

PAPERS

Frederick Douglass, Common Good Constitutionalism, and Civil Society

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ABSTRACT

Debates over common good constitutionalism often revolve around the question of whether the empowerment of government agencies or the protection of individual rights is the more effective means to attain the common good. What warrants greater attention in this dialectic is the critical function of social associations that lie between the individual and the state to advance this end. My paper argues that Frederick Douglass' political thought and political life provide a crucial intellectual resource in highlighting the important role of such associations to promote the common good. While Douglass' constitutional thought hints at his broader conception of this term, it is only when we also take into account his reflections on the art of association and the efficacy of civil society institutions that a sharper picture of his vision of the common good emerges. This underappreciated dimension of Douglass' thought suggests that the common good depends not only on the security of individual rights and on the judicious exercise of public authority, but also on the graceful weave of social relationships in civil society dedicated to cultivating excellence of character in a commonwealth.

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INTRODUCTION

This paper lies at the convergence of two recent trends in scholarship. The first trend is the heightened scrutiny given to the connection between constitutional theory and the common good, while the second is the rise of scholarship on Frederick Douglass, including, but not limited to, commentary on his pivot from his proslavery to antislavery view of the U.S. Constitution.¹ I seek to merge these two currents by exploring Douglass’ understanding of the relation between the Constitution and the common good and demonstrate how his insights can fill a lacuna in contemporary discourse over the role of constitutional interpretation and its limits in satisfying this aim.

Two of the most prominent arguments that shape the terms of debate today over the link between the Constitution and the common good are: a.) proper constitutional theory should interpret the Constitution consistent with Aristotelian and Thomistic conceptions of the *bonum commune* and lay a sharp accent on the function of public authority and administrative agencies in advancing the telos of a nation²; and b.) proper constitutional theory should interpret the Constitution in

1. For deeper elaboration of Douglass’ constitutional theory, see, e.g., Gregory M. Collins, *Beyond Politics and Natural Law: The Anticipation of New Originalist Tenets in the Constitutional Thought of Frederick Douglass*, 6 AM. POL. THOUGHT 574 (2017); Bradley Rebeiro, *Frederick Douglass and the Original Originalists*, 48 BYU L. REV. 909 (2023); Anthony Lister Ives, *Frederick Douglass’ Reform Textualism: An Alternative Jurisprudence Consistent with the Fundamental Purpose of Law*, 80 J. OF POL., 88 (2018); Diana J. Schaub, *Frederick Douglass’ Constitution*, in THE AMERICAN EXPERIMENT: ESSAYS ON THE THEORY AND PRACTICE OF LIBERTY 459 (Peter A. Lawler and Robert M. Schaefer eds., 1994); David E. Schrader, *Natural Law in the Constitutional Thought of Frederick Douglass*, in FREDERICK DOUGLASS: A CRITICAL READER 85 (Bill E. Lawson and Frank M. Kirkland eds., 1999); Peter C. Myers, *Frederick Douglass’ Natural Rights Constitutionalism: The Postwar, Pre-Progressive Period*, in THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME 73 (John Marini and Ken Masugi eds., 2005); Charles W. Mills, *Whose Fourth of July? Frederick Douglass and ‘Original Intent’*, in FREDERICK DOUGLASS: A CRITICAL READER, *supra*, at 100–42; Nicholas Buccola, *THE POLITICAL THOUGHT OF FREDERICK DOUGLASS: IN PURSUIT OF AMERICAN LIBERTY* 134, 142–43 (2013).

2. See Adrian Vermeule, *COMMON GOOD CONSTITUTIONALISM* (2022); Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037> [<https://perma.cc/99ER-A5GN>]; Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL’Y 103, (2022); Conor Casey, *‘Common Good Constitutionalism’ and the New Debate over Constitutional Interpretation in the United States*, 4 PUB. L. 1, 1 (2021). See generally HADLEY ARKES, *MERE NATURAL LAW: ORIGINALISM*

light of its protections for individual rights, which may be harmonious with broader notions of the common good as long as this approach is informed by credible methods of constitutional interpretation.³

The claim of this paper is that Douglass did maintain there was an intimate relation between the Constitution and the common good, and that the document should therefore be read in accord with the larger moral objects of the nation—which in his view could be realized in no small part by protecting individual rights. Yet this paper argues that a firmer grasp of Douglass' conception of the common good requires expanding the scope of his commentary beyond constitutional theory to explore his wider vision of a flourishing political community. For Douglass, this kind of community included not only the safeguarding of individual rights but also a vibrant and racially integrated civil society—the nexus of voluntary associations lying between the individual and the state—that fostered social progress and character formation.

The relevance of this aspect of Douglass' thought derives from the tendency in current debates over common good constitutionalism, as indicated in the two influential arguments outlined above, to accept the implicit premise that the primary vehicle to bring about the common good is either the state or the individual. What is missing in this dialectic is sufficient attention to precisely the kind of voluntary associations Douglass recognized between these two poles that can aid in the attainment of this goal. Accordingly, his political life and political thought can serve as rich resources to recover this crucial dimension of the common good that: (a) demonstrates the promise *and* limits of the Constitution in promoting this aim; (b) affirms the crucial importance of character formation filtered through civil society institutions to fulfill it; and (c) cautions against the reduction of debates over the common good to either the exercise of individual liberty or the promulgation of administrative rules, thereby suggesting that the third option between individualism and public administration—character formation through the art of association—warrants closer inspection than it has been given thus far in recent discussion about the intersection of the Constitution, rights, and teleology.

I. THE GENERAL PRINCIPLES OF DOUGLASS' CONSTITUTIONAL THEORY

A brief introduction of guiding principles of Douglass' constitutional theory will serve as a point of departure for this inquiry.⁴ Originally adopting the

and the Anchoring Truths of the Constitution (2023); JOSH HAMMER, *COMMON GOOD ORIGINALISM: OUR TRADITION AND OUR PATH FORWARD*, 4 HARV. J.L. & PUB. POL'Y 917 (2021); PATRICK DENEEN, *WHY LIBERALISM FAILED* (2019); PATRICK DENEEN, *REGIME CHANGE: TOWARDS A POSTLIBERAL FUTURE* (2023) (BOTH OF DENEEN'S BOOKS PROVIDE A BROADER THEORETICAL ACCOUNT OF THE COMMON GOOD WHILE PLACING LESS EMPHASIS ON THE ROLE OF ADMINISTRATIVE AGENCIES IN ATTAINING THIS AIM).

3. See Randy E. Barnett, *Deep-State Constitutionalism*, Spring 2022 CLAREMONT REVIEW OF BOOKS 33 (reviewing ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022)); see also Michael Foran, *Rights, Common Good, and The Separation of Powers*, 86 MOD. L. REV. 599 (2023). There have been many other criticisms of the first approach, but this article will focus on these two predominant interpretations of the connection between the Constitution and the common good.

4. See *supra* note 1.

Garrisonian abolitionists' belief that the Constitution was a proslavery document, Douglass shifted his position to an antislavery interpretation of the text throughout the 1850s.⁵ Broadly speaking, Douglass argued that the law should facilitate the causes of liberty and justice for members of all races and stations in life. Legal instruments such as the Constitution should therefore be used to further these causes rather than sanction the perpetuation of conventions and traditions that offended the elemental principles of natural morality.

