Constitutional Sankofa

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In one of Afrofuturist musician Sun Ra's songs, June Tyson chants: "When the Black man ruled this land, Pharaoh was sitting on his throne." This illustrates a common theme in Afrofuturist work, often denoted using the Twi word Sankofa*, of recovering from the past in order to build the future. Afrofuturist artists frequently draw on the cultural legacy of, inter alia, Egypt, Ethiopia, and Haitian Vodou as historical starting points for re-envisioning the present and future.*

But actually, "when the Black man ruled this land," at least as a first-order approximation (and with apologies for the gendered quotation), was Reconstruction—when the Constitution was reshaped by the self-assertion of the freed.

This Essay offers a Sankofa *approach to recovering the Constitution from the forces of white supremacy and reaction which have long betrayed the legacy of Reconstruction. Drawing on Peggy Cooper Davis's* Neglected Stories*, and bringing her call to reclaim the experiences of the freed in our understanding of the meaning of the Reconstruction Amendments together with constitutional and democratic theory, this Essay argues that the route to the Constitution's future—a future that envisions the empowerment and inclusion of subordinated and excluded and minoritized groups—goes through an aggressive reinterpretation of the past, one which is inspired by the common law tradition as well as Black intellectual history. Ultimately, it defends what I call constitutional* Sankofa*, a Black-centric interpretation of the constitutional past that chooses its historical material, within the realm of permissible historical interpretation, in order to pursue liberatory ends.*

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INTRODUCTION

Afrofuturism as the inspiration for a methodological approach may seem like a poor match for a constitutional lawyer. After all, constitutional law is downright averse to anything with "future" in the name. Its major challenges come in the form of worries about the zombie-like "dead hand" of the past ruling the present (less science fiction, more horror).[1] The currently dominant methodology, "originalism," is more associated with Justice Scalia's infamous collection of eighteenth-century dictionaries than anything forward-looking.[2]

Yet Afrofuturist artists have famously drawn on symbols of the past—particularly, the cultural and scientific achievements of Africa throughout history—to ground their leaps into the future. Thus, Ytasha L. Womack opens her book on Afrofuturism by pointing the reader to:

> [K]ey archetypes that anchor the imagination on this spaceship ride dubbed "freedom": the Dogon's Sirius star, the fabled mermaid, the sky ark, a DJ

1. One rather odd political scientist has outright analogized originalism to a zombie flick. *See* John Brigham, *Original Intent and Other Cult Classics*, 11 GOOD SOC'Y 13, 13 (2002). For a more serious though equally evocative engagement with the issue, see Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1102–06 (1998) (arguing that the solution to dead-hand problems in constitutional law is to privilege neither the will of long-dead founders nor the untrammeled political will of present majorities, but to carry out a "struggle to lay down temporally extended commitments and to honor those commitments over time").

2. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 581–84 (2008) (Scalia, J.) (citing a collection of eighteenth-century dictionaries). This Essay does not aim to serve as a direct critique of originalism. Although it occasionally uses originalism as a source of examples of alternative uses of the past, it is self-consciously agnostic as to whether there is a version of originalism that is correct or compatible with the approach to the past described here.

> scratch that blares like a Miles Davis horn, an ankh, a Yoruba deity, an Egyptian god, a body of water, a dancing robot, an Outkast ATLien.[3]

In the quoted passage, Womack seems to be simultaneously describing and performing an Afrofuturist approach to time which replaces the diachronic with the synchronic and situates dancing robots and Yoruba religious traditions together.[4] In contemporary Afrofuturist art, Janelle Monáe's cyborg alter ego Cindi Mayweather likewise lives out of chronological time—literary theorist Kristen Lillvis describes how Monáe attributes a "Digital Auction Code" and "manumission papers" to Mayweather while spanning history and the future in her musical allusions.[5] For Lillvis, this represents "subjective" and "temporal" "liminality," through which "boundary crossings enable black subjects to connect to black history in the present and also find authority in the potentiality of the future."[6]

I, following several scholars of Afrofuturist art, use the word *Sankofa* to denote this practice.[7] *Sankofa* is a Twi word from the Akan people (associated with the modern nation of Ghana) which translates as "go back and fetch it,"[8] and captures the idea of recovering from the past in order to build the future.[9] The word has been identified as part of a proverb translated more fully as "it is not taboo to return into history to reclaim the past in order to move forward."[10]

One function of Afrofuturist *Sankofa* is to resist hegemonic white/European conceptions of the future as inevitably built on assumed (and hence invisible) European cultural traditions. For example, the *Black Panther* film shows a vision of a high-technology society with futuristic buildings based on traditional African architectural forms, unsettling the assumption that the technological future descends naturally and inevitably from European styles of building.[11] Afrofuturism as a whole is, in part, a response to the exclusion (or, more

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3. YTASHA L. WOMACK, AFROFUTURISM: THE WORLD OF BLACK SCI-FI AND FANTASY CULTURE 1 (1st ed. 2013).

4. *See id.*

5. KRISTEN LILLVIS, POSTHUMAN BLACKNESS AND THE BLACK FEMALE IMAGINATION 58 (2017). On the body as property and the feminist/Afrofuturist figure of the cyborg, see *infra* Section II.A.

6. LILLVIS, *supra* note 5, at 58.

7. For examples of Afrofuturist scholars using the term, see Elisabeth Abena Osei, *Wakanda Africa Do You See? Reading* Black Panther *as a Decolonial Film Through the Lens of the Sankofa Theory*, 37 CRITICAL STUD. MEDIA COMMC'N 378, 378 (2020); Emanuelle K. F. Oliveira-Monte, *Lu Ain-Zaila's Sankofa and Brazilian Afrofuturism: Akan Philosophy and Black Utopia in a Postapocalyptic World*, 7 J. LUSOPHONE STUD. 31, 31 (2022).

8. Angi Porter, *Africana Legal Studies: A New Theoretical Approach to Law & Protocol*, 27 MICH. J. RACE & L. 249, 261 (2022).

9. According to Odamtten and Getz: "Sankofa, the artistic embodiment of the mythical Akan bird with its splayed feet facing forward to the future and its head looking back to the past, with 'food' or knowledge nestled in its mouth, has come to represent in many ways a Ghanaian philosophy of history and national development." Harry Odamtten & Trevor R. Getz, Sankofa *and the Nation-State*, 5 J. W. AFR. HIST. v, v (2019).

10. Osei, *supra* note 7, at 382.

11. *See id.* at 385–86.

accurately, erasure) of Black people from the Enlightenment project and the Eurocentric progress narratives that grow out of it.[12]

Sankofa can also represent the recovery of traditional knowledge in order to solve the problems of the present and thereby build the future. In the postcolonial context, this often means the knowledge of the oppressed, the Indigenous, and the colonized, redeployed to solve the problems created by colonizers and enslavers and their descendants.[13] For example, the landmark Afrofuturist film *The Last Angel of History* begins by retelling the traditional tale of Robert Johnson's deal with the devil at the crossroads—blues guitar genius in exchange for his soul—as the receipt of a "Black secret technology."[14] Johnson becomes the initial model for the film's own "Data Thief" character, a time-traveler, who explores the past for other secret technologies, like the African drum as a means of communication.[15]

In her analysis of Ishmael Reed's *Mumbo Jumbo*, Alondra Nelson calls a similar practice "necromancy": the projection of a "living past" into the future.[16] Kodwo Eshun describes the whole Afrofuturist project similarly as "a program for recovering the histories of counter-futures created in a century hostile to Afrodiasporic projection and as a space within which the critical work of manufacturing tools capable of intervention within the current political dispensation may be undertaken."[17]

It is in this spirit that I contend an Afrofuturist mode of thinking has decided relevance to constitutional law. The creativity and genius of Black Americans have been written out of our constitutional history just as the creativity and genius of Africa have been written out of scientific and cultural history.[18] The only path forward to a just and equitable future is to begin by embracing the secret legal technologies of the Black past.

Ultimately, I will defend what I call constitutional *Sankofa*: a Black-centric (or marginalized-group-centric more generally)[19] interpretation of the constitutional past that chooses its historical material, within the realm of permissible historical interpretation, in order to pursue liberatory ends. In addition to Afrofuturism, constitutional *Sankofa* is also rooted in the insights of critical race theory; in particular, the idea of understanding constitutional history from the standpoint of

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12. *See* Kodwo Eshun, *Further Considerations on Afrofuturism*, 3 CR: NEW CENTENNIAL REV. 287, 287–88, 297 (2003) (contextualizing Afrofuturism as a response to historical exclusion).

13. *See, e.g.*, Oliveira-Monte, *supra* note 7, at 40–41 (giving an example of traditional knowledge used to save people from ecological destruction in Brazilian Afrofuturist literature).

14. THE LAST ANGEL OF HISTORY (Black Audio Film Collective 1996) (transcript available at https://akomfrah.site.seattleartmuseum.org/wp-content/uploads/sites/33/2020/09/The-Last-Angel-of-History-Transcript.pdf [https://perma.cc/8Z5B-EWL7]).

15. *See id.*

16. Alondra Nelson, *Introduction: Future Texts*, 20 SOC. TEXT, Summer 2002, at 1, 7.

17. Eshun, *supra* note 12, at 301.

18. *See id.*

19. A fully just and democratic interpretation of the Constitution would, of course, also seek to attribute agency to and secure the liberation of others, such as Native Americans and women, excluded in the founding.

those in subordinated racial groups draws on the methodology of standpoint epistemology shared by critical race and feminist theory.[20]

This Essay proceeds in two Parts. In Part I, I sketch a constitutional theory for Afrofuturists, one which identifies the distinctively constructed nature of constitutional history, and hence the space for historical self-assertion by those who lay a claim to legal and political justice. Through an analysis of Frederick Douglass's approach to the Constitution (Section I.A) and a defense of aggressive and constructive approaches to the past (Section I.B), I argue that such a *Sankofa* approach follows a recognizable tradition of Black American approaches to the past, and that tradition also coincides with a sound approach to historical legal text within the Anglo-American legal tradition more broadly. The essence of the argument of Part I is that the kinds of historical facts that are characteristically relevant for constitutional interpretation tend to be contested if not downright indeterminate, and that actual constitutional uses of the past for that reason tend to be constructed in part based on the values which a legal advocate is trying to pursue. This is precisely how Douglass and the broader Black tradition of which he is a leading figure have characteristically treated the past.

