NINTH ANNUAL SALMON P. CHASE LECTURE

"The Pound of Flesh, but Not One Drop of Blood": Frederick Douglass's Antislavery Constitutionalism

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INTRODUCTION

When Frederick Douglass became an abolitionist lecturer in 1841, he joined a movement that had grown radical and militant. "Let us glory in the name of revolutionists," declared the flagship American Anti-Slavery Society, led by William Lloyd Garrison, in an 1844 statement.[1]

This was a departure from the sentiment prevalent among most of the prominent founders, who opposed slavery in principle but refrained from demanding a general abolition. Their patience derived in part from their commitment to constitutional federalism, which located property rights and labor relations as domestic concerns of the states, and in part from a hopeful conviction that slavery in America was a dying institution. "Slavery in time will not be a speck in our Country," Connecticut delegate Oliver Ellsworth declared at the Philadelphia convention, in support of a temporary permission for the importation of slaves.[2]

Substantial evidence supported that expectation in the year the Constitution went into operation, but thirty years later, after the invention of the cotton gin in 1793 revolutionized the plantation economy, things looked very different. Between 1790–1820, the population of people enslaved in the U.S. more than doubled, from approximately 700,000 to over 1.5 million. The number of slaveholding states—those that had enacted no measure for immediate or gradual abolition—grew from eight (including New York and New Jersey, which enacted gradual abolition measures in 1799 and 1804) to eleven. Even more tellingly, in the 1819–1820 controversy over Missouri statehood, southern congressmen belligerently affirmed their determination to expand the number of slaveholding states. When New York Representative James Tallmadge proposed to require a prohibition of slavery in Missouri's constitution, Georgia Representative Thomas Cobb warned, "you have kindled a fire which all the waters of the ocean cannot put out, which seas of blood can only extinguish."[3]

Those and like developments convinced some on the antislavery side that the time for patience with slavery, if there had ever been such a time, had expired. A new, more strident, and less compromising form of antislavery appeal, marked at the outset by its scornful rejection of gradualism, emerged under the leadership of a young editor and organizer from Massachusetts, William Lloyd Garrison. The American Anti-Slavery Society's Declaration of Sentiments, drafted by Garrison and issued upon the organization's founding in 1833, stated "[t]hat the slaves ought instantly to be set free, and brought under the protection of law . . . That all those laws which are now in force, admitting the right of slavery, are . . . utterly null and void . . . and that therefore they ought instantly to be abrogated."[4] This

1. WENDELL PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT 108 (1844).
2. MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 371 (1911).
3. *Annals of Cong*., 15th Cong., 2nd sess., 1204 (Tallmadge quoting Cobb).
4. William Garrison, *Declaration of Sentiments of the American Anti-Slavery Convention*, Dec 4, 1833, *reprinted in* SELECTIONS FROM THE WRITINGS AND SPEECHES OF WILLIAM LLOYD GARRISON 68-69 (1852) [hereinafter GARRISON].

call for the abrogation of pro-slavery law serves as a signpost of the deeper radicalism of Garrisonian abolitionism.

It might seem that the "immediate and general emancipation" the Garrisonians demanded could only have been effected by an act of the U.S. government. Yet the AASS founding statement conceded that no federal abolition power existed under the Constitution. The federal government, in the early Garrisonian view, possessed limited powers of prohibition relative to the slave trade and to the existence of slavery in federal territories, but in other respects the Constitution bore a "criminal" relation to slavery, enabling and protecting it.[5] Over time, however, this early ambivalence resolved into a conviction that the Constitution was a thoroughly and irredeemably pro-slavery instrument—in the words of the prophet Isaiah that Garrison regularly deployed, a "covenant with death" and an "agreement with hell."[6] In his editorial, "The American Union," Garrison summarized the indictment:

> To secure the adoption of the Constitution of the United States, it was agreed, first, that the African slave trade . . . should for at least twenty years be prosecuted as a national interest under the American flag, and protected by the national arm;—secondly, that a slaveholding oligarchy, created by allowing three-fifths of the slave population to be represented by their taskmasters, should be allowed a permanent seat in Congress;—thirdly, that the slave system should be secured against internal revolt and external invasion, by the united physical force of the country;—fourthly, that not a foot of national territory should be granted, on which the panting fugitive from Slavery might stand, and be safe from his pursuers—thus making every citizen a slave-hunter and a slave-catcher.[7]

From this conviction of constitutional evil, Garrisonians characteristically drew radical practical inferences. Some concluded that conscience forbade individual political action under the Constitution, on the grounds that any such action would constitute a tacit endorsement of its legitimacy; the Garrisonian Henry C. Wright declared that if he could emancipate every slave in the country by casting a single vote, he would refuse to cast that vote.[8] However, what became the signature position of Garrisonian abolitionism appeared at the level of collective action, as Garrison called for non-slaveholding states to nullify the Constitution by seceding from the Union. "Henceforth," he concluded, "the watchword of every uncompromising abolitionist, of every friend of God and liberty, must be . . . 'no union with slaveholders!'"[9]

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5. *Id*. at 69–70.
6. *The American Union*, 1845, *reprinted in* GARRISON, *supra* note 4; *Isaiah* 28:15, 18.
7. *The American Union*, 1845, *reprinted in* GARRISON, *supra* note 4, at 118.
8. WILLIAM GARRISON, THE LIBERATOR 200 (1842), in LEWIS PETTY, RADICAL ABOLITIONISM 89 (1973).
9. *The American Union*, 1845, *reprinted in* GARRISON, *supra* note 4, at 119.

I. DOUGLASS AND THE GARRISONIANS

Douglass escaped slavery as a twenty-year-old in 1838 and soon made his home in New Bedford, Massachusetts, where he worked as a day-laborer for a few years. He sharpened his speaking skills as a lay preacher in the local African Methodist Episcopal Zion Church, and he paid close attention to the abolitionist cause via Garrison's paper, *The Liberator*. He drew the notice of Garrison himself at a regional anti-slavery conference in Nantucket in 1841, where an acquaintance asked him to speak. He nervously obliged, and a deeply impressed Garrison immediately offered him employment as a paid lecturer. Thus, the young fugitive became a Garrisonian abolitionist, faithfully propagating Garrison's doctrines on the Constitution and disunion for most of the 1840s.

All the while, however, Douglass was reading and thinking, and before long he began to entertain other ideas about the proper approach to abolition. By his own testimony, the crucial moment came when, after a mid-decade sojourn in Great Britain, he moved to Rochester, New York, and launched his own antislavery paper, *The North Star*, with seed money provided by the same British friends who funded his manumission. In his second autobiography, Douglass recalled that "new circumstances compelled me to re-think the whole subject, and to study, with some care, not only the just and proper rules of legal interpretation, but the origin, design, nature, rights, powers, and duties of civil government, and also the relations which human beings sustain to it."[10] That rethinking led him to conclude the Garrisonians were fundamentally mistaken about the Constitution and its relation to slavery. In an 1851 *North Star* editorial, Douglass announced he had reached "the firm conviction that the Constitution, construed in the light of well-established rules of legal interpretation, might be made consistent in its details with the noble purposes avowed in its preamble."[11] He stated his revised opinion more directly in his Fourth of July oration the following year, asserting that, "interpreted, as it ought to be interpreted, the Constitution is a glorious liberty document."[12]

Garrison—not a man disposed to generosity when faced with disagreement—responded to Douglass's 1851 announcement, charging that "[t]here is roguery somewhere!" The implication was that Douglass's revised opinion had been purchased by antislavery philanthropist Gerrit Smith's financial support for Douglass's paper. Later critics have refrained from Garrison's imputation of venality but have tended to share his broader contention that Douglass's endorsement of an anti-slavery Constitution was dictated more by considerations of practical utility than by an impartial weighing of the evidence.[13]

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10. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 392–93 (1994) [hereinafter BF].

11. Frederick Douglass, *Change of Opinion Announced*, THE N. STAR, May 15, 1851, *reprinted in* 2 THE LIFE AND WRITINGS OF FREDRICK DOUGLASS (Philip S. Foner ed., 1950-55), 155–56 [hereinafter LW].

12. *What to the Slave Is the Fourth of July?*, 1852, *reprinted in* LW, *supra* note 11, at 2.202.

13. *E.g.*, LW, *supra* note 11, at 2.53; THOMAS E. SCHNEIDER, LINCOLN'S DEFENSE OF POLITICS 125–44 (2006); JAMES OAKES, THE RADICAL AND THE REPUBLICAN: FREDERICK DOUGLASS, ABRAHAM LINCOLN, AND THE TRIUMPH OF ANTISLAVERY POLITICS 14–19 (2007); *cf.* CHARLES W. MILLS, WHOSE

It is, of course, true that in reconsidering his opinion, Douglass was acutely aware that the issue held vast importance for the abolitionist cause. The conviction that the Constitution was an antislavery document yielded an abolitionism that was restorationist rather than revolutionary, loyalist rather than disunionist—one capable of deploying the broadest arsenal of weapons in the war against slavery. To spread the word concerning the antislavery Constitution was vital to his effort to build an effective political antislavery coalition, the "great Abolition Party of the land."[14] As Douglass came to view the matter, here was the great failing of the Garrisonian approach. The group's "worst fault," he observed in an 1855 survey of abolitionist factions, was its promiscuous call for revolution. Garrisonian abolitionists foolishly alienated themselves from the republic they meant (or should have meant) to reform. By presenting themselves as enemies of America, and indeed of all positive law, Garrisonians lent credence to a common view of abolitionists as irresponsible fanatics. They thereby obstructed the vital effort to broaden the class of sympathetic antislavery northerners. As John Brown would in his own distinctive way, Garrisonian disunionists interposed "the huge work of the abolition of the Government, as an indispensable condition to emancipation." [15] Moreover, in the unlikely event that they succeeded in that work, the result would have been to abandon the slaves to their fate, leaving them dependent on themselves to overcome the organized force of the slaveholding South. By calling for disunion, Garrisonians meant to rid the nation and non-slaveholding states of their legal responsibility for protecting slavery, including the suppression of slave rebellions; but Douglass contended the more significant practical effect of their disunion policy would be to absolve those states and the nation of any responsibility for ending it. Douglass saw no moral purity in this position but only a plain abrogation of moral duty.[16] To marshal sufficient forces to defeat slavery, the legitimacy of government in general and of the U.S. government in particular had to be defended, not undermined.

In the matter of constitutional interpretation, however, to acknowledge Douglass's practical interest is not to endorse his critics' position. All parties to the dispute over the Constitution saw practical utility in their readings. To discover such utility in any of them is not to discredit its interpretive claims. As

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FOURTH OF JULY? FREDERICK DOUGLASS AND 'ORIGINAL INTENT IN FREDERICK DOUGLASS: A CRITICAL READER 118-21 (Bill E. Lawson & Frank M. Kirkland ed., 1999) (providing a harsher judgment).

