

# “A Fixed Principle of Honesty”: Frederick Douglass, False Certainties, and Words Without Memory

Christopher Tomlins\*

[E]tymology, as it is used in daily life, is to be considered not so much a scientific fact as a rhetorical form, the illicit use of historical causality to support the drawing of logical consequences.

—Fredric Jameson<sup>1</sup>

Even in a century notable for oratory, Frederick Douglass’s capacities as an orator were astonishing. He was a master of words, whether spoken or written. Because he was born into slavery, his capacities were doubly astonishing, for as Christopher Hager has noted, “No people were more estranged from the formal culture of literacy, or more driven to improvisation, than those enslaved in the South.”<sup>2</sup> But for this very reason, to recognize Douglass as a marvel also risks turning him into a freak. So instead, I want to think about Douglass as a human being encased in language and its limits, just as we all are, and to ask what that means.

In due course, I will arrive at that question, and I will attempt an answer. But my route is necessarily circuitous. It must begin at the beginning, with some of Douglass’s own words.

Whenever I think of Frederick Douglass, one particular word always comes mind, a word he seems to have used on only one public occasion, but with deadly effect: “scrivener.”

Scrivener is a lovely word. One can imagine an orator like Douglass choosing it quite deliberately for its syllabic qualities, luxuriating over its pronunciation. “Scri-ve-ner.” Like so many of its cognate companions, it is

---

DOI: <https://doi.org/10.15779/Z384V9M>

Copyright © Christopher Tomlins.

\* James W. and Isabel Coffroth Distinguished Professor of Jurisprudence, Berkeley Law (Jurisprudence and Social Policy Program). Email: [ctomlins@law.berkeley.edu](mailto:ctomlins@law.berkeley.edu).

1. FREDRIC JAMESON, *THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM* 6 (1972).

2. CHRISTOPHER HAGER, *WORD BY WORD: EMANCIPATION AND THE ACT OF WRITING* 19 (2013).

temptingly onomatopoeic—scratch, scrawl, scrape, scribble. Or if one is willing to adventure further afield—scrawny, scraggy, scrofulous, scrounging.

Scrivener means, of course, “a person authorized to draw up or certify contracts, deeds, and other legal documents”;<sup>3</sup> it means a notary, a clerk. Herman Melville’s *Bartleby* was “a scrivener,” a clerk employed to copy documents—until, in his case, the moment arrived when Bartleby “preferred not to.”<sup>4</sup> In Melville’s story, Bartleby was just one among the host of copyists and clerks who haunted Wall Street’s law offices and brokerage firms in the 1850s; they were the literate poor, wanderers in what Michael Rogin called “the claustrophobic gloom” of mid-nineteenth-century racial capitalism.<sup>5</sup> According to “The Lawyer,” who is the narrator of Melville’s story, Bartleby was “one of those beings of whom nothing is ascertainable, except from the original sources, and, in his case, those were very small.”<sup>6</sup> Bartleby the scrivener was a lowly, anonymous figure of no social significance whatsoever. By the end of the story, Bartleby had become almost literally a nonentity. We might say he had been bled white.

Why should I wish so keenly to associate Douglass with this word? David Blight, who has devoted so many years of his life to the study of Frederick Douglass, doesn’t mention it either in his essay for this symposium, which is admittedly quite short, or in his authoritative biography, which most certainly is not.<sup>7</sup> Allow me to explain.

The word “scrivener” appears in what Professor Blight’s essay properly describes as Douglass’s “most famous expression of the antislavery Constitution,” his speech of March 26, 1860, entitled *The American Constitution and the Slave*, delivered before an audience in the Queen’s Assembly Rooms and Concert Hall at #1 La Belle Place in Glasgow. What does Douglass say there that I think is of such significance?

[T]he paper itself, and only the paper itself, with its own plainly written purposes, is the Constitution. It must stand or fall, flourish or fade, on its own individual and self-declared character and objects . . . [W]here would be the advantage of a written Constitution, if, instead of seeking its meaning in its words, we had to seek them in the secret intentions of individuals who may have had something to do with writing the paper? What will the people of America a hundred years hence care about the intentions of the scriveners who wrote the Constitution? These men are already gone from us, and in the course of nature were expected to go

---

3. *Scrivener*, OXFORD ENG. DICTIONARY, <https://www.oed.com/search/dictionary/?scope=Entries&q=scrivener> [<https://perma.cc/MS8Q-E5UU>].

4. HERMAN MELVILLE, *Bartleby*, in *THE PIAZZA TALES* 31, 48 (New York, Dix & Edwards 1856). Also published as *Bartleby*, *The Scrivener: A Story of Wall-Street*.