In Part II, I offer an Afrofuturist reading of Peggy Cooper Davis's landmark "Neglected Stories" framework for the inclusion of enslaved perspectives into our reading of the Reconstruction Amendments.[21] Davis is read in the context of the figure of the cyborg, and the perennial Black and feminist struggle for the control of one's own body.

Finally, the Conclusion briefly abstracts out the ideas from Davis's work and suggests that they may be combined with longstanding claims to control over personal and cultural information from Black, Native, and other activists. I suggest (albeit tentatively) that understanding these ideas together, and as of constitutional magnitude, potentially sets a foundation for an Afrofuturist constitutional approach to some of our most controversial new technologies, including those relating to surveillance and artificial intelligence.

In the first instance, this Essay is addressed to activists who are committed to racial equality and interested in developing novel ways to look at the Constitution to promote justice. It rests on the suppositions that new, more egalitarian accounts of the Constitution have the long-term potential to promote legal, social, and political change; that constitutional values have resonance in the political as well as the legal spheres; and that part of the political resonance of the Constitution arises from its connection with the past—from the ideology of constitutional heritage into which Americans are socialized. This Essay is thus ultimately directed at

20. *See* Richard A. Jones, *Philosophical Methodologies of Critical Race Theory*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 17, 31–32, 36 (2009) (explaining standpoint epistemology in critical race theory).

21. *See generally* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (Hill and Wang, 1st ed. 1997); Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.-C.L. L. REV. 299 (1993).

promoting an expansive constitutional imagination that repurposes that ideology of heritage in the pursuit of social justice.[22]

I. RECLAIMING AND REINVENTING HISTORY

In 1925, Arthur Schomburg—an Afro-Puerto Rican historian, a major figure in the Harlem Renaissance, and co-founder of the Negro Society for Historical Research[23]—began a famous essay with the assertion that "[t]he American Negro must remake his past in order to make his future."[24] In that essay, Schomburg highlights the work of Black scholars in unearthing the suppressed contributions of Black people to American social and intellectual progress.[25] The word "remake" reflects the insight that these discoveries are also an artifact—that history is a set of choices, and the historian, by choosing to emphasize some historical facts rather than others, constructs a narrative that is useful for building the future. Philosopher of race Tommy Curry described the views of John E. Bruce (Schomburg's co-founder in the Negro Society for Historical Research)[26] about Black racial self-construction itself in similar terms:

> Making a race, or what Bruce refers to as "race-building" is a philosophical engagement with history and a proleptic foreshadowing the future. Race-building depends on history not only as a recollection of the past or the accomplishments of the race, but also as a corrective to the constructed accounts of African achievement, and more concretely as proof that African descended people can create civilizations.[27]

That sounds like a *Sankofa* approach, many decades before the term Afrofuturism was coined. This is no coincidence: there is a long Black intellectual tradition of claiming or reclaiming the past. Afrofuturist *Sankofa* is only its most recent iteration. To accompany the subjects of Schomburg's essay, Section I.A will focus on Frederick Douglass's account of the role of the U.S. Constitution in Black liberation. That account combined familiar legal arguments with a distinctive approach to history. Through readings of several of Douglass's speeches, most importantly an 1860 speech on the Constitution that Douglass gave in Scotland and his earlier, and more famous, Fourth of July speech, I will

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22. This Essay does not necessarily entail endorsing, as an all-things-considered moral view, the proposition that we *ought* to follow values rooted in America's constitutional past. Rather, it recognizes that many Americans do endorse that view and urges the development of arguments for racial and social justice which can appeal to those who do so.

23. *See Arturo Alfonso Schomburg*, NAT'L MUSEUM AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/latinx/arturo-alfonso-schomburg [https://perma.cc/KYM7-45CS] (last visited May 14, 2024); Nancy Minty, *A.A. Schomburg: Collector of Lost Histories*, JSTOR (Jan. 25, 2022), https://about.jstor.org/blog/a-a-schomburg-collector-of-lost-histories/ [https://perma.cc/EUL6-MXQV].

24. Arthur A. Schomburg, *The Negro Digs Up His Past*, *in* THE NEW NEGRO: AN INTERPRETATION 231, 231 (Alain Locke ed., 1925).

25. *See id.* at 232–37.

26. Tommy J. Curry, *Who K(new): The Nation-ist Contour of Racial Identity in the Thought of Martin R. Delany and John E. Bruce*, 1 J. PAN AFR. STUD., Nov. 2007, at 41, 51.

27. *Id.* at 53.

draw out Douglass's approach to the constitutional past and the connections between Douglass's approach to history and the broader Black political tradition.

To bridge between the political approach to history and a legal approach to history suitable for integrating into doctrine, Section I.B will then make a seemingly odd detour to seventeenth-century England. Here, I argue that Douglass's style of argument is familiar to the Anglo-American common law-derived tradition, with its most important non-Black context being Edward Coke's reinterpretation of the Magna Carta to make it suitable to combat Stuart absolutism. I will (tentatively) defend Coke against his historical critics with a light dusting of jurisprudential theorizing, ultimately arguing that Coke-style—and thus Douglass-style—arguments are legally acceptable legal uses of the past.

A. FREDERICK DOUGLASS'S SANKOFA CONSTITUTIONALISM

In 1860, Douglass gave a speech in Glasgow, Scotland, in which he reclaimed the Constitution and its history for the purpose of abolition.[28] This general pattern of argument has been discussed in some depth in the legal literature but mostly in the context of white constitutional abolitionists such as Salmon P. Chase, Gerrit Smith, and Lysander Spooner.[29] A broad summary of the argument in Douglass's speech interpreted through the lens of the constitutional abolitionists would have it pair strict textualism, which refuses to speculate about the intent of the authors of the text, with a common-law interpretive rule according to which unjust interpretations or interpretations contrary to fundamental principles of law are to be disfavored unless clearly stated in the text.[30]

Yet I think there's more to Douglass's speech than what he would have gotten from the white constitutional abolitionists. This can only be seen in the context of his more famous 1852 Fourth of July Speech.[31] In that speech, he articulates a vigorously present-focused approach to the nation's heritage, through the lens of

28. *See* Frederick Douglass, The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?, Speech Delivered in Glasglow, Scotland (Mar. 26, 1860), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 380–90 (Philip S. Foner ed., 1999); *see also* Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335, 376–82 (2019) (analyzing 1860 speech in another context).

29. *See, e.g.*, Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 417–20 (2012) (describing the constitutional abolition movement); Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977, 999 (1997) (elucidating Spooner's theory of constitutional abolition).

30. For Spooner, see Barnett, *supra* note 29, at 990–94. For Douglass, see Gowder, *supra* note 28, at 377–79. For the common law rule, see Barnett, *supra* note 29, at 988 (discussing Spooner's use of principle as stated in United States v. Fisher, 6 U.S. 358, 390 (1805)). The principle continues in contemporary common law constitutionalism. A famous twentieth-century British example is *Anisminic Ltd v. Foreign Compensation Commission*, in which the House of Lords narrowly interpreted an "ouster" provision—a provision that seemed by the most natural reading to strip the courts of jurisdiction—on the basis of the statute's absence of particularly clear legislative language, demanding that the language make it certain that such an unusual ouster was intended before it would be applied. Anisminic Ltd v. Foreign Comp. Comm'n [1969] 2 AC 147 (HL) 170.

31. Frederick Douglass, The Meaning of July Fourth for the Negro, Speech at Rochester, New York (July 5, 1852), *in* DOUGLASS, *supra* note 28, at 188.

asking whether contemporaneous Americans ought to celebrate the achievements of the generation that founded their country:

> My business, if I have any here to-day, is with the present. The accepted time with God and His cause is the ever-living now.[32] . . . We have to do with the past only as we can make it useful to the present and to the future. To all inspiring motives, to noble deeds which can be gained from the past, we are welcome. But now is the time, the important time. Your fathers have lived, died, and have done their work, and have done much of it well. You live and must die, and you must do your work. You have no right to enjoy a child's share in the labor of your fathers, unless your children are to be blest by your labors. You have no right to wear out and waste the hard-earned fame of your fathers to cover your indolence. Sydney Smith tells us that men seldom eulogize the wisdom and virtues of their fathers, but to excuse some folly or wickedness of their own. This truth is not a doubtful one. There are illustrations of it near and remote, ancient and modern. It was fashionable, hundreds of years ago, for the children of Jacob to boast, we have "Abraham to our father," when they had long lost Abraham's faith and spirit. That people contented themselves under the shadow of Abraham's great name, while they repudiated the deeds which made his name great. Need I remind you that a similar thing is being done all over this country to-day? Need I tell you that the Jews are not the only people who built the tombs of the prophets, and garnished the sepulchers of the righteous? Washington could not die till he had broken the chains of his slaves. Yet his monument is built up by the price of human blood, and the traders in the bodies and souls of men shout—"We have Washington to *our father*."[33]

In that passage, Douglass articulates two distinct ideas about dealing with the past. The first I will call the *pragmatic claim*: the point of reaching into the past is to make it useful for the present. The second I will call the *inheritance claim*: present generations have no right to appeal to the honor of past achievements unless their own actions are, in some meaningful sense, faithful to those achievements.

The pragmatic claim and the inheritance claim seem, at first blush, to be in some tension. After all, if our use of the past is oriented toward the present, then how can it also be the case that in the present we are obliged to be faithful to the past? Yet what Douglass seems to be demanding is that we be faithful to the past *in a moral sense*: that we identify the moral end that prior generations were pursuing—or at least can be interpreted as pursuing—and continue our own part in that pursuit. This licenses a kind of idealizing interpretation of the past which Douglass exhibits in that very passage. In focusing attention on George Washington's freeing of his own slaves rather than on his central role in creating a country that revolved around slavery, Douglass reframes Washington almost as a kind of

32. *Id.* at 193.
33. *Id.* at 193–94.

abolitionist to give contemporaneous generations a positive legacy to continue for themselves.

