subordination account), it served as an effective mediating principle during the early stages of doctrinal development. Indeed, Franklin suggests that in designing the ACLU’s litigation strategy, Ruth Bader Ginsberg strategically fostered the application of stereotyping as a gloss on the real gravamen of the wrong. The reason is that predominately male judges would be more likely to detect the presence of stereotypes than some other alternative measure, especially if the stereotypes in question disadvantaged men. See Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 121-22 (2010).

argument. As a result, these mediating principles become part of the fundamental law as well—at least provisionally, subject to this process of “reevaluation and redefinition.”

One category of mediating principles familiar from the constitutional theory literature is the relation between a concept and competing conceptions of that concept. Ronald Dworkin first applied the distinction between a concept and a conception to the abstract clauses of the Constitution in a 1972 essay.⁶⁹ If I ask you to treat someone “fairly,” Dworkin suggests, that abstract concept alone cannot supply you with very much guidance for what you ought to do. You can only arrive at that particularized decision by drawing on some *conception* of fairness—that it requires equality (but of what?), etc.—a conception that is either categorically superior to other interpretations or is at least the most fitting under the circumstances. We may disagree a great deal about what fairness requires in particular cases.⁷⁰ But when we do, we also know that we are disagreeing about the same thing. This disagreement is, moreover, what Dworkin would later call a “theoretical disagreement,” one that is more substantive and well-grounded than a mere semantic disagreement that rests on some misapprehension of common terms—like a dispute over “where the nearest bank is” when one party means a financial institution while the other means a river bank.⁷¹

Another category of mediating principles we might call “normative elaboration,” or a fuller specification of the values at stake in an abstract clause. Fiss’s example considers how to interpret the concept of racial equality.

*There appears to be agreement on the purpose of the
fourteenth amendment; it was intended to secure
equality for the newly freed slaves and to give*

⁶⁹ DWORKIN, *supra* note 53, at 131, 134-135. Dworkin would continue to refine his interpretivism, which is most fully explicated in RONALD DWORKIN, *LAW’S EMPIRE* (1986).

⁷⁰ Compare John Hart Ely’s quip in *DEMOCRACY AND DISTRUST*, *supra* note 46, at 58: “We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.” This is, of course, not a disagreement that turns on any kind of reasoned justification or interpretive argument.

⁷¹ *Cf.* DWORKIN, *LAW’S EMPIRE*, *supra* note 69, at 1-44. This sort of mix-up is not at all like what participants in genuine moral and interpretive debates take themselves to be doing—much the same, I hope to show, as with the phenomenon of disagreements about principles of fundamental law.

*constitutional status to the ideal of racial equality. There has been disagreement, however, over the particular principles or rules that should be applied to realize this ideal.*⁷²

In particular, Fiss suggests that an individualized or “antidiscrimination” reading of the Equal Protection Clause does not fully determine the content of its commitment to racial equality. Rather, it serves as a mediating principle (one that, for example, praises colorblindness and condemns affirmative action). Fiss defends an alternative mediating principle, one that tracks the distinctive wrong of subordinating disadvantaged groups (and which also requires color consciousness and group-advantaging remedies like affirmative action).⁷³ Many similar principles are necessary to bore down on the values of the freedom of speech (Is it rooted in autonomy? Democracy?)⁷⁴ and religion (Is it based on accommodation? Equality? Strict separation?)⁷⁵.

Yet another kind of mediating principle might play a role in applying an abstract clause involving questions of social meaning. I have in mind two memorable lines from the Court’s segregation cases. First, from *Plessy v. Ferguson*, comes this infamous utterance:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because

⁷² Fiss, *supra* note 68, at 784.

⁷³ *Id.* Cf. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278 (2011) (providing a slightly different characterization of these competing principles and introducing a third that traces the Powell-O’Connor-Kennedy line). *See also* K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996) (offering an analysis and comparison of colorblind and color-conscious theories of the Constitution).

⁷⁴ Compare Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204 (1972), with ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

⁷⁵ For discussion of these questions, see, e.g., COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?* (2012).

*the colored race chooses to put that construction upon it.*⁷⁶

But two generations later, drawing in part on psychological evidence but also on a considered judgment of political morality and social meaning, the Court in *Brown v. Board of Education* held unequivocally that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”⁷⁷ Both of these assessments are judgments of how to understand the social meaning of an institutional arrangement, and both draw on the mediating principles to do that work. While *Plessy* clings to expressive neutrality—to an almost farcical caricature of willful blindness—*Brown* hinges on realism, staring down Jim Crow’s conveyed message of inferiority.

The model of competing (sometimes quite disparate) mediating principles explains the familiar phenomenon of deep constitutional disagreement. A mediating constitutional principle, in one sense, *is* the relevant constitutional meaning—it is necessary to give the abstract clause any particularized meaning at all. But in another sense, mediating constitutional principles come from without: by design, they mediate citizen-interpreters’ considered judgments of political morality, drawing them like a straw from a milk carton. But, as I hope to show, this is not a bug but a feature. As citizens imbue the Constitution with their conceptions of justice, the fundamental law thereby draws nearer to the ideal of law that is self-given.

These examples all illustrate how courts employ—indeed, *must* employ—mediating principles to decide cases. But the point extends beyond the courts—intermediate principles are essential for any decision-guiding interpretation. For this reason, mediating principles are an integral part of citizens’ interpretive toolkit. Moreover, disagreement over competing mediating principles grounds our constitutional debates—so that even when we disagree about so much, we continue to reason, together, about the same scheme of principle. And when it comes to principles of fundamental law, courts must not only help to frame that conversation on behalf of citizens—they must also pay close attention to what citizens have to say.

⁷⁶ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

⁷⁷ *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954).

“Black Lives Matter” is just such a mediating principle—one that operates as a gloss not only of the Equal Protection Clause, but also a host of other provisions: the Fifteenth Amendment’s guarantee against racial discrimination in voting, the protections of a jury of one’s peers in civil rights litigation, the Fourth Amendment’s prohibition against “unreasonable searches and seizures,” and the Eighth Amendment’s bar on “cruel and unusual punishment” and “excessive fines,” just to name a few.⁷⁸ Underlying all of these provisions—at least, a reading of these provisions that I believe to be the correct one—is an awareness of racial injustice in our current society and the Reconstructed Constitution’s commitment to eradicating it.

⁷⁸ See, e.g., Justice Sotomayor’s arresting dissent in *Utah v. Strieff*, 136 S. Ct. 2056, 2064-71 (2016), cataloguing both the sweeping extent of police power to search the bodies of people of color and the way in which this subjugation alienates them as constitutional citizens. It is telling that Justice Sotomayor cites not only to the body of case law, but also to scholarship on the problems of mass incarceration and seminal works of Black political thought. Her closing paragraph directly alludes to Eric Garner’s death by chokehold and the rousing cry of Black Lives Matter activists that “they can’t breathe.” “This Court has given officers an array of instruments to probe and examine you. When we condone officers’ use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens . . . [I]t is no secret that people of color are disproportionate victims of this type of scrutiny. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 95-136 (2010). For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, e.g., W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903); J. BALDWIN, *THE FIRE NEXT TIME* (1963); T. COATES, *BETWEEN THE WORLD AND ME* (2015). By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged. We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. GUINIER & G. TORRES, *THE MINER’S CANARY* 274-283 (2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.” *Id.*

B. “Black Lives Matter” Recognizes Difference and Rejects a Colorblind Constitution

We should understand “Black Lives Matter” as demanding some official recognition of difference in the lived experience of Black citizens, especially within the institutions of the legal system.⁷⁹ The movement’s genesis was predicated on the profound disparities in how the criminal justice system operates: in who dies at the hands of the police, in who faces prosecution and how, in who fills the jails and which communities bear the staggering cost of mass incarceration.⁸⁰ Alicia Garza, one of the cofounders of the movement, makes the point in stark terms:

When we say Black Lives Matter, we are talking about the ways in which Black people are deprived of our basic human rights and dignity. It is an acknowledgement Black poverty and genocide is state violence. It is an acknowledgment that 1 million Black people are locked in cages in this country—one half of all people in prisons or jails—is an act of state violence. . . . And the fact is that the lives of Black people—not ALL people—exist within these conditions is consequence of state violence.⁸¹

Garza specifically targets the rejoinder that “all lives matter,” because it “perpetuate[s] a level of White supremacist domination by reproducing a tired trope that we are all the same, rather than acknowledging” this legacy of systematic violence and subordination.⁸² Nevertheless, the colorblind refrain that “all lives matter” is a common one—for example, it was the initial (albeit later retracted) reaction from all the various candidates for the Democratic

⁷⁹ Alicia Garza, *A Herstory of the #BlackLivesMatter Movement* by Alicia Garza, FEMINIST WIRE (Oct. 7, 2014), <http://www.thefeministwire.com/2014/10/blacklivesmatter-2/> [<http://perma.cc/AA23-GVYF>].

⁸⁰ *Id.*; see also *A Vision for Black Lives: Policy Demands for Black Power, Freedom, & Justice*, MOVEMENT FOR BLACK LIVES (2016), <https://policy.m4bl.org/wp-content/uploads/2016/07/20160726-m4bl-Vision-Booklet-V3.pdf> [<https://perma.cc/KYX6-FZ4S>].

⁸¹ See Garza, *supra* note 79.

⁸² *Id.*

nomination when they were confronted by members of the movement.⁸³

Whatever anxieties provoked this flat-footed response, it reminds me of Herbert Wechsler's infamous fretting over whether *Brown v. Board of Education* was constitutionally sound. In his 1959 Holmes Lecture at Harvard Law School (what would become one of the most-cited pieces of legal scholarship of all time—although not, of course, for this reason),⁸⁴ Wechsler worried that the decision to desegregate public schools could not be supported by any sort of “neutral principle of constitutional law”⁸⁵—*i.e.*, a reason that would apply in the same manner to all similarly situated parties, regardless of their identity. For Wechsler, because *Brown* and its progeny prohibited segregation even in facilities that were nominally equal, its reasoning ultimately reduced to a claim about the freedom of association: the wrong of segregation was preventing children from attending the school that they desired.⁸⁶ But the problem that haunted Wechsler was that integration, the necessary remedy, *also* appeared to violate the freedom of association, symmetrically.⁸⁷

There are many problems with this line of argument.⁸⁸ But my point here is that the colorblind concern behind “all lives matter” shares a common and mistaken assumption with Wechsler's worry. To say *anything besides* “all lives matter,” the argument goes, is to

⁸³ Tamara Keith, *Democratic Candidates Stumble Over Black Lives Matter Movement*, (July 31, 2015), www.npr.org/sections/itsallpolitics/2015/07/31/427851451/democratic-candidates-stumble-over-black-lives-matter-movement [<https://perma.cc/3V4S-5UXL>]. Indeed, the movement has “rejected” the endorsement of the Democratic Party, suggesting that it has been inattentive to these key issues for too long.

⁸⁴ See Pamela S. Karlan, *What Can Brown Do for You?: Neutral Principles and the Struggle Over The Equal Protection Clause*, 58 DUKE L.J. 1049, 1049 (2009).

⁸⁵ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

⁸⁶ *Id.* at 31.

⁸⁷ *Id.* at 34.

