

Frederick Douglass: The Constitution Militant

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In an action almost as momentous as his original escape from enslavement, Frederick Douglass adopted an anti-slavery interpretation of the U.S. Constitution. That 1851 decision took Douglass from a platform avowedly “outside that piece of parchment” to a platform insistently faithful to the words on the page.¹

Influenced by the literalism of Lysander Spooner, Gerrit Smith, and William Goodell—if it doesn’t say “slave,” it doesn’t mean “slave”—Douglass acknowledged as early as 1849 that the Constitution, if strictly construed, was not pro-slavery.² Nonetheless, he continued for the next two years to assert that the intention of the Founders had been to protect slavery and that this aim had been achieved by nefarious draftsmanship, employing hypocritical euphemisms for slaves like “all other persons” and “persons held to service or labor.” In line with the Garrisonian interpretation of the Constitution as a pro-slavery document, Douglass insisted that the public meaning of those phrases was clear, despite the surface ambiguity of the language. As he explained in an editorial dated April 1850, the fact that “Liberty and Slavery—opposite as Heaven and Hell—are both in the Constitution” constituted a “radical defect” that made an oath to support the Constitution “morally impossible.”³

During this same period, however, Douglass was increasingly dissatisfied with where the Garrisonian hermeneutic landed the abolition cause. As he complained to Gerrit Smith in January 1851, “I am sick and tired of arguing on the slaveholders’ side of this question, although they are doubtless right so far as the intentions

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1. Frederick Douglass, *Oath to Support the Constitution*, THE NORTH STAR, Apr. 5, 1850, reprinted in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, 115, 119 (Philip S. Foner ed., 1950).

2. Frederick Douglass, *Public Letter in Response to C.H. Chase, The Constitution and Slavery*, THE NORTH STAR, Feb. 9, 1849, reprinted in 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, 352, 352-53 (Philip S. Foner ed., 1950); Frederick Douglass, *The Address of Southern Delegates in Congress to Their Constituents*, THE NORTH STAR, Feb. 9, 1849, reprinted in 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, 353, 356-57 (Philip S. Foner ed., 1950); Frederick Douglass, *The Constitution and Slavery*, THE NORTH STAR, Mar. 16, 1849, reprinted in 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, 361-67 (Philip S. Foner ed., 1950).

3. DOUGLASS, *supra* note 1, at 118.

of the framers of the Constitution are concerned.”⁴ The strong attraction of the alternative textualist approach was its focus on the letter of the law to the exclusion of those unjust intentions. As Douglass remarked to Smith, “these intentions you fling to the winds.”⁵ Despite the political attraction of this dismissal, Douglass had moral qualms about it. Here is how he explained his sticking point:

[M]ay we avail ourselves of legal rules which enable us to defeat even the wicked intentions of our Constitution makers? It is this question which puzzles me more than all others involved in the subject. Is it good morality to take advantage of a legal flaw and put a meaning upon a legal instrument the very opposite of what we have good reason to believe was the intention of the men who framed it? Just here is the question of difficulty with me. I know well enough that slavery is an outrage, contrary to all ideas of justice, and therefore cannot be law according to Blackstone. But may it not be law according to American legal authority?⁶

After “months of thought and investigation,”⁷ Douglass resolved his dilemma and ratified it with an editorial forthrightly titled “Change of Opinion Announced.” His official statement was triggered by the American Anti-Slavery Society’s move to deny recognition to abolition newspapers that did not repudiate the Constitution as a pro-slavery instrument. Douglass felt duty-bound to have *The North Star* delisted, announcing it as his “firm conviction” that “the Constitution, construed in the light of well established rules of legal interpretation, might be made consistent in its details with the noble purposes avowed in its preamble; and that hereafter we should insist upon the application of such rules to that instrument, and demand that it be wielded in behalf of emancipation.”⁸

In his brief editorial, Douglass did not say much about those rules of reading. However, he did indicate that one of the problems with the Garrisonian position was that it required resort to “the history and practice of the nation under [the Constitution]” in order to derive the meaning of the charter. As he would later point out, this was a backwards form of construction. Original intent could not be accurately ascertained by subsequent practice. Employing his great gift for metaphor, Douglass compared the Constitution and Government to a compass and a ship: “the one may point right and the other steer wrong. A chart is one thing, the course of the vessel is another.”⁹ Douglass’s remarks—at least at this point in his

4. Letter from Frederick Douglass to Gerrit Smith, Esq. (Jan. 21, 1851), in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 149.

5. *Id.* at 150.

6. *Id.*

7. Letter from Frederick Douglass to Gerrit Smith, Esq. (May 1, 1851), in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 151, 153.

8. Frederick Douglass, *Change of Opinion Announced*, THE LIBERATOR, May 23, 1851, *reprinted in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 155.

9. 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 1, at 467.

evolving position—indicate a suspicion of what is today called “public meaning” originalism. Slaveholders, and many non-slaveholders as well, may have ascribed an unwarranted hidden meaning to the “plain words” of the Constitution. From the start, a slavery-inflected public understanding skewed the implementation of the text.

Interestingly, Douglass did not altogether abandon the significance of original intent; rather he confined the determination of that intent to what the text itself indicates. In a letter to Smith written the same week that he announced his new view of the Constitution, Douglass explained that he had made up his mind that he was “only in reason and in conscience bound to learn the intentions of those who framed the Constitution *in the Constitution itself*.”¹⁰ Douglass was still interested in the original intent; he was not flinging it to the wind, as he believed his mentors did. Thus, it appears that even from the moment of his conversion, Douglass was creating a unique amalgam of text-based and intent-based interpretation that modified—and I believe improved—Spooner’s more purely semantic approach.

