

Frederick Douglass and the Two Constitutions: Proslavery and Antislavery

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[T]he Constitution . . . [says] “We the people;” not we the [W]hite people, not even we the citizens, not we the privileged class, not we the high, not we the low . . . not we the horses, sheep, and swine, and wheelbarrows, but we the people, we the human inhabitants.

—Frederick Douglass, Glasgow, Scotland (1860)

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Born a slave on the eastern shore of Maryland and spending the first twenty years of his life in bondage, Frederick Douglass possessed no conventional education. He did not spend a single day of his life in schools of any kind. His “education” came from people around him, from books, from journalism, from wide reading, and finally, from his personal experience and relationships. Douglass was with time an intellectual sponge; if he met you, he figured out what he could learn from you—whether you were the aging Thomas Clarkson in England, an ordinary hungry, ill-clad fugitive slave in western New York, an Abraham Lincoln at the White House in 1863, a racist thug who would throw him off a train for sitting in a White peoples’ car, John Brown in an attic pouring over maps, a highly educated Black scientist-physician like James McCune Smith with whom he collaborated by 1850, or a feminist radical abolitionist like Abby Kelley with whom he travelled the antislavery circuit for two years.¹ He made friendships, as well as rivalries, that provided him education, mentorship, inspiration, and even lessons in human nature from his oppressors. From the educated classes in America and England, he drew knowledge, confidence,

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1. See DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 168–69, 184, 187, 254–60, 301–03, 408–10 (2018).

advice, personal financial support, a book collection, and even competitive spirit.² Slaveholders were themselves his unwitting teachers. When he started reading the United States Constitution, he was an open book.

I.

SCHOOLING IN NATURAL RIGHTS AND GARRISONIANISM

Douglass's enslaved roots were a stock feature of his early abolitionist rhetoric, his opening witness in an incomparable indictment of American slavery. In Douglass's view, slavery's greatest threat to human beings was not physical, but, its capacity to forge ignorance:

I do not forget that thirty-two years ago I was a slave, [he remarked in 1870] within an hour's ride of this very Capital where I now am. I do not forget that on the wharves and in the ship yards of Baltimore, I studied my first lessons in spelling and took my first lessons in writing. From the time I learned to read, and learned the value of knowledge, it was among the deepest . . . wishes of my soul, to assist in the deliverance of my people, not only from . . . slavery, but from the more terrible bondage of ignorance.³

In yearning for learning, Douglass found a purpose for his life, although he needed a great deal of help and direction. Although he could romanticize his own seemingly self-made rise from nowhere to fame, he freely admitted he would have preferred schools.⁴ "There never was a self-educated man," Douglass wrote, "who with the same exertion would not have been better educated by the aid of schools and colleges."⁵ When he entered the public world of radical abolitionism at age twenty-three in 1841, his untutored ambition, raw anger, damaged psychological standing, desire for recognition, and brilliant yet florid storytelling, needed mentoring.

Douglass had a variety of mentors at different stages of his life. None were more important to his early career than William Lloyd Garrison, the prophet of immediatist, moral suasionist abolitionism and founder of the American Antislavery Society and the *Liberator*.⁶ Under Garrison's tutelage in his first years on the itinerant circuit (1841–44), Douglass began to read the Constitution. Twelve years older than his young protégé, Garrison was a devoted radical who inspired the young former slave with both his zeal and his ideas. Garrison was essentially an anarchist and a perfectionist; he demanded great loyalty from his

2. *See id.*

3. FREDERICK DOUGLASS, *Salutary*, NEW NAT'L ERA, Sept. 8, 1870, in FREDERICK DOUGLASS: SPEECHES AND WRITINGS 732, 733 (David W. Blight ed., Library of America 2022) [hereinafter Douglass, *Salutary*].

4. *Id.* at 756.

5. *Id.*

6. *See generally* HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY (1998) [hereinafter MAYER].

devotees and his intellectual and religious charisma built a strong movement.⁷ But anarchy and perfectionism were never going to provide a restful intellectual home for the fugitive slave Douglass.

Garrison believed radical abolition should resist electoral politics and voting itself. He was a strict pacifist and advocated a kind of disunionism, a confounding strategy that meant in his slogan, “no union with the slaveholders,”⁸ a withdrawal from office-holding or any political association with the evil regime of the slaveholding South. The system would one day collapse under the ethical assault on the human heart, a rising tide of moral awareness, and a desire to free individuals and the nation itself from the curse of slavery.

Among Garrison’s fiercest claims, and a strict tenet of those who followed him, was that the U.S. Constitution was written with a proslavery view. Garrison considered the Constitution the abiding buttress of slavery because of the claim that humans were property in the calculus for representation (the Three-Fifths Clause) and the pledge to defend states against insurrection and assist in the capture of fugitive slaves. Garrison viewed the variety of compromises with slave states, as well as the very system of checks and balances in the Constitution, as its fatal flaw; as early as 1843, he famously called the founding charter a “covenant with death and an agreement with hell.”⁹ Garrisonians even acceded to the proslavery Constitutionalists’ ownership of the meaning of the Fifth and Tenth Amendments, as well as the idea that slavery followed the American flag at sea and into the territories.¹⁰ As early as 1832, when Douglass was a fourteen-year-old in Baltimore studying the Bible with an old storefront religious man named Charles Lawson, Garrison had attacked John C. Calhoun and the nullification effort in South Carolina by demanding that Northerners cease allegiance to a document (the Constitution) “dripping as it is with human blood.”¹¹

Douglass’s adult perceptions of the Constitution began in these sentiments, not unlike some notions peddled by those who today see America as a place that is and has always been trans-historically racist to its legal and moral core. The very young Douglass was impressionable. He was quickly susceptible to the idea that proslavery America was rotten at its constitutional beginning, only made more so by historical practice. It seemed a logical history in line with his experience of all the thoroughly legal horror wreaked upon him and his fellow slaves in Maryland. An inhumane system so unchecked by law it could only be sustained by inhumane laws.

7. *See generally id.*

8. *Id.* at 300.

9. DOUGLASS, *Salutary*, *supra* note 4, at 584.

10. *See* MAYER, *supra* note 7, at 143. Garrison drew the famous passage about “covenant with death” and “agreement with hell” from Isaiah 28:18. William Lloyd Garrison, *No Compromise with Slavery: An Address Delivered in the Broadway Tabernacle, New York* (Feb. 14, 1854).

11. MAYER, *supra* note 7, at 143.

As he became a man of words as his only real weapon, a kind of prose poet of American democracy, Douglass needed a more far-seeing analysis. He needed a way to see law as an aid and not an enemy, especially after digesting the Declaration of Independence and breathing in from its creeds the natural rights philosophy which was a part of his everyday world while enslaved. In his early years as a public abolitionist, Douglass began to hone his belief in the natural rights tradition, a philosophy he came by even as a slave, into a world view that demanded more of law, politics, and principles. America's founding documents, the Declaration and the Constitution, were indispensable to his life, his thought, and his mental survival.¹²

But the young abolitionist, contrary to the ways conservative intellectuals use him today, did not come by his natural rights solely from Jefferson's creeds and the "genius" of the Constitution. Slavery taught him what it sought to destroy: a firm belief that his humanity, his essential rights, came from God and nature, even as humans stole, brutalized, and destroyed those rights by law with nothing to stop them. At the heart of Douglass's probing of his youth in his autobiographies was the idea that enslavement attempted to crush all semblance of natural rights for its victims. Douglass's eventual appeals to the natural rights tradition, to the right of revolution, and his need to find a useable Constitution to believe in, should be considered in light of his compelling tales of damaging as well as inspiring childhood memories. Douglass's embrace of natural rights really began in his daily childhood confrontations with the violence and humiliation of slavery. Douglass's first two autobiographies, which form perhaps his greatest literary legacy, are testaments to the meaning of natural rights.

