

Summer 2021

## Which America?: Judge Roger L. Gregory and the Tradition of African-American Political Thought

Daniel Fryer

University of Michigan Law School, fryerd@umich.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the Judges Commons, Jurisprudence Commons, Law and Philosophy Commons, Law and Politics Commons, and the Law and Race Commons

---

### Recommended Citation

Daniel Fryer, *Which America?: Judge Roger L. Gregory and the Tradition of African-American Political Thought*, 78 Wash. & Lee L. Rev. 1087 (2021), <https://scholarlycommons.law.wlu.edu/wlulr/vol78/iss3/7>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# Which America?: Judge Roger L. Gregory and the Tradition of African-American Political Thought

Daniel Fryer\*

## *Abstract*

*In this Article, written in connection with a symposium honoring Chief Judge Roger L. Gregory's twenty years on the bench, I place Judge Gregory's jurisprudence within the tradition of African-American political thought. I suggest that, at bottom, Judge Gregory has a leveling-up jurisprudence that seeks to interpret the Constitution in a way that ensures the least well-off in society are granted the same rights as the most privileged. This brand of democratic theorizing approximates a mainstream position by Black political theorists optimistically seeking to have the least well-off integrated into a fully equal society. By comparing and contrasting his work with other legal and political thinkers in this tradition, I sketch an example of how Judge Gregory uses his role in the judiciary to help shape an America that lives up to the ideals expressed in its founding documents.*

## *Table of Contents*

INTRODUCTION .....	1088
--------------------	------

---

\* Assistant Professor, The University of Michigan Law School. This Essay was inspired by a panel on democracy at a 2020 symposium honoring Chief Judge Gregory's twenty years of service on the United States Court of Appeals for the Fourth Circuit. I thank the Washington and Lee Law Review for organizing the symposium and the attendees of the symposium for fruitful discussions. I also thank the editorial staff of this journal for helpful editorial suggestions.

I. A VIEW FROM THE BENCH .....	1093
II. PUTTING THE VIEW IN CONTEXT .....	1096
CONCLUSION.....	1099

*I love America more than any other country in this world, and,  
exactly for this reason, I insist on the right to criticize her  
perpetually.*

James Baldwin<sup>1</sup>

## INTRODUCTION

The United States of America has always been a country of contradictions. At the country’s founding, there was at once a declaration of the equal rights of all persons and an assignment of control of the government to white men who owned property.<sup>2</sup> We called ourselves the “land of the free” while millions of enslaved people lived on these lands.<sup>3</sup> And today the United States is regarded as one of the richest societies in history, but for many important indicators of human development it falls below some of the poorest nations in the world.<sup>4</sup>

These contradictions are often amusing to point out, but at the same time frustrating. It explains how, as depicted in the epigraph to this paper, one could have extreme admiration for a country while simultaneously condemning its flaws. It also

---

1. JAMES BALDWIN, NOTES OF A NATIVE SON 9 (1955).

2. See A. LEON HIGGINBOTHAM JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 384 (1978) (“If the authors of the Declaration of Independence had said—‘all *white* men are created equal’ or even ‘all white men who own property . . .’ they would have more honestly conveyed the general consensus.” (omission in original)).

3. See J. David Hacker, *From ‘20. and Odd’ to 10 Million: The Growth of the Slave Population in the United States*, 41 SLAVERY & ABOLITION 840, 849 (2020) (finding that there were more than one million enslaved people living in the territory that would become the United States during the American Revolution).

4. See PETER TEMIN, THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY xiii–xiv (2017) (describing the ways in which the United States resembles developing nations); Sean McElwee, *Six Ways America Is Like a Third-World Country*, ROLLING STONE (Mar. 5, 2014, 5:00 PM), <https://perma.cc/PAN7-WT4Y> (providing examples of how the United States lags behind lower-income nations in criminal justice, gun violence, healthcare, education, inequality, and infrastructure).

illuminates how far we are from realizing the ideals outlined by the Framers of the Declaration of Independence. Some appear to live the American dream from birth; but, for others, the American ideals symbolize false hope.