The result, and its undeniable rhetorical advantages, can be seen in his first major speech post-conversion, “What to the Slave is the 4th of July,” delivered in 1852. Today, this is probably Douglass’s best-known address. It is hard to imagine the invitation to speak on Independence Day having been extended—or accepted—if not for Douglass’s shift from Garrisonianism to political-action abolitionism. Douglass said plenty of challenging things in this address—even, at one point, ungenerously wondering whether the invitation to speak was meant to mock him¹¹—but he wasn’t about to do anything as shocking as Garrison would do two years later: burning a copy of the Constitution on the 4th of July. Douglass’s new, more welcoming approach was immediately in evidence; for the first time in his storied career as an orator, he addressed his audience as “fellow citizens,”¹² and then repeated the appellation eleven more times.¹³

10. Letter from Frederick Douglass to Gerrit Smith, Esq. (May 21, 1851), in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra* note 1, at 156, 157.

11. Frederick Douglass, *The Meaning of July Fourth for the Negro*, Jul. 5, 1852, *reprinted in* 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra* note 1, at 181, 189.

12. In his Garrisonian period, he either launched directly into his subject, as in his “American Slavery” speech in 1847 when he began “I like radical measures, whether adopted by Abolitionists or slaveholders.” Frederick Douglass, *American Slavery*, Oct. 22, 1847, *reprinted in* 1 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra* note 2, at 269. Or, he greeted his audience as “Ladies and Gentlemen.” Frederick Douglass, *The American Colonization Society*, Jun. 8, 1849, *reprinted in* 1 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra* note 2, at 387. Or else—if the occasion could be presumed to be an exclusively anti-slavery gathering—as “Friends.” Frederick Douglass, *The Revolution of 1848*, Aug. 1, 1848, *reprinted in* 1 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra* note 2, at 321.

13. Douglass became an expert in the use of direct address. This speech, like many subsequent ones, displays a sophisticated pattern of vocatives. Douglass opens the first section with “Friends and Fellow Citizens,” followed by four instances of “fellow-citizens” and one of “citizens.” As he wraps up the first section, he uses a version of his opening, now rendered as “Friends and citizens.” The second section, full of anger, while it contains a further five instances of “fellow-citizens” also has two much more sharp-tongued attacks, stripped of fellow-feeling. Douglass lashes out at this audience, asking “Do you

Douglass's assertion of fellowship and national belonging was also bodied forth in the structure of the speech. There is a long, central section full of blame for the America of his day, guilty of "revolting barbarity and shameless hypocrisy."¹⁴ Flanking Douglass's searing criticism of contemporary politics and religion are opening and closing sections full of praise for the Declaration of Independence and the U.S. Constitution. Today, this patriotic framing is easily forgotten or overlooked; not surprisingly, it is the fiery denunciation that gets quoted. Indeed, it is not unusual to encounter abridgments of the speech that leave out the praise sections entirely, thus creating a false impression of the speech as a pure jeremiad and lessening the complex balance of Douglass's presentation.¹⁵

For all the surprises he had in store, Douglass began, as might be expected of an Independence Day lecturer, with an appreciative sketch of the Revolutionary Era. Celebrating the "saving principles" of the Declaration, he credits that first generation of Americans with an expansive sense of the nation's trajectory: "With them," Douglass says, "justice, liberty, and humanity were *'final'* not slavery and oppression."¹⁶ Yet, even as he expresses genuine admiration for 1776, that admiration is shadowed by disappointment. The distance of exclusion is felt most poignantly in his repeated reference to "your fathers," "your National Independence," "your political freedom," and "your great deliverance." In the last sentence of the opening section, Douglass begs off any further praise, leaving "the great deeds of your fathers to other gentlemen whose claim to have been regularly descended will be less likely to be disputed than mine!"¹⁷ With this ironic

mean, **citizens**, to mock me, by asking me to speak to-day?", Douglass, *supra* note 11 (emphasis added), and then, describing a slave auction, again puts his audience on the spot: "Tell me, **citizens**, where, under the sun, you can witness a spectacle more fiendish and shocking?" Douglass, *supra* note 11, at 194 (emphasis added). In the third and final section, as he turns to his vindication of the Constitution, Douglass returns to "Fellow-citizens!" now more emphatically, with an exclamation point. His final use of the phrase in the address is not in the vocative case. Instead, he speaks of "our fellow-citizens," using the first-person plural possessive which had been notably rare throughout the speech, but appropriate, at speech's end, to signal the possibility of combining the legal status of shared citizenship with an emotional connection between individuals of different races, Douglass, *supra* note 11, at 201–02.

14. Douglass, *supra* note 11, at 192.

15. For examples, see the performance by James Earl Jones on *Democracy Now!*: Democracy Now!, "What to the Slave is 4th of July?": James Earl Jones Reads Frederick Douglass's Historic Speech, YOUTUBE (Jul. 4, 2019), https://www.youtube.com/watch?v=O0baE_CtU08 [<https://perma.cc/9DT5-TTQ8>] (last visited Oct. 2, 2023). Here is the abridged version used in the School District of Philadelphia: Frederick Douglass "What to a Slave Is the Fourth of July?" July 5, 1852, THE SCHOOL DISTRICT OF PHILADELPHIA, <http://www.jverlin.com/page6/page37/page41/files/Frederick%20Douglass.pdf> [<https://perma.cc/2BDR-ZPEW>] (last visited Oct. 2, 2023). Other abridged versions, all of which cut the opening and closing sections: "What to the Slave is the 4th of July?" Speech Transcript by Frederick Douglass, REV.COM, https://www.rev.com/tc-editor/shared/A8st7ofWjh1URq9iTMhBggKOF01x20r3TA50v4oKCXn_XfLyJROWVzBVhQIMeCHU0_kn46AsV6rXWc0FdUamVTI3WtU [<https://perma.cc/46GW-WQGB>] (last visited Oct. 2, 2023); Frederick Douglass, "What to the Slave is the Fourth of July?" 1852, THE AMERICAN YAWP READER, <https://www.americanyawp.com/reader/democracy-in-america/frederick-douglass-what-to-the-slave-is-the-fourth-of-july-1852/> [<https://perma.cc/Z2NT-GCSY>] (last visited Oct. 2, 2023).

