

Douglass’s Constitutional Citizenship

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ABSTRACT

“We the People of the United States . . .” This ostensibly trivial phrase was the main source of Frederick Douglass’s hope for the future of blacks in the Union. Douglass had a vision of what justice required for blacks—that vision was inexorably intertwined with the idea of what it meant to be a citizen of a republic. The Constitution’s Preamble set out a citizenship worthy of one’s allegiance and devotion, if only the Union were to embrace fully the promise of its own aspirations as articulated in the Declaration of Independence and reimagined in the Gettysburg Address. A republican government of the people, by the people, and for the people, dedicated to securing the natural rights of all.

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INTRODUCTION

What are the grounds for claiming citizenship in a political community? What are the benefits of citizenship? On what grounds, if any, may a political community exclude individuals from claiming either citizenship, the benefits of citizenship, or both? These are questions that struck at the heart of Frederick Douglass's great project to procure the *full* emancipation of millions of enslaved blacks in the US. Full emancipation meant more than merely breaking the chains of the enslaved—blacks needed to be free in every sense of the term. True freedom required that slaveholders free their slaves, but also that the entire political community free the same of all impositions that prevented them from enjoying the full gamut of privileges and immunities of citizenship within the community. It was for this reason that Douglass emphatically stated to the American Anti-Slavery Society after the ratification of the Thirteenth Amendment that “the work is not done.”

Douglass understood that, in many ways, the plight of blacks rested on their claim to U.S. citizenship. The Constitution provided adequate protections for U.S. citizens so that they might flourish in a free society, but those protections were meaningless if blacks could not make a compelling claim to constitutional citizenship. So, first, Douglass had to outline what the conditions of citizenship were—what made an individual a citizen of a particular political community? To answer this question, one must first have a theory of what a political community is. Similar to Enlightenment thinkers, Douglass provided a moral account of governance through a theory of the state of nature and the conditions antecedent to forming a government. From there, Douglass offered two essential components to membership in a particular community. Each community forms itself, establishing certain parameters for admittance, some of which are common to all communities and others which might be unique. Individuals who meet said parameters may elect membership in the community or seek their fortune elsewhere. Should they elect membership, individuals must swear allegiance to the community.

But establishing membership in the community was not enough; that membership had to *mean* something if it was to assist blacks. Above all else, citizenship carried the main benefit of protection—protection of one's rights. In keeping with Enlightenment thought, Douglass believed that all persons had natural rights that derived from the natural law. Citizenship carried with it certain privileges and immunities that, combined with one's natural rights, served to facilitate a people's pursuit of happiness. Government's principal role was to ensure that these privileges and immunities were guaranteed to all citizens. The only meaningful distinction that government made between persons, according to Douglass, was distinguishing between those who were citizens and those who were aliens. Citizens—those who satisfied the conditions of membership in the community—enjoyed the benefit of the government's protection as they reciprocated allegiance to the community. Aliens, on the other hand, enjoyed their natural rights, but

could not avail themselves of the full extent of the privileges and immunities government afforded to citizens. Consequently, aliens were not required to swear allegiance to the community.

Full citizenship carried with it certain duties, duties that Douglass was quite eager to see blacks fulfill. These duties included acquiescence to the laws of the land and, of grave importance to Douglass, the duty to protect domestic soil from enemies without and within. These duties make up the substance of allegiance to the community. Indeed, Douglass found the act of taking up arms in defense of one's community to be among the best evidence that one was worthy of being numbered among that community. Thus, Douglass incessantly called for black men to fight.¹

What follows is an exposition of Douglass's theory of citizenship and blacks' claim to constitutional citizenship in the antebellum period. First, this essay will outline the prerequisites for citizenship. Following that outline is an account of the privileges and immunities that attend citizenship. Third, this essay will expound the duties associated with citizenship. Finally, this essay will conclude with a reflection on why Douglass believed that blacks had much to hope for when considering the nature of U.S. citizenship and what it had to offer.

I. A THEORY OF THE POLITICAL COMMUNITY

In many ways Douglass's theory of citizenship followed the social contract tradition, and particularly the theory of John Locke.² Douglass provided an account of the state of nature that supplied a moral account for his conception of just government. Thus, we must understand how Douglass viewed human beings in nature to comprehend the status of human beings in political society. Not unlike Hobbes, Locke, and other social contractarians before him, Douglass's origin story for human beings was one that found individuals living in pre-political society. These individuals existed in a world governed by the laws of nature and were impregnated with certain rights that conformed to those laws. However, there were two points in Douglass's state of nature that importantly distinguished him from his social contractarian predecessors. First, Douglass made clear that individuals, even in the state of nature, were not alone or isolated, but rather in communities. Second, that state of nature was not, by any means, perfect. Human beings were meant for society, not society for human beings. In this way, Douglass flipped traditional social contract theory on its head. As will be explained over the course of this essay, this caused Douglass's theory to have noticeably more robust duties imposed on the political community.

1. Frederick Douglass, *Men of Color, To Arms*, 1863, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS 317 (Phillip S. Foner ed., 1952).

2. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988) (1689).

A. *Origins of the Political Community*

Douglass most clearly described his state of nature theory in a news article, “Is Civil Government Right?” He was responding to Henry C. Wright, who published a letter addressed to Douglass’s close colleague and benefactor, Gerrit Smith, arguing that government was an inherently corrupt enterprise. Wright, channeling the Garrisonian perfectionism that had come to win over many abolitionists in the mid-1800s, stated: “*To speak of a righteous human ruler is the same as to speak of a righteous thief, a righteous robber, a righteous murderer, a righteous pirate or a righteous slaveholder.*”³ The very idea of government itself had shared the same moral foundations as slavery—both constituted unrighteous dominion. Douglass responded to Wright’s bold claims by providing the grounds for the *naturalness* of government itself.

Douglass identified several principles in nature that led to the conclusion that government was not only good, but natural. First, “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.”⁴ This first principle closely followed the Social Contract tradition, but added a unique spin. As we find in Hobbes and Locke, the natural man is one found fundamentally isolated in existence.⁵ We might suppose that human beings were social in the sense that they existed in families, the natural structure being male and female together producing offspring. But the strength of such relations in the social contract tradition is suspect at best.⁶ For Hobbes and Locke, it is plausible to assume that these family structures existed purely out of necessity, rather than out of any correspondence to some higher sense of what it means to “live well” in the state of nature. Here there is a clear break from the classical tradition (as seen in Aristotle and Cicero, for instance) in which the family structure did not exist merely out of necessity, but rather served as a reflection of the end to which human beings live—the city.⁷ Douglass’s account lies somewhere between the Social Contract tradition and the classical—man was individual *and* social in the state of nature. Human beings were not meant to be alone, but neither was their identity wrapped up solely with the community.

Douglass’s sense of human beings’ individuality derived from their God-given powers. We might describe these powers as natural powers or natural capacities.

3. Frederick Douglass, *Is Civil Government Right?*, FREDERICK DOUGLASS’S PAPER, Oct. 23, 1851, reprinted in 5 LIFE AND WRITINGS OF FREDERICK DOUGLASS 208, 209 (Phillip S. Foner ed., 1975) [hereinafter *Is Civil Government Right?*].

4. *Id.*

5. See LOCKE, *supra* note 2, at 269–78 (discussing the state of nature’s condition of “perfect Freedom” and “Equality”); THOMAS HOBBS, LEVIATHAN, 87–90 (Richard Tuck ed., 1991) (1651) (treating the “natural condition of mankind” concomitant with a state of war “of every man, against every man”).

6. See HOBBS, *supra* note 5, at 106–10; LOCKE, *supra* note 2, at 278–82.

7. See ARISTOTLE, POLITICS bk. I, at 35–53 (Carnes Lord 2d ed., 2013) (c. 384 B.C.E.); MARCUS TULLIUS CICERO, On the Republic (c. 51 B.C.E.), in ON THE REPUBLIC AND ON THE LAWS 47 (David Fott ed., 2014).