⁸⁸ For a contemporaneous refutation, see Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

commit a similar violation of neutrality—it disparages the lives of others.⁸⁹

But the Constitution is, unmistakably, *not* neutral with respect to race. Far from it—and the claim that “Black Lives Matter” can serve to remind us of that fact. There is a longstanding debate stretching back to the antebellum era about whether the founding-era text favored slavery. William Lloyd Garrison (and, for a time, Frederick Douglass) argued that the Constitution was “a covenant with death, and an agreement with hell” for the ways in which it entrenched the institutions of slavery and white supremacy.⁹⁰ Slaves were property who, when they fled, had to be rendered to their owners.⁹¹ Though they could not vote, of course, slaves’ presence boosted the political power of the South, since they counted as “three fifths of all *other* [*i.e.*, not “free”] Persons” for the purposes of representation.⁹² The initial document also delayed Congress’s ability to ban the slave trade until 1808.⁹³ However we interpret these pieces of evidence, the answer

⁸⁹ The most charitable way to understand the defense of “all lives matter” as a rejoinder to the claim that “Black Lives Matter” will likely sound in the register of colorblind constitutionalism. The contention is that *every* instance of differential treatment or distinction based on race violates the constitutional commitment to equality and fails to treat individuals with respect and dignity. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 309-10 (2013) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect. Because racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications be subjected to the most rigid scrutiny.”) (cleaned up) (majority opinion of Kennedy, J.); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”) (majority opinion of Roberts, C.J.) The claim that “all lives,” not just “black lives” might be thought to proceed from these colorblind commitments.

⁹⁰ 24 *LIBERATOR* n. 27, July 7, 1854, at 106 (reporting the remarks of William Lloyd Garrison in Framingham, Massachusetts, on July 4, 1854). For a contemporary refutation, Sean Wilentz, *Constitutionally, Slavery Is No National Institution*, *N.Y. TIMES* (Sept. 16, 2015), www.nytimes.com/2015/09/16/opinion/constitutionally-slavery-is-no-national-institution.html?_r=2 [<http://perma.cc/Q2ZP-5FNE>].

⁹¹ U.S. CONST. art. IV, § 2, cl. 3, repealed by the Thirteenth Amendment.

⁹² U.S. CONST. art. I, § 2, cl. 3 (emphasis added).

⁹³ As we will see, Douglass would later argue that the Constitution was against racial chattel slavery, even at the founding. Ronald Dworkin gestures at a similar argument in his review of Robert Cover’s *Justice Accused*. *See* Ronald

cannot be that the Constitution was *blind* to the national problem of race.

And there is no question that the Constitution became explicitly conscious of race at the end of the Civil War and the onset of the First Reconstruction. The Thirteenth Amendment directly abolished the practice of slavery,⁹⁴ while the Fourteenth Amendment sought to extend citizenship to freed Blacks and protect their basic rights, directly overturning the key holdings of the *Dred Scott* case.⁹⁵ Indeed, the Civil Rights Act of 1866, which passed between these two amendments, guaranteed to “all persons” the same level of rights protections “as is enjoyed by white citizens.”⁹⁶ The Fifteenth Amendment then sought to ensure that citizens’ voting rights “not be denied . . . on account of race, color, or previous condition of servitude.”⁹⁷

These provisions are not colorblind. They recognize difference, not sameness. In vital ways, they each insist that Black Lives Matter. Together, they acknowledge the institutionalized existence of White Supremacy, both in public and private forms. The Reconstructed Constitution—*our* Constitution in 2018, not the initial document of 1789—is dedicated to eradicating structural racism in the form of chattel slavery and its enduring impacts.⁹⁸ For over a century this commitment would continue unheeded, and even after the Second Reconstruction of the 1960s, the work remains incomplete.⁹⁹ But the Black Lives Matter movement is correct to recognize the difference in how structural forces have shaped the prospects and identities of black

Dworkin, “Review of Robert Cover, *Justice Accused*,” *Times Literary Supplement*, December 5, 1975.

⁹⁴ James A. Wynn, *America’s First ‘Black Lives Matter’ Event*, CHARLOTTE OBSERVER (Dec. 5, 2015), www.charlotteobserver.com/opinion/oped/article48053305.html [<https://perma.cc/VY7J-KB7G>].

⁹⁵ See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 380-85 (2005). For another argument linking the Fourteenth Amendment to #Blacklivesmatter, see Cass R. Sunstein, *Black Lives Matter Reclaims the 14th Amendment*, BLOOMBERG (Sept. 1, 2015), <http://www.bloombergview.com/articles/2015-09-01/black-lives-matter-reclaims-the-14th-amendment>.

⁹⁶ Codified at 42 U.S.C. § 1981 (1991).

⁹⁷ U.S. CONST. amend. XV.

⁹⁸ See AMAR, *supra* note 95, at 351-401.

⁹⁹ See ALEXANDER, *supra* note 8.

citizens, and that this disparity is unjust. And on this question our Constitution, in plain terms, is in utter agreement.

Of course, not everyone agrees with this interpretation—conservatives have consistently expounded a colorblind reading of the Constitution.¹⁰⁰ But my point here is simple and twofold. First, there is a firm constitutional basis (even an originalist one!)¹⁰¹ for a color-conscious reading of the Constitution. Second, and more importantly, we can see how the Constitution as fundamental law serves to ground interpretive disagreements—even those that run along deep fissures on questions of political morality. Participants who take up these questions, at least at some level, are engaged in interpreting principles of our fundamental law.

C. “Black Lives Matter” Acknowledges a Continuing Legacy of White Supremacy, Which Alienates Black Citizens from Their Institutions

The claim that “Black Lives Matter”—in the very implication that the words need to be said—serves as an indictment of our country’s troubled legacy of White Supremacy,¹⁰² one that continues to this day. As Michelle Alexander has observed, it weaves and stretches through different institutional forms, from chattel slavery to Jim Crow to our current era of mass incarceration.¹⁰³ Members of the Black Lives Matter movement put the point in the following way, in their 2014 “State of the Black Union”:

This country must abandon the lie that the deep psychological wounds of slavery, racism and structural oppression are figments of the Black imagination. . . . Our schools are designed to funnel our children into prisons. Our police departments have declared war against our community. . . . This corrupt democracy was built on Indigenous genocide and chattel slavery. And continues to thrive on the brutal exploitation of

¹⁰⁰ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discrimination on the basis of race.”). For further discussion, see Karlan, *supra* note 82.

¹⁰¹ See AMAR, *supra* note 95, at 351-401; BALKIN, *supra* note 43, at 220-55.

¹⁰² See *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

¹⁰³ ALEXANDER, *supra* note 8.

*people of color. We recognize that not even a Black President will pronounce our truths. We must continue the task of making America uncomfortable about institutional racism.*¹⁰⁴

In the fall of 2016, the Movement for Black Lives released a platform, the product of an inclusive, year-long deliberative process.¹⁰⁵ This document articulates a set of policy demands varying in concreteness (such as “an end to the war against Black people,” investment of resources in communities of color alongside divestment from coercive and carceral institutions, reparations, economic justice, and black political power), anchoring the aspirations for “black power, freedom, and justice.”¹⁰⁶

Black humanity and dignity requires Black political will and power. Despite constant exploitation and perpetual oppression, Black people have bravely and brilliantly been the driving force pushing the U.S. towards the ideals it articulates but has never achieved. . . .

We have created this platform to articulate and support the ambitions and work of Black people. We also seek to intervene in the current political climate and assert a clear vision, particularly for those who claim to be our allies, of the world we want them to help us create.

We reject false solutions and believe we can achieve a complete transformation of the current systems, which place profit over people and make it impossible for many of us to breathe. Together, we demand an end to the wars against Black people. We demand that the government repair the harms that have been done to Black communities in the form of reparations and targeted long-term investments. We also demand a defunding of the systems and institutions that

¹⁰⁴ *State of the Black Union: The Shadow of Crisis Has Not Passed*, TRUTHOUT (Jan. 22, 2015), <https://truthout.org/articles/state-of-the-black-union-the-shadow-of-crisis-has-not-passed/> [<http://perma.cc/AYL8-4RT7>].

¹⁰⁵ Akbar, *supra* note 12, at 421.

¹⁰⁶ *A Vision for Black Lives: Policy Demands for Black Power, Freedom, & Justice*, *supra* note 80.

*criminalize and cage us. This document articulates our vision of a fundamentally different world.*¹⁰⁷

This stirring call for justice speaks to a deep alienation from the institutions of White Supremacy, representing a profound failure by the lights of our core constitutional values.¹⁰⁸

As the critical race theorist Charles Lawrence notes, Black citizens have a distinctive and deeply ingrained perspective on the institutions that govern them: “[W]e also know the experience of the outsider.”¹⁰⁹ In a piece in *Politico*, Nikole Hannah-Jones tells the story of attending an event on July Fourth on Long Island with her family, friends, and a young student staying with her for the summer. When a gunman began to fire shots in the air, panic erupted, and the party scrambled together for safety. Hannah-Jones turned and noticed that the student, breathing heavily, was recounting the events on the phone. She writes:

*Unable to imagine whom she would be calling at that moment, I asked her, somewhat indignantly, if she couldn't have waited until we got to safety before calling her mom. “No,” she said. “I am talking to the police.” My friends and I locked eyes in stunned silence. Between the four adults, we hold six degrees. Three of us are journalists. And not one of us had thought to call the police. We had not even considered it. We also are all black.*¹¹⁰

She continues, describing a profound sense of alienation.

¹⁰⁷ *Id.*

¹⁰⁸ There is also a sense in which this “failure” is simply “the system working as it is supposed to,” as Paul Butler puts it. See Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419, 1425 (2016). And fair enough. But it should also be clear that the success of these forces of white supremacy within the institutional structure represent a systematic derogation of the constitutional commitment to equal citizenship. As we will see in the next Section, they violate the Constitution as it is best understood.

¹⁰⁹ Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *DUKE L.J.* 431, 435 (1990).

¹¹⁰ Nikole Hannah-Jones, *A Letter From Black America*, *POLITICO* (Mar.-Apr. 2015), <http://www.politico.com/magazine/story/2015/03/letter-from-black-america-police-115545.html#ixzz3dAaPF1Ze> [<https://perma.cc/K7RM-6N6E>].

*For those of you reading this who may not be black, or perhaps Latino, this is my chance to tell you that a substantial portion of your fellow citizens in the United States of America have little expectation of being treated fairly by the law or receiving justice. It's possible this will come as a surprise to you. But to a very real extent, you have grown up in a different country than I have.*¹¹¹

Quoting Khalil Gibran Muhammad, she notes that “White people, by and large, do not know what it is like to be occupied by a police force. . . . Because they are treated like individuals, they believe that if I am not breaking the law, I will never be abused.”¹¹² But because that assumption does not hold according to the lived experience of people of color, “many of us cannot fundamentally trust the people who are charged with keeping us and our communities safe.”¹¹³

I have never had to endure such alienation, and even as I read over this account once more, I find it staggering. But, if we push a little further, we can see how the claim that Black Lives Matter, even as it speaks to this profound alienation, also carves out its limits—by operating as a claim of justice and invoking a constitutional principle. The movement asserts its claims not only as a matter of human rights, but also in virtue of citizenship and membership in the political community. *The State of the Black Union* suggests that “[t]his country,” in part because of its troubled legacy of White Supremacy, “owes Black citizens nothing less than full recognition of our human rights. . . . None of us are free until all of us are free.”¹¹⁴ The essay closes with an invocation of popular sovereignty borrowed from the Preamble and a reference to the Declaration of Independence: “We the People, committed to the declaration that Black lives matter, will fight

¹¹¹ *Id.*

¹¹² *Id.* (quoting KHALIL GHIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS* (2010)).