Commentators have addressed these contradictions in various ways. The tradition of African-American political thought has long contrasted at least two responses to this predicament.<sup>5</sup> One strand of reasoning calls for those who are not afforded the same liberties as the privileged to create a separate nation where they could reach a level of self-determination.<sup>6</sup> This is the sort of thinking that led Martin Delany, for example, to recommend complete emigration of Black people from America.<sup>7</sup> Given the hopelessness of acquiring power in this country, Delany suggested, the best place to develop power was elsewhere.<sup>8</sup> “A new country, and new beginning,” he professed, “is the only true, rational, politic remedy for our disadvantageous position.”<sup>9</sup>

---

5. See Bernard Boxill, *Two Traditions in African American Political Philosophy*, in *AFRICAN-AMERICAN PERSPECTIVES AND PHILOSOPHICAL TRADITIONS* 119, 119 (John P. Pittman ed., 1st ed. 1997) (discussing the Black nationalist and integrationist traditions). Michael C. Dawson goes beyond this dualism and divides African-American political thought into six ideologies: Black nationalism, Black feminism, Black Marxism, radical egalitarianism, disillusioned liberalism, and Black conservatism. See generally MICHAEL C. DAWSON, *BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES* (2001). But even Dawson recognizes that these six categories are not all-inclusive. See *id.* at 15 (noting that the author’s chosen ideologies encapsulate only “the key ones” and that “[t]here is nothing sacred about the number six”). For the purposes of this essay, I focus on the popular dualistic approach Boxill employs. However, the ideological categories used are secondary to detailing how Judge Gregory’s democratic vision connects to several thinkers in the tradition of African-American political thought.

6. See Boxill, *supra* note 5, at 124 (stating that the separatist ideal involved enabling Black Americans to “avoid exploitation by the strong” by traveling beyond the reach of the powerful and accruing power elsewhere).

7. See *id.* at 119 (introducing an analysis of Delany’s separatist views).

8. See MARTIN ROBISON DELANY, *THE CONDITION, ELEVATION, EMIGRATION, AND DESTINY OF THE COLORED PEOPLE OF THE UNITED STATES* 191 (1852) (“[E]ven were it possible, with the present hate and jealousy that that the whites have towards us in this country, for us to gain equality of rights with them; we never could have an equality of the exercise and enjoyment of those rights. . .”).

9. *Id.* at 205. As other scholars have noted, however, Delany was not merely a Black nationalist. Indeed, in some circumstances Delany appears to endorse integrationist agendas. See Robert Gooding-Williams, *Martin*

A second approach, however, has been less pessimistic. Rather than give up hope, some have suggested that we use moral suasion to affirm the humanity in all persons. In this spirit, Frederick Douglass dismissed the idea that the disadvantaged could not seek freedom in the United States.<sup>10</sup> Given the ideals of universal freedom espoused in the Constitution, Douglass thought the document should be wielded as a tool of emancipation for all.<sup>11</sup> Rather than dismiss the contradictions, Douglass sought to reconcile them.<sup>12</sup> Embracing the possibility of an uncontradictory America, Douglass declared his conviction “that the Constitution, construed in the light of well-established rules of legal interpretation, might be made consistent in its details with the noble purposes avowed in its preamble . . . .”<sup>13</sup>

All of this may sound a little too far removed from a symposium honoring Judge Roger L. Gregory. However, I’m inclined to think that Judge Gregory represents a tradition of

---

*Delany’s Two Principles, the Argument for Emigration, and Revolutionary Black Nationalism*, in *AFRICAN AMERICAN POLITICAL THOUGHT: A COLLECTED HISTORY* 77 (Melvin L. Rogers & Jack Turner eds., 2021).

10. See FREDERICK DOUGLASS, *The Free Negro’s Place in America, 1851*, in *FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITING* 176, 177 (Philip S. Foner ed., 1999) (“[A] large portion of the American people desire to get rid of us. In proportion to the strength of their desire to have us go, in just that proportion is the strength of our determination to stay, and in staying we ask nothing but justice.”).

11. See FREDERICK DOUGLASS, *Change of Opinion Announced, 1851*, in *FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITING*, *supra* note 10, at 174 (“[H]ereafter we should . . . demand that [the Constitution] be wielded in behalf of emancipation.”).