Indeed, the foundation of Douglass's natural rights theory has been described as a "capacities-based account." Natural rights are derived from the foundation of human dignity. This dignity is characterized by human beings' "capacity to reason (the rational capacity), the capacity to comprehend morality (the moral capacity), the capacity to choose how to act (the volitional capacity), and the capacity to conceive of the self as a subject with a past, present, and future (the temporal subjective capacity)."⁸ These capacities, or "natural powers," demonstrate that human beings are fit for freedom. Locke similarly identified these natural powers as the primary source of dignity and freedom. In particular, the "capacity to conceive of one's own subjectivity" is the quintessential aspect of human beings' fitness for freedom.⁹ In other words, human beings' temporal subjectivity is what sets human beings apart from other creatures and proves that human beings ought to rule rather than be ruled.

The capacity for temporal subjectivity leads to the idea of self-ownership, which is the foundation for self-governance and the primacy of natural rights. Douglass highlighted this point when he juxtaposed his life as a slave with his life as a freeman. When Douglass was a slave, he was robbed of his temporal subjective capacity—he had no say over his past, present, or future.¹⁰ He did not own his own labor and could not make fundamental life decisions outside of a master's approval. Thus, his first day working for his own sake was something of a new life.¹¹ Douglass was truly born the day he became free; life before that day was almost a fiction—it was not truly living. Locke similarly bases his theory of natural rights on self-ownership. Human beings are born into a state of perfect freedom where their labors are properly their own.¹² By Locke's account, before political society, natural rights permitted all to prosper by using labor to obtain property.¹³ All were equal in their ownership of their labor. Each could labor in nature as they saw fit, subject to natural limits.¹⁴ These limits augment human capacity to prosper and pursue ends that produce "happiness." Douglass had a similar strain of thought, identifying self-owned labor as the basis for human flourishing. Without this basic freedom, Douglass argued, there can be no sense of human flourishing.¹⁵

8. Nicholas Buccola, "The Essential Dignity of Man as Man": Frederick Douglass on Human Dignity, 4 AM. POL. THOUGHT 228, 229 (2015).

9. *Id.* at 232 (citing JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Prometheus Books ed., 1995) (1689)).

10. See generally Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 81 MO. L. REV. 1 (2016) (detailing Douglass's experience as a slave and the effect exposure to free black people had on Douglass during his time in Maryland).

11. See FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 147 (1882).

12. See LOCKE, *supra* note 2, at 269, 287–88.

13. *Id.* at 287–88.

14. See *id.* at 269–78. Some of the limits found in the law of nature restricted men from taking more than they could consume, taking so much that it did not leave enough for others, and taking that which was transformed into property by another.

15. Frederick Douglass, *Agriculture and Black Progress*, NEW NAT'L ERA & CITIZEN, Sept. 18, 1873, at 1 ("[W]ithout property, there can be no leisure. Without leisure, there can be no thought.

Though Douglass's account of natural powers and self-ownership tracks Enlightenment thinking closely, the second principle he identifies does not. The traditional social contractarian account of society's origin is one of strict necessity. Hobbes and Locke, for instance, each identified a ubiquitous state of conflict, or state of war, that leads human beings to seek political community. For Hobbes, the state of war was ever-present—the state of nature lacked any discernable, enforceable law or standard of justice that regulated human action.¹⁶ What was needed, therefore, was a political community with the power to enforce rules and provide security for the individual's life, arguably the only thing that human beings truly "owned" in the state of nature. Locke's vision was more positive, but only slightly so. The state of nature was governed by a law that was enforceable by all persons. Yet, conflict inevitably arose and, due to inherent self-interest, all persons sought justice in their own case regardless of whether the law justified their claims.¹⁷ Political community arose purely out of necessity—the need for an impartial judge to adjudicate claims based on natural rights principles.

To compare, Douglass's second principle is this: "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."¹⁸ For Douglass, the state of nature where individuals were fundamentally atomistic, self-interest-pursuing beings, whether in the presence of conflict or not, was *unnatural*. Like more classical thinkers, Douglass identified political society as the *natural* end for human beings, indeed identifying it with their "highest interests." Rather than political society being a mere creature of necessity, human beings were naturally drawn to it. This addition provided deeper context to Douglass's assertion that human beings were naturally social. Even Hobbes and Locke had a minuscule notion of extant social relations in the state of nature, but these relations were far from the "highest interests" of human beings.¹⁹ Human beings were fundamentally characterized by their *individual*, self-interested pursuits in nature; coming together in a political community was only to further serve self-interest and preserve life, liberty, and property. Douglass, however, found something more in political society. Society, we might say, made the human being *complete*—it fulfilled not only the need of security, but it fulfilled the deepest desires and the highest sense of what it meant to be human.

Without thought, there can be no invention. Without invention, there can be no progress."). Douglass's emphasis on self-owned labor and acquisition of property is fitting, given his own experience as a slave and the general influence of Enlightenment thinking at the time. *See generally* THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM (2017).

16. *See* HOBBS, *supra* note 5, at 90, 100–01.

17. LOCKE, *supra* note 2, at 278–82.

18. *Is Civil Government Right?*, *supra* note 3, at 209.

19. *See, e.g.*, LOCKE, *supra* note 2, at Chapter VI. Locke presents family relations as purely contractual in nature. Once the child reaches an age of majority, there is little use for the family unit.

The third, fourth, and fifth principles proved that human beings could establish a just society.²⁰ Douglass argued that human beings were endowed with reason to discern between right and wrong, that human beings were prone to do what was right even though at times they chose evil, and that rewards for good and punishments for evil naturally guided human beings to do that which was good.

The final principle Douglass identified provided guidance for the ends of the political community. Douglass stated: “Finally, that 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, unless positively prohibited by Divine command, to be esteemed innocent and right.”²¹ The proper aim of the political community, therefore, was to maximize the happiness and well-being of its members. Put differently, the chief end was the common good. The political community could enact whatever laws were necessary to facilitate the “development of human perfection.” The one caveat to this was that those things which were “prohibited by Divine command” were outside of the purview of the political community. But what might that have been? What had the Divine prohibited? Douglass clarified his position on the proper ends of government by stating that “human government is limited in its powers, and subject to the very wants of human nature which call it into existence.”²² Recall that, in the state of nature, all persons enjoyed natural powers which led to the idea of self-ownership and natural rights. Yet, even as human beings were individually endowed with rights, their nature *drew* them to society. But that society was formed within the context of a rights-holding people. Thus, Douglass stated that there was “no governmental authority to pass laws, nor to compel obedience to any laws, against the natural rights and happiness of man.”²³ The Divine in this sense tracked the natural law—it prohibited that which abrogated the natural rights of human beings. Governments were endowed with the power to ensure, protect, and facilitate the natural rights of human beings. Governments were also tasked with establishing laws that proved conducive to human flourishing, or happiness. But governments were nevertheless limited in nature and could not do that which frustrated the exercise of natural rights.

B. A Theory of Citizenship: Acceptance into the Political Community

Having established the origins of the political community, what were the conditions for acceptance into that community? What were the grounds for citizenship? Douglass answered this question within the American context. Douglass’s account of the origin of the American Republic began with the Declaration of

20. *Id.*

21. *Id.* at 209–10.

22. *Id.* at 210.

23. *Id.* at 212.

Independence.²⁴ The U.S. had its beginnings around a singular idea: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”²⁵ The several colonies, in 1776, exercised their natural right to dissolve the bands of government that linked them to England and forged their own political community, and the republic shaped in 1776 was solidified by the Constitution in 1789.

It was Douglass’s position that the Constitution recognized two classes only: citizens and aliens.²⁶ The rule of the new republic, according to Douglass, was “the moment a man born upon American soil became free, he also became a citizen.”²⁷ A similar position was commonly held among anti-slavery advocates. Lysander Spooner, for example, similarly argued that the Declaration of Independence was America’s first constitution.²⁸ The Declaration proclaimed life, liberty, and the pursuit of happiness to be the law of the land for all—including slaves. Therefore, all persons, both slave and free, could claim U.S. citizenship. Douglass modified this conclusion to some degree by qualifying one’s status of citizenship with the moment that individual “became free.” Thus, when the slave was freed from bondage, he or she would automatically enjoy citizenship in the U.S.²⁹

Douglass’s conception of American citizenship presented a revealing illustration of his theory of how political communities form and the implications of that formation. Within the context of federal territories, he made plain the grounds for any jurisdiction’s freedom to govern itself. In the Kansas-Nebraska speech, Douglass addressed the arguments of his “distinguished namesake, the Hon. Stephen A. Douglas.”³⁰ Senator Stephen A. Douglas, in an effort to promote and pass his bill, the Kansas-Nebraska Act, had infamously championed a theory of

24. See Frederick Douglass, *The Reproach of the American Government*, N.Y. TIMES, Aug. 3, 1858, reprinted in 5 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 3, at 394, 401 [hereinafter *Reproach of the American Government*].

25. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

26. Frederick Douglass, *The Kansas-Nebraska Bill*, FREDERICK DOUGLASS’ PAPER, Nov. 24, 1854, reprinted in 2 LIFE AND WRITINGS OF FREDERICK DOUGLASS 316, 317 (Phillip S. Foner ed., 1950) [hereinafter *KN Speech*].

27. Frederick Douglass, *The Approaching Congress*, 1861, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS 178 (Phillip S. Foner ed., 1952).

28. LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 36 (1860). Indeed, Douglass credited Spooner among others for his refined understanding of the Constitution and its dictates. Frederick Douglass, *Change of Opinion Announced*, THE NORTH STAR, May 15, 1851, reprinted in 2 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 26, at 155–56 [hereinafter *Change of Opinion*] (“A careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell, has brought us to our present conclusion.”).

29. This distinction, if ever carried in effect, would have held little difference in outcome. Though Douglass conditioned citizenship on the free status of persons, he simultaneously argued that the Constitution, if executed properly, would eradicate slavery everywhere in the Union. See Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, 1860, reprinted in 2 LIFE AND WRITINGS OF FREDERICK DOUGLASS 467 (Phillip S. Foner ed., 1952).

30. *KN Speech*, *supra* note 26, at 318.

popular sovereignty that allowed new states simply to choose whether they would permit slavery in their respective jurisdictions.³¹ In his speech, Frederick Douglass countered Stephen Douglas by contending that the people of the territories, like the people anywhere else in the Union, carried the inherent right of self-government. This meant that the people may properly govern themselves according to popular sovereignty, which Douglass defined as “the right of the people to establish a government for themselves, as against all others It is the independent right of a people to make their own laws, without dictation or interference from any quarter.”³² This suggested that a people had a right to form a political community and discern who would be a part of that initial compact, as well as establish the conditions for subsequent additions to the community. At first blush, Douglass’s definition was no different from Douglas’s—territories ought to be able to decide for themselves who was to be part of the community and how they were to live, up to and including whether they permitted slavery. Yet, similarly to Lincoln’s response to Douglas’s arguments, Douglass made an important qualification: “The only intelligible principle on which popular sovereignty is founded, is found in the Declaration of American Independence . . . that all men are created equal and are endowed by their Creator with the right of life, liberty and the pursuit of happiness.”³³ That principle was the “basis of all social and political right.”³⁴ Though popular sovereignty—and by extension local governance—entailed the ability to self-govern within a specific boundary to the exclusion of all others outside that boundary, natural rights principles limited popular sovereignty’s range of possibilities. Popular sovereignty had to be exercised in a way that reinforced the foundations tantamount to its existence—the equality of all and the right to life, liberty, and the pursuit of happiness. That Douglass believed people may choose how they govern themselves anticipated that there would be significant variation among political societies. Douglass made clear, however, that government—even by popular sovereignty—could not pursue ends antithetical to natural rights.

Even assuming, however, that communities had the collective right to govern themselves to the exclusion of others, one might ask what gave a community the right to claim a particular geographic location over and above other communities? John Locke, for one, put a strong emphasis on the origin of property and the principle of labor. The natural world was held in common by all until persons mixed their labor with the land, converting what were once useless objects into

31. See Kansas–Nebraska Act of 1854 (10 Stat. 277); Senator Stephen Douglas, Address at the Lincoln–Douglas Debates (Sept. 15, 1858) (“. . . we must take them as we find them, leaving the people free to do as they please—to have slavery or not.”). The mechanics of the Kansas–Nebraska Act would necessarily repeal the Missouri Compromise.

32. *KN Speech*, *supra* note 26, at 329–30.

33. *Id.* at 331.

34. *Id.*

useful property.³⁵ This gave the laborer a claim to that portion of the land over and above others. Douglass believed something similar. Property was the accumulation of labor and, indeed, the very means of securing “the dignity of genuine manhood.”³⁶ The way to lay claim to land was through asserting one’s labor, the only thing one owned unconditionally. The problem in the U.S., however, was that many parts of the land were cultivated through robbed labor. Of Tennessee, for instance, Douglass stated: “The very soil of your State was cursed with a burning sense of injustice.”³⁷ The claim that slaveholders had over their property, in a sense, was tainted. The labor of the slave, though properly belonging to him, was unjustly taken by the slaveholder. One might even conclude from this that, at least in the southern states where slavery was prevalent, slaves had a better (more just) claim over the land than the slaveholders did. Douglass argued that emancipation did more than liberate the slave—it liberated the land as well.³⁸ Only then could property be properly accumulated, and a community thrive in all those aspects that tend toward the happiness of humankind.³⁹

Once established, the political community presents a two-way covenant between the community writ large and its individual members. The political community guarantees the protection and facilitation of each member’s natural rights. In addition, the political community guarantees certain privileges and immunities that, though they include natural rights, tend to expand the scope of rights and protections afforded citizens according to how the community chooses to govern itself. In exchange for certain rights granted, the citizen assumes certain duties. The citizen swears allegiance to the community, which entails adherence to the community’s laws, protecting the community from enemies (whether foreign or domestic), and protecting the natural rights of fellow citizens. What follows is an exposition of Douglass’s understanding of privileges and immunities, and allegiance within the context of the U.S. Constitution.

II. THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP

For Douglass, true emancipation could not come unless and until there was a final resolution to the problem of inequality in America. The problem of privileges and immunities had to be resolved for blacks to have full membership in the political community. Douglass stated:

35. This distinction was often used to justify the dispossession of American Indians of their lands, on the theory that they had not properly “appropriated” the land, thereby making the land “useful.” See LOCKE, *supra* note 2, at 298; *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823).

36. Frederick Douglass, *Agriculture and Black Progress*, NEW NAT’L ERA, Sept. 18, 1873, reprinted in 4 THE FREDERICK DOUGLASS PAPERS 375, 393 (John W. Blassingame and John R. McKivigan eds., Ser. No. 1 Speeches, Debates, and Interviews, 1991).

37. *Id.* at 387.

38. *Id.* (“Thus you will see that emancipation has liberated the land as well as the people.”).

39. *Id.* at 393 (where Douglass identifies the proper accumulation of property with the advent of leisure, leading to thought, then to invention, and then to progress).

Putting aside all the hay, wood and stubble of expediency, I shall advocate for the Negro, his most full and complete adoption into the great national family of America. I shall demand for him the most perfect civil and political equality, and that he shall enjoy all the rights, privileges and immunities enjoyed by any other members of the body politic.⁴⁰

Whatever the privileges and immunities of citizenship entailed, it had to be held on an equal basis by all members of the community. To exempt one group from any portion of the privileges and immunities that flowed from membership was to relegate that group to a second-class position—something Douglass believed robbed individuals of their intrinsic worth as human beings. But what did these privileges and immunities entail? Douglass believed they entailed natural, civil, and political rights.⁴¹ The one exception he provided was that of social rights, which Douglass believed were outside the purview of a limited government.