¹¹³ *Id.*

¹¹⁴ *Black Lives Matter Declaration—State of the Black Union*, DECLARATION PROJECT (2015), <http://www.declarationproject.org/?p=1654> [https://perma.cc/W733-KVFFV]. Cf. MALCOLM X, *The Ballot or the Bullet*, in MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 23, 35 (1965) (“Human rights are something you were born with. Human rights are your God-given rights. Human rights are the rights that are recognized by all nations of this earth.”).

to end the structural oppression that prevents so many from realizing their dreams. We cannot, and will not stop until America recognizes the value of Black life.”¹¹⁵ To my eye, at least, this invocation of popular sovereignty and the Constitution is not a coincidence. Indeed, I believe that claiming that Black Lives Matter serves to remedy the alienation of Black citizens, precisely because it is a claim on the Constitution.

D. “Black Lives Matter” as Emancipatory Protestantism

This brings us to an important distinction. Even if institutions acting under color of law continue to subordinate and alienate Black citizens—and *even if the Supreme Court of the United States blesses the constitutionality of those actions*—that, by itself, need not alienate Black citizens from their Constitution. For sometimes (perhaps often?) the Supreme Court gets the Constitution wrong.¹¹⁶ As we saw earlier, the Constitution, when fully Reconstructed and properly understood, does not countenance White Supremacy. It recognizes that Black Lives Matter. Where the institutions and practices of White Supremacy persist, one of the Constitution’s central purposes and designs is to eradicate and reconstruct them, root and branch. This aspiration aims to redeem the promissory note of equality found in the Declaration, and it has confronted different institutional barriers across the generations, with progress that is often reluctant, halting, and unsatisfactory. But there is no mistaking the Constitution’s commitment to equal citizenship. Its aspirational presence in the Constitution is central—as central as the institutional neglect of Black lives is glaring. To say that “Black Lives Matter” is to express or recognize Black Americans’ alienation from their *institutions*, but not their Constitution.¹¹⁷

¹¹⁵ *Black Lives Matter Declaration—State of the Black Union*, *supra* note 114.

¹¹⁶ For an illustration of the Court’s own recognition of this fact, see, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 863 (1992) (“*Plessy* was wrong the day it was decided.”) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

¹¹⁷ I should state clearly that I am not suggesting that we interpret “Black Lives Matter” as *exclusively* a claim on the Constitution. Indeed, in many (perhaps most) contexts, it is a claim about justice, identity, and humanity. Nor is my general thesis about the Constitution as fundamental law a claim that *all* of citizens’ political activity must be funneled through the pipeline of constitutional interpretation. Nevertheless, the claim that “Black Lives Matter” matters for constitutional interpretation, especially in the context of certain roles.

The key idea here is the concept of *protestant* interpretation,¹¹⁸ the notion that citizens are responsible for independently interpreting their fundamental law. This interpretive attitude has deep roots in the history of Black constitutional thought, exemplified most clearly in the writings of our nation's greatest citizen-interpreter, Frederick Douglass.¹¹⁹ And in this example we will see two features of fundamental law at work. First, we will see Douglass deploying the Constitution as a contestatory resource, invoking the inclusive language of the Preamble to enlist the Constitution onto the side of justice. Second, we will see Douglass constructively engaging with the past, interpreting our constitutional history in its best light. This thread carries throughout the storied careers of other central figures in Black constitutional thought, leading all the way to the Black Lives Matter movement today.

In March of 1860, as the sectional conflict between Northern and Southern states was roiling, Frederick Douglass gave a speech in Glasgow, Scotland.¹²⁰ Three years prior, the Supreme Court had held in *Scott v. Sanford* that the Missouri Compromise was unconstitutional and that freed blacks were not citizens under the Constitution. Douglass was a self-educated escaped slave, and he spoke not as a lawyer or an official, but as a citizen—forcefully arguing that the Constitution was opposed to slavery.¹²¹

¹¹⁸ See SANFORD LEVINSON, CONSTITUTIONAL FAITH 29, 44 (1988); see also BALKIN, *supra* note 42. For particular discussion of Douglass's speech as part of the constitutional canon, see J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1021 (1998); STEPHEN MACEDO, LIBERAL VIRTUES 102 (Oxford U. Press ed., 1990).

¹¹⁹ See Mariah Zeisberg, Frederick Douglass: Citizen Interpreter 3 (Aug. 2010) (unpublished draft), <http://ssrn.com/abstract=1583683> [<https://perma.cc/J86X-LAUN>]. For further discussion of the evolution of Douglass's constitutional thought, see Wayne D. Moore, *Constitutional Citizenship*, in CONSTITUTIONAL POLITICS 239 (Sotirios A. Barber & Robert P. George eds., 2001). See also Dorothy Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1766 (1997).

¹²⁰ FREDERICK DOUGLASS, SELECTED SPEECHES AND WRITINGS 380 (Philip S. Foner ed., 1999).

¹²¹ *Id.* Although this is the fullest and most eloquent account of Douglass's constitutional arguments, one can see the full development of his ideas in Foner's collection. Particularly illustrative are Douglass's exchanges with Gerritt Smith, and the final turn that Douglass takes in the end of his famous address on the meaning of the Fourth of July to Black citizens. *Id.* at 137, 204. See also Moore, *supra* note 119, for further discussion.

Douglass begins, appropriately, with some thoughts on the nature of the Constitution, which track what we have already said about the principle of constitutional supremacy and the features of fundamental law.

*It is no vague, indefinite, floating, unsubstantial, ideal something, coloured according to any man's fancy, now a weasel, now a whale, and now nothing. On the contrary, it is a plainly written document, . . . full and complete in itself. No Court in America, no Congress, no President, can add a single word thereto, or take a single word therefrom. It is a great national enactment done by the people, and can only be altered, amended, or added to by the people.*¹²²

There is a fact of the matter about what the Constitution says and what it means—its words are plainly inscribed and its principles accessible to our common reason. No institution may “add a single word” to the Constitution, even through interpretive efforts, for that role is reserved for the citizens, the people themselves. But that is exactly what the Taney Court does in *Dred Scott*; namely, the Justices read the word “slavery” into the Constitution, where Douglass insists it does not belong.¹²³

The key to Douglass’s argument is a distinctive interpretive presumption: “In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction. I will concede nothing.”¹²⁴ Thus, proponents of slavery must “give the Constitution a pro-slavery interpretation; because upon its face it of itself conveys no such meaning, but a very opposite” one.¹²⁵ The provisions that “have been pressed into the service of the human fleshmongers of America” make no express mention of slavery, and they should be read narrowly.¹²⁶ For example, Douglass suggests

¹²² DOUGLASS, *supra* note 120, at 381. The reference is to Polonius’s formless clouds in WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

¹²³ *Dred Scott v. Sanford*, 60 U.S. 393, 409 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹²⁴ DOUGLASS, *supra* note 120, at 386. Note also that this objection suffers from an errant understanding of the label through modern ears, as a conservative outcry against “activist judges.”

¹²⁵ *Id.* at 382.

¹²⁶ *Id.* at 383.

that the Three-fifths Clause operates as a kind of penalty against states permitting slavery, depriving those states of representation in the House that they would otherwise have.¹²⁷ Douglass further notes that the Importation Clause is the *only* provision in the Constitution with an express sunset, twenty years after ratification and fifty-eight years before Douglass's address.¹²⁸ And its implicit trajectory suggests an overarching purpose and aspiration that, in the long run, slavery would ultimately be eclipsed. Douglass's most ambitious claims attempt to blunt the impact of Article IV's Fugitive Persons Clause. Here, Douglass points to the record of the convention, where the delegates rejected an earlier draft that explicitly referenced and targeted slaves.¹²⁹ Each of these clauses assiduously avoids any mention of slavery as an institution.

Mariah Zeisberg suggests that it is at this point when Douglass goes off the rails, embracing a kind of "hyperliteralism" that "loses contact with the idea of legal fidelity at all."¹³⁰ But, intriguingly, Zeisberg claims that Douglass's misreading is *deliberate*, "strategic," even "subversive"—a distinctive interpretive stance that highlights the injustice of the institution and is available to Douglass through his status as a citizen, rather than an official.¹³¹ This reading strikes me as a bit too esoteric for Douglass as a model citizen-interpreter, seeking to advance arguments that are accessible to his fellow interpreters' common reason. But the idea of fundamental law can help us to understand Douglass on his own terms and to take his claims seriously.

One reason to mistrust Douglass's claims might be the worry that he is employing a kind of natural law methodology: something to the effect of, "the Constitution is against slavery because it is unjust." But though Douglass's interpretive presumption against injustice undoubtedly rests on some considerations of political morality, his argument cuts much more narrowly than that. Douglass is clear when he insists that the basic provisions of the Constitution are not indeterminate—unlike Hamlet and Polonius's amorphous clouds,

¹²⁷ *Id.* at 384.

¹²⁸ *Id.* at 383.

¹²⁹ *Id.*

¹³⁰ Zeisberg, *supra* note 117, at 25.

¹³¹ *Id.* at 26. Zeisberg also notes the text's express mention of states' positive law. *Id.* at 23.

“now a weasel, now a whale, and now nothing.”¹³² Nor is the content of justice—even in the face of deep disagreement about its requirements—even remotely like “any man’s fancy.” Douglass does not treat the text as malleable, even if its meaning depends in part on what justice requires. For Douglass, constitutional meaning is objective, and it must be plain and comprehensible to citizens’ common reason.¹³³ Additionally, there is a clear limit to the range of discretion that the presumption against injustice permits. Even this strong presumption must give way when the injustice is “expressed with irresistible clearness.”¹³⁴ What we see in these arguments, then, is not the petty grift of some constitutional huckster, but the earnest work of a citizen interpreter valiantly continuing to resist constitutional evil. And the idea of emancipatory protestantism tells us why he seeks to imbue the Constitution with his conception of justice—because, as a citizen, it is *his* Constitution.

With regard to the intentions and expectations of the framers, many of whom owned slaves, Douglass stresses that only the text that was ratified can determine constitutional meaning. Striking a tone that resonates with the *McCulloch* Principle, Douglass notes that those intentions “were for a generation, but the Constitution is for ages.”¹³⁵ And as to the founding generation,

*Whatever we may owe to them, we certainly owe it to ourselves . . . to maintain the truth of our own language, and to allow no villainy . . . to shelter itself under a fair-seeming and virtuous language. We owe it to ourselves to compel the devil to wear his own garments, and to make wicked laws speak out their wicked intentions.*¹³⁶

Once again, we see that this interpretive presumption is underwritten by a deep and abiding constitutional faith. Compare Dr. King’s similar sentiment from almost a century later, closing his letter from a Birmingham Jail:

¹³² DOUGLASS, *supra* note 120, at 381.

¹³³ *Id.*

¹³⁴ *Id.* at 353.

¹³⁵ *Id.* at 382.