This faith came first from what he called a "child's reasoning."¹³ In *My Bondage and My Freedom, the second autobiography* (1855) he remembered as a boy wondering "Why am I a slave? Why are some people slaves and others masters?"¹⁴ This "subject [of my study] . . . was with me in the woods and fields," he wrote, "along the shore of the river, and wherever my boyish wanderings led me."¹⁵ Often they led him to the huge trees at the Wye House plantation; he would stand under them and witness the throngs of blackbirds.¹⁶ "I used to contrast my condition with the blackbirds, in whose wild and sweet songs I fancied them happy. Their apparent joy only deepened the shades of my sorrow."¹⁷ As the giant flocks flew away, he saw how naturally free they were

12. See NICHOLAS BUCCOLA, *THE POLITICAL THOUGHT OF FREDERICK DOUGLASS* 41–83 (2012); PETER C. MEYERS, *FREDERICK DOUGLASS: RACE AND THE REBIRTH OF AMERICAN LIBERALISM* 1–6, 12–13, 49–55 (2008).

13. See FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* xxvii (Yale Univ. Press 2014) (1855).

14. *Id.* at xiv.

15. *Id.*

16. *Id.*

17. *Id.*

and imagined himself on their wings.¹⁸ The birds reminded him, he said, of the “unjust, unnatural and murderous character of slavery Without any appeal to books, to laws, or to authorities of any kind, it was enough to accept God as a father, to regard slavery as a crime.”¹⁹ The boy, remembered by the adult writer, had yearned for a certainty of the opposite of unjust and unnatural. If there were something like inherent, God-given, natural rights, then the blackbirds did not lie. Douglass employed many other uses of *nature* to stake his claim to an equality before nature’s God.

Until a certain age, Douglass said that he was convinced that young boys, including the White immigrant kids he met and jostled with in the streets of Baltimore, were natural abolitionists. Douglass trusted the consciences of his young mates; until about the age of ten they were “unseared and unperverted” by slavery’s material and moral logic.²⁰ Douglass’s reflections on the natural rights tradition burst from his experience with the “boys of Philpott Street” in Fells Point, Baltimore, who often told him, he recalled, that “they believed *I* had as good a right to be free as they did,” and that “they did not believe God ever made anyone to be a slave.”²¹ He hadn’t yet read the Preamble or the Bill of Rights in the Constitution, but the bond with these boys conditioned him to consider that equality was a natural thing, despite the facts on the streets, or in the shipyards. For this slave, natural rights doctrine took form in a pre-adult innocence, but also real experience of surrogate freedom observed in his mates. There he first encountered the “blessings of liberty” as much more than an abstraction.

When he became the Bible reading companion of old Father Lawson, Douglass also garnered some notions of natural rights. A drayman who worked for the owner of a rope walk on Fell’s Point, Lawson exuded a spirituality young Fred Bailey (Douglass’s name as a slave) had never encountered. Frederick saw Lawson as a kind of a holy man living in a hovel who prayed constantly and drew the young teen into the mysteries of Biblical storytelling. Frederick would read and Lawson would interpret and offer commentary. If slavery and life were his schools, here was a safe haven tutorial with a tattered old wise man. “I could teach him the letter,” wrote Douglass, “but he could teach me the spirit.”²² Perhaps in their recitations, they stopped in Paul’s letter to the Romans, as Frederick learned that for believers, “the law” (natural rights) was “written in their hearts.”²³ Whenever his interest began, Douglass cultivated a lifelong fascination for the apostle Paul, the “prisoner prophet.”

18. *Id.*

19. *Id.* at 109.

20. *Id.* at 126.

21. *Id.*

22. *Id.* at 136.

23. *Id.* at 123; *Romans* 2:15.

When he was fifteen, a disgruntled and angry Douglass was shipped from Baltimore back to the eastern shore and put to meaningless work in Thomas Auld's store.²⁴ He hated both the work and being forced to leave Baltimore.²⁵ Auld was "stingy" with the rations of Indian cornmeal for the hungry teenager. Douglass's memory of this experience inspired one of his most assertive philosophical defenses of natural rights doctrine.²⁶ He had a perfect right to steal his master's food, or any other possession, he argued, because not only had Auld rendered him "property," but the larger society had marked him "privileged plunder."²⁷ Douglass believed he was therefore, by birthright, "justified in plundering in return."²⁸ In this assertion of the right of revolution, the remembered hungry slave in an amoral system, the bored teenage laborer with lost hopes, wrote in retrospect with a raw logic. Douglass wrote that "[t]he morality of a free society can have no application to slave society."²⁹ Douglass articulated his argument further: "Slaveholders have made it almost impossible for the slave to commit any crime, known either to the laws of God or the laws of man. If he steals, he takes his own; if he kills his master, he imitates only the heroes of the revolution."³⁰ From this brutal environment, Douglass thus emerged as a student of human nature, of the slaveholder's mind, and of a conception of human rights. He sensed that in due time the plunderer shall be plundered.

By 1848, Douglass observed with keen enthusiasm the republican revolutions sweeping over Europe, especially in France that spring.³¹ He took heart as monarchy and slavery in the French empire came under assault from a movement of universal egalitarianism.³² "We live in stirring times and amid thrilling events," he told a Rochester audience.³³ But Douglass never missed a chance to puncture complacency with irony. While Europeans strove to free themselves from centuries of tyranny, most Americans only mouthed half-truths of support, since here voters could only choose between "tyrants and men-stealers to rule over us."³⁴ That fall, the slaveholding general and hero of the Mexican War, Winfield Scott, was elected president, sustaining the long

24. *Id.* at 138–40; *see also* DICKSON PRESTON, *YOUNG FREDERICK DOUGLASS: THE MARYLAND YEARS 107–08* (1980).

25. DOUGLASS, *supra* note 13, at 138–40.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. FREDERICK DOUGLASS, *A Day, a Deed, an Event, Glorious in the Annals of Philanthropy, Address Delivered in Rochester, NY (Aug. 1, 1848)*, in 2 *THE FREDERICK DOUGLASS PAPERS*, SER. 1, at 135, 142 (John W. Blassingame, 1985).

32. *Id.*

33. *Id.*

34. *Id.*

American tradition of electing proslavery chief executives. Douglass missed no opportunity to use contemporary history to make his case for natural rights.

On September 3, 1848, Douglass—now legally free since British antislavery friends had purchased him from his owner, Thomas Auld—published a stunning public letter to his “old master.”³⁵ The letter was a masterpiece of antislavery propaganda and an expression of personal rage. It was also a bold statement of natural rights wrapped in a kind of private/public revenge. The letter contained a couple of errors (especially about his grandmother, Betsy Bailey) for which he later apologized.³⁶ But the letter was also funny, falsely and formally delicate, and at times quite moving. He rhetorically plundered Auld with glee. He played with Auld, offering a justification for invading his “proprieties of private life,” and assured him “I will not manifest ill temper by calling you hard names.”³⁷ But his intent was explicit: “I intend to make use of you as a weapon with which to assail the system of slavery.”³⁸ The letter was widely read; a White Southerner as far away as Georgia wrote to defend Auld and slaveholding, condemning Douglass for the impudence as a “negro” claiming equality with “those that God designed to be his superior,” and overturning “the order of nature.”³⁹ Douglass had gotten their attention. He lectured Auld personally about the natural right of self-ownership:

I am myself; you are yourself; we are two distinct persons, equal persons. What you are I am. . . . God created both, and made us separate beings. I am not by nature bound to you, or you to me. Nature does not make your existence depend on me, or mine to depend on yours. I cannot walk upon your legs, or you upon mine. I cannot breathe for you, or you for me.⁴⁰

In this public humiliation, Douglass dragged Auld through their shared history, which included the unresolved mystery of whether the slaveholder was his father.⁴¹ He invoked the most basic of natural liberties—the right to family, children, marriage—and penetrated it to slavery’s domestic heart of darkness. Douglass reminded Auld that Douglass’s wife and four children were in a safe home in Rochester, unmenaced by slave catchers: “They are all in comfortable beds, and are sound asleep, perfectly secure under my roof. There are no slaveholders here to rend my heart by snatching them from my arms.”⁴² Douglass reversed the pain of enslavement by unleashing it on Auld’s conscience if not

35. Letter from Frederick Douglass to Thomas Auld, *Letter to My Old Master* (Sept. 3, 1848), reprinted in DOUGLASS: SPEECHES AND WRITINGS, *supra* note 4, at 107–09. The letter was reprinted widely in the antislavery press, and even in some Southern newspapers. On Douglass and the idea of self-ownership, see BUCCOLA, *supra* note 12, at 30–32.