5. MICHAEL PAUL ROGIN, *SUBVERSIVE GENEALOGY: THE POLITICS AND ART OF HERMAN MELVILLE* 159 (1985).

6. MELVILLE, *supra* note 4, at 1–2.

7. See generally DAVID W. BLIGHT, *FREDERICK DOUGLASS, PROPHET OF FREEDOM* (2018).

from us. They were for a generation, but the Constitution is for ages.<sup>8</sup>

In my ear, the word drips contempt. Deified “Founding Fathers” become merely clerks and copyboys. And what of Frederick Douglass? With these words, he becomes a textualist.

Did Douglass actually use the word in his speech? After all, the source on which I rely for my keyword is but one of several extant versions of Douglass’s March 26 speech. The academically authoritative, multivolume collection of *The Frederick Douglass Papers* edited by John Blassingame indicates that the speech is reported in seven distinct sources. The Blassingame collection itself chose the version published later that year by the London Emancipation Committee, in which the word “scriveners” is replaced by “men.”<sup>9</sup> Of the other six versions, three were published in contemporary Glasgow newspapers, each of which carried a report of Douglass’s speech as given on the 26th of March in their next day editions. I have been able to access two of those newspapers. The North British Daily Mail reports Douglass’s speech in full. It comports throughout with my source. The Glasgow Daily Herald reports a speech text that is identical to that carried in the North British Daily Mail, but the report is much shorter, heavily edited, and summarized. It omits the section in question.<sup>10</sup> The fourth source is an undated pamphlet, published in Halifax, Yorkshire. The text on which I rely is most likely the Halifax text. It appears under the same title as the Halifax text in the second volume of *The Life and Writings of Frederick Douglass*, compiled and edited in five volumes by Philip S. Foner and published in 1950 by International Publishers of New York. The attribution of the text of the March 26 speech in Foner’s compilation references an undated pamphlet (the sixth version) that Foner found in the library of Howard University.<sup>11</sup>

For those who may be unaware, International Publishers was then—and as far as I know, remains—the publishing arm of the U.S. Communist Party. The editor, Philip Foner, uncle of the more famous Eric Foner, was an important

8. FREDERICK DOUGLASS, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery*, in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467, 469 (Philip S. Foner ed., 1950) [hereinafter DOUGLASS, *The Constitution of the United States*].

9. FREDERICK DOUGLASS, *The American Constitution and the Slave*, in 3 THE FREDERICK DOUGLASS PAPERS, SERIES 1 (SPEECHES, DEBATES, AND INTERVIEWS) (1855–1863) 340, 348 (John W. Blassingame ed., 1985) [hereinafter THE FREDERICK DOUGLASS PAPERS].

10. *Frederick Douglass on the Constitution of the United States*, N. BRITISH DAILY MAIL, Mar. 27, 1860, at 2; *Mr. Frederick Douglass’ Lecture on the American Constitution*, GLASGOW DAILY HERALD, Mar. 27, 1860, at 3; see also DAILY BULLETIN (Glasgow), Mar. 27, 1860.

11. DOUGLASS, *The Constitution of the United States*, supra note 8, at 480. Foner’s undated pamphlet is most likely the Halifax pamphlet, which appears in the current Howard University Library catalog as FREDERICK DOUGLASS, THE CONSTITUTION OF THE UNITED STATES: IS IT PRO-SLAVERY OR ANTI-SLAVERY (Halifax, T. and W. Birtwhistle, Printers 1860). The undated Halifax pamphlet reproduces the speech text carried in full by the North British Daily Mail and reported and summarized in the Glasgow Daily Herald. If so, the seven sources that Blassingame describes are in fact recording just two versions of Douglass’s speech: the verbatim speech (the Halifax pamphlet, the Howard Library pamphlet, the Glasgow newspapers, and Foner’s *Life and Writings*) and the later London Emancipation Committee text.

historian and lifelong Party intellectual. He was the first person to collect Douglass's writings, and in doing so, he helped restore from obscurity this person whom we now take for granted as a giant figure in American history. For his life's pains, Foner was fired from New York's City College in 1942 and blacklisted during the great repression (the second Red Scare) after World War II.

I have no means of knowing why Blassingame chose the London Emancipation Committee text over the text that Foner published and that the Glasgow newspapers had reported. Perhaps in his authoritative Yale edition, Blassingame decided to avoid the potential notoriety of a blacklisted communist academic's editorial preferences. More likely, he chose to publish what looked like the most complete version available. As to Foner's earlier choice, I doubt he was even aware of the other versions—his purpose was to revive Frederick Douglass, an African American icon, for which the Howard pamphlet was good authority. We forget far too easily that before the 1950s, the U.S. Communist Party was virtually the only consistent political friend that African Americans had in the twentieth century.