¹³⁶ *Id.*

*One day the South will know that when these disinherited children of God sat down at lunch counters they were in reality standing up for the best in the American dream . . . thusly, carrying our whole nation back to those great wells of democracy which were dug deep by the founding fathers in the formulation of the Constitution and the Declaration of Independence.*¹³⁷

Those “great wells of democracy” are none other than our fundamental law. By invoking them, both King and Douglass are highlighting their inclusion and standing as citizens, full members of the political community. They both appeal to their fellow citizens, in the present and across the generations, to read our Constitution at its best and avoid constitutional injustice. And even though each figure encounters substantial opposition to his aspirational reading of the Constitution, he has faith—both in the Constitution itself and in the interpretive community that spans the generations. Like the moral arc of the universe, we might say that the Constitution and its meaning bend toward justice over time. To say as much is not to break faith in the constitutional project; it is to renew it.

Constitutional protestantism and constitutional faith subsist on a commitment to imbuing and enriching the document with one’s own conception of justice. And Douglass observes a crucial asymmetry here: we do not warp the Constitution by imbuing it with justice; we only distort it when we countenance—when we fail to properly resist—an unjust reading.¹³⁸ And this is not just a matter of faith, but a consequence of the Constitution’s holism: that it is “full and complete in itself.” Douglass canvasses the purposes of the Preamble, for “the details of a law are to be interpreted in the light of the declared objects sought by the law.”¹³⁹ This is especially true of our fundamental law.

The objects here set forth are six in number: union, defence, welfare, tranquility, justice, and liberty. These are all good objects, and slavery, so far from being among them, is a foe of them all. But it has been said that Negroes are not included within the benefits sought

¹³⁷ Martin Luther King, Jr., Letter from Birmingham City Jail, in CIVIL DISOBEDIENCE IN FOCUS 68, 84 (Hugo Adam Bedau ed., 1991).

¹³⁸ DOUGLASS, *supra* note 120, at 387.

¹³⁹ *Id.*

*under this declaration. This is said by the slaveholders in America . . . but it is not said by the Constitution itself. Its language is "we the people;" not we the white people, not even we the citizens, not we the privileged class, not we the high, not we the low, but we the people; not we the horses, sheep, and swine, and wheelbarrows, but we the people, we the human inhabitants; and, if Negroes are people, they are included in the benefits for which the Constitution of America was ordained and established.*¹⁴⁰

Douglass is right to note that the grand purposes of the Preamble do not sit well alongside the institution of slavery, that their scope carries a presumption of inclusion. And in light of these commitments and aspirations, we may derive our own protestant interpretation. Indeed, "it does not follow that the Constitution is in favour of these wrongs because the slaveholders have given it that interpretation."¹⁴¹ We need not accept slavery as integral to the Constitution, for it was the slavers' errant reading that put it there.

We should understand the claim that "Black Lives Matter" as a mediating constitutional principle for the same reasons that Douglass pressed his interpretive presumption against constitutional injustice. By offering a protestant interpretation, those who utter the claim that "Black Lives Matter" imbue the Constitution with justice, grounding their claims and establishing their standing as equal citizens under the law. In this way, even as Black citizens are alienated from the subordinating institutions of White Supremacy, they keep faith with *their* Constitution—which is dedicated to Reconstructing that political order.

The reader may be skeptical of many of the interpretive claims I have made. But I would simply note that to wager this sort of doubt is *also* to participate in a kind of interpretation—of America's constitutional history, of the arc of its aspirations, of whether and how we have fallen short of them as a people, of which groups and individuals have counted as constitutive members of that polity and what the terms of that membership signify. These are claims about America's *fundamental law*, and they are of the kind that citizens can and should engage in.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 388.

IV. THE STAKES: WHY TAKE “BLACK LIVES MATTER” AS A CLAIM OF FUNDAMENTAL LAW

“Black Lives Matter” as a constitutional principle fits the parameters and features of fundamental law that I laid out in Section I, because it is quintessentially a claim *for citizens*. The sorts of textual and principled arguments that I hashed out in Section II do not dwell in the nooks and crannies of technical doctrine, but are instead characteristically accessible to citizens’ common reason—broader claims, for example, about the continuing institutional legacy of White Supremacy. And we saw that the Constitution will bear the weight of substantial disagreement, grounding the debate over colorblindness as an aspiration. Most importantly, we saw from Frederick Douglass’s emancipatory protestantism that the Constitution can be a contestatory resource from which citizens may issue a distinctive kind of claim: a resonant harmony that blends constitutional interpretation, aspirational justice, and radical self-inclusion.¹⁴² The claim the “Black Lives Matter” sounds in that same register.

Once we make that interpretive leap, the normative, theoretical, and legal stakes come into view. In this Section, we will see how citizens’ participating in interpreting principles of fundamental law give rise to what I call the “constitutional bases of respect.” We will see how the idea of fundamental law effectively tethers interpretive positions of wide-ranging disagreement. We will consider the claim that “Black Lives Matter,” as well as its constitutional antipode—a cluster of views rooted in white ethno-nationalism. Finally, we will observe the legal stakes of accepting “Black Lives Matter” as a mediating principle of constitutional law—how this principle of fundamental law translates into the settled strictures of ordinary law and legal doctrine.

A. Emancipatory Protestantism and Constitutional Self-Inclusion

Notice the distinctive political acoustics of a claim like “Black Lives Matter.” Unlike other interpretive claims that we could imagine, this sort of claim in particular is most efficacious—perhaps only ever fully efficacious—when uttered by citizens, both to officials in their capacities and to civil society at large, as a resounding claim of

¹⁴² See *supra* discussion accompanying notes 120-41.

constitutional justice. Through these words, disaffected citizens tell the broader political community that *their* Constitution and *our* Constitution are one and the same—that it is dedicated to uprooting and Reconstructing the institutions of White Supremacy.

There is a deeper point here, a distinctive value of citizens' normative and critical engagement with the legal past. I aim to show how these protestant claims of fundamental law integrate and engage with the Constitution as a transgenerational project. As we saw with Douglass, there is a rich tradition of emancipatory protestantism in the history of Black constitutional thought. Emancipatory protestantism makes it possible for the citizen interpreter to cleave between the alienating institutions of White Supremacy and the true meaning of the Constitution, which condemns those institutions even as they persist as a matter of positive law.¹⁴³ Claiming the Constitution then becomes a kind of radical self-inclusion, where the claimant identifies herself as a member of the political community constituted by We the People. #BlackLivesMatter is one instance of emancipatory protestantism aimed at constitutional justice, one that emerges from the fertile soil and traditions of Black constitutional thought.

I return one final time to the mural in my old Brooklyn neighborhood that depicts this heritage of emancipatory protestantism throughout the twentieth century of Black constitutional thought. Together, the stories it invokes demonstrate how interpretive claims develop over time, how they are constructed and received. Each of the figures in the mural, Paul Robeson, Thurgood Marshall, and Bruce Wright, all made protestant claims on the Constitution, just like Douglass before them.¹⁴⁴ By claiming the Constitution for their own, these figures and every citizen who follows their example (including the young artist who set paint to the wall) bring their Constitution closer—perhaps as close as possible, short of Jefferson's suggestion of a new Constitution every generation¹⁴⁵—to the ideal of fundamental law that is self-given.¹⁴⁶

¹⁴³ See *supra* discussion accompanying notes 120-41.

¹⁴⁴ See *supra* discussion accompanying notes 2-3; see also *infra* discussion accompanying notes 147-50.

¹⁴⁵ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), <https://founders.archives.gov/documents/Madison/01-12-02-0248> [<https://perma.cc/6Z24-M4TS>].

¹⁴⁶ Compare John Rawls's idea of a "well-ordered society," which is "effectively regulated by a public conception of justice," that "establishes the bonds of civic

Consider the story of Judge Bruce Wright. As a judge in New York criminal court in the 1970s, Wright became the target of the Patrolmen’s Benevolent Association, which memorably labeled him “Turn ‘em Loose Bruce” for his liberal approach to setting low bail for poor and black defendants. Judge Wright also publicly decried police violence, noting that acquittals gave police “a license to hunt down blacks and kill them with impunity.”¹⁴⁷ In his memoir, *Black Robes, White Justice*, Wright reflects on the backlash that led to his reassignment in 1974, self-consciously embracing Douglass’s justice-infused protestantism.

So fearful and alarmed has the populace become that at the process of arraignment, when a defendant is merely charged with a crime, society lusts for his blood and applauds his capture only if bail is set at an impossible and inflationary figure. They cheer the violation of the very Constitution which they say is endangered [W]hen the [Eighth] Amendment says bail shall not be

friendship,” even among citizens with competing and divergent conceptions of a good life. A public conception of justice permits free and equal citizens to pursue their chosen ends under terms of cooperation that each can justify to the others, thereby “constituting the fundamental charter of a well-ordered human association.” JOHN RAWLS, *A THEORY OF JUSTICE* 5, 397 (rev. ed., 1999). Rawls notes that “[n]o society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position . . . [that] materially affects his life prospects.” *Id.* at 12. The only way to reconcile this inevitable fact with the liberal ideals of freedom and equality is to ensure that our shared institutions pass a high bar of justification—according to principles that rational parties would choose in an ideal situation designed to model the freedom and equality of moral personhood. As a result, “whenever social institutions satisfy these principles those engaged in them can say to one another that they are cooperating on terms to which they *would* agree if they were free and equal persons whose relations with respect to one another were fair.” *Id.* (emphasis added). By establishing the conditions for this sort of justificatory web, “a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed.” *Id.*

¹⁴⁷ Robert D. McFadden, *Bruce McM. Wright, Erudite Judge Whose Bail Rulings Caused an Uproar, Dies at 86*, N.Y. TIMES (Mar. 26, 2005), www.nytimes.com/2005/03/26/nyregion/bruce-mcm-wright-erudite-judge-whose-bail-rulings-caused-an-uproar.html [<http://perma.cc/9VC4-NJFR>].

*excessive, it means that it must be reasonable. What is reasonable for a person who has two dollars?*¹⁴⁸

Judge Wright would later defend his exercise of emancipatory protestantism as stemming from his obligation to “honor the admonition of the last will and testament of Frederick Douglass, which was to all black people of this country: Agitate, agitate, agitate. And I don’t think that my right to agitate stops at the courthouse door.”¹⁴⁹ We can also see Wright’s protestantism at work in his barbed response to colleagues who recalled military segregation as “national policy” during the War: “[t]hey were wrong of course. National policy was declared by the Constitution and its amendments. What they meant was that it was a national practice of raw racism and a heedless flaunting of the Constitution.”¹⁵⁰

My point is not necessarily to hold up Judge Wright as a paragon of the judicial office, though I would praise both his actions and his trenchant criticisms of the criminal justice system.¹⁵¹ My claim, rather, is that this line of emancipatory protestantism—which runs from Douglass, through Robeson, Marshall, and Wright, to today’s Black Lives Matter activists—dissolves the puzzle I alluded to at the start of this Article. Emancipatory protestantism explains how black citizens may rightly claim the fundamental law of the Constitution as their own, even as the institutions of White Supremacy persist under positive law.

Emancipatory protestantism also provides the mechanism for how constitutional claims shift in plausibility across time, from one generation to the next.¹⁵² Notice that, although Judge Wright’s words were quite inflammatory in 1979, drawing criticism from both parties, the Democratic Party has largely come to accept his positions. And

¹⁴⁸ BRUCE WRIGHT, *BLACK ROBES, WHITE JUSTICE* 203 (Carol Publishing Group ed. 1990).