36. Letter from Frederick Douglass to Thomas Auld, *supra* note 35, at 107–09.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 112–14.

his back. He wrote, "Oh! Sir, a slaveholder never appears to me so completely an agent of hell, as when I think of and look upon my dear children. It is then that my feelings rise above my control."⁴³ Natural rights are by definition primal at their root.⁴⁴ So Douglass asked Auld to imagine that he had kidnapped Auld's daughter Amanda, "made her my slave, compel her to work . . . place her name on my ledger as property," and sell her to the "brutal lust of fiendish overseers."⁴⁵ How would the old man feel about such a reversal? By using Auld, Douglass declared his freedom by nailing his former owner up on a cross of his own making.

Over and over again in the late 1840s and early 1850s, Douglass's openness to an antislavery view of law and the Constitution had been signaled in his responses to the never-ending issue of colonization, the idea of removal of Blacks to foreign lands.⁴⁶ The issue was revived with forceful advocacy by Henry Clay and the American Colonization Society around 1849–51, and Douglass responded by spitting fire.⁴⁷ He considered all versions of colonization "diabolical" and especially a mockery of the doctrine of "consent."⁴⁸ Clay's prominent claims that Blacks would only leave America "with their own consent" prompted Douglass to cry foul as he accused the colonizationists of arrogant cunning.⁴⁹ "If a highway robber should at the pistol's mouth demand my purse," the abolitionist declared, "it is possible that I would consent to give it up. If a midnight incendiary should fire my dwelling, I doubt not that I would readily 'consent' to leave it."⁵⁰ Here were the warring assumptions tearing apart the country. "The highway robber has his method," Douglass concluded, "the torturous and wily politician has his."⁵¹

Similarly, with the passage of the hated Fugitive Slave Act of 1850, Douglass responded with a full-throated defense of natural rights. When fugitives and their antislavery defenders were arrested and indicted for "treason" after the famous Christiana, Pennsylvania rescue in 1851, Douglass took a stand not unlike his position on stealing food from his master.⁵² "The basis of allegiance is protection," he argued.⁵³ The only law a slave could acknowledge

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. FREDERICK DOUGLASS, *Persecution on Account of Faith, Persecution on Account of Color*, Speech in Corinthian Hall, Rochester, NY (Jan. 26, 1851), in 2 DOUGLASS PAPERS, SER. 1, *supra* note 31, at 291, 301, 307–11; FREDERICK DOUGLASS, *Henry Clay and Colonization Cant, Sophistry, and Falsehood*, Speech in Corinthian Hall, Rochester, NY (Feb. 2, 1851) [hereinafter DOUGLASS, Clay], in 2 DOUGLASS PAPERS, SER. 1, *supra* note 31, at 311–14, 318.

48. DOUGLASS, Clay, *supra* note 47, at 318.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

was the “law of nature . . . In the light of the law, a slave can no more commit treason than a horse or an ox can commit treason.”⁵⁴ Douglass always knew when he had irony and perhaps nature on his side, if not the law. And finally, we see Douglass desperately appealing to natural rights in his despairing call to action against the *Dred Scott* decision in 1857. The ruling, by Justice Roger Taney and his seven-two majority, left Douglass in a dark place with an “earnest, aching heart” at the reality of both the elimination of the Missouri Compromise line and the declaration that Black people had “no rights” nor any future hope of citizenship in America.⁵⁵ But he fell back upon a kind of “higher law” and natural law doctrine.⁵⁶ “The Supreme Court . . . is not the only power in the world,” Douglass declared, “but the Supreme Court of the Almighty is greater.”⁵⁷ Taney “could not change the essential nature of things, making evil good, and good evil.”⁵⁸ Repeatedly in a speech that reads like a political prayer, Douglass invoked the “laws of nature” as the ultimate hope of defeating the meaning of *Dred Scott*.⁵⁹ His *Dred Scott* speech feels a bit like whistling in a graveyard, given the dreadful turn the decision represented. But it was also a call to action, as was happening all over American political culture in this era.

As Martha Jones demonstrates in her recent book, *Birthright Citizens*, the idea of antebellum “citizenship” for Black Americans was illusive, never settled, even as it was a constant, passionate quest.⁶⁰ People “without rights still exercise them,” she writes, and justify doing so in natural rights traditions as well as richly local practices and lawsuits.⁶¹ The idea of “national belonging” reached for textual and constitutional footing, but it did not necessitate it even in the face of something as seemingly conclusive as *Dred Scott*.⁶² Douglass was one major embodiment of this story of how rights and citizenship could be *performed* before they were codified in law.⁶³

II.

TRANSFORMATION TO ANTISLAVERY CONSTITUTIONALISM

In the transforming years of 1848–52, a young Douglass (thirty to thirty-four years old) turned decisively from the Garrisonian proslavery view of the Constitution to a thorough-going antislavery interpretation. His mind was always

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. FREDERICK DOUGLASS’ PAPER (Sept. 25, Oct. 23, Nov. 13, 1851); FREDERICK DOUGLASS, *Dred Scott Decision*, Speech in New York (May 14, 1857) [hereinafter DOUGLASS, *Dred Scott Decision*], in DOUGLASS: SPEECHES AND WRITINGS, *supra* note 4, at 292.

60. MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 10–14, 131–36 (2018).

61. *Id.*

62. *Id.*

63. *Id.*

in transit in these years from one idea to another, one author to another, one antislavery strategy to another. He had laid down a Garrisonian record of contempt for the Constitution; there was much to overcome and many friends to alienate and lose.

At least down to 1847, when he returned from his nineteen-month sojourn to Ireland, Scotland, and England, Douglass maintained a stern public loyalty to Garrison's view of the proslavery Constitution. There are many examples, but for a full-throated expression of this doctrine, we need only look at his address *Farewell to the British People*, delivered to a cheering, adoring audience in London, March 30, 1847, just before he embarked on his return to America. The speech is eventually a scathing attack on all manner of American proslavery hypocrisy and of his native country as "a nation of inconsistencies; completely made up of inconsistencies."⁶⁴ He had a sympathetic throng in the palm of his hands, and it is one of Douglass's funniest pieces of oratory. He skewered John C. Calhoun as the embodiment of proslavery ideology and the model of "a right out-and-out democrat" in his defenses of "liberty."⁶⁵ Douglass said that Calhoun's political life, and therefore that of all slaveholders, was on display every time he asserted "a right to property in my limbs – my very body and soul; that they have a right to me! That I am in their hands . . . a thing to be bought and sold!" despite the fact of his humanity, "possessing intellect, and a sense of my own rights."⁶⁶ He left them laughing and crying with a routine of mimicry about how his freedom had been purchased from his potential "father" and "uncle," Thomas and Hugh Auld, and that he (Douglass) "had as much right to sell Hugh Auld as Hugh Auld had to sell me," as he invited the crowd to make him an offer.⁶⁷ The idea of natural rights—claimed or obliterated—are a central thread of this classic piece of abolitionism and personal testimony.

But he started the oration with a condemnation of the Constitution as the all but hopeless vehicle of America's doom, especially represented in the "domestic insurrection" clause and the federal fugitive slave clause.⁶⁸ That fugitive slave provision had to be interpreted from its lumpy language: "No person held in service or labour . . . shall in consequence of any law or regulation" in a "state" in the Union "be released from such service or labour but shall be delivered up to be claimed by the party to whom such service or labour may be due."⁶⁹ As he had done many times before, Douglass cited these provisions and more to claim that the Constitution had for 60 years allowed the

64. FREDERICK DOUGLASS, *Farewell Address to the British People, Delivered in London (Mar. 30, 1847)*, in DOUGLASS: SPEECHES AND WRITINGS, *supra* note 4, at 44–52, 64–65.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 44, 46, 55. On Douglass's capacity to change his mind, to engage in "sharp reversals," see JAMES OAKES, *THE RADICAL AND THE REPUBLICAN: FREDERICK DOUGLASS, ABRAHAM LINCOLN, AND THE TRIUMPH OF ANTISLAVERY POLITICS 9–10* (2007).

