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## Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican

*Paul Finkelman\**

### ABSTRACT

*This Article explores how the great black abolitionist Frederick Douglass was both a constitutional actor and a constitutional theorist. Unlike most constitutional actors, Douglass was not a judge, lawyer, professor, or an elected official. Nevertheless, throughout much of his life, Douglass shaped the Constitution through his actions. He was also shaped by the Constitution as he went from being a fugitive slave – and thus an “object” of the Constitution – to being a free citizen and an appointed officeholder. He became a constitutional theorist who brought his theories into action through his speeches, writings, and activities as an abolitionist, as an antislavery activist, and then as a spokesman for African Americans during the Civil War. This Article provides insights into antebellum constitutional thought and the background to the Fourteenth Amendment. This*

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\* Ariel F. Sallows Visiting Professor of Human Rights Law, University of Saskatchewan College of Law and Senior Fellow, University of Pennsylvania Program on Democracy, Citizenship, and Constitutionalism. I began working on this Article while serving as the John Hope Franklin Visiting Professor of American Legal History at Duke Law School and continued working on it when I was the Justice Pike Hall, Jr. Visiting Professor at the Paul M. Hebert Law Center, Louisiana State University. I thank Marguerite Most of the Duke Law School library for her indispensable help in gathering materials for this Article. I also thank Bob Emery, Colleen Ostiguy, and John Kenny at the Albany Law School library and Jennifer Murray and Greg Wurzer at the law library at the University of Saskatchewan College of Law for their assistance. I presented earlier versions of this Article at a conference on Frederick Douglass at Indiana University – Purdue University at Indianapolis and at faculty colloquia at Stanford Law School, Duke Law School, the University of Pittsburgh School of Law, the Wilberforce Institute for the Study of Slavery and Emancipation, University of Hull (U.K.), Marquette Law School, the University of Kentucky Law School, and Albany Law School. I thank the faculty at those schools and institutions for their feedback. For their many helpful comments I thank Diane Barnes and John McKivigan of *The Frederick Douglass Papers* and David Blight, Jon Bush, William M. “Chip” Carter, Jr., Raymond T. Diamond, Roy Finkenbine, Julie Goldsmith, Bernard J. Hibbitts, Jedediah Purdy, Mark Shulman, and Judge David Weinstein.

*Article also explores our understanding of the Constitution and its relationship to slavery through the lens of Frederick Douglass.*

*First, the Article looks at how the Constitution impacted Douglass and how Douglass was himself a “constitutional actor,” even though he held no public office and was not even considered a U.S. citizen under the holding in Dred Scott v. Sandford. For example, Douglass was a constitutional actor when he escaped from slavery – and thus came under the Fugitive Slave Act of 1793 and Article IV, Section 2, Clause 3 of the Constitution; when he married in New York but was still a fugitive from Maryland; when he applied for, and received, a copyright for his first autobiography, even though he was a fugitive slave at the time; and when he left the United States for Great Britain without a passport. This Article also explores Douglass’s constitutional theories and understandings and how he used the Constitution to oppose slavery. I argue, in part, that his understanding of the Constitution and his approach to constitutional interpretation changed as his life circumstances changed. Thus, when he returned from England, he was a free man because British friends had purchased his liberty. This led him to a new understanding of how to approach the Constitution and how to fight slavery under the Constitution. While essentially a work of legal history, this Article also offers ways of understanding constitutional theory and the elements of being a constitutional actor. The Article also raises issues of interstate comity and the recognition in one state of a status created in another. While not explicitly stated – because this is a work of legal history – this Article obviously has implications for modern issues surrounding marriage equality, child-custody based on interstate recognitions of status changes, the interstate recognition of gender transitions, and the legal rights of non-citizens within the United States.*

## INTRODUCTION

Frederick Douglass was the most important black abolitionist in antebellum America. By the eve of the Civil War, this former slave was the most famous African American in the world. During the Civil War, he twice met with Lincoln in the White House<sup>1</sup> and then attended the party after Lincoln's second inauguration.<sup>2</sup> Douglass initiated the first meeting;<sup>3</sup> but Lincoln invited him to the White House for a second meeting to discuss various military and political issues.<sup>4</sup> During this second meeting, Lincoln's secretary interrupted the conversation to tell the President that the governor of Connecticut was there to see him.<sup>5</sup> Lincoln asked his secretary to inform "Governor Buckingham to wait, for I want to have a long talk my friend Frederick Douglass."<sup>6</sup> Douglass later recalled that "[t]his was probably the first time in the history of this Republic when its chief magistrate had found an occasion or shown a disposition to exercise such an act of impartiality between persons so widely different in their positions and supposed claims upon his attention."<sup>7</sup> What Douglass did not say, but clearly implied, is that this was certainly the first time in the history of the United States when a white man had to wait while the president discussed matters of the state with a black man.

Lincoln later invited Douglass "to take tea with him at the Soldiers' Home," where Lincoln spent his nights during the summer.<sup>8</sup> Sadly, Douglass declined the invitation because of a previous engagement.<sup>9</sup> But the very idea of the invitation was a measure of Douglass's stature. He was the first black to ever be invited to "break bread" with a president.<sup>10</sup> In mid-nineteenth century America, this was an enormous breakthrough in race relations. Very few whites socialized with blacks at this time, and they almost never shared meals with them.

At his inaugural party, Lincoln visibly and emphatically confirmed a new day for race relations and the central importance of Douglass to this

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1. JAMES OAKES, *THE RADICAL AND THE REPUBLICAN: FREDERICK DOUGLASS, ABRAHAM LINCOLN, AND THE TRIUMPH OF ANTISLAVERY POLITICS* 210, 229 (2007).

2. *Id.* at 241–43.

3. FREDERICK DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* 421–22 (De Wolfe & Fiske Co., rev. ed. 1892) (ebook) [hereinafter DOUGLASS, *LIFE AND TIMES*], <http://docsouth.unc.edu/neh/doug192/doug192.html>.

4. See generally L. DIANE BARNES, *FREDERICK DOUGLASS: REFORMER AND STATESMAN* 99 (2013) [hereinafter BARNES, *REFORMER AND STATESMAN*]; OAKES, *supra* note 1, at 229–33; DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 434.

5. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 436.

6. *Id.*

7. *Id.*

8. *Id.* at 437.

9. *Id.*

10. See "Doubly Dear To Us" *Frederick Douglass on Abraham Lincoln*, LINCOLN COTTAGE, <http://www.lincolncottage.org/douglass-valentines/> (last visited Feb. 23, 2016).

changing world. When Douglass entered the East Room of the White House, the President crossed the room to greet him, saying in a voice loud enough for all the dignitaries present to take notice: “Here comes my friend Douglass,” and then shook his hand in public, declaring “I am glad to see you.”<sup>11</sup> As historian James Oakes concluded, Douglass “went home to Rochester, honored.”<sup>12</sup> He also returned home impressed by the reality that he had helped change the nation and helped redefine American race relations. He had also helped reframe the meaning of the American Constitution.

### I. DOUGLASS AS CONSTITUTIONAL ACTOR AND ACTIVIST

Douglass comes to us as a social activist and reformer. Less well understood, he was also a constitutional actor and thinker. Throughout his life, he interacted with the Constitution, critiqued it, and helped shape it. This Article explores how a non-lawyer who was never elected to public office – a person who was a “non-citizen” for more than half his life<sup>13</sup> – was able to help shape constitutional thought and constitutional development.

In the antebellum period, Douglass was a tireless advocate of black rights, a newspaper editor, a popular public speaker,<sup>14</sup> and “one of the nineteenth century’s greatest orators.”<sup>15</sup> He would continue those endeavors for the rest of his life. During the Civil War, he initially criticized the administration for not directly moving against slavery and accepting black troops.<sup>16</sup> But he was also an active supporter of the Union cause, an advisor to Lincoln, and when the time came, a recruiter of black troops.<sup>17</sup> After the Civil War, he became a Republican activist, held numerous appointed offices, and was a constant advocate of black rights.<sup>18</sup> In 1872, he became the first black ever chosen as a presidential elector and was given the honor of personally delivering New York’s electoral votes to Congress.<sup>19</sup> Douglass understood the political and constitutional symbolism of this event:

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11. OAKES, *supra* note 1, at 242.

12. *Id.* at 243.

13. In *Dred Scott v. Sandford*, Chief Justice Roger B. Taney held that blacks, even if free, could not be citizens of the United States. 60 U.S. (19 How.) 393, 404–05 (1857). This situation was not formally changed until the ratification of the Fourteenth Amendment in 1868, when Douglass was fifty years old. See U.S. CONST. amend. XIV.

14. See generally BARNES, REFORMER AND STATESMAN, *supra* note 4, at 57.

15. DAVID BLIGHT, FREDERICK DOUGLASS’ CIVIL WAR: KEEPING FAITH IN JUBILEE 4 (1989).

16. BARNES, REFORMER AND STATESMAN, *supra* note 4, at 90.

17. See generally *id.* at 92.

18. See *id.* at 115.

19. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 508–09.

Only a few years before this any colored man was forbidden by law to carry a United States mail bag from one post-office to another. He was not allowed to touch the sacred leather, though locked in "triple steel," but now not a mail bag, but a document which was to decide the Presidential question with all its momentous interests, was committed to the hands of one of this despised class, and around him, in the execution of his high trust, was thrown all the safeguards provided by the Constitution and the laws of the land.<sup>20</sup>

Douglass never sought an elective office, although he was on the ballot as a Republican presidential elector in 1872 and was thus technically elected by the voters in New York.<sup>21</sup> Nevertheless, following the Civil War, he held numerous political appointments: envoy to Santo Domingo, president of the Freedman's Savings Bank; marshal of the District of Columbia; recorder of deeds for Washington, D.C.; and U.S. minister to Haiti.<sup>22</sup> As a young man, he fought slavery; as a mature adult, he lobbied for the recruitment of black troops at the beginning of the Civil War and then advocated for their equal treatment;<sup>23</sup> as he turned fifty, he campaigned for the ratification of the Fourteenth and Fifteenth Amendments;<sup>24</sup> he denounced black disfranchisement, lynching, and segregation in the last two decades of his life.<sup>25</sup> He was a newspaper editor, social critic, journalist, author, and political commentator.<sup>26</sup> He made much of his living giving public lectures throughout the nation, as well as in Europe.<sup>27</sup>

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20. *Id.* at 509. Douglass was not exaggerating here. In 1820, the Congress provided "[t]hat no other than a free white person shall be employed in carrying the mail of the United States." Act of April 30, 1810, ch. 37, sec. 4, 2 Stat. 592, 594 (1810).

21. See *Death of Fred Douglass*, N.Y. TIMES (Feb. 21, 1895), <http://www.nytimes.com/learning/general/onthisday/bday/0207.html>.

22. Roy E. Finkenbine, *Douglass, Frederick*, AM. NAT'L BIOGRAPHY (2000), <http://www.anb.org/articles/15/15-00186.html?a=1&n=douglass%2C%20frederick&d=10&ss=0&q=1>. As a private citizen, he was also the only African American officially connected to the World's Columbian Exposition in 1893. See *Designing an African American Pavilion for the World's Columbia Exposition of 1893*, LIBR. CONGRESS, <http://www.loc.gov/teachers/classroommaterials/connections/frederick-douglass/langarts4.html> (last visited Jan. 3, 2016).

23. When black troops were first recruited, they were paid less than white soldiers. See DUDLEY TAYLOR CORNISH, *THE SABLE ARM: BLACK TROOPS IN THE UNION ARMY, 1861–1865*, at 6 (1956). Douglass personally lobbied Lincoln to change this. See *id.* Eventually the change was accomplished, and black soldiers received retroactive payments based on equalized salaries. See *id.*

24. See BARNES, REFORMER AND STATESMAN, *supra* note 4, at 109–10.

25. See *id.* at 124.

26. See generally *Death of Fred Douglass*, *supra* note 21.

27. See BARNES, REFORMER AND STATESMAN, *supra* note 4, at 126.

He published three different autobiographies<sup>28</sup> and then added a second edition to his last autobiography when he lived another decade.<sup>29</sup> The first of these – *Narrative of the Life of Frederick Douglass* – was the most famous slave narrative in the antebellum period.<sup>30</sup> It sold over 30,000 copies within five years and was quickly translated into French, German, and Dutch.<sup>31</sup> Today, it remains the most widely read slave narrative.<sup>32</sup> By the time of the Civil War, Douglass was famous throughout the nation and in much of the western world.<sup>33</sup> At his death in 1895, he was unquestionably the unelected leader of black America.<sup>34</sup>

Douglass was also a constitutional actor, theorist, and critic, especially in the years leading up to the Civil War.<sup>35</sup> Douglass's path from fugitive slave to political activist took him across the antebellum constitutional landscape of proslavery America and antislavery theory. Douglass's life and his various experiences as a slave, fugitive, and freeman also made him the living embodiment of the great constitutional issues of antebellum America. His constitutional theory grew out of the life he lived, and thus, his understanding of the Constitution evolved as his horizons expanded and his legal status changed. When he entered the antislavery movement as a fugitive slave fresh from Maryland, he became a disciple of William Lloyd Garrison and unhesitatingly accepted Garrison's view that the Constitution was a proslavery "covenant with death, [and] an agreement with hell."<sup>36</sup> His views of the Constitution changed after British friends purchased his freedom and he was no longer a fugitive slave. To understand Douglass's role as both a constitutional actor and as a constitutional thinker, we must begin with an understanding of how the antebellum Constitution protected slavery.

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28. FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* (1845) (ebook) [hereinafter DOUGLASS, *NARRATIVE*], [https://www.ibiblio.org/ebooks/Douglass/Narrative/Douglass\\_Narrative.pdf](https://www.ibiblio.org/ebooks/Douglass/Narrative/Douglass_Narrative.pdf); FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* (2008) (ebook) [hereinafter DOUGLASS, *MY BONDAGE AND MY FREEDOM*], <http://www.gutenberg.org/files/202/202-h/202-h.htm>; DOUGLASS, *LIFE AND TIMES*, *supra* note 3.

29. DOUGLASS, *LIFE AND TIMES*, *supra* note 3.

30. Roy E. Finkenbine, "Who Will . . . Pay for their Sufferings?": *New York Abolitionists and the Failed Campaign to Compensate Solomon Northup*, 95 *N.Y. HIST.* 637, 638 (2014); LAURA BROWDER, *SLIPPERY CHARACTERS: ETHNIC IMPERSONATORS AND AMERICAN IDENTITIES* 42 (2000).

31. Finkenbine, *supra* note 22.

32. Finkenbine, *supra* note 30, at 638; *see* BROWDER *supra* note 30, at 42.

33. BARNES, *REFORMER AND STATESMAN*, *supra* note 4, at 43.

34. *See Death of Fred Douglass*, *supra* note 21.

35. Finkenbine, *supra* note 22.

36. WILLIAM LLOYD GARRISON, *WILLIAM LLOYD GARRISON AND THE FIGHT AGAINST SLAVERY: SELECTIONS FROM THE LIBERATOR* 36 (William E. Cain ed., 1995); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 228–29 (1977); *see* JAMES BREWER STEWART, *HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY* 98–99 (rev. ed. 1996).

## II. THE GARRISONIAN CONSTITUTION: A COVENANT WITH DEATH

The great Boston abolitionist William Lloyd Garrison believed that the Constitution was a proslavery document – “a covenant with death, an agreement with hell.”<sup>37</sup> The evidence for this position was found in the document itself.<sup>38</sup> Initially, Garrison and his followers focused on those clauses that gave the South extra representation in Congress for its slaves,<sup>39</sup> guaranteed that the national government would suppress slave rebellions,<sup>40</sup> prohibited Congress from ending the African slave trade before 1808 but did not require that it ever be ended,<sup>41</sup> counted slaves for the election of the president through the electoral college and the three-fifths clause,<sup>42</sup> guaranteed that fugitive slaves would be returned to their owners,<sup>43</sup> and made it impossible to ever amend the constitution to harm slavery without significant southern support. The Constitution required that two-thirds of both Houses of Congress pass a constitutional amendment and that three-fourths of the states ratify it.<sup>44</sup> From 1787 to 1850, there was usually an equal number of slave and free states or, at most, one or two more free or slave states for a short time.<sup>45</sup> By

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37. GARRISON, *supra* note 36.

38. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 3–36 (3d ed. 2014) [hereinafter FINKELMAN, *SLAVERY AND THE FOUNDERS*] (providing a full discussion of all the proslavery provisions of the Constitution).

39. U.S. CONST. art. I, § 2, cl. 3 (three-fifths clause).

40. *Id.* § 8, cl. 15 (domestic insurrections clause); *id.* art. IV, § 4 (domestic violence clause).

41. *Id.* art. I, § 9, cl. 1 (migration and importation clause). See Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 433, 452 (2009).

42. *Id.* art. II, § 1, cl. 2 (electoral college clause). For a greater elaboration on this, see generally Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002).

43. U.S. CONST. art. IV, § 2, cl. 3. In the Constitution, the language is “person held to service or labour,” but the clause is more commonly referred to as the Fugitive Slave Clause. See *id.* Like all other clauses in the Constitution affecting slavery, the Framers intentionally used descriptions of slaves and slavery, rather than using the word, in order to both confuse or mislead the general public and to make the proslavery Constitution more palatable to northerners. DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY* 44 (2002).

44. U.S. CONST. art. V (the amendment provision requiring that three-quarters of the states ratify a constitutional amendment giving the slave states a perpetual veto over all amendments).

45. For example, the South had a one-state advantage from the time of the admission of Arkansas in June 1836 until the admission of Michigan in January 1837. *Statehood Dates*, 50STATES, <http://www.50states.com/statehood.htm#VonTiMaRiGy> (last visited Feb. 24, 2016). Similarly, the South gained a one-state advantage when Florida entered the Union in March 1845 and had a two-state advantage when Texas



1860, there were fifteen slave states<sup>46</sup> and eighteen free states, which left the South with full veto power in the Senate to stop any amendment from going to the states and perpetual veto power to prevent any amendment to the Constitution.<sup>47</sup> Indeed, had there been no civil war and slavery continued, to this day, in 2016, the fifteen slave states that existed in 1860 could block a constitutional amendment to end slavery.

In 1840, the publication of James Madison's notes from the constitutional convention debates<sup>48</sup> bolstered the Garrisonian position by demonstrating that the proslavery provisions were not accidental. The debates Madison recorded showed that the proslavery provisions of the Constitution were the result of southern demands, northern acquiescence, and political tradeoffs.<sup>49</sup>

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became a state in December 1845. *Id.* Iowa came into the Union a year later, in December 1846, reducing the southern advantage to one state and Wisconsin's admission in May 1848 restored equality. *Id.* Given the large number of slave states, it would also have been impossible, at least until the twentieth century, to have an amendment on slavery pass the Senate. While the North had a much larger population and thus more members in the House as late as 1860, the South still had enough representatives to defeat any measure requiring a two-thirds majority. *Census of 1860 Population-Effect on the Representation of the Free and Slave States*, N.Y. TIMES (Apr. 5, 1860), <http://www.nytimes.com/1860/04/05/news/census-1860-population-effect-representation-free-slave-states.html?pagewanted=all>; *Results from the 1860 Census*, CIVIL WAR HOME PAGE, [http://www.civil-war.net/pages/1860\\_census.html](http://www.civil-war.net/pages/1860_census.html) (last visited Feb. 24, 2016) (providing statistics on slave and free populations for 1860). This would not have been the case, however, if slaves had not been counted for representation.

46. They were, in the order of their admission to the Union or their ratification of the Constitution: Delaware, Georgia, Maryland, South Carolina, Virginia, North Carolina, Kentucky, Tennessee, Louisiana, Mississippi, Alabama, Missouri, Arkansas, Florida, and Texas. *Statehood Dates*, *supra* note 45. For a definition of "the South," see Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77 (1985).

47. Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 424 (2013).

48. WIECEK, *supra* note 36, at 239. Madison's convention notes first appeared in 1–3 HENRY D. GILPIN, *THE PAPERS OF MADISON* (1840) (ebook), <http://catalog.hathitrust.org/Record/009833199/Home> (providing all volumes in .PDF format). The authoritative modern editions of the records of the Convention are 1–4 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1966) and JAMES H. HUSTON, *SUPPLEMENT TO FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1987). See *Farrand's Records: The Records of the Federal Convention of 1787*, LIBR. CONGRESS, <http://memory.loc.gov/ammem/amlaw/lwfr.html> (last visited Nov. 4, 2015) (observing that "Farrand's Records remains the single best source for discussions of the Constitutional Convention"). These volumes have Madison's notes as well as notes, letters, and other materials from many other delegates. *Id.* This modern version provides even more support for Garrison's view that the Constitution was proslavery. *Id.*

49. For a history of the proslavery concessions at the constitutional convention, see FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 38.