16. Douglass, *supra* note 11, at 185–86.

17. *Id.* at 187–88.

coda, Douglass more than hints that he is, in fact, linked by blood to the fathers. Like so many born into slavery, Douglass is one of the natural sons, unacknowledged by the white offspring whom law and custom regard as the legitimate heirs.

It is to those heirs that Douglass turns in the main portion of the speech, comparing the Americans of his day to the children of Jacob who boasted “we have ‘Abraham to our father,’ when they had long lost Abraham’s faith and spirit.”¹⁸ Douglass savages the present generation for betraying the legacy of the Declaration by perpetuating and strengthening slavery. Adopting “the slave’s point of view,” and speaking as his representative, Douglass becomes more emphatic: “This Fourth July is *yours*, not *mine*.”¹⁹ Nonetheless, throughout his painful survey of the nation’s transgressions, Douglass continues to address his audience as “fellow-citizens,” reminding them that the enslaved are “your countrymen.”²⁰

According to Douglass, the final wrong of the current generation has been to try to lodge the wrong of slavery in the Constitution itself by claiming that “the right to hold, and to hunt slaves is a part of that Constitution framed by the illustrious Fathers of this Republic.”²¹ Douglass calls this out as “a slander upon their memory”—the support of slavery having been no part of their “design.”²² The closing section of the address vindicates the Constitution as “a glorious liberty document.”²³ Douglass summons all citizens to read the document for themselves, using their “home-bred, unsophisticated understandings” to form their own opinion of the matter based on the “plain and intelligible” text.²⁴

Douglass’s July 4th address is much more than a famously devastating attack on slavery. Its tripartite structure is designed to illustrate how flagrantly the nation’s practice violates its parchment regime. This is the political application of the essential point Douglass had learned from his legal studies: the charter of government is as distinct from the government as compass from ship, or chart from course. Holding to his aspirational patriotism, Douglass measures out praise and blame in hopes of getting the ship of state to sail true.

The best-known passages in the speech highlight America’s inconsistency. Think of the paragraph that begins: “The existence of slavery in this country brands your republicanism as a sham, your humanity as a base pretense, and your Christianity as a lie.”²⁵ Whereas the Garrisonians located that inconsistency squarely within the Constitution, Douglass has instead re-located it elsewhere, in the customs of society. As he argued in his reaction to the Dred Scott decision:

18. *Id.* at 188.

19. *Id.* at 190, 189.

20. *Id.* at 200.

21. *Id.* at 201.

22. *Id.*

23. *Id.* at 202.

24. *Id.*

25. *Id.* at 201.

“Slavery lives in this country not because of any paper Constitution, but in the moral blindness of the American people.”²⁶ America’s brokenness is not a function of its Constitution but of its failure to live up to its founding charter. Like the original people of the Book, Americans have “made void the law by their traditions.”²⁷ As a result, the charter can and ought to be deployed as a primary weapon in the antislavery struggle. Douglass insists that all he asks is that Americans “live up to the Constitution, adopt its principles, imbibe its spirit, and enforce its provisions.”²⁸

The redeemed Constitution was not the only powerful instrumentality newly available to Douglass. The ballot too became a resource.²⁹ Immediately after his constitutional conversion, Douglass began strategizing on the best use of the ballot. In September 1852, he gave advice to the ranks of “voting abolitionists” in an editorial titled “Our Position in the Present Presidential Canvass.”³⁰ Editorials like this became a regular feature of his journalism. While Douglass occasionally mentions judicial action as a route to dismantle slavery, he spends more effort on the kinds of congressional action that would be possible once “practical abolitionists” make their influence felt at the ballot box.³¹ For Douglass, abolition had to be the act of the American people. After all, whatever results might be expected from the appointment of justices prepared to issue decisions based on a natural rights-inflected jurisprudence depended on the prior election of antislavery office-holders. Douglass had always been more politically attuned than his millenarian co-workers in the American Anti-Slavery Society. His shift to the Liberty Party (and eventually the Republican Party) allowed his prudential reasoning greater scope.

Douglass’s acute awareness of public opinion may help explain the effort he put into reassessing the Founders’ intent. His Garrisonian opponents laid great weight on three pro-slavery elements: the supposed pro-slavery intentions of the drafters and ratifiers, the subsequent pro-slavery behavior of the U.S. government, and “the uniform acquiescence of the people in such an understanding.”³² In his first extended defense of his own anti-slavery reading of the Constitution in

26. Frederick Douglass, *The Dred Scott Decision*, May 11, 1857, reprinted in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 407, 416.

27. *Id.* at 424.

28. *Id.*

29. Letter from Frederick Douglass to Gerrit Smith, Esq. (April 15, 1852), in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 174, 177.

30. Frederick Douglass, *Our Position in the Present Presidential Canvass*, FREDERICK DOUGLASS’ PAPER, Sep. 10, 1852, reprinted in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 211.

31. See Frederick Douglass, *The Republican Party—Our Position*, FREDERICK DOUGLASS’ PAPER, Dec. 7, 1855, reprinted in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 379, 379–83 (discussing respective powers of Congress and the Supreme Court).