69. DOUGLASS, *Farewell Address to the British People*, *supra* note 64, at 44, 46, 55.

founding charter to gut “everything good and great in the heart of the American people” and summoned them “to defend this great lie before the world.”⁷⁰ The clause about insurrection, though it did not name slaves, he said, “converts every [W]hite American into an enemy to the [B]lack man,” and aims “every bayonet, sword, musket, and cannon . . . at the bosom of the negro.”⁷¹ Likewise, the fugitive clause meant the “American Constitution makes the whole land one vast hunting ground for men.”⁷² It made the United States a nation of “bloodhounds,” in which “no valley so deep, no mountain so high, no plain so expansive, no spot so sacred” could protect the lonely runaway from capture.⁷³ The proslavery elements of the Constitution comprised, in Douglass’s view at this time, “one of the most deadly enactments against the natural rights of man.”⁷⁴ Proslavery Constitutionalism had sewn deep roots in American political traditions.⁷⁵

Or so it was in the spring of 1847. Within a year or two this analysis would all begin to change. Upon his return to the United States, and his rapid relocation to Rochester, New York, Douglass searched for new ideas, inspirations, mentors, and indeed independence. His mind remained open to any way to torment slaveholders, to rouse his readership in his newly founded newspaper, the *North Star*, and to especially find his feet in a political-legal attack upon slavery that offered more hope and dividends than the constant appeals to the craven hearts of proslavery Americans. He never gave up completely on moral suasion; it was still useful in pulpits on Sundays, but on Thursdays and Fridays when he had to write his editorials and get his paper out, it was not enough. In so doing he discovered a deep philosophical body of antislavery constitutional thought. He discovered mentors in the writings of Lysander Spooner, Alvan Stewart, and especially William Goodell, and in a new and abiding friendship with Gerrit Smith, the wealthy radical political abolitionist in upstate New York and a key founder of the Liberty party. In his loathing of the Constitution, Douglass had felt stateless. But now the Mexican War had put slavery back at the center of American political affairs, and Douglass wanted to have a voice in the fight at that center. He did not convert overnight; his move to antislavery Constitutionalism was a slow, if steady, process.

In many ways, Douglass read, listened, and learned his way to antislavery Constitutionalism. He cherished his right to change his mind, rejected the purist demands of Garrisonianism, and embraced a philosophical pragmatism that would guide him to a new kind of radicalism. Douglass relished his right to inconsistency. As early as March 16, 1849 in an essay, “The Constitution and Slavery,” he wrote that he did not wish to be “consistent with the creed of either

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

antislavery party.”⁷⁶ As a nearly perfect precursor of William James’s “What Pragmatism Means,” Douglass said “the only truly consistent man is he who will, for the sake of being right today, contradict what he said wrong yesterday.”⁷⁷ James later famously wrote, “the greatest enemy of any one of our truths may be the rest of our truths.”⁷⁸

As the historian of slavery, abolition, and the coming of the Civil War, James Oakes, has made clear, there were two antebellum Constitutions, one proslavery and the other antislavery and they were at war with one another.⁷⁹ Both sides had “colonized” the Constitution, writes Oakes, converting its clauses and ideas to their ever more dangerously diverse ends.⁸⁰ Like the experiential roots of his natural rights beliefs, Douglass also became an antislavery Constitutionalist through his encounter with the roiling politics of slavery. He was a natural at political insurgency, increasingly thrived on the short-form political editorial essay and came to realize that bending wills and affecting real power might be the only way to even imagine ending slavery in the American republic. So why not put the Constitution to work?

Somewhere in the late 1840s Douglass began to read antislavery Constitutionals, Spooner and particularly William Goodell.⁸¹ Born in Chenango County, New York in 1792, but raised largely in Connecticut, Goodell became a religiously inspired activist, writer, and editor, first in the temperance movement and then as a radical abolitionist. Deeply inspired by the late eighteenth century theology and antislavery of Samuel Hopkins and Jonathan Edwards, Jr., he was an early Garrisonian, a founder of the American Antislavery Society in the 1830s who tried to sustain a Calvinist commitment to moral reform.⁸² But Goodell fell out of the Garrisonian tribe by the 1840s, especially over politics and the founder’s anarchism and disunionism; he was a major figure in the Liberty Party, founded in 1840, and a leader of the anti-Garrisonian faction in the great schism in abolitionism of that year. He was a kind of scribe for political abolitionism. Goodell believed in a political theology and did not toe any Garrisonian lines about how state and church were hopelessly corrupt. He

76. Frederick Douglass, *The Constitution and Slavery*, N. STAR, Mar. 16, 1849, *reprinted in* 1 LIFE AND WRITINGS OF FREDERICK DOUGLASS 361 (Philip S. Foner ed., 1955); William James, *What Pragmatism Means*, in PRAGMATISM 38 (Bruce Kuklick ed., 1981); *see also* NICK BROMELL, THE POWERS OF DIGNITY: THE BLACK POLITICAL PHILOSOPHY OF FREDERICK DOUGLASS 101–23 (2021).

77. James, *supra* note 76, at 38.

78. *Id.*

79. JAMES OAKES, THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION 21 (2021). Oakes’s book has influenced my own views in some important ways. Also very important is the older work, WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 (1977).

80. OAKES, *supra* note 79, at 21.

81. Steve Gowler, *Radical Orthodoxy: William Goodell and the Abolition of American Slavery*, 91 NEW ENG. Q. 592, 592–624 (2018).

82. *Id.*

was fiercely religious and advocated a “Bible politics,” but politics rooted in law nonetheless.⁸³

When Douglass finally read Goodell’s *Views of American Constitutional Law in its Bearing Upon American Slavery* (1844), he had found a new text, and the philosopher who might usher him away from the orthodoxies in which he felt trapped. In a somewhat disjointed, but compelling line-by-line, clause-by-clause antislavery reading of the Constitution, Goodell applied a moral microscope to the founding charter with righteous certainty. Goodell had no legal training, but he drew on a tradition of antislavery Constitutionalism older than many today recognize. From the “letter” to the “spirit” of the document, Goodell revealed the Constitution, for those willing to follow his lead, as a blueprint for natural rights and liberty.⁸⁴ He began with some questions for which he then provided 150 pages of unequivocal answers; and one can imagine the intellectually hungry Douglass inspired to read on. The United States was “one nation,” Goodell posited, living by the “arrangements” of the Constitution.⁸⁵ “Do they describe a civil government, or only a confederacy,” he asked?⁸⁶ A “treaty between disunited states?” Were the “essential elements” the methods of “a free government or a despotism? Is it in favor of liberty or of slavery?”⁸⁷ Without subtlety, Goodell declared the house could never be divided.⁸⁸ “Both or neither, it can not be. One or the other, it undoubtedly IS.”⁸⁹ Doors slowly opened from such a text for an eager Douglass, reading voraciously as he wrote three and four editorials per week and hurried out on trains to lecture in order to make a living.⁹⁰

A few examples from Goodell will have to suffice. He pilloried the three-fifths clause as a matter of definitions. Since the words “slavery or slaves” were not used and instead the document only referred to “persons,” meaning “human beings in distinction from things,” not “goods and chattels personal,” but “sentient beings,” the infamous three-fifths provision was only a tax agreement from which the “Yankee states . . . got the worst of the bargain.”⁹¹ Goodell possessed a certain wit and was just warming up. Over and over, he cited verbatim definitions of terms from Noah Webster’s recent American dictionary, with a certain chuckle: “we must call Noah Webster again to the stand.”⁹² For the Tenth Amendment, the “reserved rights” or powers of the states, Goodell

83. *Id.*

84. WILLIAM GOODELL, *VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY* 7–8 (Cornell Univ. Libr. Digit. Collections 2022) (1844). And on Goodell’s significance, see WIECEK, *supra* note 79, at 154, 161, 250–53, 257–58; and OAKES, *supra* note 79, at 38–41. The scholarship on antislavery Constitutionalism is both old and new.

85. GOODELL, *supra* note 84, at 7–8.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 27–29, 37–39.

92. *Id.* at 11.

broke down every word in the text.⁹³ “What powers,” he asked? “To reduce immortal souls to chattels – to transform lawlessness into law? To construct a rectangular triangle?”⁹⁴ Goodell’s analysis was above all an unyielding application of natural rights doctrine, and it drew Douglass into its sway. “The reserved RIGHTS of the states,” wrote Goodell, “cannot include reserved WRONGS!”⁹⁵ In language right from radical abolition’s rhetorical well, he urged that the Tenth Amendment be used as a dagger in the heart of states’ rights doctrine, rather than as its buttress. He suggested a “more dignified and republican use than that of attesting the right of baby stealing, and woman whipping, and selling boys and girls at auction, along with tallow candles by the pound!”⁹⁶ Thus could the essence of moral suasion be melded into antislavery Constitutionalism. Douglass had found a bridge away from Garrisonians to a new kind of radicalism. He was really listening and reading.