14. *Slavery Unconstitutional*, 1856, *reprinted in* LW, *supra* note 11, at 5.373; *The Final Struggle*, 1855, *reprinted in* LW, *supra* note 11, at 2.378.

15. *See* FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 757–60 (1882) [hereinafter LT] (Although Douglass certainly had little desire for personal martyrdom, his main objection to Brown's revised plan was that it "would be an attack on the federal government, and would array the whole country against us."); *cf.* LW, supra note 11 at 2.461–62 (This criticism of Brown did not come easily to Douglass, who voiced it despite believing from the beginning that "the old man" was a hero and martyr and despite his strong aversion to conceding any moral ground to his adversaries).

16. *Anti-Slavery Movement*, 1855, *reprinted in* LW, *supra* note 11, at 2.350–52; *Is the United States Constitution for or against Slavery?,* 1851, *reprinted in* LW, *supra* note 11, at 5.193; *The Dred Scott Decision*, 1857, *reprinted in* LW, *supra* note 11, at 2.415–17; *The Dissolution of the Union*, *reprinted in* LW, *supra* note 11, at 5.354–56; *American Slavery*, 1854, *reprinted in* LW, *supra* note 11, at 5.310.

noted, Douglass reported that his revised opinion—unlike his original one—was based on his extensive study of "the whole subject," comprehending the text and history of the Constitution and the fundamentals of political philosophy. In his revised opinion, the true meaning of the U.S. Constitution was fully intelligible only in light of the first principles of political life. To meet the challenge posed by Garrisonians' and slaveholders' readings, Douglass and other constitutional abolitionists drew upon a venerable tradition of natural-law jurisprudence in fashioning their novel constitutional arguments. Before directly considering Douglass's arguments, however, it is useful to review the position he came to reject, which signified the most uncompromising if not also the most formidable challenge to the anti-slavery Constitution.

II. THE GARRISONIAN CONSTITUTION

Abolitionists had been divided since the 1830s over the Constitution's relation to slavery. Against the pro-slavery reading that slaveholders and then-Garrisonians propagated, relative moderates led by Salmon Chase, James Birney, Joshua Giddings, William Jay, Charles Sumner, and John Quincy Adams, as well as radicals including Alvan Stewart, Gerrit Smith, William Goodell, and Lysander Spooner argued variously for the antislavery Constitution.[17] With the advent of the political-abolitionist Liberty Party, which split off from Garrisonian abolitionism in 1840, and the growing influence of political abolitionism throughout the 1840s and 1850s, Garrisonians intensified their opposition to the Constitution. Perhaps the most learned and concentrated statements of the Garrisonian readings were issued from the pen of Wendell Phillips, a graduate of Harvard Law School, where he was a student of the great Justice Joseph Story.

Phillips published *The Constitution a Pro-slavery Compact* in 1844 through the American Anti-Slavery Society. He did so, he indicated in the volume's introduction, to defend the Garrisonian disunionist position against a "new theory," contrived "to serve the purposes of a party . . . that the Constitution does not tolerate slavery." The dispute over constitutional interpretation between Garrisonians and the defenders of the antislavery constitution focused on the following five clauses, specified by Phillips in his introduction:

1. Article I, Section 2: "Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons . . . *three fifths of all other persons*
2. Article I, Section 8: "Congress shall have power . . . to suppress insurrections
3. Article I, Section 9: "The migration or importation of such persons as any of the States now existing, shall think proper to admit, shall not be

17. WILLIAM WIECEK, SOURCES OF ANTISLAVERY CONSTITUTIONALISM 150–227, 249–75 (1977) [hereinafter WIECEK].

> prohibited by the Congress, prior to the year one thousand eight hundred and eight . . .
> 4. Article IV, Section 2: "No person, held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law of regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due
> 5. Article IV, Section 4: The United States shall guarantee to every State in this Union a republican form of government; and shall protect each of them against invasion; and, on application of the legislature, or of the executive . . . *against domestic violence*.[18]

Phillips acknowledged that the wording of these clauses was ambiguous in some respects. To ascertain their meanings and that of the Constitution as a whole with respect to slavery, he employed a theory of legal interpretation whereby the Constitution was to be read in the light of the original intention and understanding of its framers, ratifiers, and subscribers. The bulk of his book was therefore a compilation of historical evidence concerning the document's original design and the commonly accepted understanding of its meaning. He drew most heavily upon James Madison's *Notes of Debates in the Federal Convention of 1787*, first published in 1840, along with records of several state ratifying conventions and of debates in the First Congress of the United States. This evidence was further corroborated by the opinions and actions of succeeding generations. Defending this interpretive approach, Phillips challenged its critics: if the original understanding of the framers and ratifiers, along with "the unanimous, concurrent, unbroken practice of every department of the Government . . . and the acquiescence of the whole people for fifty years do not prove which is the true construction, then how and where can such a question ever be settled?"[19]

Reading the text in the light of the pertinent historical evidence, Phillips believed it was unquestionable that the Constitution embodied a deliberate, damning compromise with slavery. The purpose and effect of Article I, Section 2, Clause 3, commonly known as the "Three-Fifths Clause," were to provide "for the safety, perpetuity and augmentation of the slaveholding power" by allowing it additional representation in the House of Representatives and the Electoral College based on its claims to human property. The migration or importation clause of I.9 meant that for twenty years after ratification, "the citizens of the United States were to be encouraged and protected in the prosecution of that infernal traffic," the African slave trade. The mandate in IV.2 requiring all states to return any escaped "person held to service or labor" was, in plainer language, a mandate to return fugitive slaves to their masters, and the effect of this clause was to make "slavery a national institution, a national crime, and all the people who

18. PHILLIPS, *supra* note 1, at 4–7.
19. *Id*. at 5–6, 96.

are not enslaved, the body-guard over those whose liberties have been cloven down." In I.8 and IV.4, the Congress's anti-insurrection power and the guarantee to the states of federal assistance against domestic violence "were adopted with special reference to the slave population, for the purpose of keeping them in their chains by the combined military force of the country." These clauses' "solemn guarantee of security to the slave system," Phillips declared, "caps the climax of national barbarity."[20]

To Phillips and other Garrisonians, the Constitution's clear accommodations of slavery could not be excused as prudent concessions by the founders to the imperative of union in the face of pressing threats to national security. Rather, they were framed and adopted in a spirit of pure venality. Singling out the agreement whereby northern delegates accepted the slave trade's extension in I.9 in exchange for an unrestricted national commerce power to protect northern industry, Phillips charged that "our fathers bartered honesty for gain and became partners with tyrants that they might share in the profits of their tyranny." All in all, he concluded, the evidence was overwhelming. The Constitution represented not the fulfillment but the betrayal of the Declaration of Independence; it was just what "our fathers intended to make it, and what, too, their descendants, this nation, say they did make it . . . a 'covenant with death and an agreement with hell.'"[21]

As the natural moral law required the support of human positive law, so the efficacy of natural law in America required the support of American law. But for Douglass, no less than for the Garrisonians, the prudential imperative to secure northern allies in no way overrode the duty to oppose unjust law. "If, indeed, the Constitution be for slavery," he allowed, then "reason, humanity, religion, and morality alike" enjoin support for "revolution, at whatever cost and at whatever peril."[22] But what the Garrisonians held to be incontestable became, for Douglass, increasingly questionable as the 1840s drew to a close.

III. DOUGLASS'S NATURAL-LAW CONSTITUTIONALISM

Douglass endorsed the Garrisonian reading of the Constitution through the 1840s, though his confidence in it started to waver shortly after he began publishing the *North Star* in late 1847. What prompted the change in particular was his "careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell."[23] His debt to them, above all to Spooner, began with his

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20. *Id*. at 98, 101, 104, 107.

21. *Id*. at 6, 7, 98–100; *see The United States Constitution*, 1832, *reprinted in* GARRISON, *supra* note 4, at 302–15; *see generally* WILLIAM I. BOWDITCH, SLAVERY AND THE CONSTITUTION (1849).

22. *Is the United States Constitution for or against Slavery?*, 1851, *reprinted in* LW, *supra* note 11, at 5.192.

23. *Change of Opinion Announced*, *reprinted in* LW, *supra* note 11, at 2.155; *id*. at 5.420; *Douglass's Monthly*, 1860, *reprinted in* LW, *supra* note 11, at 5.285 (Douglass declared Spooner's work the ablest argument ever written for the antislavery Constitution, and his argument shows a closer indebtedness to Spooner's than to that of any other political abolitionist); *see* LYSANDER SPOONER,

invocation of the "well established rules of legal interpretation" that supplied the grounding for their revisionist reading. For Douglass and Spooner, those rules were "as old as law," and they rose "out of the very elements of law."[24] Proper interpretation began with an understanding of the essential nature and purpose of law: "Law is not merely an arbitrary enactment with regard to justice, reason, or humanity"; it "is in its nature opposed to wrong."[25] Invoking the weightiest authority in the Anglo-American legal tradition, Douglass affirmed with Blackstone that law "is the supreme power of the state, commanding what is right and forbidding what is wrong."[26] The primacy of natural justice was the foundation and pervading inspiration of the rules of legal interpretation. But for both Douglass and Spooner, the interpretive rules yielded by this premise assumed stricter and looser forms. In Douglass's various statements one can discern three distinct lines of argument, varying by the degree of independent authority they accorded to positive, or man-made, laws and to extratextual evidence as to the design of such laws.

A. Argument #1

In its strictest application, the natural-law or natural justice interpretive principle entailed a perfect, unconditional subordination of positive law to natural law. Positive law could exist as law, could bind or oblige those subject to it, only so far as it conformed with the law of nature. So, Douglass stated, "[laws] against fundamental morality are not binding upon anybody." On this point, he maintained, the authority of Blackstone accorded with the classical natural rights theory and with the "instinctive and spontaneous convictions of mankind."[27] On this radically antipositivist principle, where matters of fundamental justice were involved, neither the author's intention nor even the positive text itself could be

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UNCONSTITUTIONALITY OF SLAVERY (1845) [hereinafter SPOONER]; *see also* Randy Barnett, *Was Slavery Unconstitutional before the Thirteenth Amendment? Lysander Spooner's Theory of Interpretation*, 28 PAC. L. J. 977, 977–1014 (1997); *see* WILSON MOSES, CREATIVE CONFLICT IN AFRICAN AMERICAN THOUGHT 53–54 (2004) (Wilson Jeremiah Moses has also credibly suggested that Samuel Ringgold Ward, whom Douglass had debated in 1849, probably exercised some influence in persuading Douglass away from the Garrisonian position.).

24. *Slavery Unconstitutional, reprinted in* LW, *supra* note 11, at 5.373; *Dred Scott Decision*, *reprinted in* LW, *supra* note 11, at 2.418.

25. *The Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, 1860, *reprinted in* LW, *supra* note 11, at 2.476, 2.418.