The fullest statement of Douglass' mature constitutional theory—and one that was particularly impressive given that Douglass was not a lawyer or legal scholar—was a speech he delivered in Glasgow in 1860 titled “The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?”, in which he explained the central interpretative tenets of what I have characterized as “public meaning textualism.”⁶ One of its most consequential prongs was the precept that legal interpretation should focus on the “plain and common-sense” meaning⁷ of the words of the Constitution as reasonably understood by the general public at the time of its ratification. Rather than embodying an act of esoteric communication among political and legal elites, the document in Douglass' view was written in accessible language that could be comprehended using straightforward reasoning rather than abstract theorizing or psychoanalysis. Extracting the meaning of a particular clause, such as the Fugitive Slave Clause, did not demand that interpreters attempt to get inside the head of its drafters and plumb their internal motivations for supporting the provision. “It would be the wildest of absurdities, and lead to endless confusion and mischiefs,” Douglass observed in “Constitution of the United States,” “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.”⁸

Anticipating the concept that became known as the “summing problem”⁹ in constitutional theory, Douglass pushed back against the idea that constitutional provisions should be interpreted based on the original intent of the Constitution's drafters. If various private motivations inspired delegates at the Philadelphia Convention to champion particular provisions, how could one draw out a

5. For Douglass' reflections on this topic in the late 1840s and early 1850s, see Letter from Frederick Douglass to C.H. Chase (Feb. 9, 1849), *reprinted in* 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, 1817-1849 352, 352–53 (Philip S. Foner ed., 1950); Frederick Douglass, The Constitution and Slavery (Mar. 16, 1849), *id.*, at 361; Frederick Douglass, Change of Opinion Announced (May 23, 1851), *reprinted in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, 1850-1860, 155, 155–56 (Philip S. Foner ed., 1950); Frederick Douglass, Is the United States For or Against Slavery (July 24, 1851), *reprinted in* 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: SUPPLEMENTARY VOLUME 1844-1860, 191 (Philip S. Foner ed., 1975); Frederick Douglass, The US Constitution And Anti-Slavery (July 24, 1853), *id.* at 284. I will retain the spelling and punctuation used in these volumes.

6. Collins, *supra* note 1.

7. Frederick Douglass, The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery? (Mar. 26, 1860), *reprinted in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 5, at 477.

8. *Id.* at 469.

9. See Robert W. Bennett, *Originalism and the Living American Constitution*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 84, 87–91 (Robert W. Bennett & Lawrence B. Solum eds., 2011).

coherent conception of intent from this collision of wills? “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 to be respected so far, and so far only, as we find those intentions plainly stated in the Constitution,” he explained.¹⁰ Insofar as intent should be considered in constitutional interpretation, it should derive from the public intent of the provisions rather than the private intent of the provisions’ drafters. This difference foreshadowed the tensions in twentieth-century originalist jurisprudence between original intent originalism and original public meaning originalism.¹¹

In addition, Douglass diminished the importance of historical and social context in his interpretation of the Constitution. Distinguishing between the American government and the American Constitution, he argued that the presence of slavery throughout American history did not mean the Constitution granted moral validation to the practice.¹² This conviction harmonized with the heavy stress he placed on the strict semantic content of the document to discern its proper meaning, rather than on the surrounding intentions, motivations, and circumstances that led to its adoption.

Douglass framed the classic antislavery argument based on this appeal to the plain and literal words of the Constitution, stripped of supratextual historical and social conditions, in his *Dred Scott* speech:

Neither in the preamble nor in the body of the Constitution is there a single mention of the term *slave* or *slave holder*, *slave master* or *slave state*, neither is there any reference to the color, or the physical peculiarities of any part of the people of the United States. Neither is there anything in the Constitution standing alone, which would imply the existence of slavery in this country.¹³

To consider Douglass’ observation in a different light: If one stood behind a Rawlsian veil of ignorance and read the Constitution without regard to historical context, the framers’ intent, and the existence of slavery in the United States, he would struggle to identify a single word that formally recognized the institution, much less legally sanctioned it.

Consequently, in addition to “public meaning textualism,” modern scholarship has described Douglass’ theory of constitutional interpretation as “reform textualism,” “natural rights constitutionalism,” “natural rights originalism,” “natural law constitutionalism,” and “aspirational” constitutionalism.¹⁴ As I have posited elsewhere, its hermeneutical principles most closely adhere to New Originalism

10. Douglass, *supra* note 7, at 469.

11. See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 7–10 (2018).

12. Douglass, *supra* note 7, at 467–68.

13. FREDERICK DOUGLASS, THE DRED SCOTT DECISION, *reprinted in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 5, at 419.

14. See *supra* note 1.

rather than Old Originalism.¹⁵ Although prevailing tensions remain between Douglass and New Originalism, both schools of thought, as well as original intent originalism, profess a fidelity to the fixed meaning of the Constitution at the time of its ratification and to the belief that constitutional interpretation should be constrained by this meaning.¹⁶ On a similar note, I have argued that natural rights and natural law interpretations of Douglass' constitutional theory are not wrong as much as they are incomplete in giving comprehensive expression to the various strands of his hermeneutics addressing questions of public meaning, constitutional intent, and structural integrity that are not inherent in doctrines of moral philosophy.¹⁷ An appreciation for his brand of public meaning textualism helps to fill this void.

II. THE MORAL AIMS OF A COMMONWEALTH

We can begin to understand Douglass' conception of the common good by first noting his view that the Constitution did play a formative role in advancing it, namely by furnishing legal protection for individual liberty. He maintained that the document should in fact be read with reference to its broader moral purpose, indicating that the study of the Constitution could not be separated from the substantive aims of a commonwealth.

The most powerful way Douglass conveyed this idea was through his firm embrace of the presumption-of-liberty argument in constitutional hermeneutics, which was endorsed by his fellow constitutional abolitionists such as Lysander Spooner and is today associated most closely with Randy Barnett.¹⁸ According to Douglass, if an element of ambiguity did exist in a constitutional provision, the proper method of interpretation should read it in its most favorable light conducive to the cause of liberty. Because the Constitution was a "glorious liberty document,"¹⁹ as Douglass famously argued in "The Meaning of July Fourth for the Negro" (1852), each clause of the document should be read to embody this moral touchstone.

Douglass' various interpretations in "Constitution of the United States" of the constitutional provisions that directly or indirectly referenced slavery provided empirical substance to this approach: The Three-Fifths Clause, "taking it at its

15. Collins, *supra* note 1, at 576.

16. See Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12 (Grant Huscroft and Bradley W. Miller eds., 2011) (providing an example of this classic formulation).

17. Collins, *supra* note 1, at 31–33.

18. See LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (1845); Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment? Lysander Spooner's Theory of Interpretation*, 28 PAC. L. J. 977 (1997); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (rev. ed. 2014) (2004). See also Helen J. Knowles, *Securing the 'Blessings of Liberty' for All: Lysander Spooner's Originalism*, 5 N.Y.U. J.L. & LIBERTY 34 (2010); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

19. Frederick Douglass, *The Meaning of July Fourth for the Negro* (July 5, 1852), *reprinted in* 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra* note 5, at 202.

worst,” still “leans to freedom, not to slavery”²⁰ since it deprived slave states of two-fifths of political power granted to free states²¹; Article One, Section Nine’s prohibition against banning the slave trade until 1808 “makes the Constitution anti-slavery rather than for slavery”²² since it imposed a heavy price—the legal protection of the trade for only twenty years—on slave states entering the union; and Article Four, Section Two’s so-called Fugitive Slave Clause was not referring to slaves, who could not enter into voluntary contracts, but rather to indentured servants.²³ Such examples showed that the “strict construction” of clauses was necessary when laws were “taught to be made the means of oppression, cruelty, and wickedness.”²⁴

Douglass’ interpretations of these clauses, while not immune from criticism, are vivid illustrations of the presumption-of-liberty reasoning in his constitutional theory and in the interpretative methods of other constitutional abolitionists in his time. “Where a law is susceptible of two meanings, the one making it accomplish an innocent purpose, and the other making it accomplish a wicked purpose,” Douglass contended in “Constitution of the United States,” “we must in all cases adopt that which makes it accomplish an innocent purpose.”²⁵ As Diana Schaub has shrewdly noted, Douglass may have remained suspicious over some of Spooner’s particular interpretations of the Constitution that assumed perhaps too literal a character.²⁶ Indeed, in his attempt to abstract the words from the document’s text, Douglass himself may have been guilty of reading his own views into the Constitution. Both thinkers nevertheless contended that this innocent purpose—liberty—should steer the ambiguities of constitutional provisions toward higher moral ends.

In a contest between freedom and servitude, then, the former should always triumph. Douglass observed that when the liberty of defenders of the proslavery interpretation of the Constitution:

is in question they will avail themselves of all rules of law which protect and defend their freedom; but when the black man’s rights are in question they concede everything, admit everything for slavery, and put liberty to the proof. They reverse the common law usage, and presume the Negro a slave unless he can prove himself free. I, on the other hand, presume him free unless he is proved to be otherwise.²⁷

20. Douglass, *supra* note 7, at 472.

21. In this section of his speech, Douglass does not mention lower tax liability, an important benefit granted to slaveholding states by the Three-Fifths Clause.