The debates confirmed Garrison's analysis of the Constitution. For example, Reverend Samuel J. May had initially resisted Garrison's constitutional analysis, but the abolitionist minister later admitted that he was "disconcerted" by "the publication of the 'Madison Papers,'"<sup>50</sup> which included Madison's notes from the Constitutional Convention. With this documentary record in hand, Reverend May "could not so easily maintain [his] ground in the discussions which afterwards agitated so seriously the Abolitionists themselves, – some maintaining that the Constitution, was, and was intended to be, proslavery."<sup>51</sup>

Indeed, Madison's notes confirmed Garrison's understanding of the Constitution as being overwhelmingly protective of slavery.<sup>52</sup> The proslavery clauses of the Constitution led the Garrisonians to oppose voting, office holding, or participating in politics because doing so would require one to take an oath to support "the pro-slavery, war-sanctioning Constitution of the United States."<sup>53</sup> Following this analysis to its logical conclusion, Garrisonians – including Douglass in the 1840s – argued that northerners should secede.<sup>54</sup> Under the slogan "No Union with Slaveholders," the Garrisonians repeatedly argued for a dissolution of the union.<sup>55</sup>

Coming to terms with Garrisonian constitutionalism is difficult for modern scholars because it seems so antithetical to how history actually played out. Americans properly associate disunionist sentiment with the South, the Confederacy, and slavery. Disunion was the policy of the proslavery "bad guys," and so it is hard to understand how the nation's most prominent opponent of slavery supported dissolving the Union.

Three decades ago, the brilliant legal theorist Robert Cover contended that the Garrisonians "eschewed participation in and renounced obligation to government under such a Constitution."<sup>56</sup> But Cover's analysis misunderstands both the radicalism of the Garrisonians and their tactical strategies. They did not refuse to fulfill most of their civic obligations. They paid taxes, testified in court, served on juries, and did not generally disobey federal or state laws that were unrelated to slavery. A few close allies of Garrison even practiced law.<sup>57</sup> Garrisonians refused to participate in the return of fugitive slaves, and they were always willing to aid runaway slaves, but their pacifism precluded them – or at least most of them – from participating in the rescue of

50. SAMUEL J. MAY, *SOME RECOLLECTIONS OF OUR ANTISLAVERY CONFLICT* 143 (1869).

51. *Id.*

52. FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 38, at 3–45; WIECEK, *supra* note 36, at 239.

53. Letter from William Lloyd Garrison to Samuel J. May (July 17, 1845), *in* 3 *THE LETTERS OF WILLIAM LLOYD GARRISON* 303 (Walter M. Merrill ed., 1973).

54. WIECEK, *supra* note 36, at 238.

55. JOHN L. THOMAS, *THE LIBERATOR: WILLIAM LLOYD GARRISON* 305–37 (1963); WIECEK, *supra* note 36, at 237

56. Robert M. Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4, 36 (1983).

57. *See, e.g.*, Letter from William Lloyd Garrison to Samuel J. May (Jan. 5, 1841), *in* *THE LETTERS OF WILLIAM LLOYD GARRISON*, *supra* note 53, at 7 n.5.

fugitive slaves who were in the custody of federal officials.<sup>58</sup> They were neither anarchists nor revolutionaries. Moreover, they regularly took advantage of First Amendment rights of freedom of speech, press, and petition – constantly mailing antislavery literature to people in other states, including southerners.<sup>59</sup> They vigorously exercised their constitutional right to petition Congress on issues surrounding slavery, including occasionally asking Congress to dissolve the Union.<sup>60</sup> Without a hint of irony, they took advantage of their constitutional right to peacefully seek an end to the government under the Constitution.

Cover explains the Garrisonian rejection of the Constitution as a function of their perfectionism, arguing that by “demarcating reality, perfectionist Garrisonian norms necessarily gave up any emphasis on the transformation itself.”<sup>61</sup> But this analysis misunderstands the logic and implications of the Garrisonian position. The Garrisonians were fully interested in “the transformation” from a slaveholders’ republic to a free society, but they did not believe that this transformation could be achieved through politics within the Union.<sup>62</sup> They saw the Constitution as an insurmountable impediment to the transformation they wanted. Given the Constitution’s many proslavery provisions, they saw no plausible way to end slavery through politics or law.<sup>63</sup> In the antebellum period, almost all lawyers, judges, politicians, and constitutional scholars agreed that the national government had absolutely no power to interfere with slavery in the states where it existed.<sup>64</sup> That could only come with a constitutional amendment, but the constitutional structure made it impossible to adopt any amendment harming slavery before the Civil War.

A constitutional amendment requires passage by two-thirds of each house of Congress and then ratification by three-fourths of the states.<sup>65</sup> Between 1800 and 1860, there was almost always an equal number of slave and free states, although sometimes one section or the other had a one or two state majority.<sup>66</sup> Because about half the states in the Union allowed slavery, such

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58. See WIECEK, *supra* note 36, at 228–48; Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793 (1996).

59. See GILBERT HOBBS BARNES, *THE ANTI-SLAVERY IMPULSE* 109–45 (1933) [hereinafter BARNES, *ANTI-SLAVERY IMPULSE*].

60. See generally *id.*

61. Cover, *supra* note 56, at 37.

62. WIECEK, *supra* note 36, at 236–38.

63. See *id.* at 245. It is worth noting that their analysis was not wrong. Slavery would ultimately be ended by both disunion and war.

64. See LOUIS P. MASUR, *LINCOLN’S HUNDRED DAYS* 14 (2012).

65. U.S. CONST. art. V.

66. Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 424 (2013) [hereinafter Finkelman, *Proslavery Constitution*]. In the 1840s, for example, both Texas and Florida entered the Union before Iowa and Wisconsin, giving the South a two-state majority during most of the Mexican War. *Id.*

an amendment was essentially impossible. In 1860, there were fifteen slave states.<sup>67</sup> To get an antislavery amendment out of the Senate before the Civil War would have required a forty-five state Union with no new slave states. This was hardly on the horizon in the 1840s or 1850s.<sup>68</sup> Even if an amendment somehow passed the Senate, it would take three-fourths of the states to ratify it.<sup>69</sup> If all fifteen slave states opposed the amendment, it could *never* be ratified. Thus, the fifteen slave states had a permanent veto over any amendment.<sup>70</sup>

The Garrisonians argued that because the Constitution protected slavery, anyone voting or holding office under the Constitution was obligated to support slavery.<sup>71</sup> Every judge, state as well as federal, swore an oath to “be bound” by “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof.”<sup>72</sup> This included the Fugitive Slave Act of 1793<sup>73</sup> and later the Fugitive Slave Law of 1850.<sup>74</sup> Members of Congress and all the state legislatures were also “bound by Oath or Affirmation, to support this Constitution.”<sup>75</sup>

Under this constitutional structure, the Garrisonians concluded that disunion was the only plausible way to end slavery.<sup>76</sup> Starting in 1844, Garrison emblazoned the masthead of his paper, *The Liberator*, with the slogan “No Union With Slaveholders.”<sup>77</sup> Garrison argued that if slavery was a sin and the Constitution supported and protected slavery, then the only moral response to slavery was for the northern states to leave the Union and separate themselves from supporting slavery.<sup>78</sup> Thus, contrary to Cover’s argument,

67. *Id.* at 421; *see supra* notes 45–47 and accompanying text.

68. In 1860, slavery was legal and vibrant in the Indian Territory – which became Oklahoma. *See Slavery, OKLA. HIST. SOC’Y* (2009), <http://www.okhistory.org/publications/enc/entry.php?entry=SL003>. Had Oklahoma become a state and West Virginia not been spun off from Virginia, the sixteen slave states could have prevented any constitutional amendment from being passed by the Senate until 1959, when Hawaii became a state. *See Statehood Dates, supra* note 45.

69. U.S. CONST. art. V.

70. Indeed, only secession by the slave states allowed for the constitutional revolution that led to the end of slavery. Had the slave states never left the union, to this day the fifteen slave states of 1860 would be able to block an amendment to end slavery.

71. Cover, *supra* note 56, at 36; WIECEK, *supra* note 36, at 239; Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *YALE J.L. & HUMAN.* 413, 445–47 (2001) [hereinafter Finkelman, *The Founders and Slavery*].

72. U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

73. Ch. 7, 1 Stat. 302 (1793) (repealed 1864).

74. Ch. 60, 9 Stat. 462 (1850) (amending Fugitive Slave Act of 1793) (repealed 1864).

75. U.S. CONST. art. VI, cl. 3.

76. WIECEK, *supra* note 36, at 236–38. Ironically, of course, they were correct. Abolition came about only after the South seceded.

77. THOMAS, *supra* note 55; *see also* WIECEK, *supra* note 36, at 237.

78. WIECEK, *supra* note 36, at 236–38.

the Garrisonians believed that the transformation of American society could only come through agitation, education, moral suasion, and ultimately disunion.<sup>79</sup> For the Garrisonians, disunion was not merely a practical response to the proslavery Constitution, it was the *only* practical response.

While disunion was unlikely to be achieved, the Garrisonian theory was a plausible vehicle for opposing slavery. By persistently pointing out slavery's stranglehold on the Constitution and American politics, the Garrisonians were able to educate northerners about their complicity with slavery. In asking for a dissolution of the Union, the Garrisonians exposed southern hypocrisy over states' rights and nullification.<sup>80</sup> The Garrisonian critique of the Constitution reminded northerners that they propped up southern slavery through the return of fugitive slaves and their constitutional obligation to provide troops to suppress slave rebellions.<sup>81</sup>

Cover argues that the Garrisonian constitutional argument "was central to the definition of the Garrisonian community with its holistic version of perfection on earth."<sup>82</sup> But the Garrisonian position was actually quite practical and hardly perfectionist. Had northerners seceded, it is not difficult to imagine the eventual collapse of southern slavery if there had been two countries – which might be called the South United States and the North United States.<sup>83</sup> Without the Fugitive Slave Clause of the Constitution – and federal implementation of it – slavery would have become unstable and ultimately untenable in the northern part of the new South United States. Slaves from Delaware, Maryland, Virginia, Kentucky, and Missouri could easily have fled to the North United States. Masters in those states would have been forced to either move further south or sell their slaves south. Either outcome would have increasingly weakened slavery in the northern part of the new South United States. Furthermore, the South needed a strong national army to suppress slave rebellions, which, under the Constitution, the North helped provide. In a separate country, southerners would have faced the huge cost of policing slavery on their own.

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79. *Id.* at 238.

80. Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Coming of the Civil War*, 45 AKRON L. REV. 449, 452 (2012) [hereinafter Finkelman, *States' Rights, Southern Hypocrisy*]. In the end, the eleven of the slave states would secede, but not because these states felt their "states' rights" were threatened. *See id.* On the contrary, they complained about northern states' rights, which were used to oppose slavery. *Id.*

81. *See generally* Finkelman, *The Founders and Slavery*, *supra* note 71, at 414–15 (discussing the extent to which the Constitution obligated northerners to suppress slave rebellions).

82. Cover, *supra* note 56, at 38.

83. For a discussion of this theory, see Finkelman, *The Founders and Slavery*, *supra* note 71, at 446 (arguing that if the North had seceded slavery, it would have been untenable in the upper South, and eventually, slavery would have been concentrated in the deep South and Haiti-like conflagration would have been a likely outcome).

This argument is, of course, completely hypothetical. But, the historical evidence supports this analysis. One reason that the four Upper South slave states – Delaware, Maryland, Kentucky, and Missouri – did not secede and join the Confederacy in 1860–61 is that the master class in that region fully understood that the Union protected their slave property through the Fugitive Slave Clause of the Constitution and the Fugitive Slave Law of 1850.<sup>84</sup> Masters in the Upper South understood, just as Garrison and his followers did, that if northerners were not obligated to return fugitive slaves, the institution of slavery in the Upper South would be fatally weakened. Not surprisingly, slaveowners in Kentucky and Missouri did not secede in 1860–61.<sup>85</sup>

Thus, for the Garrisonians, including Frederick Douglass, working to end the Union and permanently weaken slavery was far more useful than electing the occasional antislavery congressman or senator.

### III. DOUGLASS AND THE GARRISONIAN POSITION: AN OVERVIEW

As a fugitive slave fresh from Maryland in the late 1830s and early 1840s, the young Douglass was heavily influenced by Garrison and his doctrines. He encountered Garrison shortly after his escape from slavery, and as this Article sets out below, he quickly came to work for Garrison as an anti-slavery speaker.<sup>86</sup> In these early years, he absorbed the Garrisonian argument and wove it into his public talks about slavery. In 1845, he went to the British Isles, where he gave hundreds of speeches advocating disunion.<sup>87</sup> After he returned from almost two years in the British Isles, Douglass's constitutionalism evolved. By the late 1840s, Douglass began to argue for what one might call a "practical constitutionalism" in the struggle against slavery.<sup>88</sup>

As Douglass's opposition to slavery became more result-oriented, he gradually rejected some tenants of Garrison. By 1848, Douglass was willing to consider political activity. A few years later, he dramatically rejected Garrison's analysis of the proslavery Constitution, even though he had spent a decade making precisely that argument.<sup>89</sup> On a theoretical level, and on the basis of the actual history of the Founding, it is clear that Garrison always had the better argument. The Constitution of 1787 was overwhelmingly proslavery.<sup>90</sup> It protected slavery at every turn, and it created a slaveholder's Un-

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84. See generally STANLEY HARROLD, *BORDER WAR: FIGHTING OVER SLAVERY BEFORE THE CIVIL WAR* 116–37, 183–207 (2010).

85. *Id.* at 204–05.

86. BARNES, *REFORMER AND STATESMAN*, *supra* note 4, at 31.

87. John W. Blassingame, *Introduction to Volume One*, in 1 FREDERICK DOUGLASS, *THE FREDERICK DOUGLASS PAPERS: SERIES TWO* xxxii–iii (John W. Blassingame et al. ed., 1999) [hereinafter 1 DOUGLASS, *PAPERS SERIES TWO*]; see *infra* Part VII.

88. See *infra* Part VI.

89. See *infra* Part IX.

90. FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 38, at 3–45.

ion.<sup>91</sup> From 1789 until 1861, slaveowners and their northern doughface<sup>92</sup> allies dominated Congress, the White House, and the Supreme Court.<sup>93</sup> But

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91. *Id.* See also Paul Finkelman, *The Root of the Problem: How The Proslavery Constitution Shaped American Race Relations*, 4 BARRY L. REV. 1 (2003); MASUR, *supra* note 64, at 14.

92. “Doughface” was a mid-nineteenth century term of derision for a northerner who voted with southerners on issues involving slavery. See Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1848 (1996). A “doughface” was best defined as a northern man with southern principles. *Id.* It was said their faces were made of bread dough, or covered with bread dough, and could be shaped into anything the southerners wanted. LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860*, at 85–87 (2000). The classic doughfaces were Presidents Millard Fillmore and James Buchanan. See PAUL FINKELMAN, *MILLARD FILLMORE* (2011) [hereinafter FINKELMAN, *MILLARD FILLMORE*]; Paul Finkelman, *James Buchanan, Dred Scott, and the Whisper of Conspiracy*, in JAMES BUCHANAN AND THE COMING OF THE CIVIL WAR 20–45 (John W. Quist & Michael J. Birkner eds., 2013) [hereinafter Finkelman, *Whisper of Conspiracy*]. For a summary of all the slaveholding presidents, see *Slaveholding Presidents*, HAUENSTEIN CTR. AT GRAND VALLEY ST. U., <http://hauensteincenter.org/slaveholding/> (last visited Apr. 14, 2016).

93. From 1789 to 1850, only two men who had never owned slaves – John Adams and John Quincy Adams – served as president, each for only one term. See Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 869–70 (2011) [hereinafter Finkelman, *The Cost of Compromise*]. Martin Van Buren owned no slaves when he entered the office but came from a slaveholding family in New York State and had personally owned at least one slave earlier in his career. *Slaveholding Presidents*, *supra* note 92. All other presidents in this period were slaveholders. Finkelman, *The Cost of Compromise*, *supra*, at 870. From 1850 to 1860, there were three northern presidents, Millard Fillmore, Franklin Pierce, and James Buchanan who had never owned slaves. MELVIN I. UROFSKY & PAUL FINKELMAN, *MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 374 (3d ed. 2011). But all three were notoriously known as doughfaces for their persistent and unwavering support of slavery. See JEAN H. BAKER, *JAMES BUCHANAN* (2004); Finkelman, *Whisper of Conspiracy*, *supra* note 92; FINKELMAN, *MILLARD FILLMORE*, *supra* note 92; MICHAEL HOLT, *FRANKLIN PIERCE* (2010). Slaveholders served as Chief Justice from 1801 to 1864; with the exception of a few years in late 1820s, there was southern majority on the Court from 1801 to 1860; twenty-five of the thirty-nine speakers of the House between 1801 and 1860 were slaveowners. Finkelman, *The Cost of Compromise*, *supra*, at 870; Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 2 n.6 (1997). Except for the terms from 1830 to 1836, there was a southern majority on the Court from 1801 until the Civil War began. *Justices of the United States Supreme Court*, GREEN PAPERS, <http://www.thegreenpapers.com/Hx/JusticesUSSC.html> (last visited Apr. 14, 2016). In the 1840s and 1850s, this majority was supplemented by northern doughface justices, like Samuel Nelson, Robert Grier, and Levi Woodbury, who almost always voted to support slavery. See *id.* However, even when the Court had a northern majority, Justice Henry Baldwin of Pennsylvania was a northern doughface Democrat who always voted to support slavery, thus giving supporters of slavery a majority on

by the 1850s, Douglass was less interested in theoretical consistency than in practical results. More importantly perhaps, by the 1850s, Douglass was a changed man in new circumstances, and so he saw the Constitution in a different light.

As a young fugitive slave, Douglass found the Garrisonian argument compelling and consistent with his own experiences as a slave and as a refugee from southern bondage. However, in less than a decade after Douglass became an abolitionist, he legally gained his freedom through the intervention of British friends. This change in his personal status led him to rethink his commitment to the Garrisonian view of the Constitution and Garrison's opposition to political activity. In 1848, Douglass began to explore electoral politics, attending the national Free Soil Party Convention.<sup>94</sup> After his return from Great Britain in 1847, Douglass began to question Garrison's constitutional theory and his opposition to electoral politics.<sup>95</sup> Finally, in May 1851, Douglass announced that his views of the Constitution had changed.<sup>96</sup> Thereafter, he would be a political abolitionist, giving his support to the Liberty Party, the Free Soil Party, and, ultimately and more importantly, to the Republican Party.<sup>97</sup>

To understand Douglass's changing views – to understand Frederick Douglass's Constitution – we must begin with his early life and his escape to freedom.

#### IV. DOUGLASS THE FUGITIVE SLAVE: ANTISLAVERY CONSTITUTIONALISM AT THE GROUND LEVEL

The future abolitionist Frederick Douglass was born a slave in Maryland in February 1818, with the name Frederick Augustus Washington Bailey.<sup>98</sup> He would change his name to Johnson when he escaped from Maryland in 1838.<sup>99</sup> Shortly after that, he arrived in Massachusetts and took the last name of Douglass.<sup>100</sup> Douglass never knew who his father was, although probably it was his owner Aaron Anthony, a small planter with about thirty slaves of

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the court in every term except 1835, when there was an even three-three split. See UROFSKY & FINKELMAN, *supra* note 93, at 377–446.

94. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 560.

95. See *infra* Part VI.

96. See *infra* Part VI. See Frederick Douglass, *Change of Opinion Announced*, reprinted in 2 PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, PRE-CIVIL WAR DECADE, 1850–1860*, at 155–56 (1975) [hereinafter 2 FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*]. The editorial first appeared in *The North Star*, but was reprinted by William Lloyd Garrison in *The Liberator*. *Id.* at 156.

97. See *infra* Part VI.

98. BARNES, *REFORMER AND STATESMAN*, *supra* note 4, at 11.

99. DOUGLASS, *NARRATIVE*, *supra* note 28, at 94.

100. *Id.* at 95–96. To avoid confusion, I will refer to him during his youth as “Frederick” and as “Douglass” for the period after 1838 when he escaped bondage, shortly after he turned twenty.



his own.<sup>101</sup> Anthony's main income came from serving as the business manager for Colonel Edward Lloyd V, one of the richest men in Maryland, who owned thirteen separate plantations, thousands of acres of land, and hundreds of slaves.<sup>102</sup>

Frederick barely knew his mother – who lived on another plantation owned by Lloyd – and was mostly raised by his grandmother until he was about six-and-a-half, when he was moved to Wye House Planation to live close to Colonel Lloyd's main home.<sup>103</sup> While at Wye Plantation, Frederick spent much of his time in the Lloyd mansion.<sup>104</sup> His “job” as a young slave was to be a companion and playmate for Lloyd's son.<sup>105</sup> This exposure to the Lloyd household allowed Frederick to learn “standard spoken English despite living as a plantation slave.”<sup>106</sup> In 1826, when he was about eight years old, Frederick was sent to Baltimore to live with Hugh and Sophia Auld.<sup>107</sup> Hugh Auld was the brother of Thomas Auld, who had married Aaron Anthony's daughter, Lucretia Anthony Auld.<sup>108</sup> Hugh and Sophia had a son about Frederick's age, and so they now needed a slave companion for him.<sup>109</sup>

Most likely, the placement of Frederick in the Lloyd household and then in the Auld household was the result of interventions by his father, Aaron Anthony. It is likely that most of the Anthony family knew Frederick was a relative, and they made his bondage less harsh than it might otherwise have been. Sending Frederick to Baltimore made sense, in that it removed Aaron Anthony's slave son from his household, while at the same time ensuring he would be in relatively comfortable surroundings. It is possible that Aaron Anthony planned to manumit his son Frederick at some point, and thus these childhood experiences in the Lloyd and Auld households were deliberately designed to prepare him for freedom.