12. See Nick Bromell, *A “Voice from the Enslaved”: The Origins of Frederick Douglass’s Political Philosophy of Democracy*, 23 *AM. LITERARY HIST.* 697, 711 (2011) (noting that Douglass’s way of thinking “creates a framework that allows contraries to co-exist in a tense, dynamic relation with each other”).

13. Douglass, *supra* note 11, at 173. It is worth noting, however, that Douglass’s position on the legitimacy of the American government changed over time. Following William Lloyd Garrison, Douglass initially endorsed the view that the Constitution was a slaver’s document that lacked legitimacy. See DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 214 (2018) (describing how the Constitution became Douglass’s “intensive focus” as “the base of slavery’s stranglehold on America”). But by the early 1850s, Douglass began to see the Constitution as possessing the necessary principles for freedom and equality for all. *Id.* at 216–17. Those principles—especially as detailed in the preamble—provide the tools necessary for the Constitution to become a source of freedom and justice for all Americans. U.S. CONST. pmbl.

African-American political thought that strives to advance the democratic principles that America stands on instead of dismissing them as lofty ideals. In this sense, he follows Douglass in wielding the Constitution to advance freedom for all and encouraging society to live up to its avowed principles. Below I'm going to sketch a few key elements of Judge Gregory's underlying democratic theory to make this case. At bottom, Judge Gregory has a *leveling-up* jurisprudence that seeks to ensure the least well-off are afforded the same legal protections as the most privileged in our society.

Two points are worth emphasizing at the outset. First, as with any interpretative venture like the one I am engaging in, there will be a risk of projecting on the subject beliefs that they may not hold themselves. This is especially true when trying to derive a political theory out of writings restricted by constitutional standards that govern judicial review,<sup>14</sup> and the norms of judicial opinion writing, that are never explained in a systematic way. I make no claim to completely evade some level of projecting here. But it is important to note that Judge Gregory also likes to place his role on the bench within the tradition of African-American legal and political thinkers.<sup>15</sup> That he sees himself in that tradition is at least some reason to believe he belongs there. But we may also want to question whether that self-perception is warranted, and, if so, where exactly does he

---

14. See U.S. CONST. art. III, § 2 (discussing the limitations on judicial review).

15. In his opinions, for instance, Judge Gregory references the works of African-American political theorists to illuminate the impact of the legal issue at stake. See, e.g., *United States v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring) (referencing the works of Frederick Douglass, James Baldwin, and other African-American political theorists to explain the importance of affirming a decision upholding everyone's right to be free from unreasonable searches and seizures). In interviews, Judge Gregory notes longstanding affiliations with African-American bar associations as among the most important to him. See, e.g., Judge Willie J. Epps Jr., *An Interview with Judge Roger L. Gregory*, ABA (Nov. 1, 2018), <https://perma.cc/Z8SQ-G9HE> (discussing the Old Dominion Bar and National Bar Associations). Indeed, even in his closing remarks for the Symposium from which this essay is inspired, Judge Gregory paid homage to several African-American legal and political theorists who inspire his thinking about the legal issues that each panel addressed: Fannie Lou Hamer for his views on voting rights; Sojourner Truth for his views on reproductive rights and gender justice; Ida B. Wells for his views on criminal justice and antiracism; and Constance Baker Motley for his thoughts on the future of the judiciary.

fall within that tradition? These are the questions I want to engage here.

The other point worth emphasizing is the position from which Judge Gregory writes. Familiar in African-American political thought are challenges to live up to the democratic ideals of this nation, levied against institutions by those who are targets of those institutions. Thus, the tradition brings to mind critiques by those born to an enslaved parent,<sup>16</sup> those born in bondage themselves,<sup>17</sup> anti-lynching crusaders,<sup>18</sup> antiracism activists,<sup>19</sup> or persons who have fallen victim to racial criminalization.<sup>20</sup> These *external* criticisms often serve as poignant evaluations of our legal systems, and their shortcomings, and provide a critical standpoint to understand the effect of our systems' malfunctions. But perhaps just as significant are *internal* critiques—that is, evaluations by persons who have prominent positions in the legal systems that are being challenged to create a better America. With the increased presence of Black Americans in leadership positions

---

16. See, e.g., DAVID WALKER, *APPEAL TO THE COLOURED CITIZENS OF THE WORLD* 4–5 (3d ed. 1830) (“I appeal to Heaven for my motive in writing—who knows that my object is, if possible, to awaken in the breasts of my afflicted, degraded and slumbering brethren, a spirit of inquiry and investigation respecting our miseries and wretchedness in this *Republican Land of Liberty!!!!!!*”).

