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The Other Ordinary Persons

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Abstract

If originalism aims to center the original public meaning of text, who constitutes "the public"? Are we doing enough to capture historically excluded voices: impoverished white planters; dispossessed Natives; silenced women; and the enslaved? If not, what more is required? And for those who are not originalists, how do we ensure that, as American law consults the wisdom of the ages, we do not sever entire sources of wisdom?

This brief symposium Article engages these themes, offering two modest, interrelated claims. The first is that important informational, ethical, and democratic benefits accrue when American legal doctrine includes the voices and perspectives of marginalized and subjugated members of the American community. The second is that additional scholarly attention should be given to the moments in which jurists center and elevate the voices and perspectives of the marginalized. To that end, this essay focuses on a Fourth Circuit case in which Chief Judge Roger L. Gregory did center such perspectives: United States v. Curry.[1]

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* Fred O. Smith, Jr., Associate Professor, Emory Law School. I am honored to be included in this scholarly engagement with Chief Judge Roger L. Gregory's life, work, and legacy.

1. 965 F.3d 313 (4th Cir. 2020).

I am the farmer, bondsman to the soil.
I am the worker sold to the machine.
I am the Negro, servant to you all.
I am the people, humble, hungry, mean—
Hungry yet today despite the dream.
Beaten yet today—O, Pioneers!
I am the man who never got ahead,
The poorest worker bartered through the years.

Langston Hughes[2]

INTRODUCTION

The knowledge of my familial lineage extends to, and ends with, my great-great-great grandparents, Henrietta and Horace Elder. I am uncertain if they were born in the United States, or if they are among my ancestors whom enslavers brought here by force. Were Horace and Henrietta stripped of the language and the religion of their birth? Or would that have been their parents, or grandparents? Like most descendants of enslaved persons, my knowledge of my family is obstructed and obscured by legal institutions' deliberate indifference to their humanity. When American law asks what an ordinary person would have thought about the definition of words like "liberty" or "cruel" in the 1791 Bill of Rights, I sometimes wonder if Henrietta and Horace are among the included ordinary people. Shorn of the

2. LANGSTON HUGHES, *Let America Be America Again*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES 189, 190 (Arnold Rampersad & David Roessel eds., 1994).

right to read or write,[3] let alone vote or hold office,[4] we have little in the way of records about what they thought.

One of Horace and Henrietta's children was Anthony Elder, my great-great grandfather who was born around 1830. Anthony and his wife Laura (my great-great grandmother) were born enslaved. Their photographs—taken late in their life and gifted to me by my aunt—help assure that I never forget them. Appreciating our kinship feels particularly special given that they were born into a nation in which their familial relationships had no legal protection.[5] For those who were not enslaved, much of what is known about individuals in times past comes from legal documentation like census records, marital records, birth records, and death records. But for Anthony and Laura, the law recognized them only as property until the mid-1860s.[6] Until then, it was far from inevitable that they would ever have any such records.[7] When American law asks what an ordinary person would have thought about the meaning of the Reconstruction Amendments of the 1860s[8], I again sometimes wonder if Anthony and Laura are ordinary people. And what is lost if their experiences are not consulted?

When law strives to understand ambiguous, capacious terms in written legal texts, there is a limited range of places we reach to understand what ordinary persons would have understood those terms to mean. Courts look to dictionaries and

3. *See* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 46 (1982) ("Institutionalized marginality, the liminal state of social death, was the ultimate cultural outcome of the loss of natality as well as honor and power."); FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 63 (1845) (reciting the strategies Douglass had to employ to learn to read and write).

4. *See* Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987) (stating that Black slaves were excluded from "a matter so basic as the right to vote").

5. *See* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 240–41 (1999) (discussing how the law denied slaves the rights of marriage and inheritance).

6. *See* Fred O. Smith, Jr., *On Time, (In)equality, and Death*, 120 MICH. L. REV. (forthcoming 2021) (on file with author) [hereinafter Smith, *On Time*].

7. *See id*.