The move to Baltimore had a dramatic impact on Frederick's life. His new mistress, Sophia Auld, had grown up in a non-slaveholding family and had never owned a slave.<sup>110</sup> She was unfamiliar with traditional attitudes toward slavery and the accepted treatment of slaves.<sup>111</sup> Thus, Sophia Auld was kindly, almost motherly, to young Frederick, who was mostly “employed” – if one can use that term in this context – as a companion for Sophia

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101. *Id.* at 2.

102. *Id.* at 7.

103. See generally BARNES, REFORMER AND STATESMAN, *supra* note 4, at 1–15.

104. DOUGLASS, NARRATIVE, *supra* note 28, at 7.

105. *Id.* at 26.

106. Robin L. Condon & Peter P. Hinks, *Introduction to Volume Three*, in 3 FREDERICK DOUGLASS, THE FREDERICK DOUGLASS PAPERS: SERIES TWO xxvii (John R. McKivigan ed., 2012) [hereinafter 3 DOUGLASS, PAPERS SERIES TWO].

107. DOUGLASS, NARRATIVE, *supra* note 28, at 24.

108. *Id.* at 23.

109. *Id.* at 26.

110. *Id.*

111. *Id.*

Auld's young son.<sup>112</sup> Sophia Auld read the Bible to Frederick, taught him the alphabet, and started to teach him to read.<sup>113</sup> She no doubt enjoyed the process of teaching her son and his young companion. She was probably charmed by the precocious Frederick. She did not know that most masters frowned on teaching slaves to read and write.<sup>114</sup> Upon discovering what Sophia was doing, her husband, Hugh Auld, forbade future lessons, declaring that literacy would ruin the young slave.<sup>115</sup> He told his wife, in front of Frederick, "[i]f you give a nigger an inch, he will take an ell."<sup>116</sup> Mr. Auld sternly continued:

"A nigger should know nothing but to obey his master—to do as he is told to do. Learning would *spoil* the best nigger in the world. Now," said he, "if you teach that nigger (speaking of myself) how to read, there would be no keeping him. It would forever unfit him to be a slave. He would at once become unmanageable, and of no value to his master. As to himself, it could do him no good, but a great deal of harm. It would make him discontented and unhappy."<sup>117</sup>

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112. *Id.*

113. *Id.* at 28–29.

114. *Id.* at 29.

115. *Id.*

116. *Id.*

117. *Id.* This story is told in the other versions of his autobiography in slightly different ways. In *My Bondage, My Freedom*, he wrote:

"[I]f you give a nigger an inch, he will take an ell;" "he should know nothing but the will of his master, and learn to obey it." "[I]f you teach that nigger—speaking of myself—how to read the bible, there will be no keeping him;" "it would forever unfit him for the duties of a slave;" and "as to himself, learning would do him no good, but probably, a great deal of harm—making him disconsolate and unhappy." "If you learn him now to read, he'll want to know how to write; and, this accomplished, he'll be running away with himself."

DOUGLASS, *MY BONDAGE AND MY FREEDOM*, *supra* note 28, at 114. In his final autobiography, the 1892 edition of *Life and Times*, Douglass told the story this way:

Of course he forbade her to give me any further instruction, telling her in the first place that to do so was unlawful, as it was also unsafe; "for," said he, "if you give a nigger an inch he will take an ell. Learning will spoil the best nigger in the world. If he learns to read the Bible it will forever unfit him to be a slave. He should know nothing but the will of his master, and learn to obey it. As to himself, learning will do him no good, but a great deal of harm, making him disconsolate and unhappy. If you teach him how to read, he'll want to know how to write, and this accomplished, he'll be running away with himself."

This tirade whetted Frederick's appetite for more education even as Mrs. Auld stopped her lessons and halfheartedly tried to prevent him from reading newspapers and other pieces of literature in the house.<sup>118</sup> Frederick would spend the next dozen years of his life as a slave, always expanding his literacy skills. He often convinced white boys in his Baltimore neighborhood to teach him what they were learning in school.<sup>119</sup> He always carried a copy of Webster's spelling book, and he later paid fifty cents for a copy of *The Columbian Orator*, which he used to learn public speaking and to expand his vocabulary.<sup>120</sup>

Hugh Lloyd was, of course, correct. Literacy did "spoil" Frederick as a slave. As a free adult, Douglass later recalled, "[T]eaching me the alphabet, had given me the *inch*, and no precaution could prevent me from taking the *ell*."<sup>121</sup> He spent most of the next seven years in Baltimore, living with the Aulds.<sup>122</sup> Up to this point, Frederick had lived a rather charmed life for a slave, except of course for the fact that he had been cut off from his mother, grandmother, and siblings.<sup>123</sup> He had not been subjected to physical punishment or hard farm labor, and he lived in relative comfort.<sup>124</sup>

In 1833, the fifteen-year-old Frederick suddenly found himself returned to the countryside, where he was back in the custody of his new owner, Thomas Auld, the son-in-law of his original owner, the late Aaron Anthony.<sup>125</sup> This change in his life reflected the reality of slavery – slaves had no control over where they lived and no chance to ever know where they would live next. Nor could they count on even being owned or controlled by the same person for any length of time. Under the laws of Maryland (and every other slave state), Frederick Bailey was a chattel – a piece of moveable property.<sup>126</sup> As such, he could be bought, sold, or, in his case, bequeathed.<sup>127</sup> He

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DOUGLASS, LIFE AND TIMES, *supra* note 3, at 96–97; 3 FREDERICK DOUGLASS, *Life and Times of Frederick Douglass*, reprinted in 3 DOUGLASS, PAPERS SERIES TWO, *supra* note 106, at 62.

118. DOUGLASS, NARRATIVE, *supra* note 28, at 33.

119. *Id.*

120. *Id.* at 34.

121. *Id.* at 29.

122. *Id.* at 32.

123. *Id.*

124. *See id.*

125. *Id.* at 45.

126. As one treatise on slave law noted: "The cardinal principle of slavery—that the last is not to be ranked among sentient beings, but among things, as an article of property, a chattel personal—obtains as undoubted law in all these (the slaveholding) States." WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE 27 (1853) (citing GEORGE M. STROUD, A SKETCH OF THE LAWS RELATED TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 22, 23 (1827)). As another treatise writer noted, "Slaves, *from their nature*, are chattels . . ." *Id.* at 29–30 (quoting JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY 2 (1837)). *See generally* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860 (1996).

could be moved around and assigned to whoever his owner chose.<sup>128</sup> The Constitution supported this reality by leaving the regulation of personal status and personal property entirely to the states, except when slaves escaped.<sup>129</sup> Thus, with the blessings of the constitutions and laws of Maryland and the United States, Frederick Bailey – a moveable piece of property – was forced to leave Baltimore and return to rural Maryland and to the direct custody of Thomas Auld.<sup>130</sup>

Frederick remained in the countryside for nearly three years.<sup>131</sup> During this period, Auld rented the sixteen-year-old Frederick to Edward Covey, who was infamous in the neighborhood for his harsh treatment of slaves and his ability to make them pliable and obedient.<sup>132</sup> He was known as a “nigger-breaker.”<sup>133</sup> For six months, Covey brutally abused Frederick, regularly beating him.<sup>134</sup> Initially, this treatment worked. Douglass later recalled:

Mr. Covey succeeded in breaking me. I was broken in body, soul, and spirit. My natural elasticity was crushed, my intellect languished, the disposition to read departed, the cheerful spark that lingered about my eye died; the dark night of slavery closed in upon me; and behold a man transformed into a brute!<sup>135</sup>

However, after about six months of this treatment, Frederick fought back. He resisted Covey's attempt to whip him, and after a two-hour struggle, the famed “nigger-breaker” was unable to subdue Frederick.<sup>136</sup> Finally, in a face-saving move, Covey declared he had punished Frederick enough and left the young slave alone.<sup>137</sup> Douglass later noted, “The Truth was, that he

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127. The leading southern treatise on slavery, published in 1858, assumed that slaves were subject to sale by their owner, and that there were no limitations on this. THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES 246 (§ 276) (1858). Nevertheless, the author thought, “[i]t would be well for the law, at least, to provide against such separations of families by the officers of the law, in cases of sales made by authority of the Courts, such as sheriffs' and administrators' sales.” *Id.*

128. *Id.*

129. U.S. CONST. art. IV, § 2, cl. 3.

130. DOUGLASS, NARRATIVE, *supra* note 28, at 44.

131. *Id.* at 45.

132. *Id.* at 50–57.

133. *Id.* at 50. This was the term Douglass used. In the last version of his autobiography, Douglass referred to him as “Covey, the Negro Breaker,” although this seems to be the only place he changed his language to use to more progressive term “Negro.” DOUGLASS, LIFE AND TIMES, *supra* note 3, at 126.

134. DOUGLASS, NARRATIVE, *supra* note 28, at 52–58.

135. *Id.* at 55.

136. *Id.* at 61–63.

137. *Id.* at 62–64.

had not whipped me at all.”<sup>138</sup> Covey never again laid a hand on Frederick, and at the end of the one-year rental period, he was returned to his owner.<sup>139</sup> In his first autobiography, Douglass explained that “[t]his battle with Mr. Covey was the turning-point in my career as a slave. It rekindled the few expiring embers of freedom, and revived within me a sense of my own manhood. It recalled the departed self-confidence, and inspired me again with a determination to be free.”<sup>140</sup> Although he would remain in slavery for almost four more years, he would never again be whipped.<sup>141</sup>

While not strictly constitutional, there were legal implications to young Frederick’s resistance. In the southern states, it was a crime – often a capital offense – for slaves to resist a master or overseer,<sup>142</sup> or in the case of Covey, some other white who had authority over them.<sup>143</sup> Such rules, like all state laws creating and protecting slavery, were implicitly supported by the Constitution. As the Garrisonians stressed, the Constitution sanctioned and supported southern laws regulating slavery and race relations and, at the same time, through the system of federalism, left the treatment of individuals and property entirely up to the states.<sup>144</sup>

The successful outcome of his fight with Covey – that he was never whipped again – increased Frederick’s determination to gain his freedom. In 1835, Frederick used his writing skills to forge passes as he organized an escape from slavery for himself and a few other slaves.<sup>145</sup> Frederick and his comrades were captured, and he fully expected to be sold south for his mis-

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138. *Id.* at 62. Oddly, in subsequent editions of his autobiography, Douglass changed this quotation to: “The fact was, he had not whipped me at all.” 3 FREDERICK DOUGLASS, *Life and Times of Frederick Douglass*, reprinted in 3 DOUGLASS, PAPERS SERIES TWO, *supra* note 106, at 111.

139. DOUGLASS, NARRATIVE, *supra* note 28, at 62–63.

140. *Id.* at 63.

141. *Id.*

142. There were a few antebellum cases in which appellate courts overturned murder convictions of slaves who had killed whites while defending their own lives. *See State v. Will*, 18 N.C. 121 (1834); *see also State v. Caesar*, 31 N.C. 391 (1849); *State v. Jarrott*, 23 N.C. 76 (1840).

143. In *State v. Mann*, the Supreme Court of North Carolina set out the rule that a renter was considered to have all the rights and powers of the master, when punishing the slave. 13 N.C. 263, 263 (1829). Masters could limit the powers of the renter by contract, but without such powers, the renter could act just like the master. *Id.* In *Scudder v. Woodbridge*, Chief Justice Henry Lumpkin of Georgia affirmed the power of the master to limit how a renter could use a slave through the rental contract. 1 Ga. 195 (1846).

144. *See generally* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW (1996). For a contemporary study of slave law, see GEORGE M. STROUD, A SKETCH OF THE LAWS RELATED TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA (1827) (2d ed. 1856) and COBB, *supra* note 127.

145. DOUGLASS, NARRATIVE, *supra* note 28, at 74.

deeds.<sup>146</sup> Instead, much to his surprise and pleasure, he was returned to Hugh and Sophia Auld and hired out to a ship builder to learn to caulk ships.<sup>147</sup>

After twice being rented out in Baltimore, Hugh Auld allowed Frederick to hire his own time.<sup>148</sup> Under this system, Frederick would find a job, use his salary to pay for his own food and lodging, and give a set sum of money to Auld every week.<sup>149</sup> Arrangements like this were common, but illegal and legally impossible because a slave could never be a party to a contract.<sup>150</sup> Thus, as Thomas R.R. Cobb noted in his treatise on the law of slavery, “in almost all the States,” there were “penalties against the master for permitting his slaves to hire their own time, or to go at liberty.”<sup>151</sup> In 1787, the same year the Constitution was written, Maryland passed a law prohibiting slaves from hiring their own time.<sup>152</sup> Whites were required by law to supervise their slaves, and slaves could not legally move about without supervision.<sup>153</sup> Laws provided fines for masters who allowed their slaves to travel without written authorization or to live unsupervised and hire their own time; and slaves caught doing such things could be jailed.<sup>154</sup> It was also illegal for free people – white or black – to rent lodgings to slaves.<sup>155</sup> In fact, it was technically illegal for free people to transact business with slaves unless the slave was acting on behalf of a master with a pass or other written permission from the master.<sup>156</sup> Those hiring a slave – as opposed to renting a slave from a master – could also be prosecuted for luring a slave from his master.<sup>157</sup> At common law, hiring someone’s slave constituted a form of conversion or trespass, just as if the hirer used some other chattel property that belonged to someone else.<sup>158</sup>

The myriad of laws prohibiting hiring slaves or transacting business with them were mostly ignored.<sup>159</sup> Businesses happily sold goods to slaves without asking for proof that they had their master’s consent to allow them to make the purchase or proof that the money they were spending belonged to

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146. *Id.* at 76–80.

147. *Id.* at 80.

148. *Id.* at 89–90.

149. *Id.*

150. COBB, *supra* note 127, at 240 (§ 265). See MORRIS, *supra* note 144, at 339.

151. COBB, *supra* note 127, at 108–09 (§ 117).

152. Act of May 22, 1787, ch. 33, 1787 Md. Laws xix; Act of Feb. 4, 1817, ch. 104, 1817 Md. Laws 106. See 2 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 19 (The Lawbook Exchange, Ltd. 2006) (1862).

153. Act of Feb. 4, 1817.

154. MORRIS, *supra* note 144, at 339.

155. Act of Feb. 4, 1817.

156. MORRIS, *supra* note 144, at 351–53.

157. *Id.* at 339–41, 345.

158. See generally *id.*

159. See RICHARD C. WADE, SLAVERY IN THE CITIES: THE SOUTH, 1820–1860, at 48, 149 (1964).

them.<sup>160</sup> Baltimore had a substantial free black population, and whites seeking to hire blacks or sell them goods or services were unlikely to ask too many questions about their status.<sup>161</sup> Many businesses, especially taverns, sold goods to blacks without asking if they were actually free.<sup>162</sup> Employers eagerly hired slaves.<sup>163</sup> They were likely to be good workers, and because of their vulnerability – they did not want to have to return to their masters – they were likely to accept lower wages than whites and not cause any trouble at the work place.<sup>164</sup> Masters allowed their slaves to do this because it was convenient and profitable.<sup>165</sup> A master did not have to worry about feeding, clothing, housing, supervising, or disciplining a slave and could count on a weekly cash payment.<sup>166</sup> Slaves like Frederick Bailey liked the system because it gave them a great deal of personal freedom and allowed them to live without the supervision of a master.<sup>167</sup>

By hiring his own time, Frederick was now living almost like a free person, although his wages were not his own.<sup>168</sup> More importantly, he still had absolutely no control over his future or his destiny. He might have been able to hire his own time for years, remaining in Baltimore with all its advantages as a major city. But at any time, his master could also order him back to the countryside or sell him to the Deep South, where he might have ended up laboring on a cotton or sugar plantation. By this time, he was romantically involved with Anna Murray, a free black woman living in Baltimore.<sup>169</sup> The couple was ready to be married, but of course, as a slave, Douglass could never be united with his fiancée in a legally binding or legally sanctioned marriage. A marriage, then as now, was a contract between the two spouses and the state. But slaves could never sign a contract.<sup>170</sup> They could take wives and husbands, and masters might even perform marriage ceremonies for them or hire a preacher to do so.<sup>171</sup> Southern ministers regularly argued

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160. *Id.* There are obvious parallels to the illegal hiring of slaves, especially the urban South and the modern hiring of undocumented workers.

161. *Id.* at 18–19, 149.

162. *See generally id.*

163. *See generally id.*

164. This situation also has parallels to hiring undocumented workers.

165. DOUGLASS, NARRATIVE, *supra* note 28, at 89.

166. *Id.*

167. *Id.*

168. *Id.*; COBB, *supra* note 127, at 241 (§ 267).

169. Douglass later wrote in his second autobiography, *My Bondage and My Freedom*, “[i]n the meantime, my intended wife, Anna, came on from Baltimore—to whom I had written, informing her of my safe arrival at New York—and, in the presence of Mrs. Mitchell and Mr. Ruggles, we were married, by Rev. James W. C. Pennington.” DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 28, at 265.

170. COBB, *supra* note 127, at 242–43 (§ 270).

171. *See* Tera W. Hunter, Opinion, *Putting an Antebellum Myth to Rest*, N.Y. TIMES (Aug. 1, 2011), [http://www.nytimes.com/2011/08/02/opinion/putting-an-antebellum-myth-about-slave-families-to-rest.html?\\_r=0](http://www.nytimes.com/2011/08/02/opinion/putting-an-antebellum-myth-about-slave-families-to-rest.html?_r=0).

that slave unions should be celebrated in the eyes of God.<sup>172</sup> But these slave unions, even if performed by a minister or a justice of the peace, were never legal marriages, protected by law.<sup>173</sup> Frederick might “marry” his fiancée, but he could be taken away from Anna Murray at the whim of his master or at the hammer of an auctioneer in the face of an economic reversal or to settle an estate when his owner died.<sup>174</sup>

As a caulker in Baltimore, Frederick mingled with free blacks, other slaves, and white working men.<sup>175</sup> Courting Anna Murray similarly allowed him to spend time with free people, who never had to worry that a master's economic needs or bad temper could ruin their lives. On the docks, he also met free black sailors from the North.<sup>176</sup> Meanwhile, he honed his speaking and reading skills, learned more about the geography of the United States, and came to understand that the northern states did not allow slavery.<sup>177</sup> He read newspaper stories of antislavery petitions to Congress which, he later explained, “delight[ed] the hearts of the slaves” when they discovered that some white people in the North opposed slavery.<sup>178</sup> While not explicitly realizing it, he was also learning about the First Amendment, with its right to petition, and the nature of a free press, which most Americans recognized as a fundamental constitutional right, even though the First Amendment did not technically apply to the states.<sup>179</sup> He was also learning about the Constitution's system of federalism – even though he probably had never heard the term – that allowed some states to prohibit slavery, even as the Constitution protected slavery in a variety of ways.

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172. *See, e.g.*, Special Comm. Appointed by the Protestant Episcopal Convention, *Protestant Episcopal Convention of South Carolina, Duty of Clergymen in Relation to the Marriage of Slaves, 1859*, reprinted in PAUL FINKELMAN, *DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH* 114–20 (2003).

173. Some masters performed marriage ceremonies for slaves, hired ministers to perform them, or even allowed a justice of the peace or a judge to officiate at a slave “marriage.” *Id.* at 114. But under the law, these were not real marriages because they had no status at law. *Id.* at 119.

174. Many masters understood that a ceremony might create a more stable union, thus leading to harmony on the plantation and children, which would increase the wealth of the master. *See id.* at 120–21. Ministers urged masters to give their slaves Christian weddings, but ministers also understood that sale of one of the parties constituted a *de facto* divorce and the slaves were free to remarry. *See id.* at 119.

175. DOUGLASS, *NARRATIVE*, *supra* note 28, at 89–90.

176. *Id.* at 86–88.

177. 1 FREDERICK DOUGLASS, *The Union, Slavery, and Abolitionist Petitions: Addresses Delivered in Hingham, Massachusetts, on 4 November 1841*, reprinted in *THE FREDERICK DOUGLASS PAPERS: SERIES ONE* 6, 8 (John W. Blassingame ed., 1985) [hereinafter 1 DOUGLASS, *PAPERS SERIES ONE*].