In light of that passage, we can return to Douglass's 1860 speech and see how it isn't merely a natural law/textualist approach to the Constitution. Rather, it is also rooted in an idealized construction of the legal past. In the 1860 speech, Douglass has a complex approach to history. At one point, he offers the constitutional abolitionist approach as an alternative to history, suggesting that:

> The speaker at the City Hall laid down some rules of legal interpretation. These rules send us to the history of the law for its meaning. I have no objection to such a course in ordinary cases of doubt. But where human liberty and justice are at stake, the case falls under an entirely different class of rules. There must be something more than history—something more than tradition.[34]

Douglass also offers something like the pragmatic claim, but now as a reason to not appeal to intention in interpreting the Constitution:

> 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 from us. They were for a generation, but the Constitution is for ages. Whatever we may owe to them, we certainly owe it to ourselves, and to mankind, and to God, to maintain the truth of our own language, and to allow no villainy, not even the villainy of holding men as slaves . . . to shelter itself under a fair-seeming and virtuous language.[35]

However, even as he rejects the intentions of the Framers and orients himself to the present and the future rather than to the past, Douglass nonetheless recruits yet another seemingly pro-slavery Southern Founding Father to his side.[36] In an effort to refute the notion that the Fugitive Slave Clause is clear textual support for slavery within the Constitution, Douglass tells a story from the convention.[37] According to Douglass, James Madison explained that the word "servitude" could not be in the Fugitive Slave Clause "because the convention would not consent that the idea of property in men should be admitted into the Constitution."[38] At the same time, Douglass emphasizes that the historical record is ambiguous (and hence, as I shall suggest in Section I.B, there is still more room for a justice-oriented reading), observing that "[t]he fact that Mr. Madison can be cited on both sides of this question is another evidence of the folly and absurdity of making the secret intentions of the framers the criterion by which the Constitution is to be construed."[39]

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34. Douglass, *supra* note 28, at 386.
35. *Id*. at 382.
36. *See id*. at 385–86.
37. *Id*.
38. *Id*. at 386.
39. *Id*.

In (very partially) idealizing Madison the same way he idealized Washington in the Fourth of July speech, Douglass paves the way for an idealized reading of the constitutional text itself, deploying not only natural law but also its expressed purposes:

> Here are its own objects as set forth by itself:—"We, the people of these United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." The objects here set forth are six in number: union, defence, welfare, tranquillity, justice, and liberty. These are all good objects, and slavery, so far from being among them, is a foe of them all.[40]

In this, Douglass was in the good company of other Black abolitionists who offered idealizing accounts of America's legal texts.[41] Frequently, for example, the Declaration of Independence was identified as a textual repository of free American values, which the actual Constitution failed to live up to.[42]

Douglass concludes the speech by reiterating the idea of constitutional text as something to be interpreted for *pragmatic purposes*—with the recognition that the point of legal interpretation is to do things in the world: "If the South has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice."[43]

The two speeches together illustrate what William Moses calls Douglass's "Hegelian" approach, which reads the Constitution as a text of historical progress, rooted in the Declaration of Independence and subject to an idealized interpretation in light of its progressive object.[44] Douglass also displays his "Hegelian" orientation in a speech to the American Anti-Slavery Society after *Dred Scott*.[45] After giving a natural law case against slavery, he predicts its doom because of the historical teleology of the U.S. Constitution:

> I base my sense of the certain overthrow of slavery, in part, upon the nature of the American Government, the Constitution, the tendencies of the age, and the character of the American people; and this, notwithstanding the important decision of Judge Taney.
>
> I know of no soil better adapted to the growth of reform than American soil. I know of no country where the conditions for affecting great changes in the

40. *Id.* at 387.

41. *See, e.g.*, Gowder, *supra* note 28, at 384–89 (providing other examples of idealized accounts).

42. *Id.* at 386–89.

43. Douglass, *supra* note 28, at 389.

44. *See* Wilson J. Moses, *"The Ever-Present Now": Frederick Douglass's Pragmatic Constitutionalism*, 99 J. AFR. AM. HIST. 71, 72, 76 (2014).

45. *See* Frederick Douglass, The Dred Scott Decision, Speech Delivered Before American Anti-Slavery Society, New York (May 14, 1857), *in* DOUGLASS, *supra* note 28, at 344.

> settled order of things, for the development of right ideas of liberty and humanity, are more favorable than here in these United States.
>
> The very groundwork of this government is a good repository of Christian civilization. The Constitution, as well as the Declaration of Independence, and the sentiments of the founders of the Republic, give us a platform broad enough, and strong enough, to support the most comprehensive plans for the freedom and elevation of all the people of this country, without regard to color, class, or clime.[46]

A few pages later, Douglass once again attributes abolitionism, or something near to it, to the Founding Fathers, this time citing "Washington and Jefferson, and Adams, and Jay, and Franklin, and Rush, and Hamilton, and a host of others."[47]

Douglass is not alone in this approach to the principles of American democracy.

1. Two Kinds of Sankofa

Melvin Rogers, in a new book tracing out this strain of Black American activism, reads Douglass in the Fourth of July speech as working

> to reimagine who constitutes the civic "we" of society . . . [by] retriev[ing] this principle [of "the people"] from the past . . . [and] counsel[ling] his fellows to place it in the service of the present and future. This implies that acting and reimagining the future is worthwhile and meaningful, but progress is not inevitable.[48]

Rogers also identifies this approach with numerous other Black activists of the nineteenth and twentieth centuries, who "are fully aware of the entanglement of democracy and white supremacy, freedom and slavery, even as they seek to pull from and transform those portions of America's traditions that might support a racially just society."[49]

In that reading, Rogers focuses on the political rather than the legal character of Douglass's *Sankofa*.[50] Section I.B of this Essay will transpose *Sankofa* into the legal domain by arguing that the approach to the past that Douglass displays is not only suitable to but even characteristic of the Anglo-American common law tradition. Before doing so, however, I must address a seeming gap in the supposedly unified approach to the past that I claim to have been elucidating.

The reader may worry that I seem to be talking about two totally different kinds of Black historical claims-making—the Schomburg kind, which is about Black

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46. *Id.* at 350.
47. *Id.* at 356.
48. MELVIN L. ROGERS, THE DARKENED LIGHT OF FAITH: RACE, DEMOCRACY, AND FREEDOM IN AFRICAN AMERICAN POLITICAL THOUGHT 5 (2023).
49. *Id.*
50. *See id.*

people reclaiming their own history and integrating Black agency into a story of the past, and the Douglass kind, which is about claiming the institutions historically built by others.

Douglass was, in essence, claiming inclusion in what is nominally someone else's past—as the Fourth of July speech reminds us, the (white) American people did not consider him one of their number.[51] While he was scolding the (white) Americans for neglecting the legacy of their own founders, he was also demanding genuine inclusion in that legacy and recognition within the ambit of the noble words of the Declaration of Independence and the Constitution.[52] We can think of Douglass's approach as *Sankofa*-as-expanding: the notion of an appeal to a reinterpretation of the past that provides the basis for the inclusion of oneself in a constitutional order designed by and for others, and hence for the creation of a shared future together.[53]

By contrast, the historical reconstruction Schomburg's essay described[54]—and, we will see in the next Section, the sort of constitutional theory that Peggy Cooper Davis has contributed to modern scholarship—could be called *Sankofa*-as-remembering: a reinterpretation of a shared past that emphasizes the contributions of the neglected and forgotten. *Sankofa*-as-remembering superficially seems more congruent with the approach of Afrofuturist art, which, after all, focuses in part on historical Black achievement.[55]

I claim that the seeming disjuncture between the two forms of *Sankofa* is merely an illusion. Each sort of *Sankofa* shares the premise that there is a reading of the constitutional past available that is useful for building justice in the present and the future. More importantly, the boundaries between the reclaiming of the past of one's own people and the reclaiming of the past of one's oppressors should not be overstated because, in any kind of political or legal advocacy that posits and advocates a shared polity, it is incumbent on the advocate to tell a story of joint as opposed to divided or opposed political agency. That story of joint agency implies historical retellings that include both groups in pursuit of the same cause of justice that the contemporaneous reteller is advocating for.

For Douglass, the ambiguity surrounding the extent to which the Black past and Black agency can be integrated into the general/white American past and general/white American democratic agency is the whole point. His Fourth of July speech is a pinnacle of the American rhetorical tradition not merely because he pummels the United States for its enslaving hypocrisy but because the whole idea of the speech is that he simultaneously speaks as an American and an other,

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51. *See* Douglass, *supra* note 31, at 194.

52. *See id.*

53. For Rogers, this is also distinctively American, associated with a Jeffersonian idea that the American "people" is not a fixed thing but open to demands for inclusion. *See* ROGERS, *supra* note 48, at 27.

54. *See* Schomburg, *supra* note 24.

55. *See, e.g.*, Aaron X. Smith, *Introduction: Defining Our Future on Our Terms*, *in* AFROCENTRICITY IN AFROFUTURISM: TOWARD AFROCENTRIC FUTURISM 3, 7–8 (Aaron X. Smith ed., 2023) (describing a version of Afrofuturism as directed at recovering neglected past African achievements).

addressing his fellow citizens and the Americans who have excluded him in the same breath.[56]

He maintains this strategy in later speeches too. For example, in an 1882 speech on remembrance and "Decoration Day" (the holiday now known as Memorial Day), he exhorts his audience to recall the efforts of the loyalists represented in the third person,[57] as well as to recall the way that the enslavers corrupted the principles of the Declaration of Independence and the Constitution.[58] But Douglass also emphasizes the integration of the efforts of Black Americans into these efforts in a very Douglassian passage, which deploys the same rhetorical technique as in the Fourth of July speech, strategically using pronouns to represent himself and the slaves of the South as both separate from and part of the Union *demos*:

> On an occasion like this, it should not be forgotten that these emancipated people, who are often so harshly criticized were the only friends the loyal nation had in the South during the war.
>
> They were eyes to our blind, legs to our lame, guides to our wounded and escaping prisoners, and often supplied information to our generals, which prevented the slaughter of thousands. It should also not be forgotten that, when permitted to do so, they enrolled themselves as soldiers of the Republic, and did their duty like brave men. They did not suppress your rebellion, but they did help you to suppress it.[59]

In that passage, we can see both versions of *Sankofa* together—as Douglass claims for his own people an ennobled role in an ennobled history of the whole, while also making clear through his acknowledgment of their separateness that this role was contested and had to be actively claimed rather than presumed. This is precisely what one would expect of a thinker whose entire career was devoted to building a shared democracy.

B. THE GAP BETWEEN LEGAL TRUTH AND HISTORICAL TRUTH

I now defend constitutional *Sankofa* as not merely a political or a rhetorical strategy, but also a legal strategy suitable for use in constitutional theory. This Section contextualizes constitutional *Sankofa* in an account of the relationship between historical claims and legal claims.