17. See, e.g., FREDERICK DOUGLASS, *My Slave Experience in Maryland*, in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITING, *supra* note 10, at 13

You, the people of . . . the whole Northern States, have sworn under God that we shall be slaves or die! And shall we three millions be taunted with a want of the love of freedom, by the very men who stand upon us and say, submit, or be crushed?

18. See, e.g., IDA B. WELLS, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* 1 (1892) (“The Afro-American is not a bestial race. If this work can contribute . . . toward proving this, and . . . arouse the conscience of the American people to a demand for justice to every citizen, and punishment by law for the lawless, I shall feel I have done my race a service.”).

19. See, e.g., Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, COMMENTARY, Feb. 1965, at 7 (“[W]e can agitate the right questions by probing at the contradictions which still stand in the way of the ‘Great Society.’ The questions having been asked, motion must begin in the larger society, for there is a limit to what Negroes can do alone.”).

20. See, e.g., Martin Luther King, Jr., *Letter from Birmingham Jail*, LIBERATION: AN INDEP. MONTHLY, June 1963, at 10–16 (advocating for direct action against unjust laws); MUMIA ABU-JAMAL, *LIVE FROM DEATH ROW* 11–16 (Harper Collins ed., 1996) (critiquing racial disparities in the numbers of individuals on death row in America).

in the United States,<sup>21</sup> more opportunities are presented to evaluate those who have a commitment to bettering the condition of historically disempowered citizens and the authority to hold our legal and political institutions accountable. By focusing on what Judge Gregory has referred to as his “view from the bench,”<sup>22</sup> these brief remarks are a call to engage with internal critiques of our legal and political systems by Black theorists who have roles within these institutions.

### I. A VIEW FROM THE BENCH

Judge Gregory does not hide his aspirations to use the Constitution to advance a cause of freedom for all in our society. As he puts it: “That’s what the rule of law means; it’s about sharing the blessings of equality and justice with all. It is not mere generosity because our Constitution requires no less from our legal system.”<sup>23</sup> Thus, when he feels his colleagues do not fully appreciate what it means for vulnerable persons to lose the “intangible collection of aspirations that we have come to call the American Dream,”<sup>24</sup> he does not mince his words. “This Circuit’s tolerance for the oppression of some people is disheartening,”<sup>25</sup> he wrote when the Fourth Circuit refused to rehear a case concluding that a live-in housekeeper did not face persecution when her home was destroyed by a

---

21. See Anna Brown & Sara Atske, *Black Americans Have Made Gains in U.S. Political Leadership, but Gaps Remain*, PEW RSCH. CTR. (Jan. 22, 2021), <https://perma.cc/D7MF-2NBB> (discussing the upward trajectory of Black political leadership over the past several decades). This, however, is not to suggest that Black persons have not held significant positions in our legal and political institutions in the past. Indeed, even Frederick Douglass, who is discussed often in this essay, held government positions later in life. But Douglass’s attempt to seek political reform by occupying political positions is often criticized as self-serving and complicit—and his political insight at that time is often viewed as “dull.” See Sharon R. Krause, *Frederick Douglass: Nonsovereign Freedom and the Plurality of Political Resistance*, in AFRICAN-AMERICAN POLITICAL THOUGHT: A COLLECTED HISTORY 139 (Melvin L. Rogers & Jack Turner eds., 2021) (discussing criticisms of Douglass).

22. Michael Marshall, *Faith in Law Key to Black Struggle, Gregory Says*, UNIV. OF VA. SCH. OF L. (Feb. 21, 2003) [hereinafter Michael Marshall], <https://perma.cc/GA2B-3MUJ>.

23. Epps, *supra* note 15.

24. *Mirisawo v. Holder*, 616 F.3d 594, 595 (4th Cir. 2010) (Gregory, J., dissenting in denial of rehearing en banc).

25. *Id.*



government-sponsored militia.<sup>26</sup> His commitment to a reading of the Constitution as a guarantor of justice and equality for all guides his historically informed jurisprudence to follow the claims of justice to its full extent.