22. Douglass, *supra* note 7, at 472.

23. *Id.* at 475.

24. *Id.* at 475–76.

25. *Id.* at 476.

26. Schaub, *supra* note 1, at 470.

27. Douglass, *supra* note 7, at 476–77.

In short, the presumption of liberty was a cardinal interpretative premise of Douglass' moral reading of the Constitution.

Douglass' conception of liberty in a legal context, however, did not adopt a posture of inflexibility opposed to any limitations on individual freedoms. His criticisms of the Supreme Court in the *Civil Rights Cases* (1883), in which the Court invalidated provisions of the 1875 Civil Rights Act that proscribed private acts of racial discrimination in public accommodations, endorsed the role of the state in regulating the personal conduct of private business owners and establishments. The Court "has viewed both the Constitution and the law with a strict regard to their letter, but without any generous recognition of their broad and liberal spirit," Douglass lamented in a speech in reaction to the cases.²⁸ His rejoinder to the *Civil Rights Cases* suggested that liberty must be married to justice—such as racial equality in public accommodations—both as a method of constitutional interpretation and as an ethical compass for American politics.

Here we begin to discern key elements of Douglass' conception of the common good, a blend of individual rights with necessary government intervention to protect blacks from invidious racial discrimination in the private sphere. Rather than interpret the Constitution through a narrow prism of individual autonomy, he placed noticeable emphasis on the document's Preamble as a broad framework to grasp the moral purposes of the American political community. As Douglass explained in "Constitution of the United States:"

Here are its own objects as set forth by itself: — "We, the people of these United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." The objects here set forth are six in number: union, defence, welfare, tranquillity, justice, and liberty. These are all good objects, and slavery, so far from being among them, is a foe of them all.²⁹

In his judgment, the so-called slavery provisions of the Constitution, when read in light of the plain and public meaning of these teleological aims of the Preamble, should be understood to privilege liberty and justice over servitude and injustice.

Similarly, Douglass in his *Dred Scott* speech connected the aspirations of the Preamble to the Declaration of Independence. "Such are the objects announced by the instrument itself," he said, "and they are in harmony with the Declaration of Independence, and the principles of human well-being."³⁰ In 1861, when insisting that the federal government should both seek to defeat the Confederacy

28. FREDERICK DOUGLASS, THE CIVIL RIGHTS CASE (Oct. 22, 1883), reprinted in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, 1865-1895, 392, 399 (Philip S. Foner ed., 1950).

29. Douglass, *supra* note 7, at 477.

30. Douglass, *supra* note 13, at 419.

and eradicate slavery, Douglass did write that the “grand object, end and aim of Government is the preservation of society,”³¹ suggesting in the context of his argument that slavery was the cause of the Civil War and thereby should be abolished to prevent anarchy. There is a *prima facie* tension between this Lockean-tinged reasoning and his invocations of the teleological objects listed in the Preamble, but perhaps his logic was that the pursuit of such objects was not possible if society did not exist in the first place. The realization of higher moral ends required, first and foremost, the basic prerequisite of social order.

In fact, Douglass in his *Dred Scott* speech appeals to a political and ethical foundation he held was sufficient to eradicate slavery, which in many ways is compatible with common good constitutionalism’s endorsement of the authority of legislators, administrators, and judicial officials to bring about justice in a political community. Douglass observed:

Within the Union we have a firm basis of anti-slavery operation. National welfare, national prosperity, national reputation and honor, and national scrutiny; common rights, common duties, and common country, are so many bridges over which we can march to the destruction of slavery.³²

The goal of abolition, mixed with the national imperatives of reputation and honor and the shared rights and duties of Americans, comprised a treasury of moral and political capital necessary to liberate slaves. A vision of the common good that required the emancipation of blacks guided Douglass’ understanding of the substantive aims of a commonwealth. This was a necessary condition for the attainment of the common good—but it alone was not sufficient.

III. DOUGLASS’ CONCEPTION OF THE COMMON GOOD BEYOND LIBERTY AND HIS IDEA OF CIVIL SOCIETY

Read in a vacuum, Douglass’ impassioned celebration of “liberty,” both in “Constitution of the United States” and in his other writings and speeches (even given his additional allusions to the Preamble and justice), stands vulnerable to the predominant criticism that common good constitutionalism, and common good conservatism more generally, level against liberals, libertarians, and classical liberal-minded conservatives on both textual and ethical grounds: Living constitutionalism and the fusionist conservative project in post-World War Two America are motivated by the desire for the expansion of individual autonomy at the grave expense of the common good, localism (or, paradoxically, nationalism), and traditional moral virtue.³³ On the matter of the Preamble specifically, common good constitutionalism argues that its reference to “liberty” should be read

31. FREDERICK DOUGLASS, CAST OFF THE MILL STONE (Sept. 1861), *reprinted in* 3 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, 1861-1865, 154, 155-56 (Philip S. Foner ed., 1952).

32. DOUGLASS, *supra* note 13, at 416.

33. *See supra* note 2.

in alignment with classical notions of the concept, namely the “faculty of choosing the common good,”³⁴ rather than the maximization of private choice.

The aim of this section is to suggest that Douglass, while a passionate advocate of liberty in the tradition of classical liberalism, harbored a conception of the common good that remains resistant to these charges because it possessed degrees of complexity that cannot be reduced only to pleas on behalf of individual freedom, important as this goal was in his political life. Individual rights and public authority were certainly crucial prongs of his conception of the general welfare: As has been eloquently discussed in Douglass’ scholarship, Douglass was a consistent proponent of free labor and underscored the fundamental responsibility of government to secure political, economic, and civil rights for blacks.³⁵ But he also understood the common good to draw its ethical content from a pastiche of familial and voluntary associations that promoted the growth and prosperity of a people.

Therefore, although Douglass typically did not employ the phrase “common good” in his writings and speeches—he would often use “general welfare” instead, reminiscent of the Preamble and the idioms of the time period; we shall use these terms interchangeably herein—the next two sections will attempt to tease out his provisional conception of the idea. The intricate dimensions of Douglass’ notion of the common good require far deeper elaboration than this space allows. We shall highlight a number of key themes of his beliefs on this subject, however, in order to illustrate that his apprehension of the common good penetrated beyond the enjoyment of individual liberty and the government’s protection of rights to encompass the ethical, social, educational, intellectual, and religious aims fostered by kinship networks and intermediary institutions of civil society.

Before proceeding, we must first mention that Douglass’ remarks on families and voluntary associations flowed from his intuition that human nature consisted of both individualist and social threads. As he wrote in his 1851 essay “Is Civil Government Right?”, an inquiry into the “rightfulness” of civil government should assume:

first, that man is a social as well as an individual being; that he is endowed by his Creator with faculties and powers suited to his individuality and to society. Second, that individual isolation is unnatural, unprogressive and against the highest interests of man; and that society is required, by the natural wants and necessities inherent in human existence.—Third, that man is endowed with reason and understanding capable of discriminating between good and evil, right and wrong, justice and injustice.³⁶

34. VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 2, at 39.

35. See Buccola, *supra* note 1; PETER C. MYERS, FREDERICK DOUGLASS: RACE AND THE REBIRTH OF AMERICAN LIBERALISM (2008); TIMOTHY SANDEFUR, FREDERICK DOUGLASS: SELF-MADE MAN (2018).

36. FREDERICK DOUGLASS, IS CIVIL GOVERNMENT RIGHT? (Oct. 23, 1851), *reprinted in* 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 5, at 209.

Adopting an Aristotelian-Thomistic understanding of man and society, enlivened by a Lockean streak of individualism, Douglass succinctly captured key premises of the art of association: man's natural sociability; atomism as an affront to nature, progress, and the telos of man; the inevitability of society as a preserve for the fulfillment of human needs; the function of society to promote the general welfare through the satisfaction of such needs; and man's capacity to make rational judgments about right and wrong (thereby enabling him to pursue justice in association with others).