The existence of at least two versions of the text will naturally lead one to ask why I prefer Foner's text. The reason is simple: Douglass was an orator, and Foner's version is redolent of the spoken word, as the report in the *North British Daily Mail* confirms. Blassingame himself notes that "Douglass usually spoke extemporaneously, relying as little as possible on notes."<sup>12</sup> Blassingame's text is much longer than Foner's, and in the London Emancipation Committee tract in which it originally appeared, Douglass's speech is published in juxtaposition to a critique of his antislavery constitutionalism by the English Garrisonian George Thompson, with whom Douglass had been engaged in dueling speeches during his visit to Glasgow. This suggests to me that both men revised remarks for publication that had originally been delivered on the stump. During his revision, Douglass replaced the contemptuous "scrivener" with the anodyne "men."

Now, all this does no more than illustrate that historians obsess over their sources and over the politics of their sources. To cut to the chase, why do I think this single word is so telling?

Although the Founders of the republic were by and large either proponents of slavery or reconciled to the inevitability of its continued existence, the document they produced sustains readings that are antislavery. There is nothing remotely remarkable about that. No text can be controlled by its author, or by its context, no matter what the occasional historian, or originalist Supreme Court Justice, might think. As Professor Blight's essay indicates, in his post-1849, post-Garrisonian phase, Frederick Douglass, who had previously thought the Constitution a wicked proslavery document, decided to become a fierce

---

12. John W. Blassingame, *Introduction to THE FREDERICK DOUGLASS PAPERS*, *supra* note 9, at xii, xiii.

proponent of the *possibility* that the document could sustain an antislavery reading. But unlike his rival to that office, the *soi-disant* father of political abolitionism and Chief Justice to be Salmon P. Chase, Douglass founded the possibility of an antislavery Constitution not on any attributed antislavery *intent* of the Founders, to whose intentions he professed indifference. Rather, he founded the possibility on the text as such. In this instance, Douglass *reads a text* rather than seeks to divine the authorial intentionality that supposedly lurks beneath the surfaces of texts and dictates their meanings. The Constitution *declares itself* in words on paper, and they are the only words that matter. “What will the people of America a hundred years hence care about the intentions of the *scriveners* who wrote the Constitution?”<sup>13</sup>

The unfortunate answer to Douglass’s question, as we all know, is that whether or not “the people” care, legal elites—of all political stripes and of all professions, whether juridical, or forensic, or academic—profess to care a lot, to the point that the Constitution is firmly in hock to their endless hermeneutic squabbles over its scriveners’ supposedly foundational intentions. American legal and constitutional historians need to understand their own role in this state of affairs. Though one of the signal achievements of the constitutional history of the last two decades has been to establish, at least to my satisfaction, that the Founders’ Constitution was written quite *intentionally* to accommodate slavery,<sup>14</sup> that very achievement tends to push to the margin attempts (like Douglass’s) to read it *without* privileging historical actors’ intentionality. And though legal historians in their turn have abashed originalism by demonstrating that legal meanings change as their contexts change, their contextualizing method—which they call “historicism”—nevertheless binds the meaning of any text to the moment and circumstances of its origin, or of its subsequent reinterpretation, such that the text’s meaning is always located *somewhere* in mechanical historical time, like a butterfly stuck on a pin.<sup>15</sup> Indeed, historicism tends to privilege the moment over the meaning, the context over the text, such that meaning is rendered always a creature of moment.<sup>16</sup> Historicists, one might observe, would have little time for Douglass’s fondness for natural law.

As a practical matter, Douglass knew perfectly well that “the original intent and meaning’ of the Constitution was to sanction and safeguard slavery.” After all, those were his exact words in early 1849, written as he was shifting

---

13. DOUGLASS, *The Constitution of the United States*, *supra* note 8, at 469 (emphasis added).

14. See generally DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009); GEORGE VAN CLEVE, *A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (2010); ROBIN EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006); MARK GRABER, *DRED SCOTT AND THE POLITICS OF CONSTITUTIONAL EVIL* (2006).

15. See CONSTANTIN FASOLT, *THE LIMITS OF HISTORY* 10–11 (2004).

16. The historicist position, which has since become orthodoxy in legal history, was first canvassed at length in Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1017–56 (1981).

toward his antislavery textualism.<sup>17</sup> To argue otherwise is to slight the evidence of our own eyes. Slaveholders in the company of apologists for slavery wrote the Constitution. It required what, however reluctantly, became a revolutionary war to loosen the hold of what they had written on the country. And the very occurrence of that war proved the original document had been an abject failure in birthing a real (which is to say, *not* a slaveholders') republic.<sup>18</sup>

The irrelevance of any constitutional rule of law to the development of the antebellum American polity was perfectly clear from the time of the Missouri Compromise, if not before. The Missouri Compromise, after all, was the creation of a purely political, log-rolling polity, a polity of pure self-interest and pure expansive force (as slavery itself, Indigenous genocide, and the contrived Mexican War all attest<sup>19</sup>). That antebellum polity lasted precisely seventy years—not exactly “for the ages.” In other words, it lasted just about as long as the French Third Republic, to which it bears a superficial resemblance—a polity originating in bourgeois self-interest and antagonism to radical popular democracy, a polity born in the wake of one war and destroyed by another.<sup>20</sup>