It may be tempting at first to dismiss the preceding sentence as a general platitude that could be said about anyone in robes. But this would be a mistake. There are several judges who display greater skepticism of the Constitution, or even our laws in general, as a guarantor of justice. This is even true of Black jurists thought to be writing in the tradition of African-American political thought. Take, for instance, Justice Clarence Thomas who writes from the Black nationalist and Black conservative traditions.<sup>27</sup> Rather than seeing the law as a source of social justice, Justice Thomas has expressed his skepticism for those who look to the law to solve many of our social problems. Speaking at Clark College, a historically Black college in Atlanta, Thomas declared that “[p]roblems of racial inequality cannot be solved by the law—even civil rights law.”<sup>28</sup> For Justice Thomas, “government was and is one of the major culprits in the problems of black Americans.”<sup>29</sup> Far from embracing the integrationist position, Justice Thomas claims that a universal rejection of separatism implies a view of Black inferiority.<sup>30</sup> And far from embracing the law as a tool for justice, Justice Thomas scorns courts using their authority in an aggressive manner—even when motivated by a worthy goal.<sup>31</sup>

---

26. *Id.* at 594 (empathizing with the plight of Rosemary Mirisawo, the housekeeper who lost her home).

27. See COREY ROBIN, *THE ENIGMA OF CLARENCE THOMAS* 105–09 (2019) (discussing how Justice Thomas weaves together the Black nationalist and conservative traditions).

28. *Id.* at 95 (internal quotations omitted).

29. *Id.* at 94 (internal quotations omitted).

30. See *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring)

After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.

31. See *id.* at 124

As with any inherent judicial power, however, we ought to be reluctant to approve its aggressive or extravagant use, and instead

Whereas Justice Thomas appears closer to the Black nationalists who seek to convince Black people to give up the illusion that government actors could positively affect their condition,<sup>32</sup> Judge Gregory seems to follow Douglass toward an integrationist agenda that believes the Constitution could be “wielded in behalf of emancipation”<sup>33</sup> for those who are oppressed.

And—in case you were wondering—this isn’t just a liberal/conservative split. Even well-known Black liberal jurists are quick to dismiss the Constitution as a glorious liberty document. Indeed, because of its contradictions, many Black writers have been less optimistic about the words in the document being used for liberation.<sup>34</sup> Justice Thurgood Marshall, for example, did not have any problem scrapping the idea that the Framers of the Constitution exhibited a profound sense of justice.<sup>35</sup> He dismissed such an affinity to “a written document now yellowed with age.”<sup>36</sup> And he advocated for a living constitution that was equipped “to meet the challenges of a changing society.”<sup>37</sup>

But you won’t get this level of dismissal towards our founding documents from Judge Gregory. He, no doubt,

---

we should exercise it in a manner consistent with our history and traditions. Motivated by our worthy desire to eradicate segregation, however, we have disregarded this principle and given the courts unprecedented authority to shape a remedy in equity. (internal citations omitted).

32. See Robin, *supra* note 27, at 105 (“As [Justice Thomas] sees it, the combination of white racism, racial inequality, and the small size of the black electorate make it impossible for African Americans, acting as a self-conscious, self-identified, coherent group, to achieve a foothold, much less win any concrete or permanent gains, in the political sphere.”).

33. Douglass, *supra* note 11, at 202–03.

34. See CHARLES MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 172 (1998) (“Most blacks have viewed the Constitution more ambivalently than Douglass did, and few today would endorse his interpretation of ‘original intent.’”).

35. Thurgood Marshall, *Racial Justice and the Constitution: A View from the Bench*, in *AFRICAN AMERICANS AND THE LIVING CONSTITUTION* 314, 315 (John Hope Franklin & Genna Rae McNeil eds., 1995) [hereinafter Thurgood Marshall] (“I do not believe that the meaning of the Constitution was forever ‘fixed’ at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound.”).

36. *Id.* at 314.