32. Frederick Douglass, *Is the United States Constitution For or Against Slavery?*, FREDERICK DOUGLASS’ PAPER, July 24, 1851, reprinted in 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 191, 194 (Philip S. Foner ed., 1975). Douglass includes a long quote from the *Pennsylvania Freeman* (a publication of the Pennsylvania Anti-Slavery Society) which had attacked both Spooner and Douglass

July of 1851, Douglass responds that all of this is “apocryphal tradition,” not “history.”³³ Further, there are actually competing narratives or traditions. There is the Calhounite/Garrisonian pro-slavery Constitution, according to which “the right to property in slaves stood precisely upon the same constitutional basis as any other property.”³⁴ There is the leave-it-to-the-states reading according to which the Constitution is indifferent to slavery; Douglass seems to be anticipating Stephen Douglas’s “popular sovereignty” position here. Finally, there is the antislavery Constitution—antislavery at least to the degree that it “sought to limit, to circumscribe, and to hasten the extinction of slavery.”³⁵ All these varying versions rely on the evidence of “history.” Douglass is quite willing to engage on this embattled ground. He offers two main arguments: first, the leading figures of the founding era, whether northerners or southerners, were anti-slavery in their sentiments; second, “the statesmen of that early period held slavery to be an expiring institution.”³⁶ Those facts, plus “the completeness with which they have excluded every word sanctioning the right of property in man,” argue for the rectitude of their intentions.³⁷

With his mention of the actual words, however, Douglass moves from the battles over “conflicting and irreconcilable intentions” (such as might have been held by different states in adopting the Constitution) to “the words of the bond.”³⁸ Thus, his fundamental position is that “the Constitution is the record of its own intention.”³⁹ In parsing its language, even such evidence as “contemporaneous usage” (say, with respect to the meaning of “person held to service or labor”) is not acceptable if the result would be to enshrine iniquity by euphemizing it.⁴⁰ An unobjectionable definition (“person held to service or labor” equals “indentured servant”) must be preferred over a villainous one (“person held to service or labor” equals “slave”) for, as Douglass explains, “villainy is an exception.”⁴¹ If the purpose of a clause is to perpetrate “outrage,” that nefarious purpose must be made “open, clear, palpable and unmistakable.”⁴²

In the 1851 article, Douglass quotes the four “alleged slaveholding clauses,” largely relying on the absence of any explicit reference to slavery in them. He offers nothing further about either the three-fifths clause or the fugitive clause. Of the importation clause, he adds that it has expired; as a dead letter, it can be ignored. His most extensive remarks concern the insurrection clause. Borrowing

as “pitiable and ridiculous . . . wasting time and strength in such impracticable theories and frivolous absurdities.” *Id.*

33. *Id.* at 195.

34. *Id.*

35. *Id.*

36. *Id.* at 196.

37. *Id.*

38. *Id.* at 198.

39. *Id.*

40. *Id.*

41. *Id.* at 199.

42. *Id.* at 198–99.

from John Quincy Adams, Douglass argues that this clause holds great antislavery promise for, in the event of a slave insurrection, it could empower the federal government to abolish slavery as the root cause of the domestic disturbance.

Almost a decade later, Douglass delivered a speech in Glasgow, Scotland, in refutation of the British Garrisonian George Thompson. In this final vindication of the U.S. Constitution, his arguments have undergone considerable refinement, with much greater prominence given to the Founders' morally defensible intentions. This is particularly the case once Douglass moves from laying out his general rules of reading (which continue to focus on "the paper itself, with its own plainly-written purposes" rather than "secret motives or unexpressed intentions") to the specifics of the four contested clauses.⁴³

Beginning with Article I, Section 2, Douglass is now willing to grant—"for sake of the argument," he says—that the phrase "all other persons" does refer to slaves.⁴⁴ Although he mentions Spooner's view that the phrase must refer to resident aliens, he does not argue strongly for it. Instead, he readily concedes "the very worst construction."⁴⁵ Yet, that concession no longer troubles him, for he argues that the three-fifths clause was, in effect, a penalty levied upon the slaveholding states—a penalty that "deprives those States of two-fifths of their natural basis of representation."⁴⁶ Were these states to abolish slavery, their congressional representation would be fully proportionate to their population. Douglass's glass-half-full verdict is that "taking it at its worst, it still leans to freedom, not to slavery" (another of Douglass's lovely pictorial descriptions).⁴⁷ Judged by Spooner's hermeneutics, Douglass's concession is a large one, for he has allowed slavery into the Constitution. And yet, he must believe that this concession strengthens his interpretive hand. Meeting his opponents on their own ground, understanding the Constitution as the documentary record of a power struggle between pro-slavery and anti-slavery forces, Douglass argues not for an unpersuasively pure text but rather for a freedom-leaning one. The founding generation did struggle over this matter, but they tilted in the right direction. When Douglass delivers this speech in March of 1860, vindications of precisely this sort were proving successful, certainly with Republican voters.

On a side note, it is striking that Abraham Lincoln's presentation of the meaning of the three-fifths clause is much more negative than Douglass's. In his Peoria Address of 1854, Lincoln points out that the slave states "have greatly the advantage of" the free states, since slaves are "so used as to swell the influence of the

43. Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, speech delivered in Glasgow, Scotland (Mar. 26, 1860) in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra* note 1, at 467, 469.

44. *Id.* at 472.

45. *Id.*

46. *Id.*

47. *Id.*

white people's votes."⁴⁸ Citing the respective congressional delegations of South Carolina and Maine, Lincoln demonstrates that "in the control of the government, the two States are equals precisely," with six representatives each.⁴⁹ However, South Carolina has half the number of white voters as Maine: "Thus each white man in South Carolina is more than the double of any man in Maine."⁵⁰ Lincoln calls this slave-bolstered franchise "manifestly unfair."⁵¹ His reason for putting the clause in this glass-half-empty perspective is to demonstrate to Northern voters that they have a strong personal interest in resisting the spread of slavery to any new territory or state. While the rule of representation is constitutionally binding on the existing states, Lincoln does not want "new partners . . . brought into the firm, on the same degrading terms against me."⁵²