The second quality of Douglass' wider notion of the common good is that it reinforced the underappreciated teleological bent in his political theory. Hinting at this dimension of his thought in his praise of the Preamble, as discussed in Section II, Douglass elsewhere steadily communicated a firm belief in the notion that freedom and society must exist *for something*, which is one reason why he frequently peppered his writings and speeches with terminology such as "justice" and "humanity," as well as "liberty" and "rights."³⁷ There are unmistakable deontological commitments in Douglass' political and moral philosophy, as exemplified most powerfully by his Lockean embrace of self-ownership³⁸, but the preservation of rights was not the only end goal of his political activism. In "Is Civil Government Right?", Douglass declared that, unless proscribed by divine command, "whatever serves to increase the happiness, to preserve the well-being, to give permanence, order and attractiveness to society, and leads to the very highest development of human perfection" is "to be esteemed innocent and right."³⁹ He later wrote in 1871 that the "happiness of man must be the primal condition on which any form of society alone can found a title to existence."⁴⁰ Rather than defending liberty only for liberty's sake, Douglass held that it served as an essential pillar of the general welfare that, when paired with his millenarian inclinations, embodied the fusion of teleology and hope in his political thought.⁴¹

Accordingly, with regard to his constitutional theory, let us state the obvious and mention that Douglass argued for a pro-liberty interpretation of the so-called slavery provisions of the Constitution not to authorize libertinism but to put forth the most convincing legal argument to free blacks from the institution of slavery. As will become clear throughout this section, his activism on behalf of abolition

37. Douglass, *supra* note 19, at 196 ("... to all rights in this republic ... law nor justice, humanity nor religion"); Douglass, *supra* note 7, at 476 ("justice, reason, or humanity"; "justice and liberty"); FREDERICK DOUGLASS, THE INAUGURAL ADDRESS (Apr. 1861), *reprinted in* 3 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 31, at 76 ("ideas of right, justice and humanity"); FREDERICK DOUGLASS, SOUTHERN BARBARISM (1886), *reprinted in* 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 28, at 433 ("natural claims of justice and humanity").

38. Buccola, *supra* note 1, at 28, 40.

39. Douglass, *supra* note 36, at 209–10.

40. Frederick Douglass, The Labor Question (Oct. 12, 1871), *reprinted in* 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 28, at 283.

41. See DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM (2018) (providing commentary on the prophetic dimension of Douglass that illuminated his confidence in the downfall of slavery and the dawning of enlightenment and progress).

through constitutional and political means was part of his more expansive civilizational project to assist blacks in building up the social, political, and educational structures necessary to combat the pernicious effects of servitude and racial prejudice and help to orchestrate their transition from slavery to freedom. Emancipation from servitude was not emancipation from the constraints of society.

The important point for our purposes is that Douglass' defense of individual liberty was woven into his broader conception of the common good that was buttressed by a network of familial and voluntary associations such as churches, mutual aid societies, self-help groups, and educational organizations. These institutions were necessary in his judgment for the moral, intellectual, and economic elevation of the black race in the nineteenth century: They met the concrete needs of black communities while promoting the virtues of character, industry, and temperance imperative for social improvement; they vested blacks with a sense of meaning and belonging vital to their well-being in an environment that remained hostile to them; they provided a public forum for debate about the nature of justice and rights; and they promoted a spirit of sociability that overcame the weakness of the individual.⁴²

These motifs are evident in Douglass' biographical background. One of the core themes of his autobiographies is the disruptive effect of slavery on the fundamental social unit of any political community: the family. The tearing apart of mother and child under slavery destroyed the natural social bonds that otherwise emerged between them in a state of freedom. As he wrote in *Narrative of the Life of Frederick Douglass* (1845), "For what this separation is done, I do not know, unless it be to hinder the development of the child's affection toward its mother, and to blunt and destroy the natural affection of the mother for the child."⁴³ Douglass explained further in *My Bondage and My Freedom*:

There is not, beneath the sky, an enemy to filial affection so destructive as slavery. It had made my brothers and sisters strangers to me; it converted the mother that bore me, into a myth; it shrouded my father in mystery, and left me without an intelligible beginning in the world.⁴⁴

42. Chapter Two of my current book manuscript, provisionally titled THE IDEA OF CIVIL SOCIETY IN EARLY BLACK POLITICAL THOUGHT, which addresses how early black thinkers and activists understood the art of association in civil society, explores this aspect of Douglass' thought. See also ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield and Delba Winthrop trans. and ed., Univ. of Chi. Press, 2000) (1835) (providing the classic statement on voluntary associations in America, among a litany of topics).

43. Frederick Douglass, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, 1 THE FREDERICK DOUGLASS PAPERS, SERIES 2, 13 (John W. Blassingame, John R. McKivigan, and Peter P. Hinks, eds., Yale University Press, 1999).

44. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 57 (Barnes & Noble Classics, 2005) (1885).

For the “grand aim of slavery . . . is to reduce man to a level with the brute. It is a successful method of obliterating from the mind and heart of the slave, all just ideas of the sacredness of *the family*, as an institution.”⁴⁵ The sentimental attachments of the family—the social institution with the weightiest responsibility to rear children with character—were shorn by slavery, creating physical, social, and emotional distance from kin that robbed the heart of love and the soul of belonging.

Furthermore, Douglass’ political and social life was characterized by immersion in a wide variety of civil society institutions, including the African Methodist Episcopal Zion Church, the American Anti-Slavery Society, and women’s rights organizations. Douglass was also deeply engaged with newspapers, which had been identified by Alexis de Tocqueville in *Democracy in America* as a particularly powerful and affecting manifestation of voluntary associations in the United States.⁴⁶ Not only did he edit *The North Star*, *Frederick Douglass’ Paper*, *Douglass’ Monthly*, and the *New National Era*, but Douglass’ reading of *The Liberator*, William Lloyd Garrison’s famous abolitionist newspaper, awakened him to enduring moral principles that intensified his commitment to the anti-slavery movement. “I had not long been a reader of the ‘Liberator,’ before I got a pretty correct idea of the principles, measures, and spirit of the anti-slavery reform,” he wrote in the *Narrative*, “I took right hold of the cause.”⁴⁷ Indeed, Douglass believed that “the pulpit and the press” were the two most important institutions in which the public should seek guidance for their “right moral sentiment.”⁴⁸

Zooming out further, Douglass’ political project of abolishing slavery and securing equal rights under the law for blacks coexisted with his broader civilizational program—both before and after the Civil War—to promote the moral, intellectual, social, educational, and economic development of blacks through the art of association. The most famous example of this undertaking was Douglass’ consistent involvement in antislavery organizations, including Garrison’s American Anti-Slavery Society, but even his initial forays into antislavery activism in the North gave him a tantalizing taste of moral purpose and liberty. As he explained in the *Narrative* regarding his early participation in an antislavery convention in Nantucket, Massachusetts:

The truth was, I felt myself a slave, and the idea of speaking to white people weighed me down. I spoke but a few moments, when I felt a degree of freedom, and said what I desired with considerable ease. From that time until now, I have been engaged in pleading the cause of my brethren—with what success, and with what devotion, I leave those acquainted with my labors to decide.⁴⁹

45. *Id.* at 42.

46. DE TOCQUEVILLE, *supra* note 42, at 493–95.

47. Douglass, *supra* note 43, at 80.

48. 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 5, at 226.

49. FREDERICK DOUGLASS PAPERS, *supra* note 43, at 80.

Douglass' involvement in antislavery meetings and engagement with antislavery newspapers exhibited some of the best attributes of civil society: the power of human association in counteracting the limits of the individual—in this case, the limits of the individual in fostering antislavery activism without combining his resources and talents with others; similarly, the pooling of joint efforts to meet a specific need—blacks' freedom—in a community (or nation); the encouragement of public discussion about justice and morality; the subordination of the ego for a cause greater than the self; the strengthening of purpose and meaning; and the kindling of the soul.