A. *Natural and Civil Rights*

Douglass believed that natural and civil rights were closely tied together. Natural rights were those rights enjoyed in the state of nature. Anything that an individual could do in the state of nature, which was right, would be considered a natural right. Douglass identified life, liberty, and property to be among the most basic rights found in nature.⁴² The reason most adherents to natural rights principles readily identified these was that, even though any right enjoyed in nature was a “natural right,” upon entering a political community it becomes clear that the status across these rights is not uniform. When entering the political community, the individual gives up certain rights. Principal, though not exclusive, among these is the right to enforce the natural law in one’s favor.⁴³ Therefore, there were certain rights which, though natural, were nevertheless relinquished upon entering the social compact. Other rights, however, were inalienable. At some level, the right, even if modified or qualified, could not be fully relinquished by the rights-bearer. Going back to Douglass’s remonstrance of Stephen Douglas’s Kansas-Nebraska Bill, Douglass argued that the bill could not work because of this basic, natural rights-principle: a people could not vote on whether they would tolerate slavery in their community because one could not fully relinquish one’s

40. Frederick Douglass, *The Present and Future of the Colored Race in America*, 1863, in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 27, at 347, 348–49 [hereinafter *The Colored Race in America*].

41. As will be explained, the final category—political rights—was outside the scope of how many understood privileges and immunities in the late antebellum era. See generally RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 106 (2021).

42. See Douglass, *supra* note 29, at 477–78 (identifying rights protected by due process); see also *Is Civil Government Right?*, *supra* note 3, at 209–12 (identifying one of the core functions of government to protect rights and the Constitution’s role in doing so).

43. See LOCKE, *supra* note 2, at § 88.

liberty, even voluntarily through popular sovereignty.⁴⁴ Some things, in other words, were simply “off the table” when establishing a government.

Douglass, like many in antebellum America, believed that the Fifth Amendment’s Due Process Clause explicitly guaranteed those fundamental, inalienable rights of life, liberty, and property. However, dissimilar from many of his contemporaries, Douglass believed the Fifth Amendment protected the inalienable rights of *all* U.S. inhabitants, everywhere in the Union.⁴⁵ For instance, he argued that the Due Process Clause, properly executed, would free all the slaves in the Union. Douglass justified this claim by arguing that the Fifth Amendment, along with the other first ten amendments, operated against not only the federal government, but state governments as well.⁴⁶

Aside from the inalienable rights of life, liberty, and property, many natural rights were secured by civil rights. Civil rights were those rights granted by the political community, generally for the purpose of protecting or augmenting natural rights. By granting and protecting such civil rights, government achieved what Douglass thought all governments—properly understood—strive toward: “whatever serves to increase the happiness, to preserve the well-being, to give permanence, order and attractiveness to society[.]”⁴⁷ At another time Douglass stated: “The first duty of a government is to make its laws respected, and this can only be done by their just and impartial administration.”⁴⁸ As government created civil rights, it had to do so in a just and impartial way. But to be just, the law had to conform to the natural law. Thus, in a sense, all government-granted civil rights had to be informed by natural rights which preceded them.

Douglass argued that because natural rights were held equally by all in the state of nature, so too must civil rights be held equally by the citizenry.⁴⁹ While Douglass’s first point would have been readily accepted by most of his time, his second point—that civil rights were to be held equally by the citizenry—was not as universally accepted. Even among anti-slavery advocates, for instance, there was some dispute as to the proper place for blacks in society. While some argued for the full incorporation of blacks into society in every aspect, still others believed that the deprivation of natural rights was the sole problem—concern for

44. See *KN Speech*, *supra* note 26, at 331.

45. See Douglass, *supra* note 29.

46. The Supreme Court rejected this point in *Barron v. Baltimore*, 32 U.S. 243 (1833). Nevertheless, Douglass, along with some of the more radical abolitionists, ignored the Supreme Court’s decision and continued to argue that the Due Process Clause ought to be applied to the states where slavery still existed. See Frederick Douglass, *The Dred Scott Decision* (Speech Delivered Before the American Anti-Slavery Society, New York), May 11, 1857, *reprinted in* 2 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 26, at 407, 419 [hereinafter *Dred Scott Speech*].

47. *Is Civil Government Right?*, *supra* note 3, at 209.

48. Frederick Douglass, *One Country, One Law, One Liberty for All Citizens*, *reprinted in* 5 THE FREDERICK DOUGLASS PAPERS 401 (John W. Blassingame and John R. McKivigan eds., Ser. No. 1 Speeches, Debates, and Interviews, 1992).

49. See *infra*, notes 47–48.

disparate civil rights was not at issue.⁵⁰ Even if equal conventional rights was ideal, it was not necessary and certainly not possible politically. But to understand Douglass's divergence in this regard it is helpful to hearken to his refined view of human nature. Unlike traditional social contract theory, Douglass's state of nature contained fundamentally social beings, rather than purely atomized individuals. In Douglass's view, human beings were naturally drawn to each other. Each recognizing the dignity in the other, people everywhere instinctively desired to commune with one another on an equal basis.⁵¹ In this way, political society formed as a limited enterprise to enjoy natural rights and to increase human flourishing on an equal level. To achieve both, conventional rights were made, which derived from citizenship or commitment to a political community. Though governments could properly withhold some civil rights from some based on citizenship, they had to grant all citizens the same rights because of the fundamental rationale for government. People did not align themselves with the political community to be suddenly relegated to a second-class position, but rather to enjoy the highest development of human perfection through equal participation in the political community.

Where the government was involved, rights had to be allotted on an equal basis. "In this department of human relations," Douglass argued, "no notice should be taken of the color of men; but justice, wisdom, and humanity should weigh alone, and be all-controlling."⁵² Governments could choose differently concerning which rights to protect, but justice always had to prevail in its administration. Such matters as race, intellect, and ability were not legitimate factors in the government's calculus.⁵³ Thus, Douglass's theory of how rights were properly allocated may be summed up as follows: natural rights always belonged to individuals; civil and political rights became theirs through membership in the political community; and human nature required that once membership in the political community was established, those rights be protected on equal terms amongst all its members. The equality that existed in nature, in effect, had to be reflected in the political community.

Douglass brought more clarity to the subject of discrimination between citizens by discussing discrimination in the U.S. In doing so, Douglass clarified what he understood as equal rights for all citizens. Douglass did not hold that governments could make *no* distinctions, but that governments could only discriminate in ways that were reasonable. When he referenced odious discrimination, he often

50. See, e.g., JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 248 (Mnemosyne Publ'g Co., Inc. ed., 1969) (1849). A prominent abolitionist, Tiffany advocated for the enslaved to be emancipated and incorporated into civil society, but stopped short of advocating for all civil rights, such as voting.

51. See *Is Civil Government Right?*, *supra* note 3, at 209–11.

52. Frederick Douglass, *Cause of the Negro People*, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 40, at 418.

53. See *The Colored Race in America*, *supra* note 40, at 352 ("The question is not whether the colored man is mentally equal to his white brother, for in this respect there is no equality among white men themselves.").

did so in the context of racial discrimination.⁵⁴ For example, Douglass covered a rather public instance of discrimination in Boston, where three black men were denied entry into a café. Douglass offered an important, two-part analysis on how to distinguish between legitimate and illegitimate discrimination. He chided the act, stating that “they were not refused accommodation because of anything over which they had control, nor for anything that would stand the test of reason, but simply because they were *gentlemen* and colored.”⁵⁵ Discrimination may be legitimate, but only in a limited set of circumstances. First, one could discriminate based on things that are within control of the subject. People have the option, for instance, to go without clothing in public places, but that choice is squarely within their power. For any other discriminatory standard, it must “stand the test of reason.”⁵⁶ There could be situations in which discrimination based on characteristics individuals are powerless to affect could be reasonable. Children, for instance, may not have the requisite cognitive capacity to vote. But women do.⁵⁷

As for the proper scope of civil rights, Douglass pointed to the Reconstruction Amendments as the prime example of proper protection of citizens. Those amendments, he averred, “were intended to give full freedom to every person without regard to race or color in the United States.”⁵⁸ Douglass argued: “Complete liberty and *exact equality* in the enjoyment of all civil, political, and public rights should be established and effectually maintained throughout the Union by efficient and appropriate State and Federal legislation.”⁵⁹ This meant blacks must be afforded the right to sit on and be tried by impartial juries, the

54. See Frederick Douglass, *The Word “White”*, FREDERICK DOUGLASS’S PAPER, Feb. 24, 1854, reprinted in 5 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 3, at 319, 319–20 (“The Homestead Bill . . . contains a provision limiting the advantages which it is designed to secure, solely to that part of God’s children, who happen to live in a skin which passes for white Some deeds there are, so wantonly cruel, so entirely infernal, as to stun the feeling, and confound all the powers of reason.—And such an one is this.”). For Douglass, even the mention of race in a way that restricts one’s actions on that basis is illegitimate. Trumbull’s light defense of miscegenation laws on the grounds that such laws provided equal rights to both whites and blacks (i.e., whites can only marry whites, blacks can only marry blacks) would have made little sense in Douglass’s eyes. Any law using race as a basis for discrimination was inherently illegitimate.