178. *Id.*

179. By this time, the Supreme Court had in fact ruled that the Bill of Rights did not protect liberty from state abridgements. *Barron v. Baltimore*, 32 U.S. 243, 248 (1833).



Most of all, as he lived in Baltimore, Frederick learned that he could no longer tolerate his status as a slave.<sup>180</sup> The arrangement that allowed Frederick to hire his own time whetted his desire for freedom, gave him new reasons to want to escape bondage, and provided him with the opportunity to escape.

#### V. FREDERICK BAILEY'S FIRST CONSTITUTIONAL MOMENT

In 1838, when he had just turned twenty, Frederick Bailey escaped to the North with papers borrowed from a free black sailor.<sup>181</sup> Frederick's escape was his first encounter with the Constitution, although at the time he surely was not thinking in that way. In making his escape from bondage, Frederick lacked "free papers" that blacks who were not slaves carried in the South.<sup>182</sup> Instead, he carried a "seaman's protection," which he had borrowed from a free black sailor he met in Baltimore.<sup>183</sup> A "seaman's protection" was a document issued to merchant sailors by a collector of a port under a 1796 federal act "for the relief and protection of American Seamen."<sup>184</sup> In the third version of his autobiography, *The Life and Times of Frederick Douglass*, written more than forty years after his escape from slavery,<sup>185</sup> Douglass explained that the "seaman's protection" identified the bearer as a free man, "describing his person and certifying to the fact that he was a free American sailor. The instrument had at its head the American eagle, which at once gave it the appearance of an authorized document."<sup>186</sup> In fact, the seamen's protection was more complicated than this and the very existence of the papers Frederick borrowed to gain his freedom raised surprisingly interesting constitutional questions.

The 1796 act was designed to protect American sailors from impressment by foreign navies, especially the British navy.<sup>187</sup> The law established a

180. DOUGLASS, NARRATIVE, *supra* note 28, at 87–88.

181. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 246. Douglass did not tell this story until after slavery ended because he did not want to reveal to whites and slave catchers the method he used, and other slaves might have used, to escape bondage. *Id.*

182. *Id.* at 245–46.

183. *Id.*

184. Act of May 28, 1796, ch. 36, 1 Stat. 477; Act of Mar. 3, 1813, ch. 42, 2 Stat. 809.

185. Douglass waited until after the Civil War to explain how he escaped because he did not want to ruin the possibility that other slaves might also be able to use his method. See *Life and Times of Frederick Douglass*, FREDERICK DOUGLASS HERITAGE, <http://www.frederick-douglass-heritage.org/life-and-times-of-frederick-douglass/> (last visited Jan. 3, 2016).

186. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 246.

187. See Ruth Priest Dixon, *Genealogical Fallout from the War of 1812*, 24 PROLOGUE MAG. (1992), <http://www.archives.gov/publications/prologue/1992/spring/seamans-protection.html>.

system of providing American sailors with papers to prove their identity as American citizens before they left the United States. The law read in part:

That the collector of every district shall keep a book or books, in which, at the request of any seaman, being a citizen of the United States of America, and producing proof of his citizenship, authenticated in the manner hereinafter directed, he shall enter the name of such seaman, and shall deliver to him a certificate, in the following form; that is to say: "I, A. B., collector of the district of D., do hereby certify, That E.F., an American seaman, aged \_\_\_ years, or thereabouts, of the height of \_\_\_ feet \_\_\_ inches, [describing the said seaman as particularly as may be] has, this day, produced to me proof in the manner directed in the act, intituled 'An act for the relief and protection of American seamen ;' and, pursuant to the said act, I do hereby certify, that the said E.F. is a citizen of the United States of America. . ."

..<sup>188</sup>

Significantly, when the port collectors gave these papers to free black sailors, they assumed that free blacks were citizens of the United States, since under the act only citizens were entitled to a "seaman's protection."<sup>189</sup> This was a problematic assumption since, at the federal level, free blacks were not treated as citizens.<sup>190</sup> Federal law prohibited black immigrants from becoming naturalized citizens<sup>191</sup> and banned free blacks from serving in the militia,<sup>192</sup> becoming letter carriers,<sup>193</sup> or serving in public office in the District of Columbia.<sup>194</sup> A federal law of 1813 dealing with seamen on American ships referred to "citizens of the United States, or persons of colour, natives of the United States,"<sup>195</sup> implying that free blacks were not "citizens of the United States." However, Congress never amended the earlier act regulating "seamen's protections." This leads to the obvious conclusion that there was a disconnect between the statute, which applied to "citizens," and the acts of government officials, giving the seamen's protections to non-citizen free blacks who were "natives of the United States." The struggle of free African Americans to obtain passports further underscores the murky nature of giving free blacks certificates that implied they were citizens.<sup>196</sup> In 1821, Attorney

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188. Act of May 28, 1796.

189. DOUGLASS, LIFE AND TIMES, *supra* note *supra* note 3, at 246.

190. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 70 (1978).

191. Act of Mar. 26, 1790, ch. 3, 1 Stat 103.

192. Act of May 8, 1792, ch. 33, 1 Stat. 271 (requiring that "each and every free able-bodied white male citizen" be enrolled in the militia).

193. Act of Apr. 30, 1810, ch. 37, 2 Stat. 592.

194. Act of May 15, 1820, ch. 104, 3 Stat. 583.

195. Act of Mar. 13, 1813, ch. 42, 2 Stat. 809.

196. For a short discussion of this issue, see CRAIG ROBERTSON, THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT 131–34 (2010).

General William Wirt asserted that free blacks were not entitled to passports because they were not citizens of the United States.<sup>197</sup> In 1832, a full quarter century before he wrote his opinion in *Dred Scott*,<sup>198</sup> Roger B. Taney, while serving as Attorney General, concluded that free blacks could not have passports because “they were evidently not supposed to be included by the term *citizens*” in the Constitution.<sup>199</sup> While the federal government granted a few passports to free blacks, giving these documents to African Americans was rare,<sup>200</sup> and the few examples of them may be the exceptions that prove the general rule.

Frederick Bailey, of course, did not know of any of these legal and constitutional ambiguities or debates over whether a free black could be granted a passport.<sup>201</sup> As a slave he was, of course, clearly not entitled to any of these documents. Nevertheless, through his contacts on the docks of Baltimore, he was able to borrow a government issued identification paper – a “seaman’s protection” – belonging to a free black, even though it is not clear if any free blacks were technically allowed to have such a document because, for most purposes, the federal government had not treated free blacks as “citizens” of the United States.<sup>202</sup>

Thus, Frederick was able to escape bondage by using the antebellum equivalent of a federally issued identification document – although one that was not his own. This document gave him protection from the Fugitive Slave Clause of the Constitution, the Fugitive Slave Act of 1793, and the Maryland laws that created and sustained slavery. Ironically, Frederick was able to trump all of this law with his borrowed identification papers.

Frederick’s escape plan was audacious, but relatively simple. He travelled by train to Philadelphia in broad daylight, dressed as a merchant sailor.<sup>203</sup> He did not pay his fare at the ticket window because he was afraid the ticket agent might scrutinize his papers.<sup>204</sup> Instead, he boarded the train just as it was leaving the station without a ticket and had enough money with him to pay the fare to the conductor.<sup>205</sup>

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197. Leon Litwack, *The Federal Government and the Free Negro, 1790–1860*, 43 J. NEGRO HIST. 261, 272 (1958).

198. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

199. FEHRENBACHER, *supra* note 190, at 70.

200. Litwack, *supra* note 197, at 271.

201. Curiously, there appears to be no case law on the issue of black sailors being granted a “seamen’s protection” or any discussion in executive branch. We only know that free blacks were given these documents. See, e.g., Kelly S. Drake, *The Seaman’s Protection Certificate as Proof of American Citizenship for Black Sailors*, 50 LOG MYSTIC SEAPORT 11 (1998).

202. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 246.

203. *Id.*

204. *Id.* at 247.

205. *Id.* at 246.

After boarding a train, Frederick sat patiently waiting to pay his fare to the conductor.<sup>206</sup> Free blacks were common in Maryland and even more common in Baltimore. While a slave state with more than 90,000 people in bondage, in 1840 Maryland also had about 62,000 free blacks.<sup>207</sup> In 1840, almost eighty-five percent of Baltimore's 21,000 blacks were free.<sup>208</sup> Thus, the conductor should not have been surprised to have a free black on his train. Furthermore, free black sailors were common in port cities like Baltimore, so Frederick, pretending to be a sailor, was not unusual. When the conductor came to Douglass, he asked to see his "free papers."<sup>209</sup> The runaway slave, who was dressed in sailor's garb, replied with a brazen but successful answer. He later wrote of the experience:

[The conductor] said to me . . . "I suppose you have your free papers?" To which I answered: "No, sir; I never carry my free papers to sea with me." "But you have something to show that you are a free man, have you not?" "Yes, sir," I answered; "I have a paper with the American eagle on it, that will carry me round the world." With this I drew from my deep sailor's pocket my seaman's protection . . . . The merest glance at the paper satisfied him, and he took my fare and went on about his business.<sup>210</sup>

While the ruse worked because free blacks and free black sailors were common in Baltimore, Frederick was also lucky. The seaman's protection Douglass borrowed described a man far shorter than he was, and probably older.<sup>211</sup> Had the conductor carefully examined the paper, the escaping slave probably would have been discovered. But, his luck was also tied to his skills. He had been working in the Baltimore shipyards, and he knew how to talk like a sailor. He also had the advantage of having learned standard English at the Lloyd house, which he continued to use at the Auld house.<sup>212</sup> Thus, he did not sound like a plantation slave. To the conductor, he probably

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206. *Id.* at 247.

207. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* 63 tbl. 35 (Population Div., U.S. Census Bureau, Working Paper No. 56, 2002), [http://mapmaker.rutgers.edu/REFERENCE/Hist\\_Pop\\_stats.pdf](http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf).

208. Campbell Gibson & Kay Jung, *Historical Census Statistics On Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For Large Cities And Other Urban Places In The United States* 61 tbl. 21 (Population Div., U.S. Census Bureau, Working Paper No. 76, 2005), <http://www.census.gov/population/www/documentation/twps0076/MDtab.pdf>.

209. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 247.

210. *Id.*

211. ERIC FONER, GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD I (2015) (asserting that the papers belonged to a "retired" sailor).

212. Condon & Hinks, *supra* note 106, at xxvii.

sounded more like a northern free black than a Maryland slave. His confidence, his literacy, his experience on the docks, his lack of discomfort being around whites, and his urban skills also made him seem like a free person. Frederick's ability to act like a free man and talk like a free man helped make him a free man. The ruse worked. He was soon in New York.<sup>213</sup>

Frederick Bailey had just finished the first phase of his initial constitutional moment: he had crossed interstate lines as a fugitive slave. He had used a borrowed federally created document to evade the constitutional protection for masters that allowed for the return of fugitive slaves. With this document, he pretended to be both a free man and a citizen of the United States, and he was able to bluff his way past a train conductor, whose primary job was not to interdict runaways, but to collect fares and tickets. Ironically, the use of this borrowed document, which facilitated his escape, also made Frederick into a constitutional object – a person “held to Service or Labour in one State, under the Laws thereof, escaping into another.”<sup>214</sup> As the train left Maryland, Frederick became an interstate fugitive slave, subject to return to Maryland “on demand”<sup>215</sup> of his master if, of course, his master could find him.

In New York, he encountered other “constitutional moments.” He quickly learned that there were many slave catchers in New York City, even though he was no longer in a slave jurisdiction and no longer under the laws of a slave state.<sup>216</sup> The Constitution prohibited the free states from emancipating runaway slaves and instead required that they be returned “on demand” of their owners.<sup>217</sup> The newly arrived fugitive was aware of the slave catchers, but probably knew little of the constitutional clause and the federal law that protected them and endangered him. He might have wondered why Maryland slave law followed him into the North, but he knew it had something to do with the Fugitive Slave Act. Later, he would learn that this was, in fact, a function of the Fugitive Slave Clause of the Constitution<sup>218</sup> and the Fugitive Slave Act of 1793<sup>219</sup> that Congress had passed to implement the constitutional clause. Under the 1793 law, a master or his agent was “empowered to seize or arrest” an alleged “fugitive from labour”<sup>220</sup> and bring the slave before a state or federal judge or magistrate in order to obtain the necessary paperwork to bring the fugitive back to the South. In practice, this led to

213. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 250.

214. U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause).

215. *Id.*

216. New York ended all slavery on July 4, 1827, under an act passed in 1817. Act of Mar. 31, 1817, ch. 137, 1817 N.Y. Laws 136. For a discussion of slave catchers in New York, see GRAHAM RUSSELL GAO HODGES, DAVID RUGGLES: A RADICAL BLACK ABOLITIONIST AND THE UNDERGROUND RAILROAD IN NEW YORK CITY (2010). See also FONER, *supra* note 211.

217. U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause).

218. *Id.*

219. Ch. 7, 1 Stat. 302 (1793).

220. *Id.* at 1 Stat. 303.

freelance slave catchers roaming the streets of New York and other northern cities, looking for potential runaways who could be returned to their masters for a reward.<sup>221</sup> The Constitution allowed New York to be a free state, but it did not allow all people in the state to be secure in their liberty. Freedom, even in the North, was subordinated to slavery under the Constitution of 1787.<sup>222</sup>

When he reached New York, Frederick Bailey took a new name, now calling himself Frederick Johnson.<sup>223</sup> Soon after his arrival, Frederick Johnson encountered another fugitive named Jake, who he had known when they were both slaves in Baltimore.<sup>224</sup> He warned Frederick to avoid the docks, where slave catchers roamed, looking for fugitives who often gravitated to the maritime industry.<sup>225</sup> As a skilled caulker, he might easily have found work on the docks. But as a newly arrived black with such a skill, he might have been easily noticed and more quickly seized and forcibly returned to Maryland. Frederick's friend directed him to David Ruggles, the Secretary of the New York Vigilance Committee,<sup>226</sup> who was essentially the leader of the informal underground railroad in the city.

Ruggles put "Frederick Johnson" up for a few days while he waited for the arrival of his fiancée, Anna Murray, who began her journey to New York as soon as she received word that Frederick had safely arrived.<sup>227</sup> When she reached New York, they were quickly married by the black abolitionist minister Reverend J.W.C. Pennington.<sup>228</sup>

This marriage was also a new constitutional moment for Frederick – although again, one he would not have recognized at the time. In Maryland – and every other southern state – a slave could never be legally married, even if a minister, justice of the peace, or some other official performed a marriage ceremony for a slave couple.<sup>229</sup> As Thomas R.R. Cobb noted in his treatise

221. See HODGES, *supra* note 216, at 35.

222. For a discussion of the proslavery aspects of the U.S. Constitution, see FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 38.

223. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 255.

224. FONER, *supra* note 211, at 2–4.

225. *Id.*; DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 251–52.

226. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 253; see HODGES, *supra* note 216; FONER, *supra* note 211.

227. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 253.

228. *Id.*

229. For example, sometime around 1836 or 1837, the slave Dred Scott married Harriet Robinson at Fort Snelling in what was then the Wisconsin Territory and is now Minnesota. Paul Finkelman, *Was Dred Scott Correctly Decided? An "Expert Report" For the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1224 (2008). Scott was a slave owned by an army doctor, Captain John Emerson. *Id.* at 1223. Robinson was a slave owned by Major Lawrence Taliaferro, the Fort Snelling Indian agent. *Id.* at 1224. Taliaferro was also a Justice of the Peace, and in that capacity he performed a marriage ceremony for the two slaves. *Id.* However this was not a legal marriage, just a ceremonial union. *Id.* at 1224–25. Either could have been sold away from the other by Dr. Emerson, who acquired Harriet after the marriage to Dred. *Id.* at 1225.

on slave law, “The inability of the slave to contract extends to the marriage contract, and hence there is no recognized marriage relation in law between slaves.”<sup>230</sup> Marriage was entirely regulated by state law.<sup>231</sup> Under all state law, a marriage was a contract and no slave state allowed a slave to be a party to a contract, although they were often the objects of contracts.<sup>232</sup> Thus, under Maryland law, the slave Frederick Bailey could never have been legally married. But, the system of American federalism allowed each state to set its own rules for basic family law.<sup>233</sup> For the purposes of New York civil law, “Frederick Johnson” might have been deemed a free person capable of being married. But, because he was a fugitive slave, neither Maryland nor the United States would have recognized that marriage. Had he been captured in New York, he would have been returned to Maryland where his owner could have forbidden him from having any contact with his wife.<sup>234</sup> Indeed, in his treatise, Cobb asserted that “a fugitive slave, though he may be in a State where slavery does not exist, is still incapable of contracting, his *status* remaining unchanged.”<sup>235</sup>

Cobb supported this argument by citing a New York case, *Glen v. Hodges*,<sup>236</sup> which involved a contract signed by a fugitive slave while living as a runaway in Vermont.<sup>237</sup> At the time – 1810 – slavery was still legal in New York, but not in Vermont.<sup>238</sup> The New York court ruled:

The negro, being a slave, was incapable of contracting, so as to impair the right of his master to reclaim him. A contrary doctrine would be intolerable, so far as respects the security of the owner’s right, and

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230. COBB, *supra* note 127, at 242–43 (§ 270). Cobb was the only southerner to publish a treatise on slave law. Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75, 84 (1999) [hereinafter Finkelman, *Law of Negro Slavery*]. He was the son-in-law of Chief Justice Joseph Henry Lumpkin of Georgia, and with his father-in-law the co-founder of the Lumpkin Law School, which morphed into the University of Georgia School of Law. *Id.* at 87–88. He was also the main author of the Confederate Constitution. *Id.* at 90.

231. *See* Finkelman, *Law of Negro Slavery*, *supra* note 230, at 114.

232. *Id.* at 114–15.

233. *See id.*

234. Douglass’s marriage provided obvious parallels to the modern problem of interstate recognition of same-sex marriage, at least before the U.S. Supreme Court decision in *Obergefell v. Hodges*. *See* 135 S. Ct. 2584 (2015).

235. COBB, *supra* note 127, at 246 (§ 277).

236. 9 Johns. 67 (N.Y. Sup. Ct. 1812). Cobb incorrectly cites *Glen v. Hodges* as *Giles v. Hodges*. COBB, *supra* note 127, at 246 n.3 (§ 277).

237. *Id.* at 67.

238. In 1799, New York passed a gradual abolition act under which the children of all slave women were free at birth, subject to an indenture. Act of Mar. 29, 1799, ch. 62, 1799 N.Y. Laws 388. Under this law, slaves living in New York State born before March 29, 1799, remained in slavery for the rest of their lives. *See id.* New York ended all slavery on July 4, 1827, under an act passed in 1817. Act of Mar. 31, 1817, ch. 137, 1817 N.Y. Laws 136.

would go to defeat the provision altogether. The defendant, therefore, contracted with the negro, and sued out the attachment, at his peril. It was a fraud upon the master's right. The fact being established that the negro was a fugitive slave, the attachment was no justification to the party who caused it to be sued out.<sup>239</sup>

This precedent was quite dated by the time Cobb wrote in 1858, and it was arguably outdated in New York in 1838 when Frederick Johnson – as he now called himself – married Anna Murray in New York City.<sup>240</sup> New York State completely abolished slavery on July 4, 1827,<sup>241</sup> and absent some non-New Yorker making a claim to a slave,<sup>242</sup> New York law treated all people as free.<sup>243</sup> By this time, it seems likely that New York courts would have recognized a marriage of a fugitive slave for purposes of New York law, such as child custody, or inheritance, or spousal immunity in testimony. But at the same time, the New York courts had only recently affirmed their obligation to return fugitive slaves to southern masters.<sup>244</sup> Thus, had Frederick Johnson's master hauled him before a New York court, that court would have been obligated to certify his return to bondage, forcibly separating him from his wife.<sup>245</sup> However, if such a hearing had taken place, the same New York court might have applied spousal immunity to his new wife and refused to allow Anna Murray Johnson to be forced to testify about Frederick Johnson's

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239. *Glen*, 9 Johns. at 69–70.

240. DOUGLASS, NARRATIVE, *supra* note 28, at 94.

241. Act of Mar. 31, 1817 (providing for the abolition of slavery). Under New York's gradual abolition act of 1799, all people born in the state after July 4, 1799, were born free. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 53 (1981) [hereinafter FINKELMAN, AN IMPERFECT UNION]. Section 32 of the 1817 law provided, "That every negro, mulatto or mustee within this state, born before the fourth of July, one thousand seven hundred and ninety-nine, shall, from and after the fourth day of July, one thousand eight hundred and twenty-seven, be free." Act of Mar. 31, 1817, ch. 137, § 32, 1817 N.Y. Laws 136, 144.