Yet Douglass recognized that civil society institutions were a vehicle for aims beyond emancipation, such as the cultivation of the intellect, character formation, and educational progress. He believed that social contact could, in great part, serve as a propitious means to advance these goals, an insight he hinted at in his autobiographies. For example, in Chapter Ten of the *Narrative*, which included Douglass' famous depiction of his fight with Edward Covey as the "turning-point in my career as a slave,"⁵⁰ Douglass provided poignant remarks on his desire to spread the blessings of education and literacy to slaves, deeply sensitive to the harrowing reality that many masters discouraged their intellectual development. He did so by starting a Sabbath school and teaching other slaves, ranging up to forty male and female students of all ages, how to read.

Douglass' portrayal of this experience displayed the noblest qualities of social association and character formation:

I look back to those Sundays with an amount of pleasure not to be expressed. They were great days to my soul. The work of instructing my dear fellow-slaves was the sweetest engagement with which I was ever blessed. We loved each other, and to leave them at the close of the Sabbath was a severe cross indeed. When I think that these precious souls are to-day shut up in the prison-house of slavery, my feelings overcome me, and I am almost ready to ask, 'Does a righteous God govern the universe? and for what does he hold the thunders in his right hand, if not to smite the oppressor, and deliver the spoiled out of the hand of the spoiler?' These dear souls came not to Sabbath school because it was popular to do so, nor did I teach them because it was reputable to be thus engaged. Every moment they spent in that school, they were liable to be taken up, and given thirty-nine lashes. They came because they wished to learn. Their minds had been starved by their cruel masters. They had been shut up in mental darkness. I taught them, because it was the delight of my soul to be doing something that looked like bettering the condition of my race. I kept up my school nearly the whole year I lived with Mr. Freeland; and, beside my Sabbath school, I devoted three evenings in the week, during the winter, to teaching the slaves at home. And I have the happiness to know, that several of

50. *Id.* at 54.

those who came to Sabbath school learned how to read; and that one, at least, is now free through my agency.⁵¹

The Sabbath school held both practical and philosophical significance. Practically speaking, it bolstered the literacy skills of slaves, leading in part to the emancipation of at least one slave. On a higher level, it represented the luminous convergence of persons in the pursuit of a common aim, providing an arena of social interaction between the individual and the state that promoted character formation and nourished sentimental attachments. As he wrote,

They were noble souls; they not only possessed loving hearts, but brave ones. We were linked and interlinked with each other. I loved them with a love stronger than any thing I have experienced since.⁵²

The art of association led not only to the expansion of the mind but to the warming of the soul, giving slaves a sense of meaning, purpose, and belonging.

In addition, Douglass believed that voluntary associations for religious, charitable, intellectual, educational, and recreational purposes, as well as the rise of the black professional class, represented ornaments of progress necessary for racial uplift. Assessing the condition of freedmen following Reconstruction, he noted in 1883 that “[c]hurches, preachers, teachers, Sunday-schools, night schools, day schools, singing schools, and other schools, societies for mutual aid, debating societies, libraries, and literary clubs, lawyers, doctors, editors, and newspapers, have sprung up and have multiplied with wonderful rapidity.”⁵³ American society as a whole, to Douglass, would come closer to attaining complete progress if blacks were given the same rights and privileges as whites, but these associations in his view supplied concrete evidence of social improvement indispensable for advancing the general welfare (and specifically the welfare of blacks in this context), even if civil society institutions had not been fully integrated.

One specific illustration of Douglass’ keen awareness of the intersection of civil society and the common good was his oration in September 1865 at the dedication of the Douglass Institute (named after Douglass himself), which has been described as the “focal point” of Baltimore’s black community between 1865 and 1890.⁵⁴ It served as the meeting place for fraternal orders, social organizations, and black leaders of the Republican Party, encouraging the political, social,

51. *Id.* at 59–60.

52. *Id.* at 60.

53. 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 28, at 407.

54. *The Douglass Institute*, MARYLAND STATE ARCHIVES (1997), <https://msa.maryland.gov/msa/stagser/s1259/121/6050/html/douginst.html> [https://perma.cc/D3XR-X2XU]. *But see* DAVID W. BLIGHT, FREDERICK DOUGLASS’ CIVIL WAR: KEEPING FAITH IN JUBILEE, 200 (1989) (observing that the institute “did not achieve distinction among black institutions.”); *see also* Philip S. Foner, *Address of Frederick Douglass at the Inauguration of Douglass Institute, Baltimore, October 1, 1865*, 54 JOURNAL OF NEGRO HISTORY 174, 174 (1969).

educational, and moral elevation of blacks in Baltimore. The foremost mission of the institute was to facilitate the “‘intellectual advancement of the colored portion of the community.’”⁵⁵

Douglass’ address described the Douglass Institute as a symbol of improvement despite the continuing milieu of racial prejudice. The founding of the organization by blacks in the city of his youth, he said, “looms before me as a *first* grand indication of progress,”⁵⁶ for it represented the “abilities and possibilities of our race.”⁵⁷ The aim of the institute was synonymous with that of the black race overall. It was to

develop manhood, to build up manly character among the colored people of this city and State. It is to teach them the true idea of manly independence and self-respect. It is to be a dispenser of knowledge, a radiator of light. In a word, we dedicate this Institution to virtue, temperance, knowledge, truth, liberty and justice.⁵⁸

Accordingly, the organization promoted the “social, moral, political and educational duties” of a people.⁵⁹ The Douglass Institute thus represented a blunt challenge to the noxious attitude at the time that blacks were incapable of “any thing higher than the dull round of merely animal life,” instead showing that they were “devoted to all the higher wants and aspirations of the human soul.”⁶⁰

Douglass’ presentation of the institute in this manner reflected his vigorous emphasis on improvement as one of the distinguishing traits of human beings compared to non-rational animals, an observation smoothly reconcilable with his comment in “Is Civil Government Right?” that “individual isolation” was “unprogressive.” Man, he asserted in his Douglass Institute speech, “learns from the past, improves upon the past, looks back upon the past, and hands down his knowledge of the past to after-coming generations of men” so that they “may carry their achievements to a still higher point.”⁶¹ Douglass’ preference was for blacks to combine their talents and resources with whites in broader civil society, but the staying power of racial prejudice alerted him to the necessity of black associations amidst this acrimonious environment.⁶²

The germane lesson for our purposes is that Douglass’ praise of the Douglass Institute reinforced his appreciation for such institutions in furthering the moral, educational, and intellectual causes of a people who faced grave obstacles to social reform in antebellum America as a result of deep-seated racial

55. 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 28, at 544.

56. *Id.* at 175.

57. *Id.* at 177.

58. *Id.* at 182.

59. *Id.*

60. *Id.* at 176.

61. *Id.* at 181.

62. *Id.* at 178–79.

discrimination. The institute was a kind of voluntary association that aspired to advance the common interests of blacks, embodying not only their commitment to racial uplift but also the human instinct for improvement.

Douglass imagined the convergence of improvement, civil society, and character formation even more vividly in his 1848 editorial “What Are the Colored People Doing for Themselves?” Arguing that blacks must strengthen their spirit of self-reliance within their communities as northern whites removed barriers to black advancement in antebellum America, Douglass urged three influential churches—the Bethel Church of Philadelphia, the Zion Church of New York, and St. Phillips’ Church of New York—to encourage progress and reform among their congregations in order to inculcate virtues of character necessary for the elevation of the black race. “What we, the colored people, want, is *character*, and this nobody can give us. It is a thing we must get for ourselves,” he implored. “We must labor for it. It is gained by toil—hard toil. Neither the sympathy nor the generosity of our friends can give it to us.”⁶³ The black churches held the noble responsibility to spread this ethic, a particularly critical task given the stubborn persistence of racial discrimination that restricted black participation in white-run voluntary associations at the time. Douglass continued:

We must get character for ourselves, as a people. A change in our political condition would do very little for us without this. Character is the important thing, and without it we must continue to be marked for degradation and stamped with the brand of inferiority. With character, we shall be powerful. Nothing can harm us long when we get character.—There are certain great elements of character in us which may be hated, but never despised. Industry, sobriety, honesty, combined with intelligence and a due self-respect, find them where you will, among black or white, must be *looked up to*—can never be *looked down upon*.⁶⁴

According to Douglass, the development of these virtues would expose the spurious presumptions of racial prejudice and advance black progress. Education was one avenue that could aid such a cause: “The means of education, though not so free and open to us as to white persons, are nevertheless at our command to such an extent as to make education possible.”⁶⁵ Douglass’ aforementioned Sunday school for slaves was a striking encapsulation of this belief.