¹⁴⁹ See John Kalish, *Controversial Memorial for ‘Turn ‘Em Loose Bruce,’* NAT’L PUB. RADIO (June 6, 2005), www.npr.org/templates/story/story.php?storyId=4682253 [<https://perma.cc/PF5H-3NAP>].

¹⁵⁰ WRIGHT, *supra* note 148, at 111-12.

¹⁵¹ I think Judge Wright’s invocation of Douglass’s admonition in light of his official duties as a judge is also defensible, but my discussion of citizens’ and judges’ responsibilities belongs elsewhere.

¹⁵² Cf. Balkin’s discussion of arguments both “off the wall” and “on the wall” in BALKIN, *supra* note 43, at 129-37.

they have done so rather recently, at the behest of activists proclaiming the value of Black lives. The mural of the Preamble depicts an interpretive conversation across the twentieth century.¹⁵³ We should bear in mind, after all, that Douglass’s antebellum emancipatory protestantism was not successful—but a Civil War and Reconstruction charted a path toward his broad reading of the Preamble.¹⁵⁴

Most importantly, the mural conveys a message that this conversation is predicated upon and that sustains it: *The Constitution is ours, too. “We the People” includes us, as well. We belong.*

B. Principles of Fundamental Law and the Constitutional Bases of Respect

This discussion brings us to an objection: given its institutional legacy of injustice, subordination, and white supremacy, why should

¹⁵³ This includes Paul Robeson’s claims on the Constitution. See his writings as a student at Rutgers (including his professor’s dismissive rejection of a breathless reading of the Equal Protection Clause) in PAUL ROBESON SPEAKS, *supra* note 3.

¹⁵⁴ See Moore, *supra* note 119. Certainly, that war and those formal amendments were not sufficient to secure Black citizens’ substantive equality. But the mural speaks to that arc of the story as well. For an illustrative discussion, compare Alfred Brophy on “The Great Constitutional Dreambook” in Ralph Ellison’s *THE INVISIBLE MAN* (1952), which stands in for Black citizens’ faith in constitutional redemption during the Jim Crow era. See Alfred Brophy, *The Great Constitutional Dream Book*, in *ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES* 360 (2008). In Ellison’s novel, the narrator observes an elderly black couple being evicted from their Harlem apartment. We see markers of their emancipation and with the narrator’s repeated refrain that “we’re a law abiding people,” we see the empty promises of the post-bellum legal order laid bare. All the couple has is “The Great Constitutional Dream Book.” Brophy writes that “Ellison was alluding to ‘dream books,’ which in the late nineteenth and early twentieth centuries were popular in African-American culture for dream interpretation. The ‘Great Constitutional Dream Book’—for Ellison, and for African Americans during the years between the end of Reconstruction in 1877 and the beginning of the civil rights movement, around the time of the Supreme Court decision in *Brown v. Board of Education* (1954)—was an image, an idea. It alluded to the dreams of what the Constitution might be and the life that might exist under it. . . . A constellation of ideas then in circulation in the black press, on how the legal world ought to be construed, constituted that dream book. Ellison was referring to the dreams of African-American intellectuals generally—about equality, the campaign to stop lynching, equal funding for separate schools, an end to discrimination in housing, the right to vote, and segregation in public transportation. Those dreams became a movement to place the idea of equality at the center of U.S. constitutional law.” *Id.* at 360.

we care about what the Constitution says, or even what it means? To be sure, constitutional inclusion is an important value—but shouldn't we instead give conceptual priority to what *justice* requires? One might be tempted to read the Movement for Black Lives' *Vision*, with its broad indictment of American institutions, in exactly that way.¹⁵⁵

But this choice as presented, between constitutional fidelity and justice, is a false one. A more searching theoretical approach will deliver a deep connection between the Citizens' Constitution, citizens' interpretive participation, and an essential element of social justice: the institutional grounding for citizens' self-respect.

There is a distinctive participatory value in citizens' engagement with constitutional meaning. Adopting the standpoint of constitutional citizenship and the interpretive perspective provides a democratic-republican basis for deliberating about what justice requires—together, as citizen-interpreters, whose arguments are grounded in shared principles of fundamental law. In particular, citizens' common participation in constitutional interpretation gives rise to what I will call the *constitutional bases of respect*.¹⁵⁶

There are two aspects to the constitutional bases of respect. They consist in both (1) mutual recognition of fellow citizens' equal status through the deliberative process of ongoing interpretive argument about basic principles, as well as (2) the institutional foundations of citizens' self-respect in light of a society's "constitutional essentials."¹⁵⁷

We can look to an element of John Rawls's theory of justice as an illustration of how basic institutional structures and the values they promote can give rise to (or undermine) citizens' self-respect and their mutual respect for one another under those shared institutions.

Rawls argues that the principles of a just society are those that would be chosen in a thought experiment he calls the "original position," which is designed to model citizens' free and equal status.¹⁵⁸ The parties to the original position select the principles of justice from behind a "veil of ignorance": they know, for example, that they have a

¹⁵⁵ *A Vision for Black Lives: Policy Demands for Black Power, Freedom, & Justice*, *supra* note 80.

¹⁵⁶ The term is a direct reference to Rawls's idea of the "social bases of self-respect" as a primary good of distributive justice, discussed below.

¹⁵⁷ JOHN RAWLS, *POLITICAL LIBERALISM* 227-30 (1993).

¹⁵⁸ RAWLS, *supra* note 146.

capacity for a sense of justice and a capacity to form, revise, and pursue a “conception of the good”—and, indeed, these two capacities give rise to “fundamental aims and interests in the name of which they think it legitimate . . . to make claims on one another.”¹⁵⁹ But, importantly, they don’t know much else. They especially do not know *their particular* conception of what is valuable in life—only that it will be of the utmost importance to them.¹⁶⁰ The parties also do not know other morally arbitrary features of their lives, such as their race, gender, talents, *etc.*¹⁶¹

Facing this set of choice conditions, Rawls argues that the parties will seek to determine principles for the fair division of what he calls “primary social goods”—the sort of all-purpose means that would be rational to pursue no matter what particular conception of a good life one might turn out to have, and also which can be suitably governed by principles of distributive justice.¹⁶² Income, wealth, access to offices and opportunities—whatever goals and projects you might pursue with your life, these are the all-purpose means that will prove instrumental.¹⁶³

Of these various goods, “perhaps the main” or “most important” primary good to a theory of distributive justice is “the social bases” of “self-respect.”¹⁶⁴ Rawls says that “[i]t is clearly rational for [moral persons] to secure their self-respect. A sense of their own worth is necessary if they are to pursue their conception of the good with satisfaction and to take pleasure in its fulfillment. Self-respect is not so much a part of any rational plan of life as the sense that one’s plan is worth carrying out”¹⁶⁵—a sense that is palpable from the shape of our shared institutions and how they order our social world. A theory of justice concerns itself with the *social bases* of self-respect because when social institutions are governed by principles of justice, they

¹⁵⁹ *See id.* at 11-17, 118, 131. These capacities correspond to the features of “moral personhood” that form the basis of equality and which situate persons of justifying fair terms of social cooperation with one another. *See id.* at 441-49.

¹⁶⁰ *Id.* at 389.

¹⁶¹ *Id.* at 118-19.

¹⁶² *Id.* at 79.

¹⁶³ *Id.* at 79-80.

¹⁶⁴ *Id.* at 386, 477-78.

¹⁶⁵ *Id.* at 155.

thereby express citizens' common respect for one another. Under such conditions,

*in public life citizens respect one another's ends and adjudicate their political claims in ways that also support their self-esteem. It is precisely this background condition that is maintained by the principles of justice. . . . This democracy in judging each others' aims is the foundation of self-respect in a well-ordered society.*¹⁶⁶

We can observe this promise of just institutions most concretely in cases of constitutional *injustice*. Take, for example, Chief Justice Taney's haunting words in *Dred Scott*, claiming a racialized constitutional inheritance that rendered white Europeans the sole members of our political community, to the exclusion of African slaves and their descendants:

The question is simply this: Can a negro whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

. . . .

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This

¹⁶⁶ *Id.* at 388.

*opinion was at that time fixed and universal in the civilized portion of the white race.*¹⁶⁷

With such a conception of our constitutional essentials, Taney literally makes it impossible for people of color to imagine themselves as political equals—so much so that Dred Scott’s suit must be dismissed for lack of standing by dint of the fact that he was born a slave, without regard to any other achievement or occurrence in his unfortunate life (such as the fact that he lived for years on free soil, was married and bore children there).¹⁶⁸ *Dred Scott* unmistakably envisions our shared institutions as designed to subordinate and degrade, not to express persons’ respect for one another.

Or consider Dr. King’s response to the failures of Reconstruction, in his famous missive from a Birmingham jail—especially his impatience with white moderates’ plea for civil rights activists to “wait”:

*[W]hen you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, brutalize and even kill your black brothers and sisters with impunity; when you see the vast majority of your twenty million Negro brothers smothering in an air-tight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can’t go to the public amusement park that has just been advertised on television, and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky . . . then you will understand why we find it difficult to wait.*¹⁶⁹

This daunting description of institutional alienation and humiliation sits in stark contrast with Rawls’s discussion of the possibility for a

¹⁶⁷ *Dred Scott v. Sanford*, 60 U.S. 393, 403, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁶⁸ *Id.* at 457-58.

¹⁶⁹ King, Jr., *supra* note 137, at 68, 72-73.

scheme of equal constitutional liberty to serve as the basis of citizens' respect:

The account of self-respect as perhaps the main primary good has stressed the great significance of how we think others value us. But in a well-ordered society [i.e., one governed by principles of justice] the need for status is met by the public recognition of just institutions, together with the full and diverse internal life of the many free communities of interests that the equal liberties allow. The basis for self-respect in a just society is not then one's income share but the publicly affirmed distribution of fundamental rights and liberties. And this distribution being equal, everyone has a similar and secure status when they meet to conduct the common affairs of the wider society. No one is inclined to look beyond the constitutional affirmation of equality for further political ways of securing his status.¹⁷⁰

The point is to illustrate a theoretically rich notion of constitutional essentials as a shared basis of respect for ourselves and our fellow citizens—one that seems consistent with at least the *text* of the Constitution—and to notice the considerable gap between that promise

¹⁷⁰ RAWLS, *supra* note 146, at 477. Note that this also occurs in the background of other just institutions, such as the fair value of political liberties (forbidding distortions of political equality based on disparities of income or wealth), fair equality of opportunity (so that one's initial starting point in society has absolutely no correlation with their potential to succeed—only their level of talent), and the difference principle (so that any disparities in the level of talents redounds to the advantage of all—including the least-advantaged). In this way, principles of justice will “publicly express men’s respect for one another. In this way they insure a sense of their own value.” *Id.* at 156. Rawls continues, “For when society follows these principles, everyone’s good is included in a scheme of mutual benefit and this public affirmation in institutions of each man’s endeavors supports men’s self-esteem. . . . For by arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberties, persons express their respect for one another in the very constitution of their society. In this way they insure their self-respect as it is rational for them to do.” *Id.* This is Rawls’s strongest argument for why the parties to the original position would select the difference principle, rather than maximizing the average utility of members of society.

and the historical reality in which we find ourselves. But this gap creates a distinctive opportunity for citizens who adopt the constitutional point of view. Where this gap exists between abstract constitutional provisions that seem to invite justice and substantive equality—such as the Preamble and the Reconstruction Amendments—and the groan of subordinating institutions that continue to reject those values, emancipatory protestantism makes it possible for citizens (both in their individual capacities and when they carry out their constitutional role responsibilities) to reclaim and redeem the promise of those provisions.¹⁷¹ The arc of constitutional progress, as it were, can bend towards justice—because citizens choose to make it that way.