242. New York still allowed visiting masters to bring slaves into the state for up to nine months. *See* FINKELMAN, AN IMPERFECT UNION, *supra* note 241, at 72. At this time, the New York courts recognized their obligation to return fugitive slaves under Article IV of the Constitution. *Jack v. Martin*, 12 Wend. 311, 314–15 (N.Y. Sup. Ct. 1834); *Jack v. Martin*, 14 Wend. 507, 518 (N.Y. 1835). But, absent a master claiming a slave from another jurisdiction, there is no evidence that any New York court, judge, or law enforcement officer ever treated any blacks as slaves after 1827.

243. *See* FINKELMAN, AN IMPERFECT UNION, *supra* note 241, at 72.

244. *Jack*, 12 Wend. at 314–15; *Jack*, 14 Wend. at 518.

245. The only case to my knowledge dealing with this issue is *Irving v. Ford*. 179 Mass. 216 (1901). In this case, Chief Justice Oliver Wendell Holmes, Jr., upheld the validity of a marriage performed in Massachusetts in the 1850s between a fugitive slave and free black woman. *Id.* For a detailed discussion of this, see Finkelman, *Law of Negro Slavery*, *supra* note 230.



escape from Maryland.<sup>246</sup> However, if Frederick Johnson had been captured in New York and returned to Maryland, Anna Murray Johnson would have had no status as Frederick's wife, although, under New York law, their marriage status would have been recognized and legitimate.<sup>247</sup>

While Frederick Johnson could marry in New York, it was not clear he could be safe there. Given his shipyard skills and striking bearing – he was over six feet tall in an age when most men were much shorter<sup>248</sup> – he would have quickly attracted the attention of slave catchers in that city. While slave catchers could operate anywhere in the North, some places were clearly safer for fugitives than others.<sup>249</sup> New Bedford, Massachusetts, was one of them.<sup>250</sup> A small port city, tied to whaling and commercial fishing, it had a significant free black population and many white opponents of slavery.<sup>251</sup> As a skilled caulker, Frederick Johnson could easily find employment there and yet not have to worry constantly about being seized by a slave catcher.<sup>252</sup> In New York City, slave catchers, even those with southern accents, could blend into the metropolis while they hunted their human prey.<sup>253</sup> In New Bedford, they would be quickly identified, carefully watched, and could expect little support from the local authorities and great hostility from most of the local population.<sup>254</sup> Thus, with the help of Ruggles and Pennington, including letters of introduction to blacks and abolitionists, the young couple headed off to New Bedford.<sup>255</sup>

When he left Maryland, the fugitive was known to the world as Frederick Bailey.<sup>256</sup> In New York, he used the name Johnson.<sup>257</sup> But in New Bedford, the first man to help him was Nathan Johnson, and there were already so many blacks named Johnson that a new surname seemed necessary.<sup>258</sup> Na-

246. See Bennett Capers, *Enron, Doma, and Spousal Privileges: Rethinking the Marriage Plot*, 81 *FORDHAM L. REV.* 715, 718 (2012).

247. See Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 *J. MARSHALL L. REV.* 299, 307–08 (2006) (explaining that those who were considered slaves had no marital rights, thus dismissing any chance of successfully claiming spousal immunity).

248. E.B. LONG & BARBARA LONG, *THE CIVIL WAR DAY BY DAY: AN ALMANAC, 1861–1865*, at 707 (1971). A quarter of a century later, the average height for U.S. soldiers in the Civil War was five feet, eight and one-quarter inches. *Id.*

249. See Finkelman, *The Cost of Compromise*, *supra* note 93, at 847.

250. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 258.

251. *Id.* at 254 (describing conditions favorable to “free” black people in New Bedford).

252. *Id.* at 253–54, 258.

253. *Id.* at 251. See also FONER, *supra* note 211; HODGES, *supra* note 211.

254. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 258.

255. DOUGLASS, *NARRATIVE*, *supra* note 28, at 94; DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 253–54.

256. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 255.

257. *Id.*

258. *Id.* at 254–55.

than Johnson, having just read Sir Walter Scott's *The Lady of the Lake*, suggested this new refugee take the name Douglas, after one of the heroes of the poem James Douglas. Frederick Bailey Johnson accepted the suggestion, adding a second "s" to his new last name.<sup>259</sup> Thus, to hide from slave catchers – to hide from the awesome power of the Constitution – Frederick Douglass was reborn in New Bedford, Massachusetts.<sup>260</sup>

## VI. A YOUNG ABOLITIONIST, CONSTITUTIONAL THEORY, AND CONSTITUTIONAL REALITY

Literate, skilled, young, and idealistic, it took Douglass very little time to acclimate himself to New Bedford's black community and its vibrant anti-slavery culture.<sup>261</sup> He read the nation's leading antislavery newspaper, *The Liberator*, and attended antislavery meetings.<sup>262</sup> *The Liberator* was edited by William Lloyd Garrison, the founder of the American Anti-Slavery Society ("AA-SS") and the nation's most famous abolitionist.<sup>263</sup> The Garrisonians soon "discovered" Douglass, and he quickly became an activist and then a professional abolitionist lecturer.<sup>264</sup> Garrison's organization hired him as a speaker for their public events.<sup>265</sup> In an age when lectures were a form of public entertainment – as well as a method of communicating ideas and gaining adherents to a cause – Douglass was enormously successful. As a young man, he had memorized speeches in *The Columbian Orator*,<sup>266</sup> and this preparation, combined with his natural poise and self-confidence, made him into an instant success as an abolitionist speaker. Eventually, he would become "one of the nineteenth century's greatest orators."<sup>267</sup>

Most of his talks were about his experiences as a slave, but as he became more involved in the abolitionist movement, he also discussed constitutional issues.<sup>268</sup> Unlike many of his white counterparts, Douglass could tie constitutional arguments to his own experiences.<sup>269</sup> Thus, in an 1841 anti-slavery meeting in Hingham, Massachusetts, Douglass expressed his views

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259. *Id.* at 255.

260. *Id.* at 256.

261. *Id.* at 262.

262. *Id.* at 265.

263. See generally HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY* (1998); JAMES BREWER STEWART, *WILLIAM LLOYD GARRISON AT TWO HUNDRED: HISTORY, LEGACY, AND MEMORY* (2008); THOMAS, *supra* note 55.

264. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 267.

265. *Id.*

266. DOUGLASS, *NARRATIVE*, *supra* note 28, at 34.

267. BLIGHT, *supra* note 15, at 4.

268. DOUGLASS, *LIFE AND TIMES*, *supra* note 3, at 269.

269. *Id.*

on the American union.<sup>270</sup> He pointed out that “the Northern people stand pledged by this union to return runaway slaves” and that this constitutional obligation “constitutes the bulwark of slavery,” because slaves were “told that if they escape to the North, they will be sent back.”<sup>271</sup> He explained that “this is the union whose ‘*dissolution*’” the Garrisonians “want to accomplish.”<sup>272</sup>

Douglass later added to the debate over antislavery petitions to Congress.<sup>273</sup> Since the mid-1830s, abolitionists had been flooding Congress with petitions against slavery, often paralyzing the House of Representatives in what is known as “the Great Petition Campaign.”<sup>274</sup> The House of Representatives responded to the petition campaign by adopting a “gag rule,” which provided that all antislavery petitions should be tabled without being read or considered.<sup>275</sup> This rule was in force from 1836 until 1844.<sup>276</sup> Abolitionists seized on the gag rule as proof that slavery threatened the liberty of all Americans by trampling on their First Amendment right to petition Congress.<sup>277</sup> At the local level, the petition campaign helped spread antislavery ideas as men and, significantly, women went door-to-door gathering signatures of their neighbors while taking the opportunity to hand out abolitionist literature.<sup>278</sup> At the national level, the campaign had enormous propaganda value as it exposed the many ways the national government supported slavery and how proslavery politicians were able to dominate American politics.<sup>279</sup> The petitions were important in raising antislavery consciousness in the North, even though they had virtually no effect on public policy.<sup>280</sup>

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270. DOUGLASS, *The Union, Slavery, and Abolitionist Petitions*, *supra* note 177, at 6.

271. *Id.*

272. *Id.*

273. *Id.* at 8.

274. RUSSELL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860*, at 41–85 (1964); BARNES, *ANTI-SLAVERY IMPULSE*, *supra* note 59, at 144. To date, *The Anti-Slavery Impulse* remains the best study of the petition campaigns.

275. BARNES, *ANTI-SLAVERY IMPULSE*, *supra* note 59, at 110. For further explanation of gag rules, see WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* (1996).

276. BARNES, *ANTI-SLAVERY IMPULSE*, *supra* note 59, at 130–45. *See also* WIECEK, *supra* note 36, at 186, 215 (noting that the first gag rule was passed in 1836 and repealed in 1844).

277. NYE, *supra* note 274, at 41–85.

278. BARNES, *ANTI-SLAVERY IMPULSE*, *supra* note 59, at 141.

279. *Id.* at 111.

280. *Id.* During this period, Texas persistently sought admission to the Union, but there was little support in Congress or the White House for this, in part because of the antislavery firestorm it would ignite. MILLER, *supra* note 275, at 285. The petitions may have helped create this climate in opposition to Texas annexation. However, other concerns, including fears of a war with Mexico, also prevented Texas statehood. *Id.* at 309.

Garrisonians, who generally eschewed political action and did not vote, were divided on whether they should be involved in petitioning Congress. From the beginning, Douglass supported the petitions because his life experiences shaped his constitutional understandings.<sup>281</sup> He knew that literate slaves – such as he had been – were able to read newspapers and learn about the debates in Congress over the petitions.<sup>282</sup> He asserted – from his own experience as a slave – that “[t]hese petitions delight the hearts of the slaves; they rejoice to know that something is going on in their favor.”<sup>283</sup> He knew that when slaves learned about the petitions, “they talk over what they have heard—they talk about liberty.”<sup>284</sup> For Douglass, the petition campaign was an example of practical constitutionalism – using the First Amendment to give encouragement to slaves in a way that undermined the South’s system of bondage.

There was another constitutional lesson in the petition campaign that Douglass learned but did not immediately absorb or apply. Asserting Constitutional rights allowed whites and blacks in the North to challenge slavery, even if they could not defeat the institution.<sup>285</sup> Exposing the totalitarian nature of southern congressmen – their willingness to use the gag rule to suppress petitions because they did not like their content – taught all northerners that slavery threatened the civil liberties of whites even as it denied freedom to blacks. The petition campaign implicitly demonstrated that basic constitutional rights in a liberal democracy – such as those in the First Amendment – could be used to challenge the proslavery constitutional regime. When Douglass moved away from the Garrisonian rejection of politics, he took this lesson with him.

Douglass did not immediately apply this lesson because, as a Garrisonian, he rejected political participation.<sup>286</sup> But the lesson clearly taught the potential for agitation and social change under a liberal constitutional regime. Even though the Constitution itself protected and supported slavery, the Constitution also allowed some agitation against slavery.<sup>287</sup> The petitions to Congress, and the gag rule that southern members of the House pushed through to suppress these petitions, raised antislavery consciousness throughout the North. From 1836 to 1844, the gag rule illustrated the stranglehold slavery had on the national government under the Constitution.<sup>288</sup> The fact

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281. DOUGLASS, *The Union, Slavery, and Abolitionist Petitions*, *supra* note 177, at 8.

282. *Id.*

283. *Id.*

284. *Id.*

285. See BARNES, *ANTI-SLAVERY IMPULSE*, *supra* note 59, at 144 (explaining the value the petition campaigners received in merely conversing with those opposed to their principals).

286. Imani Perry, *Occupying the Universal Embodying the Subject of African American Literary Jurisprudence*, 17 *LAW & LITERATURE* 97, 124 n.56 (2005).

287. Finkelman, *Proslavery Constitution*, *supra* note 66, at 426.

288. *Id.*

that the gag rule could be passed and implemented underscored the Garrisonian contention that the Constitution was a “Covenant With Death and an Agreement in Hell.”<sup>289</sup> But, the fact that a tiny group of abolitionists scattered across the North could create such anxiety among the slave state representatives suggested the power of the liberties found in the First Amendment – freedom of speech, press, and the right to petition.<sup>290</sup> Opponents of slavery could use their constitutional rights to agitate and undermine the southern hegemony in the national government.<sup>291</sup> From 1836 until 1844, the House maintained its gag rule, tabling antislavery petitions without reading them.<sup>292</sup> The volume of petitions grew throughout this period as tens of thousands of Americans signed petitions protesting the federal government’s involvement with slavery and Congress’s denial of their constitutional right to petition.<sup>293</sup> The Great Petition Campaign, as it came to be known, brought thousands of northerners into the antislavery movement and helped teach the North that slavery threatened the civil liberties of whites as well as the personal liberty

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289. Finkelman, *The Founders and Slavery*, *supra* note 71.

290. In 1860–1861, southerners would in part justify secession as a response to northerners using the First Amendment – and northern state laws and constitutions – to agitate against slavery. Finkelman, *States’ Rights, Southern Hypocrisy*, *supra* note 80, at 475. In other words, the secessionists were leaving the Union in part because it allowed free speech that was hostile to slavery. *Id.*

291. *Id.* Between 1789 and 1852, only three northerners served as president – John Adams, John Quincy Adams, and Martin Van Buren. Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247, 249 n.15 (1994) [hereinafter Finkelman, *Story Telling on the Supreme Court*]. Each served only one four-year term. *Id.* Van Buren, while from New York, was a strong supporter of slavery and southern interests, and he was a former slaveowner. *Slaveholding Presidents*, *supra* note 92. William Henry Harrison, although elected from Ohio, was a Virginian by birth and owned slaves for much of his life. Finkelman, *The Cost of Compromise*, *supra* note 93, at 888. All of the other eight presidents in this period were southern slaveowners. Henry Cohen, *Challenging the Boundaries of Slavery by David Brion Davis*, 51 FED. LAW. 43 (2004). From 1801 until 1864, the Chief Justice of the Supreme Court of the United States was a slaveholding southerner – Marshall and Taney – and, except for the terms from 1830 to 1836, there was always a southern majority on the Court from 1801 until the Civil War began. *Justices of the United States Supreme Court*, *supra* note 93. However, even when the Court had a northern majority, Justice Henry Baldwin of Pennsylvania was a solid doughface Democrat who always voted to support slavery, thus giving supporters of slavery a majority on the court in every term except 1835 when there was an even three-three split. See UROFSKY & FINKELMAN, *supra* note 93, at 377–446. Southerners dominated the House and Senate, invariably serving as the leaders of both bodies. Finkelman, *The Cost of Compromise*, *supra* note 93, at 870. No strong opponents of slavery ever served in presidential cabinets, but uncompromising supporters of slavery, like Abel P. Upshur, John C. Calhoun, and Jefferson Davis, held such positions. *Id.* at 850 n.28.

292. Finkelman, *Proslavery Constitution*, *supra* note 66, at 425.

293. BARNES, *ANTI-SLAVERY IMPULSE*, *supra* note 59, at 130; MILLER, *supra* note 275.

of blacks.<sup>294</sup> Eventually, Douglass would come to see that political action was a valuable tool in the struggle against slavery, *even* under a proslavery Constitution.

But in the early 1840s, Douglass was not ready to endorse the Constitution or advocate political participation to fight slavery. He was an orthodox Garrisonian who saw the Constitution as proslavery. Like other Garrisonians, he believed it was pointless to engage in traditional electoral politics, because there was no constitutional or political path to ending slavery and the South controlled national politics.<sup>295</sup> Like other Garrisonians, he also believed that political participation was morally corrupting, because office holders had to take an oath to support the Constitution – the proslavery “covenant with death” as the Garrisonians called it. For the Garrisonians like Douglass, the only solution to this dilemma was disunion – for the free states to separate from the slave states and create a new nation based on liberty and morality.<sup>296</sup>

In early May 1845, on the eve of the publication of his first autobiography, Douglass spoke in New York City to the Twelfth Annual Convention of the AA-SS.<sup>297</sup> There, he explained how the Constitution affected slaves and slavery.<sup>298</sup> “While you continue in the Union, you are as bad as the slaveholder” he told the gathering of abolitionists.<sup>299</sup> The solution to this complicity was simple and direct: “If you have thus wronged the poor black man, by stripping him of his freedom; how are you going to give evidence of your repentance? Undo what you have done.”<sup>300</sup> This discussion was an orthodox Garrisonian view of the Constitution, but with a very personal subtext because Douglass was a fugitive slave subject to being seized and sent South. Thus, Douglass asked if his listeners were “willing to have your coun-

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294. NYE, *supra* note 274, at 41–85 (discussing “The ‘Great Petition Strategy’ and the Use of the Mails”). See Finkelman, *Proslavery Constitution*, *supra* note 66, at 426.

295. From 1789 to 1860, only two presidents – John Adams and John Quincy Adams – were even mildly antislavery. Finkelman, *Story Telling on the Supreme Court*, *supra* note 291, at 249–50 & n.15. All other presidents were either slaveowners or former slaveowners (every president from 1789–1850) or, in the 1850s, proslavery northern doughfaces (Millard Fillmore, Franklin Pierce, and James Buchanan). *Id.* at 291. For most of this period, the Democratic Party controlled national politics, and southern slaveholders dominated that party in both houses of Congress. Finkelman, *The Cost of Compromise*, *supra* note 93, at 870. With the exception of the first half of the 1830s, there was a southern majority on the Supreme Court from 1801 to 1860; twenty-five of the thirty-nine speakers of the House between 1801 and 1860 were slaveowners. *Id.*

296. *Id.* at 4.

297. 1 FREDERICK DOUGLASS, *My Slave Experience in Maryland: An Address Delivered in New York, New York, On 6 May 1845*, reprinted in 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at 33.

298. *Id.*

299. *Id.*

300. *Id.*

try the hunting-ground of the slave.”<sup>301</sup> Tying Garrisonian constitutional theology to evangelical Protestant theology, he observed: “God says thou shalt not oppress: the Constitution says oppress: which will you serve, God or man?”<sup>302</sup>

This analysis, like all his discussions of slavery and the Constitution, fused Garrisonian disunionism with Douglass’s *personal* situation. As a fugitive slave, he was in constant danger of becoming an “object” of the Constitution. The United States – and the North – was a “hunting-ground of the slave” and Douglass was one of the hunted.<sup>303</sup> In his New York speech, he named his former master in Maryland – something most fugitives never did, because it exposed them to great danger, and it would alert their masters to where they were and what name they were using.<sup>304</sup> The Auld family in Maryland did not know who Frederick Douglass was, but now they could find out that Frederick Bailey was in Massachusetts living under the name Frederick Douglass. As a result, Douglass might be more easily seized as a fugitive. With the publication of his autobiography later that month,<sup>305</sup> Douglass was even a greater potential target for slave catchers. He was now famous, and he had revealed where he was from and who “owned” him under the laws of Maryland.<sup>306</sup> More than at any other time in his life, Douglass was now likely to become an object of the Constitution’s Fugitive Slave Clause.

At any moment, he might be dragged before a judge and sent back to Maryland under the Fugitive Slave Act of 1793.<sup>307</sup> Or, he might legally be snatched from his home in the middle of the night and hurried off to Maryland without even a hearing before a judge. Three years before Douglass published his autobiography, the Supreme Court held in *Prigg v. Pennsylvania*<sup>308</sup> that slaveowners – or their agents – had a constitutional right of “self-help,” which allowed them to seize their fugitive slaves without any due process hearing or judicial superintendence.<sup>309</sup> The author of *Prigg* was Joseph Story who, like Douglass, lived in Massachusetts.<sup>310</sup> The Garrisonians denounced this decision.<sup>311</sup> They called Justice Story the “SLAVE-CATCHER-IN-CHIEF FOR THE NEW ENGLAND STATES” for his support of bondage in the case

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301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 29–30.

305. The book was published on May 28, 1845. DOUGLASS, NARRATIVE, *supra* note 28.

306. DOUGLASS, *My Slave Experience in Maryland*, *supra* note 297, at 29–30.

307. Ch. 7, 1 Stat. 302 (1793) (“An Act respecting fugitives from justice, and persons escaping from the service of their masters.”).

308. 41 U.S. 539 (1842).

309. See Finkelman, *Story Telling on the Supreme Court*, *supra* note 291, at 253.

310. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 5 (1985).

311. Finkelman, *Story Telling on the Supreme Court*, *supra* note 291, at 293–94.

of the Virginia fugitive slave George Latimer.<sup>312</sup> For most Garrisonians and other northern whites who opposed slavery, the proslavery provisions of the constitution or proslavery decisions like *Prigg* were mostly abstractions. But for a fugitive slave like Frederick Douglass, the proslavery Constitution and the *Prigg* decision were not abstractions: they were a very real threat to his liberty.