8. U.S. CONST. amends. XIII–XV.

legislative debates.[9] And, when it comes to the Constitution in particular, courts look to a few great (almost exclusively) men who have come to form something of an American democratic canon.[10] In the sphere of constitutional law, most notably, there are those like James Madison and Alexander Hamilton whose writings have a special place in the interpretive firmament.[11] Courts routinely, and entirely sensibly, cite to their work as both historical authority and democratic authority.[12] Here, historical authority describes instances in which courts look to their descriptive representations about the early life of the republic.[13] Democratic authority describes instances in which courts cite to their ideals, principles, and beliefs as lodestars to which we should aspire.[14]

American law would be deeply impoverished if we did not consult the writings of those who wrote and promoted the document. But under the dominant methods of constitutional interpretation today, might more be required? If originalism aims to center the original public meaning of text, who constitutes "the public"? Are we doing enough to capture the voices of impoverished white planters, dispossessed Natives, silenced women, and the enslaved? And if *The Federalist Papers*, legislative debates, and Samuel Johnson's dictionary are insufficient sources to capture their voices, what more is required of us to understand the original public meaning of the Constitution? For those who are not originalists and are partial to common law constitutionalism, are there ways to be more

9. *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 527 (2014) (consulting founding-era dictionaries); Alden v. Maine, 527 U.S. 706, 743–44 (1999) (looking to Eleventh Amendment ratification debates).

10. *See* Pamela C. Corley et al., *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RSCH. Q. 329, 329 (2005) (discussing the Supreme Court's "enhanced use of the Federalist Papers means the Court is increasing its reliance on some standard of original authority").

11. *See id.* at 336 (describing the oft-cited Madison and Hamilton as "key founding fathers").

12. *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 819 (2015) (citing THE FEDERALIST NO. 61 (Alexander Hamilton)); McCreary County v. ACLU of Ky., 545 U.S. 844, 878 (2005) (citing THE FEDERALIST NO. 78 (Alexander Hamilton)); Chao v. Va. Dep't of Transp., 291 F.3d 276, 280 (4th Cir. 2002) (citing THE FEDERALIST NO. 39 (James Madison)).

13. *See supra* note 12 and accompanying text.

14. *See supra* note 12 and accompanying text.

careful that we are not severing entire sources of wisdom as we consult the wisdom of the ages?

This Article engages these themes, offering two modest, interrelated claims. The first is that important informational, ethical, and democratic benefits accrue as a result of including the voices and perspectives of marginalized and subjugated members of the American community.[15] The second is that additional scholarly attention should be given to the moments in which jurists center and elevate the voices and perspectives of the marginalized.[16] To that end, this Article focuses on a Fourth Circuit case in which Chief Judge Roger L. Gregory did center such perspectives: *United States v. Curry*.[17]

I. WE THE PEOPLE—ALL THE PEOPLE

This Part expounds on the thesis that there are benefits to including the voices and perspectives of marginalized and subjugated persons in legal doctrine. In this Article, "marginalized and subjugated persons" means members of groups who either explicitly or practically have had their will, relationships, and dignity subverted by legal institutions. It is often easier to exclude these voices, rather than include them. But when this inclusion happens there are at least three benefits.

A. *Informational Value*

First, there is important informational value in including the voices of the previously excluded. Two dominant theories of constitutional interpretation today both depend heavily on assessing historical facts. For example, under "original meaning originalism," one "seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."[18] Answering this question requires some degree of historical evidence and context to understand what a reasonable listener

15. *See infra* Part I.A.

16. *See infra* Part I.B.

17. 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring).

18. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 94–95 (Princeton Univ. Press rev. ed. 2014).

would have observed. If we now understand "the public" and "reasonable listener" to include previously dehumanized and wrongly excluded persons, then it could only enhance our understanding of the original document for us to make intentional efforts to seek out their perspectives as we interpret the Constitution's meaning.

This informational value holds with respect to another prevalent constitutional approach—common law constitutionalism—which emphasizes the role of precedent. The "theory holds that the development of constitutional law is best predicated on a collection of 'judgments that have been accepted by many generations in a variety of circumstances,' including judgments about which conventions should govern constitutional interpretation."[19] To the extent that the power of this approach rests on the "acceptance" of judgments over "generations," one might reasonably ask: accepted by whom? If large groups of persons in the United States have been excluded, unrepresented, or wrongly underrepresented, can it always be said that the prior generations accepted the legal judgments? Consulting those excluded voices—especially voices of resistance—could aid in offering a more nuanced understanding of the power and limitations of this constitutional theory.

B. *Democratic Value*

Second, consulting a wider range of voices can move constitutional interpretation closer to its democratic ideal. In our constitutional tradition, the legitimacy of the government emanates from the people themselves.[20] But as Justice Thurgood Marshall reminded the nation in his famous 1987 address, at the time of the Constitution's ratification, the drafters' conception of the polity was exceptionally narrow and

19. Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471, 1477 (2020) [hereinafter Smith, *The Constitution After Death*] (quoting David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996)).