55. Frederick Douglass, *Caste in Boston*, THE NEW NAT’L ERA, May 9, 1872, reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS 292, 293 (1872) (emphasis in original).

56. *Id.*

57. This point will be discussed more in depth in Section III.B. See Frederick Douglass, *Equal Political Rights for Women*, FREDERICK DOUGLASS’S PAPER, July 8, 1859, reprinted in 5 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 3, at 452 (“Some of the women in Kansas are signing petitions to the new Constitutional Convention, asking for equal political rights with men, on the popular sovereignty principle. The men will find it easier to vote against the petitions than to answer its arguments.”).

58. Frederick Douglass, *Give the Freedom Intended for Us*, THE NEW NAT’L ERA, Dec. 5, 1872, reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 55, at 298 [hereinafter *Give the Freedom Intended for Us*].

59. *Id.* at 299. Douglass’s account of public sentiment at the time differs significantly from historians who have investigated the matter. See, e.g., RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON 173–75 (1997).

right to school choice, and the right to equal access to public accommodations.⁶⁰ Charles Sumner's supplementary Civil Rights Bill, Douglass believed, could answer these just ends and reconcile the Constitution's just aims with its administration.⁶¹ Sumner's initial draft of the bill would prohibit discrimination in public accommodations, jury service, and schooling.⁶² Douglass continued to advocate for the Sumner bill until its eventual passage in 1875.⁶³

Douglass believed that failure to protect the full litany of civil rights left the enjoyment of even life, liberty, and property hanging in the balance. For instance, Douglass believed it was no accident when his home in Rochester, New York burned down, destroying his house and most of his belongings, including a large collection of his treasured writings from the antebellum period.⁶⁴ Douglass stated: "The spirit which would deny a man shelter in a public house, needs but little change to deny him shelter, even in his own house."⁶⁵ A regime permitting discrimination in any measure of civil rights could hardly expect inalienable natural rights to be respected.⁶⁶

B. Political and Social Rights

Douglass's rights analysis did not stop at civil rights. Douglass's sense for what the U.S. social compact entailed also included political rights, but his theory stopped short of social rights. As discussed earlier, there was some disagreement as to whether natural rights implicated equal enjoyment of all civil rights. There was less disagreement concerning political rights—political rights were fundamentally a political question, one to be determined by each society as it saw fit. There was no moral command educating political communities on who could

60. Douglass clarified a couple weeks later that his overtures for equality did not extend beyond rights that were properly natural, civil, and political. Social equality, Douglass argued, was beyond the pale of government regulation. See Frederick Douglass, *The Evening Star on Social Equality*, THE NEW NAT'L ERA (Dec. 19, 1872), reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 55, at 300–01.

61. See generally Douglass, *The Civil Rights Case* (Speech at the Civil Rights Mass-Meeting Held at Lincoln Hall), reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS 392 (1872).

62. By the time the bill made its rounds through Congress, the provision denying discrimination in schooling was removed. Civil Rights Act, 18 Stat. 335–37.

63. See, e.g., Frederick Douglass, *Letter from Frederick Douglass*, THE NEW NAT'L ERA, Feb. 1, 1872, reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 55, at 286.

64. See Phillip S. Foner, *Frederick Douglass: Reconstruction, 1865–1868* (1955), in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 55, at 13, 80; Frederick Douglass, *Letter from the Editor*, THE NEW NATIONAL ERA, Jun. 13, 1872, reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 55, at 294–96 [hereinafter *Letter from the Editor*].

65. *Letter from the Editor*, *supra* note 64, at 294–95 ("First, How [sic] did it happen? How was it extinguished? What was saved? What was lost? What was damaged? I do not mean to answer these questions in detail, nor to indulge in sentimental description. The fire was doubtless the work of an incendiary.").

66. In this respect, Douglass may have had a point. Throughout the South during the Jim Crow era, blacks were largely relegated to a second-class status and simultaneously endured constant terrorism from organized groups (such as the KKK) that local law enforcement was either incapable or uninterested in regulating. See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004).

exercise the right to vote. Indeed, from the founding era, it was common to restrict the right to vote, even among citizens.⁶⁷ This sentiment carried to the late antebellum period and was noticeably present during Reconstruction. But where traditional regulations on political rights generally associated with characteristics one had control over, such as owning a considerable value of property,⁶⁸ the question now was whether governments could restrict the right to vote based on immutable characteristics, such as one's race or sex. It was perhaps for this reason that Douglass believed vindicating the right to vote required a special defense.⁶⁹

Unlike others of his time, Douglass drew a direct connection between human beings' natural equality and the right to vote.⁷⁰ When entering political society, human beings' natural equality informed the government's most basic principles, including representation. Being what they were, human beings inexorably existed in communities; yet each enjoying self-ownership could live properly by no other principle than self-government. It was therefore essential for human beings to have the equal opportunity to vote as an outward manifestation of their natural powers. Moreover, exercising the right to vote became something of a duty, as human beings not only had the power to govern themselves, but their relational character imputed mutual obligations upon all to share in governance. Self-ownership, the natural pull to political society, and human beings' social nature all mutually reinforced Douglass's theory of the need for universal suffrage. Voting tied individuals to the political community and served as a conduit to a greater cognizance of one's sense of self within a community—as an individual bearer of natural rights with political obligations to the community to which one has given allegiance. Voting, in this respect, was an educative endeavor as much as a fulfilling of one's purpose—human beings gained a sense of their capacities and responsibilities as they realized them within the social context.⁷¹ If persons did not vote, they were deprived not only of their natural rights but also of a greater sense of their natural powers and their worth within the political community. Voting, therefore, was critical to the development of both the individual and the commonwealth.

67. See, e.g., James Madison, *Note to His Speech on the Right of Suffrage*, at <https://press-pubs.uchicago.edu/founders/documents/v1ch16s26.html> [<https://perma.cc/HMV7-FN3F>] (arguing that suffrage, though a fundamental aspect of republican government, be restricted to property owners); see Const. Art. I Sec. 4 (relegating matters of elections to the states).

68. See generally, Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 Yale L. J. 473 (1997).

69. For a more detailed analysis of Douglass's efforts to secure black suffrage, see, generally, Bradley Rebeiro, *The Work is Not Done: Frederick Douglass and Black Suffrage*, 97 NOTRE DAME L. REV. 1511 (2022).

70. Curiously, during Reconstruction, Douglass relied much more heavily on arguments based on expediency than natural rights when advocating for equal suffrage. See *id.* at 1522–30.

71. Frederick Douglass, *What the Black Man Wants*, Apr. 1865, reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 55, at 157, 159 (“No class of men can, without insulting their own nature, be content with any deprivation of their rights.”).