For Douglass, the threat to his personal liberty created by this constitutional reality was particularly acute. The first edition of his autobiography, *Narrative of the Life of Frederick Douglass*, was published on May 28, 1845, and it was an immediate best seller.<sup>313</sup> This very success jeopardized Douglass's liberty because he was now famous and easy to find. Any slave catcher looking for a quick commission might snare Douglass and turn him into a nice payday. A slave catcher could use Douglass's own book to support the legality of seizing Douglass as a fugitive. Douglass's identification of his owner made it even easier for any enterprising thug to bring Douglass back to Maryland for a suitable reward.

The publication of Douglass's book also illustrated the bizarre complexity of the American constitutional structure and its support of slavery. Under the Constitution, the national government granted copyright protection to authors of books in order to "Promote the Progress of Science and useful Arts."<sup>314</sup> Starting in 1790, Congress passed laws to implement this clause.<sup>315</sup> The regulations were not limited by race or citizenship.<sup>316</sup> The law only required that the copyright applicant prove authorship.<sup>317</sup> The key revision of the copyright law, passed in 1831, authorized the granting of a copyright to "any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book."<sup>318</sup> Thus, the Constitution and U.S. copyright law allowed Douglass – a resident of the United States, even if he was not a citizen – to take out a copyright in his work. Douglass did this, registering it with the clerk of the U.S. District Court for the District of Massachusetts.<sup>319</sup> There is some irony in this process because, had Douglass been seized as a fugitive, the slave catcher might have brought him before this same court to get a certificate of removal to take him back to Maryland.<sup>320</sup> It is also odd, if not ironic, that the U.S. District Court,

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312. KENT NEWMYER, *supra* note 310, at 375–76.

313. *Life and Times of Frederick Douglass*, *supra* note 185.

314. U.S. CONST. art. I, § 8, cl. 8.

315. Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790) (promoting learning by securing the copies of maps, charts, and books).

316. *Id.*

317. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 ("An Act to amend the several acts respecting copy rights."); *see also* Act of May 31, 1790.

318. Act of Feb. 3, 1831.

319. DOUGLASS, NARRATIVE, *supra* note 28, at page titled "Copyright Information" ("Entered, according to Act of Congress, in the year 1845, BY FREDERICK DOUGLASS, in the Clerk's Office of the District Court of Massachusetts.").

320. U.S. CONST. art IV, § 2, cl. 3.



which gave Douglass copyright in his own book did not also alert its own marshal that Douglass was a fugitive slave who owed “service or labour” to Thomas Auld of Maryland.

Slavery was predicated on theories of white racial supremacy and black inferiority. Douglass proved the absurdity of such theories by writing and taking out a copyright in a great book. But the same Constitution that protected his copyright also protected his master’s right to seize Douglass as a fugitive slave.<sup>321</sup> Moreover, Thomas Auld could also have claimed all of Douglass’s royalties because a slave could own no property, and anything the slave owned technically belonged to the master.<sup>322</sup>

The publicity from his copyrighted book only increased the possibility that Douglass might be seized and returned to slavery. Under the coercive pressure of the Constitution’s Fugitive Slave Clause, Frederick Douglass, prominent speaker, best-selling author, and copyright holder, was forced to flee the United States for the protective umbrella of Queen Victoria and the Union Jack.<sup>323</sup> Thus, on August 16, 1845, Douglass sailed for Liverpool.<sup>324</sup> He sailed without a passport because, generally, the U.S. government refused to give passports to blacks.<sup>325</sup> There were a few instances of prominent, “respectable,” and well-off free blacks getting passports,<sup>326</sup> but this did not describe Douglass, who was a professional agitator with almost no financial assets and was not a free person, but a fugitive slave. Indeed, going to the federal government to ask for a passport would have been foolhardy because the federal officials might properly have seized the increasingly famous author as a fugitive slave.

Douglass would remain in England for a year and a half.<sup>327</sup> While there, he would continue to articulate the Garrisonian view that the proslavery Constitution necessitated disunion.<sup>328</sup> In many of his speeches, he would discuss how the American Constitution protected slavery.<sup>329</sup> While in Great Britain,

321. Paul Finkelman, *State’s Rights, but to What?*, N.Y. TIMES (Dec. 20, 2010, 9:00 PM), [http://opinionator.blogs.nytimes.com/2010/12/20/states-rights-but-to-what/?\\_r=0](http://opinionator.blogs.nytimes.com/2010/12/20/states-rights-but-to-what/?_r=0).

322. COBB, *supra* note 127, at 241–42 (§ 267–68) (noting that anything a slave owned or earned belonged to the master, which would of course have included royalties in a book); DOUGLASS, LIFE AND TIMES, *supra* note 3, at 42.

323. Blassingame, *supra* note 87, at lii.

324. *Id.* at xcvi–vi; 2 FREDERICK DOUGLASS, THE FREDERICK DOUGLASS PAPERS: SERIES ONE, xvii–iii (John W. Blassingame ed., 1985) [hereinafter 2 DOUGLASS, PAPERS SERIES ONE].

325. CRAIG ROBERTSON, THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT 131–34 (2010).

326. *Id.* at 132–33.

327. 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xcvi–vi.

328. *Id.* at lvi.

329. 1 FREDERICK DOUGLASS, *Slavery and America’s Bastard Republicanism: An Address Delivered in Limerick, Ireland, On 10 November 1845, reprinted in* 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at 79.

he would develop and refine his antislavery constitutional argument.<sup>330</sup> He honed his analysis, sharpened his arguments, and expanded his critique of the American system, as he explained to people in Great Britain why the Constitution of the world's first democratic republic had to be understood as a bulwark of tyranny and oppression.<sup>331</sup> By the time he left England, Douglass had a careful and searing critique of the Constitution that was bolstered by his own experience as a slave in Maryland and a fugitive slave in the North.<sup>332</sup>

However, while in England, Douglass's personal situation dramatically changed when his British friends purchased his freedom from Auld.<sup>333</sup> Douglass left the United States as a fugitive slave, fleeing a Constitution that provided the mechanisms for his return to bondage; he returned to the United States in 1847 as a free man.<sup>334</sup> This change would help set the stage for his transformation from a Garrisonian critic of the Constitution to an advocate of using the Constitution and the political system it created to challenge slavery.

## VII. SEEING THE CONSTITUTION FROM A DISTANCE

In the United Kingdom, Douglass continued to excoriate the U.S. Constitution while constantly reminding his listeners that, under it, he remained mere property.<sup>335</sup> Douglass arrived in Liverpool on August 28, 1845, and two days later he went to Ireland.<sup>336</sup> He would remain in the British Isles until April 4, 1847.<sup>337</sup> During this period, he would give at least 100 lectures on slavery to a variety of audiences.<sup>338</sup> At one of his first talks he spoke at the Dublin Music Hall, which seated 3000.<sup>339</sup> In September of 1845, he attended a lecture by the famed Irish patriot Daniel O'Connell, speaking for a repeal of the Act of Union.<sup>340</sup> O'Connell was as passionate about antislavery as he was about Irish independence and often tied the two arguments, since they both

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330. See generally 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177.

331. DOUGLASS, *Slavery and America's Bastard Republicanism*, *supra* note 329, at 79.

332. See generally 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177; also see generally 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324.

333. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 314–15.

334. 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xcvi–vi; 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at xvii–iii.

335. DOUGLASS, *Slavery and America's Bastard Republicanism*, *supra* note 329, at 79.

336. 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xcvi–vi.

337. 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at xvii–iii.

338. 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xcvi–cii; 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at xvii–iii.

339. 1 FREDERICK DOUGLASS, *Irish Christians and Non-Fellowship With Man-Stealers: An Address Delivered in Dublin, Ireland, On 1 October 1845*, reprinted in 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at 34.

340. 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xcvi.

rested on fundamental liberty.<sup>341</sup> To Douglass's great pleasure, O'Connell recognized him in the audience and asked him to address the meeting.<sup>342</sup> On October 1, 1845, he spoke for an hour and a half to some 3000 people at the Dublin Music Hall on the subject of slavery and religion.<sup>343</sup> He would give over thirty public lectures in Ireland to Anti-Slavery Societies, churches, and temperance societies.<sup>344</sup> Some were large meetings, such as the 3000 people at the Dublin Music Hall, and others were small.<sup>345</sup> In some towns, he gave multiple lectures over two days.<sup>346</sup> In other towns and cities, he gave more than one talk on the same day.<sup>347</sup> In Cork, he spoke to about 260 "respectable inhabitants," including the mayor and "some of the most influential men of the city."<sup>348</sup> Three days later, that city's Imperial Hall "was thronged" by a "most respectable and attentive audience" with an alderman presiding.<sup>349</sup> His lectures touched on religion, temperance, and racial prejudice, but increasingly he wove constitutional and legal issues into his talks.<sup>350</sup> After Ireland, he gave sixteen speeches in Scotland before moving on to England.<sup>351</sup> He arrived in London in May 1846.<sup>352</sup> He remained in England until May 1847, although he returned to Scotland a number of times.<sup>353</sup>

In Limerick, and in other cities in the United Kingdom, he "read extracts from the laws of the slaveholding states"<sup>354</sup> to illustrate the barbarity of the system. In these speeches, he stressed that American law was based on English law, but had been perverted by slavery.<sup>355</sup> Basic slave law was developed and enforced at the state level, but as he reminded British audiences, the states existed under the Constitution.<sup>356</sup> Thus, Douglass "charged the entire

341. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 42.

342. BENJAMIN QUARLES, FREDERICK DOUGLASS 39–40 (1970); 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xcvi.

343. DOUGLASS, *Irish Christians and Non-Fellowship With Man-Stealers*, *supra* note 339, at 34.

344. 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xcvi–cii; 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at xvii–iii.

345. DOUGLASS, *Irish Christians and Non-Fellowship With Man-Stealers*, *supra* note 339, at 34; 1 FREDERICK DOUGLASS, *Intemperance and Slavery: An Address Delivered In Cork, Ireland, On 20 October 1845*, reprinted in 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at 55.

346. 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xcvi.

347. *Id.*

348. DOUGLASS, *Intemperance and Slavery*, *supra* note 345, at 55.

349. *Id.* at 59.

350. *See generally* 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177.

351. 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xcvi–iii

352. *Id.* at xcix.

353. *Id.* at xcix–cii; 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at xvii–iii.

354. DOUGLASS, *Slavery and America's Bastard Republicanism*, *supra* note 329, at 79.

355. *Id.*

356. *Id.*

American nation with being emphatically responsible for slavery in the whole country.”<sup>357</sup> This was because “all the states were united under one constitution, and that constitution protected and supported slavery.”<sup>358</sup> Always able to personalize his constitutional analysis, Douglass pointed out “there was no one spot in all America upon which he could stand free.”<sup>359</sup> A free man in England, a famous author and orator, he was always “an outlaw in America, and he could be hunted back again to his master.”<sup>360</sup> Reflecting the Garrisonian argument that no moral man could serve in the U.S. government, he noted that all “the judges and the other officers of the state solemnly swore every year” to uphold the Constitution, including the Fugitive Slave Clause, and that “a participator in the law of the land” was bound to accept the rule that “the slave must be a slave or die.”<sup>361</sup>

Douglass understood the nature of American federalism and the autonomy of states in defining their social institutions. His speeches were often similar, but throughout his time in the British Isles, his constitutional theory was developing. In his later speeches, he seems to have spent more time discussing the Constitution than in his earlier ones.<sup>362</sup> He explained to his British audiences that there were “no slaves in the free states,” because “these states have constitutions of their own.”<sup>363</sup> But, he pointed out that there was “one Constitution over all, the federal Constitution, and there are certain provisions in that Constitution which compel the free states to lend their political aid, in upholding and sustaining the existence of slavery—therefore the free states are responsible for the existence of slavery in the slave states.”<sup>364</sup> The constitutional protections for slavery permeated and corrupted the American nation. Douglass asserted that the Constitution “pretends to establish justice, and to secure the blessings of liberty to the present generation and to posterity.”<sup>365</sup> But, under this slaveholding Constitution, “Americans are political hypocrites.”<sup>366</sup>

While in the United Kingdom, Douglass explained the double standards within the constitutional structure that undermined the liberty of free people as well as slaves and threatened the liberty of whites as well as blacks.<sup>367</sup> He argued that the “Northern States are but the tools of the slaveholders.”<sup>368</sup>

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357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at 80.

362. See generally 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177.

363. 1 FREDERICK DOUGLASS, *The Free States, Slavery, And The Sin Of The Free Church: An Address Delivered In Paisley, Scotland, On 19 March 1846*, reprinted in 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at 186.

364. *Id.*

365. *Id.* at 187.

366. *Id.*

367. *Id.*

368. *Id.*

Thus, a northerner could not travel in the South “with the Declaration [of Independence] in one hand and the word of God in the other to declare the rights of all men,” even though the Constitution said that “he shall enjoy equal rights in all states.”<sup>369</sup> If he did this, he would be “hung at the first lamp post.”<sup>370</sup> Slavery not only dominated the American government, but it abridged the constitutional rights of all free northerners.<sup>371</sup> Douglass pointed out that even in Washington, D.C., where only the federal constitution applied, abolitionists were denied free speech despite the fact that “the Constitution . . . declares . . . that every citizen has a right to speak.”<sup>372</sup>

Douglass taught his Irish, Scottish, and English audiences that the northern states “were free only in name,” and that “every American who holds office swears he will bring his entire force to bear in keeping the slave in bondage; and there was one clause in the American Constitution which made it the duty of the several states to return the slave to his master when he escaped from bondage.”<sup>373</sup> Thus, there was “not a foot of ground in all the American Union on which their humble servant could stand without being liable to be hunted with blood-hounds.”<sup>374</sup> Douglass himself could only return to his native land “with the view of being dragged again into slavery.”<sup>375</sup> These constitutional protections for slavery went to the heart of the Garrisonian critique of the Constitution and to Douglass’s own life as a constitutional actor: without the Constitution, the Fugitive Slave Clause, and the obligation of the North to help protect slavery and suppress slave rebellions, the institution “would not exist a single hour in America.”<sup>376</sup>

In his farewell speech in London, Douglass focused intensely on the failure of the Americans to live up to the Constitution’s promise to “secure the blessings of liberty to ourselves and our posterity.”<sup>377</sup> He argued that since 1787, Americans had “defended this great lie before the world.”<sup>378</sup> He noted that under the domestic insurrections clause of the Constitution, “[e]very bayonet, sword, musket, and cannon has its deadly aim at the bosom

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369. 1 FREDERICK DOUGLASS, *America’s Compromise With Slavery And The Abolitionists’ Work: An Address Delivered In Paisley, Scotland, On 6 April 1846*, reprinted in 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at 210–11.

370. *Id.* at 211.

371. *Id.* at 210–11.

372. *Id.* at 212.

373. 1 FREDERICK DOUGLASS, *American Slavery And Britain’s Rebuke Of Man-Stealers: An Address Delivered In Bridgwater, England, On 31 August 1846*, reprinted in 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at 364.

374. *Id.* at 364–65.

375. *Id.* at 365.

376. *Id.*

377. U.S. CONST. pmb1.

378. Frederick Douglass, *Farewell Speech to the British People, at London Tavern, London, England, March 30, 1847*, reprinted in 1 PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, EARLY YEARS, 1817–1849*, at 207 (1975) [hereinafter 1 FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*].

of the Negro.”<sup>379</sup> Meanwhile, the Fugitive Slave Clause meant that those slaves who escaped to freedom, such as Douglass, could be “hunted down like a felon, and dragged back to hopeless bondage.”<sup>380</sup> This clause made the entire United States “one vast hunting-ground for men; it gives to the slaveholder the right at any moment to set his well-trained bloodhounds upon the track of the poor fugitive; hunt him down like a wild beast, and hurl him back to the jaws of slavery.”<sup>381</sup> Such a rule violated the Biblical injunction against returning fugitive slaves, but it was nevertheless embedded into the Constitution.<sup>382</sup> Douglass argued that without the Union and the Constitution, with its proslavery clauses, “the slaveholders of the South would be unable to hold their slaves.”<sup>383</sup> The lesson was clear: the Constitution preserved slavery. Thus, if northerners were “not actual slaveholders, they stand around the slave system and support it.”<sup>384</sup>

### VIII. RETURNING TO THE UNITED STATES

In 1847, when Douglass returned to the United States, he returned not as a fugitive slave, but as a free man.<sup>385</sup> While he was in England, two wealthy antislavery women, Ellen Richardson and her sister-in-law, Anna Richardson, raised 150 pounds sterling to purchase Douglass's freedom.<sup>386</sup> Douglass recalled that after this “ransom”<sup>387</sup> was paid to Hugh Auld,<sup>388</sup> the two women placed “the papers of my manumission into my hands.”<sup>389</sup> Douglass later explained the constitutional significance of this event: “To this commercial transaction, to this blood-money, I owe my immunity from the operation of the fugitive slave law of 1793, and also from that of 1850.”<sup>390</sup>

Many Garrisonians objected to Douglass allowing himself to be purchased.<sup>391</sup> Sending money to a slaveowner was supporting slavery, just as voting under the Constitution supported slavery. The abolitionists sought moral purity; Douglass sought liberty and the freedom to speak openly

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379. *Id.* at 208.

380. *Id.* at 209.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 210.

385. 1 DOUGLASS, PAPERS SERIES ONE, *supra* note 177, at xvi.

386. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 314–15.

387. *Id.* at 314.

388. *Id.* at 315. The transaction was enormously complicated. *Id.* at 314–15. Thomas Auld sold Douglass to Hugh Auld, who in turn manumitted him in return for the 150 pounds sterling. *Id.*

389. *Id.*

390. *Id.* at 315. Douglass gained his freedom before the passage of the Fugitive Slave Law of 1850, but he wrote about this event after that law was enacted. See Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850).

391. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 314.

against slavery. He saw nothing wrong with permanently securing his freedom and never having to worry about being seized under the Fugitive Slave Act.<sup>392</sup> While a fugitive slave, Douglass was famous and risked capture. His fame made him more vulnerable than most fugitives. But, once he was legally free, his fame protected him from kidnapping or mistaken identity. Average northern free blacks – people known only to their friends and family – worried that they or their children might be kidnapped and sold south or seized and “legally” removed as a fugitive.<sup>393</sup> But, someone as famous and prominent as Douglass could not be mistakenly seized as a fugitive and was less likely to be kidnapped. Indeed, Douglass argued that if he had been a “private person,” there would have been no reason to purchase his freedom because he “could have lived elsewhere, or perhaps might have been unobserved even here [in the United States], but I had become somewhat notorious, and I was therefore much exposed to arrest and capture.”<sup>394</sup> Douglass argued that being ransomed from slavery was not a violation of abolitionist principles, rather “Douglass answered his critics by comparing the exchange to ‘money extorted from a robber’ or a ‘ransom’ rather than an affirmation of any man’s right of ownership of another.”<sup>395</sup>

When he returned to the United States, Douglass continued to follow the Garrisonian analysis of the Constitution.<sup>396</sup> He insisted that people who voted were supporting slavery.<sup>397</sup> He articulated how the Constitution forced northerners to support and protect slavery.<sup>398</sup> Speaking in Syracuse, New York, in September 1847, about six months after his return from Britain, Douglass reiterated the hardline Garrisonian analysis: “The Constitution I hold to be radically and essentially slave-holding, in that it gives the physical and numerical power of the nation to keep the slave in his chains.”<sup>399</sup> Reiterating a point he made in many speeches in Britain, Douglass asserted, “[t]he language of the Constitution is you shall be a slave or die.”<sup>400</sup> More eloquent and polished than when he had left for England two years earlier, Douglass pressed northern whites to see the hypocrisy of their society: “Wherever waves the star-spangled banner there the bondman may be arrested and hurried back to the jaws of Slavery.”<sup>401</sup> The Constitution – and its support for

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392. *Id.*

393. *Id.* at 346–47.

394. *Id.* at 314–15.

395. Condon & Hinks, *supra* note 106, at xvi.

396. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 322.

397. Frederick Douglass, *American Slavery, Speech Delivered at Market Hall, Syracuse, New York, September 24, 1847*, reprinted in 1 FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 378, at 274–75.

398. *Id.* at 274.

399. *Id.*

400. *Id.* at 274–75.