26. Frederick Douglass, *Slavery the Live Issue*, 1854, *reprinted in* 2 THE FREDERICK DOUGLASS PAPERS 462 (John W. Blassingame & John R. McKivigan ed., 1979-1992), 155–56 [hereinafter TFDP] (Douglass misquoted slightly); *see* WILLIAM BLACKSTONE, COMMENTARIES 53. Some constitutional abolitionists criticized Blackstone for ambiguity with respect to natural-law jurisprudence. *E.g.,* WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW, IN ITS BEARING UPON AMERICAN SLAVERY 4 (1971) [hereinafter Goodell]; *see also* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 25 (1845). *See* WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER'S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY 8, 19 (1847), *reprinted in* New York: Arno Press (1967) (for the Garrisonian reading of Blackstone). http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm [https://perma.cc/VN7S-CMEC].

27. *Is It Right and Wise to Kill a Kidnapper?*, 1854, *reprinted in* LW, *supra* note 11, at 5.327; *id*. at 2.208, 476.

decisive for the meaning of constitutional law. The specific controversy over the U.S. Constitution would appear to be baseless, as the document's justice would become a mere tautology: the Constitution did not enact or protect any injustice because no constitution *could* do so, irrespective of whatever express or implicit provisions it might contain.[28] The Constitution could have explicitly named slavery and pronounced it just, and according to this strictest line of argument in Douglass's reasoning, any such provision nonetheless would have been a mere dead letter, void and unenforceable on its face.

B. Argument #2

Neither Douglass nor Spooner insisted on that strict, uncompromising application of natural-justice jurisprudence. The interpretive principles on which Douglass based his main arguments permitted a recognition of positive law as genuine, binding law—even, in some cases, when it stood contrary to the requirements of justice. The nature of law did not by definition *exclude* all injustice, but it remained "*opposed* to all such wickedness," making it "difficult to accomplish such objects under the forms of law." Legally authorized villainy had to be understood as anomalous; "the rules of legal interpretation hem it in on every side."[29] Those rules mandated a presumption of the law's "innocence" or, in other words, of its conformity with natural justice and so of its protection of human liberty. As a presumption this premise was rebuttable, but its effect was to place an exceedingly heavy burden of precision on those who would enact injustice into law. A law that would authorize an unjust power had to receive the very strictest construction. A longtime lover of Shakespeare, Douglass contended "the pound of flesh, but not one drop of blood" signified the proper rule of interpretation where slavery or any other manifest injustice was involved. Where a text was worded ambiguously, in any contest between just and unjust meanings, the construction favoring justice had to prevail.[30] Again following Spooner, Douglass invoked the authority of the U.S. Supreme Court, citing its statement in an early case unrelated to slavery, *U.S. v. Fisher*: "Where rights are infringed, where fundamental principles are overthrown . . . the legislative intention must be expressed with *irresistible clearness*, to induce a design to effect such objects." As Spooner put it, fundamentally unjust laws had to "perish for uncertainty."[31]

Just as this natural-law jurisprudence entailed certain presumptions respecting what the Constitution said or did not say, so, too, it carried implications

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28. *See The Fugitive Slave Law*, 1852, *reprinted in* LW, *supra* note 11, at 2.208 ("When human government destroys human rights, it ceases to be a government . . . *and is entitled to no respect whatever*") (emphasis added); *cf. id.* at 5.327–28.

29. *Constitution of the United States: Is it Pro-slavery or Anti-slavery*, 1860*, reprinted in* LW, *supra* note 11, at 2.476 (emphasis added); *id.* at 5.199.

30. LW, *supra* note 11, at 2.475–76; *Slavery the Live Issue*, 1854*, reprinted in* TFDP, *supra* note 27, at 2.465.

31. *Slavery Unconstitutional, reprinted in* LW, *supra* note 11, at 5.373 (emphasis in original); *id.* at 5.198, 2.479; SPOONER, *supra* note 24, at 18–19, 164, 189–93, 200–04.

respecting how to determine what it actually said and even what it actually was. Partisans of a proslavery interpretation betrayed an eagerness to enlarge the Constitution. They incorporated into it various extratextual sources, the most important of which contained evidence of the framers' intentions as expressed in their original deliberations. But the requirement of irresistible clarity rendered all such extratextual incorporations presumptively inadmissible, and Douglass came to view the Garrisonians' enlarging of the Constitution as a great error. In his most developed exposition of the abolitionist Constitution, presented in an 1860 speech in Glasgow, Scotland in response to a speech by the leading British Garrisonian, George Thompson, he began by insisting on a properly compact conception of the legal instrument under scrutiny:

> Before we examine into the disposition, tendency, and character of the Constitution, I think we had better ascertain what the Constitution itself is. . . . What, then, is the Constitution? . . . The American Constitution is a written instrument full and complete in itself. . . . [T]he mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading, was adopted as the Constitution of the United States. It should also be borne in mind that the intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are so respected so far, and so far only, as we find those intentions plainly stated in the Constitution. It would be the wildest of absurdities, and lead to endless confusion and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it. It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say. . . . I repeat, the paper itself, and only the paper itself, with its own plainly written purposes, is the Constitution.[32]

Douglass was well aware that the Constitution's text did not always yield a single, plain meaning. Two rules were paramount for the interpretation of ambiguous passages. First, the Constitution's meaning and spirit were to be understood primarily by reference to its objects: one had to "look to the ends for which a law is made, and . . . construe its details in harmony with the ends sought." In keeping with the authoritative commentary of Justice Story, this rule required more specifically that one should be guided by the Preamble, which, as a summary of the Constitution's objects, was to be regarded as "indicative of the import of what is to follow."[33] Second, one had to interpret the Constitution, wherever possible, as

32. *Constitution of the United States: Is it Pro-slavery or Anti-slavery?*, 1860, *reprinted in* LW, *supra* note 11, at 2.468–68; *cf.* SPOONER *supra* note 24, at 57–58, 114–23, 171–79; WILLIAM GOODELL, SLAVERY AND ANTI-SLAVERY: A HISTORY OF THE GREAT STRUGGLE IN BOTH HEMISPHERES; WITH A VIEW OF THE SLAVERY QUESTION IN THE UNITED STATES 574 (1852).

33. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 56 (Regnery Publ'g 1986) (1840).

an internally consistent whole: "One part of an instrument must not be allowed to contradict another unless the language be so explicit as to make the contradiction inevitable." A radical defect of the Garrisonian argument, Douglass contended, was that it yielded a constitution "full of contradictions."[34]

These interpretive presumptions in favor of internal consistency and the objects declared in the Preamble did not foreclose the possibility of anomalous provisions, representing exceptions to the principles and objects to which the Constitution was dedicated. But they did greatly reduce the likelihood of such provisions. Once again, Douglass's interpretive principle required that any anomalous, unjust provision be formulated with irresistible clarity, excluding any plausible attribution of a meaning consistent with justice. Here it is also worth noting that in such cases, Douglass's principle allowed consideration of evidence beyond the bare text. Constructions based upon extratextual evidence of the ratifiers' understanding (perhaps as influenced by the framers) would be admissible to reveal constitutional ambiguity, where the effect would favor justice. Such evidence could render doubtful the reading of a given provision as serving an unjust purpose. Further, the rule of irresistible clarity for injustice was closely related to "another very important rule of legal interpretation," which disallowed any "*unnecessary exception*" to "the prevailing provisions and principles of a law [that] are favorable to justice, and general in their nature and terms."[35] This rule would govern circumstances in which two clear, normally just objects of a law conflicted with one another, so that one temporarily had to give way, admitting a necessary exception to its enforcement.

For Douglass's purposes, the practical import of these rules of interpretation was clear, but he insisted that his antislavery reading proceeded from no interpretive contrivance but rather from the essential nature of law: "neutral principles" of interpretation properly conceived could not require neutrality between justice and injustice. However, that may be, by Douglass's interpretive rules, the presumption of an antislavery Constitution was virtually insuperable. For a constitution to be judged proslavery under them, its endorsement of slavery would need to be even stronger than that contained in Justice Taney's infamous *Dred Scott* formulation: it would need to affirm slavery "distinctly and expressly"[36] and also *unambiguously*. At least with respect to the issues surrounding slavery, to adopt Douglass's rules would mean to render detailed textual interpretation nearly supererogatory. Even so, his understanding of the rules of interpretation supplied only the blueprint, not the completed edifice, of his constitutional construction. What remains to be seen is how Douglass applied his rules of interpretation to elucidate the substantive meaning of the Constitution in relation to slavery.

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34. *Dred Scott Decision*, 1857, *reprinted in* LW, *supra* note 11, at 2.418; *Slavery Unconstitutional*, *reprinted in* LW, *supra* note 11, at 5.375–76; SPOONER, *supra* note 24, at 94, 180–81, 198–99.

35. *Slavery Unconstitutional*, *reprinted in* LW, *supra* note 11, at 374 (emphasis original); SPOONER, *supra* note 24, at 196–97.

36. Dred Scott v. Sandford, 60 U.S. 393, 451 (1857).

For Douglass's natural-justice jurisprudence, the initiating question was the least difficult. That slavery constituted a gross violation of natural justice was beyond doubt. Echoing John Locke, Douglass held that slavery was an ongoing state of war, waged by masters both against their individual victims and against human nature itself. Its fundamental wrongness was attested by universal moral intuition: "There is not a man beneath the canopy of heaven that does not know that slavery is wrong *for him*."[37]

For the Garrisonians, this premise yielded the conclusion that the U.S. Constitution possessed no authority as law. Rejecting any presumption in favor of liberty or justice in the interpretation of positive laws, they contended that the identification of even a single unjust provision sufficed to nullify the whole of the Constitution.[38] Douglass argued entirely to the contrary. By a literalist reading of the "plain text," he not only affirmed the antislavery Constitution but also categorically denied "the presentation of a single pro-slavery clause in it."[39] He focused first on two telling pieces of evidence: (1) the fact that the antebellum Constitution contained no explicit mention of slavery or servitude, and (2) the manifestly just, antislavery design of the Constitution's Preamble.

Douglass found great significance in the Constitution's omission of any explicit reference to slavery or servitude. To complicate Garrisonion readings of the historical evidence, he cited the testimony of Madison, who disclosed that "the convention would not consent that the idea of property in men should be admitted into the Constitution." But on the strict textualist principle, the decisive fact appeared in the Constitution's language. Making no express reference to slavery or servitude and referring to the constituents of the United States as "the people," without qualification by race or status in labor relations, the Constitution could not be held to sanction slavery.[40] At the very least, its language in disputed passages introduced an element of ambiguity, which sufficed to establish the antislavery reading. To support this conclusion, Douglass surveyed the specific provisions commonly held to refer indirectly to slavery. He argued that the three-fifths clause in Article I, Section 2 "might fairly apply to aliens—persons living in the country, but not naturalized." He conceded only for the sake of argument that Article I, Section 9 referred to the "African slave trade"; the Constitution itself "[did] not warrant any such conclusion." In the troublesome provision in

37. *The Meaning of July Fourth for the Negro*, 1852, *reprinted in* LW, *supra* note 11, at 2.191 (emphasis original); *Slavery, the Free Church, and British Agitation Against Bondage*, 1846, *reprinted in* TFDP, *supra* note 26, at 1.327; *cf.* LW, *supra* note 11, at 1.109.