Whites also possessed the responsibility to expedite racial progress as a means to promote the general welfare, for both they and blacks sprung from a common humanity. This imperative included the duty of white churches to rebuke rather than condone slavery; the duty of white-run civil society and economic institutions to expand access to blacks; and the duty of the federal government to secure equality under the law for blacks. “We ask that, having the same physical, moral,

63. 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 5, at 318.

64. *Id.*

65. *Id.* at 319.

mental, and spiritual wants, common to other members of the human family, we shall also have the same means which are granted and secured to others, to supply those wants,” he explained in his 1853 oration “The Claims of Our Common Cause.” Therefore, “We ask that the doors of the school-house, the workshop, the church, the college, shall be thrown open as freely to our children as to the children of other members of the community.”⁶⁶

Douglass’ conception of the general welfare hinged ultimately on the integration of the races to facilitate social improvement and harmony. While not denying the benefits of black-run institutions in an age of racial segregation, he envisioned the United States to be a multiracial constitutional democracy in which blacks and whites (and immigrants) were woven together by a shared American identity. “A nation within a nation is an anomaly,” Douglass averred in his 1889 speech “The Nation’s Problem” “There can be but one American nation under the American government, and we are Americans.”⁶⁷ Furthermore, what was good for blacks was good for whites. This was why Douglass appealed to whites in “The Claims of Our Common Cause” as “men, as citizens, as brothers, as dwellers in a common country, equally interested with you for its welfare, its honor and for its prosperity.”⁶⁸ Black elevation was necessary for the progress of whites as well as blacks.

Douglass’ insight into the human aptitude for improvement and the salience of character formation in civil society was anchored in the deeper natural law inclinations of his political thought. This element of his moral philosophy has been well documented,⁶⁹ but the pertinent point here is that he traced a strong connection between natural law and the capacity of human beings for progress. “. . . [A]ll genuine reform must rest on the assumption that man is a creature of absolute, inflexible law, moral and spiritual,” he said in his 1883 speech “It Moves, or the Philosophy of Reform,” “and that his happiness and well-being can only be secured by perfect obedience to such law.”⁷⁰ Natural law not only served as the basis of his moral philosophy, and of the Declaration of Independence and Constitution from his perspective, but it was also the ethical substructure for any attempt at social and intellectual betterment.

Douglass was quite aware of the imperfections of voluntary associations, as demonstrated by his criticism of the Supreme Court for invalidating the public accommodations provisions of the 1875 Civil Rights Act. In addition, perhaps his most renowned speech to modern ears, “The Meaning of July Fourth for the

66. 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 5, at 256.

67. The Nation’s Problem (April 16, 1889), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, 725, 732 (Philip S. Foner, ed., abridged and adapted by Yuval Taylor, 1999).

68. 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 5, at 258.

69. See Myers, *supra* note 35, at 47–82; Buccola, *supra* note 1, at 28–30, 36, 113–14; VINCENT W. LLOYD, BLACK NATURAL LAW 1–31 (2016).

70. It Moves, or the Philosophy of Reform (November 20, 1883), in THE ESSENTIAL DOUGLASS: SELECTED WRITINGS & SPEECHES, 286, 295 (Nicholas Buccola, ed., 2016) (hereinafter THE ESSENTIAL DOUGLASS).

Negro,” celebrated the principles of the American Founding, but it also attacked the most important civil society institution in his age—the American church—for its complicity in perpetuating the slave system.⁷¹ His famous admonition to whites in his 1865 speech “What the Black Man Wants” to “Do nothing with us!” followed comments that revealed the limits of benevolent associations in bringing about racial justice.⁷² Even more fundamentally, Douglass was frequently denied access to civil society institutions in his social life.⁷³ Nevertheless, he held a conception of civil society that, when considered in its widest dimensions, offered a promising medium for blacks to spur racial progress despite persistent racial discrimination throughout the nineteenth century.

What, then, is the purpose of this discussion about Douglass’ reflections on the art of association and his experiences with civil society institutions? It is to suggest that, while Douglass’ presumption-of-liberty reasoning in his constitutional theory gestured toward his broader understanding of the common good, it was by no means sufficient to capture it in its fullest complexities. We must reiterate that any inquiry into this subject would require more extensive investigation, for we have not adequately addressed his thoughts on notions of respect, spiritual fulfillment, citizenship, women’s rights, and other salient topics in his writings and speeches. The relevant point for my argument, however, is that rather than confining the common good in Douglass’ thought to his constitutional defense of liberty, we can paint a provisional, though by no means exhaustive, account of a Douglassian conception of the term, to which we shall return in Section IV, that takes into account the examples and lessons above relating to civil society.

Consequently, as demonstrated in this section, Douglass maintained that the general welfare comprehended, in addition to individual liberty, the strengthening of organic relations among family members, the stirring of man’s religious and moral conscience, the cultivation of man’s intellectual faculties, the establishment of educational institutions in the pursuit of knowledge, the awakening of sentimental attachments, and the rational apprehension of eternal truths grounded in the natural law that transcended race and contingency. The common good for Douglass therefore was not the aggregation of utility-maximizing agents, nor could it be reduced to debates over constitutional theory. At the very least, it was rather the general abundance of knowledge, liberty, virtue, and religion, powered by the instincts of improvement unique to the human condition and the spirit of hope intrinsic to social progress, that both blacks and whites could enjoy if, among a variety of conditions, they possessed individual liberties and rights that were secured by law, *and* if intermediary institutions fulfilled their critical functions in watering the seeds of affection and promoting shared moral aims in

71. 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 5, at 181–204.

72. 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 28, at 164.

73. See 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 5, at 229–31 (providing an account of Douglass’ exclusion from such institutions in America compared to the more racially tolerant atmosphere he witnessed in London).

pursuit of the good. Douglass recognized that the objects of a commonwealth demanded freedom—but he grasped that it also demanded something more than freedom: the extension of justice to all, the protection of individual dignity, the practice of character, the shared pursuit of concrete goals in communities, the racial integration of institutions, and a durable social fabric.

IV. CONTEMPORARY DEBATES OVER THE RELATION BETWEEN THE CONSTITUTION AND THE COMMON GOOD

Douglass' conception of the multilayered texture of the general welfare holds immediate relevance to contemporary debate over the relation between the Constitution and the common good. We shall address this implication by first summarizing two main strands in the debate, briefly mentioned in this article's introduction, that scrutinize whether the Constitution should be interpreted in light of the substantive aims of a commonwealth.

The most prominent one is Adrian Vermeule's defense of common good constitutionalism, or what we may call "public authority common good constitutionalism." Defended forcefully by Vermeule and Conor Casey, this constitutional theory holds that interpretations of the Constitution should accord with the "substantive moral principles that conduce to the common good,"⁷⁴ reflecting classical conceptions of law as embodied in the *ius commune*. Rather than adhering to positivist notions of originalism or endorsing the evolution of social values associated with living constitutionalism, public authority common good constitutionalism empowers legislators, administrators, and judges to interpret the Constitution in a manner that channels individuals, associations, and communities toward the highest ethical aims of a polity.

Grounded in Aristotelian and Thomistic notions of *eudaimonia* and teleology, the common good is thus the moral justification for actions by public officials to promote human flourishing. The final aim of legislative, administrative, and judicial authority is, in Vermeule's judgment, not the preservation and expansion of man's individual autonomy as derived from his pre-political natural rights to life, liberty, and estate. Nor is it the encouragement of social experimentation in traditional matters of morality, as exemplified by the Supreme Court's recognition in the twentieth-century of the constitutional rights to privacy and same-sex marriage. It is rather to spread the blessings of peace, justice, and abundance throughout the polis in a way that renders each man his due.

