

Do Abolitionism and Constitutionalism Mix?

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Dorothy Roberts, *Abolition Constitutionalism*, 133 **Harv. L. Rev.** 1 (2019).

Dorothy Roberts's Abolition Constitutionalism is a monumental achievement and certain to become required reading on prison abolition. With little hesitation in calling the U.S. prison state an extension of slavery, the article is thoroughly and unapologetically abolitionist. It eschews criminal justice reform to "improve" the system in favor of "nonreformist reforms—those measures that reduce the power of an oppressive system." It makes the case that "new abolitionists"¹ should instrumentally utilize constitutional arguments in their efforts to eliminate imprisonment. This radical article is the foreword to the *Harvard Law Review's 2018 Supreme Court Term issue*. Yes, that Harvard Law Review. Yes, this Supreme Court.

Abolition Constitutionalism will doubtlessly have wide readership within the academy. I hope that it will also be widely read by nonacademics. Roberts writes accessibly and beautifully, and as evidenced by her meticulous citations, she has encyclopedic knowledge of the racial history of policing and punishment, the modern American prison abolition movement, and the Supreme Court jurisprudence on the reconstruction amendments. But, at 120 pages, the article is an undertaking for those unaccustomed to law reviews. Here, I offer a truncated overview in the hope of sparking even greater readership. I will pepper the overview with my impressions and analyze Roberts's conclusion that "instrumental" constitutionalism is helpful to abolitionism.

The article begins with the most frequently asked question about prison abolitionism: What is it?² Roberts traces new abolitionism to a 1998 Critical Resistance conference at Berkeley and adopts its concept of a "long-term political vision" toward ending the "prison industrial complex." She outlines three main tenets of abolitionism: "First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime. Third, we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems."

Roberts' historical analysis makes a compelling case that the American prison state was born of the desire to repress formerly enslaved persons—and all blacks—and has served its purpose well. Less clear is why this ignoble history necessitates jettisoning policing and punishment altogether, rather than reforming, and in some places strengthening, them. Roberts herself notes that "criminal law treats prisons as essential to prevent or redress crimes committed by economically and racially marginalized people but unnecessary to address even greater social harms inflicted by the wealthy and powerful." A stark example is that, "after Emancipation, white southerners began ritually kidnapping and killing black people" with impunity. Current capital punishment studies demonstrate this legacy of impunity, as those who kill black victims are far less likely than those who kill whites to receive capital punishment. Why not make the system better for "marginalized people" while using it instrumentally to get at "the wealthy and powerful?"

Abolitionists' answer lies in a distinction between instrumental and institutional analyses of the criminal apparatus. Indeed, I have previously queried why progressives respond to discrimination against black

victims in capital punishment by calling for *less* punishment (abolition) rather than executing more killers-of-blacks, while at the same time, they respond to a perceived bias against female homicide victims by calling for *more* punishment (eliminating provocation and elevating manslaughters to murders). The answer, I asserted, is the tendency to view death sentencing as an inherently racist *institution* but prison sentencing as something that can be used instrumentally against privileged bad actors (woman-killers, racist cops). New abolitionists regard not just capital punishment but the entire criminal (in)justice system as an endemically pernicious, irredeemable institution. As Roberts puts it, “Efforts to fix the criminal punishment system to make it fairer or more inclusive are inadequate or even harmful because the system’s repressive outcomes don’t result from any systemic malfunction.... Therefore, reforms that correct problems perceived as aberrational flaws in the system only help to legitimize and strengthen its operation. Indeed, reforming prisons results in more prisons.”

The last sentence hints at a controversy in abolitionist theorizing. Abolitionists generally applaud efforts to dial back policing, lower sentences, and release prisoners. There is less consensus on “reform”—whether abolitionists can, for example, support New York’s plans to close [Rikers Island](#) and open several smaller more “humane” prisons or Texas’s plan to build a new prison ostensibly tailored to women’s (and mothers’) needs. Roberts does not, and need not, fully resolve such controversies. She seeks to show that constitutionalism can be of instrumental use to the abolitionist in the consensus effort to shrink the penal state.

Now, abolitionists critique the instrumental use of criminalization because such serves to legitimate an institution that should be dismantled. Couldn’t the same critique apply to constitutionalism? The constitutional legal apparatus was also forged in the fires of American slavery, and constitutional law has often served as an enemy of, or alternatively a poisoned gift to, racial justice advocates. Roberts faces head on the argument that “constitutional change within formal legal processes occurs only to maintain the look of legitimacy,” such that “the very project of abolition constitutionalism could be antiabolitionist.” Indeed, she lays out a detailed bill of particulars against constitutionalism as a viable path toward racial justice and eradicating the prison industrial complex, which includes the state action doctrine, standing, colorblindness, [Adarand](#) and reverse discrimination, [McCleskey v. Kemp](#), [Utah v. Streiff](#), and the list goes on.

What then redeems the institution of constitutional law enough for it to be used by abolitionists instrumentally? Roberts finds promise in two sources. The first is the Antebellum-era Republican’s radical argument that the text of the original constitution forbid human bondage of any sort, even if the Framers intended differently. She hopes that courts will adopt interpretations, like that of [Randy Barnett](#), that this radical abolitionist view is embodied by [Fourteenth Amendment](#), despite widespread “revisionist history.” The second source of hope is Justice Sotamayor, and more specifically, her dissents in cases like [Streiff](#) that draw a straight line between [Jim Crow](#) and modern policing. “Suppose,” Roberts muses, “a majority of Justices not only ruled in line with [Justice Sotomayor](#)’s dissenting opinions in [Heien](#), [Streiff](#), [Husted](#), and [Perez](#), but also applied this reasoning to other claims of constitutional violations in policing, surveillance, sentencing, and prison conditions? Such a series of Supreme Court decisions would deliver a tremendous blow to the prison industrial complex.”

But I do not suppose that will happen any more than I suppose that the fact that a Chicago officer gave a homeless man the boots off his feet last June portends a redemptive future of policing. I fear that constitutionalism will less likely take a Sotamayor-dissent turn than become an even more formidable opponent of prison abolitionism. In turn, the effort to “hold courts and legislators accountable to an abolitionist reading” of the constitution may be so much tilting at windmills. Worse, I worry about strengthening an institution that may be on the verge of *Adarand-ing* all kinds of constitutional rights—amplifying religious liberty rights to give cover to discrimination and reproductive oppression, minting new rights to life and property that interfere with states’ prerogatives on abortion and

depolicing. In more paranoid moments, I worry about the return of *Lochner* as states make serious efforts to tackle wealth inequality. Perhaps abolitionists' focus should be on building momentum outside the courts and insulating abolitionist programs from constitutional interference.

In the end, I may not see great promise in constitutional law as an instrument of prison abolition, but Roberts's article has deeply enriched my understanding of both abolitionism and constitutionalism.

1. This is quite distinct from "new abolitionism" as it is used in some feminist circles to mean activists who regard pornography and prostitution as "modern day slavery" and advocate for *strengthening* carceral interventions in those realms.
2. I have seen this question weaponized: If the abolitionist cannot answer it in a simple, practical, yet all-encompassing manner, then abolitionism is too "vague" to take seriously. Of course, the same is not said of "law and economics," "feminism," and "originalism."

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