37. *Id.* at 317.

acknowledges their shortcomings and the progress that still needs to be made. But he also sees the founding documents as providing the framework for freedom.<sup>38</sup> Judge Gregory's jurisprudence is grounded in admiration for the Framers' project.<sup>39</sup> And he appeals to it when spotting an injustice that he finds inconsistent with the written law.<sup>40</sup> Thus, when dissenting from the Fourth Circuit's decision not to grant a writ of habeas corpus for a prisoner who the government and district court agreed received an unjust sentence, Judge Gregory remarked that the decision failed to "guard against a morbid encroachment upon that which is so precious our Framers ensured its continued vitality in our Constitution."<sup>41</sup> Whereas Judge Gregory is willing to give the Framers credit for creating a document that served as inspiration for the oppressed,<sup>42</sup> Justice Marshall goes against the tradition of Douglass and declares such credit unwarranted.<sup>43</sup>

## II. PUTTING THE VIEW IN CONTEXT

There are many deeper issues that I am intentionally evading in this hasty sketch of these icons' views. Yes, a lot of Justice Marshall's criticisms are more appropriately leveled against those who treat the original *intent* of the Framers with a saint-like status, and only a few of them are more appropriately directed at fidelity to the original *text* that Judge

---

38. See Michael Marshall, *supra* note 22 ("It is a tribute to our forefathers that they laid the framework of freedom. It's a great nation and I'm proud to be on the federal court, but there's a ways to go.").

39. See, e.g., *United States v. Surratt*, 797 F.3d 240, 276 (4th Cir. 2015) (Gregory, J., dissenting) (invoking the court's "solemn responsibility" to uphold the ideals of the Framers).

40. See, e.g., *id.* at 273–76 (discussing the Court's duty to properly apply the writ of habeas corpus where the defendant received an excessive sentence, but the majority did not right the wrong).

41. *Id.* at 276.

42. See Michael Marshall, *supra* note 22 ("Blacks had hope for freedom when the colonies won independence," Gregory said, 'hopeful because of the language of the Declaration of Independence.'").

43. Thurgood Marshall, *supra* note 35, at 317 ("We the People' no longer enslave, but the credit does not belong to the framers.").

Gregory (and Frederick Douglass) employ.<sup>44</sup> And, sure, Justice Thomas does not appear to adhere to the principles of separatism in the way that Black political theorists of the nineteenth and early-twentieth century did.<sup>45</sup> Even in his more provocative moments,<sup>46</sup> Justice Thomas seems to be saying that the job of the judiciary is to guarantee desegregation—not integration.<sup>47</sup> No doubt a more careful analysis than the one that I am able to provide here would also show that the countless similarities between these jurists far outweigh the differences.<sup>48</sup>

Still, stressing these differences shows the intellectual particularities of Judge Gregory and where he fits in this ideological tradition. My main point here is that Judge Gregory mirrors Frederick Douglass in his appreciation of the Framers' project and his desire to use the Constitution as a tool for social uplift. Justice Thomas shares an appreciation for the Framers' project, but he does not put much stock into the idea that the Constitution is a tool for social uplift. And Justice Marshall viewed a (living) Constitution as a tool for social uplift, but he does not put much stock into the Framers' project. By doing

---

44. Compare *supra* notes 35, 43 and accompanying text (critiquing the Framers), *with supra* note 36 and accompanying text (critiquing the Constitution).

45. As some scholars have recently pointed out, even Martin Delany, who is considered the “father” of Black nationalism, altered his nationalist view depending on the personal or political issues in front of him. See generally Robert Gooding-Williams, *Martin Delany's Two Principles, the Argument for Emigration, and Revolutionary Black Nationalism*, in *AFRICAN AMERICAN POLITICAL THOUGHT: A COLLECTED HISTORY* 77 (Melvin L. Rogers & Jack Turner eds., 2021).

46. See *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (“It never ceases to amaze me that the courts are willing to assume that anything that is predominantly black must be inferior.”).

47. See *id.* at 122 (“[M]ere de facto segregation (unaccompanied by discriminatory inequalities in educational resources) does not constitute a continuing harm after the end of de jure segregation.”); cf. Tommie Shelby, *Integration, Inequality, and Imperatives of Justice: A Review Essay*, 42 *PHIL. & PUB. AFFS.* 253, 274 (2014) (“[R]acial justice requires desegregation and economic fairness but does not require residential integration or proscribe voluntary self-segregation in neighborhoods.”).