The second prominent argument in the debate over common good constitutionalism, espoused by Randy Barnett and Michael Foran, among others, is what we may characterize as "natural rights common good constitutionalism," which is highly critical of Vermeule's approach. Barnett does not deny that a political community should seek the common good, nor that broader metaphysical commitments should constitute the moral ground for this aim. Yet he asserts,

74. Vermeule, *Beyond Originalism*, *supra* note 2.

unlike Vermeule, that the security of natural rights is the necessary precondition for its realization. Barnett writes, “The protection of natural rights is essential to the achievement of the common good, not only because the good of individuals is an end in itself, but because such rights constrain the age-old sacrifice of the individual for the greater good.”⁷⁵

Similar to how, in his political and social thought, Douglass praised an array of virtues, such as self-restraint, diligence, and association, as tools for social improvement, Barnett defends individual freedom not for enabling the mere satisfaction of subjective preferences but for allowing for the development of moral habits necessary for human flourishing.⁷⁶ Foran also rejects the belief that a permanent tension exists between the good of the whole and the good of the individual, instead maintaining that teleological and deontological commitments form a harmonious convergence in the quest for the common good of a political community.⁷⁷ Just as rights in an abstract sense should not be severed from or prioritized over more expansive notions of the public welfare, the common good should not take unimpeachable precedence over individual rights, nor should it be abstracted from the concrete texture of these rights oriented toward principle-based conduct.⁷⁸

Although liberal political thought is often chided for repudiating teleological conceptions of the common good⁷⁹, these criticisms in many ways articulate traditional applications of Lockean liberalism in recognizing the presence of a common good insofar as this good is derived from the protection of individual rights.⁸⁰ The debate between advocates of individual rights belonging to the classical liberal and libertarian tradition—such as Douglass, Barnett, and Foran—and proponents of common good constitutionalism, such as Vermeule, then, may not hinge in the end on whether one school or the other denies the existence of a common good, but instead on whether the resilient protection of rights is an indispensable prerequisite for this teleological objective. The question remains as to how Douglass fits into this debate.

V. BRIDGING THE CONCEPTUAL GAP BETWEEN NATURAL RIGHTS COMMON GOOD CONSTITUTIONALISM AND PUBLIC AUTHORITY COMMON GOOD CONSTITUTIONALISM

Thus far, we have described Douglass’ emphasis on public meaning textualism in his constitutional theory; his belief that the Constitution is best interpreted with reference to aspirational moral goals; his conception of the common good as an

75. Barnett, *supra* note 3, at 37.

76. *Id.* at 38.

77. Foran, *supra* note 3, at 606–09.

78. *Id.* at 615.

79. See Deneen, *supra* note 2; DAVID WALSH, *THE GROWTH OF THE LIBERAL SOUL* (1997); LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1965); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3rd ed. 2007).

80. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 353 (Peter Laslett, ed., (Cambridge University Press 1993).

idea that includes the security of individual liberty but also the pursuit of man's moral, religious, intellectual, and educational aims as distilled through families and voluntary associations in civil society; his recognition of the spirit of improvement and reform inherent in the human condition; and the natural law framework that underpinned all of these ideas.

Now we have arrived at how Douglass' insights can inform contemporary debates over the relationship between the Constitution and the common good.⁸¹ The dispute between natural rights common good constitutionalism and public authority common good constitutionalism, while both acknowledging the importance of *eudaimonia* in a well-ordered political community, continues to fluctuate back and forth over the question of whether the former does or does not constitute aggregative-preferences liberalism, and whether the latter does or does not undermine the common good by refusing to afford sufficient protection for individual rights. In a larger sense, this debate continues to grapple with the question of whether the locus of authority to advance the common good should lean more heavily toward the state or the individual, a tension reflective of broader intellectual trends in the twentieth century that have embraced key premises of this binary.⁸²

The dialectic of this conflict, however, tends to diminish the influence of a critical factor that both natural rights common good constitutionalism and public authority common good constitutionalism have hinted at and yet have not given it the attention it demands. This factor, one whose roots in the Western philosophical tradition are as deep or deeper than rights-based or common good-based political thought, is the role of *character formation through civil society institutions that stand between the individual and the state*. Barnett certainly alludes to this consideration in his aforementioned appeal to his defense of individual freedom as a necessary precondition for the habituation of virtue and the realization of *eudaimonia*, and Foran also gestures toward it. Vermeule and Casey, it is quite safe to say, would agree as well about the importance of building up the character of the citizenry in a political community.

But this is where the relevance of Douglass emerges. Douglass' political thought and social life, as discussed in Section IV, teach that this consideration is absolutely crucial for any meaningful conception of the common good and thus warrants much sharper emphasis than it has been granted in contemporary literature on the topic. Let us start with Aristotle. Appeals to Aristotle from both strands of common good constitutionalism primarily tap into his thought to underscore his conceptions of both the natural law and the common good. Equally as crucial to Aristotle's political philosophy and ethical theory, however,

81. I will avoid commentary on the tensions among Douglass, natural rights common good constitutionalism, and public authority common good constitutionalism over specific methods of interpretation. One example of such tensions is Douglass' stronger emphasis on interpreting the literal meaning of words.

82. See JOHN RAWLS, *A THEORY OF JUSTICE* (1973) (endorsing the egalitarian welfare state); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (embracing a night watchman state).

is the idea of character formation immersed in a graceful weave of political and social relationships spanning from families to the state. It was the nexus of *these* relationships—more so than the individual or the administrative agency (which admittedly is an appendage of the modern state)—that was, in his judgment, indispensable for the cultivation of virtue and the attainment of *eudaimonia*.⁸³

Framed differently, social association for Aristotle was absolutely essential in the pursuit of the common good. This line of reasoning has continued to hold much sway in contemporary political theory, as illustrated by the rise of liberal communitarianism and conservative communitarianism in the mid-to-late twentieth century, which has drawn attention to the vital function of intermediary institutions in promoting the public welfare though the achievement of joint aims in communion with others, thereby protecting against social isolation, moral and spiritual degradation, and the concentration of power.⁸⁴

Douglass' political and social thought, reinforced by his vigorous involvement with civil society organizations throughout his life, sheds light on this pivotal consideration in understanding a proper conception of the common good. This is not to argue that Douglass was a seamless precursor of twentieth-century communitarianism; indeed, his repeated references to self-reliance may position him slightly outside the communitarian mainstream. The point is that, in addition to striving to secure the government enforcement of blacks' individual rights, Douglass, as captured by the examples in Section IV, steadily highlighted the efficacy of social association in promoting excellence of character through moral, educational, and intellectual means.

In essence, Douglass' political thought, much like public authority common good constitutionalists, did not imagine American society as the aggregative summation of individual preferences, reminiscent of crass forms of utilitarianism, but as the expression of a national creed merging individual initiative with a communitarian ethos, and weaving together men and women from different stations in life into a unifying American identity informed by the natural law.⁸⁵ Additionally, Douglass, much like natural rights common good constitutionalism, cherished the protection of individual liberty as an essential precondition for the striving of the common good. One of his most famous speeches, "Self-Made Men," precisely highlighted the diligence and industry of individual men who

83. See ARISTOTLE, *NICOMACHEAN ETHICS* (Terence Irwin trans., 1985). Admittedly, these various units were not as sharply distinct in ancient Athens and premodern Europe as they are in contemporary American society. Nor was Aristotle's notion of *koinonia politikè* synonymous with modern notions of "civil society." Note that "civil society" through the eighteenth century was used by writers in contradistinction to the state of nature. In addition, Aristotle certainly affirmed the role of the legislator in governing to pursue the common good, but he did not have in mind Vermeule's conception of the modern bureaucracy.

84. See Deneen, *supra* note 2; ROBERT NISBET, *THE QUEST FOR COMMUNITY: A STUDY IN THE ETHICS OF ORDER AND FREEDOM* (2010); WILSON CAREY MCWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* (1973); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2nd ed. 1998); *THE ESSENTIAL COMMUNITARIAN READER* (Amitai Etzioni ed., 1998).

85. See Buccola, *supra* note 1; Blight, *supra* note 41.

did not hold the social relationships and connections that could otherwise have helped them achieve upward mobility.⁸⁶ Douglass thus accommodated both the individual and the state in his notion of the general welfare, championing the individual rights of blacks and defending the enforcement power of government to secure them.