Beyond the natural rights element, America's particular regime warranted universal suffrage. In social contract theory, political societies are established based on consent. All members of the commonwealth exercise their ability to self-govern by consenting to the laws of the commonwealth. Douglass believed this was necessary because the natural law, though the source of natural rights, had no effect except through positive law enactments. In the case of the U.S., a written constitution established the mode of consent—through state conventions—and established what many referred to as the “organic” law of the land.⁷² Douglass found it significant that the mode of governance the U.S. settled upon was a democratic republic. Douglass explained:

Again, I want the elective franchise, for one, as a colored man, because ours is a peculiar government, based upon a peculiar idea, and that idea is universal suffrage. If I were in a monarchical government, or an autocratic or aristocratic government, where the few bore rule and the many were subject, there would be no special stigma resting upon me, because I did not exercise the elective franchise. It would do me no great violence.⁷³

For Douglass, a democracy best reflected the principles of natural rights, but the nature of consent permitted more than one legitimate form of government. Whether it was a monarchy, autocracy, or aristocracy, people could consent to be governed in various ways.⁷⁴ Presumably so long as the consent given was voluntary, individuals could acquiesce to a regime where there was not rule of the

72. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess., 351, 353–59 (Jan. 22, 1866) (statement of Rep. Rogers), reprinted in 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 43, 44 (Kurt T. Lash, ed., 2021) [hereinafter 2 LASH]; CONG. GLOBE, 39th Cong., 1st Sess., 403–07 (Jan. 24, 1866) (statement of Rep. Eliot), reprinted in 2 LASH, at 53, 54; CONG. GLOBE, 39th Cong., 1st Sess., 2458–69 (May 8, 1866) (statement of Rep. Garfield), reprinted in 2 LASH, at 158, 162 (speaking of the nature of organic law when referencing the adoption of the first section of the Fourteenth Amendment: “It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.”).

73. *What the Black Man Wants*, supra note 71, at 159.

74. The important point here was that government had to originate in popular sovereignty. Zuckert helpfully clarifies that such accounts of government's origins do not typically purport to give an *actual* historical account, but rather “it refers to a kind of moral account of the origin, or, perhaps better put, a rational reconstruction of the origin . . . This is not so much a thesis about the past as a vision of the present and the future; it presents a way to reconceive the nature of politics and the relationship of citizens to it.” See MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 10 (1998). That said, while Douglass believed that popular sovereignty-based origins could legitimate various political regimes, there is some dispute as to whether non-democratic natural rights-based regimes could be legitimate. See *id.* at 165 (denoting the difference between theory and practice, which calls into question whether a non-democratic regime could adequately account for a political philosophy based on natural rights); *What the Black Man Wants*, supra note 71, at 159. Cf. THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM (2017) (arguing that a republic is the only legitimate form of government for a natural rights-based regime).

many, but rule based on the best, the brightest, the richest, the most virtuous, or whatever other criterion.⁷⁵ But regardless of the regime type, the requirement of protecting natural rights would still remain—all governments were instituted for that sole purpose. Simply the *way* in which it was done would vastly differ. The natural rights and voting rights connection could, therefore, sever to some degree in non-democratic regimes. In an aristocracy, where the principle was rule by the few over the many, it would be no injustice to deny voting rights to the many given the nature of the regime. The aristocracy would remain legitimate as long as it ruled in a way that did not deprive others of their natural rights. In a regime where the rule was intentionally by the few, and such rule was *consented* to, the equality principle would not extend to political rights. In a democracy, on the other hand, where the rule is by the many, the people consent to rule and to be ruled on an equal basis. Douglass argued that in such regimes universal suffrage was the rule. Anything otherwise would be an exception, and to single out blacks as the exception was to brand them “with the stigma of inferiority.”⁷⁶ In the U.S., blacks theoretically entered the social contract on an equal basis and consented to a regime founded on equal rule, but they were unjustly deprived of their equal status. Thus, for Douglass, equal voting rights were a consequence of natural human equality, but only in a regime premised on the principle of equal rule.

Though Douglass was gravely concerned with the withholding of political rights and the stigma of inferiority it would create, he was surprisingly not as concerned with the stigma that arose from unequal *social* rights. Equal rights, Douglass clarified, only pertained to the sphere of government relations—civil and political—while social equality remained outside the purview of government. Douglass found social equality to be wholly outside the question of government’s duty to respect human equality—social equality “does not exist anywhere.”⁷⁷ As a matter of course, in his view, some would simply have more than others. After all, this was the nature of private ownership—a point of theory that Douglass heavily relied on in his calls for emancipation. What was more, individuals had the right to associate with whomever they chose, which (though deplorable in many respects) could implicate the exclusion of some based on their race.

Douglass’s distinction between civil and political rights on the one hand, and social rights on the other, might be understood as a public versus private distinction. Recall the case of the Boston café, where Douglass lamented the exclusion of certain gentlemen on account of their color. Douglass characterized this episode as an attack on the civil liberties of those men. The government had a duty to ensure that a public accommodation, such as a café, was generally open to the public, regardless of race. On the other hand, as a legal matter, Douglass did not seem to have a problem with more intimate social or domestic associations that

75. That said, Douglass clearly believed that democratic republics constituted the best form of government. See *What Black Man Wants*, *supra* note 71, at 157–60; *KN Speech*, *supra* note 26, at 316–17.

76. *What the Black Man Wants*, *supra* note 71, at 159.

77. *The Colored Race in America*, *supra* note 40, at 352.

barred entry based on race or some other category. From this, we might gather that Douglass believed that the government should not interfere with these more intimate social relations, but that it should also guarantee equal access to those accommodations that are quintessentially public in nature.⁷⁸ Ultimately, Douglass believed that social equality to a certain extent would take care of itself, so long as the government fulfilled its primary duty to provide equal civil and political rights.⁷⁹

III. THE DUTIES OF CITIZENSHIP

But citizenship does not come with privileges and immunities alone; there are certain duties that come with it as well. Douglass put it most simply by stating “the relation of the citizen to the State is one of reciprocal rights and duties that the citizen is bound to render true allegiance to the State, and the State is equally bound to render that which is just and equal to the citizen.”⁸⁰ Thus, we find that duties may be summed up by one word: allegiance. The citizen must swear allegiance to the community in which he or she resides. This allegiance entails something of a covenant—the individual promises to abide the laws of the land and protect the rights of others, whether the offender of rights be a proper member of the community or not. In exchange, the community promises to protect the full litany of privileges and immunities the citizen is entitled to. In this way people come together and mutually abide as they facilitate the flourishing of all within the community. For Douglass, this had a few immediate, practical consequences. First, this meant that, with the advent of the Civil War, blacks needed to pick up arms and the federal government would be wise to use those arms in the fight against the rebels. Second, this meant that emigration was not only impractical, but it was morally wrong. Aside from their natural claim to citizenship, blacks had proven that their allegiance lay with the Union. In this sense, they belonged to the Union as much as the Union belonged to them. There was a reciprocity between both to ensure that blacks remained a part of the Union, and that the Union persevered.

A. Allegiance

To Douglass, the most fundamental covenant citizens made was to uphold the rule of law. In a democracy, this meant abiding the rule of the majority. Citizens abide by the rule of the majority because of several basic assumptions. First, Douglass believed that men were generally good, and, therefore, majorities would

78. Frederick Douglass, *Cause of the Negro People*, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 40, at 418 (“Whatever prejudice and taste may be innocently allowed to do or dictate in social and domestic relations, it is plain, that in the matter of government, the object of which is the protection and security of human rights, prejudice should be allowed no voice whatever.”).

79. See Frederick Douglass, *What Shall be Done With the Freed Slaves?*, Nov. 1862, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 40, at 297.

80. Frederick Douglass, *Duty of Colored Men*, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 40, at 373.

more often pass just laws than unjust ones.⁸¹ Second, government is limited—its power to adopt laws that obliges its citizens does not extend to laws that violate the natural rights and happiness of human beings. Third, somewhat paradoxically, citizens must accept some of society’s laws that are against their best interest, since individuals do not always choose in their best interest. Humans are forever fallible, and yet they are the very fabric of society. Therefore, some laws will be adopted that do not comport with human beings’ best interests. And, for Douglass, to deny laws simply on the ground that they are not in one’s best interest would be the same as denying the individual the ability to self-govern.⁸² For the sake of the Union, therefore, citizens must tolerate laws that they may fundamentally disagree with, so long as those laws do not violate inalienable natural rights.⁸³

The second part of the covenant was to protect the rights of others, and the Civil War precisely presented the opportunity to do so. Yet, as the threat of disunion became reality and the rebels engaged in open warfare against their brethren, Douglass was not immediately able to advocate for blacks to join the Union cause. Two main impediments prevented him from doing so. First and foremost, Abraham Lincoln and his administration were reluctant to make the war one of emancipation. Lincoln seemed poised to reassure the rebels that coming back to the Union would not mean the end of slavery in the South. Instances such as Lincoln forcing General Fremont to return captured slaves to their former masters rather than freeing them suggested that Lincoln’s approach to the war was to preserve the Union at any cost—even if it meant protecting the property claims of rebels in their slaves.⁸⁴ Second, Lincoln and his administration were hesitant to enlist free blacks in the cause. This reluctance likely stemmed from the first impediment. To enlist blacks in the Union army would surely incense the South and give the impression that the war was meant to free all the slaves, even if Lincoln never intended to do so.⁸⁵ For these reasons, Douglass was quite critical

81. See *Is Civil Government Right?*, *supra* note 3, at 211 (“Why is this respect to be shown to the majority? Simply because a majority of human hearts and intellects may be presumed, as a general rule, to take a wiser and more comprehensive view of the matters upon which they act than the minority.”).