This is the redemptive promise of emancipatory protestantism. With a legacy of injustice and a justice-seeking Constitution, citizens may take it upon themselves to occupy that gap and, bit by bit, restore the constitutional bases of respect—reclaiming the meaning of abstract provisions and layering on content-supplying mediating principles like “Black Lives Matter.” This is precisely what Douglass is doing in his reading of the Preamble.¹⁷² And Rawls very much has King in mind in his discussion of civil disobedience when constitutional principles aim at justice but institutions fall short.¹⁷³ When such disobedience satisfies certain conditions—that it is public, open, accepting of punishment, and most of all, directed as an appeal to shared principles of constitutional justice—it promotes what Rawls would later call “stability for the right reasons.”¹⁷⁴ Citizen-disobedients thereby take responsibility for their Constitution and its principles, imbuing its meaning with their conception of justice and thereby affirming their own worth through their interpretive participation:

In a democratic society, then, it is recognized that each citizen is responsible for his interpretation of the principles of justice and for his conduct in the light of

¹⁷¹ Cf. Balkin & Levinson, *supra* note 118, at 1021.

¹⁷² DOUGLASS, *supra* note 120, at 380, 387.

¹⁷³ This falls in *A Theory of Justice*'s discussion of “nonideal” theory. RAWLS, *supra* note 146, at 335-43. Rawls wrote the initial paper in 1969 for a collection of essays on civil disobedience, in a chapter immediately following King's Letter. See John Rawls, *The Justification of Civil Disobedience*, in CIVIL DISOBEDIENCE 240-55 (Hugo Adam Bedau ed., 1969).

¹⁷⁴ JOHN RAWLS, POLITICAL LIBERALISM xxxvii n.5 (expanded ed. 2005).

them. There can be no legal or socially approved rendering of these principles that we are always morally bound to accept, not even when it is given by a supreme court or legislature. Indeed, each constitutional agency, the legislature, the executive, and the court, puts forward its interpretation of the constitution and the political ideals that inform it. Although the court may have the last say in settling any particular case, it is not immune from powerful political influences that may force a revision of its reading of the constitution. The court presents its doctrine by reason and argument; its conception of the constitution must, if it is to endure, persuade the major part of the citizens of its soundness. The final court of appeal is not the court, nor the executive or the legislature, but the electorate as a whole. The civilly disobedient appeal in a special way to this body.¹⁷⁵

In this way we see how taking up the standpoint of constitutional citizenship provides a democratic basis for deliberating about justice, together. The Citizens' Constitution provides the foundation for recognizing one another as equal citizens and considering our fellow interpreters' arguments with respect—even amidst deep disagreement. And it supplies the grounds for what emerges to serve as the basis of each citizen contributor's self-respect. The claim that "Black Lives Matter," as an instance of emancipatory protestantism and as a claim of fundamental law, plays this role.

C. The Problem of Illiberal Constitutional Extremities

Institutional acceptance that "Black Lives Matter" then carries with it a necessary implication—the imperative to excise the constitutional impurity of White Supremacy like the dross from refined metal.¹⁷⁶ By rejecting the degradation of White Supremacy, institutional recognition of "Black Lives Matter" as a claim of fundamental law thereby promotes the constitutional bases of respect.

But another objection quickly comes into view. The agents of White Supremacy, long before Chief Justice Taney and long into subsequent centuries, have also laid claim to the Constitution. A recent

¹⁷⁵ RAWLS, *supra* note 146, at 342.

¹⁷⁶ See discussion *supra* Sections II.A-II.B.

article by Jared Goldstein traces the history of “The Klan’s Constitution” and finds that the KKK, in its various iterations, “has consistently been guided by the conviction that the United States is fundamentally a white nation, that the nation’s founders were dedicated to white rule, and that the Constitution should be understood as the source of white power.”¹⁷⁷ The strongest version of these interpretive positions certainly represents an instance of what we might call “constitutional extremities”—but Goldstein shows that its currents have also coursed through institutional enactments that are far closer to the mainstream. These examples range from Taney’s appalling claims in *Dred Scott*,¹⁷⁸ to the nativism that underlay immigration restrictions in the late nineteenth and early twentieth centuries,¹⁷⁹ to the forces that eroded Reconstruction and promoted Jim Crow for a century.¹⁸⁰ The problem is this: how can “Black Lives Matter” operate as a claim of fundamental constitutional law if our founding document also seems (at least according to some interpreters) to countenance its constitutional antipode, a legacy of White Supremacy?

One way to respond to the objection is to flatly deny the premise and refuse to give any credence to “the Klan’s Constitution.” Perhaps people have held those interpretive views, but people believe all kinds of crazy things—and in this case, at least, they are mistaken. Frederick Douglass was correct about the founding Constitution’s antiracist tilt, which the Reconstruction Amendments—the *re*-founding texts of our Constitution, today—and the victories of the Civil Rights Movement serve to confirm.¹⁸¹

But this response rescues “Black Lives Matter” as a constitutional claim at the expense of the theoretical and normative foundations of fundamental law. Doesn’t the interpretive prospect of illiberal constitutional extremities, which reject constitutional inclusion at their core, undermine the very notion of the constitutional bases of respect? How can the Constitution ground citizens’ mutual respect and

¹⁷⁷ Jared A. Goldstein, *The Klan’s Constitution* (Roger Williams Sch. of Law Legal Studies, Working Paper No. 179, 2018) (abstract).

¹⁷⁸ DOUGLASS, *supra* note 120, at 381; Goldstein, *supra* note 177, at 4.

¹⁷⁹ Goldstein, *supra* note 177, at 5.

¹⁸⁰ *Id.* at *passim*.

¹⁸¹ See *supra* discussion accompanying notes 77-81, 98-111.

recognition in the face of such deep and rending disagreement? A more satisfactory response must press further.

Still, we needn't stray too far from that line of argument—we should not lose sight of the fact that *the Klan is*, after all, *very much mistaken* about the best interpretation of constitutional values. Even against the background churn of principles of fundamental law, some things are settled. Among them is the outcome of our “great civil war,” which, as the President who oversaw its course once said, tested whether “a new nation, conceived in liberty and dedicated to the proposition that all men are created equal[,] . . . can long endure.”¹⁸² Also settled are the constitutional landmarks of *Brown v. Board of Education*,¹⁸³ the Civil Rights Act of 1964,¹⁸⁴ and the Voting Rights Act of 1965¹⁸⁵—which emerged from the movements of the twentieth century and breathed life into that war's “new birth of freedom.”¹⁸⁶

It is no coincidence that, in Goldstein's recitation of the Klan's different episodes of constitutional thought, White Supremacists so frequently place themselves on the wrong side of history. Klan members such as Nathan Bedford Forrest praised “the old Constitution” of 1861, willfully repudiating the legitimacy of its subsequent amendments—but such wistful romanticism does not change the outcome of those struggles, now written on the face of our institutions. William Simmons, who formed the second Klan with its surge of nativism, testified before Congress in 1921 that the organization was “assembled around the Constitution of the United States, to safeguard its provisions, advance its purposes, and perpetuate its democracy.”¹⁸⁷ Such a view, of course, is plausible only if one denies that the Constitution purports to secure the equal

¹⁸² President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), (transcript available at http://avalon.law.yale.edu/19th_century/gettyb.asp) [perma.cc/FV3D-LVUY].

¹⁸³ *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

¹⁸⁴ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e to § 2000e-17).

¹⁸⁵ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 53 U.S.C. 10301 to § 10314).

¹⁸⁶ Lincoln, *supra* note 182. For the idea that these pieces of positive law extended the vision of Reconstruction and permanently altered the constitutional landscape, see BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014).

¹⁸⁷ Goldstein, *supra* note 177, at 33 n.155.

citizenship of the descendants of emancipated slaves, as full members of the democratic polity. Perhaps the Klan might squint and blur such an omission during the height of Jim Crow, with Reconstruction a relegated memory—but as we have observed, the story does not end there. The second Klan could embrace constitutional values (“[d]emocracy, fair-dealing, impartial justice, equal opportunity, religious liberty, independence, self-reliance, courage, endurance, [and] acceptance of individual responsibility”) ¹⁸⁸ as “uniquely the product of Anglo-Saxon culture” and which “could only truly be embraced by white Protestants.” ¹⁸⁹ But, as Goldstein notes, this cultural chauvinism led ineluctably to an even more dubious assertion—that White Supremacy is *the* core constitutional value. ¹⁹⁰ Frederick Douglass has already explained to us why this insertion of iniquity into the document is such a spurious displacement of constitutional text and history. ¹⁹¹

To the extent that constitutional extremities like the Klan’s invoke more overlapping constitutional values, this is a welcome occurrence—it serves to better ground our deepest disagreements as a nation and generate common argumentative resources. More importantly, liberal constitutional values and the arc of their development exert an ongoing force on interpretive argumentation. Goldstein documents the increasing “Nazi-fication” of the Klan over the latter half of the twentieth century, turning away from constitutional patriotism towards a revolutionary stance and radical ethno-nationalism—one that rejects Lincoln’s “notion of a ‘proposition nation.’” ¹⁹² If we set this course against the broader backdrop of constitutional development, we can observe the centripetal force repelling the Klan and its commitment to White Supremacy away from prevailing views about what the Constitution means. As the Klan became increasingly marginalized (even the object of cultural ridicule) in the 1970s and beyond, it is hardly a coincidence that its interpretive constitutional resources grew depleted. ¹⁹³

¹⁸⁸ *Id.* at 37 (quoting Hiram Evans).

¹⁸⁹ *Id.*

¹⁹⁰ Goldstein, *supra* note 177, at 33.

¹⁹¹ *See supra* discussion accompanying notes 98-111.

¹⁹² Goldstein, *supra* note 177, at 73 (quoting Nationalist Front’s “Unity Statement”).

¹⁹³ *Id.* at 63.

Again, we see a similar thread of argument against the Klan's interpretive claims, which reach for the Constitution but are repelled by its liberal and egalitarian commitments.¹⁹⁴ So too with all illiberal views that occupy constitutional extremities—they might well encounter the same refrain, invoking *Brown*, the Fourteenth Amendment, and other bits of positive law: "It's been decided already! The Constitution rejects your illiberal commitments." But isn't this an odd refrain for the protestant view I have described, where constitutional meaning is not determined by authoritative institutions, but rather at the tribunal of each citizens' individual reason, as they deliberate together about what their Constitution means?¹⁹⁵

And here we arrive at the key point, which allows us to vault through the problem of illiberal constitutional extremities and secure the theoretical basis for fundamental law. What matters about *Brown* and the Fourteenth Amendment as guarantees of equal citizenship—the reason why the Klan gets the Constitution so wrong—is not the *mere fact* of positive legal authority. It's true that on a Monday morning in May of 1954, nine judges in black robes decided that districts in Kansas, South Carolina, Delaware, Virginia, and the District of Columbia could no longer segregate schools based on race.¹⁹⁶ And it's also true that they did so because, eighty-six years prior, Congress proposed, and the states ratified, a constitutional amendment forbidding states to "deny to any person . . . equal protection of the laws."¹⁹⁷ Facts like these, about the past actions of government officials and words on the page, are obviously important in determining constitutional meaning. But they matter less than—or, better, they take on their particular salience and importance *because of*—a more basic fact: widespread acceptance, across generations of citizens, that these constitutional landmarks and their animating principle of equal citizenship are central to the Constitution. The core constitutional value of equality permeates the fabric of citizens' common reason.