Douglass pursues his reinterpretation of the Founders' intent more extensively with respect to the importation clause. Once again, contra Spooner, he accepts his opponent's allegation that the clause applies to slaves. He reiterates his 1851 point that the clause has long been a dead letter since the international slave trade was outlawed in 1808. Not content with that dismissal, Douglass declares "there is still more to be said."⁵³ Focusing not on the twenty-year continuance of the trade, but on the constitutional grant of power to ban it, Douglass notes that on both sides of the Atlantic there was a strong belief that slavery itself depended on the international slave trade. Thus, "the American statesmen, in providing for the abolition of the slave trade, thought they were providing for the abolition of slavery."⁵⁴ Douglass argues not only that the clause is "anti-slavery, because it looked to the abolition of slavery rather than to its perpetuity," but also that "it showed that the intentions of the framers of the Constitution were good, not bad."⁵⁵ Once again, a price was exacted from the partisans of slavery. They came into the Union on the condition that the slave trade would be foreclosed to them in the foreseeable future—a price they accepted because "[a]ll regarded slavery as an expiring and doomed system, destined to speedily disappear from the country."⁵⁶ Here, an intent-based interpretation, attentive to the intentions of both the few ("the American statesmen") and the many ("all"), yields a more powerfully anti-slavery Constitution than does the purists' refusal to see slavery anywhere in the text.

With respect to the insurrection clause, Douglass's treatment is nearly identical to his 1851 speech. The only new element is his happy expectation that an "anti-slavery man" may soon be President, along with "an anti-slavery Congress,"

48. Abraham Lincoln, *The Repeal of the Missouri Compromise and the Propriety of its Restoration: Speech at Peoria, Illinois, in Reply to Senator Douglas* (Oct. 16, 1854) in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 283, 307 (Roy P. Basler ed., 1946).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 308.

53. Douglass, *supra* note 43, at 473.

54. *Id.*

55. *Id.*

56. *Id.*

jointly prepared to deploy the Constitution against slavery should it become “a source of insurrection.”⁵⁷

Finally, the nation’s most famous (former) fugitive slave takes up the provision that had been the target of his most outraged denunciations when he was a Garrisonian—the provision that turned the entire country over to the slave-hunting bloodhounds. In response to the misrepresentations of George Thompson, Douglass reexamines the records of the Constitutional Convention. He acknowledges that the South Carolinians had sought to add language that would “require that fugitive slaves and servants should be delivered up like criminals.”⁵⁸ That proposal, however, was “promptly and indignantly rejected by that convention.”⁵⁹ With the proposal withdrawn, whatever happened next took place offstage. The draft that reappeared for consideration was adopted without further debate, although it did receive a few further edits in the final days. Douglass stresses the significance of a switch from the word “servitude” to “service” and Madison’s testimony that the word “was struck out because the convention would not consent that the idea of property in man should be admitted into the Constitution.”⁶⁰

Records of the Federal Convention

[2:443; *Madison*, 28 Aug.]

Mr. Butler and Mr. Pinkney moved “to require fugitive slaves and servants to be delivered up like criminals.” Mr. Wilson. This would oblige the Executive of the State to do it, at the public expence.

Mr. Sherman saw no more propriety in the public seizing and surrendering a slave or servant, than a horse.

Mr. Butler withdrew his proposition in order that some particular provision might be made apart from this article. Art XV as amended was then agreed to nem: con:

[2:446; *Journal*, 29 Aug.]

It was moved and seconded to agree to the following proposition to be inserted after the 15 article

“If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor” which passed in the affirmative [Ayes—1; noes—0.]

[2:577, 601; *Committee of Style*]

If any Person bound to service or labor in any of the United States shall escape into another State, He or She shall not be discharged from such service or labor in

57. *Id.*

58. *Id.* at 474.

59. *Id.* at 475.

60. *Id.*

consequence of any regulations subsisting in the State to which they escape; but shall be delivered up to the person justly claiming their service or labor

....

No Person legally held to service or labour in one state, escaping into another, shall in consequence of regulations subsisting therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labour may be due.

[2:628; *Madison, 15 Sept.*]

Art. IV, sect 2, parag: 3. The term “legally” was struck out, and “under the laws thereof” inserted after the word “state,” in compliance with the wish of some who thought the term legal equivocal, and favoring the idea that slavery was legal in a moral view—

U.S. Constitution, Article 4, Section 2, Clause 3

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Reproduced from *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner, volume 4 (Chicago: University of Chicago Press, 1987), 525-26.

Here, Douglass is not quite accurate. He seems to have confused the wordsmithing of the three-fifths clause with that of the fugitive provision. On Thursday, September 13, 1787, Edmund Randolph moved that, in Article I., Section. 2, the phrase “the whole number of free persons, including those bound to servitude for a term of years,” be changed to “. . . those bound to service . . .” for the reason that “servitude” was “thought to express the condition of slaves,” while “service” described “the obligations of free persons.”⁶¹ This change made in the three-fifths clause would have bearing on the interpretation of the fugitive provision since it too speaks of “persons held to service or labor.” Douglass’s main point is that the fugitive provision must refer to indentured servants who have fled the terms of their contracts rather than slaves. The vocabulary discussion earlier in the convention does offer some support for his claim, even though it does so as an extrapolation from a different portion of the text. In other words, if “bound to service” in the three-fifths clause was deliberately chosen to refer only to indentured servants (with slaves classed as “all other persons”), then doesn’t “held to service” in the fugitive clause also refer only to indentured servants? Similarly, Madison’s statement was made in the context of the extended debate about the international slave trade on August 25 rather than during the very abbreviated discussion on September 15 when the fugitive provision received its final markup.⁶² Nonetheless, it is not incorrect to argue that those

61. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Athens, OH: Ohio Univ. Press, 1966), 633.