401. *Id.* at 275.

slavery – followed the flag in antebellum America.<sup>402</sup> Douglass was no longer a fugitive slave at this point – no longer personally subject to being seized and returned to the “jaws of slavery.”<sup>403</sup> But, he still directly tied the proslavery Constitution to his own life, stating:

I can read with pleasure your Constitution to establish justice, and secure the blessings of liberty to posterity. Those are precious sayings in my mind. But when I remember that the blood of four sisters and one brother, is making fat the soil of Maryland and Virginia,--when I remember that an aged grandmother who has reared twelve children for the Southern market . . . I have no patriotism. How can I love a country where the blood of my own blood, the flesh of my own flesh, is now toiling under the lash.<sup>404</sup>

In 1850, Douglass participated in a major debate over the proslavery nature of the Constitution at a convention of the AA-SS held in Syracuse, New York.<sup>405</sup> The AA-SS was Garrison's organization, but all abolitionists, of “whatever latitude or longitude,” had been invited to attend.<sup>406</sup> Thus, a large number of Liberty Party men, including Gerrit Smith – who lived near Syracuse – came to the meeting.<sup>407</sup> The Liberty Party participated in politics and ran candidates.<sup>408</sup> In this debate, Gerrit Smith argued for an antislavery interpretation of the Constitution and proposed a resolution declaring that the Constitution was “not to be for slavery, but *against* slavery” and that it contained “the powers adequate to overthrow every part of American slavery.”<sup>409</sup> Douglass vociferously opposed this resolution, setting out all the clauses that protected slavery and asked the searing question: “Does Mr. Smith suppose any Union in 1789 could have been secured on his construction of the Consti-

402. *Id.* at 274–75. Douglass's analysis here was prescient. A decade later, in *Dred Scott v. Sandford*, Chief Justice Taney would hold that Congress could not ban slavery in the federal territories – or free slaves brought into free territories – because such an action would constitute an unconstitutional taking of private property in violation of the Fifth Amendment. 60 U.S. (19 How.) 393, 438–39 (1857); Douglass, *American Slavery*, *supra* note 397, at 274–75. Taney essentially held that the proslavery constitution followed the flag. *See Dred Scott*, 60 U.S. (19 How.) at 438–39; Douglass, *American Slavery*, *supra* note 397, at 274–75.

403. Douglass, *Farewell Speech to the British People*, *supra* note 378, at 206.

404. Douglass, *American Slavery*, *supra* note 397, at 276.

405. 2 FREDERICK DOUGLASS, *Is The Constitution Pro-Slavery? A Debate Between Frederick Douglass, Charles C. Burleigh, Gerrit Smith, Parker Pillsbury, Samuel Ringgold Ward, And Stephen S. Foster In Syracuse, New York, On 17 January 1850*, reprinted in 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at 220 n.6.

406. *Id.* at 217.

407. *Id.*

408. *See generally* REINHARD O. JOHNSON, *THE LIBERTY PARTY, 1840–1848: ANTISLAVERY THIRD-PARTY POLITICS IN THE UNITED STATES* (2009); BETTY FLADELAND, *JAMES GILLESPIE BIRNEY: SLAVEHOLDER TO ABOLITIONIST* (1955).

409. DOUGLASS, *Is The Constitution Pro-Slavery?*, *supra* note 405, at 220 n.6.



tution? That they could not reclaim their fugitive slaves, and that slave insurrections could not be put down by the force of the country?”<sup>410</sup> Douglass argued that Smith’s position was disingenuous and dishonest.<sup>411</sup> “Under the sham of upholding the provisions of the Constitution, they are waging war against the Constitution. We want downright honesty, in dealing even with slaveowners.”<sup>412</sup>

Douglass’s argument was powerful and historically grounded. Smith had no answer to his question about whether the Constitution “could have been secured” on an antislavery basis.<sup>413</sup> Madison’s notes and Jonathan Elliot’s compilation of the debates over ratification<sup>414</sup> demonstrated the strength of Douglass’s argument. The southern delegates at the Convention made it clear that they would not support the Constitution without numerous explicit protections of slavery.<sup>415</sup> The debates in the southern state ratifying conventions revealed how important these protections of slavery were to securing ratification.

Douglass made his views clear:

LET THE UNION THEN BE DISSOLVED. I wish to see it dissolved at once. It is the union of the white people of this country who can be summoned in their whole military power to crush the slave, that perpetuates Slavery. Dissolve the Union, and they will raise aloft their unfettered arms and demand freedom, and if resisted, would hew their way to Liberty, despite the pale and puny opposition of their oppressors. In view of the opposition of this union, I welcome the bolt, whether from the North or the South, from Heaven or Hell, which shall shiver this Union in pieces. . . . [A]fter they had achieved independence [the Founders] attempted to unite Liberty in holy wedlock with the dead body of Slavery, and the whole was tainted. Let this unholy, unrighteous union be dissolved.<sup>416</sup>

Douglass continued this analysis with a penetrating appraisal of the Founding generation:

Talk to me of the love of liberty of your Washingtons, Jeffersons, or Henrys. They were strangers to a just idea of Liberty! He who does not love Justice and Liberty for all, does not Liberty and justice. They

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410. *Id.* at 221.

411. *Id.* at 217.

412. *Id.* at 221.

413. *Id.* at 217.

414. See 1–5 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787* (2d. 1836).

415. For a history of these debates at the constitutional convention, see FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 38, at 17.

416. DOUGLASS, *Is The Constitution Pro-Slavery?*, *supra* note 405, at 222–23.

wrote of Liberty in the Declaration of Independence with one hand, and with the other clutched their brother by the throat! These are the men who formed the union! I cannot enter into it. Give me NO UNION WITH SLAVEHOLDERS! I wish to dissolve the union of these States, and to do it in a direct way.<sup>417</sup>

This was Douglass as a full-throated Garrisonian, infusing his constitutional theory with solid history and enormous passion. He offered an honest and unflinching reading of a Constitution written by a convention dominated by slaveowners for a Republic in which slavery was legal in eleven of thirteen states.<sup>418</sup> This was one of Douglass's most powerful articulations of his disunionist constitutional theory. Within a year, he would be distancing himself from this theory, and in less than two years, he would openly renounce these views.

#### IX. THE NEW DOUGLASS AND THE NEW READING OF THE CONSTITUTION

While he publicly remained an orthodox Garrisonian into the early 1850s, almost as soon as he returned from Great Britain, Douglass began to struggle with the rigidity of the Garrisonians and the logic of their anti-constitutionalism.<sup>419</sup> Once again, the circumstances of his life impacted his constitutional theory. Douglass was deeply offended that some Garrisonians objected when he acquired freedom through purchase.<sup>420</sup> He rejected an ideological purity that forced him to either be a fugitive – subject to being dragged back to the South – or living in exile in England.<sup>421</sup> Shortly after he broke with the Garrisonians, he wrote about their response to his emancipation in his second autobiography:

Some of my uncompromising anti-slavery friends in this country failed to see the wisdom of this arrangement, and were not pleased

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417. *Id.* at 223.

418. See generally FINKELMAN, AN IMPERFECT UNION, *supra* note 241. By 1787, only Massachusetts and New Hampshire had abolished slavery. Paul Finkelman, *The Abolition of The Slave Trade: U.S. Constitution and Acts*, N.Y. PUB. LIBR. (2007), [http://abolition.nypl.org/print/us\\_constitution/](http://abolition.nypl.org/print/us_constitution/). Three other states, Pennsylvania (1780), Rhode Island (1784), and Connecticut (1784), had passed gradual abolition acts but slavery was still legal in all these states. *Id.* No other states (including the future free states of New York and New Jersey) had taken any steps to end slavery. See *id.*; see generally FINKELMAN, AN IMPERFECT UNION, *supra* note 241; ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967).

419. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 315–16.

420. W. Caleb McDaniel, *The Lives of Frederick Douglass*, RICE U. (Jan. 9, 2013), <http://wcm1.web.rice.edu/lives-of-frederick-douglass.html>.

421. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 315.

that I consented to it, even by my silence. They thought it a violation of anti-slavery principles—conceding a right of property in man—and a wasteful expenditure of money. On the other hand, viewing it simply in the light of a ransom, or as money extorted by a robber, and my liberty of more value than one hundred and fifty pounds sterling, I could not see either a violation of the laws of morality, or those of economy, in the transaction.<sup>422</sup>

This personal experience doubtlessly led to a rethinking of his constitutional views in two ways.

Douglass believed he had an important contribution to make to antislavery, and while he could have remained in England, doing so would have partially silenced him America. Douglass further wrote:

I felt that I had a duty to perform—and that was, to labor and suffer with the oppressed in my native land. Considering, therefore, all the circumstances—the fugitive slave bill included—I think the very best thing was done in letting Master Hugh [Auld] have the hundred and fifty pounds sterling, and leaving me free to return to my appropriate field of labor.<sup>423</sup>

Thus, he rejected the Garrisonian rigidity that said he should remain a slave merely to support a theoretical principle.

The Garrisonians objected to the transaction, because it sanctioned making people into property and acknowledged the legitimacy of slavery.<sup>424</sup> But by taking that position, the Garrisonians also turned Douglass into an object in four ways, much like when he was slave. Without the purchase, Douglass was an “object” of the Constitution’s Fugitive Slave Clause and perpetually vulnerable to removal to the South. In addition, by condemning the purchase, the Garrisonians effectively objectified Douglass by making him a living object or example for their own cause. Third, their opposition to the transaction subjected Douglass to a different set of rules than they faced. Free northern opponents of slavery, white and black, were not subject to seizure and were free to travel anywhere in the free states without fear.<sup>425</sup> An unfree

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422. DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 28, at 291.

423. *Id.*

424. *See id.*

425. *See* Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850). Traveling in the South for free blacks was another matter. Most southern states prohibited free blacks from entering their jurisdiction. *See generally* Paul Finkelman, *States Rights North and South in Antebellum America*, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 125–58 (Kermit Hall & James W. Ely, Jr. eds., 1989) [hereinafter Finkelman, *States Rights North and South in Antebellum America*]. South Carolina authorized the arrest and temporary incarceration of any free black sailor who left a ship that had docked in Charleston. *Elkison v. Deliesseline*, 8 Fed. Cas. 493 (C.C.D. S.C. 1823) (refusing to issue a writ of habeas corpus on behalf of a

Douglass did not have those rights. Finally, the Garrisonian position denied Douglass his own humanity and, in nineteenth century terms, his manhood. Garrison dedicated his life to removing the chains of bondage for all of America's slaves, but he was opposed to Douglass arranging, with the help of wealthy friends, the removal of his own chains so he could become a free man.<sup>426</sup>

Douglass preferred the practical solution of accepting the reality of slavery – and the constitutional provision that allowed his master to seize him anywhere in the United States.<sup>427</sup> Douglass and his friends acknowledged the power of Maryland law and federal law that constricted his freedom.<sup>428</sup> This did not mean they accepted the morality of that law. This criticism of Douglass's method of becoming free led him to question the nature of the whole Garrisonian argument.<sup>429</sup> Garrison would have left him in jeopardy – or in Great Britain – for the rest of his life, while Douglass's British friends would liberate him to return to the United States to fight slavery.

Less obvious, but perhaps more important in the long term, this experience affected how Douglass would read the Constitution. While in Britain, he had consistently denounced the United States, the Constitution, and the whole system of slavery.<sup>430</sup> In Britain, Douglass was an exile critical of the constitutional structure that forced him to leave his homeland. But as a free man, he returned to the United States because he had a “duty to perform—and that was, to labor and suffer with the oppressed in [his] native land.”<sup>431</sup> In coming to this understanding, Douglass was discovering a sense of patriotism – love of his homeland – even as he despised the politics and constitutional arrangements of that country.<sup>432</sup> When he returned from England, he asked, “How can I love a country where the blood of my own blood, the flesh of my own flesh, is now toiling under the lash?”<sup>433</sup> But ironically, the very act of coming back showed a certain amount of love of country, despite his disgust for the proslavery political system and Constitution.

The transformation of his status – from fugitive to free man – also affected his ability to help achieve political change in the United States. As a

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free black sailor on a British ship who was incarcerated in South Carolina while his ship was in port).

426. DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 28, at 291.

427. See U.S. CONST. art. IV, § 2, cl. 3.

428. See DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 28, at 291–92.

429. See *id.* at 306–07.

430. See, e.g., FREDERICK DOUGLASS, *Reception Speech At Finsbury Castle England, May 12, 1846*, reprinted in DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 28, at 317–327; FREDERICK DOUGLASS, *Inhumanity Of Slavery: Extract From A Lecture On Slavery In Rochester In 1850*, reprinted in DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 28, at 344–48.

431. DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 28, at 291.

432. See DOUGLASS, DOUGLASS, *Inhumanity Of Slavery*, *supra* note 430, at 347–48.

433. Douglass, *American Slavery*, *supra* note 397, at 276.

free man, he could vote in New York State, where he moved after his return from Great Britain.<sup>434</sup> As a free man, he could openly travel and speak his mind without fear of capture.<sup>435</sup> He could – and did – start his own newspaper to espouse his opposition to slavery.<sup>436</sup> He could now take advantage of all the constitutional rights of a citizen of New York and some of the rights of a free resident of the United States that were protected by the Constitution.<sup>437</sup> His new status as a free man impacted his constitutional views.

After returning to the United States, Douglass moved to Rochester, New York, to start a newspaper funded in part by his British friends.<sup>438</sup> His paper, *The North Star*, would compete with Garrison's *Liberator* for subscribers and the financial support of America's antislavery community.<sup>439</sup> In moving in this direction, Douglass took advantage of American federalism, the First Amendment, and the postal system created by the Constitution. In Rochester, he could say what he wanted and publish his views on slavery. The First Amendment did not apply to the states in the antebellum period,<sup>440</sup> but New York had a similar free press provision in its constitution,<sup>441</sup> and in that free state, Douglass was protected in his publishing activities. The national Constitution did protect a free press when newspapers were sent by mail to other places,<sup>442</sup> and Douglass availed himself of this protection to not only publish *The North Star*, but also to send it to other states. As a newspaper publisher, Douglass was becoming a new kind of constitutional actor.

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434. See N.Y. CONST. of 1821 art. II, § 1. New York's constitution of 1821 kept a property requirement for black voters while eliminating it for white voters. *Id.* While many blacks in New York could not meet this requirement, Douglass could. David W. Blight, *Voter Suppression, Then and Now*, N.Y. TIMES (Sept. 7, 2012), [http://www.nytimes.com/2012/09/07/opinion/frederick-douglass-and-voter-fraud.html?\\_r=0](http://www.nytimes.com/2012/09/07/opinion/frederick-douglass-and-voter-fraud.html?_r=0). He might also have been able to vote in Massachusetts before he left for Britain because the Bay State had universal adult male suffrage under its 1780 constitution. MASS. CONST. of 1780, ch. I, art. II. As a Garrisonian, however, there is no evidence that he did vote. It is also not clear if, as a fugitive slave it would have been safe for him to vote in Massachusetts.

435. See DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 28, at 291.

436. See *id.* at 304–07.

437. See generally N.Y. CONST. of 1821.

438. Marguerite L. Butler, *The National Frederick Douglass Moot Court Competition—Operating in the Spirit and Legacy of Frederick Douglass*, 25 N.C. CENT. L.J. 66, 95 n.47 (2002).

439. See GARRISON, *supra* note 37, at 47.

440. See *Barron v. Baltimore*, 32 U.S. 243 (1833); *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. 589 (1845) (reaffirming holding in *Barron* that the Bill of Rights did not impose any limitations on the states.)

441. N.Y. CONST. of 1821, art. VII, § 8 (“Every citizen may freely speak, write, and publish his sentiments, on all subjects . . .”).

442. Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 37 (2012).

Meanwhile, Garrison could never understand or accept what, to him, appeared to be apostasy.<sup>443</sup> Garrison expected Douglass to return to Massachusetts and continue to be a speaker for his organization.<sup>444</sup> While Douglass was still Garrison's ally in their interpretation of the Constitution, he was no longer under Garrison's sway, and when he started his newspaper, he was actually competing with him for subscribers.<sup>445</sup> Garrison felt that he had discovered Douglass, and in his mind, made him who he was. When he asserted his own financial and intellectual independence, Garrison rejected him.<sup>446</sup> In a sense, the Garrisonians saw Douglass as an object – a person who belonged to them.<sup>447</sup>

Meanwhile, Douglass found support among Garrison's rivals in the anti-slavery world. The political abolitionist and philanthropist Gerrit Smith became his benefactor and friend.<sup>448</sup> Smith rejected Garrisonian constitutionalism and disunion.<sup>449</sup> In June 1848, Douglass began to ally with the Liberty Party, attending the National Liberty Party Convention in Buffalo.<sup>450</sup> In the 1844 presidential election the Liberty Party, which was dedicated to using electoral politics to end slavery, won over 62,000 votes running the former slaveowner turned abolitionist James G. Birney.<sup>451</sup> In the wake of the Mexican War, a new antislavery political vehicle emerged: the Free Soil Party.<sup>452</sup> Some Free Soilers were dedicated abolitionists, but many were not that radical.<sup>453</sup> They did not want to challenge the existence of slavery in the South, but only wanted to prevent its spread to the new territories acquired from Mexico.<sup>454</sup> Nevertheless, the more radical Liberty Party merged with the

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443. GARRISON, *supra* note 37, at 45.

444. *Id.* at 48.

445. See DOUGLASS, MY BONDAGE AND MY FREEDOM, *supra* note 28, at 307–08.

446. Reginald Leamon Robinson, *Race, Myth, and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1, 42 n.168 (1996).

447. It is worth noting that Garrison treated white “apostates” in the same way. THOMAS, *supra* note 55. William Goodell, who broke with Garrison, later referred to him as “the pope” – a particularly caustic comment to be thrown at one evangelical Protestant by another. *Id.*

448. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 325.

449. JOHN R. MCKIVIGAN, *Smith, Gerritt*, AM. NAT'L BIOGRAPHY (2008), <http://www.anb.org/articles/15/15-00627.html>.

450. BLIGHT, *supra* note 15, at 28; DOUGLASS, LIFE AND TIMES, *supra* note 3, at 343.

451. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 343. *1844 Presidential General Election Results*, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1844> (last visited Jan. 3, 2016).

452. FREDERICK J. BLUE, THE FREE SOILERS: THIRD PARTY POLITICS, 1848–54, at 1 (1973).

453. GARRISON, *supra* note 37, at 15.

454. *1848 Free Soil Party Platform*, ANGELFIRE, <http://www.angelfire.com/indie/ourcampaigns/1848.html> (last visited Jan. 16, 2016). The second point in this platform declared:

Free Soilers.<sup>455</sup> Gerrit Smith, a very wealthy opponent of slavery who had been supporting Douglass's newspaper, was one of the Liberty men who moved into the new party.<sup>456</sup> Smith also rejected the pacifism of Garrison.<sup>457</sup> In 1851, he would participate in the violent rescue of the fugitive slave Jerry McHenry in Syracuse.<sup>458</sup> At the end of the decade, he would provide funds for John Brown's raid on Harpers Ferry.<sup>459</sup> Clearly, Douglass saw a kindred spirit in Smith's willingness to confront slavery in a more dramatic and direct fashion than Garrison.

Despite his flirtations with the Liberty Party and his willingness to attend the Free Soil Party Convention in 1848,<sup>460</sup> Douglass was not ready to abandon Garrisonian constitutional theory. As the discussion of his debate in Syracuse shows,<sup>461</sup> as late as January 1850, Douglass was still vigorously supporting disunion. However, within a year Douglass was moving away from Garrisonian constitutionalism, and "by July 1851[,] his conversion"<sup>462</sup> to a "radical antislavery view of the Constitution . . . was complete."<sup>463</sup> By 1852, he had completely, and publicly, renounced his earlier support for Garrisonian constitutionalism.<sup>464</sup> What explains this dramatic complete reversal of his constitutional understanding? Part of this transformation came from Douglass's changing circumstances. As a newspaper editor living in western New York, he met new people and was exposed to new ideas, and this led him to rethink his older constitutional theories. He later explained:

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Resolved, That slavery in the several states of this Union which recognize its existence depends upon the state law-, [sic] alone, which cannot be repealed or modified by the federal government, and for which laws that government is not responsible. We therefore propose no interference by Congress with slavery within the limits of any state.

*Id.* The third point declared: "Resolved, That we accept the issue which the slave power has forced upon us; and to their demand for more slave states and more slave territory, our calm but final answer is: No more slave states and no more slave territory." *Id.*

455. BLIGHT, *supra* note 15, at 35; JOHN R. MCKIVIGAN, ABOLITIONISM OF AMERICAN LAW x (1999).

456. *See* BLIGHT, *supra* note 15, at 35.

457. *See id.*

458. ANGELA F. MURPHY, THE JERRY RESCUE: THE FUGITIVE SLAVE LAW, NORTHERN RIGHTS, AND THE AMERICAN SECTIONAL CRISIS (2016); STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 86–89 (2010).

459. *See* PAUL FINKELMAN, HIS SOUL GOES MARCHING ON: RESPONSES TO JOHN BROWN AND THE HARPERS FERRY RAID 41–42 (1995).

460. BLIGHT, *supra* note 15, at 29.

461. *See supra* notes 396–418 and accompanying text.

462. BLIGHT, *supra* note 15, at 33.

463. *Id.*

464. *Id.* at 34. *See* JIN PING-WU, FREDERICK DOUGLASS AND THE BLACK LIBERATION MOVEMENT: THE NORTH STAR OF AMERICAN BLACKS 46 (2000).