¹⁹⁴ U.S. CONST. amend. XIV.

¹⁹⁵ See *supra* discussion in Section II.

¹⁹⁶ *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954).

¹⁹⁷ U.S. CONST. amend. XIV.

D. From Fundamental Law to Ordinary Law: The Legal Stakes

A final question remains. If we understand the claim that “Black Lives Matter” as a claim of fundamental law, how does it translate to actual changes in ordinary law and legal doctrine?

One place to look, of course, are the demands from the voices of the movement itself. The Movement for Black Lives’ “Vision” calls for “an end to the war against Black people,” “investment-divestment” of resources away from incarceration and towards restoring communities, reparations for the enduring harms of chattel slavery, economic justice, and increased black political power.¹⁹⁸ Certainly these are worthy goals, and recognizing “Black Lives Matter” as a claim of fundamental constitutional law underscores the extent to which American society is deeply committed to these sorts of steps to rectify the lasting legacy of White Supremacy. And they amount to important concrete intermediate steps—from an end to capital punishment, sweeping transformation of bail practices, increased decarceration and decriminalization, even movement towards the abolition of the prison system.¹⁹⁹

But there are also consequences from the claim that “Black Lives Matter” that flow from the aspirations of fundamental law to the gritty details of ordinary law and doctrine. In the remainder of this section, I will sketch several concrete examples of how the claim that “Black Lives Matter” applied as a mediating principle for these and other related constitutional provisions, might alter particular institutions and outcomes.

- **The Law of Immunity and Jury Control:** *Which claims can even reach a jury?*

The Supreme Court’s conjoint doctrines of qualified immunity under § 1983 (limiting officers’ liability for civil rights violations that are not “clearly established”) and summary judgment (disposing of cases where no reasonable jury could find a dispute of material fact) make for a devastating combination against civil rights plaintiffs who have suffered excessive force at the hands of the state.²⁰⁰ In such cases,

¹⁹⁸ See *A Vision for Black Lives: Policy Demands for Black Power, Freedom, & Justice*, *supra* note 80.

¹⁹⁹ See Akbar, *supra* note 12, at 428.

²⁰⁰ *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014).

this doctrinal confluence keeps mixed question of fact and law—i.e., *reasonableness*—away from juries who might be well suited to appreciate the plaintiffs' claims.²⁰¹ It is vital that the jury should hear these cases, make such mixed inquiries, and deliberate together about the relevant principles that will decide what is reasonable under the circumstances.²⁰²

On the night of March 29, 2001, a Deputy Sheriff in Peachtree City, Georgia attempted a routine traffic stop.²⁰³ Victor Harris was driving 73 miles per hour on a 55-mile-per-hour four-lane highway.²⁰⁴ Upon seeing the blue lights flash behind him, Harris accelerated further. The Deputy gave pursuit, commencing a chase that would reach speeds of up to 85 miles per hour.²⁰⁵ Harris attempted a failed maneuver to evade capture by diverting into an empty parking lot.²⁰⁶ As Harris reentered the highway, Deputy Timothy Scott took the lead in pursuit.²⁰⁷ Approximately six minutes after the chase had begun, Scott deliberately struck Harris's rear bumper, causing Harris's car to spin out of control and overturn into a nearby embankment.²⁰⁸ As a result of the crash, Harris lost the use of his arms and legs.²⁰⁹ Harris filed a § 1983 claim, arguing that Scott's use of deadly force was an unreasonable seizure of his person, violating his rights under the Fourth and Fourteenth Amendments.²¹⁰

Scott moved for summary judgment, a procedure that essentially cuts out the jury's fact-finding phase of a trial.²¹¹ Federal courts will only grant a motion for summary judgment when "there is no genuine

²⁰¹ *Id.* at 658-59.

²⁰² *See id.* at 660. Qualified immunity has recently come under attack from various quarters in the literature. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 48 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018).

²⁰³ *Harris v. Coweta Cty.*, 433 F.3d 807, 810 (11th Cir. 2005), *rev'd sub nom.* *Scott v. Harris*, 550 U.S. 372 (2007).

²⁰⁴ *Id.*

²⁰⁵ *Scott*, 550 U.S. at 374-75.

²⁰⁶ *Id.* at 375.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 375-76.

²¹¹ *Id.* at 376.

dispute as to any material fact and the movant is entitled to judgment as a matter of law,”²¹² so that “a reasonable jury would not have a legally sufficient evidentiary basis to find for the other party.”²¹³ Scott claimed to prevail as a matter of law because he had qualified immunity: Harris had no clearly established right against the use of deadly force in a high-speed chase like this one.²¹⁴ Although the Supreme Court’s twenty-two-year-old precedent²¹⁵ established the relevant factors for the use of deadly force²¹⁶, Scott sought a clear rule exempting high-speed chases from that inquiry.²¹⁷ If Scott was correct, and Harris did not have a clearly-established right against deadly force, then Scott would be immune against any liability. The jury’s findings would no longer decide any dispute over a material fact, and Scott should then win the case on a motion for summary judgment, as a matter of law.

Because summary judgment short-circuits a jury trial, courts will draw any factual inferences in favor of the non-moving party and ask whether a reasonable jury could still find in its favor.²¹⁸ If, even then, no reasonable jury could find for the non-moving party, then granting summary judgment will not impair the right to a civil jury trial.²¹⁹ Here, both the District Court and the Eleventh Circuit Court of Appeals denied Scott’s motion.²²⁰ Harris alleged several key facts, including precautions that he took to avoid any harm and the lack of danger to other drivers.²²¹ If a jury were to find those facts, under the

²¹² FED. R. CIV. P. 56 (a).

²¹³ FED. R. CIV. P. 50 (a)(1).

²¹⁴ *Scott*, 550 U.S. at 386.

²¹⁵ *See Tennessee v. Garner*, 471 U.S. 1 (1985). *See also Harris v. Coweta Cty.*, 433 F.3d 807, 815-16 (11th Cir. 2005), *rev’d sub nom. Scott*, 550 U.S. at 372 (discussing the *Garner* factors).

²¹⁶ *Garner*, 471 U.S. at 11-12 (listing the factors as: suspect poses immediate risk of harm to officer or public, deadly force is necessary to prevent escape, warning).

²¹⁷ *Scott*, 550 U.S. at 382.

²¹⁸ *Harris*, 433 F.3d at 811, *rev’d sub nom. Scott*, 550 U.S. at 372.

²¹⁹ *Scott*, 550 U.S. at 380.

²²⁰ *Harris*, 433 F.3d at 810, 821.

²²¹ *Id.* at 815-16. “We reject the defendants’ argument that Harris’ driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury. As noted by the district court judge, taking the facts from the non-movant’s

Court's prevailing precedent, they could also reasonably find for Harris. The lower courts reasoned, therefore, that Scott should not be able to circumvent the jury.²²²

But the Supreme Court reversed—and not just because of how the lower courts applied the law, but also because of what the Justices saw. “There is,” Justice Scalia writes for an 8-1 majority, “an added wrinkle in this case: existence in the record of a videotape capturing the events in question.”²²³ Granting the motion for summary judgment, Scalia recounts that “the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury. . . . [Harris’s] version of events is so utterly discredited by the record that *no reasonable jury could have believed him*.”²²⁴

Justice John Paul Stevens, the lone dissenter, concludes instead that “the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.”²²⁵ On his viewing, Justice Stevens doubts that Harris’s initial speeding violation and attempts at evasion posed enough of an immediate threat to justify deadly force (as opposed to arresting him later, as soon as the next morning).²²⁶ He notes that the other vehicles involved either had pulled over to the right-hand shoulder, as they would yield to an ambulance with sirens similarly blaring, or were safely in the opposite

viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.” *Id.* (citations omitted).

²²² *Scott*, 550 U.S. at 372.

²²³ *Id.* at 378. The video from the study in Dan M. Kahan et al., *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 855 n.71 (2009) is available at <https://www.youtube.com/watch?v=qrVKSgRZ2GY>.

²²⁴ *Scott*, 550 U.S. at 380. (emphasis added).

²²⁵ *Id.* at 390 (Stevens, J., dissenting).

²²⁶ *Id.* at 393 (Stevens, J., dissenting) (“We now know that they could have apprehended respondent later because they had his license plate number.”).

lane.²²⁷ Most importantly, Justice Stevens objects to the Court's *de novo* review of the record in the guise of deciding a question of law.²²⁸ The tape, whatever its contents, "surely does not provide a principled basis for depriving [Harris] of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable."²²⁹ Justice Scalia's response doubles down on the unambiguous contents of the tape. Providing a link to what is perhaps the Court's most noteworthy multimedia opinion, he concludes: "We are happy to allow the videotape to speak for itself."²³⁰ (I invite the reader to take a look as well.)

A recent study by Dan Kahan provides stronger empirical grounds for such skepticism.²³¹ After showing the video to a sample of 1,350 viewers, the majority of participants in the study agreed with the Court's take,²³² that Harris posed a significant danger and that Scott's actions were reasonable.²³³ But the distribution of disagreement, perhaps unsurprisingly, was far from uniform. "African Americans, low-income workers, and residents of the Northeast, for example, tended to form more pro-plaintiff views of the facts than did the Court. So did individuals who characterized themselves as liberals and Democrats."²³⁴ These groups "tended to perceive less danger in Harris's flight, to attribute more responsibility to the police for creating the risk for the public, and to find less justification in the use of deadly force to end the chase."²³⁵ A jury of twelve citizens that was

²²⁷ *Id.* at 390 n.1. Stevens also coyly teases his colleagues, speculating that they might have been "unduly frightened" by flashes of light from these passing cars: "Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately." *Id.*

²²⁸ *Id.* at 389-90.

²²⁹ *Id.* at 390.

²³⁰ *Id.* at 378 n.5.

²³¹ Kahan et al., *supra* note 223, at 838.

²³² *Id.* at 841.

²³³ *Id.* at 851.

²³⁴ *Id.* at 841. Rather than merely reporting their results through a multivariate regression model that isolates single explanatory variables, see, e.g., *id.*, Table 2, at 869, the authors employ a clever statistical approach that explores relevant combinations of these variables. *Id.* at 870-79.

²³⁵ *Id.* at 841.

at least partially composed of members of these groups, if those jurors determined that deadly force was not justified, would have to arrive at a general verdict through deliberation.²³⁶

We cannot say, with such stark empirical evidence of dissensus, that any juror who views the tape favorably to Harris is, on that basis, unreasonable.²³⁷ Nor can we predict that, when the jurors exchange their arguments and perspectives through the process of deliberation, these views will tilt one way or the other. The tape plainly does not speak for itself—a genuine dispute of material fact remains, and summary judgment against Harris is improper.