When it came to the Constitution’s meaning or intent, Goodell appropriated the Preamble to the cause in the clearest terms. It intended: “a more perfect union”; “to establish justice”; “to ensure domestic tranquility”; “to provide for the common defense”; “to promote the domestic welfare”; and “to secure the blessings of liberty to ourselves and our posterity.”⁹⁷ If the founders actually meant these six great prescriptions, said Goodell, then the sum of its parts meant to “overthrow the deadly antagonist of liberty, to wit, Slavery.”⁹⁸ Douglass, like so many other antislavery Constitutionalists would almost verbatim use Goodell’s list and language in many future speeches and essays.

Two of Goodell’s most lengthy analyses of antislavery constitutional provisions were Article IV, section 4, that “the United States shall guaranty to every state in the Union, a republican form of government”; and the Fifth Amendment’s prescription that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”⁹⁹ Both of these in time became favorite arguments of Douglass’s as well. Again, with Webster in hand, breaking down every word, from “guaranty” to “republican,” from “amendment” and even the word “person,” Goodell exploited every opening to an egalitarian reading of the Constitution.¹⁰⁰ He enjoyed introducing “Mr. Madison to the stand” in his imaginary court of interpretation.¹⁰¹ Quoting Federalist 39, Goodell found the Virginian musing on just how “republican” the government was to be: a republic was the only form consistent with the “fundamental principles of the Revolution; or with that honorable determination which animates every votary of Freedom,

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 40–47.

98. *Id.*

99. U.S. CONST. amend. V.

100. Goodell, *supra* note 84, at 27–28.

101. *Id.* at 47–63.

to rest all our political experiments on the capacity of Mankind for self-government.”¹⁰² These were words of gold for antislavery Constitutionalists. A slave state, Goodell therefore concluded, “cannot be a republic.”¹⁰³ What Madison and others may have “intended,” didn’t even matter; what did matter were numbers and morality. Oligarchies were not republics. And with the Due Process Clause, Goodell dwelt with laser focus on the idea that a “person” was an “individual human being, with a body and a soul.”¹⁰⁴ Proslavery “strict constructionists” he concluded, must acknowledge that every person “now held in bondage in the United States, yet ‘not deprived of liberty, by due process of law’ to be set free.”¹⁰⁵ Such was the moral reasoning of the most radical form of antislavery Constitutionalism.

Douglass would later in 1863 give to Goodell the credit as the person “to whom the cause of liberty in America is as much indebted as to any other one American citizen.”¹⁰⁶ But his journey to a full embrace of the antislavery Constitution had many other influences and turning points. Between 1848 and 1852, Douglass struggled mightily to maintain his fledgling newspaper, his growing family with five children, and his psychological and physical stability.¹⁰⁷ Indeed, he had an emotional breakdown for a prolonged period in 1851.¹⁰⁸ Other than his wife Anna, two people sustained him: Gerrit Smith as financier and mentor on antislavery Constitutionalism, and Julia Griffiths, his dear friend from England who came to live in Rochester for six years and was Douglass’s fund-raiser, emotional companion, and assistant editor who kept the *North Star* alive.¹⁰⁹ As she tempered her friend’s anger and helped him manage the brutal assaults he endured from Garrisonians due to his “apostasy” to the old organization, Griffiths also guided his ideological transformation into political action, providing a sounding board for new ideas and new writing about parties, pivotal events, possible uses of violence, voting, literature and more.¹¹⁰

Smith, a large landowner in New York state, had advocated some eccentric millenarian causes in the 1830s, but by 1840, he joined Goodell and others in founding the Liberty Party.¹¹¹ By the late 1840s, he had developed a “circle” of

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. DOUGLASS, *The Present and Future of the Colored Race in America*, Speech Delivered in Brooklyn, NY (May 15, 1863), in 3 DOUGLASS PAPERS, SER. 1, *supra* note 31, at 579. See DAVID BLIGHT, *DOUGLASS: PROPHET OF FREEDOM* 202–51 (2018).

111. See Lawrence J. Friedman, *The Gerrit Smith Circle: Abolitionism in the Burned-Over District*, 26 CIVIL WAR HISTORY 18, 18–38 (1980); John R. McKivigan, *The Frederick Douglass-Gerrit Smith Friendship and Political Abolitionism in the 1850s*, in FREDERICK DOUGLASS: NEW LITERARY AND HISTORICAL ESSAYS 205–32 (Eric J. Sundquist ed., 1990); RICHARD H. SEWELL, *BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES, 1837-1860*, at 94–95

abolitionists who made antislavery Constitutionalism a visible movement with a prominent place in both the new Free Soil and Republican parties.¹¹² All of these influences made the federal authority at the base of slavery's stranglehold on America the subject of Douglass's intensive focus. He had caught the scent now of a potent idea—how constitutional principle could be elevated above constitutional practice. By 1849 Douglass had rejected Garrison's "covenant with evil" rhetoric and said he was "satisfied" that the Constitution was "not a proslavery instrument."¹¹³ Although he now had the full menu of antislavery Constitutionalism at his disposal, by April 1850 he still felt perplexed about some elements. "Liberty and Slavery – opposite as heaven and hell – are both in the Constitution," he wrote in his paper.¹¹⁴ But this was precisely its "radical defect": it offered no resolution for the "war of elements which is now rocking the land."¹¹⁵ Douglass gave his "sympathies" at this juncture to the antislavery Constitution, but not yet his full "judgment."¹¹⁶ He concluded for the moment that the Constitution was "at war with itself."¹¹⁷ Two Constitutions indeed—and he now had to decide which side he was on.¹¹⁸

January 1851 still found Douglass teetering between legal and moral logic. But he had "about decided," he declared, "to let slaveholders and their northern abettors have the laboring oar in putting a proslavery interpretation on the Constitution."¹¹⁹ Beginning to swallow the theory whole, he proclaimed, "I am

(1976); N. STAR (Apr. 5, 1850); Letters from Gerrit Smith to Frederick Douglass (Feb. 9, Mar. 16, Mar. 30, 1849), in 2 DOUGLASS PAPERS, SER. 1, *supra* note 31, at 356–57; 371–72; Letters from Frederick Douglass to Gerrit Smith (May 1, May 21, June 10, 1851), in GERRIT SMITH PAPERS, box 11 (Syracuse Univ. Libr.).

112. See sources cited *supra* note 111.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Letter from Frederick Douglass to Gerrit Smith (Jan. 31, 1851), in GERRIT SMITH PAPERS, *supra* note 111. Literature on originalism is vast. For my purposes here and to understand how and why Douglass made such shifts in his view of the Constitution, see generally JACK BALKIN, LIVING ORIGINALISM (2011). Balkin shows how originalist readings of the text and historical context can and has been used by liberals and conservatives over time. See AKHIL AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012), especially chapters 2–3 and 5. In various places, Amar argues that liberal originalism is just as potent a theory and practice as the current stress on conservative originalism. Indeed, Amar has shown that it was the liberal original readings of the Constitution that led to so many landmark decisions by the Warren Court, driven especially by Justice Hugo Black. For a popular expression of this view, see Akhil Amar, *Why Liberal Justices Need to Start Thinking Like Conservatives*, TIME (June 30, 2022), <https://time.com/6192277/supreme-court-originalism/> [<https://perma.cc/HX6A-TFPC>]. The piece is written with wit and an effort to reach general readers, but the analogy of the Golden State Warriors to the originalists missed the shot from beyond the arc for this basketball fan. For a historical grounding of where and how originalism came about, long before the term was used, see generally AKHIL AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION (2021), especially the preface and chapters 4 and 11. Although respectful of some forms of originalist thinking, for a highly

sick and tired of arguing on the slaveholders' side of this question, although they are doubtless right about the intentions of the framers of the Constitution."¹²⁰ For the moment the framers seemed the better "originalists." He stumbled over whether "it is good morality to take advantage of a legal flaw and put a meaning upon a legal instrument the very opposite of what we have good reason to believe was the *intention* of the men who framed it?"¹²¹ Although he didn't quite completely trust it yet, Douglass needed the detailed textual analysis of Goodell in these difficult days of the early 1850s, buffeted by violent rescues of fugitive slaves and a national political system coming apart at the seams. Indeed, with Goodell as a guide, Douglass was becoming his own kind of originalist; he now drew upon a whole new reading of the text of 1789.¹²² Smith's arbitrary, vague declaration that slavery was such a moral outrage that it simply could not garner legal status was not enough for his protégé. Douglass did tell his mentor, though, that he had "ceased to affirm the proslavery character of the Constitution."¹²³ He had argued his way to this new position, rather than merely imbibing it. Soon Douglass made this new argument a feature of the greatest speech of his life.