62. *Id.* at 648.

edits were in accord with Madison's general preference and the preference of the many other delegates who did not want slavery to have moral or legal status under the Constitution.⁶³ Accordingly, on September 15, the word "legally" was deleted from the fugitive provision in preference for the phrase "under the laws thereof." Madison's *Notes* indicate that this substitution was "in compliance with the wish of some who thought the term legal equivocal, and favoring the idea that slavery was legal in a moral view."⁶⁴ Of course, the problem with Madison's account of the edits—and perhaps why Douglass doesn't cite it directly—is that it does suggest that the delegates understood the fugitive provision as applying to slaves as well as indentured servants. The drafters sought to allow slaveholders to recapture escapees, yet without granting either the justice or the legality of slavery under the Constitution. In other words, the edits were designed to keep slavery a creature of state law only, with recaption a matter of state comity.

Douglass, however, refuses to grant that the clause could have reference to slaves. He has reached the limits of his moral tolerance. An actual constitutional obligation to return slaves, no matter how carefully worded or hedged about with reservations, would simply be too obnoxious a duty. Thus, in this case, Douglass adheres to Spooner's strict construction, limiting the application to indentured servants. "I will concede nothing," he writes. "It must be shown that it is so nominated in the bond. The pound of flesh, but not one drop of blood." With this allusion to Shakespeare's greatest technician of the law, Douglass lays out those "beneficent rules of legal interpretation." Such guidelines hadn't been required to the same degree with respect to the other clauses where Douglass had been willing to tap into a more history-inflected account of the Founders' good intentions.

Douglass ends his Glasgow speech where he began, with an emphasis on the text alone. He offers a commentary on the Preamble, setting great store by its inclusionary language of "We the People" and its six admirable objects: union, justice, domestic tranquility, common defense, general welfare, and liberty. As he explained in an 1857 debate with Charles Lenox Remond, "the objects of a law must . . . have a controlling influence on the details of the law, and its objects must settle the intention when its details seem to be in conflict."⁶⁵ Why should blacks be assumed to be outside of those clearly stated, broad aims? Nothing in the text excludes them. Douglass's verdict on his former allies is harsh: "But how dare any man who pretends to be a friend to the Negro thus gratuitously concede away what the Negro has a right to claim under the Constitution?"⁶⁶

There is today a class of progressive activists who adopt the old Garrisonian position, regarding the framers of the Constitution as "the most flagitious knaves

63. *Id.*

64. *Id.*

65. A Debate between Frederick Douglass and Charles Lenox Remond: "Is the Plan of the American Union Under the Constitution, Anti-Slavery or Not?" (May 20, 21, 1857), in *The Frederick Douglass Papers, Series 1: Speeches, Debates, and Interviews, Volume 3, 1855-63* 152 (John W. Blassingame ed., Yale Univ. Press 1985).

66. Frederick Douglass, *supra* note 9, 477.

ever known, . . . liars and poltroons, keeping the word of promise to the ear and breaking it to the heart.”⁶⁷ The 1619 Project puts it less colorfully than Douglass did then, but the characterization is identical: “our founding ideals of liberty and equality were false when they were written” and “the framers carefully constructed a document that preserved and protected slavery without ever using the word.”⁶⁸ I suspect that Douglass would oppose the contemporary heirs of Garrison just as vigorously as he did those in his time who saw only slavery and shame in the nation’s founding documents. Here is Douglass’s final summary of their error—an interpretive error with disastrous political effects:

[T]he constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself; by discrediting and casting away as worthless the most beneficent rules of legal interpretation; by ruling the Negro outside of these beneficent rules; by claiming everything for slavery; by denying everything for freedom; by assuming that the Constitution does not mean what it says, and that it says what it does not mean; by disregarding the written Constitution, and interpreting it in the light of a secret understanding. It is in this mean, contemptible, and underhand method that the American Constitution is pressed into the service of slavery.⁶⁹

Douglass became a dedicated constitutionalist. At the same time, in a fascinating parallel development, his militancy increased. This is particularly evident in his call for violent resistance to the 1850 Fugitive Slave Law. On August 11, 1852, Douglass declared: “The only way to make the Fugitive Slave Law a dead letter is to make half a dozen or more dead kidnappers.”⁷⁰ He repeated this advice often in the years leading up to the Civil War.⁷¹ This might seem a paradoxical combination: deepened loyalty to the rule of law accompanied by an endorsement of lawbreaking. Of course, this is a combination which is familiar to us through

67. Douglass, *supra* note 65, at 157.

68. Nikole Hannah-Jones, *The 1619 Project*, N.Y. TIMES MAG., Aug. 18, 2019, at 14, 18.

69. Douglass, *supra* note 9, at 477.

70. Frederick Douglass, *The Fugitive Slave Law*, FREDERICK DOUGLASS’S PAPER, Aug. 1852, reprinted in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 206, 207.

71. See Frederick Douglass, *Freedom’s Battle at Christiana*, FREDERICK DOUGLASS’S PAPER, Sept. 25, 1851, reprinted in 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 32, at 204–08; Douglass, *Is Civil Government Right?*, FREDERICK DOUGLASS’S PAPER, Oct. 23, 1851, reprinted in 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 32, at 213–14; Douglass, *Is It Right and Wise to Kill a Kidnapper?*, FREDERICK DOUGLASS’S PAPER, June 2, 1854, reprinted in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 284–89; Douglass, *Anthony Burns Returned to Slavery*, FREDERICK DOUGLASS’S PAPER, June 9, 1854, reprinted in 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 32, at 325–26; Douglass, *The True Remedy for the Fugitive Slave Bill*, FREDERICK DOUGLASS’S PAPER, June 9, 1854, reprinted in 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 32, at 326; Douglass, *Is It Right and Wise to Kill a Kidnapper?*, FREDERICK DOUGLASS’S PAPER, June 9, 1854, reprinted in 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 32, at 327–28; Douglass, *The Ballot and the Bullet*, FREDERICK DOUGLASS’S PAPER, Oct. 1859, reprinted in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 457, 458.