20. *See* Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1431 (1987) ("Legitimacy flowed from the people . . . ."); Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1943 (2012) ("In America, as the story is written, the ultimate power rests with the people.").

"defective."[21] He wrote, "on a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years."[22] Against this backdrop, consulting voices and perspectives that were either unrepresented or underrepresented in 1791 (or 1865 or 1965 and so on) can give democratic voice to human beings who were wrongly excluded from the polity.

In particular, including and amplifying such voices can help move constitutional interpretation closer to what Professor Richard Fallon has called "ideal legitimacy".[23] Fallon's work distinguishes between whether a constitution has achieved "minimal legitimacy" or "ideal legitimacy."[24] Minimal legitimacy turns on whether a constitution crosses a certain degree of acceptability or acceptance.[25] Ideal legitimacy turns on whether a constitution has reached maximal practices on questions like democratic assent.[26] He observes, "[i]nsofar as we apply ideal theories of moral legitimacy, we thus seem destined to reach a gloomy conclusion: the Constitution is not morally legitimate."[27] By contrast,

> [i]f we move from an ideal to a *minimal* theory, the Constitution's prospects for passing muster immediately look better. . . . [T]he premises supporting minimal theories

21. *See* Marshall, *supra* note 4, at 1338 ("To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today."); *see also* Stuart Taylor Jr., *Marshall Sounds Critical Note on Bicentennial*, N.Y. TIMES (May 7, 1987), https://perma.cc/9ZGS-44QM.

22. Marshall, *supra* note 4, at 1341.

23. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1797–98 (2005) (discussing legitimacy as a moral concept).

24. *Id.* at 1797–98.

25. *See id.* at 1798 ("[M]inimal theories of moral legitimacy define a threshold above which legal regimes are sufficiently just to deserve the support of those who are subject to them in the absence of better, realistically attainable alternatives.").

26. *See id.* at 1797 (noting that the achievement of "ultimate standards of justice" may also provide the basis for ideal legitimacy).

27. *Id.* at 1809.

> are spare and uninspiring: because nearly any legal regime is better than none, officials will normally be justified in enforcing existing law, and citizens will typically have a duty to support even flawed legal regimes that exist within their communities (even if they do not have a "general" obligation to obey every individual law) unless there is a better available alternative.[28]

In his view, the United States Constitution meets that minimal standard.[29]

Although I agree with this basic analysis, "there is a continuum between the minimal and the ideal," as I have written elsewhere.[30] It is therefore wise that doctrinal decisions move the nation ever closer to the ideal. If the legal exclusions that were in place in 1791 were in place today, the Constitution would not meet the contemporary threshold of legitimacy. When possible, courts should deploy accepted methods of constitutional interpretation in ways that do not reproduce undemocratic and antidemocratic norms. Such moves could bolster the democratic legitimacy of the Constitution, moving the nation ever closer to its ideal, without encouraging backsliding toward the bare minimum. "A doctrine need not cross into illegitimacy overnight."[31]

C. *Ethical Value*

The third argument is ethical. One generation can become complicit in a prior generation's mass horrors. And therefore, each generation should be diligent about avoiding such complicity. My other work on posthumous harm further develops this argument.[32] If one generation subverts the memory, will, and reputation of a group, then members of that group will sometimes be denied an equal place in the nation's

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28. *Id.*

29. *See id.* ("Surely, one might think, the Constitution must meet this minimal standard. I believe that it does . . . .").

30. Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2355 (2018).

31. *Id.* at 2356.

32. *See generally* Smith, *On Time*, *supra* note 6; Smith, *The Constitution After Death*, *supra* note 19.

collective memory.[33] This kind of inequality is present in the United States due to past legal erasure of enslaved and indigenous persons' humanity[34] and intentional disinformation campaigns.[35] This inequality is mitigated in part by consciously amplifying the voices of those who were legally erased.[36]

II. DOCTRINAL AMPLIFICATION OF THE HISTORICALLY EXCLUDED

Centering historically excluded voices is easier said than done. How does one consult the voices of individuals who were intentionally silenced? The answer is undoubtedly too complex to comprehensively answer in this Article, but this Part assesses two strategies that appear in the writings of Judge Gregory. The first strategy is citations—for historical and democratic authority—to influential Black Americans who were prominent during key "constitutional moments."[37] The second is centering the perspective of individuals with limited political power today: Black Americans, poor Americans, those convicted of crimes, and the intersection thereof.[38] These two strategies do not predictably lead to so-called "liberal" or "conservative" outcomes. Therefore, the strategies should be pursued for their

33. *See* Smith, *The Constitution After Death*, *supra* note 19, at 1518–28 (arguing that posthumous subordination of the dead's bodies, beliefs, and stories can have broader consequences for inequality).