82. See *id.* at 212 (“It may still be further asked, will they always decide rightly? They may not, for the individual does not always decide for himself what is for his best interest. What then? Shall we abolish the individual, and deny him the right to govern himself because he may sometimes govern wrongly? The reasoning which would deny the right of society to frame laws for its own protection, preservation and happiness, would, if rigidly adhered to, deny to man the right to govern himself; for is he not a frail mortal, and has he any more right to ruin himself than he has to ruin others?”).

83. In the case that laws do violate inalienable natural rights, such as slave laws, Douglass believed that such a state was a state of lawless violence, which required the individual to act prudently in determining whether to tolerate such violence or not. See Bradley Rebeiro, *Natural Rights (Re) Construction: Frederick Douglass and Constitutional Abolitionism* (2021) (Ph.D. dissertation, University of Notre Dame) (on file with author).

84. See WALTER STAHR, SALMON P. CHASE: LINCOLN’S VITAL RIVAL 354–55 (2021).

85. There is some evidence, however, that Lincoln indeed sought the emancipation of slaves early on in the war, even if his policies and actions at times indicated otherwise. See Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), in *Abraham Lincoln Papers*. Careful, prudential decision-making characterized Lincoln’s presidency, after all. Even if he did not always enact the most

of Lincoln's approach to the war and was hesitant to encourage his black compatriots to aid the war effort.⁸⁶ Nonetheless, Douglass admonished blacks to prepare for war. He encouraged blacks to "drink as deeply into the martial spirit of the times as possible," including organizing themselves and purchasing and learning how to use arms.⁸⁷ Douglass wanted blacks prepared for the time in which their allegiance had a *hope* of being honored in a reciprocal agreement with the Union, and that time would not be far off.

With the Emancipation Proclamation, Douglass determined the time had come for blacks to prove their mettle and fulfill their duty as citizens. At the forefront of Douglass's concern was providing ample reasons for blacks to engage in the war effort. He provided many justifications for blacks to commit their lives to the cause—nine in total.⁸⁸ Those nine might be encapsulated into four more broad considerations, however.

First, there was a moral duty to defend right against wrong. Moral discernment was fundamentally a human enterprise, one in which every human being was in the business of. Human beings, having the capacity to discern between right and wrong, had a duty to uphold that which was right. Douglass remarked that if men were like animals, they would have no responsibility in the war effort—a horse could not tell whether the rebels were pursuing a righteous cause.⁸⁹ But someone who remains neutral in the war effort "despises and insults his own nature and invites the contempt of mankind."⁹⁰ Curiously, the way Douglass expressed this obligation was not so much as being tied to citizenship but rather humanity. Any person with the capacity to reason had an obligation to denounce the rebels and support the Union.

Second, belonging to a community required the individual to share the same fate of that community—it mattered to the individual how the community would fare and how the community perceived the individual. Community membership reinforced one's responsibility to defend right against wrong to ensure that right prevailed in one's community. Douglass, addressing his black contemporaries, stated: "You are, however, not only a man, but an American citizen."⁹¹ Blacks needed to demonstrate "not only your willingness but your earnest desire to fulfil [sic] any and every obligation which the relation of citizenship imposes."⁹² But in

progressive policy toward abolition, he certainly took incremental steps toward that goal throughout the war.

86. See Frederick Douglass, *The President and His Speeches*, Sept. 1862, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 40, at 266, 267–68; Frederick Douglass, *Black Regiments Proposed*, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 40, at 96 [hereinafter *Black Regiments Proposed*].

87. *Black Regiments Proposed*, *supra* note 86, at 97.

88. See generally *Why Should a Colored Man Enlist?*, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 40, at 340.

89. See *id.*

90. Frederick Douglass, *Why Should a Colored Man Enlist?*, reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 40, at 341.

91. *Id.*

92. *Id.*

addition to responsibility, there was also honor in defending one's own. Defending the nation was not only a matter of duty in this sense—it was intrinsically good to fight for the Union against its enemies. Douglass believed that blacks would do themselves a great disservice if they did not take up arms. Not only would they fail in their responsibility to uphold right over wrong, but they would risk the contempt of their fellow citizens, which, though he needed not point out, Douglass warned was a real possibility given blacks' reputation was already at a considerable disadvantage, even in the North.

Third, referring to the covenant of citizenship, if blacks showed full commitment to the community, the community must do the same for them. Though enjoyment of all privileges and immunities belonged by right to blacks in the Union, it was lamentably still disputed to varying degrees in all the states. There was always a question of whether blacks properly belonged or not. Douglass believed that, should they enlist, blacks would put to bed the question of belonging and make the Union their "country in common with all other men born in the country or out of it . . . He who fights the battles of America may claim America as his country—and have that claim respected."⁹³ Especially those pro-slavery advocates or otherwise detractors of the black cause understood this well. Douglass believed that it was for this precise reason that many were adamantly opposed to blacks in the army. These objectors did not want blacks to have the chance to demonstrate beyond reasonable doubt that blacks too, were of noble stock and courageous—that blacks were just as much human and could act virtuously, thereby being worthy of honor.⁹⁴

Finally, even if the community failed to honor its end of the bargain, blacks would do well to enlist and learn to fight, for there was intrinsic value in doing so. If the community either could not or refused to protect the rights of blacks, it would be up to blacks to defend their own rights. Douglass implored blacks to "learn the use of arms, to become familiar with the means of securing, protecting and defending your own liberty."⁹⁵ Douglass was not naïve to the fact that the U.S. in the 1860s was a precarious place for blacks. Political and social relations that ought to be handled through the rule of law too often fell to the caprice of white rulers over blacks. Indeed, Douglass's time presented a state of affairs where "no race of men can depend wholly upon moral means for the maintenance of their rights."⁹⁶ Such a state was no different than Locke's state of war where, for lack of an impartial authority, every person had to adjudicate the natural law in his or her favor. Douglass presented his own situation in somewhat Machiavellian terms, suggesting that people were to be governed by love of right

93. *Id.* at 342–43.

94. *See id.* at 342 ("[E]very Negro-hater and slavery-lover in the land regards the arming of Negroes as a calamity and is doing his best to prevent it . . . In nine cases out of ten, you will find it safe to do just what your enemy would gladly have you leave undone. What helps you hurts him. Find out what he does not want and give him a plenty of it.").

95. *Id.*

96. *Id.*

or fear of wrong. Where moral means have failed (or the love of right is wanting), it behooves people to learn to defend their rights. Douglass stated: “When it is seen that black men no more than white men can be enslaved with impunity, men will be less inclined to enslave and oppress them. Enlist therefore, that you may learn the art and assert the ability to defend yourself and your race.”⁹⁷ In other words, when the carrot has ceased to work, one must use the stick. If government failed in its duty, the broader political community will have been a failure. Under such circumstances, blacks had an obligation to protect *their* community against the encroachment of others, and fighting for the Union would train them in that noble art.