As demonstrated by his endorsement of voluntary associations, however, Douglass further attested to the immense value of intermediary institutions that lied between the individual and the state in promoting the moral, social, and intellectual aims of blacks, as well as those of the United States writ large. Self-reliance and racial uplift for Douglass included not only individual self-improvement but also community self-improvement, which was nurtured in great part by the art of association and the watering of sentimental attachments within individual races and, ideally, between races.

We may piece together this feature of Douglass' thought with his other reflections on natural rights, government, and the Constitution to sharpen the significance of his conception of the common good. The common good was the legacy of an interlaced fabric of individuals, voluntary associations, and local and federal governments aspiring to promote excellence of character and the moral and intellectual improvement of both men and women⁸⁷, which reflected man's capacity for rational judgment and his knack for reform. Moreover, although Douglass, as mentioned, recognized the salient function of black-run organizations, he ultimately held that a blending of blacks and whites in civil society—facilitated mostly by organic interactions, though at selective times compelled by government⁸⁸—furnished the most promising means for social progress because racial integration reflected the cosmopolitan impulses of humanity that saw through the pretense of skin color.

Accordingly, while Douglass simultaneously stressed the importance of individual liberty and recognized the role of government in safeguarding blacks' rights, his attention to the power of social association marked his awareness of the gradations of complexity of a political community that transcended the individual-versus-the-state binary that continues to be embraced today,⁸⁹ and that remains

86. *Self-Made Men* (March 1893) in *THE ESSENTIAL DOUGLASS*, *supra* note 71, at 332, 332–49 (Nicholas Buccola ed., 2016). See Sandefur, *supra* note 35.

87. See *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, VOL. 4, *supra* note 28, at 40–44 (advocating for women's rights, though he believed that securing the black franchise warranted priority following the Civil War).

88. As evidenced by Douglass' criticisms of the Supreme Court's decision in the *Civil Rights Cases*, discussed above.

89. See MATT ZWOLINSKI & JOHN TOMASI, *THE INDIVIDUALISTS: RADICALS, REACTIONARIES, AND THE STRUGGLE FOR THE SOUL OF LIBERTARIANISM* (2023) (expressing a libertarian perspective on the issue); see JOSEPH E. STIGLITZ, *PEOPLE, POWER, AND PROFITS: PROGRESSIVE CAPITALISM FOR AN AGE OF DISCONTENT* (W.W. Norton & Company, 2019) (expressing a progressive perspective on the issue); see also *AFRICAN-AMERICAN POLITICAL THOUGHT: CAPITALISM VS. COLLECTIVISM: THE COLONIAL PERIOD TO 1945* (Marcus D. Pohlmann ed., 2003). Much like natural rights common good constitutionalism and public authority common good constitutionalism, these thinkers would not repudiate the merit of social

implicit in the debate between natural rights common good constitutionalism and public authority common good constitutionalism. “The structure of the American Constitution and Government imply the existence among the whole people of a fraternal good will, an earnest spirit of co-operation for the common good, a mutual dependence of all upon each and of each upon all,” he wrote in 1862.⁹⁰ Man had the right to individual liberty, but the advancement of the general welfare was characterized by a web of interdependent social relations radiating a spirit of brotherhood.

To frame this matter differently, the strict delineation in the academy between rights and external influences, autonomy and heteronomy, liberty and society, is not so clearly defined in an actual political community, since individual rights are sharply refracted when they come into contact with the pragmatic substance of social life. If character formation is as paramount to the satisfaction of the common good as I am suggesting, then the most crucial metric to measure human flourishing is not the particular scope of individual autonomy or the amount of legally authorized power of administrative agencies. It is, rather, the health of a vibrant civil society and the depth of social relationships that mediate between the individual and the state. Even more, insofar as the individual *qua* individual and the public administrator *qua* public administrator are constituents for promoting the common good in modernity, it is absolutely essential that they act with character in the Aristotelian sense, since both entities, when holding positions of power, can wreak enormous havoc on the settled customs of communities if not constrained by institutional mechanisms *and* by inner self-restraint.

Therefore, I suggest that immediate and extended family networks, traditional voluntary associations such as churches, charitable organizations, and self-help groups, and the leadership class of major cultural institutions all possess considerably more influence than administrative agencies or private choice in shaping the character of citizens. These forms of social association, operating at their highest capacities⁹¹, provide religious and moral instruction, teach habits of delayed gratification, and diffuse a spirit of benevolence throughout the general population. They further help to endow individuals with meaning, purpose, and belonging, qualities that human beings struggle to achieve either in private or as a result of bureaucratic centralization, and qualities that are essential to protecting men and women from the menace of social estrangement in modernity. Douglass was keenly aware of these positive effects of the art of association.

associations, but their heavy focus on the individual and the state minimizes the vitality of the intermediary area between these two entities.

90. THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, VOL. 3, *supra* note 31, at 291.

91. I qualify this because some associations are formed for nefarious purposes that can erode character formation.

I suspect that any and all forms of common good constitutionalism would agree with much of this analysis.⁹² Moreover, a proper interpretation of the Constitution has certainly facilitated the conditions necessary for flourishing voluntary associations by endorsing legal protections for the rights to association, property, free speech, due process, and contracts.⁹³ Yet, the crux of the matter is that the vital role of character formation purified through civil society institutions in advancing the common good gets overwhelmed by debates over the individual liberty-versus-administrative law dichotomy, the merits of originalism versus living constitutionalism, and a host of other political and legal considerations that struggle to comprehend the deeper ethical foundations of the common good. Douglass' political life and political thought serve as a necessary corrective to these fluctuating tendencies.

CONCLUSION

In sum, Douglass' constitutional theory advocated a reading of the U.S. Constitution based on the original public meaning of its provisions rather than on the original private intent of the delegates who drafted them. If a clause contained a whiff of ambiguity, Douglass maintained that the text should be read in a way that leaned toward freedom, not servitude, an approach that bears a close resemblance to influential strands of New Originalism. In valuing the importance of the Preamble in setting a guiding framework for the pursuit of the common good, Douglass, not unlike the various iterations of common good constitutionalism, thus believed that the Constitution should be interpreted with reference to aspirational moral aims, although their interpretative methods contained areas of noticeable friction.⁹⁴

With regard to the conflict between natural rights common good constitutionalism and public authority common good constitutionalism, however, Douglass provides a salient contribution to this debate that has not been acknowledged with the seriousness it deserves. While Douglass celebrated natural rights and natural law and recognized the role of the state in seeking racial justice, he also defended and was an active participant in intermediary institutions of civil society, such as churches, charities, antislavery societies, self-help organizations, and racial uplift cooperatives. Douglass further denounced slavery for dissolving the natural social affections in slave families. Consequently, his vision for the common good did not begin or end with debates over proper methods of constitutional interpretations, but rather reflected a broad effort from antebellum to postbellum America to integrate individual agency and the government's enforcement of

92. See VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 2, at 155–58. Consider Vermeule's idiosyncratic endorsement of the Catholic notion of subsidiarity as a "state of exception." Admittedly, Vermeule's considerable deference to public authority might undermine conventional understandings and crowd out key institutions of civil society.

93. See LUKE C. SHEAHAN, WHY ASSOCIATIONS MATTER: THE CASE FOR FIRST AMENDMENT PLURALISM (2020) (offering a recent defense of freedom of association).

94. See footnote 82.

rights with the imperatives of social progress and excellence of character nurtured by civil society institutions and familial affections.

Insofar as this insight can yield practical guidance to questions relating to the link between the Constitution and the common good, it suggests that greater attention should be given to proper constitutional interpretation of clauses that *relate to the protection of the rights of families and other social associations*, not simply to individual rights and administrative authority (all of which admittedly influence each other). More importantly, Douglass' political thought and political life, beyond any strengths or weaknesses of his constitutional theory, impart the lesson that individual rights, antislavery constitutionalism, strict constructionism, plain meaning textualism, and government were necessary but not sufficient to establish justice and promote the common good. The tightening of ethical and social bonds, familial affections and sentimental attachments, was the additional ingredient indispensable for synthesizing individual liberty with the moral aspirations of a nation. The common good, in all its intellectual variants, derives its full nourishment not from the private preferences of the individual citizen, nor from the national edicts of the administrator, legislator, or judge, but from the habituation of virtue and the spirit of fraternity cultivated in forms of social organization that lie between the individual and the state.