34. *See id.* at 1526–27 (contrasting the lack of legal protections for the gravesites of enslaved and indigenous peoples with the presence of statutes prohibiting disruption of Confederate soldiers' gravesites and describing the disparate results in treatment of those sites).

35. *See id.* at 1546 (observing that former Senate Majority Leader Mitch McConnell, in rebuffing congressional efforts to explore reparations, publicly noted that the victims and perpetrators of chattel slavery are dead).

36. *See id.* at 1547 (arguing that "legal norms can remind and reinforce the importance of respect for that spiritual self that the law continues to honor even after our corporeal presence abates").

37. *See generally,* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (Belknap 1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (Belknap 1998).

38. *See, e.g.*, Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1161–65 (2018) (offering a conceptual framework that seeks to rectify the over- and under-enforcement of crime by centering the perspective of structurally unequal groups).

inherent democratic, ethical, and evidentiary value, rather than their ideological consequences.

A key case that illustrates these points is *United States v. Curry*,[39] especially Chief Judge Gregory's concurrence, and Judge J. Harvey Wilkinson's dissent. To radically different effect, both jurists elevated and centered the voices of individuals who have been historically deprioritized and marginalized.[40] At issue in that case was the seizure and frisking of Billy Curry, Jr.[41] At the time of Curry's seizure, officers were responding to reports that several gunshots had just been fired in or around an apartment complex.[42] Upon arriving at the scene, officers observed, among others, "five to eight men—including Curry—calmly and separately walking in a public area behind the complex, away from the general vicinity of where the officers believed the shots originated."[43] There were also other individuals in the vicinity, closer to where the shots likely originated.[44]

Under *Terry v. Ohio*,[45] when an officer has articulable, reasonable suspicion of criminal activity, that officer may conduct a brief investigatory stop.[46] As a part of that stop, the officer may frisk the person who has been seized to ensure the officer's safety.[47] In *Curry*, the government argued that *Terry* justified the stop.[48] In the government's view, even though there

39. 965 F.3d 313 (4th Cir. 2020).

40. *Compare id.* at 332–34 (Gregory, C.J., concurring) (emphasizing that it is *how* the police interact with members of disadvantaged and dispossessed communities that matters in the Fourth Amendment context), *with id.* at 346–50 (Wilkinson, J., dissenting) (acknowledging the existence of "two Americas" and disparity in policing across racial and socioeconomic groups, but concluding that the utility of predictive policing is of greater weight).

41. *See id.* at 315.

42. *See id.* at 317.

43. *Id.* at 315.

44. *See id.*

45. 392 U.S. 1 (1968).

46. *See id.* at 30–31 (finding that "[s]uch a search is a reasonable search under the Fourth Amendment").

47. *See id.* at 30 (emphasizing that an officer is entitled to make this type of search for the "protection of himself and others in the area").

48. *See Curry*, 965 F.3d at 318 (explaining that the government initially "relied solely on the theory that Curry's seizure was a lawful *Terry* stop" but argued "[l]ater, in requested supplemental briefing . . . that exigent circumstances allowed for Curry's seizure").

was no individualized suspicion of Curry and Curry was not in the immediate vicinity of the shots, the search was justified because of exigent circumstances.[49] The district court disagreed, ruling that the stop violated the Fourth Amendment.[50] Ultimately,[51] sitting en banc, the Fourth Circuit majority affirmed the district court, reasoning:

> Requiring such suspicionless seizures to be narrowly targeted based on specific information of a known crime and a controlled geographic area ensures that the exigency exception does not swallow *Terry* whole. Because these limiting principles were wholly absent from Curry's stop, we hold that the stop was not justified by exigent circumstances and thus was not reasonable under the Fourth Amendment.[52]

Judge Wilkinson disagreed, largely focusing on the policy implications of the majority's legal conclusion. He observed that while wealthy individuals can afford private patrols in their neighborhoods, the "least fortunate" and "dispossessed" Americans cannot.[53] The majority's opinion exacerbated the unequal burden of violent crime that those communities experience because it would make policing in "high-crime" areas more difficult and unattractive as a profession.[54] He noted that a number of police departments, including Richmond's, had started resorting to "hot spot" and "predictive" policing, where officers aim to surveil, control, and detain individuals in

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49. *See id.* at 320

> Notably, in this case, the government does not challenge the district court's holding that the officers lacked individualized suspicion that Curry was involved in criminal activity at the time of his seizure. In other words, the government does not claim that Curry's stop was a valid *Terry* stop. Instead, it claims that the seizure was justified by the so-called exigent circumstances exception.