We could conclude that Douglass's dismissal of the scribes was itself nothing more than pure politics—an attempt to deny the slave power its constitutional camouflage. But as Professor Blight's essay shows, in telling us how Douglass learned to read the Constitution—which, in my view, is his essay's single most important achievement—there is so much more to it than pure politics. Douglass's dismissal of original intent and contextual circumstance from any authority over text was the substitution of a reading practice located not in historical time, but what in March 1849 Douglass named “a fixed principle of honesty” that urged the adoption of “that which may seem to us true . . . at the ever-present now.”<sup>21</sup> This was not a reading practice designed to produce, relativistically, a new meaning for a new moment. It was one that engaged in a

---

17. Letter from Frederick Douglass to C.H. Chase (Feb. 9, 1849), in 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 8, at 352, 352–53. In this remarkable letter, Douglass writes, in two short paragraphs (the entirety of the letter) the following: (1) “On a close examination of the Constitution, I am satisfied that if strictly ‘construed according to its reading,’ it is not a pro-slavery instrument . . .” (2) “I now hold, as I have ever done, that the original intent and meaning of the Constitution (the one given to it by the men who framed it, those who adopted, and the one given to it by the Supreme Court of the United States) makes it a pro-slavery instrument—such an one as I cannot bring myself to vote under, or swear to support.” The point is, there is no inconsistency here. Paragraph one reads a text. Paragraph two infers a meaning from context. *Id.*

18. See CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865, at 509–69 (2010).

19. “Our nation seems resolved to rush on in her wicked career, though the road be ditched with human blood, and paved with human skulls.” *The War with Mexico*, N. STAR, Jan. 21, 1848. See also N. STAR, Feb. 18, 1848.

20. See generally JOHN MERRIMAN, MASSACRE: THE LIFE AND DEATH OF THE PARIS COMMUNE (2014).

21. Frederick Douglass, *The Constitution and Slavery*, N. STAR, Mar. 16, 1849. “Words have no memory,” Fredric Jameson observes in *The Prison-House of Language*. JAMESON, *supra* note 1, 6 (1972). Here, Douglass offers his own “immediate lived experience” in place of “the illicit use of historical causality to support the drawing of logical consequences.” *Id.*

radically anti-historicist decontextualization of the Constitution, one that enabled Douglass to read the text strictly on its surface and to discover in it, as would a “man from another country,” an endless *silence* on slavery: a fugitive clause cast in language derived from institutions of bondage other than slavery—that is, apprenticeship and indentured servitude, and a three-fifths clause that counted those bondsmen-for-years among the free and acknowledged all others simply as “other persons.” This was the reading practice Douglass embraced in 1849.

Suppose a man from another country should read [the fugitive] clause of the American Constitution, with no other knowledge of the character of American institutions than what he derived from the reading of that instrument, will anyone pretend that the clause in question would be thought to apply to slaves? We think not. Nor would he dream of such an outrage, such a savage monstrosity, on reading any other part of the Constitution.—Blot slavery from existence, and the whole frame-work of the Constitution might remain unchanged. There is, therefore, nothing in the Constitution which means slavery—only slavery—and nothing else than slavery.<sup>22</sup>

So, what—if any—is the significance of this reading practice for us, today?

As Norman Spaulding argued years ago, if the Civil War and Reconstruction represent, however reluctantly, a second revolution in American history, and with it an entire remaking of the Constitution and hence of the republic, modern American legal elites at least since the Rehnquist Court have been engaged in a knowing counter-revolution, the results of which we see littered around us like rubble.<sup>23</sup> One might argue that in Justice Samuel Miller’s lead opinion in the *Slaughter-House Cases*,<sup>24</sup> and perhaps even in Justice Joseph Bradley’s indulgence of a private taste for discrimination in the *Civil Rights Cases*,<sup>25</sup> the post-Civil War Supreme Court had the excuse of blind ignorance. One might argue that in its sheer fragility in the wake of Roger Taney’s grotesque chief justiceship, the Court was attempting to find an accommodation for itself between the fact of the Reconstruction Amendments and the culture of the polity that had emerged from the war. That at least is the argument Pamela Brandwein

---

22. Frederick Douglass, *The Address of Southern Delegates in Congress to Their Constituents; Or, the Address of John C. Calhoun and Forty Other Thieves*, N. STAR, Feb. 9, 1849. See, generally, the important work of HOANG GIA PHAN, *BONDS OF CITIZENSHIP: LAW AND THE LABORS OF EMANCIPATION* 1–23 (2013). To continue with Jameson, “We may express all this in . . . another way by showing that the ontological foundations of the synchronic and the diachronic are quite different from each other. The former lies in the immediate lived experience of the native speaker; the latter rests on a kind of intellectual construction, the result of comparison of one moment of lived time and another by someone who stands outside, who has thus substituted a purely intellectual continuity for a lived one.” JAMESON, *supra* note 1, at 6.

23. Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 1992 (2003) (“[T]he Rehnquist Court’s revival of robust antebellum federalism principles turns on a ‘chillingly amnesic’ suppression of the structural significance of the Civil War and Reconstruction Amendments.”).

24. 83 U.S. 36 (1872).

25. 109 U.S. 3 (1883).

offers in her book *Rethinking the Judicial Settlement of Reconstruction*, which I greatly admire.<sup>26</sup>

But unlike the post-Taney Court, the Rehnquist Court and its successors do not have the excuse of blindness, or ignorance, or institutional fragility. They, just like us, have enjoyed the advantage of historical awareness. We *know* the history of the last 170-odd years. We *know* what the later nineteenth-century polity did to African Americans—to their suffrage, their civil rights, their access to public accommodations, and on, and on. We *know* all about the long reign of Jim Crow. In that light, the juridical counter-revolution begun in the later twentieth century has been a purposeful and uncaring counter-revolution, instituted quite deliberately, to exalt so-called first principles of federalism established by the original, failed late eighteenth-century constitutional settlement, while systematically diminishing “the plain exertion of national power over the states” that was the outcome of Civil War and Reconstruction.<sup>27</sup> No “fixed principle of honesty” here. This law is a lie. That was Spaulding’s point.

And now we have our current Court, the Alito-Gorsuch-Kavanaugh Court, arrogant agent of intellectual and practical chaos. Originalism stands exposed as a fig leaf for nothing but juridical power, a fig leaf fashioned in fits of nostalgia from shards of an imaginary lost world. The alternative so-called Living Constitution seems to me simply a different form of nostalgia, a liberal nostalgia for a different lost world, parked somewhere between 1937 and 1970. That makes it less a living constitution than a sort of zombie constitution—not inappropriate, one must admit, for an age of popular culture utterly preoccupied with the antihumanism of the living dead.

One feels the pain of those fated to teach constitutional law. It must be so hard to be a constitutional lawyer these days. How can one’s heroic efforts to string constitutional cases or doctrines onto golden threads of jurisprudential consistency actually earn intellectual respect, particularly as the current Supreme Court continuously grinds out new constitutions as fast as you attempt to explain the previous ones, as if it were the dedicated mechanism for the production of a multiverse of alternate legal realities? Professor Blight says there are two constitutions, or maybe three. It seems to me there are a hundred constitutions, or a thousand. The Court generates one on one day, another on a different day, as suits its purposes. *McGirt*<sup>28</sup> one day, *Castro-Huerta* the next.<sup>29</sup> If you didn’t

---

26. See generally PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011).

27. Spaulding, *supra* note 23, at 1992.

28. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

29. Explaining why the Supreme Court should court disaster for Native nations by reversing two hundred years of practice and precedent in the matter of state jurisdiction to prosecute crimes by or against Native Americans on tribal lands, Justice Kavanaugh’s majority opinion in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), amounts to “because we can.” See also *id.* at 2505 (Gorsuch, J., dissenting).



like the decision in *Vaello Madero*, neither did Justice Gorsuch. If you did like it, don't worry; he voted for it anyway.<sup>30</sup> Perhaps if you wait around long enough, this Court will generate a constitution just for you.

Under such circumstances, “a man from another country”<sup>31</sup> encountering lectures on the genius of the American Constitution might be pardoned for the same polite incomprehension that, across the Atlantic, the mother of all parliaments in the epoch of Brexit has provoked in its observers. Much like Brexit itself, and the accompanying rapid-fire succession (Cameron, May, Johnson, Truss, Sunak) of floundering and self-contradictory Tory governments we have witnessed, it would be comical, were it not so consequential for so many vulnerable people, were it not so uncaring, so cynical, so ill motivated.<sup>32</sup>

How should we understand this state of current affairs, and what is its relationship to words and language? I think we are encountering the tremors of an end to false certainties.

Human beings are no strangers to evil and lies. Once upon a time, however, all the evil and the lies that human beings managed to generate were ultimately covered for us by God.<sup>33</sup> The buck stopped with God, which meant in turn that sinful humanity seeking forgiveness was permanently indebted to God. In Christian theology, according to Jonathan Edwards, the hinge upon which the redemption of humanity turns is God the son's purchase of salvation for sinners from God the father. “Then,” says Edwards, was “[the] whole debt paid. Then finished the whole of the purchase of eternal life.”<sup>34</sup> It is a moment that has attracted innumerable commentators, among them, perhaps most famously,

30. As Justice Gorsuch pointed out in his concurrence, the foundation of the majority opinion in *United States v. Vaello Madero* rests ultimately on *Downes v. Bidwell*, 182 U.S. 244 (1901), and related cases, the *Insular Cases*, a foundation that Justice Gorsuch described as “rotten” and grounded on “ugly racial stereotypes”—a sad state of affairs both for the decision *and* for the concurrence. *United States v. Vaello Madero*, 596 U.S. 159, 180, 185, 189 (2022) (Gorsuch, J., concurring).