III.

TEXT AND INTENTION

In his *What to the Slave Is the Fourth of July* address in Rochester in 1852, the rhetorical masterpiece of American abolitionism and a demolition of national hypocrisy, Douglass showed off for two pages his newfound ideology. He cited Spooner, Goodell, and Smith as authorities who had "clearly vindicated the Constitution from any design to support slavery for an hour."¹²⁴ Douglass kept it simple and sweeping and gave to some later and current day conservatives as well as liberals a useful language. "In that instrument [Constitution]," he said, "I hold that there is neither warrant, license, nor sanction of the hateful thing [slavery]; but, interpreted as it ought to be interpreted, the Constitution is a

critical recent analysis of originalism, see generally ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022).

120. Letter from Frederick Douglass to Gerrit Smith, *supra* note 119.

121. *Id.*

122. *Id.*

123. See *supra* note 119 and accompanying text.

124. FREDERICK DOUGLASS, *What to the Slave Is the Fourth of July*, Address Delivered in Rochester, NY (July 5, 1852), in DOUGLASS: SPEECHES AND WRITINGS, *supra* note 4, at 188–90; DAMON ROOT, *A GLORIOUS LIBERTY: FREDERICK DOUGLASS AND THE FIGHT FOR AN ANTISLAVERY CONSTITUTION* 156 (2020). Root's work is a fair and serious assessment of Douglass's constitutional thought. Some conservative journalists and historians seek to appropriate Douglass instrumentally to their cause of limited government, color-blind conservatism, and a doctrine of self-reliance. Root largely avoids this pattern. OAKES, *supra* note 79, at 40. For a rigidly conservative treatment of Douglass's thought and constitutional views, see generally TIMOTHY SANDERFUR, *SELF-MADE MAN* (2018), and David W. Blight, *How the Right Co-opts Frederick Douglass*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/opinion/right-coopts-frederick-douglass.html> [<https://perma.cc/868U-R4MH>].

Glorious Liberty Document.”¹²⁵ Both the conservative journalist, Damon Root, in a book devoted to Douglass’s antislavery Constitutionalism and left-leaning James Oakes in *The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution*, find unsteady common ground about the Black abolitionist’s “glorious liberty” claim. Root, however, must insist at the ending of his book that, despite all the policy and legislative ends to which Douglass sought to put the Constitution, he remains not only a great proponent of “freedom” and “equality,” but also of “individualism” and against “collectivism.”¹²⁶ The right loves their Douglass, some with research and some with a narrow ideological assertion and a need to enlist him in their causes of self-reliance, limited government, and sometimes merely because he was once a Republican. With different aims, both left and right can get right with Douglass.

Yet another version of the antislavery Constitution had emerged in the 1840s, and Douglass would selectively adopt it as well. The Ohio senator and legal defender of fugitive slaves, Salmon P. Chase, championed the argument that the “intentions” of the founders were for a speedy abolition of slavery.¹²⁷ He believed that slavery was a creature of positive state law and thereby merely “local” in America.¹²⁸ The federal government had the power, Chase maintained, in places where it had exclusive jurisdiction (the District of Columbia, the territories), but not in the slave states themselves because of “property” laws.¹²⁹ Such a limitation on national authority had long been called the “federal consensus,” giving proslavery Southerners and many antislavery Northerners a basis for common ground, as it also rejected the methods and aims of radical abolitionists.¹³⁰ Goodell had no truck with the notion of a federal consensus. Of these two kinds of antislavery Constitutionalism, one said the federal government can and *must* end slavery everywhere, while the other said it *could* do so only some places.¹³¹ Douglass took sustenance from both as the crises of the 1850s darkened, although he was never at peace with the Chase-Republican Party position.¹³²

125. *Id.*

126. *See supra* note 124 and accompanying text.

127. On Chase’s constitutional views, see ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 73–77, 83–87 (1970). *See also* Letter from Salmon Chase to Frederick Douglass (Jan. 23, 1849); Letter from Frederick Douglass to Salmon Chase (Feb. 2, 1849), in 1 *LIFE AND WRITINGS*, *supra* note 76, at 352–53. Chase and his allies argued that the duty of abolitionists, therefore, was to restrict or cordon off slavery, encircle it by halting its expansion, and try with time to pressure the South to emancipate enslaved people by state action. Chase’s view eventually became the organizing basis of the Republican Party’s doctrine of free soil in the territories.

128. Letter from Salmon Chase to Frederick Douglass (Jan. 23, 1849); Letter from Frederick Douglass to Salmon Chase (Feb. 2, 1849), in 1 *LIFE AND WRITINGS*, *supra* note 76, at 352–53.

129. *See sources cited supra* note 128..

130. *Id.*

131. *Id.*

132. *See supra* note 124 and accompanying text.

In an 1855 editorial, Douglass took aim at the Republicans' stance, asserting that the party "virtually declares to the country, and to the world, that it does not propose to interfere with the Constitutional Rights of those traffickers in the blood of souls, who are daily depriving millions of men and women of their liberty, without due process of law."¹³³ In each succeeding speech or essay during the 1850s, Douglass rehearsed every tenet of the antislavery Constitution: the Preamble and its six objectives; the guarantee of republican government; the writ of habeas corpus; the Due Process Clause of the Fifth Amendment; the Fourth Amendment right of citizens to be "secure in their persons . . . against unreasonable searches and seizures";¹³⁴ foreign slave trade abolition; and the Bill of Rights as a whole.¹³⁵ In 1855 he announced he would stand firmly with Goodell and Smith and not with the Republicans' aim to merely stop slavery's expansion. He chose "principle," he said, over the practical.¹³⁶

In the shuddering aftermath of the *Dred Scott* decision, Douglass struggled to forge hope out of despair. He once again rehearsed all six tenets of the Preamble, and demanded audiences remember that "the term *slave* or *slave holder*, *slave master* or *slave state*," are nowhere in the Constitution.¹³⁷ He said, "Neither is there any reference to color, or the physical peculiarities of any part of the people of the United States."¹³⁸ Some conservatives, especially Justice Clarence Thomas (in the *Grutter* decision in 2003 most famously), like to point to this element of Douglass's post-*Dred Scott* rhetoric to enlist him on the side of their notions of color-blind jurisprudence across time.¹³⁹ That requires them to generally ignore that he sang a very different tune after the revolution of emancipation and in support of the race consciousness in the Thirteenth, Fourteenth, and Fifteenth Amendments. In his *Dred Scott* speech in May 1857, he recited the opening of the Constitution with his own twist:

"We, the people"—not we, the [W]hite people—not we, the citizens, or the legal voters—not we, the privileged class, and excluding all other classes but we, the people; not we, the horses and cattle, but we the people—the men and women, the human inhabitants of the United

133. FREDERICK DOUGLASS, *The Republican Party – Our Position*, FREDERICK DOUGLASS' PAPER (Dec. 7, 1855), in DOUGLASS: SPEECHES AND WRITINGS, *supra* note 4, at 277–79. In the mid-1850s, Douglass reserved his loyalty to the small Radical Abolition Party, which ran, and for one term succeeded in electing, Gerrit Smith to Congress.

134. U.S. CONST. amend. IV.

135. *Id.*

136. *Id.*

137. DOUGLASS, *Dred Scott Decision*, *supra* note 59, at 300–02. *See Grutter v. Bollinger*, 539 U.S. 306, 349–78 (2003) (Thomas, J., concurring in part and dissenting in part). Thomas began his dissent with a lengthy quotation from Douglass during the early Reconstruction period in which Douglass said that the country should "do Nothing with us." Using this passage completely out of historical context, Thomas said: "Like Douglass, I believe [B]lack can achieve in every avenue of American life without the meddling of university administrators." *Id.* at 350. Thomas's dissent is largely a matter of "belief," and very little of history.