50. *See* United States v. Curry, No. 3:17CR130, 2018 WL 1384298, at *13 (E.D. Va. Mar. 19, 2018).

51. Initially, a divided Fourth Circuit reversed the district court. United States v. Curry, 937 F.3d 363 (4th Cir.), *reh'g en banc granted*, 784 F. App'x 870 (4th Cir. 2019), *on reh'g en banc*, 965 F.3d 313 (4th Cir. 2020), *as amended* (July 15, 2020), *as amended* (July 16, 2020).

52. United States v. Curry, 965 F.3d 313, 316 (4th Cir. 2020).

53. *Id.* at 346 (Wilkinson, J., dissenting).

54. *Id.* at 349.

high-crime areas before incidents occur.[55] The majority's approach would undermine these methods, he explained, because "the sole practical takeaway from the majority opinion is that police officers on the scene of an unfolding emergency must *sit and wait* for identifying information, rather than use discretion and judgment to get control of a possibly deadly event."[56] These kinds of limits on officers' ability to surveil and detain citizens who those officers predict will commit crimes carries the risk of "making law enforcement in our dispossessed communities a thankless task."[57] And if those officers abandon their presence in such areas given onerous constitutional restrictions, this will foster a "quiet neglect and subtle abandonment by law" that "risks hastening the exodus of small businesses, many minority-owned, which rely upon law enforcement for protection."[58]

Three of the four concurring opinions answered Judge Wilkinson's dissent.[59] Judge Gregory offered the most powerful response. From the outset, Judge Gregory's opinion casts the underlying Fourth Amendment legal question as one of equality. "Our decision today affirms that a central tenet of law nearly as old as this country—namely, '[t]he right of the people to be secure . . . against unreasonable searches and seizures'—applies equally to all."[60] He critiqued and rejected paternalistic jurisprudence that attempts to "save minority or disadvantaged communities from themselves."[61] Moreover, Judge Gregory marshaled evidence of racial inequalities in the criminal legal system over the centuries:

> Of course, the story of two Americas of which Judge Wilkinson speaks is an ancient tale to some. There's a long history of black and brown communities feeling unsafe in police presence. And at least "[s]ince Reconstruction, subordinated communities have endeavored to harness the criminal justice system toward recognition that their lives

55. *Id.* at 347.

56. *Id.* at 348.

57. *Id.* at 346.

58. *Id.* at 349.

59. *Id.* at 331 (Gregory, C.J., concurring); *id.* at 334 (Wynn, J., concurring); *id.* at 343 (Thacker, J., concurring).

60. *Id.* at 331 (Gregory, C.J., concurring) (alterations in original).

61. *Id.* at 332.

> have worth." Thus, just a few decades ago, laws designed to decrease violence in these communities were considered "a civil rights triumph." The thought being that our government had finally "promised to provide police protection to a community so long denied it." This increased protection, however, led to what has been described as "a central paradox of the African American experience: the simultaneous over- and under-policing of crime."[62]

This paragraph reflects both aforementioned approaches to jurisprudential inclusion: (1) expanding the democratic canon to include a wider range of influential voices; and (2) centering the perspectives of everyday Americans who are underrepresented in halls of power.

Specifically, Judge Gregory cites Douglass and Baldwin, influential individuals who resisted a disordered legal order during their lifetimes, as historical and democratic authority.[63] Douglass's speech, "What to the Slave is the Fourth of July?," was a clarion call from a man who had escaped human bondage to a country whose rhetoric on liberty did not match its laws.[64] And as for Baldwin, Judge Gregory cited to the perspective that, in some circumstances and communities, armed agents of the state make people feel less safe.[65] The towering scholarship he cited thereafter draws a line from past to present, detailing the depressing persistence of inequalities in the American legal system. And his description of "a central paradox of the African American experience" illuminated the perspective of a historically excluded group.[66] That approach is reminiscent of his oft-cited 2013 majority opinion in *United States v. Black*,[67] where he wrote:

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62. United States v. Curry, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring) (citations omitted).