B. Against Colonization

If there was one thing that was antithetical to the spirit of citizenship, it was the campaign for black emigration. In the 1850s, there was a growing concern in the North with increasing black populations. As committed as the North was to anti-slavery efforts, a substantial portion of the population was concerned about what abolition would mean for their communities. Even if they did not wish to see blacks enslaved or treated unfairly before the law, they did not necessarily wish for blacks to become members of their political communities. This group of people called for colonization—for blacks to seek their fortune elsewhere in the world, typically in Liberia.⁹⁸

Douglass did not mince words concerning emigration—he referred to the spirit of colonization as “satanic.”⁹⁹ Colonizationists were wolves in sheep’s clothing. They typically argued that blacks had suffered enough at the hands of oppressors in the several states. Blacks deserved more, but the unfortunate truth was that by nature people of different races did not cohabitate well. If blacks were to thrive (as they deserved), they were better off thriving in a location more suited to their race.¹⁰⁰ To this end, colonizationists argued that the federal government should provide the means necessary for blacks to establish a colony on a continent where blacks could flourish, such as Africa or South America; this included purchasing land for such an enterprise and paying the funds associated with blacks’ relocation.¹⁰¹ But Douglass saw such calls for what they were—poor attempts to

97. *Id.* at 342.

98. Frederick Douglass, *The Spirit of Colonization*, Sept. 1862) reprinted in 3 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 40, at 260, 260–61 [hereinafter *The Spirit of Colonization*]. At one point Lincoln advocated for blacks to colonize Liberia. Douglass alludes to this point in his oration in memory of Lincoln. See Frederick Douglass, *Oration in Memory of Abraham Lincoln*, Apr. 14, 1876, reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 55, at 309, 313.

99. *The Spirit of Colonization*, *supra* note 98, at 261.

100. See *id.* at 262 (“If [blacks’] destiny be not that of some kind of servile inferiority to the white man, separation from him is necessary to the negro’s highest elevation and happiness. For it is an established truth of history, that two free races between whom amalgamation by intermarriage is impossible, can never occupy the same land in peace on terms of social and political equality.”).

101. Congress even managed to pass legislation to pave the way for colonization. See DC Emancipation Act, § 11, available at <https://catalog.archives.gov/id/299814?objectPage=4> (last visited Nov. 4, 2023) [<https://perma.cc/TJ4C-YDVU>].

circumvent the government's duties to its citizens. The spirit of colonization, in this sense, was no different than the spirit of prejudice and persecution against a subset of U.S. citizens.

Douglass explained: "The colonization agents and the persecuting mob co-operate. Colonization gives life and vigor to popular prejudice, gives it an air of philosophy, piety and respectability, and the violence of the mob, gives the facts to sustain their pious Negro-hating theories."¹⁰² The reason why blacks were not thriving in the U.S. was because of popular prejudice and subjugation of blacks as second-class citizens. This persecution provided grounds for colonizationists to argue that blacks could not thrive in a predominantly white nation. And, in a vicious circle, such justifications provided the mobs ample rhetorical devices to justify racial violence—blacks would be fine if they just left.

Beyond disavowing it as a deceptive cloak for racial prejudice, blacks needed to reject calls for colonization because their allegiance belonged to the Union, not some supposed land of origin. Whether the call to emigrate came from blacks or whites, the folly and danger in such an enterprise was the same.¹⁰³ Douglass believed that the only real place for African Americans was the U.S.—they did not belong anywhere else. But if blacks needed to return to Africa, Douglass facetiously suggested to colonizationists that, if their logic was sound, every people should return to its land of origin. He argued that colonizationists should "set the world right generally, sending each race to the land of its ancestors, and each individual to the precise house or hut in which he was born."¹⁰⁴ That would mean white U.S. citizens should return to Europe, Native Americans should be returned to New England, blacks should return to Africa, and the Dutch and English in Africa should return to Holland and England.¹⁰⁵ One may deduce from Douglass's arguments that one's allegiance to a political community figured more prominently than the tribe from which that individual came.¹⁰⁶ Put differently, one's conventional community mattered more than one's natural community.

In this sense, there needed not be any real concern about the supposed "incompatibility" of races. When citizens establish a community on free and equal terms, they will naturally mix. To make his point, Douglass contrasted England and the U.S. He remarked that, in England, public accommodations did not exclude blacks, and some blacks were even reported to have been treated with respect and

102. *The Spirit of Colonization*, *supra* note 98, at 261.

103. See Frederick Douglass, *Why is the Negro Lynched?*, 1894, reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 55, at 491, 514 [hereinafter *Why is the Negro Lynched?*] ("To have a home, the Negro must have a country, and he is an enemy to moral progress of the Negro, whether he knows it or not, who calls upon him to break up his home in this country, for an uncertain home in Africa.").

104. *The Spirit of Colonization*, *supra* note 98, at 264.

105. See *id.*

106. See *id.*; *Why is the Negro Lynched?*, *supra* note 103, at 514.

courtesy by English people.¹⁰⁷ The only difference between the two, Douglass opined, was “that liberty has civilized England, while slavery has barbarized America.”¹⁰⁸ Should America rid itself of slavery and its discriminatory laws, all other aspects of society would take care of themselves.

CONCLUSION

Douglass’s constitutional citizenship, in the end, would be more aspirational than realized. By 1894, for instance, it had become clear that Reconstruction was a success as a matter of law but a failure as a matter of fact. The Reconstruction Amendments were perfect, according to Douglass. The amendments clarified the guarantees the Constitution provided since its inception. The Fourteenth Amendment solidified citizenship for all naturally born in the U.S. or otherwise brought all previously excluded into the fold through naturalization. Also, it finally made the states responsible for ensuring that citizenship was honored within their borders. Yet Douglass found himself, in 1894, addressing the question: Why is the Negro Lynched? For blacks in the Union, and particularly in the South, the idea of privileges and immunities, of inalienable natural rights, remained only ideas all too often. In practice, these citizens often found their privileges and immunities discarded, and the rule of law abandoned, when it suited a white mob. The mob denied blacks the due process of law and lynched them with increasing frequency. Someone could commit these heinous acts for something as simple as accusing a black man of knocking on the door of a white woman’s house.¹⁰⁹

Under such conditions, one might fairly ask: What good was citizenship? Douglass provided something of an answer when he stated: “No people can prosper unless they have a home, or the *hope* of a home . . . to have a home [one] must have a country.”¹¹⁰ Because of human beings’ natural sociability, they cannot flourish outside of the political community. Therefore, they come together to commit themselves to one another and mutually guard each other’s rights. But so long as human beings were what they were, no political community would be perfect. Rather than wait for perfection (even as he often demanded it), Douglass opined that blacks needed to have a *hope* of a home, of a country they could call their own. Even after the Civil War and the Reconstruction Amendments, the U.S. had not quite achieved that status, but blacks had a rational hope that it one day would be a proper “home” for them. Of the U.S.’s future, Douglass forecasted: “The sky of the American Negro is dark, but not rayless; it is stormy, but

107. See *The Spirit of Colonization*, *supra* note 98, at 265–66. Of course, Douglass also recollected that he himself received rather fair treatment in England as opposed to his time in the US. See Douglass, *supra* note 11, at 300.

108. *The Spirit of Colonization*, *supra* note 98, at 266.

109. See *White Mob Lynches Black Man in SC for Allegedly Knocking on White Woman’s Door*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/jan/13> (last visited Nov. 3, 2023) [<https://perma.cc/Z7BY-SKVG>].

110. *Why Is the Negro Lynched?*, *supra* note 103, at 514.

not cheerless.”¹¹¹ The work was far from done, but they had planted the seeds of full citizenship in the Constitution. What was left was to make the promises of citizenship a reality. Blacks needed to continue to swear allegiance and thereby force the U.S. to keep its end of the bargain. Douglass remarked: “For after all, our destiny is largely in our own hands,” and “[t]here is but one destiny, it seems to me, left for us, and that is to make ourselves and be made by others a part of the American people in every sense of the word.”¹¹² Blacks would eventually make it such that the U.S. had no option but to fully honor their citizenship, lest it remain a perpetual hypocrisy. And, as a final word on this point, Douglass stated: “We are here and are here to stay. It is well for us and well for the American people to rest upon this as final.”¹¹³

111. Frederick Douglass, *The United States Cannot Remain Half-Slave and Half-Free*, Apr. 1883, reprinted in 4 LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 55, at 354, 355.

112. *Id.* at 366, 370.

113. *Why is the Negro Lynched?*, *supra* note 103, at 515.