38. PHILLIPS, *supra* note 1, at 100–01.

39. *What to the Slave is the Fourth of July?*, *reprinted in* LW, *supra* note 11, at 2.202; TFDP, *supra* note 26, at 2.386.

40. *Constitution of the United States, reprinted in* LW, *supra* note 11, at 2.475; *Dred Scott Decision*, *reprinted in* LW, *supra* note 11, at 2.418–19, 424; *see* JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 532 (Adrienne Koch ed., 1966) (1840).

Article IV, Section 2, the "persons held to service" could only signify indentured servants, not persons enslaved.[41]

As applied to the objects set forth in its Preamble, Douglass's plain-text reading implied that the Constitution not only withheld support for slavery but was in fact decidedly antagonistic to it. In his view, the antislavery position of the Preamble was clear in every clause. With justice and liberty intermingled among its expressly declared objects, the Preamble's principles were closely akin to those of the Declaration of Independence,[42] and neither could be held to sanction slavery or any racial caste system under the law. With their inclusive references to "all men" and to "the People of the United States" and the "general welfare," the Declaration and the Preamble demanded and promised the securing of justice and the blessings of liberty for all Americans equally, irrespective of race or color.[43] The grave danger that slavery posed to "a more perfect Union" had long been evident. The Preamble's references to "domestic tranquility," "the common defense," and "the general welfare" implied a national power and duty to eradicate slavery as the greatest threat to each. In this way, Douglass contended that even if one began from a positivist premise, conceiving of the Constitution as an instrument only of human, positive law, the conclusion of a natural justice constitutionalism was inescapable. By virtue of the Preamble's linkage to the ideas of the Declaration, the positive law in this case *was* the natural law.

Furthermore, Douglass argued, the Constitution's pro-liberty position extended well beyond its statement of general purposes. The nation's supreme positive law guaranteed specific rights incompatible with slavery and delegated to the national government specific powers to act against slavery anywhere in the United States. Conceiving inclusively of U.S. citizenship under the Constitution, he inferred from various constitutional guarantees and prohibitions that the rights of U.S. citizens were incompatible with slavery. He cited the guarantee, in peacetime, of the writ of habeas corpus; the guarantee that no person shall be deprived of the rights of life, liberty, or property without due process of law;[44] the guarantee of a

41. *Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, 1860, *reprinted in* LW, *supra* note 11, at 2.471–76; SPOONER, *supra* note 24, at 67–72, 277–87; GOODELL, *supra* note 27, at 21–27.

42. *DRED SCOTT DECISION*, *reprinted in* LW, *supra* note 11, at 2.419; SPOONER, *supra* note 24, at 36–39 (presenting a still more emphatic statement of the constitutional importance of the Declaration).

43. PHILLIPS, *supra* note 1, at 97; *Strong to Suffer, and Yet Strong to Strive*, 1886, *reprinted in* TFDP, *supra* note 27, at 5.217–218; *Slavery Unconstitutional*, *reprinted in* LW, *supra* note 11, at 5.375.

44. SPOONER, *supra* note 24, at 102–04. Douglass seems to have been guilty of an excessively enthusiastic nationalism in his readings of the habeas corpus guarantee and the Fifth Amendment. Article I, Section 9, containing the habeas corpus guarantee, seems clearly marked as a set of denials of power to the Congress or the U.S. government, in contrast to Article I, Section 10, which denies powers specifically to the states (and makes no mention of the habeas corpus right). *Id.* at 58–67. (Douglass's reading of the Fifth Amendment may reflect the influence of Goodell, although Douglass went beyond Goodell in his nationalistic reading of the amendment. Wiecek has pointed out that the Supreme Court's ruling in *Barron v. Baltimore* (1833), holding that the Bill of Rights, in particular the Fifth Amendment, restrained exclusively the national government and not the states, remained a matter of legal controversy even in state and federal courts at least through the 1840s); Wiecek, supra note 18, at 265–67.

republican form of government to every state in the Union; and the prohibition of the enactment of any bill of attainder. It was squarely within "the power of the Supreme Court," as well as any lower federal court, "to abolish Slavery by a righteous decision" adjudicating any of these clauses. Likewise, the U.S. Congress had the power to abolish the interstate slave trade, just as it had abolished the importation of slaves in 1808; to establish federal courts in slaveholding states and to appoint antislavery judges to them; to organize slaves as a militia; and to suppress insurrections, including their causes, among which slavery was certainly prominent. "Congress has power to abolish Slavery in the States, such Slavery being illegal, and unconstitutional."[45]

The militancy of Douglass's strictly textualist reading of the Constitution should be clear. For Douglass and Spooner, in contrast to more moderate political abolitionists, it was not enough to say that the Constitution was *antislavery* in its general spirit. Rather, they emphasized that the Constitution was *abolitionist* in the precise sense. Slavery was worse than a constitutional anomaly—it was specifically *unconstitutional*. In Douglass's reading, the Constitution provided both the federal *power* and the federal *duty* to abolish slavery, instantly and everywhere in the U.S. The federal government was "constitutionally bound to abolish Slavery in the States," pursuant to the Supremacy Clause in Article VI, Section Two, and Section Two, and abolition was a condition of the Constitution's standing as the supreme law of the land.[46] In this respect, Douglass's position represented a still more radical counterpart to Garrisonian immediatism. Rather than withdrawing political allegiance as a means of pressuring slaveholders to abolish slavery, as the Garrisonians did, Douglass demanded abolition by direct constitutional action immediately upon the election of a government representing an antislavery majority. Anticipating a Republican victory in 1860, he believed that the moment was close at hand: "If 350,000 slaveholders have . . . been able to make slavery the vital and animating spirit of the American Confederacy for the last seventy-two years, now let the freemen of the North . . . resolve to blot out for ever the foul and haggard crime."[47]

At this point a Garrisonian rejoinder is in order. As Douglass and Spooner characterized it, the Garrisonian argument entailed a reading of the Constitution as the product of a "bait-and-switch" scheme perpetrated by unscrupulous Framers, who presented to the public a document cleansed of all references to slavery even as they intended it to aid in slavery's defense.[48] But the historical record, presented in abundance in Phillips's book, left no room for reasonable doubt: the Constitution's tacit recognition of slavery was publicly acknowledged,

45. *The Republican Party—Our Position*, Dec. 7, 1855, *reprinted in* LW, *supra* note 11, at 2.379–82; *see also* LW, *supra* note 11; *id*. at 2.109, 473, 477–78, 3.137, 5.197–98.

46. *The Republican Party—Our Position*, Dec. 7, 1855, *reprinted in* LW, *supra* note 11, at 2.381.

47. *Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, 1860, *reprinted in* LW, *supra* note 11, at 2.480; *see also* LW, *supra* note 11, at 5.197.

48. *See Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, 1860, *reprinted in* LW, *supra* note 11, at 2.469; *see also* SPOONER, UNCONSTITUTIONALITY OF SLAVERY, *supra* note 23, at 122.

defended, and deplored by various Framers, and commonly understood by the ratifiers. There had been no secret understanding whereby the Framers had defrauded the ratifiers. The nation in 1787 and 1788 had entered into a constitutional bargain with slavery "willingly and with open eyes," Phillips wrote.[49] This fact enabled Garrisonians to object to the strict textualist position on moral as well as interpretive grounds. The original constitutional compromises were framed and adopted "in *good faith*." To affirm that the text mandated an abolitionist reading, contrary to the understanding of the Framers and ratifiers, was "to advocate fraud and violence toward one of the contracting parties, *whose co-operation was secured only by an express agreement and understanding between them both, in regard to the clauses alluded to*."[50] Although a commitment by compact to abet injustice might be facially void, Garrisonians argued, in no case could a positive compact license action contrary to its originally agreed-upon meaning. Douglass and Spooner's natural-justice reading of the Constitution was, in the Garrisonian view, itself an incitement to violate the natural law of keeping compacts.

Of all the objections leveled against constitutional abolitionism, Douglass found this one the most challenging. In a January 1851 letter to Gerrit Smith, written as his conversion to Smith's position was nearly complete, he declared himself "sick and tired of arguing on the slaveholders' side" of the constitutional debate, but he remained troubled by this question: "Is it good morality to take advantage of a legal flaw and put a meaning upon a legal instrument the very opposite of what we have good reason to believe was the intention of the men who framed it?"[51] Spooner's natural-justice jurisprudence in its strict application yielded a simple answer: if the Framers' intentions were criminal, good morality required that they be disregarded. But as he reflected upon this objection, Douglass was evidently dissatisfied with any simple response. Moreover, the persisting influence of the opinion of the Framers' proslavery intentions, which reached its extremity in the *Dred Scott* ruling, compelled him to address the objection on its own grounds. Although he seems always to have preferred his strict-textualist argument, he was moved by the persisting influence of the Framers'-intention approach to adumbrate a third, more complex line of argument, grounded in an alternative reading of the historical evidence of the Framers' and ratifiers' understanding.

C. Argument #3

Douglass's point of departure for this third line of argument was his concession, at least for the sake of argument, of the interpretive relevance of evidence,

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49. PHILLIPS, THE CONSTITUTION, *supra* note 1, at 3–6, 94, 96, 98, 104; *see also* PHILLIPS, *Review of Lysander Spooner*, *supra* note 26, at 27–34.

50. PHILLIPS, THE CONSTITUTION, *supra* note 1, at 96 (emphasis original). Justice Joseph Story accepted this claim with particular reference to the Fugitive Slave Clause (Article IV, section 2.3), writing for the Supreme Court majority in *Prigg v. Pennsylvania,* 41 U.S. 539, 564–65, 611 (1842).

51. Letter to Gerrit Smith (January 21, 1851), *in* LW, *supra* note 11, at 2.149–50.

beyond the text itself, regarding the Framers' intentions. A companion concession directly followed—that various constitutional provisions did indeed refer to slavery. Nonetheless, Douglass insisted that such concessions did not disturb his conclusion: that slavery provisions made no principled or permanent exception to the instrument's general object of justice.