48. Indeed, since Judge Gregory views Thurgood Marshall as the greatest judge to ever live, see Epps, *supra* note 15, it would be easy to detail the various similarities between the two jurists. And, of course, it is possible that some of the differences between the two could be attributed to the different courts in which they serve.

both, Judge Gregory allows us to see how the project Frederick Douglass employed may look from the bench. It also allows us to see what happens when someone attempts to manage the contradictions behind the original liberal claim that “We the People” are free and equal, instead of rising above them. This ability to maintain consistency—which Anna Julia Cooper called “stable equilibrium of opposition,”<sup>49</sup> and Ralph Ellison called “an attitude of antagonistic cooperation”<sup>50</sup>—is the hallmark of a mainstream position by African-American political theorists seeking to have the least well-off integrated into a society where they can enjoy the constitutional protections afforded to the most privileged.<sup>51</sup>

So what does this integrationist democratic project look like from Judge Gregory’s perspective? Well, it starts by acknowledging that, as Martin Luther King, Jr. wrote, “we are tied together in a single garment of destiny, caught in an inescapable network of mutuality.”<sup>52</sup> And it precludes the erosion of any constitutional protection because persons are a member of “a certain demographic.”<sup>53</sup> We all fall or rise together. It provides the appropriate level of scrutiny to a government’s attempt to disregard individual rights with inappropriate race-based classifications.<sup>54</sup> And even while acknowledging that

---

49. ANNA JULIA COOPER, *Has America a Race Problem? If So, How Can It Best Be Solved?*, in *THE VOICE OF ANNA JULIA COOPER* 121, 128 (Charles Lemert & Esme Bhan, eds., 1998).

50. RALPH ELLISON, *The Little Man at Chehaw Station*, in *GOING TO THE TERRITORY* 3, 7 (1986).

51. See Bromell, *supra* note 12, at 698 (discussing how Douglass’s theorizing about democracy “self-consciously inaugurat[es] a distinctively African-American tradition of political thought about U.S. democracy). Howard McGary notes that, along with Douglass, the major figures in this tradition include Booker T. Washington, Martin Luther King, Jr., the National Association for the Advancement of Colored People, the Southern Christian Leadership Conference, and the National Urban League. HOWARD MCGARY, *RACE AND SOCIAL JUSTICE* 52–53 (1999).

52. *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) (Gregory, J.) (quoting Martin Luther King, Jr., *Remaining Awake Through a Great Revolution*, Address at the National Cathedral, Washington, D.C. (Mar. 31, 1968)).

53. See *id.* (“[W]e must ensure that the Fourth Amendment rights of *all* individuals are protected.”).

54. See *Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016) (Gregory, J.) (“Laws that classify citizens based on race are constitutionally suspect and therefore subject to strict scrutiny; racially gerrymandered

there appear to be “two Americas,” it attempts to bridge the gap by assuring “that there truly is equal protection under the law.”<sup>55</sup> For Judge Gregory, Black history is “the same as American history,”<sup>56</sup> and the way to end the division is to strive for King’s dream of national unity. Which America is worth loving? The one that is open to perpetual criticism until the universal equality and freedom expressed in the Declaration of Independence is extended to all.

### CONCLUSION

Writing these remarks has required me to practice an extreme level of restraint. I have tried to make sense of the topic at hand using Judge Gregory’s public opinions, speeches, and interviews. And—in the spirit of Judge Gregory and Frederick Douglass—I’ve attempted to stick close to the text while proffering views about where he may sit in the tradition of African-American political thought. In this sense, these “neutral” observations have primarily been an exercise in understanding, not assessment. They have also excluded observations based on the personal relationship that I have with someone I consider a mentor, friend, and one of the best legal minds to serve in robes.

Still, I can’t shake the sense that this purportedly neutral approach robs any potential reader of actually engaging Judge Gregory’s contributions as a work of African-American political thought,<sup>57</sup> misconstrues his optimism, and fails to communicate

---

districting schemes are no different, even when adopted for benign purposes.”), *aff’d sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

55. *United States v. Curry*, 965 F.3d 313, 334 (4th Cir. 2020) (Gregory, C.J., concurring). For a discussion of how Judge Gregory’s “*tour de force* concurring opinion” fits within a larger critique of the policing of Black people in the United States, see Brandon Hasbrouck, *Abolishing Racist Policing With the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1114–18 (2020).