138. DOUGLASS, *Dred Scott Decision*, *supra* note 59.

139. *Grutter*, 539 U.S. at 349–50 (Thomas, J., concurring in part and dissenting in part).

States, do ordain and establish this Constitution.¹⁴⁰

At the end of that speech, Douglass invoked Goodell and the antislavery interpretation of the Constitution as his wellspring of hope.

That hope of an American future became an ever-harder proposition after John Brown's raid on Harpers Ferry in 1859 and the looming descent into disunion by 1860. Douglass had been in every legal sense complicitous in Brown's raid, and he fled the country through Canada to England only a short while after the shocking event. While in the British Isles in an exile from which he did not know if he could ever return, Douglass gave his most famous expression of the antislavery Constitution in an address in Glasgow, Scotland, March 26, 1860, *The American Constitution and the Slave*.¹⁴¹ The leading British Garrisonian, George Thompson, had directly attacked Douglass in Glasgow on February 26, accusing him of shifting all his views on the Constitution since his earlier tours in 1846–47, which of course was true. Douglass demanded a rebuttal and traveled to Glasgow to do so. The American reveled in these point-counterpoint exchanges; he needed a foil, an antagonist. Douglass recited all the features of the antislavery Constitution. But he also, more than anywhere else, declared himself a textualist at this point on the founding charter. Go to the "text," he demanded.¹⁴² "What is the Constitution?" he asked. "It is no vague, indefinite, floating unsubstantial something, called, to any man's fancy, now a weasel and now a whale."¹⁴³ It was a "plainly written document" to be interpreted in its "words."¹⁴⁴ "The mere text . . . the text and only the text, and not any commentaries . . . is the Constitution of the United States."¹⁴⁵ The "intentions," he declared, are to be "respected . . . so far only as they have succeeded on getting these intentions expressed in the written instrument itself."¹⁴⁶ These remarks reflect Douglass's Goodell-like certainty by the late antebellum period that the words of the charter were the basis itself of antislavery Constitutionalism. The old arguments about the slaveholding framers' "secret intentions" to lay poison throughout the Constitution, "to cloth itself in the garb of virtuous language," meant only that real seekers of truth owe it to themselves "to compel the devil to wear his own garments."¹⁴⁷

Douglass admitted the vast chasm between text and practice, that "the American people . . . have made void their law by their traditions," that history had rendered constitutional practice proslavery, despite the letter and spirit of the

140. *Id.*

141. FREDERICK DOUGLASS, *The American Constitution and the Slave: An Address, Delivered in Glasgow, Scotland (Mar. 26, 1860)*, in DOUGLASS: SPEECHES AND WRITINGS, *supra* note 4, at 329, 333–39.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

document.¹⁴⁸ The Glasgow speech was both belief and strategy, as much political argument as it was legal. Douglass thoroughly embraced the idea that the 1808 restriction of the foreign slave trade had been antislavery from its inception.¹⁴⁹ As for the “slave insurrection clause,” Douglass insisted that “there is no such clause” in the Constitution.¹⁵⁰ “Slavery is itself an insurrection,” Douglass asserted as the radical abolitionist rather than constitutional analyst.¹⁵¹ He said, “It is an insurrection by one party in the country against the just rights of another part of the people.”¹⁵² Were he the president, the orator maintained, “it would be my duty not only to put down the insurrection, but to put down the cause of the insurrection.”¹⁵³ He turned the text of the document in its many parts into a prescription for federal emancipation of slaves everywhere. Here was Goodell, and at least some of Chase, speaking loudly through Douglass.

At Glasgow, Douglass also did not miss the opportunity to enlist James Madison’s declaration against “property in man” to the antislavery constitutional cause.¹⁵⁴ “I admit nothing in favor of slavery,” Douglass said, “when liberty is at stake.”¹⁵⁵ His rhetoric could be read as straining for justifications in a historical moment of dire threat and lonely exile, or as a firm statement of the natural rights roots of his position on the Constitution. “There must be something more than history, something more than tradition, to lead me to believe that law is intended to uphold and maintain wrong.”¹⁵⁶ Protestors outside the Supreme Court building today in Washington must feel the same sentiments, as though they have come to the temple to pray, and know they are walking by faith and not by sight.

At Glasgow, Douglass freely admitted he had once held other views. But he playfully declared he held no claim to “infallibility,” and cherished the right to change his mind.¹⁵⁷ “When I escaped slavery, twenty-two years ago,” he said, “the world was all new to me, and if I had been in a hogshead with the bung in, I could not have been much more ignorant of many things than I was then.”¹⁵⁸ At that time he had “two elbows and a good appetite,” and “could not spell two words correctly.”¹⁵⁹ But now, looking across the Atlantic back at his country in crisis he hoped that “votes” and “law” might yet “reform the government.”¹⁶⁰ Soon, though, ballots would not be the ultimate arbiters of America’s crisis; the two Constitutions soon would be at real war.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 340–42.

153. *Id.*

154. *Id.* at 343–45.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 350–52.

160. *Id.*

IV.

TWO CONSTITUTIONS, THEN AND NOW

Historians can and do change their minds as well about interpretations and the uses of evidence. It has long been understood that unless compromises were struck to buttress the interests of the slave states, no constitution may ever have been achieved in 1787, and the thirteen original states may have careened off into regional coalitions at best. James Oakes admits that “once upon a time,” he believed that the proponents of the proslavery Constitution had the better of the argument, and that any attempt to breathe antislavery meaning into the document was but strained or rhetorical, and not textual.¹⁶¹ In my own decades of teaching and writing on these matters, I too advanced a similar viewpoint. I never denied the passion of those abolitionists who forged an antislavery interpretation of the Constitution; but until relatively recently, I considered their arguments utterly strategic, born of an increasingly desperate political agenda for fighting the Slave Power, the idea that slaveholders comprised a plot to take and hold all elements of federal power in the 1850s. Political abolitionists needed a more politically useful Constitution. Constitutional thought, though, is never fully fixed or static; historical memory and law march together on many broken paths, and this awareness, as well as ever-deeper dives into Douglass as a political thinker, brought me to new conclusions.¹⁶²

Many abolitionists were brilliant propagandists; forceful narratives and moral fervor were the tools of their trade, and I had spent years studying perhaps the most skilled of all. In my first book, back in 1989, I treated Douglass’s development of an antislavery interpretation of the Constitution as a slowly evolving perspective on his road to becoming a pragmatic political abolitionist, but also as a form of wish-fulfillment in the absence of alternatives. I called his antislavery Constitutionalism “dubious,” a search for political and moral ground on which to stand rather than embrace violent revolution by the 1850s.¹⁶³

Over time, our Constitution, of course, has remained the source of multiple, divisive interpretations. We still have at least two Constitutions on many issues: the nature of federalism, abortion rights, voting rights, environmental protection, the place of redistributive justice in American society, election laws, gun culture and the right to bear firearms, how to teach about race, slavery and gender in classrooms, whether state legislatures should have sole power over election law

161. James Oakes, *Frederick Douglass’s Constitution*, 111 CALIF. L. REV. 1989, 1990–91 (2023).

162. Especially influential for me have been OAKES, *supra* note 79; BUCCOLA, *supra* note 12; WIECEK, *supra* note 79. See also David E. Schrader, *Natural Law in the Constitutional Thought of Frederick Douglass*, in FREDERICK DOUGLASS: A CRITICAL READER 85, 85–99 (Bill E. Lawson and Frank M. Kirkland eds., 1999). All of these works root Douglass’s antislavery Constitutionalism in his commitments to natural rights and natural law. None, however, delve deeply into Douglass’s experience as a slave.

163. See DAVID W. BLIGHT, *FREDERICK DOUGLASS’ CIVIL WAR: KEEPING FAITH IN JUBILEE* 32 (1989).

and procedures, whether the federal government should regulate a national-global post-industrial economy that has made hyper-economic inequality a permanent part of our polity, and many more. And our “democracy,” about which we are so justifiably worried, is no democracy at all as long as we limp along under the quite undemocratic institutions of the United States Senate and the Electoral College. Our system of selecting and confirming Supreme Court justices is broken. We have a majority on the Supreme Court determined to return every power possible to the states, reverting the “Union” to where it was generations ago when it was a collection of battling sovereigns with common borders. The historical template for these debates may always be the unfinished failures and triumphs of antislavery Constitutionalism’s struggle against proslavery Constitutionalism in the 1850s and 1860s, as well as the long struggle to preserve the Reconstruction Constitution.