In his 1860 Glasgow speech on the Constitution and slavery, Douglass presented his most elaborate analysis of the four main provisions commonly cited as supports for slavery. Considering, first, the Three-Fifths Clause in Article I, Section Two. he rejected the common reading, originated by dissenting antislavery Founders, that the Clause gave a political advantage to slaveholding states by increasing their congressional representation.[52] Supposing that "other persons" in that Clause signified those enslaved, Douglass observed that the Three-Fifths Clause marked the lone instance in which the Constitution denied to states full congressional representation of any class of its inhabitants. The Clause therefore represented "a downright disability laid upon the slaveholding states; one which deprives those states of two-fifths of their natural basis of representation." If the Constitution supplied some political incentive for states to increase their slave populations, it supplied even greater political incentives for slaveholding states to liberate their slaves and thus to increase their representation by the further two-fifths.[53]

Douglass interpreted provisions in Article I, Sections Eight and Nine in a like manner. Turning initially to what is commonly considered the Slave Trade Clause (Article I, Section Nine), he contended, first, that even if that Clause originally protected the slave trade, the protection had long since expired and thus had become a dead letter. More important, however, he found an antislavery design in the fact that the protection was merely temporary.[54] Concerning the Insurrections

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52. Gouverneur Morris summarized the dissenting founders' view: "The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and South Carolina who goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with such a laudable horror, so nefarious a practice" (quoted in MADISON, *supra* note 40, at 411).

53. *Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, 1860, *reprinted in* LW, *supra* note 11, at 2.472. Some support for Douglass's position appears in *Federalist* no. 54, where Publius defends Article I, Section 2 as a concession made by slaveholding states, who "waived" application of the principle "that the slaves, as inhabitants, should have been admitted into the census according to their full number." *Cf.* Don E. Fehrenbacher's remark: "[The] characterization of the three-fifths clause as a *bonus* for slaveholders . . . is not intrinsically sounder than the view (held by Frederick Douglass, for instance) that it was a *penalty* on slaveholding"; *see* FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 40 (Ward M. McAfee ed., Oxford Univ. Press, 2001) (emphasis original). For a rejoinder, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 87–98 (Random House, 2005). *See also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3-36, 109–11 (M.E. Sharpe ed., 2001).

54. Declaring that part of the price of union to slaveholders was that "the slave trade shall be put an end to in twenty years," Douglass may have confused the delegation of a *power* to abolish the slave

Clause his argument was simpler: by a reasonable, broad construction, the power to suppress insurrections comprehended a necessary and proper power conclusively to suppress slave insurrections by abolishing their root cause—slavery itself. In fact, Douglass maintained from 1851 on that there was "no part of the Constitution from which slaveholders [had] more to apprehend" than this Clause.[55] If the Constitution recognized slavery's existence, it did not thereby legitimate it. It recognized slavery even as it guaranteed individual and state rights incompatible with slavery and provided national powers to abolish it.

Having conceded that Article I, Sections Two, Eight, and Nine might refer to slavery, however, Douglass refused to make any such concession regarding what seemed the most damning provision of all, commonly known as the Fugitive Slave Clause in Article IV, Section Two. Following Spooner, he persistently contended that the Clause referred only to "indentured apprentices and others" who were bound, "under contract duly made, to serve and labour." In the 1860 speech, as in previous arguments concerning this Clause, he based his claim on historical evidence as well as on the text itself. He was well aware of the historical evidence that Garrisonians adduced to support the contrary reading, drawn mainly from the 1787 Constitutional Convention and from Madison's explication of the Clause at the Virginia Ratifying Convention. It was true, Douglass conceded, that the Clause originated in an attempt by South Carolina delegates Charles Cotesworth Pinckney, Charles Pinckney, and Pierce Butler to insert a provision requiring that "fugitive slaves . . . be delivered up like criminals." It was true, too, that Madison had told Virginia's ratifiers that the Clause would better secure their property in slaves. But the attempt to gain explicit recognition of slavery in the Constitution was "promptly and indignantly rejected" in keeping with the Convention's view, as expressed and endorsed by Madison just a few days prior to the South Carolinians' proposal, that it was wrong to admit into the Constitution the idea that there could be property in men. At the very least, these ambiguities could be taken to show that neither the text itself nor the pertinent historical evidence yielded the "irresistible clarity" required to establish a proslavery provision.[56]

In making this argument, Douglass did not address the counterargument that the historical evidence concerning the framing of Article IV, Section Two, Clause Three actually did demonstrate with sufficient clarity that the provision in question was meant to acknowledge slavery's local legality. The general principle of slavery's merely local legality was affirmed by more moderate proponents

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trade, which Congress could choose or decline to exercise, with a *mandate* to abolish that trade at a date certain. This was either a simple error or a polemical exaggeration of the confidence of many framers that this clause would ensure the abolition of the slave trade in twenty years. *Cf.* GOODELL, *supra* note 26, at 29, 110.

55. *Constitution of the United States*, 1860, *reprinted in* LW, *supra* note 11, at 2.473; *Is the United States Constitution for or against Slavery?*, July 24, 1851, *reprinted in* LW, *supra* note 11, at 5.197–98.

56. *Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, 1860, *reprinted in* LW, *supra* note 11, 2.474–75; *see also* LW, *supra* note 11, at 5.310, 328; *cf.* PHILLIPS, THE CONSTITUTION, 31–33, 105–6; MADISON, *supra* note 40, at 532, 545–46, 552, 648.

of the antislavery Constitution, including Supreme Court Justices Benjamin R. Curtis and John McLean, the authors of vigorous dissents in the *Dred Scott* case.[57] With respect to the particular constitutional provision, the text did ultimately include a clause acceptable to Butler and the Pinckneys. In rejecting the South Carolinians' initial proposal, the Convention seemed to reject only the national endorsement of slavery's moral legitimacy that its explicit recognition in the Constitution might have implied. So understood, that rejection was consistent with the reading of Article IV, Section Two, Clause Three as a concession to slavery's local existence. These considerations might seem to support the charge that Douglass's refusal to concede a reference to slavery in that Clause reflected his polemical and personal interests rather than a fair reading of the evidence. Impelled by his interest to advance the antislavery cause in the most efficacious manner possible, Douglass espoused a hard-line, abolitionist reading of the Constitution and also served personally as a leading agent of the Underground Railroad[58]—neither of which positions permitted him, on this objection, to concede even a limited accommodation of slaveholders' desire for a constitutional guarantee with respect to their recovery of fugitive slaves.

To vindicate on legal grounds his work for the Underground Railroad and his advocacy of resistance to the Fugitive Slave Law, Douglass needed more than his well-founded argument that the latter was unconstitutional irrespective of the meaning of Article IV, Section Two, Clause Three, as a violation of various criminal-procedure guarantees.[59] He also needed a more persuasive reading of that Clause, one that acknowledged its relation to slavery and yet somehow showed that it imposed upon states no constitutional obligation to "deliver up" fugitives and thus to compel private actors such as Douglass to do so. Of course, no such reading was available to him. Even so, Douglass might have found some antislavery significance in the Clause. Pertinent, first, is its failure to provide a federal enforcement power for the obligation to deliver fugitives to their erstwhile masters. Article IV, Section One (the "Full Faith and Credit Clause") confers an obligation on the states and delegates to the Congress an enforcement power, whereas Article IV, Section Two confers various obligations on the states and delegates no corresponding enforcement power.

Still more telling, although Douglass again left the point undeveloped, is the adjective used in Article IV, Section Two to describe those supposed to be fugitive slaves. In Article I, Section Two (the "Three-Fifths Clause"), indentured servants are referred to as "persons bound to service" and thus distinguished from the "other persons" commonly thought to be those enslaved. In Article IV, Section Two, those enslaved are referred to as "persons held to service." The term "persons *bound*" is morally ambiguous, perhaps in keeping with the mixed status of indentures: in one sense unfree, as if bound by rope or chain, and in

57. *See* Dred Scott v. Sandford, 60 U.S. 393, 534–64, 624–26 (1857).
58. BF, *supra* note 10, at 709–11.
59. xxx

another sense free, as if bound by voluntary contract. "Persons *held*," however, conveys no such ambiguity: the relation indicated is one of pure force, against the will of the person held. This distinction between *bound* and *held* works against Douglass's denial in argument #2 that Article IV, Section Two signifies a recognition of slavery. But it works in support of his broader contention in argument #3 that if the Constitution recognizes slavery, it does so in a spirit of moral condemnation rather than one of affirmation of the institution's legitimacy.

In any case, the shortcomings in Douglass's reading of the Fugitive Slave Clause were not fatal to his larger argument. Although his work for the Underground Railroad did not permit him to concede the Constitution's accommodation of slavery on the issue of fugitives, such a concession would not have discredited his aggressively abolitionist reading of the Constitution as a whole. To see how he could have defended this position, it is necessary to reconstruct his third line of argument further.

Underlying Douglass's modified argument concerning the meaning of the Constitution's text was his modified understanding of the Framers' intentions. In January 1851, he continued to affirm that the Garrisonians were "doubtless right" about the Framers' proslavery intentions. Six months later, he had reached the opposite conclusion.[60] He was aware that a few delegates at the Philadelphia Convention spoke in defense of slavery, as he was aware of the softness of some Founders' opposition to slavery. He lamented the comfort that slaveholders could derive from the fact that some of the greatest Founders were also slaveholders. Especially Washington's and Jefferson's "anti-slavery declarations are less potent for good than their pro-slavery examples have been made for evil."[61] Nonetheless, as even the ardently proslavery Georgian Alexander Stephens (the newly chosen vice president of the Confederate States of America) conceded in March 1861 in his now-famous "Cornerstone" speech, the emergence of a powerful proslavery partisanship postdated the founding: "All the public men of the South were once against [slavery]." The general truth, as Douglass came to see it, was that the Garrisonians were wrong, as Justice Taney was still more glaringly wrong, about the founding generation's opinions with respect to slavery: "The intentions of the Framers of the Constitution were good, not bad."[62]

Of course, although most Founders shared with the succeeding generation's radical abolitionists a principled disapproval of slavery, they did not share the

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60. Letter to Gerrit Smith (January 21, 1851), *in* LW, *supra* note 11, at 2.149; *Is the U.S. Constitution for or against Slavery?*, July 24, 1851, *reprinted in* LW, *supra* note 11, at 5.196.

61. *Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, *reprinted in* LW, *supra* note 11, at 2.474; Eulogy on the Late Honorable William Jay (May 12, 1859), *in* LW, *supra* note 11, at 5.449.