31. Douglass, *supra* note 22.

32. Explaining what quickly proved to be her utterly disastrous economic policies, former British Prime Minister Elizabeth (Liz) Truss indicated that her prime motivation in policy formation was concern for her own electoral success: “Instinctively, I was determined to act with maximum speed. I knew this risked mistakes being made, but the normal pace of the Whitehall machine would be nowhere near sufficient to tackle the immediate emergencies we were facing, let alone to attempt to get the British economy onto a path to growth *with barely two years left until the next election*.” Liz Truss, ‘*I Assumed upon Entering Downing Street My Mandate Would Be Respected. How Wrong I Was*,’ TELEGRAPH (Feb. 5, 2023) (emphasis supplied), <https://www.telegraph.co.uk/politics/2023/02/04/liz-truss-downing-street-reflection-mini-budget-boris-johnson/> [https://perma.cc/L9AY-SWHS]. For commentary, see Louis Ashworth, *Fisking the Trussay*, FIN. TIMES (Feb. 6, 2023), <https://www.ft.com/content/290bdbaf-549e-4cca-8628-05bd5768b00f> [https://perma.cc/WC3L-Q44T].

33. Take, for example, the profound deferral of ethical responsibility conveyed in the notorious modern phrase, “kill them all, let God sort them out.” See, e.g., DOOM at 75:30 (Universal Pictures 2005). This phrase has its origins in the words of the twelfth-century papal legate Arnaud Amalric during the Albigensian Crusade: “*Caedite eos. Novit enim Dominus qui sunt eius*.” (“Kill them. For the Lord knows who are His.”).

34. JONATHAN EDWARDS, A HISTORY OF THE WORK OF REDEMPTION 331 (John F. Wilson ed. and trans., Yale Univ. Press 1989) (1774).

Friedrich Nietzsche, who described it as Christianity's stroke of genius, the "horrific and paradoxical expedient" that ensured that human obligation was forever moralized as guilt, while simultaneously granting humanity an exit from otherwise endless moral torture: "God sacrificing himself for the guilt of man, God paying himself off, God as the sole figure who can redeem on man's behalf that which has become irredeemable for man himself—the creditor sacrificing himself for his debtor, out of *love* (are we supposed to believe this?), out of love for his debtor!"<sup>35</sup>

Jonathan Edwards's answer to Nietzsche would have been that Nietzsche had misunderstood the work of redemption. God did not sacrifice himself out of love for his debtor. The debtor, that is humanity, is actually quite incidental to the work of redemption, merely the occasion for it rather than its centerpiece.<sup>36</sup> The truth of the work of redemption is nothing less, or more, than God's self-glorification.<sup>37</sup> Humanity's purpose, besides which little else mattered, was worship. It was worship to which God was awesomely indifferent because God was already and always complete and so had no need of worship to be assured of completion. But worship was still required of humanity as a way of acknowledging that God's glory was the acme of enjoyment and as such decreed the limits that applied to everyone else. Observations by Giorgio Agamben, which he formulates as a series of (appropriately enough) three paradoxes, set the scene for us:

The paradox of glory has the following form: glory is the exclusive property of God for eternity, and it will remain eternally identical in him, such that nothing and no one can increase or diminish it; and yet, glory is glorification, which is to say, something that all creatures always incessantly owe to God and that he demands of them. From this paradox follows another one, which theology pretends to present as the resolution of the former: glory, the hymn of praise that creatures owe to God, in reality derives from the very glory of God; it is nothing but the necessary response, almost the echo that the glory of God awakens in them. That is (and this is the third formulation of the paradox): everything that God accomplishes, the works of creation and the economy of redemption, he accomplishes only for his glory. However, for this, creatures owe him gratitude and glory.<sup>38</sup>

As Agamben's account of glory makes plain, God embodies what Jacques Lacan calls *jouissance*, the utter self-enjoyment of the being who is impossibly

---

35. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 72 (Douglas Smith trans., Oxford Univ. Press 2008) (1887).

36. The purpose of humanity, at least according to Milton, was to replace the rebel angels whom God had cast out in the original war in heaven. See JOHN MILTON, PARADISE LOST bk. 2, at 830–35 (Gordon Teskey ed., W.W. Norton & Co. 3rd rev. ed. 2005) (1674).