63. *See id.*

64. For a transcription of the speech, see Dave Zirin, *'What to the Slave is the Fourth of July?' by Frederick Douglass*, NATION (July 4, 2012), https://perma.cc/3LG3-58D3.

65. *See Curry*, 965 F.3d at 332 ("There's a long history of black and brown communities feeling unsafe in police presence." (citing James Baldwin, *A Report from Occupied Territory*, NATION (July 11, 1966), https://perma.cc/EHZ2-CAKJ)).

66. *Id.*

67. 707 F.3d 531 (4th Cir. 2013). It is also reminiscent of Justice Sonia Sotomayor's dissent in *Utah v. Strieff*, wherein she cited to, among others,

> In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion.[68]

Centering and elevating historically excluded perspectives is not new for Judge Gregory.

Judge Wilkinson's dissenting opinion in *Curry* deployed two similar approaches. He, too, cited Baldwin for the proposition that "[i]t is true that the police have made more than their share of mistakes and that the sad legacy of racism and mistrust hovers today over police-citizen interactions."[69] Moreover, Wilkinson implicitly recognized some of the vociferous concerns that protestors were simultaneously raising about violent, unaccountable policing. To that end, he made the remarkable statement that "[t]he deaths of George Floyd, Eric Garner, and

W.E.B. Du Bois and James Baldwin as historic and democratic authority. *See* Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016). Her dissent also centered on the perspectives of the marginalized more globally, writing, "[w]e 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." *Id*. at 2071 (citing LANI GUINIER & GERALD TORRES, THE MINER'S CANARY 274–83 (2002)). Likewise, Justice Clarence Thomas has often invoked Frederick Douglass as historic and democratic authority, and often written about the experiences of Black Americans when crafting opinions. *See* Stephen F. Smith, *Clarence X?: The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583, 584 (2009); *see also* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2071 (2021) (describing ways that Justice Thomas has invoked narratives about historic racism in opinions about reproductive autonomy and gun rights); *cf.* Jamison v. McClendon, 476 F. Supp. 3d 386, 400 (S.D. Miss. 2020) (Reeves, J.) (citing to Frederick Douglass as historical and democratic authority in a scholarly, poignant opinion on qualified immunity).

68. *Black*, 707 F.3d at 542.

69. *Curry*, 965 F.3d at 349 (Wilkinson, J., dissenting).

far too many others have been heartbreaking. They are crimes not only against law but against humanity."[70]

Readers can decide which of these towering judicial figures offered the more persuasive arguments. I highlight these opinions because they illustrate what modest attempts to expand the democratic canon, and center traditionally marginalized perspectives, can look like. Further, the episode also indicates that elevating and centering the marginalized does not inherently lead to a conservative or progressive legal conclusion.

CONCLUSION

As a democracy with an anti-democratic past, it is incumbent on us to explore ways not to reproduce past exclusion. As a nation whose egalitarian ethics have evolved, it is important that we take active steps not to become complicit in horrors that are incompatible with those ethics. And as members of the legal profession, it is important that we act carefully when deploying legal standards that search for "public" meaning, or for the views of ordinary persons, or even for the common law wisdom that has accrued over generations. Such inquiries should be nuanced and capacious enough to account for exclusion and resistance. Judge Gregory is an important part of that march. He entered the national history books when he integrated the United States Court of Appeals for the Fourth Circuit. Part of his legacy may well be that his jurisprudence has also contributed to integration of the democratic canon, and the integration of the perspectives that judicial opinions have rarely centered.

Yet I'm the one who dreamt our basic dream
In the Old World while still a serf of kings,
Who dreamt a dream so strong, so brave, so true,
That even yet its mighty daring sings
In every brick and stone, in every furrow turned
That's made America the land it has become.
O, I'm the man who sailed those early seas

70. I say remarkable because no one has been convicted for killing Eric Garner, and at the time the opinion was written, George Floyd's murderer had not yet been convicted. *Id.* at 346.

In search of what I meant to be my home—
For I'm the one who left dark Ireland's shore,
And Poland's plain, and England's grassy lea,
And torn from Black Africa's strand I came
To build a "homeland of the free."

Langston Hughes[71]

71. HUGHES, *supra* note 2.