62. *Progress of Slavery*, *DOUGLASS' MONTHLY* (Aug. 1859), *reprinted in* LW, *supra* note 11, at 2.454; *Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, 1860, *reprinted in* LW, *supra* note 11, at 2.473; *cf. The Dred Scott Decision* (Speech delivered before American Anti-Slavery Society, New York, May 13, 1857), *reprinted in* LW, *supra* note 11, at 2.422–23; *Reproach and Shame of the American Government*, Aug. 2, 1858) *reprinted in* LW, *supra* note 11, at 5.401–2. For elaborations of this argument, see THOMAS G. WEST, VINDICATING THE FOUNDERS 1-36 (Rowman & Littlefield, 1997); HARRY V. JAFFA, A NEW BIRTH OF FREEDOM 216–22, 286–98 (Rowman & Littlefield, 2000).

latters' insistence upon immediate abolition. But according to Douglass, that was because they saw no need for it. They regarded slavery as "an expiring and doomed system, destined to speedily disappear from the country." In the eyes of many founders, to press for immediate, national abolition would have been dangerously imprudent, imperiling a fragile Union to achieve an end that, they supposed, would likely be achieved in any event in the reasonably near future. Fearful of a radical solution and hopeful for a moderate one, most of the founders favored a policy of deferred and gradual emancipation.[63] More specifically, they believed that by licensing (and creating a powerful public expectation of) a federal prohibition on the importation of slaves into the United States after 1807, they had supplied the essential constitutional impetus for slavery's eventual abolition.[64] In Douglass's hindsight, this optimism concerning slavery's transience appeared as a "stupendous error."[65] But for the purposes of his third line of argument, the relevant point concerned the design, not the historical efficacy of the Founders' constitutional policy. In an 1863 speech he summarized his view of the Founders' design by means of a revealing metaphor: "If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed."[66]

The full meaning of Douglass's scaffolding metaphor, which epitomized his third line of constitutional-abolitionist argument, deserves closer attention than it has received. Admirers of the metaphor have properly focused on its implication that the Constitution's accommodations of slavery were accidental, not essential, to its core meaning.[67] In the Founders' design as Douglass understood it, slavery was to be tolerated so far, and only so far, as that tolerance proved instrumental in a timely manner to the completion of the U.S. as a republican, constitutional union. Beyond that general significance, however, particular questions remained concerning both means and ends. What form was the policy of tolerance to take? By what mechanism of efficient causation was temporary tolerance of slavery supposed to advance the completion of "the magnificent structure"? By what

63. *Reproach and Shame of the American Government*, Aug. 2, 1858, *reprinted in* LW, *supra* note 11, at 5.402; *Is the Plan of the American Union under the Constitution, Anti-slavery or Not?*, May 20, 1857, *reprinted in* TFDP, *supra* note 26, at 3.153; *see also* LW, *supra* note 11, at 2.473; TFDP, *supra* note 26, at 3.180.

64. *Constitution of the United States: Is It Pro-slavery or Anti-slavery?*, 1860, *reprinted in* LW, *supra* note 11, at 2.473. At the Pennsylvania ratifying convention, James Wilson remarked on this clause in Article I, Section 9: "I consider this as laying the foundation for banishing slavery out of this country." THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot, ed., 1836), http://memory.loc.gov/ammem/amlaw/lwed.html [https://perma.cc/4X66-26UU]. *Cf*. DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 129, 311–13, 404–19 (Cornell Univ. Press, 1975).

65. *The Cause of the Negro People* (Address of the Colored National Convention to the People of the United States), Oct. 4-7, 1864), *reprinted in* LW, *supra* note 11, at 3.417.

66. *Address for the Promotion of Colored Enlistments* (Delivered at a mass meeting in Philadelphia), July 6, 1863, *reprinted in* LW, *supra* note 11, at 3.365.

67. Herbert Storing, *Slavery and the Moral Foundations of the American Republic*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC, 221 (Robert H. Horwitz, ed., Univ. Press of Virginia, 1979).

criteria was the policy to be judged effective or ineffective in this process of completion?

Douglass's answers to those questions are incomplete, but he provided his most suggestive statement of them in his "Slaveholders' Rebellion" speech, delivered on July 4, 1862. With respect to the form of tolerance, Douglass, like Lincoln, ascribed to the Founders a policy of containment—"nonextension" in the language of the day—whose object would be "to confine slavery to its original limits," thus tolerating the oppressive practice for the time being in existing slaveholding states but preventing it from expanding into federal territories, i.e. prospective new states. Douglass was ambivalent about this policy. He consistently denounced as insufficiently radical the nonextensionist policy of the Free-Soil and Republican parties in the 1850s, although in the absence of electorally viable abolitionist alternatives, he advocated voting for those parties' candidates.[68] Even in his "Slaveholders' Rebellion" speech, he denounced the Founders for missing what he characterized as prime opportunities "to seal the doom of the slave system," first at the close of the War of Independence (when "slavery was young and small" and "the nation might easily have abolished it"), and a few years thereafter at the framing of the Constitution. Yet in the very same speech he praised the Founders' policy as "wise" and "right." The Founders' design in confining slavery, he remarked, was to "leave the system to die out under the gradual operation of the principles of the Constitution and the spirit of the age."[69]

What did Douglass mean by "the gradual operation" of the Constitution's principles and "the spirit of the age"? Specifically *how* was the nonextension policy to advance the completion of the constitutional order and thereby prepare the end of slavery?

Douglass's answer appears in his remarks about the Missouri Compromise. Despite his complaint about the Founders' failure to act more decisively against slavery, the crucial betrayal of the nation's principles occurred not in 1787, as the Garrisonians had it, but instead in 1820. The resolution that year of the crisis over Missouri statehood signified to Douglass "the first palpable departure from right policy." The Missouri Compromise, he contended, marks "the beginning of that political current which has swept us on to this rebellion, and made the conflict unavoidable." That fateful law "gave [slavery] a new lease of life. . . . The line of thirty-six degrees, thirty minutes, at once stamped itself upon our national politics, our morals, manners, character and religion. From this time there was a south

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68. *The Slaveholders' Rebellion* (Speech delivered on the 4th day of July, 1862, at Himrods Corners, Yates Co., N.Y.), July 4, 1862, *reprinted in* LW, *supra* note 11, at 3.249; *see e.g.*, *The Fugitive Slave Law* (Speech to the National Free Soil Convention at Pittsburgh), Aug. 11, 1852, *reprinted in* LW, *supra* note 11, at 2.206–7; *The Anti-slavery Movement* (Lecture delivered before the Rochester Ladies' Anti-Slavery Society), Jan. 1855, *reprinted in* LW, *supra* note 11, at 2.353; *The Republican Party—Our Position*, Dec. 7, 1855, *reprinted in* LW, *supra* note 11, at 2.379–83; *What Is My Duty as an Anti-slavery Voter?*, Apr. 25, 1856, *reprinted in* LW, *supra* note 11, at 2.391–93; *Danger of the Republican Movement*, July 1856, *reprinted in* LW, *supra* note 11, at 5.386–87; *Fremont and Dayton*, Aug. 15, 1856, *reprinted in* LW, *supra* note 11, at 2.396–401.

69. LW, *supra* note 11, at 3.247–49.

side to everything American, and the country was at once subjected to the slave power. . . . We became under its sway an illogical nation"—illogical in the same sense Lincoln's "House Divided" was illogical, in the attempt to reconcile fundamentally irreconcilable principles within a common constitutional order.[70]

For Douglass, as for Lincoln, the decisive consideration concerned the effect of the tolerance/nonextension policy on Americans' moral sentiment. During the Revolutionary Era, Douglass maintained, "the moral sentiment of the country was purified by that great struggle for national life." The effect of the Missouri Compromise, however, was to "[barter] away an eternal principle of right for present peace. We undertook to make slavery the full equal of Liberty, and to place it on the same footing of political right with Liberty." Douglass's view of the Missouri law was thus radically at odds with Lincoln's understanding of it, but it was identical in principle to Lincoln's view of the Kansas-Nebraska Act of 1854. In the two men's respective critiques, these laws signified a renunciation of the Declaration's affirmation of natural human rights as the first principle of legitimate government and its replacement by a posture of moral indifference—what Lincoln derided as Senator Stephen Douglas's "don't care" policy with respect to the permission or prohibition of slavery.[71] What the lawmakers in 1820 should have done instead, Douglass maintained, was "simply [adhere] to the early policy of the fathers [by] sternly refusing the admission of another State into the Union with a Constitution tolerating slavery." Had Congress done so, "slavery would have fallen into gradual decay. The moral sentiment of the country, instead of being vitiated as it is, would have been healthy and strong against the slave system," and the effect would have been to compel elected officials in larger numbers to oppose rather than to appease the slaveholding interest. So far as the Founders' tolerance/containment policy conveyed to public sentiment a clear reprobation of slavery and identified it as a morally anomalous and temporary presence in the U.S. constitutional order, it could have served effectively as the scaffolding Douglass conceptualized.

When and by what criteria, according to this argument, could the constitutional edifice be judged complete and the scaffolding removed? Douglass's answer concerning the causal efficacy of the tolerance/containment policy suggests, first, that whenever a decisive anti-slavery consensus was formed in public sentiment—whenever the public's commitment to the Founders' design of a natural-rights republic became sufficiently broad and deep, thus rendering slavery as small and weak as Douglass (questionably) claimed it was in the Founding era[72]—the scaffolding could be removed and slavery abolished by federal legislative action.

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70. *The Slaveholders' Rebellion* (Speech delivered on the 4th day of July, 1862, at Himrods Corners, Yates Co., N.Y.), July 4, 1862, *reprinted in* LW, *supra* note 11, at 3.247–48.

71. *See id.* at 3.247–49; CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 8, 41, 310, 392 (Paul M. Angle ed., Univ. of Chicago Press, 1958).

72. *The Slaveholders' Rebellion* (Speech delivered on the 4th day of July, 1862, at Himrods Corners, Yates Co., N.Y.), July 4, 1862, *reprinted in* LW, *supra* note 11, at 3.247–48.

Due to the degradation of moral sentiment initiated, in Douglass's view, by the Missouri Compromise, that moment never arrived. But Douglass's scaffolding argument entails a further consideration pertinent to the judgment of the tolerance policy's proper duration. If the security and perfection of the republic were the paramount objects, then slavery's abolition became imperative not only when it became safe to do so—when the scaffolding of tolerating slavery was no longer *needed*—but also in the event that the scaffolding itself posed an active *danger* to the republican union, threatening either to disfigure the main building permanently or to bring it down altogether. Amid such circumstances, the pressing question would no longer be whether the union could survive the cessation of the tolerance policy. The question instead would be whether the republic could survive the continuation of that policy, after tolerance had been reconceived as moral indifference toward slavery—a position, as Douglass and Lincoln both recognized, that was hardly distinguishable in practice from approval of it.

This, for Douglass, is just what happened in the wake of the Missouri settlement. The compromise commenced a national "demoralization," consisting in a "scandalous perversion of the . . . meaning of the declaration" in which the principle of universal, natural human rights was replaced by "the heartless dogma, that the rights declared in that instrument did not apply to any but white men." What then emerged was a proslavery sentiment no longer acquiescent to the notion that human bondage was defensible only as a necessary, hence temporary evil, but instead one increasingly militant and aggressive, holding slavery to be a positive good that must be perpetuated and expanded, whatever the cost to the American union. Again, in Douglass's words,

> Slavery . . . became in a few years after [the Missouri Compromise] rampant, throttling free speech, fighting friendly Indians, annexing Texas, warring with Mexico, kindling with malicious hand the fires of war and bloodshed on the virgin soil of Kansas, and finally threatening to pull down the pillars of the Republic, if you Northern men should dare vote in accordance with your constitutional and political convictions.[73]

IV. DOUGLASS'S CONSTITUTIONAL ABOLITIONISM: A CRITICAL OVERVIEW

Douglass's constitutional-abolitionist arguments are surely gratifying to admirers of the Founders' Constitution, but their capacity to withstand critical challenges requires still further explication. Two main lines of criticism are especially challenging. The first concerns the coherence of Douglass's arguments with one another, and the second concerns the adequacy of his reading of the pertinent history in his third "scaffolding" argument.