37. John F. Wilson, *Editor's Introduction to A HISTORY OF THE WORK OF REDEMPTION*, *supra* note 34, at 40–41.

38. GIORGIO AGAMBEN, THE POWER AND THE GLORY: FOR A THEOLOGICAL GENEALOGY OF ECONOMY AND GOVERNMENT 216 (2011).

complete.<sup>39</sup> Famously, this God perished in the Enlightenment. But God's death simply exposed the empty space that God had filled. Once exposed, gaping and awful, the empty space prompted a frenetic succession of inadequate limit-setting replacements, each an attempt to fill the cavity anew. One was the Enlightenment's own "humanity itself"; another was Immanuel Kant's categorical imperative; another was Jeremy Bentham's utilitarian "greatest happiness" principle; another was the Hegelian trifecta of state, spirit, and species-being; another was the nation; and so on and on. Each place-filler purports to confer identity and fulfillment on human beings in the same way that abject worship of God once did. Each is a facile representation of imagined completion, or "closure" as we call it; each is a sort of God hologram, what Jacques Lacan calls "The Big Other."<sup>40</sup>

In America, the Constitution is one of those inadequate placeholders. It is an Enlightenment placeholder, a God substitute, a sacred text, created (very explicitly) to confer identity and fulfillment on human subjects.<sup>41</sup> "We the People."<sup>42</sup> This is the guiding heritage its adjudicators have imagined for themselves ever since.<sup>43</sup> It has led them to their cacophony of choices, rendered with little humility, but always in veneration of the original.

All the God holograms promise completion of the deficient human subject, which is to say us, just as the original God did in the redemption contract by offering us participation in everlasting glory. That is why we create them. They promise us our very own perfection and happiness, our entrance into *jouissance*. "[A] more perfect union."<sup>44</sup> But none of them can deliver on the promise. Our completion is impossible because we are creatures of language. And so are they. The placeholders we create cannot heal our deficiencies because they share them.

We are condemned to language. This was Jacques Derrida's point. I am sure we are all familiar with his enigmatic observation, "*il n'y a pas de hors-texte*," which in Guyatri Spivak's translation means "there is nothing outside the text," or in other words, there is nothing but language. There is no need to be *quite* so abrupt, for the phrase has other meanings; for example, "there is no outside text," or in other words, that which *is* outside the text is not expressible in language. This, the inexpressible, is what Lacan calls the Real, by which he means the state of natural being that exists all around us, about which we fantasize endlessly (for example, in our fascination with death), but from which

39. See MARIA ARISTODEMOU, *LAW, PSYCHOANALYSIS, SOCIETY: TAKING THE UNCONSCIOUS SERIOUSLY* 14 (2014).

40. *Id.* at 107.

41. See generally JORDAN WATKINS, *SLAVERY AND SACRED TEXTS: THE BIBLE, THE CONSTITUTION, AND HISTORICAL CONSCIOUSNESS IN ANTEBELLUM AMERICA* (2021).

42. U.S. CONST. pmbl.

43. See generally ROBERT J. STEINFELD, 'TO SAVE THE PEOPLE FROM THEMSELVES': THE EMERGENCE OF AMERICAN JUDICIAL REVIEW AND THE TRANSFORMATION OF CONSTITUTIONS (2021).

44. U.S. CONST. pmbl.

we are all forever and always severed by our entrance into language. This separation is the original cut, the absolute, necessary severance that creates self-consciousness, and in doing so maims us irreparably.

In life, what we experience, our consciousness, is not the real but the symbolic order, the order of language and law—in other words, ideology. This is the realm in which we live our lives. It is the realm created by the cut, and thus the realm of our lack, our deficiency. Professor Blight's essay contains a quite beautiful illustration of this, in its sensitivity to Douglass's image of the blackbirds. "I used to contrast my condition with the blackbirds," says Douglass, "in whose wild and sweet songs I fancied them happy. Their apparent joy only deepened the shades of my sorrow." We should ask, precisely of what is his story an image? Of course, Douglass offered it as a commentary on what it meant to be enslaved. But slavery is a creation of language and law; it is an emanation of the symbolic order in which Douglass lived. Which means that Douglass's commentary is not just a commentary on his own enslavement; it is also a commentary on *all* human separation from the state of natural being. Even a master of language like Douglass could not remake himself as that wild, sweet, joyful creature he had observed, not before his freedom, nor after; it was a powerlessness of which Douglass was deeply aware throughout his life, something that Blight's biography of Douglass shows rather profoundly.

Frederick Douglass plumbed the realm of the symbolic order in which he, and we, are immersed. He did so in his own way, as an autodidact, and he came to the conclusion that to comprehend the symbolic order of language and law that cut him off from the wild freedom of nature, only the text itself offered a standpoint with a degree of stability to hold onto, not all the nattering and bickering about deeper authorial intentions, whether doctrinal or social and empirical, not the mysteries below the surface of the text available only to those who appoint themselves cognoscenti and spend all their time disagreeing with each other, but the text itself.<sup>45</sup> Not because it is the key to something else, to completion, but because it is, very precisely, itself. Alone. And that is all it is. It is all we have.