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56. *See* Charles W. Mills, *Whose Fourth of July? Frederick Douglass and "Original Intent," in* FREDERICK DOUGLASS: A CRITICAL READER 100, 102–04 (Bill E. Lawson & Frank M. Kirkland eds., 1999) (explaining Douglass's rhetorical fluctuation between first-person and second-person American identity).

57. Frederick Douglass, We Must Not Abandon the Observance of Decoration Day: An Address Delivered in Rochester, New York, (May 30, 1882), *in* THE FREDERICK DOUGLASS PAPERS 38, 44–45 (John W. Blassingame & John R. McKivigan eds., 1992).

58. *Id.* at 46–47.

59. *Id.* at 51 (emphasis omitted).

Section I.B.1 will briefly sketch three relatively uncontroversial propositions about the relationship between legal and historical claims, which together will suggest that there can never be a way to unproblematically derive legal truth from history, even in circumstances where one's theory of law makes direct reference to enactments made in the past.

Section I.B.2 argues that, accordingly, there is more flexibility in permissible uses of the past for legal purposes than is typically assumed in current debates about constitutional law and history, and that the *Sankofa* approach, as exemplified by Douglass, is a permissible use of that flexibility. This Section develops its argument through a perhaps unusual case study: the great common lawyer Edward Coke's seventeenth century conversion of the Magna Carta from a charter of feudal privileges into the foundation of the rights of Englishmen. The use of Coke—who is, along with Blackstone, perhaps the key figure of America's common law inheritance from England[60]—is also meant to suggest that the *Sankofa* approach fits well within the existing common law tradition. Ultimately, the same argument that justifies Coke's transformation of the Magna Carta and modern lawyers' reliance on that transformation also justifies the efforts of Black liberation activists like Douglass to transform the Constitution.[61]

This Section is partial and tentative. Its objective is not to articulate a complete or final theory of the relationship between legal and historical claims—an enterprise that would take several books, not one small part of a law review article about a completely different idea. Rather, the objective is to suggest that an approach like Douglass's is sufficiently plausible to make it worth our time to explore and develop.

1. Three Propositions about Law and History

I begin by stating the three propositions that this Section will defend in summary form:

- First is the foundational proposition from moral philosophy that there is a gap between "is" and "ought," and that this entails that legal claims cannot simply be read from the face of historical claims;[62]

60. *See* Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 439–40 (2003) (describing Coke's influence on American legal culture).

61. This may also suggest—though I do not aim to defend such a view here—that constitutional *Sankofa* may be compatible with flavors of originalism that focus on original legal methods, such as that of William Baude and Stephen Sachs. *See generally* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019) (summarizing an approach to originalism that begins with legal methods endorsed at the founding). The basic idea of such an argument would be that the U.S. Constitution implicitly endorsed a legal background that included Coke's—and hence Douglass's—method of using the past.

62. *See generally* Daniel J. Singer, *Mind the Is-Ought Gap*, 112 J. PHIL. 193 (2015) (summarizing the conventional view of the is–ought gap).

- Second is that legal propositions also are constituted, at least in part, by what legal actors do (the basic proposition of legal positivism).[63] However, that positivist observation itself should trigger worries about the aforementioned is–ought gap, which is bridged by a variety of normative propositions connecting the behavior of legal actors and ought claims, such as, *inter alia*, claims about coordination, valid authority, and/or agreement—some of which involve reference to the past; and

- Third is that reference to the legal past is challenged by a substantial degree of indeterminacy or at least lack of discoverability. This is especially true about the kinds of claims about the past that are characteristically most relevant to legal claims, which typically involve the cognitions of groups, such as what the words in some legal instrument meant to some population or what some group of legislators intended to do.

To elaborate on these claims, first consider the is–ought gap. It is widely recognized that one cannot simply derive claims about what one should do, such as moral claims, from claims about mere empirical facts about the world.[64] Rather, there needs to be some kind of bridging claim that supplies the normative content to the empirical facts. Thus, we cannot simply assimilate legal–historical propositions—there has to be a bridge to connect the historian's "is" to the lawyer's "ought."[65]

We can interpret some arguments in legal theory as efforts to supply such a bridging claim. For example, McGinnis and Rappaport have defended originalism on the argument that supermajority decisions tend to be welfare-maximizing (as well as a moral endorsement of welfare maximization), such that we ought to follow legal rules enacted (historically speaking) by supermajorities.[66]

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63. Of course, not all legal theorists accept positivism. However, this Section is primarily designed to address objections by positivists to the importation of idealized interpretations of the past into legal claims. It seems that a non-positivist could simply accept the moral ideas underneath an idealized interpretation of the Constitution directly into the law without running it through debates about interpreting the past. Thus, critics of Douglass have sometimes just assumed that he was doing natural law theory rather than positivism (i.e., reasoning directly from moral ideals to legal claims without passing them through historical facts about what legal actors did). *See, e.g.*, Mills, *supra* note 56, at 119–20 (accusing Douglass of using natural law theory). As such, the defense of Douglass in this Section can safely assume a positivist theory of law.

64. *See, e.g.*, Singer, *supra* note 62, at 194.

65. For Solum, this normative principle operates at the point where the "communicative content" of legal text is translated into the "ought" of its legal text—he argues, I think aptly, that historical claims cannot bridge that is–ought gap. *See* Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1123 (2015). There is an extensive debate between originalists and historians about the layer of "interpretation" prior to the is–ought gap, where the constitutional interpreter is sorting out the meaning of the text. *See, e.g.*, Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 935–40 (2015) (disagreeing with Solum about how we interpret historical legal text). This Essay does not need to take a position on that debate, for what I, like Douglass and Coke, am concerned about is the ultimate legal import of the fact that there is a constitution out there that says some stuff. Accordingly, in this Essay, I use "interpretation" not in Solum's technical sense associated with linguistic meaning, but to more colloquially refer to the entire process of getting from text to legal conclusion.

66. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 2 (2013). I note, however, that the U.S. Constitution is unlikely to have such virtuous properties in view

Second, consider the role of historical claims in legal positivism, such as Hart's "practice theory," which identifies rules with the practices and attitudes of legal actors.[67] If the content of law is a function of what legal actors do, and we assume that our claims about the content of the law are meant to create obligations, then we have to supply a bridging claim between identifying particular legal acts and the ought propositions of legal obligation. In other words, we must be able to explain why our decision to identify these legal acts (and not others) from these actors (and not others) generates moral obligations.[68] Sometimes, those bridging claims involve historical facts.

For example, we might think that it is morally valuable to respect democratic decisions of the past (bridging claim), and hence have reason to incorporate claims about what past democratic lawmakers decided (practice of legal actors) into our identification of which social practices are law. Alternatively (or additionally), we might think that rule of law values require consistency in our interpretation of the law, and hence have reason to incorporate precedent-like claims about what past officials making legal decisions did into our present-day identification of which social practices are law. However, as the contrast between those two examples illustrates, the particular normative bridging claims that we endorse are going to determine which facts and interpretations about the past are legally meaningful.

Finally, on the difficulty of discovering the past: in democratic legal systems, the most plausible candidate for bridging claims between facts and normative propositions tends to be about groups of people, for example, that democratic majorities or legislatures have authority to make binding legal rules. Such claims implicate historical facts about group cognitions, such as what mass populations understood words to mean or what legislatures intended to do. But such facts are difficult or even impossible to discover in any conclusive way.

As Douglass explained in the 1860 speech, "The fact that Mr. Madison can be cited on both sides of this question is another evidence of the folly and absurdity of making the secret intentions of the framers the criterion by which the Constitution is to be construed."[69] Likewise, as every lawyer trying to interpret a statute knows, individual members of a group of people that has enacted some text will often have done so for very different reasons.[70] This is also part of why

of the familiar fact that the population from which its original ratifying supermajority was drawn was grotesquely unrepresentative of the many whom that population was vigorously oppressing at the time.

67. *See* H.L.A. HART, THE CONCEPT OF LAW 255 (2d ed. 1994).

68. Of course, we might also accept philosophical anarchism, that is, the claim that there is no such true ought claim. *See* George Klosko, *The Moral Obligation to Obey the Law*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 511, 522–25 (Andrei Marmor ed., 2012) (describing controversy about obligation to obey the law).

69. Douglass, *supra* note 28, at 386.

70. *See generally* Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269 (2019) (arguing that multimember bodies like legislatures lack the sort of communicative intentions that the practice of statutory interpretation is supposed to discover). Fallon's argument applies with vastly more force to the entire polities which supposedly exercise democratic agency over constitutions.

whenever originalists try to assert something definitive about the past as a source of authority for present-day constitutional interpretations, they are promptly eviscerated by historians: there's always countervailing evidence to any definitive "here's what they meant by X" statements.[71] Moreover, social choice theory suggests that the dream of a unified will of a multi-member body proceeding by a vote is inevitably futile.[72]

Bringing the three propositions together: claims about the past require normative bridges to connect them to the ought statements of legal morality, but those normative bridges tend to call for appeals to propositions about the past that range between extremely difficult to discover and outright indeterminate. What this tends to amount to, in actual practice, is that the claims about the past to which we appeal in the law tend to be constructed rather than discovered, and those acts of construction tend to be influenced by the normative ideas we hold.

For example, our canons of statutory interpretation include a variety of principles that serve less to draw evidence-based conclusions about what a legislature intended than to provide rules by which we might attribute intent to legislatures based on our *values*. One easy example is the presumption against extraterritoriality, which at various points has been justified by, among other things, the appropriate degree of respect that the United States ought to show other sovereigns.[73]

In the next Section, I will argue that this ineluctably normative character of the use of the past in the law provides the opening through which *Sankofa* may enter.

2. Law as Practical and Normative

Sir Edward Coke famously used the Magna Carta in the seventeenth century to justify parliamentary resistance to the absolutist tendencies of the Stuart

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71. *See, e.g.*, Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 740–47 (2013) (eviscerating Scalia's use of history in *District of Columbia v. Heller*, 554 U.S. 570 (2008)). For the overall problem with the Constitution, see *id.* at 752–53 ("The controversy over the meaning of freedom of the press in Pennsylvania supports the idea that there was no interpretive consensus on the most basic issues of constitutional interpretation in the Founding era."). As Cornell aptly suggests, the words in the Constitution meant different things to "different legal audiences," and "[d]eciding which, if any, of these different historically grounded interpretations ought to guide us when interpreting the Constitution today is not a question that history can answer," but rather involves "inescapably philosophical or political decisions." *Id.* at 755.

72. *See generally* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982) (describing mathematical reasons for being skeptical about the notion of collective will discoverable by voting).

73. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."). For further discussion of the presumption, see William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1591–95 (2020) (describing Supreme Court transition from justification of presumption by international comity to justification of it by legislative intent).

monarchs.[74] For example, Coke's (mis)readings of the Magna Carta contributed to parliamentary efforts to empower the writ of habeas corpus against arbitrary monarchical imprisonment, based on the idea that the Great Writ was the key enforcement mechanism of the Great Charter.[75] This Section makes use of Coke's example as a case study to defend the idea that normatively-constructed interpretations of the past in the law (or at least the Anglo-American tradition) are permissible; by defending Coke, it also defends Douglass (and thereby *Sankofa*).

In the long run, Coke's side won. The legal legacies of his interpretation of the Magna Carta, such as the Petition of Right and the Habeas Corpus Act of 1679, established some of the key foundations of contemporary British (and American) law.[76] However, even that fact contains some surprising controversy. To clarify the various standpoints from which one might make use of controversial claims about the past, I will first argue that modern lawyers are correct to follow Coke, including by attributing present-day rule of law ideas to the Magna Carta. I will then defend Coke himself.

a. In Defense of Modern Lawyers' Reliance on Normatively Inflected History

In 2015, medieval historian and then-Justice of the U.K. Supreme Court Jonathan Sumption gave an address to the Friends of the British Library entitled "Magna Carta: Then and Now" in which he contrasts "the lawyer's view" and "the historian's view" of the document.[77] For lawyers, the Magna Carta is "a major constitutional document, the foundation of the rule of law and the liberty of the subject in England."[78] Historians are "sceptical about the charter's constitutional significance."[79]

Sumption sides with the historians. Against the received view among English lawyers (attributed mainly to Coke), he becomes downright vituperative, describing the legal view as "the distortion of history to serve an essentially modern political agenda," "high-minded tosh," and "the worst kind of ahistorical Whiggism."[80] This sort of scorn is common among historians, who have for at least a century pushed back against lawyers' idealizing account of the Magna Carta.[81]

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74. For a summary of the relevant history, see PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 129–30, 134–36 (2016); Lord Sumption, Just., U.K. Sup. Ct., Magna Carta Then and Now: Address to the Friends of the British Library, 14–15 (Mar. 9, 2015) (transcript available at https://www.supremecourt.uk/docs/speech-150309.pdf [https://perma.cc/EAQ3-9MJR] (last visited May 14, 2023)).

75. *See* Justin J. Wert, *With a Little Help from a Friend: Habeas Corpus and the Magna Carta After Runnymede*, 43 PS 475, 476 (2010); *see also* Augusto Zimmermann, *Sir Edward Coke and the Sovereignty of the Law*, 17 MACQUARIE L.J. 127, 137–43 (2017) (detailing influence of Coke's transformation of the Magna Carta in English and American law).

76. Wert, *supra* note 75, at 476.

77. Sumption, *supra* note 74, at 1.

78. *Id.*

79. *Id.*

80. *Id.* at 4.

81. *See* Wert, *supra* note 75, at 475.

However, the lawyers' claims that the Magna Carta is "the foundation of the rule of law and the liberty of the subject in England," and that the charter has "constitutional significance"[82] read to me as *legal* propositions. They are true if it's appropriate for an English lawyer demanding, say, a fair trial on behalf of their client to cite the Magna Carta as the source of authority for that demand; they're false otherwise.

Thus, Sumption is mistaken to dismiss those claims as historically false. Historical facts about what happened in 1215, like what the barons intended to do when they forced the Charter on King John, do not directly bear on whether the Magna Carta has constitutional force in the English rule of law.[83]

For a positivist, if the legal officials in a jurisdiction consistently act as if document X is the legal source of right Y, then it is at least plausibly true as a legal matter that document X is the legal source of right Y.

Of course, to say that rules are constituted by social practices is not to say that *the sources of rules* are constructed by social practice. But propositions about legal rules typically also involve propositions about their sources of authority. To see this, imagine an English lawyer says that "you have a right to a fair trial under the Magna Carta," and that statement consistently persuades British officials to confer on criminal defendants various rights associated with fair trials. Further imagine that if that lawyer had instead appealed to, say, the U.S. Constitution, the Dissolution and Calling of Parliament Act 2022,[84] or precedent from Rumpole of the Bailey,[85] the argument would not have been persuasive, because those sources are irrelevant to the legal claim made, *notwithstanding* whether or not the underlying proposition that defendants have a right to a fair trial is true. That example suggests that identification of the authority for a legal rule is an essential part of the legal argument for applying that rule. In such a system, it seems at least highly plausible to suppose that whatever social facts give us the truth conditions for statements about legal rules also give us the truth conditions for statements about the authority for legal rules. For those reasons, we ought to adjudicate Sumption's dispute between historians and lawyers in favor of the lawyers.[86]

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82. *See* Sumption, *supra* note 74, at 1.

83. *See* C. H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 27–28 (1914) (explaining that even though the "traditional" lawyers' interpretation of the Magna Carta has been rejected by historians, "[s]ome centuries of decisions have thoroughly established this traditional interpretation as a matter of law, and have given it a legal validity entirely independent of its origin in 1215").

84. *See* Dissolution and Calling of Parliament Act 2022, c. 11 (U.K.) (repealing the Fixed-term Parliaments Act 2011, restoring prerogative power of the Monarch to dissolve Parliament).

85. Rumpole of the Bailey is a fictional television series. *See Rumpole of the Bailey*, IMDB, https://www.imdb.com/title/tt0078680/ [https://perma.cc/UJN4-5XL7] (last visited May 14, 2024).

86. To be fair, it is always possible to deny that legal officials have *consistently* asserted any version of the Magna Carta claim. Lord Sumption, for example, observes that the House of Lords had a recent opportunity to treat the Magna Carta like a binding rule of law document but failed to do so. *See* Sumption, *supra* note 74, at 16–17. Fair enough, but then the lawyers who utter the Magna Carta claim would just be mistaken about their own practices (and at any rate, this wouldn't impinge on the argument of this Essay).

b. In Defense of Coke's (and Douglass's) Historical Normativity

The foregoing, however, did not amount to a defense of Coke himself. There was a distinct moment when Coke introduced a historically questionable reading of the Magna Carta and the aims of its enactment. From the perspective of a contemporary of Coke, at that moment we still ought to question whether that reading was permissible.

Let us begin with the idea that what Coke was doing is similar to what Douglass was doing. Both Coke and Douglass had available to them authoritative legal texts from the past, which contained seemingly value-laden language susceptible to broadly egalitarian interpretations. And both Coke and Douglass choose to support those interpretations with normatively inflected appeals to the past, appeals which were clearly chosen in light of their ability to support morally valuable ends in the present. We can assume for the sake of argument that both Coke and Douglass acted against a substantial weight of historical evidence which suggested, at a minimum, that the rule of law for all was not predominant in the minds of the barons at Runnymede and freedom for the enslaved was not predominant in the minds of the generation that enacted the Constitution. Thus, both Coke and Douglass carried out a kind of potentially questionable legal entrepreneurship that hoped to have retroactive effect—changing the meaning of the Magna Carta or the Constitution in a way that would reflect across the whole legal timeline.[87]

Given the language of Chapter 39 of the Magna Carta, "No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land,"[88] Coke chose to tell a story about the constitutional values expressed by that document but reflecting, in the words of Moses Finley, "immemorial custom and usage."[89] Combining textual warrant and appeal to the past made a legal argument suitable for the parliamentary party to, for example, claim that Charles I was forbidden to imprison Englishmen for reasons of state. Coke as an activist influenced Coke's interpretations of the Magna Carta as a lawyer, and those interpretations were at least in part instrumental (or at least the object of motivated reasoning)—he gave the text interpretations suitable to the political use to which it was to be put.

But, as I suggested at the end of Section I.B.1, this is to be expected. Interpretations of things like what the barons who pointed swords at John

87. Consider as another signal example the implicit legal theory of the Nuremberg trials, which is that the Holocaust was always illegal under international law notwithstanding the seeming ex post facto character of that judgment, as well as the obvious fact that those who wrote and interpreted the law of Germany during the Nazi regime happened to think it was just fine. *See* Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L CRIM. JUST. 830, 834–37 (2006) (describing a critique of the ex post facto nature of the Nuremberg trials).

88. *1215 Magna Carta: Clause 39*, MAGNA CARTA PROJECT, https://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_39 [https://perma.cc/EX9G-X7P5] (last visited May 14, 2024).

89. *See* M.I. FINLEY, THE USE AND ABUSE OF HISTORY 40 (1975).

Lackland meant to do with the document they imposed on him are typically going to be at least partly constructive. And, other than in law review articles and law school classrooms, legal propositions—including their underlying claims about the past—are rarely uttered without some concrete impact in the world that the utterer is trying to achieve. So it should be unsurprising that the use of the past by a lawyer is typically influenced by the values that the lawyer in question is trying to pursue. And, I claim, this is perfectly fine: the normative goals of legal claims about the past in law may, indeed *should*, exercise some influence on ways we construct the past for legal purposes.[90]

Because (for the reasons given in Section I.B.1) we already use normative propositions as a way of selecting which historical facts are relevant to the legal "ought," the most plausible candidate for an objection to the view I just stated (lawyers may interpret the past in light of the values we're trying to pursue) is itself rooted in legal values, but in such a way that the objection attempts to represent itself as more faithful to the underlying history. We can call this the *authority of history objection*.

The authority of history objection observes that legal enactments are supposed to be authoritative acts *of their enactors*. If we have moral reason in the present to respect enactments because we have reason to respect enactors (for example, because of their democratic character), figuring out what we ought to do might require what we might call *properly historical* inquiry about the legislative will of those enactors. I use "properly historical" here to stand for something closer to what Sumption would have us do with the Magna Carta, as opposed to what he thinks lawyers do with the Magna Carta, that is, inquiring about the cognitions of the people of 1215 without reference to our present-day values and goals.

But reflection on Douglass shows that the authority of history objection fails. The objection raises three questions that Douglass would rightly insist we defend on their own terms.

The first is the legitimate authority of enactors: in most actual societies (and certainly in the United States) it's far from obvious that the original enactors of long-ago law deserve respect on the grounds of their democratic legitimacy or anything like it (because of, you know, all the enslaving, genocide of Indigenous peoples, coverture, etc.).