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73. *Id*. at 3.248–49. On slavery as a positive good, see especially John C. Calhoun, Speech on the Reception of Abolition Petitions (Feb. 6, 1837), *in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 474 (Liberty Fund, 1992).

A. On the Coherence of Douglass's Argument

The question of coherence arises with respect to both method and substance. As we have seen, Douglass's first two lines of argument employ different degrees of a strictly textualist method of interpretation, while his third line of argument focuses on discerning the framers' intentions from the pertinent historical, extratextual evidence. Douglass claimed to have employed this latter approach only for the sake of argument, to address on their own terms the claims by Garrison and others that the historical evidence exposes the Constitution's proslavery design. He could therefore credibly maintain that his methodological commitments remained consistent across his various arguments. But the questions concerning the substantive coherence of his arguments are at once more challenging and more revealing.

The key substantive question appears in Douglass's seeming endorsements of both the radical and the moderate positions regarding abolition—the radicals' demand for immediate abolition and the moderates' calls for gradual abolition. Douglass's reading of the framers' intentions seems to imply that the Constitution required no more than slavery's gradual abolition and therefore that it embodied some recognition, however limited and temporary, of slavery's legality. Once again, despite his impatience with the nonextension approach, Douglass called the framers' antislavery intentions "good" and their nonextension policy "wise." By his scaffolding argument seen in this light, he might seem, despite himself, to have endorsed in its essentials the moderate, gradualist position taken by Lincoln and the Republicans. And yet, notwithstanding his reference to slavery as constitutional scaffolding, Douglass never retracted his insistence (1) that slavery never had been and never could be legalized under the original U.S. Constitution, and (2) that the Constitution required slavery's immediate national abolition, to be effectuated as soon as an abolitionist legislative majority was instated.

In one aspect, Douglass's position was indeed self-contradictory: he praised the Founders' temporary tolerance approach even as he blamed them for not abolishing slavery during the Founding Era. In the practically decisive respect, however, his position was internally coherent. Here, too, as in his Fourth of July oration, his business was with the present.[74] His primary claim was that irrespective of whether the Founders' intention and approach supported abolition in the late 18th century, their approach did support it in his own day, in mid-19th century, post-Missouri Compromise America. Implicit in Douglass's scaffolding argument is the contention that the founding period and the early years of the Republic represented a peculiar legal situation in which the Constitution's antislavery principles and powers were legally authoritative and yet, by common understanding, temporarily suspended in their practical operation. Toleration of

74. *The Meaning of July 4th for the Negro* (Speech at Rochester, New York), July 5, 1852, *reprinted in* LW, *supra* note 11, at 2.188.

slavery was, in this reasoning, something akin to an act of prosecutorial discretion. Douglass accurately used the words then in currency, "gradual" or "gradualism," to denote the Founders' position on the proper *mode* of abolition, but with respect to the schedule for commencing it, *deferred* abolition is a more precise term to describe their position as he understood it. The implication is that even if the Founders' tolerance/nonextension policy *previously* imposed a binding limit on national power—i.e. in the Founding Era and at most for a generation or so thereafter—that limit was no longer binding on Douglass's generation. The framers' decision in 1787 to defer slavery's abolition by entrusting it, for a time, to individual states was consistent, in Douglass's view, with a constitutional mandate to abolish it by national action a generation or so later.[75]

One must note with emphasis that Douglass's scaffolding argument did not depend on any 19th-century conception of a "living Constitution." The claim was not that the Constitution's meaning had somehow changed over the decades from accommodative to prohibitive of slavery; it was instead that the Constitution was from the beginning antislavery and changed only from a *contingently* to an *actively* abolitionist instrument. The original Constitution incorporated a tacit contingency principle whereby slavery was to be tolerated temporarily, provisionally, and instrumentally—tolerated only so far as doing so served to strengthen and perfect the constitutional union and only so long as the utility of that policy was understood to have a proximate terminus.

In his speech on the *Dred Scott* decision, Douglass contended (with some overstatement) that "all" the Founders "looked for the gradual *but certain* abolition of slavery and shaped the Constitution with a view to this grand result."[76] He thereby implied that the premise of the Garrisonians' and slaveholders' strongest argument could be turned against its advocates. Their proslavery conclusion rested largely on the claim that a constitutional accommodation of slavery was a *sine qua non* of union for the southernmost original states. Because at least Georgia and the Carolinas would not have ratified a constitution lacking some such accommodation, the Founders' Constitution must be understood as a compromise with slavery, and it was therefore illegitimate to read it later as permitting or mandating departures from that original understanding. But according to the argument Douglass adumbrated, the prevalence of antislavery opinion among most Founders required that a corresponding condition be discerned in at least some northern states' ratifications. Just as delegates from the Deep South would not have ratified a constitution that required or permitted immediate abolition, so,

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75. *See* Don E. Fehrenbacher's incisive comment: "It is as though the framers were half-consciously trying to frame two constitutions, one for their own time and the other for the ages, with slavery viewed bifocally—that is, plainly visible at their feet, but disappearing when they lifted their eyes"; FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 27 (Oxford Univ. Press, 1978). *See also* JAMES OAKES, THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION (W.W. Norton, 2021).

76. LW, *supra* note 11, at 2.422; TFDP, *supra* note 26, at 3.180; *see Is the U.S. Constitution for or against Slavery*, July 24, 1851, *reprinted in* LW, *supra* note 11, at 5.196.

too, delegates from several northern states could not be supposed to have ratified a constitution that protected slavery in perpetuity. They could only be supposed to have ratified a constitution that honored their expectation that at some point, the odious scaffolding would be removed from their great edifice of liberty. It was understandable that the Founders for a time entrusted abolition to the states, given the optimism many of them shared in expecting the remaining slaveholding states to see the wisdom of abolition within the foreseeable future. But they entrusted that power to the states on condition that the states concerned would use it with reasonable expedition.

In other words, if an original "federal consensus" on slavery ever existed,[77] in Douglass's view it must have included the conviction that slavery was unjust and impermanent in the American constitutional order. Such a consensus would have dissolved the moment the original understanding of slavery as a deviant institution approaching its impending extinction was demoted to the status of a partisan opinion, opposed by an insurgent opinion of slavery as a positive good worthy of expansion and perpetuation. This, for Douglass, was the constitutional significance of the Missouri crisis. In the aftermath of that controversy, the slaveholding interest had renounced the original understanding and replaced it with an affirmation of slavery's permanent and even honored presence within the U.S. constitutional order. It had terminated any reasonably conceivable original consensus on slavery, and thereby also terminated any obligation on the part of northern states or the federal government to acquiesce in slavery's continuation. In this manner, Douglass could coherently argue that the Founders temporarily tolerated the existence of slavery in 1787 and that a national antislavery majority in the 1850s would possess a constitutional right and duty to effect its abolition as soon as possible.

B. On the Cogency of Douglass's Argument

To establish the coherence of a given argument is not necessarily to establish its cogency. To assess the soundness of Douglass's scaffolding argument in particular, one must first acknowledge the fragmentary and incomplete character of that argument. In the fragmentary form, in which he presented it as in the fuller construction attempted here, Douglass's scaffolding argument rests to a troubling degree on inference rather than on a compelling assemblage of historical evidence.

That most founders held slavery to be morally repugnant is well documented, as Douglass observed; but existing records show no evidence of antislavery founders explicitly affirming with approval any federal abolition power. The absence of such evidence then gives rise to a further objection to Douglass's argument: the Founders' silence in this matter, fraught with grave moral and political significance, sustains a strong presumption against ascribing to them a

77. I take the term from WIECEK, SOURCES OF ANTISLAVERY CONSTITUTIONALISM, *supra* note 17, at 16.

willingness to override the states via a federal abolition power. Furthermore, Douglass fashioned his scaffolding argument in defense of his textualist argument, against the charge that it was morally wrong to interpret the Constitution in contravention of the framers' stated, historically substantiated intentions. Douglass agreed that such an act would be morally culpable, but the shortcomings in his historical argument lend weight to suspicions that he himself was guilty of the same sort of interpretive license. If so, the shortcomings in his scaffolding argument would leave unaddressed the strongest objection to his textualist arguments, and his entire constitutional-abolitionist argument would be imperiled.

The thrust of this line of objection is to characterize Douglass's constitutional abolitionism as a further mode of heroic opposition, vindicated in the end only by the force of arms. On Douglass's reasoning so understood, slavery signified a gigantic violation of the natural law and thus activated a natural right and duty of opposition by any proper means—including, it would seem, the polemical reinterpretation of constitutional law. Critics in our time, too, have charged that Douglass's reading of the Constitution was driven primarily by considerations of practical (moral and political) utility rather than by compelling evidence. For William Wiecek, author of a thorough history of antislavery constitutionalism in the United States, Douglass's and other radicals' arguments were "flawed and disingenuous."[78] One might even say that viewed in this light, Douglass carried the spirit of his friend John Brown into the field of constitutional law, summoning allies by treating the Constitution as a kind of arsenal he could ransack for his assault on slavery. This line of objection carries considerable weight, but it cannot stand as the final word on Douglass's constitutionalism.

Douglass's historical argument regarding the founders' original consensus, though it lacks sufficient evidence to settle the question conclusively, nonetheless holds substantial plausibility. Its inconclusiveness should not obscure the point that his inference of a contingent federal abolition power, one to be activated in the event that continuing tolerance of slavery posed a mortal threat to the constitutional republic, was indeed defensible. With the inference framed in these general terms, Douglass and Lincoln, along with other constitutional moderates, were in principled agreement.