Whether Scott acted reasonably under the circumstances is a mixed question of law and fact, as is the case for any question of negligence.²³⁸ But we might understand Scalia to offer a new rule of law: that the use of deadly force in high-speed pursuit is *per se* justified, never unreasonable. But the Court does not state its holding in such a way, and Justices Ginsberg and Breyer disclaim it explicitly in their concurrences.²³⁹ Even if the Court had announced such a categorical rule of law (keeping these sorts of cases away from juries), it would not be sound.²⁴⁰ As the majority itself notes,²⁴¹ the relative balance of factors that are unquestionably relevant—population density, time of day, weather conditions, the dangerousness of the offense—would seem to depend quite heavily on the particular facts and resist any categorical rule. To use Justice Stevens’s compelling example, a car chase through the Nevada desert is worlds apart from one that proceeds through busy downtown Las Vegas.²⁴² The question of what is reasonable under the circumstances, unsurprisingly, is

²³⁶ See JEFFREY ABRAMSON, *WE, THE JURY* (Harvard Univ. Press ed. 2000) (discussing the dynamics of jury deliberations).

²³⁷ Kahan accuses the Court of “cognitive illiberalism.” Kahan et al., *supra* note 223 at 894-902. This attempt at reasoned justification is “hopelessly solipsistic” in its conclusion that, per summary judgment standards, the tape speaks for itself. *Id.* at 849.

²³⁸ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180-81 (1989).

²³⁹ *Scott v. Harris*, 550 U.S. 372, 386, 388 (2007) (Ginsburg, J., concurring) (Breyer, J., concurring).

²⁴⁰ *But see Mullenix v. Luna*, 136 S. Ct. 305 (2015).

²⁴¹ *Scott*, 550 U.S. at 383 (“[I]n the end we must still slosh our way through the factbound morass of ‘reasonableness.’”).

²⁴² *Id.* at 389.

particular to those circumstances.²⁴³ It is a mixed question of law and fact.

But there is a more fundamental point: that the jury has a crucial role to play in determining these sorts of mixed questions of law and fact, especially on the interpretive question of constitutional reasonableness. Citizen-jurors are in the best position to make that particularized judgment, rather than judges. Certainly, this sort of question is within their competence. The law presupposes jurors' capacity to render particularized applications of accessible principles (e.g., negligence) and community norms, drawing on local knowledge. A mountain of evidence confirms it.²⁴⁴ The key point, however, is that the jury's interpretive responsibility is especially valuable in the constitutional domain, for cases of express constitutional application.

First, is the distinctive value of group deliberation within the jury. In the corpus of cases in the Chicago Jury Project, Kalven and Zeisel found that nine out of every ten verdicts ultimately tipped in the same direction as the initial majoritarian vote.²⁴⁵ This finding cuts against the notion that isolated and obstreperous holdouts can force a hung jury.²⁴⁶ But it also suggests, as Abramson rightly points out, that in the remaining tenth of cases the minority is able to persuade the majority.²⁴⁷ These were "likely to be cases where the minority did have the stronger arguments and so were able to resist the normal tide of peer pressure. In these cases, the requirement of unanimity arguably permitted deliberation to continue long enough for reasoned argument to prevail over initial opinions."²⁴⁸ This is especially true in mixed cases of constitutional law and fact, with their application of *principles* (such as "Black Lives Matter") to particular facts. They must decide together what was reasonable under the circumstances, deliberating about what factors matter most in determining whether Officer Scott's use of deadly force was excessive and why.

²⁴³ *Id.* at 382.

²⁴⁴ See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966) (the *locus classicus*).

²⁴⁵ *Id.* at 488.

²⁴⁶ They suggest that it might take as many as three opposing votes (if not four or five) to generate this result. *Id.* at 462. See also ABRAMSON, *supra* note 236, at 202.

²⁴⁷ *Id.* at 197.

²⁴⁸ *Id.*

Additionally, the distinctive value of the jury's deliberative character comes into view when we combine it with a further value of *inclusion*. Though we are still far from its realization, the Court has clearly articulated the ideal of the jury as a "cross-section of the community," easing discriminatory barriers to jury service based on race²⁴⁹ and gender.²⁵⁰ There is value not just in *representing* these different groups and identities, but also in encountering all these different perspectives and engaging with their various deliberative contributions.²⁵¹ Powerful judges in black robes (even in plainclothes) interact with the police in a fundamentally different way than do many citizens. The social position that judges occupy²⁵² and the remarkably homogenous life experience that leads them there²⁵³ largely shields judges from arbitrary, excessive, and even discriminatory policing.²⁵⁴ Many citizens are not so lucky—and whether the results are tragic,

²⁴⁹ *Batson v. Kentucky*, 476 U.S. 79, 83, 97-98 (1986).

²⁵⁰ *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994).

²⁵¹ Abramson also favors the deliberative account of the jury's inclusive value, in lieu of mere representativeness. *See* ABRAMSON, *supra* note 236, at 139-41.

²⁵² Article III District Court Judges receive an annual salary of \$208,000. *See Judicial Compensation*, U.S. CTS., www.uscourts.gov/judges-judgeships/judicial-compensation [<http://perma.cc/2WMF-5SSZ>] (last visited Oct. 16, 2018). This amount places them well into the top decile of earners each year. *See United States Household Income Brackets and Percentiles in 2018*, U.S. CTS., <https://dqydj.com/united-states-household-income-brackets-percentiles/> [perma.cc/DE24-78MT] (last visited Oct. 27, 2018). And it is constitutionally guaranteed to continue (or increase) for the entire duration of their lives. *See* Linda Greenhouse, *Chief Justice Advocates Higher Pay for Judiciary*, N.Y. TIMES (Jan. 1, 2007), <https://www.nytimes.com/2007/01/01/us/01scotus.html> [perma.cc/C3E3-MNMY]. For many, entering the judiciary brings a significant step down in their income from lucrative private practice. *Id.*

²⁵³ *See Broadening the Bench: Professional Diversity and Judicial Nominations*, ALLIANCE FOR JUST. (Report), Mar. 18, 2016, at 5, available at <https://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf> [<https://perma.cc/E8UQ-MA3P>].

²⁵⁴ For a fictional contrast, we might consider the story of Judge Roberto Mendoza in *The West Wing: Celestial Navigation* (NBC television broadcast Feb. 16, 2000), who is racially profiled and falsely arrested. Of course, the episode does not entirely dispel the notion that federal judges enjoy certain privilege. It ends with Mendoza's release from jail, only after two of the President's top aides browbeat a handful of hapless Connecticut state police into relinquishing their nominee to the Supreme Court.

endemic, or both,²⁵⁵ their perspectives could certainly add to the determination of whether police conduct is “reasonable.”

Taking seriously the notion that “Black Lives Matter” means that these perspectives ought to figure into deciding cases like Victor Harris’s. Studies from Kalven & Zeisel’s to Kahan *et al.* confirm that this perspective is present in the cross-section of lay jurors, and also that it could make a considerable difference in deliberations. But these voices cannot make a difference if judges deploy qualified immunity and summary judgment to prevent constitutional torts from reaching a jury, simply because they believe that they know better.

▪ **The Law of Jury Selection:** *Who gets to serve on the jury?*

Similarly, a recognition of the difference in the lived experience of black citizens and the reality of institutional subordination would underscore the importance of an inclusive and representative jury. Formal racial discrimination is barred under *Strauder v. West Virginia*, and *Batson v. Kentucky* bars the use of peremptory challenges if they are racially motivated.²⁵⁶ But these formal barriers are only somewhat effective against all but the most egregious instances of discrimination. The Court’s recent decision in *Foster v. Chatman* gives *Batson* more teeth, though its doctrinal impact remains to be seen.²⁵⁷ Studies show that presence of black jurors even in the pool reduces convictions.²⁵⁸ But beyond that finding, there is a robust theoretical case that diversity and difference in the jury room brings distinctive benefits to bear on the deliberative process.²⁵⁹

Citizen-jurors’ capacity to serve is directly linked to what I call the constitutional bases of respect—the oath and office of the juror empowers them to deliberate together with their fellow citizens, and it ensures that their voices are heard. And, symmetrically, if this

²⁵⁵ See *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (“[I]t is no secret that people of color are disproportionate victims of this type of scrutiny.”). See also Judge Scheindlin’s factual findings for New York City’s “stop and frisk” policy in *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (2013). The City dropped its appeal after the election of Bill DeBlasio in 2013.

²⁵⁶ *Batson v. Kentucky*, 476 U.S. 79, 107-08 (1986).

²⁵⁷ *Foster v. Chatman*, 136 S. Ct. 1737, 1741-42 (2016).

²⁵⁸ See Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1019 (2012).

²⁵⁹ See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1177-78 (2005).

opportunity is denied on the basis of their race, citizens' constitutional bases of respect fall to the predations of White Supremacy. Taking seriously the claim that "Black Lives Matter" means that we cannot countenance this violation, and it would substantively enhance the doctrine of *Batson* and *Foster* accordingly.

- **The Law of Standing:** *Who may bring what sorts of claims to be heard?*

In *City of Los Angeles v. Lyons*,²⁶⁰ a black citizen sued the city of Los Angeles and certain police officials after having been put in a chokehold during a traffic stop. (This same maneuver, which is now officially banned in most jurisdictions, caused the death of Eric Garner).²⁶¹ After demonstrating a policy to routinely wield this technique in a way that brought significant harm, Lyons received several forms of relief from the lower courts.²⁶² But the Supreme Court struck down the injunction that Lyons sought—an order forbidding police from using chokeholds in the future.²⁶³ A divided Court held that Lyons lacked standing for that particular remedy, because it was “no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.”²⁶⁴ But thirty years later and with clearer eyes, I believe we can see that the plaintiff and a similarly situated class of black citizens really *are* more likely to be put in a chokehold. And the arguments of the “Black Lives Matter” movement, if we accept them, explain why: a recognition of difference, a legacy of subordination, and emancipatory protestantism on the part of the plaintiff challenging these constitutional injustices.²⁶⁵

²⁶⁰ *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

²⁶¹ See Benjamin Mueller, *Review Board Recommends Stiffest Punishment for Officer in Garner Case*, N.Y. TIMES (Sept. 8, 2017) <https://www.nytimes.com/2017/09/08/nyregion/eric-garner-chokehold-review-board.html> [<https://perma.cc/Q5WB-FEHD>].

²⁶² *Lyons*, 461 U.S. at 98-99.

²⁶³ *Id.* at 99-100.

²⁶⁴ *Id.* at 108.

²⁶⁵ This goes beyond simply taking judicial notice of facts—this goes to the substance of the claim. Cf. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

Most importantly, however, is the principle that “Black Lives Matter” should figure into *the merits* of all these cases, and more. It should be articulated and addressed in the deliberations of juries, the opinions of judges, and the hearts and minds of the citizenry. Together, as a people, we should take seriously the principle’s core components—its recognition of difference and a legacy of subordination, its promise of emancipatory protestantism. Not everyone will agree (much less take comfort) in what the claim that “Black Lives Matter” connotes. But we should all note that it strikes at the core of our Constitution.