Martin Luther King, Jr.'s defense of "civil disobedience" in his "Letter from a Birmingham Jail." However, there is nothing "civil" about Douglass's version. Douglass is not organizing peaceful protests. Rather, he is urging that federal marshals or their delegated agents be met with lethal force should they attempt to return individuals to slavery. The Democratic newspaper in his hometown, the *Rochester American*, denounced his militancy as incompatible with his newfound constitutionalism.

But the ground he now occupies—that of a professed upholder of the Constitution, while at the same time he argues in favor of revolutionary violence, which if successful on a large scale, would be nothing short of an overthrow of the Government itself—involves a self contradiction and lands him in absurdity. It may be a man's duty to become a revolutionist—to seek the subversion of one Government, for the purpose of setting up a better. That we do not deny. But if while carrying on open resistance to the recognized authority of the existing Government, he still pretends to uphold it, our belief in his honesty, or our respect for his understanding—one or the other—must give way.⁷²

In reply, Douglass denies that he is either revolutionary or involved in subverting the government, countering that his position is "simple resistance to the enforcement of one enactment, standing alone."⁷³ And that enactment, the 1850 Fugitive Slave Law, he regards as unconstitutional, since there is, remember, no "fugitive slave" clause in the Constitution. Of course, the standard democratic cure for an unconstitutional law would be to work through the political process for its legislative repeal or judicial invalidation. And that is the law-abiding course that Douglass will recommend in 1883 after the devastating Supreme Court decision which gutted the Civil Rights Act of 1875, ushered in widespread segregation, and prepared the way for *Plessy v. Ferguson* in 1896. However, the attempt to return individuals to slavery (or to enslave free people) is qualitatively different. At stake is the most fundamental human right. As Douglass argued in his first reflection on this issue after a deadly confrontation between slavecatchers and their human prey: "The only law which the alleged slave has a right to know anything about, is the law of nature. This is his only law."⁷⁴

In keeping with his habit of always pursuing questions to their roots, Douglass inquired into the nature of government. Before making the case for resistance to government, he first speculated about the needfulness of government. In an editorial a month after the events at Christiana entitled "Is Civil Government Right?," Douglass spurned the no-governmentism of the Garrisonians, declaring that a society with government "is a paradise to pandemonium, compared with society

72. Douglass, *Is it Right and Wise to Kill a Kidnapper*, *supra* note 71, at 327 (Douglass includes the attack on him in his editorial in response).

73. *Id.* at 328.

74. Douglass, *Freedom's Battle*, *supra* note 71, at 208.

without it.”⁷⁵ Nonetheless, because the purpose of government is “to protect the rights of man,” a government that fails in that duty loses its entitlement to respect.⁷⁶ Douglass echoes the well-known reasoning of John Locke whose *Second Treatise* stated that “where-ever violence is used, and injury done, though by hands appointed to administer justice, it is still violence and injury, however coloured with the name, pretences, or forms of law.”⁷⁷ If government itself employs unjustified force, then “physical resistance is the antidote for physical violence.”⁷⁸

After another incident in which a deputized agent was killed while trying to apprehend a fugitive slave, Douglass further spelled out the justification for such dramatic action. In an 1854 editorial titled “Is It Right and Wise to Kill a Kidnapper?,” Douglass argued that the slave-catchers had forfeited their right to life by their assault on those who were pursuing their natural right to liberty. Because the government was failing in its duty to protect the innocent, then either the slave “or his friends” might act in his defense, meting out “bloody death” to those engaged in the “infernal business.”⁷⁹ Killing a slavecatcher is equivalent to “the slaughter of a ravenous wolf in the act of throttling an infant.”⁸⁰ Once again, Douglass begins from Lockean premises, stating that “every man is the rightful owner of his own body”⁸¹ and possesses an “original right of self defence.”⁸²

This appeal to the doctrine of natural rights is then buttressed by a prudential argument. It isn’t sufficient to argue for the rightfulness of resistance; its wisdom must also be established. Here, Douglass’s argument takes on a distinctly American complexion. In large part because Americans pride themselves on their founding assertion of independence in accord with natural rights, they respect others—whether individuals or collectives—who do the same. While Americans say they believe in mankind’s natural entitlement to rights, in fact they are inclined to credit such claims only when made by those willing to risk life for liberty. Thus, the black population’s long enslavement is perversely twisted into evidence of fitness for slavery, against the letter of the nation’s universalist creed. When fugitive slaves quietly submit to recapture, their non-resistance “creates contempt for them in the public mind.”⁸³ Douglass insists that the imputation of black cowardice must be refuted by bold action vindicating natural rights. Political realism requires that rights be earned. In keeping with this conviction, Douglass, in speech after speech, would quote his favorite lines from Byron:

75. Douglass, *Is Civil Government Right?*, *supra* note 71, at 212.

76. Douglass, *Freedom’s Battle*, *supra* note 71, at 208.

77. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 281 (Peter Laslett, ed., Cambridge Univ. Press, 1988) (1690).

78. Douglass, *Is Civil Government Right?*, *supra* note 71, at 214.

79. Douglass, *Is It Right and Wise to Kill a Kidnapper?*, *supra* note 71, at 286, 287.

80. *Id.* at 287.

81. Douglass, *Freedom’s Battle*, *supra* note 71, at 205.

82. Douglass, *Is It Right and Wise to Kill a Kidnapper?*, *supra* note 71, at 286.

83. *Id.* at 287.