The second is whether properly historical interpretation is even possible. Recall the point Douglass made about the possibility of citing Madison on both sides.[91] It may simply be impossible to confidently come to an interpretation of the past on questions like how groups of people understood their world or their

90. This argument was inspired by feminist philosopher Sally Haslanger's influential case for the goal-oriented construction of race and gender concepts, in which she points out that often our purpose for invoking notions of race or gender is to do something with them—to use them to promote justice—and that the concepts we select ought to be suitable for that purpose. *See* Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them to Be?*, 34 NOÛS 31, 36 (2000). It seems to me that the same goes for interpretations of historical text in law.

91. *See* Douglass, *supra* note 28, at 386.

words or what they meant to do—without assistance from external normative considerations.

This leads into the third question—whether the historical will of some past enactor, even a legitimate one, is sufficient to establish the moral ought of legal obedience. It may be that the enactor was evil and willed law which is morally impermissible to follow. From Douglass's standpoint, if historical inquiry plus some propositions about democratic authority had the power to lead inexorably to the conclusion that the Constitution was an authoritative enactment authorizing slavery, then so much the worse for democratic authority; he'd have to have remained a Garrisonian, for no constitution authorizing slavery could be worthy of obedience. But, if both evil and non-evil interpretations of the constitutional past were possible, why should Douglass have been obliged to select the evil one?

Thus, Moses observes that Douglass and no less a constitutional enslaver than Roger Taney displayed similar methods of reading the Constitution—but that they could reach opposite conclusions because they selected different evidence from history.[92] Given that the interpretation of constitutional text has a vast and internally-conflictual history to draw from, we must, in essence, choose a side—and our criteria for doing so cannot disregard what we're trying to achieve.[93]

This is constitutional *Sankofa*. It brings together the practices of lawyers in offering normative interpretations of the past with the practices of Black liberation activists reconstructing American history. As Rogers puts it, "the interventions of African Americans are less of a recovery than a reconstruction. Gathering the symbols of their present and America's past, they deploy them and speak through them, but always to authorize something that never truly existed."[94] This is essentially the description that legal historians give of Coke—except, of course, that Rogers writes to praise his subjects while the legal historians write to condemn theirs.[95]

The foregoing Part has amounted to the identification of constitutional *Sankofa* in Douglass's argument for the incompatibility of the Constitution with slavery, a

92. Moses, *supra* note 44, at 76.

93. For this reason, Mills's reading of Douglass is uncharitable. Mills suggests that Douglass thought (a) that the Framers believed in natural law, and hence, (b) that they must have been against slavery because slavery violated natural law. *See* Mills, *supra* note 56, at 119–21. This is obviously implausible, but, *contra* Mills, the argument thus far in this Essay suggests that we can instead read Douglass more charitably and suppose that he saw that what the Framers did could be permissibly interpreted in an abolitionist manner regardless of what was actually going on in their wicked little heads.

94. ROGERS, *supra* note 48, at 6.

95. To briefly address another objection: this is not to suggest that such strategies of constitutional interpretation are free from consequences. It's not a coincidence that both Coke's and Douglass's victories required civil war. As Mark Graber reminds us, when a constitutional order embeds institutions reflecting and protecting the power of those who benefit from its unjust provisions—like slaveholders—practical constitutional actors need to consider the political (that is, violent) risks of their interpretive strategies. *See* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 3–8 (2006). But this is just a tactical consideration for activists; it doesn't undermine the argument of this Essay that such activists may permissibly read the Constitution in a *Sankofa* way, if doing so is consistent with their overall theory of change.

defense of that practice as a mode of legal interpretation, and an association between that practice and broader legacies of Black political thought. The next Part will develop a concrete example in the form of a *Sankofa* reading of Peggy Cooper Davis's scholarship about the Reconstruction Amendments and family law.

II. WHEN THE BLACK MAN RULED THIS LAND?

In one of Sun Ra's songs, June Tyson chants: "When the Black man ruled this land, Pharaoh was sitting on his throne."[96] A quintessential Afrofuturist homage to a history of Black greatness, references to Egypt were characteristic of Sun Ra.[97] Yet taken literally, Ra's chant is also somewhat anachronistic, even paradoxical—if the "this land" in question is the United States, Pharaoh obviously never ruled it, and it wasn't ruled by Black men during Pharaonic times. If "this land" is Egypt, its relevance is unclear for the country of Sun Ra's birth and life, and there were many more recent examples of Black rulership across the world to which he could have referred.

Obviously, we shouldn't take it literally. Interpreted in a more literary fashion, the chant draws attention to the distant other-ness of Black rulership and provokes reflection on the notion of Black rulership of *this* actual land. The latter calls upon us to recall that there was at least one period where Black Americans exercised enough political power in the United States to be fairly characterized as "ruling." During Reconstruction, the freed briefly, and for the first time, exercised political power in something like a fair share relative to their proportion of the population, with the result that numerous Black officeholders were elected, the Fourteenth Amendment was ratified, and serious, albeit abortive, efforts were made to truly integrate the freed into the polity.[98]

From the constitutional perspective, this reminder invites us to take account of the authorial agency of Black Americans in Reconstruction. If constitutional law is justifiable as a product of democracy, it must go through some account of the political agency of the people who live under the government it structures. This is, I think, the moral intuition behind the theory of originalism: if the Constitution is to count as an exercise of popular sovereignty, then we have to understand it with reference to the likely goals, and hence cognitive universe, of the enacting sovereign.[99] But all too often, constitutional law proceeds with the assumption

96. SUN RA & HIS BLUE UNIVERSE ARKESTRA, *When the Black Man Ruled This Land*, *on* UNIVERSE IN BLUE (Enterplanetary Koncepts BMI 1972).

97. *See generally* Marcel Swiboda, *Re Interpretations: Sun Ra's Egyptian Inscriptions*, 13 PARALLAX 93 (2007) (describing Sun Ra's use of Egyptian themes in his music).

98. *See* W.E.B. Du Bois, *Reconstruction and its Benefits*, 15 AM. HIST. REV. 781, 788, 795–99 (1910) (describing Black suffrage, its role in the ratification of the Fourteenth Amendment, and the vast impact it, along with Black officeholders, had during the Reconstruction period).

99. This is not meant as an endorsement of originalism (or any version thereof). Originalism need not be justified by democratic authorship, and even if such democratic authorship is necessary to justify a constitution, it need not be sufficient. Moreover, there can be other ways to give a theory of the Constitution as a product of democratic authorship without focusing on the founding generation. *See*

that the relevant cognitive universe through which the Constitution is to be interpreted is parochial and white.[100] In this context, "When the Black man ruled this land" calls upon us to imagine Black people as constitutional authors and to interpret our law from a Blacker cognitive universe. For the most obvious example, it begins to seem somewhat ridiculous to imagine pro-Black affirmative action as a form of "race discrimination" warranting strict scrutiny under the Fourteenth Amendment when at the very same time as Black people were ratifying that Amendment, they were also demanding land reform (the famous Forty Acres) to set their newly won citizenship on a firm economic foundation.[101]

A. NOW WITH 60% LESS PATRIARCHY!

This Essay, however, focuses on a different dimension of America's racist neglect of Black constitutional agency. In 2023, the gendered focus of Sun Ra's song is jarring—it is "the Black *man*" whose rule is remembered.[102] The appeal to traditional notions of masculine rulership erases the political agency of women of all races. Reva Siegel has observed this neglect in constitutional interpretation, which has frequently ignored women's agency in constitution-making.[103] Let's not replace racist constitutionalism with misogynist constitutionalism.

The landmark scholarship of Peggy Cooper Davis addresses both problems. Davis has unearthed the constitutional relevance of traditionally feminized concerns, such as reproduction and the family, through the lens of the enslaved and the formerly enslaved.[104] In Davis's work, the experience and self-assertion of enslaved women come to the forefront and become a critical piece of our constitutional memory (to use Siegel's term).

Davis's scholarship became particularly relevant in 2022, when the Supreme Court, in overturning the half-century-old constitutional right to an abortion, boldly declared that abortion rights were "not deeply rooted in the Nation's history and traditions."[105] That declaration seems to have been made in complete ignorance or disregard of Davis's scholarship which revealed that the assertion by women of control of their own bodies and their own reproductive capacities was salient in the period preceding the ratification of the Fourteenth Amendment, the constitutional source of the late and lamented right to abortion in *Roe*.[106] Of particular importance, considering the further existence of Thirteenth Amendment

generally Gowder, *supra* note 28, at 351 (giving a trans-temporal account of constitutional democratic legitimacy).

100. *See* PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 12–14 (2021).

101. *Id.* at 65–66.

102. *See* SUN RA & HIS BLUE UNIVERSE ARKESTRA, *supra* note 96 (emphasis added).

103. *See* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 19 (2022).

104. *See* Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1348–49 (1994); *see also* DAVIS, *supra* note 21; Davis, *supra* note 21, at 310.

105. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 250 (2022).

106. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215.

arguments for the abortion right,[107] is evidence that enslaved women procured abortions as a way of resisting enslavers' control of (and profit from) their reproductive capacities and the creation of enslaved children.[108] By focusing on this history in a *Sankofa* mode, we can see forced childbearing as part of slavery and hence part of what the Thirteenth Amendment abolished.

Accordingly, I offer Davis's "Neglected Stories" framework as a quintessential application of *Sankofa* to constitutional law. In the 1993 article that began Davis's "Neglected Stories" framework, she defends the constitutional abortion right with a straightforward three-part argument:

1. History and tradition are relevant in determining the meaning of constitutional concepts like due process;[109]
2. Previous accounts of the abortion right have been based in a narrow perspective of the nation's history and traditions, one which undersells the principles like family autonomy which support that right;[110] and
3. Attention to the experiences of the enslaved reveals another side to America's history and traditions, one that shows the Fourteenth Amendment as part of a constitutional effort to secure the rights to family autonomy which had been denied to the enslaved.[111]

Her account of the struggle for family autonomy that led up to the Fourteenth Amendment describes, *inter alia*, how marriage was forbidden to the enslaved,[112] how abolitionists (including Black abolitionists) cited the destruction of marital relationships among the enslaved as one of the key evils of slavery,[113] and how the freed immediately claimed the right to marry.[114] Once we recall that Black Americans were among the authors of the Reconstruction Amendments,[115] the natural terminus of Davis's reasoning is clear: rights of familial autonomy were part of the constitutional change the freed built.