So described, it seems almost simpleminded. So much of our lives as human beings, as academics, are devoted to deep plunges beneath the text. There *must* be something explanatory there, we think, something profound. If only we can locate it, we will have unlocked the path to *jouissance*, to our completion. Not all have thought this way. In his youth, Karl Marx mused about "the legal nature of things,"<sup>46</sup> which one can see as a powerful impulse to consider the

---

45. For commentary, see MARIANNE CONSTABLE, JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW 8–44 (2005).

46. Karl Marx, *Debates on the Law of the Theft of Wood*, RHEINISCHE ZEITUNG, Oct. 25, 1842, reprinted in ARTICLES FROM THE RHEINISCHE ZEITUNG 51, [https://www.marxists.org/archive/marx/works/download/Marx\\_Rheinische\\_Zeitung.pdf](https://www.marxists.org/archive/marx/works/download/Marx_Rheinische_Zeitung.pdf) [<https://perma.cc/2EMP-XWHV>].

synchronic meaning of surfaces, not dissimilar from Douglass's textualism. Marx observed:

The law is not exempt from the general obligation to tell the truth. It is doubly obliged to do so, for it is the universal and authentic exponent of the legal nature of things. Hence the legal nature of things cannot be regulated according to the law; on the contrary, the law must be regulated according to the legal nature of things.<sup>47</sup>

Here, "legal nature" points toward a unity of the material with the legal that is prior to "the law" and that creates a totalized standard for the validity of laws, just as Douglass's "fixed principle of honesty" leads him to the unmediated text (and only the text) of the Constitution. For both, that which does not comport with the surface measure is invalid. It is, as Marx put it, "a lie." In a deeply unstable world, neither of these mid-nineteenth-century masters of words was naïve. Each sought a standpoint free from the dissimulations of conventional hermeneutics that might clarify choice and enable decision.<sup>48</sup>

But that was then. Sadly, in my view, if we *do* begin at the surface and with the text, and begin seriously, we will still not discover the stability we seek: not in the text, not in Douglass's fondness for natural law, not in the legal nature of things. We will discover something very different and very important—we will discover that there is no haven of stability, indeed that our very quest for it means we are still suffering from our God hologram complex. The empty space cannot be filled; it is the price of consciousness. Our job is to learn to live with the emptiness, which means to recognize that our existence is inevitably one lived in ideology—in language and in law. Our responsibility, and the adjudicator's responsibility, is to try to avoid being deceived by the false certainties of the symbolic order in the midst of which we live. Our responsibility, and the adjudicator's responsibility, is to face up to our lack of completion and to determine how to live with it as mature and ethical human beings.<sup>49</sup>

A reader may think I have wandered far off David Blight's track, too far from Frederick Douglass and his words, too far for comfort. I own to the wandering, but I believe I have wandered purposefully. Like Walt Whitman—yet another of the mid-nineteenth century's masters of words—my wandering has returned me to where I began, in my case to questions about words and their

---

47. *Id.*

48. For my own attempt, which might, however, be considered the product of a hermeneutics of suspicion, see Christopher Tomlins, *The Threepenny Constitution (and the Question of Justice)*, 58 ALA. L. REV. 979, 979–1008 (2007). Here, my point is that Douglass's scrivener and Marx's legislator are both merely conduits to the extent they convey truths accurately, and liars if they do not. Either way, their own choices, their own interpretive intentions are unimportant, except so far as they explain the lie. For as Walter Benjamin put it, choice belongs with myth and nature, decision with truth. WALTER BENJAMIN, *GOETHE'S ELECTIVE AFFINITIES* (1924), reprinted in 1 WALTER BENJAMIN: SELECTED WRITINGS, 1913–1926, at 346 (Marcus Bullock & Michael W. Jennings eds., 2004) ("Choice is natural and can even belong to the elements; decision is transcendent.").

49. ARISTODEMOU, *supra* note 39, at 107.

meanings. But also like Whitman, in *his* wanderings, I am ending, quite deliberately, on a note of cold uncertainty.

“Inquiring, tireless, seeking that yet unfound,” Whitman wrote in that last year of peace, 1860, the same year that Frederick Douglass offered his Glasgow address,

Now I face the old home again – looking over to it,  
joyous, as after long travel, growth, and sleep;  
But where is what I started for, so long ago?  
And why is it yet unfound?<sup>50</sup>

Like Whitman, I have examined the world for certainties and found only evanescence. We have no God, no hologrammatic substitute, no constitutional place-filler to ease our burden of incompleteness. What we have is the same opportunity we have always had: to discard false certainties and to dedicate our energies to a different task, the task of becoming mature and ethical human beings. The greatest compliment one can pay to Frederick Douglass is that his “fixed principle of honesty” means he is somewhere ahead of us on that difficult road.

---

50. WALT WHITMAN, LEAVES OF GRASS 312 (1860). For the revised version, entitled *Facing West from California's Shores*, see WALT WHITMAN, *Facing West from California's Shores*, in LEAVES OF GRASS, 116, 116 (1867).