“hereditary bondsmen, know ye not, who would be free, themselves must strike the blow.”⁸⁴

For Locke, resistance does imply the aim of overthrowing and replacing a tyrannical government. When a group makes what Locke euphemistically calls “the appeal to heaven,” they take up arms and let the god of battles determine the victor. Douglass, however, denies that his counsel is revolutionary in this sense. Perhaps the situation of the fugitive slave is an exception since the slave has been in a perpetual state of war all along with his master. His act of self-defense is directed not so much against the American government as against his specific oppressor. The militancy of Douglass is thus very different from that of a figure like Malcolm X who framed his endorsement of violence as contributory to revolution—a black nationalist revolution. Interestingly though, both thinkers formulate their positions in terms of the relationship between two instruments: “the ballot” and “the bullet.” In 1859, Douglass pens an editorial titled “The Ballot and the Bullet”; Malcolm X’s best-known and most rhetorically sophisticated speech is entitled “The Ballot or the Bullet.” The choice of coordinating conjunction (*and* vs. *or*) is telling. Malcolm X presents the nation as at a crossroads: whites must either secure to blacks a genuine ballot or be ready for them to cast bullets. Douglass also speaks in threatening tones, but he indicates that the two elements can be used simultaneously:

What we want is an anti-slavery Government, in harmony with our anti-slavery speech, one which will give effect to our words, and translate them into acts. For this, the ballot is needed, and if this will not be heard and heeded, then the bullet When anti-slavery laws are wanted, anti-slavery men should vote for them; and when a slave is to be snatched from the hand of a kidnapper, physical force is needed, and he who gives it proves himself a more useful anti-slavery man than he who refuses to give it, and contents himself by talking of a “sword of the spirit.”⁸⁵

Douglass heaps disdain on the non-voting pacifists who refuse to employ either the ballot or the bullet and trust instead exclusively to soul force. Malcolm X had been similarly disdainful of Martin Luther King’s spiritual appeals to the conscience of bigots. Douglass’s remarks suggest that he might be both theoretically and temperamentally closer to Malcolm X than to King.

However, as an American patriot, Douglass does share with King a focus on the imperative need to transform majority opinion. Douglass’s hope is that the 1850 Fugitive Slave Law will become, in effect, unenforceable in more and more northern communities. Indeed, his first editorial on the topic of “slave-catching” praised his homebase of Rochester, New York, for its inhospitality to “the greedy

84. Frederick Douglass, *What are the Colored People Doing for Themselves*, in 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 2, at 315 (Philip S. Foner ed., 1950) (quoting Lord Byron, *Childe Harold’s Pilgrimage*, canto 2, st. 76).

85. Douglass, *The Ballot and the Bullet*, *supra* note 71, at 458.

hunters of men.”⁸⁶ He then savagely satirized two of the local newspapers that were “vigorously at work to induce a sentiment in the public mind favorable to slave-catching.”⁸⁷ Douglass addresses himself to various audiences as he crafts a militant strategy to fortify anti-slavery convictions. To fellow blacks, Douglass recommends “A good revolver, a steady hand, and a determination to shoot down any man attempting to kidnap.”⁸⁸ This message to blacks to imitate “the Heroes of the American Revolution” is designed also to sway northern whites.⁸⁹ Having made the case for the unconstitutionality of the 1850 Fugitive Slave Law and the natural rights justification for resisting it, Douglass believes that a few exemplary acts of courage will compel admiration across the color line. He is confident that “there is something in the heart of universal manhood that will say, ‘you served the villain right.’”⁹⁰ Finally, Douglass reasons that it will not take many dead bloodhounds to influence the self-interested calculations of the slaveowners and their hirelings. As he explained in his 1851 editorial:

Men need to be taught, not only the happy consequences arising from dealing justly, but the dreadful consequences which result from injustice; their fears, therefore, may be as legitimately appealed to as their hopes, and he who repudiates such appeals, throws away an important instrumentality for establishing justice among men, and promoting the peace and happiness of society.”⁹¹

Persuasion can take many forms; in the case of the most morally recalcitrant individuals, the “sense of justice” may be reachable only through their “bodily fears.”⁹²

Once Douglass embraced an anti-slavery reading of the U.S. Constitution, he became a militant constitutionalist. For Douglass, the Constitution was more than a frame of government. The fixity he valued was of a different sort—not a set structure of branches, offices, and procedures, but rather a polestar, guiding progressive improvement. In fact, Douglass named his first newspaper *The North Star* after the “star of hope” that directed runaway slaves in their nighttime travels. When he abandoned Garrisonianism in 1851, Douglass simultaneously began a new publishing venture, the eponymously named *Frederick Douglass’ Paper*. It was as if the natural celestial pole had been supplemented or maybe replaced by

86. Douglass, *Rochester and Slave-Catching*, in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 1, at 164.

87. *Id.* See also Douglass, *Notice to Sportsmen and Hunters*, reprinted in 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 32, at 214. Douglass penned another piece of biting satire in response to the recapture of Anthony Burns. See Douglass, *Anthony Burns Returned to Slavery*, *supra* note 71, at 325–26.

88. Douglass, *True Remedy*, *supra* note 71, at 326.

89. *Id.*

90. Douglass, *American Slavery, Lecture No. 11*, January 24, 1854, reprinted in 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 32, at 311.

91. Douglass, *Civil Government*, *supra* note 71, at 213.

92. *Id.*

the man-made light of the Constitution. With its Polaris-like Preamble, the Constitution is a permanent source of national self-correction. Because of its orienting power, textual fundamentalism became one of Douglass's main weapons in the antislavery struggle. For Douglass, behind the Constitution is an ultimate source of illumination: the natural rights theory of the Declaration of Independence. That higher law, in accordance with the truth of human nature, always informs the rule of law. Perhaps most controversially, Douglass argued that the higher law required militant opposition to the unconstitutional 1850 Fugitive Slave Law. In doing so, Douglass believed that he was keeping faith with the letter of the Constitution, as well as the spirit or intentions of the Founders. His vindication of the Founders is more than verbal; it is a summons to imitate them, pledging life, fortune, and sacred honor in the cause of liberty.