56. Michael Marshall, *supra* note 22; *cf.* Douglass, *supra* note 10, at 177 (“[S]imultaneously with the landing of the Pilgrims, there landed slaves on the shores of this continent, and . . . for two hundred and thirty years and more we have had a foothold on this continent.”).

57. As Tommie Shelby and Brandon Terry write:

The approach to black political thought that we favor also rejects hagiography. Black thinkers are due far more respect and attention than they typically receive from political philosophers. They should not, however, be uncritically celebrated or treated as oracles of

the pride that Judge Gregory has as an American. Let me conclude with one final thought to slightly mitigate these concerns.

Judge Gregory once said something to me along the lines of: “It’s easy to be a patriot when society is structured to your benefit; it’s much harder to be a patriot in a country where the cards are stacked against you from birth.” As I reflect on, and write about, race relations in this country, I return to that statement often. Although Frederick Douglass is sometimes referred to as “the greatest American of all time,”<sup>58</sup> it may be a stretch to call him a patriot.<sup>59</sup> I believe Judge Gregory, though, *is* a patriot—despite living in a society where many cards were stacked against him from birth.<sup>60</sup> Indeed, I’m not sure *I* know a better American. His faith, upbringing, and love of history contributed to his idea that, as a public servant, he could use his position in our judicial system to share the “blessings of equality and justice with all.”<sup>61</sup>

Is this idealistic vision a bit too optimistic? Perhaps.<sup>62</sup> Are protestors on to something when they suggest that no amount

---

near-divine wisdom. Criticism and disagreement are often appropriate, and necessary.

TOMMIE SHELBY & BRANDON TERRY, *TO SHAPE A NEW WORLD: ESSAYS ON THE POLITICAL PHILOSOPHY OF MARTIN LUTHER KING, JR.* 6 (2018).

58. BLIGHT, *supra* note 13, at xvi.

59. See, e.g., FREDERICK DOUGLASS, *Letter to William Lloyd Garrison, January 1, 1846*, in FREDERICK DOUGLASS: *SELECTED SPEECHES AND WRITING*, *supra* note 10, at 17 (“That men should be patriotic is to me perfectly natural; and as a philosophical fact, I am able to give it an *intellectual* recognition. But no further can I go. If ever I had any patriotism, or any capacity for the feeling, it was whipt out of me long since by the lash of the American soul-drivers.”)

60. See, e.g., Michael Marshall, *supra* note 22 (“Gregory said it is a testimony to the American Dream that he could one day serve on the Court of Appeals . . . ‘Our nation gives people a chance to become the people they believe they might want to become.’”).

61. See Epps, *supra* note 15 (discussing Judge Gregory’s upbringing and his commitments as a public servant).

62. Here, I am regrettably reminded of the remorse Kenneth Clark, the Black psychologist who provided critical testimony about the harmful effects of segregation in *Brown v. Board of Education*, expressed in his later years:

I write these words in my seventy-sixth year. My beloved wife is dead and my career is nearing an end. Reluctantly, I am forced to face the likely possibility that the United States will never rid itself of racism and reach true integration. I look back and I shudder at how naive we all were in our belief in the steady progress racial

of reform will achieve the level of freedom for all required by justice? Perhaps.<sup>63</sup> Are there times when it appears that Judge Gregory's project of leveling up is being ignored by some of his colleagues? Perhaps.<sup>64</sup> Is the country better off having Judge Gregory in the position to take up the cause of freedom and justice for all? That's an easy and emphatic: yes!

---

minorities would make through programs of litigation and education. . . . I am forced to recognize that my life has, in fact, been a series of glorious defeats.

Kenneth B. Clark, *Racial Progress and Retreat: A Personal Memoir*, in RACE IN AMERICA 3, 15 (Herbert Hill & James E. Jones, Jr. eds., 1993).

63. Judge Gregory would likely find some truth in Douglass's attestation that Black persons in prominent positions are a form of political resistance because it alters the public image of Black Americans. See Krause, *supra* note 21, at 139 ("[Douglass] also felt that a black man in political office was in itself a form of political resistance because of the multiple ways it contested the color line and modeled a new public image of African Americans.").

64. See *supra* notes 23–25 and accompanying text.