B. OF AFRO-FEMINIST CYBORGS

The right to abortion also implicates the control of one's own body, which is a persistent theme both of slavery and Afrofuturism. *The Last Angel of History*

107. *See generally* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (giving Thirteenth Amendment defense of right to abortion).
108. Davis, *supra* note 21, at 374–75.
109. *See id.* at 303.
110. *See id.* at 303–05.
111. *See id.* at 307–09.
112. *Id.* at 314–18.
113. *Id.* at 318–20.
114. *Id.* at 321–22.
115. *See* GOWDER, *supra* note 100, at 69–72 (arguing that Black Americans had an authorial role in the Reconstruction Amendments through contributing to abolition, victory in the Civil War, ratification of the Fourteenth Amendment, and the demands that shaped the Amendments' content).

ends with Kodwo Eshun explaining Afrofuturism as a continuation and reclamation of the Black body as a machine:

> In the 18th century, slaves like Phillis Wheatley read poetry to prove that they were human, to prove that they weren't furniture, to prove that they weren't robots, to prove that they weren't animals. In that sense, a certain idea of cybernetics has already been applied to Black subjects ever since the 18th century. I think what we get at the end of the 20th century in music technology is a point where producers kind of willingly take on the role of the cyborg—willingly take on that man-machine interface.[116]

The Afrofuturist cyborg thus represents a kind of *Sankofa*, a merging of the physical past with the technological future. By reclaiming the body as a machine, cyborg Afrofuturism subverts and takes control of the slave binary, under which the enslaved was sometimes a tool, sometimes a person, sometimes both.[117]

Unsurprisingly, since women have also had to fight for control of their own bodies (and evidently still do), the cyborg also has a rich tradition in feminist theory, with the key literature being philosopher Donna Haraway's "Cyborg Manifesto."[118] Oliveira-Monte connects the Afrofuturist figure of the cyborg to Haraway's cyborg, which challenges the (white and masculinized) notion of a pure separation between the animal and the technological, and represents the embrace of "permanently partial identities."[119] In Haraway's words, in the cyborg, "[n]ature and culture are reworked; the one can no longer be the resource for appropriation or incorporation by the other."[120]

To adopt the role of the cyborg is also to claim autonomy. A cyborg uses the powers of both the natural and the technological within and upon themselves, controlling their own body in a literal sense that defies the control-by-others of bodies under slavery and patriarchy. Thus, Haraway says that feminist cyborgs "refuse the ideological resources of victimization so as to have a real life" and "are actively rewriting the texts of their bodies and societies."[121]

Some of the most prominent Afrofuturist work by women reimagines Black bodily control. Perhaps most famous is the work of Octavia Butler. The first two novels of her *Patternist* series revolve around the genetic struggle and collaboration between two Africans—a character named Doro, presented more-or-less as male, with a plan to create superhumans through selective breeding, and a woman named Anyanwu, a shape-shifter with the genetic material to provide the

116. THE LAST ANGEL OF HISTORY, *supra* note 14, at 39.

117. *See, e.g.*, THE FEDERALIST NO. 54 (James Madison) (acknowledging ambiguous status of the enslaved as both property and person).

118. DONNA J. HARAWAY, SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 149–81 (1991).

119. *See id.* at 154; Oliveira-Monte, *supra* note 7, at 38. Douglass, of course, knew all about permanently partial identities. *See* Mills, *supra* note 56, at 101 (describing Douglass's use of rhetorical ambiguity between categories of citizen and non-citizen).

120. HARAWAY, *supra* note 118, at 151.

121. *Id.* at 177.

foundation for Doro's goals, although also a victim of Doro's (thoroughly masculine) intrusions on her bodily autonomy.[122] Ultimately, in the second book, Doro is killed by one of the superhumans he created—a woman named Mary.[123] No wonder that Haraway cited Butler as a key influence for the feminist cyborg.[124] Another vivid Afrofuturist example of the cyborg as an assertion of self-ownership is Janelle Monáe's alter ego Cindi Mayweather, "a time travelling, human-shaped android from the year 2719."[125] Media theorist Nathalie Aghoro reads Monáe's invocation of the cyborg as a manifestation of "the will to counter normative determination,"[126] and as a form of "empowerment through practices of queering and performances of cyber blackness."[127]

I propose to read Davis's reconstruction of the historical memory of enslaved women seizing control of their own bodies as a cyborg project. *Contra* Justice Alito's blinkered view of the history of abortion,[128] Davis identifies that bodily and family autonomy are genuine Fourteenth Amendment values.[129] By beginning with the agency and self-determination of Black women, Davis empowers us to imagine a constitutional future in which that control is reclaimed for all women.[130]

Davis's historical reclaiming is, on the argument of Part I of this Essay, suitable for direct importation into present-day constitutional doctrine as *Sankofa*. That is, from among the available historical evidence, we can choose to emphasize the evidence that Davis identifies; from the available interpretations of what slavery meant as a constitutional concept, we can choose to emphasize those of the enslaved women who fought to control their own bodies and their own reproductive capacities. We can make those choices in a clear-eyed fashion, recognizing that other choices are possible, but that the project of affirming this particular lens on the past can provide a foundation for asserting, in both the legal and the political spheres, that a version of the Fourteenth and Thirteenth Amendments that recognizes a tradition of reproductive and bodily autonomy is just as sound as Alito's version.[131]

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122. *See* OCTAVIA E. BUTLER, WILD SEED (1998) [hereinafter BUTLER, WILD SEED]; OCTAVIA E. BUTLER, MIND OF MY MIND (1977) [hereinafter BUTLER, MIND OF MY MIND]. Close engagements with issues of sexual, reproductive, and genetic autonomy are characteristic of much of Butler's work. For a discussion of her novel *Dawn* along similar lines, see generally Justin Louis Mann, *Pessimistic Futurism: Survival and Reproduction in Octavia Butler's* Dawn, 19 FEMINIST THEORY 61 (2018).

123. *See* BUTLER, MIND OF MY MIND, *supra* note 122, at 235–37.

124. HARAWAY, *supra* note 118, at 173.

125. Nathalie Aghoro, *Agency in the Afrofuturist Ontologies of Erykah Badu and Janelle Monáe*, 2 OPEN CULTURAL STUD. 330, 337 (2018).

126. *Id*. at 334.

127. *Id*. at 339.

128. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 223–302 (2022).

129. *See* Davis, *supra* note 104, at 1349.

130. Davis's work also helps us reject an alternative right-wing narrative about race and abortion which associates the American movement for abortion rights with eugenicist impulses by whites seeking to reduce Black reproduction. *See* Box v. Planned Parenthood, 139 S. Ct. 1780, 1783–91 (2019) (Thomas, J., concurring) (connecting modern abortion rights movement to eugenics).

131. *Dobbs*, 597 U.S. at 250.

CONCLUSION: ON THE REAL-LIFE DATA THIEVES

The reader might justly wonder: What does the Afrofuturist framework add to constitutional theory? Why not stick with Davis's framework of neglect, or Siegel's framework of memory? This Essay recognizes the value of both of those frameworks, but the Afrofuturist lens adds a focus on *agency* in several respects.

First, Afrofuturism recognizes the future as a thing to be consciously built—by the oppressed—and the past as a thing to be actively engaged with (recall the "go back and fetch it" translation of *Sankofa*).[132] As such, it meshes nicely with the approach to legal history that I have identified with Douglass and Coke, which emphasizes the active use and interpretation of the past rather than the passive reception of it.[133]

Second, Afrofuturism emphasizes Black agency from the past. Examples discussed in this Essay include Sun Ra's *When the Black Man Ruled This Land*,[134] the secret Black technology in *The Last Angel of History*,[135] and Doro and Anyanwu shaping the genetic heritage of humanity in Butler's *Patternist* series.[136] This focus on Black agency is well-suited to help mitigate the most intractable problem of American constitutional theory: namely the threat posed to its democratic authority by the exclusion of the enslaved, Native Americans, and women from those who were given a formal say in its ratification. A *Sankofa* approach gives us a way to democratically re-read the Constitution by reconstructing the authorial agency of the oppressed.

Constitutional agency from the past demarcates the difference between political and legal versions of *Sankofa*. Characterizing the political valence of Black appeals to American history, ideals, and institutions, Rogers suggests that they operate as "rhetorical devices" within "a discursive field" meant to "transform[] the reach of . . . terms" like "democracy, equality, [and] freedom."[137] This is powerful, but it's ultimately just an appeal to the moral values of whites—to the claim that they should read the appeals to "liberty" and "the people" in their constitutional documents to include Black people. But when we transpose those strategies to constitutional law and combine them with an assertion of agency, they become claims to *legal authority*. Constitutional *Sankofa* generates the claim that Black people have participated in the exercise of authority which wrote words like "liberty" into our law, and hence that a method of legal interpretation that aims to effectuate the will of an authoritative lawgiver has to take into account Black aims, experiences, and interests.

Third, the science-fictional figure of the cyborg is important to the Black constitutional experience because it expresses the individual-level demand for

132. Porter, *supra* note 8, at 261.

133. *See* DOUGLASS, *supra* note 28; Wert, *supra* note 75.

134. SUN RA & HIS BLUE UNIVERSE ARKESTRA, *supra* note 96.

135. THE LAST ANGEL OF HISTORY, *supra* note 14.

136. *See generally* BUTLER, WILD SEED, *supra* note 122; BUTLER, MIND OF MY MIND, *supra* note 122.

137. ROGERS, *supra* note 48, at 35–36.

agency over the self which has been so critical in American freedom movements. At the same time as enslaved women were asserting control over their own bodies, Douglass was arguing that the representation of the enslaved body as a mere machine and not a human could not be sustained under the Constitution.[138]

For the Afrofuturist constitutional theorist, the question becomes: What knowledge, what unplumbed experience for the future, can even the cruel experience of being enslaved, of being mechanized, teach? The Black American is a constitutional cyborg, with a place in society forever framed by the experience of being treated as a tool for the ends of another. The understanding conferred by that experience, of what it takes to *not* be a tool, to build a society in which nobody is a tool—a society in which the cyborgs have rights too—must be integrated into our law.