The focal point of this agreement appears in the constitutional war power. In this view, the war powers the Constitution delegates to the Congress and the president include the power to wage war by any or all means authorized by the traditional law of nations. By a long-established consensus, the law of nations authorizes the liberation of slaves held by one's enemy. So declared former President John Quincy Adams in an 1842 speech in the U.S. House of Representatives: "when a country is invaded, and two hostile armies are set in

78. WIECEK, SOURCES OF ANTISLAVERY CONSTITUTIONALISM, *supra* note 17, at 249; *see* ROBERT COVER, JUSTICE ACCUSED, *supra* note 26, at 154–58; CHARLES W. MILLS, WHOSE FOURTH OF JULY? FREDERICK DOUGLASS AND 'ORIGINAL INTENT', *supra* note 13, at 115–16.

martial array, *the commanders of both armies have power to emancipate all the slaves in the invaded territory* . . . I lay this down as the law of nations."[79] In an 1863 pamphlet defending the constitutionality of the Emancipation Proclamation, New York attorney Grosvenor P. Lowrey echoed Adams in maintaining that the power to emancipate inheres in the power to make war, and further observed that this power was tacitly recognized by the founders themselves in the treaties that concluded the War of Independence and the War of 1812.[80]

In finding a lawful basis for the power to emancipate in wartime, Adams placed his main emphasis on the law of nations, but he also briefly suggested a grounding in constitutional text and tradition. The war power, Adams contended, comprehends also the power delegated in Article I, Section 8 to suppress domestic insurrections: "if [the slave states] come to the free States, and say to them, you must help us to keep down our slaves . . . then I say that with that call comes a full and plenary power to this House and to the Senate over the whole subject. It is a war power."[81] Douglass knew and approved of Adams's opinion. He made explicit reference to it in an April 1861 speech,[82] but he had already developed it—and taken a characteristically expansive view of the power under consideration—in his 1860 Glasgow speech. Employing reasoning similar to that of Chief Justice John Marshall in *McCullough v. Maryland* (and prior to Marshall, of Alexander Hamilton),[83] Douglass applied the doctrine of broad implied powers to the anti-insurrection power: "The right to put down an insurrection carries with it the right to determine the means by which it shall be put down. If it should turn out that slavery is a source of insurrection, that there is no security from insurrection while slavery lasts, why, the Constitution would be best obeyed by putting an end to slavery, and an anti-slavery Congress would do that very thing."[84]

Douglass's formulation in that passage is curiously conditional ("if it should turn out"), but it is beyond question that he held slavery to be indeed a source of insurrection. More than that, according to Douglass slavery was *itself* an insurrection. "What is a slaveholder but a rebel and a traitor?" he asked in a June 1861

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79. CONG. GLOBE, 27th Cong., 2nd Sess. 429 (statement of Rep. John Quincy Adams) (emphasis original), accessed at https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=010/llcg010.db&recNum=444 [https://perma.cc/46Q5-E8CU].

80. *See* GROSVENOR P. LOWREY, THE COMMANDER-IN-CHIEF; A DEFENCE ON LEGAL GROUNDS OF THE PROCLAMATION OF EMANCIPATION; AND AN ANSWER TO EX-JUDGE CURTIS PAMPHLET, ENTITLED "EXECUTIVE POWER" 12–15, 26–29 (2d ed., G.P. Putnam, 1863). On the founders' recognition of this power, see also SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTI-SLAVERY AT THE NATION'S FOUNDING 263–64 (Harvard Univ. Press, 2018); OAKES, THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION, *supra* note 75, at 136–37.

81. CONG. GLOBE, *supra* note 79, at 429.

82. *Hope and Despair in These Cowardly Times* (Rochester, N.Y.), 1861, *reprinted in* TFDP, *supra* note 26, at 3.427–28.

83. McCullough v. Maryland, 17 US 316, 406–11 (1819); Alexander Hamilton, *Opinion on the Constitutionality of a National Bank*, Feb. 23, 1791, *reprinted in* THE POLITICAL WRITINGS OF ALEXANDER HAMILTON 56–57 (Cambridge Univ. Press, 2017).

84. *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?* (Speech in Glasgow, Scotland), Mar. 26, 1860, *reprinted in* LW, *supra* note 11, at 2.473.

speech. "A man cannot be a slaveholder without being a traitor to humanity and a rebel against the law and government of the ever-living God."[85] As noted above, Douglass held slavery to be a longstanding state of war, waged particularly against its primary victims and generally against the completion of republican, constitutional government in America. On this point, Douglass showed himself to be, in effect, a radical Lockean, in contrast to Lincoln, Adams, and other constitutional moderates. As Douglass viewed the matter, what activated the federal abolition power was not only a shooting war commenced by slaveholders against the constitutional, republican union, but also (in Locke's language) a declaration by slaveholders of a "sedate, settled design"[86] to transform their country into a slaveholding oligarchy—to corrupt the republican elements of the Union if possible and to banish them if necessary. Slaveholders supplied abundant evidence of that design ever since the Missouri crisis. Based on this expansive view of insurrection, Douglass would have deployed a federal abolition power earlier and with broader application than Lincoln did. But the important fact remains that Douglass and Lincoln, radicals and moderates, both affirmed the existence of that constitutional power, disagreeing only on the timing and scope of its deployment. As the fateful month of April 1861 drew to a close, Douglass welcomed the opportunity to plant his argument for constitutional abolition on the comparatively solid ground first staked out by Adams and soon to be occupied by the Great Emancipator.[87]

CONCLUSION

Despite some serious shortcomings, it is a mistake to view Frederick Douglass's reading of the founders' constitution reductively, as an expression of mere abolitionist partisanship. As a general proposition, though not in all particulars, his arguments present a solid basis in text, history, and political philosophy for his pro-liberty, antislavery constitutionalism. It is fair to add, however, that by his enlarged notion of interpretive fidelity—reading the Constitution in light of the objects announced in its own Preamble and of the natural-law principles summarized in the Declaration of Independence—Douglass's antislavery constitutionalism was an exercise in republican statesmanship as well as in constitutional interpretation. As slaveholders' threats of secession and civil war loomed, Douglass's and others' arguments for the antislavery Constitution bolstered loyalist efforts by refusing to concede the ground of legality to the rebel cause. At the same time, by his rebuke of Garrisonian calls for disunion, Douglass rejected the superficially appealing but deeply self-destructive posture of alienation from law and country by which racial reformers have been recurrently tempted, in his day and our own.

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85. *The Decision of the Hour, Substance of a Lecture Delivered at Zion Church*, Jun. 16, 1861, *reprinted in* LW, *supra* note 11, at 3.122.

86. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 278-79 (Peter Laslett ed., Cambridge Univ. Press, 1988) (1690).

87. *Hope and Despair in These Cowardly Times* (Rochester, N.Y.), 1861, *reprinted in* TFDP, *supra* note 26, at 3.427–28.

In the final, future-oriented section of his Fourth of July oration in 1852, Douglass assured his audience: "notwithstanding the dark picture I have this day presented of the state of the nation, I do not despair of this country. There are forces in operation, which must inevitably work the downfall of slavery . . . I, therefore, leave off where I began, with hope." This was more than an attempt to boost morale at a particularly difficult moment. In Douglass's understanding, the hopefulness he harbored and commended to others was evidence-based. It drew its strength, he explained, primarily from the nation's great founding texts—"from the Declaration of Independence, the great principles it contains, and the genius of American Institutions" as embodied in the Constitution, that "glorious liberty document"— and it also drew strength from Douglass's Jeffersonian confidence that ongoing advances in communications, transportation, and commerce would accelerate the propagation, around the country and around the world, of the natural-rights principles that informed those documents. At a still deeper level, however, Douglass's hopefulness reflected more than a confidence in the impending triumph of just principles. A spirit of hopefulness, in his understanding of moral psychology, was itself a natural-law imperative.

As Douglass conceived of it, natural law requires not only the protection of natural human rights but also, as a secondary rule, the cultivation of the moral sentiments and habits of character that enable the effective exercise of rights. In his second autobiography, preparing the climactic moment of his battle with the tyrannical slavemaster Edward Covey, Douglass disclosed an essential condition of moral humanity by describing the moment in which he was most *de*humanized. Having suffered a severe beating at the hands of Covey and then a crushing rebuke by his legal owner, Thomas Auld, Douglass found himself alone in the woods in a condition of radical hopelessness—alienated from his society, from his past or future, from his very human nature. Slavery brutalized most of all by depriving its victims of any "future with hope in it," whereas "the life and happiness" of the human soul is to be forward- and upward-looking, envisioning "unceasing progress." Because this is the moral condition in which one can effectively exercise one's right to liberty, it is a natural-law imperative to cultivate and preserve it where possible.[88]

In his "Slaveholders' Rebellion" speech, Douglass declared, "No people ever entered upon the pathway of nations, with higher and grander ideas of justice, liberty and humanity than ourselves."[89] That promising heritage must not be renounced or discarded at the promptings of interest, zeal, or frustration. Seen in this light, in Douglass's constitutional thought as in his political philosophy the presumption in favor of liberty and a presumption in favor of hopefulness are two sides of a coin. The presumption for a U.S. constitution of liberty is also a presumption that America can make a proper home, a true mother- and fatherland

88. BF, *supra* note 10, at 278, 304–05.

89. *The Slaveholders' Rebellion* (Speech delivered on the 4th day of July, 1862, at Himrods Corners, Yates Co., N.Y.), 1862, *reprinted in* LW, *supra* note 11, at 3.248.

that provides security and belonging and nurtures the healthy aspirations of all its people, irrespective of color or previous condition. In the solitude episode in his autobiography, we see an indication of the common thread connecting Douglass's battles on various antislavery fronts. For much of his abolitionist career, Douglass directed his heaviest rhetorical fire toward three main target groups: slaveholders and their apologists; Garrisonian disunionists; and proponents of black colonization or emigration. What those three groups had in common, in Douglass's view, was that all were purveyors of alienation and hopelessness, working wittingly or unwittingly to demoralize America's black population.

Among the great evils of the Supreme Court's radically proslavery *Dred Scott* ruling, according to Douglass, was that it rendered free blacks "aliens and enemies in the land of their birth."[90] This was true also of the emigrationist position, which taught black Americans their native homeland, the only home most had ever known, was not their true home and thus fostered among them a utopian "longing for some mighty revolution in our affairs," without which no meaningful progress was possible. The same was true of Garrisonian disunionism, which taught that the U.S. constitutional order was so radically corrupt from its inception that the only hope for the cause of liberty lay in its destruction. By Douglass's lights, the practical yield of all these positions among black Americans would likely be an attitude of perpetual opposition, destined to end in a spirit of nihilism or futility.[91] The broader lesson of his constitutionalism is then to implore his friends and fellow citizens: Do not endorse readings of the Constitution or of the country's meaning and history whose effect would be to render us aliens and dash our hopes for America, unless the evidence compels such endorsement with irresistible clarity.

Here, finally, is perhaps the most enduringly significant point of convergence for Douglass and his friend Abraham Lincoln. The promise of America's constitutional republic, Lincoln told the Congress in December 1861, was to exemplify "the just, and generous, and prosperous system, which opens the way to all—gives hope to all, and consequent energy, and progress, and improvement of condition to all."[92] The natural-rights, constitutional republic as the distinctively hope-embodying and hope-giving form of government: this is the fuller significance of Frederick Douglass's anti-slavery, pro-liberty constitutionalism.

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90. *Slavery and the Irrepressible Conflict*, Aug. 1, 1860, *reprinted in* TFDP, *supra* note 26, at 3.369.

91. *See generally* PETER C. MYERS, FREDERICK DOUGLASS: RACE AND THE REBIRTH OF AMERICAN LIBERALISM 152–60 (Univ. Press of Kansas, 2008) (explaining this concept with a more thorough discussion).

92. Abraham Lincoln, Annual Message to Congress (Dec. 3, 1861), *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 634 (Roy Basler ed., Da Capo Press, 2001).