The heat in our public history wars today needs more light and more and better history. That said, it is very difficult to sustain faith in truth, persuasion, and historical consciousness itself in today’s climate of commodified political lies. Today we spend so much energy and time trying to do as Douglass said about lynching at the end of his life in 1894: We are trying to take the power out of *lies*.¹⁶⁴ It is the “incoherency of ignorance or distraction” that raises such obstacles in fighting racism, violence, and misinformation.¹⁶⁵ “While any lie may be safely told against the negro and be credited,” declared Douglass, “this lie [the ‘excuses’ for lynching] will find eloquent mouths bold enough to tell it, and pride themselves upon the superior wisdom in denouncing the ignorant negro voter.”¹⁶⁶

A third Constitution, of course, emerged from the Reconstruction amendments and formed the basis of a second founding of the United States. The most sanguine period in Douglass’s political life was the brief shining moment of 1866–1872 or so. He saw the United States as reinvented in the blood sacrifice of the war and especially in the revolution of emancipation. He advocated even a kind of soft imperialism in which the new American egalitarianism, etched into law, should be exported to the Caribbean and beyond to unfree peoples. In an editorial written just after Ulysses Grant’s reelection in December 1872, Douglass held on tight to the amendments and to the civil rights and voting rights promises of Reconstruction, as though he felt them slipping away. “We claim that the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution,” he wrote, “were intended to give full freedom to every person without regard to race or color.”¹⁶⁷ In his understanding of this constitutional transformation—

164. FREDERICK DOUGLASS, *Lessons of the Hour*, speech delivered many times (1894), in DOUGLASS: SPEECHES AND WRITINGS, *supra* note 4, at 728–30, 744.

165. *Id.*

166. *Id.*

167. FREDERICK DOUGLASS, *Give Us the Freedom Intended for Us*, NEW NAT’L ERA (Dec. 5, 1872), in DOUGLASS: SPEECHES AND WRITINGS, *supra* note 4, at 602–04; see ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION*

especially section one of the Fourteenth—there was nothing “color-blind” in its immediate or long-term meanings. It was “the violent interference with the [B]lack man” in his right to vote and myriad other discriminations, which he names, that gave the question centrality in American life.¹⁶⁸ And Douglass returned to the “intention of this Nation,” expressed in the amendments.¹⁶⁹ “We are not free. We cannot be free without the appropriate legislation provided for in the above amendments.”¹⁷⁰ There is no mistaking his powerful “We.”¹⁷¹

Slide ahead with me a decade to a despairing address Douglass gave in the wake of *U.S. v. Stanley*, the “Civil Rights Cases” decision on October 22, 1883, that essentially crushed the Fourteenth Amendment.¹⁷² He warmly honored Justice John Harlan for his heroic dissent, but referred to the Supreme Court as the “autocratic” branch of government.¹⁷³ He did not merely say that the decision had portrayed “the United States before the world as a nation utterly destitute of power to protect the rights of its own citizens.”¹⁷⁴ He recited section one of the Fourteenth Amendment, setting it off as though holy writ. And after falsely paying tribute to all the “learned lawyers” on the platform that day in Washington, he cut to the heart of the old argument about “intention.”¹⁷⁵ The Court, he maintained, had “construed the Constitution in defiant disregard of what the object and intention of the adoption of the Fourteenth Amendment.”¹⁷⁶ That amendment embodied the second founding with a profoundly new intent—to secure the liberties and equality before law for the freedpeople emancipated by the United States government. The Court “made no account” of the “intention and purpose” of the Civil Rights bill it now overturned.¹⁷⁷ Over and over, for pages of a carefully crafted diatribe against the decision, Douglass rained down the word “intention” on his audience.¹⁷⁸

“In the dark days of slavery, this Court,” pronounced Douglass, “on all occasions, gave the greatest importance to *intention* as a guide to interpretation. The object and intention of the law . . . must prevail.”¹⁷⁹ The only guide was “what the framers meant,” and the proslavery argument always concluded that

(2019); David W. Blight, *Frederick Douglass's Vision for a Reborn America*, ATLANTIC (Dec. 2019), <https://www.theatlantic.com/magazine/archive/2019/12/frederick-douglass-david-blight-america/600802/> [https://perma.cc/KW3R-B69C].

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. 109 U.S. 3 (1883)

173. FREDERICK DOUGLASS, This Decision Has Humbled the Nation: An Address, Delivered in Washington, DC (Oct. 22, 1883), in DOUGLASS: SPEECHES AND WRITINGS, *supra* note 4, at 660–61, 664–66.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 666–67.

“intention” applied “only to [W]hite people.”¹⁸⁰ Color-blindness, to Douglass, was nothing more than autocracy in flimsy disguise. Then, as of old, Douglass recited for paragraphs every feature of the antislavery interpretation of the Constitution, revived in 1883 for this desperate use in a moment of profound defeat. In preparing the speech, he must have referred back to texts and notes from 1857 or 1860. The speech painfully pulsates with the idea that history is never over, that victories are always warnings of what may come, that defeats are challenges to renewed fights. Douglass demonstrated how much he had come to loathe the doctrine of states’ rights in all its guises. “It used to be thought that the whole was more than the part;” he all but shouted, “that the great included the less, and that what was unconstitutional for a State to do was equally unconstitutional for an individual member of a State to do.”¹⁸¹ Douglass concluded with a kind of scream into the dark: “O for a Supreme Court of the United States which shall be as true to the claims of humanity, as the Supreme Court formerly was to the demands of slavery!”¹⁸²

On October 3, 2022, in oral arguments in the Supreme Court over Alabama’s challenge to section two of the Voting Rights Act of 1965, Justice Ketanji Brown Jackson firmly responded to the Alabama solicitor general, Edmund La Cour, who claimed that the issue of voting rights was and always had been “race neutral.”¹⁸³ Carefully, Justice Jackson schooled the Court on the historical inaccuracy of such a claim. She said the “framers” of the Fourteenth Amendment never meant it to be “race-blind.”¹⁸⁴ Bad history is bad history, and potentially dangerous, she suggested. A quick look at the *Congressional Globe* and at speeches by the amendment’s principal author, John Bingham, would surely prove that, and Justice Jackson cited Bingham. She kept it clear and simple, as though asking her colleagues to go read their history of Reconstruction. “The entire point of the amendment,” she said, “was to secure the rights of the freed former slaves,” to make freedom real for “Black citizens.”¹⁸⁵

It would appear that Justice Jackson and Frederick Douglass are having a conversation, even if a lonely one, across time. To make this country have the same conversation today is as harrowing as Douglass’s dark plea of 1883. At the end of that speech on the *Stanley* Supreme Court decision, Douglass took up the fear, the moral panic, among Whites of “social equality,” alleged to be the point of the Civil Rights Bill now stricken down. He appealed to his life-long creed

180. *Id.*

181. *Id.*

182. *Id.*

183. Transcript of Oral Argument at 57, *Allen v. Milligan*, 143 S. Ct. 2607 (2023) (No. 21-1086). [hereinafter *Allen Transcript*]; Evan Turiano, *Justice Jackson Offered Democrats a Road Map for Securing Equal Rights*, WASH. POST (Oct. 10, 2022), <https://www.washingtonpost.com/made-by-history/2022/10/10/originalism-ketanji-brown-jackson-supreme-court/> [<https://perma.cc/5JXZ-YB2B>].

184. Turiano, *supra* note 183.

185. *Allen Transcript*, *supra* note 183, at 58; *see* Turiano, *supra* note 183.

about natural rights. If it had been a bill “for social equality,” Douglass said, “so is the Declaration of Independence . . . so is the Sermon on the Mount, so is the Golden Rule . . . so is the Apostolic teaching, that of one blood God has made all nations to dwell on all the face of the earth,” and “so is the Constitution of the United States.”¹⁸⁶

186. DOUGLASS, *This Decision Has Humbled the Nation: An Address*, *supra* note 173, at 669.