As a closing case study, I offer the experience of Henrietta Lacks as the kind of negative of the Afrofuturist approach in this Essay. The Lacks case is quite well-known; a very brief summary is that Ms. Lacks was a Black victim of cervical cancer whose cells were the basis for the "immortal" cell line, known as HeLa, and used in biological research for decades.[139] She was not told of this use of her cells, and her family did not learn of it until decades later—she was a real-life victim of a (genetic) data thief.[140] In 2023, Ms. Lacks's descendants settled a lawsuit with biotech company Thermo Fisher over the misappropriation of her cells.[141]

Ms. Lacks's race made her vulnerable to appropriation—her cells ended up in the hands of researchers when she sought treatment at Johns Hopkins, the "only major hospital" in the area that would treat Black patients.[142]

There are several ways to characterize the wrong inflicted on Lacks. She was arguably deprived of control over her own biological information (albeit not information she was born with), as it was genetic (i.e., informational, encoded in the chromosomes) changes associated with HPV and then cancer that made her cells so useful to researchers.[143] She was arguably deprived of control over her own body in the form of her cells. Her descendants were arguably deprived of control over her remains, a description which also invokes the rights of family

138. Douglass, *supra* note 28, at 387 ("If there are two ideas more distinct in their character and essence than another, those ideas are 'persons' and 'property,' 'men' and 'things.' Now, when it is proposed to transform persons into 'property' and men into beasts of burden, I demand that the law that contemplates such a purpose shall be expressed with irresistible clearness.").

139. REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS 1–4 (2011). For a slightly superfluous bit of Afrofuturist flavor, Ms. Lacks might even claim to be the first person in space: her cells made it into "the second satellite ever in orbit" in 1960. *Id*. at 137.

140. *See id*. at 33, 169, 179–81.

141. Lea Skene & Sarah Brumfield, *Henrietta Lacks' Family Settles Lawsuit with a Biotech Company That Used Her Cells Without Consent*, AP (Aug. 1, 2023, 4:55 PM), https://apnews.com/article/henrietta-lacks-hela-cells-thermo-fisher-scientific-bfba4a6c10396efa34c9b79a544f0729 [https://perma.cc/LA6K-MVHN]; Amanda Holpuch, *Family of Henrietta Lacks Settles with Biotech Company That Used Her Cells*, N.Y. TIMES (Aug. 1, 2023), https://www.nytimes.com/2023/08/01/science/henrietta-lacks-cells-lawsuit-settlement.html.

142. SKLOOT, *supra* note 139, at 15.

143. *See* I.N. Lyapun, B.G. Andryukov & M.P. Bynina, *HeLa Cell Culture: Immortal Heritage of Henrietta Lacks*, 34 MOLECULAR GENETICS, MICROBIOLOGY & VIROLOGY 195, 196–97 (2019).

and of dignified treatment of remains. The last of those is congruent with other controversies over the abuse of Native American remains, which has been a persistent manifestation of Native genocide in the United States.[144] More distantly, the conjunction of control of body, remains, and information also bears some affinity to longstanding claims about the control of cultural knowledge and protection against appropriation and mockery characteristic not just of Black Americans, but also of Native Americans and other oppressed groups.[145]

The lawsuit Lacks's descendants filed against Thermo Fisher reflects the multi-faceted nature of the wrong.[146] Their complaint alleges that the defendant "literally sells Ms. Lacks' cellular material,"[147] and her "living tissue."[148] It alleges the misappropriation of "genetic material,"[149] and the disrespectful treatment of "a loved one's body."[150] It characterizes the sale of the cell line as a violation of Ms. Lacks's interest in personal informational privacy.[151] The complaint further identifies the vulnerability of Ms. Lacks to the misappropriation of her cells due to race discrimination by hospitals at the time,[152] and implies that the hospital targeted Black patients for that misappropriation.[153]

An amicus brief in the case identified that the misappropriation of the bodies of nonconsenting Black persons for the purposes of medical research in the United States could be traced back to slavery.[154] Gender, as well as race, is implicated in

144. *See generally* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992) (describing the context of federal legislation to rectify some abuses of Native American remains).

145. *See generally* Dianne Lalonde, *Does Cultural Appropriation Cause Harm?*, 9 POL. GRPS. & IDENTITIES 329 (2021) (giving an account of "the specific harms that cultural appropriation may result in: nonrecognition, misrecognition, and exploitation"). Here, I must acknowledge a certain degree of performative tension: there is a longstanding controversy about the relatively privileged diasporic Black appropriation of cultural concepts and artifacts from non-diasporic African communities. *See generally* Janell Hobson, *Between Diasporic Consciousness and Cultural Appropriation*, AFR. AM. INTELL. HIST. SOC'Y (Oct. 3, 2015), https://www.aaihs.org/between-diasporic-consciousness-and-cultural-appropriation/ [https://perma.cc/2S9F-Y27U] (describing such controversy). I acknowledge that objections might be offered not only against Afrofuturist artists from the Global North, but also against this Essay's use of *Sankofa* itself. By way of tentative self-defense, I note that the normative status of such use is, in my view, ultimately debatable in view of the distinctive moral standing of diasporic communities to claim access to lost (and perhaps even untraceable) homelands.

146. *See* Civ. Complaint & Request for Jury Trial at 2–5, Est. of Henrietta Lacks v. Thermo Fisher Sci. Inc., No. 21-cv-02524 (D. Md. Oct. 4, 2021).

147. *Id.* ¶ 10.

148. *Id.* ¶ 12.

149. *Id.* ¶ 10.

150. *Id.* ¶ 12.

151. *See id.* ¶ 13.

152. *Id.* ¶¶ 2–3, 5.

153. *See id.* ¶ 26. Johns Hopkins denies this implication, claiming that the doctor in question collected cells "from all patients—regardless of their race or socioeconomic status." *The Legacy of Henrietta Lacks*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/henriettalacks/ [https://perma.cc/SYP3-9T3R] (last visited May 14, 2024).

154. Amici Curiae Brief of the Lawyers' Committee for Civil Rights Under Law, the National Health Law Program, and the National Women's Law Center in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss at 5, Est. of Lacks v. Thermo Fisher Sci. Inc., No. 21-cv-02524 (D. Md. Feb. 22, 2022) (citing Ayah Nuriddin, Graham Mooney & Alexandre I R White, *Reckoning with*

this history: one of the sources on which the amicus brief relies notes that "James Marion Sims, widely held as the founder of US gynaecology, came to many of his discoveries in the 19th century by experimenting on enslaved women."[155]

In the context of Davis's scholarship, this connection between medical research and the legacy of slavery invites us to ask whether freedom from medical experimentation and misappropriation might also fit into the *Neglected Stories* framework. More historical research is needed to substantiate the idea, but to the extent that the nonconsensual use of one's body in medical research was a characteristic evil of slavery against which abolitionists fought,[156] that too could be taken into account in interpreting the Thirteenth and Fourteenth Amendments.

I thus conclude by raising the possibility of bringing together—somewhat allusively, even promiscuously, I confess—Davis's insights, the case of Henrietta Lacks in its historical context, and the assertion of reproductive and genetic self-control that runs through works like Octavia Butler's novels. These sources can perhaps take us much of the way to a more full-fledged cyborg constitutionalism, rooted in the will and authority of a Black woman who determines that if anyone will control her reproductive capacity and her genetic heritage, it will be herself alone. Such a vision ought to inspire us to ask the question: What if knowledge about the self, the embodiment of information in one's body, and the rights of one's family and community to that knowledge as well as to one's body itself (insofar as one wills it) could come together into a constitutional right that could set the use of the human body and human information on a more equal, inclusive, and just basis?

Such a right could resonate well beyond the cases of reproductive or even simple physical autonomy. Information about the body, including, for example, the body's location in space and proximity to other bodies, is instrumental in other wrongs inflicted on Black Americans in the present. For example, Sarah Brayne describes extensive location-based big data surveillance by Los Angeles

Histories of Medical Racism and Violence in the USA, 396 LANCET 949, 949 (2020)); *see* Stephen C. Kenny, *The Development of Medical Museums in the Antebellum American South: Slave Bodies in Networks of Anatomical Exchange*, 87 BULL. HIST. MED. 32, 34–36 (2013) (describing the use of enslaved Black bodies for medical research through "medical museums" in the antebellum period); Todd L. Savitt, *The Use of Blacks for Medical Experimentation and Demonstration in the Old South*, 48 J.S. HIST. 331, 331 (1982) (describing uses of Black bodies in antebellum southern medical research).

155. Nuriddin et al., *supra* note 154, at 949; *see also* Durrenda Ojanuga, *The Medical Ethics of the 'Father of Gynaecology', Dr J Marion Sims*, 19 J. MED. ETHICS 28, 29–30 (1993) (describing Sims's efforts to find a surgical cure for vaginal fistula by conducting torturous experiments on the enslaved).

156. Todd L. Savitt cites one example from abolitionist literature: Theodore Dwight Weld's *American Slavery as It Is*. Savitt, *supra* note 154, at 341 (citing THEODORE DWIGHT WELD, AMERICAN SLAVERY AS IT IS: TESTIMONY OF A THOUSAND WITNESSES 170 (1839)). Examination of the source on which Savitt relies reveals that the (white) abolitionist author reprinted several advertisements from the South Carolina Medical College, which were interpreted to reveal that the college marketed itself to students based on its access to Black bodies both living and dead for involuntary study. *See* WELD, *supra*, at 169–71. This in turn was offered as evidence both for the narrow perception of Black bodies as property rather than people and for the wickedness and cruelty of enslavers. *See id.* at 171.

police.[157] As Brayne points out, "individuals living in low-income, minority areas" are more vulnerable to these kinds of surveillance.[158] In other words, the surveillance of Black and Brown bodies is linked to ongoing unjust abuses in policing. If we read the concerns of Black Americans past and present into the conjunction of our Fourteenth and Fourth Amendment law, we might begin to imagine a constitutional right to the control of information about oneself suitable for addressing such surveillance.

Consider also a parallel case from the commercial context: the well-known problem of machine learning algorithms made predominantly by non-Black men disproportionately misidentifying Black people, especially Black women.[159] Might the Afrofuturist approach encourage us to imagine a constitutionally rooted property right to own one's own body and information, and from there to reimagine what even those commercial tools would look like in a world where this right to control was reflected in the information economy—a kind of Menlo Park Wakanda[160] in which data are used for, not against, communities of color?

It might seem unusual to start with abortion and end in biased data science. But the *Sankofa* principle can identify the fundamental ideals and experiences underneath the rights claims in each context—and can aid us in envisioning a future of genuine autonomy and justice.

157. Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOCIO. REV. 977, 990–94 (2017).

158. *Id.* at 997; *see also* Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson & April Pattavina, *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 552–53 (2016) (describing finding of racial disparity in study of police surveillance in Boston).

159. *See* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, PROC. MACH. LEARNING RSCH., 2018, at 1, 1.

160. I said what I said.