But for the responsibility of conducting a public journal, and the necessity imposed upon me of meeting opposite views from abolitionists outside of New England, I should in all probability have remained firm in my disunion views. My new circumstances compelled me to re-think the whole subject, and study with some care not only the just and proper rules of legal interpretation, but the origin, design, nature, rights, powers, and duties of civil governments, and also the relations which human beings sustain to it. By such a course of thought and reading I was conducted to the conclusion that the Constitution of the United States—in inaugurated ‘to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty’—could not well have been designed at the same time to maintain and perpetuate a system of rapine and murder like slavery, especially as not one word can be found in the Constitution to authorize such a belief.<sup>465</sup>

Douglass might also have added that some of these non-New England abolitionists, like Smith and William Goodell, were both financially and intellectually supporting Douglass's newspaper.<sup>466</sup>

External political events also affected Douglass's constitutional theory. His great defense of Garrisonian constitutionalism in Syracuse took place in January 1850.<sup>467</sup> Nine months later, Congress put the finishing touches on the series of laws known as the Compromise of 1850, which was an enormous victory for slavery.<sup>468</sup> For Douglass, the worst part of the Compromise was the Fugitive Slave Act of 1850,<sup>469</sup> which threatened the personal security of almost every black in the North. This law created a national bureaucracy for the return of fugitive slaves with one or more newly appointed federal commissioners in every county to enforce the law.<sup>470</sup> The law empowered a judge or commissioner to call on a U.S. marshal, the nation's military, the state militia, and even a local posse to help return fugitive slaves to their masters.<sup>471</sup> This law was precisely the kind of federal legislation that Garrisonian constitutional theory would have predicted. It showed just how much the Constitution and the federal government protected slavery.

Rather than confirming for Douglass that the Garrisonian analysis was right, the law made him question Garrisonian theory on two points: Garrison's objection to political action within the context of the Constitution and

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465. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 323.

466. *Id.* at 324–25.

467. DOUGLASS, *Is The Constitution Pro-Slavery?*, *supra* note 405, at 218–19.

468. Paul Finkelman, *The Appeasement of 1850*, in CONGRESS AND THE CRISIS OF THE 1850'S, at 36–79 (Paul Finkelman & Donald R. Kennon eds., 2012); Finkelman, *The Cost of Compromise*, *supra* note 93, at 850.

469. Ch. 60, 9 Stat. 462 (1850).

470. Finkelman, *The Cost of Compromise*, *supra* note 93, at 845.

471. *Id.*



Garrison's insistence on non-resistance and his objection to violence. In January 1851, Douglass attended an antislavery convention in Syracuse to protest the new fugitive slave law. He did not disown Garrisonian theory, but he began to edge away from it.<sup>472</sup> In his first speech, on the afternoon of January 7, he argued that when Senator James Mason of Virginia proposed the 1850 law, "[p]eople would not then believed the bill could be enacted" because it was "flagrantly opposed to the Constitution, so scandalous a violation of the plainest principles of justice."<sup>473</sup> This argument indicated Douglass believed that there were limits on how much protection slavery could command, even under the proslavery Constitution. Obviously, if the fugitive slave law was "flagrantly opposed to the Constitution," then some parts of the Constitution could be interpreted to protect liberty, due process, and fundamental justice.<sup>474</sup> For example, the 1850 law denied alleged fugitive slaves access to the writ of habeas corpus in direct violation of the language of the Suspension Clause of the Constitution,<sup>475</sup> allowed their seizure without a warrant in violation of the Fourth Amendment,<sup>476</sup> allowed their status to be adjudicated without a grand jury indictment in violation of the Fifth Amendment,<sup>477</sup> and prohibited them from having a jury trial to determine their status.<sup>478</sup>

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472. 2 FREDERICK DOUGLASS, *Resistance To Blood-Houndism: Address Delivered In Syracuse, New York, On 7-8 January 1851*, reprinted in 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at 272.

473. DOUGLASS, LIFE AND TIMES, *supra* note 3, at 283, 342-43.

474. DOUGLASS, *Resistance To Blood-Houndism*, *supra* note 472, at 272-74.

475. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

476. *Id.* at amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

477. *Id.* at amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

478. *Id.* at amend. VI. The right to a jury trial could have been claimed under the Sixth Amendment, which required a jury trial "in all criminal prosecutions." *Id.* However, defenders of the law would have argued that sending someone back as a slave was not a criminal proceeding, but a civil one. See Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864). However, there might also have been a claim under the Seventh Amendment, which "preserved" the "right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. A fugitive slave hearing was not technically a suit at common law, but attorneys for alleged fugitives might have argued that the blacks "owned" themselves, and since as slaves they were worth far more than twenty dollars, the return of a fugitive slaves was essentially a suit between the claimant and the alleged slave. See Act of Sept. 18, 1850. However, the 1850 Act prohibited jury trials in rendition proceedings. *Id.*

In this speech, Douglass reiterated his basic support for Garrisonian non-resistance, declaring, "I am a peace man. I am opposed the shedding of blood in all cases where it can be avoided."<sup>479</sup> But, he also declared that for "any Fugitive . . . nothing short of the blood of the slaveholder who shall attempt to carry him off, ought to satisfy him."<sup>480</sup> He urged the Convention to endorse this position.<sup>481</sup> He ended by moving closer to a new understanding of resistance to slavery. Thus, "[W]hen any human being will so far sink his manhood as to become a wolf, a tiger, or a bloodhound, he is not fit to live. I do believe that two or three dead slaveholders will make this law a dead letter."<sup>482</sup> That evening, he reaffirmed his new militancy, asserting that he had "once thought human life of more value than anything else," but now Douglass "thought Liberty of more value."<sup>483</sup> A new Douglass who emphatically rejected Garrisonian pacifism and non-resistance was clearly emerging. Douglass may have been "opposed to shedding of blood," but he was in fact calling for killing slave catchers if that was necessary to stop them.<sup>484</sup>

Douglass's views were in a complicated transition. Although Douglass denounced the new 1850 law as "opposed to the Constitution,"<sup>485</sup> he reiterated that he did not believe "that the Constitution was an Anti-Slavery instrument."<sup>486</sup> Indeed, he argued that "the framers of the Constitution enacted the Fugitive Bill in effect."<sup>487</sup> Thus, he remained a disunionist.

Douglass's new support for violent resistance was consistent with his circumstances and with his past behavior. As a teenager, Douglass had famously fought the slave breaker, Covey.<sup>488</sup> His description of this event is perhaps the most famous chapter of his autobiography. As an abolitionist speaker in the early 1840s, Douglass fought back and was "beaten . . . and severely bruised" when a train conductor tried to force him into a segregated railroad car.<sup>489</sup> He also defended himself against attacks by proslavery ruffians.<sup>490</sup> Douglass was brave, tough, and never a pacifist. In his response to

479. DOUGLASS, *Resistance To Blood-Houndism*, *supra* note 472, at 275.

480. *Id.*

481. *Id.*

482. *Id.* at 277. He would make this point more famously at the Free Soil Convention in 1852, declaring that "[t]he only way to make the Fugitive Slave Law a dead letter is to make half a dozen or more dead kidnapers." 2 FREDERICK DOUGLASS, *Let All Soil Be Free Soil: An Address Delivered In Pittsburgh, Pennsylvania, On 11 August 1852*, reprinted in 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at 390. He believed "[a] half dozen more dead kidnapers carried down South would cool the ardor of Southern gentlemen, and keep their rapacity in check." *Id.*

483. DOUGLASS, *Resistance To Blood-Houndism*, *supra* note 472, at 277.

484. *Id.* at 275.

485. *Id.* at 274.

486. *Id.* at 277.

487. *Id.*

488. DOUGLASS, NARRATIVE, *supra* note 28.

489. BARNES, REFORMER AND STATESMAN, *supra* note 4, at 35.

490. *Id.* at 41.

the Fugitive Slave Act of 1850,<sup>491</sup> Douglass became more aggressive. He was no longer arguing for self-defense, but for aggressive proactive responses to the slave catcher, who he compared to “a wolf, a tiger, or a bloodhound” and who was “not fit to live.”<sup>492</sup> Within a year, Douglass would jettison Garrisonian constitutional theory, just as he was rejecting non-resistance and Garrison’s disdain for political action.<sup>493</sup> The Fugitive Slave Act of 1850 was forcing Douglass to resist the politics that led to the law with political action. Similarly, the Fugitive Slave Act was forcing Douglass to respond to aggressive violence – on the part of slave catchers and the federal government – with aggressive violence and, if necessary, lethal force to stop the return of fugitive slaves.

As he moved from Garrisonian views to more aggressive opposition to slavery and a political opposition to the slave power, Douglass was easily drawn to Gerrit Smith’s brand of political activism and his willingness to confront slavery directly. In the end, Douglass’s change of direction led to a less intellectually honest but more politically pragmatic reading of the Constitution. One might compare the Douglass of the 1840s with the Douglass of the 1850s and have them debate each other. But such a comparison or debate would miss the point. By 1851, Douglass was committed to practical attacks on slavery, rather than historically accurate theoretical discussions of the Constitution. He no longer wanted to support the Garrisonian view that the Constitution was proslavery, in part because that was also the position of the slaveowners. He told Smith that he had “decided to let Slaveholders and their Northern abettors have the Laboring *oar* in putting a proslavery interpretation upon the Constitution.”<sup>494</sup> Douglass was not implying that Garrison was an “abettor” of the proslavery position. This was clearly a reference to northern doughfaces. Rather, Douglass declared that he was personally “sick and tired of arguing on the slaveholders’ side of this question, although they are doubtless right so far as the intentions of the framers of the Constitution are concerned.”<sup>495</sup> Douglass acknowledged he had learned much from Smith’s constitutional analysis and was ready to endorse Smith’s constitutional theory, which allowed him “fling to the winds” the “intentions” of the framers.<sup>496</sup> In May, Douglass announced in his newspaper, *The North Star*, that he no longer supported the Garrisonian position, but instead believed

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 thereafter we

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491. *Id.* at 35.

492. DOUGLASS, *Resistance To Blood-Houndism*, *supra* note 472, at 277.

493. *Id.* at 272.

494. Letter from Frederick Douglass to Gerrit Smith (Jan. 21, 1851), *reprinted in* 2 FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra* note 96, at 149.

495. *Id.*

496. *Id.* at 149–50.

should insist upon the application of such rules to that instrument, and demand that it be wielded in behalf of emancipation.<sup>497</sup>

In 1852, Douglass attended the national convention of the Free Soil Party. Quite unexpectedly, the longtime political abolitionist Lewis Tappan nominated him to be the secretary of the Convention, and he was given this position by acclamation.<sup>498</sup> This was coup for the political abolitionists, because the most prominent black abolitionist in the nation – who had once been a stalwart Garrisonian – was now in their camp. But it was a huge accomplishment for Douglass as well, as he became the first black to ever hold such a position in national convention of white political leaders. This striking moment in American politics – a black man being chosen as an official at a national political party convention – “aroused comment in Europe as well as in [the United States].”<sup>499</sup> That fall Douglass used his newspaper to campaign for the national Free Soil ticket and also for his friend and patron, Gerrit Smith, who successfully ran for Congress.<sup>500</sup>

William Lloyd Garrison was livid about Douglass's transformation, calling it “roguery,”<sup>501</sup> and at least implying that Douglass had joined Smith because of the philanthropist's financial support of Douglass.<sup>502</sup> But in fact, the change was strategic. Douglass was “sick and tired”<sup>503</sup> of providing ammunition for slaveholders, even though he admitted that Garrison was correct about the “intentions of the framers.”<sup>504</sup> On this point Douglass was correct, even though he would soon reject this position.<sup>505</sup> The Garrisonians were surely right about the proslavery origins and thrust of the Constitution. It was a covenant with death. It protected slavery from beginning to end. But after 1851, Douglass abandoned his historically accurate understanding of the Founding, arguing that the majority of the Framers on the Constitution “were earnest anti-slavery men, and intended to frame a Constitution that would finally secure the equality of *all* the people.”<sup>506</sup> He argued that if one took “the [C]onstitution according to its plain reading” there was not “a single pro-

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497. Douglass, *Change of Opinion Announced*, *supra* note 96, at 155. The editorial first appeared in *The North Star*, but was reprinted by William Lloyd Garrison in *The Liberator*. *Id.* at 156.

498. Philip S. Foner, *Frederick Douglass*, in 2 FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 96, at 75 [hereinafter Foner, *Frederick Douglass*].

499. *Id.* at 76.

500. *Id.* at 76–77.

501. Douglass, *Change of Opinion Announced*, *supra* note 96, at 156.

502. Foner, *Frederick Douglass*, *supra* note 498, at 54.

503. Letter from Frederick Douglass to Gerrit Smith, *supra* note 494.

504. *Id.*

505. See *infra* text accompanying notes 506–10 and 538–53.

506. 2 FREDERICK DOUGLASS, *Antislavery Principles And Antislavery Acts: An Address Delivered In Cincinnati, Ohio, On 27, 28, 29 April 1852*, reprinted in 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at 349.

slavery clause in it.”<sup>507</sup> Rewriting 200 years of American legal history in a single sentence, he argued that slavery “*never was lawful, and never can be made so.*”<sup>508</sup> Thus, he would conclude on the eve of the Civil War that even the three-fifths clause of the Constitution “*leans to freedom.*”<sup>509</sup> Such claims were, at best, silly. They were historically indefensible and surely intellectually dishonest. He knew better, or at least he had known better.<sup>510</sup>

But if the Garrisonians were right in demonstrating that the Constitution was proslavery, they were wrong, at least from Douglass’s perspective, in their response to that analysis: their refusal to participate in politics and their demands for disunion. Douglass argued against the Garrisonian rejection of politics because “[m]en should not, under the guidance of a false philosophy, be led to fling from them such powerful instrumentalities against Slavery as the Constitution and the ballot.”<sup>511</sup> As political scientist Nicholas Buccola has argued, Douglass had concluded that “the Garrisonian position was problematic because it forced the antislavery movement to fight for abolition with one hand tied behind its back.”<sup>512</sup> Middle class and wealthy northern whites – like Garrison and his most important lieutenant, Wendell Phillips – could afford the moral purity of disunion, a withdrawal from politics, and a policy of non-resistance. They could wait for the eventual collapse of the Union and perhaps for slavery to end in a Haiti-like firestorm sometime in the future. They were free citizens under the Constitution, not objects of the Constitution. Most blacks – whether slave, fugitive, or free – could not afford the luxury of waiting for the inevitable collapse of slavery. Increasingly, free blacks and fugitives in the North no longer had patience for a theory that might lead to the end of slavery *sometime* in the future. This was especially true for refugees from the South who lived in constant danger of being seized as fugitive slaves. Even fugitive slaves who had become legally free, like

507. 2 FREDERICK DOUGLASS, *What To The Slaves Is The Fourth Of July?: An Address Delivered In Rochester, New York, On 5 July 1852*, reprinted in 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at 386.

508. Douglass, *Change of Opinion Announced*, *supra* note 96, at 155–56.

509. 3 FREDERICK DOUGLASS, *The American Constitution And The Slave: An Address Delivered In Glasgow, Scotland, On 26 March 1860*, reprinted in 3 FREDERICK DOUGLASS, THE FREDERICK DOUGLASS PAPERS: SERIES ONE 352 (John W. Blassingame ed., 1985) [hereinafter 3 DOUGLASS, PAPERS SERIES ONE].

510. In 1849, he had more accurately described the three-fifths clause this way:

Every slaveholder was virtually told by that Constitution, virtually instructed by it, to add as many to his stock as possible, for the more slaves he possessed he would not only have more wealth but more political power. For every five slaves he might be said to have three votes.

DOUGLASS, *Is The Constitution Pro-Slavery?*, *supra* note 405, at 197.

511. Letter from Frederick Douglass to Gerrit Smith (Apr. 15, 1852), reprinted in 2 FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, *supra* note 96, at 177.

512. NICHOLAS BUCCOLA, THE POLITICAL THOUGHT OF FREDERICK DOUGLASS 142 (2012).

Douglass, still had relatives and friends in bondage. Douglass's enslaved relatives could not wait for the millennium, and Douglass was far too impatient to wait.

The passage of the new Fugitive Slave Act in 1850 further undermined the idea that conscientious opponents of slavery could withdraw from politics and law. The 1850 law created a national law enforcement bureaucracy – the first in American history – to help capture and return fugitive slaves.<sup>513</sup> Douglass no longer had to personally fear slave catchers or kidnappers, but he was fully aware that many of his black friends and neighbors in Rochester, Syracuse, Boston, and elsewhere in the North, were in danger. Douglass and other blacks in the North needed activist antislavery lawyer-politicians – like Salmon P. Chase of Ohio, Thaddeus Stevens of Pennsylvania, Charles Sumner of Massachusetts, John P. Hale of New Hampshire, and William Henry Seward of New York – who were ready to fight for the repeal of the 1850 law and ready to go into court to defend fugitive slaves and abolitionists who helped rescue fugitive slaves from federal custody. In the 1850s, there would be a series of dramatic rescues and attempted rescues of fugitive slaves and resistance by fugitive slaves.<sup>514</sup> Douglass supported these rescues and praised them.<sup>515</sup> He happily harbored fugitives and helped them escape to Canada or disappear into sympathetic communities in the North.<sup>516</sup> Indeed, in the 1840s and 1850s, at least 100 fugitive slaves passed through his Rochester home on their way to Canada.<sup>517</sup>

These confrontations with federal authority, and the trials that followed them, brought forth new abolitionists who ran for office and helped defend fugitives and their allies in court. The abolitionists who rescued or tried to rescue these fugitives were not Garrisonian pacifists. The lawyers who defended them had taken an oath to the Constitution in order to practice law, but they now used the law to fight slavery. The politicians who ran against slavery on the Free Soil Party in 1848 and 1852, and the Republican Party in 1856 and 1860 offered a far more productive way to fight slavery than the

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513. Finkelman, *The Cost of Compromise*, *supra* note 93, at 845.

514. Among others, in Boston the Shadrach rescue (1851) and the failed rescues of Thomas Sims (1851) and Anthony Burns (1851); the Christiana, Pennsylvania, slave rebellion (1851); the Jerry Rescue in Syracuse (1851); the Joshua Glover rescue in Milwaukee (1854), leading to *Ableman v. Booth*; and the Oberlin-Wellington Rescue (1858). See generally LUBET, *supra* note 458; 62 U.S. (21 How.) 506 (1858).

515. See LUBET, *supra* note 458, at 63–64.

516. BARNES, REFORMER AND STATESMAN, *supra* note 4, at 72. After the Christiana Slave Rebellion Douglass harbored William Parker and two other fugitive slaves who, while resisting capture under the fugitive slave law, had killed a slaveowner in a firefright in Christiana, Pennsylvania, and then brazenly rode the train to Rochester. *Id.* Douglass helped them get to Canada. *Id.*; DOUGLASS, LIFE AND TIMES, *supra* note 3, at 219–20; Paul Finkelman, *The Treason Trial of Castner Hanway*, in AMERICAN POLITICAL TRIALS 77–96 (Michal Belknap ed., revised ed. 1994).

517. BLIGHT, *supra* note 15, at 27.

logical, intellectually consistent, and historically accurate, but politically and legally ineffective theories and tactics of the Garrisonians.

Thus, Douglass left the Garrisonians to join with radical antislavery constitutionalists like Gerrit Smith, William Goodell, and Salmon P. Chase, who would use law, politics, and the Constitution to fight slavery.<sup>518</sup> This did not lead to any immediate constitutional change. As William Wiecek notes, “In the short run,” the radical antislavery constitutionalists were “a failure.”<sup>519</sup> With little exaggeration, Robert Cover noted that the antislavery constitutionalists operated “in the face of a state legal order less likely to hold slavery unconstitutional than to declare the imminent kingship of Jesus Christ on Earth.”<sup>520</sup> Salmon P. Chase of Ohio, for example, was known as the “Attorney General for Fugitive Slaves,” but he could not persuade a single justice on the Supreme Court – even the moderately antislavery John McLean<sup>521</sup> – to support his attempts to limit the reach of the Fugitive Slave Clause or the Fugitive Slave Act of 1850.<sup>522</sup>

In this context, the Garrisonians were ironically far more practical and theoretically correct. They believed that disunion would destroy slavery.<sup>523</sup> Ultimately, they were right. They might even have predicted that their pro-slavery enemies would initiate the disunion. As a Garrisonian, Douglass had argued that disunion could come from the North or the South and the result would be the same.<sup>524</sup> As Douglass said in his 1850 speech in Syracuse, he would “welcome the bolt, whether from the North or the South, from Heaven or from Hell, which shall shiver this Union in pieces” so “this unholy, unrighteous union be dissolved.”<sup>525</sup> For Garrisonians – like Douglass in 1850 – it did not matter who left the Union first because once the Union collapsed, it was a short step for the national government to be rid of the albatross of slavery and to dissolve the constitutional support for the institution.<sup>526</sup>

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518. BARNES, REFORMER AND STATESMAN, *supra* note 4, at 73; BLIGHT, *supra* note 15, at 8–36.

519. WIECEK, *supra* note 36, at 274.

520. Cover, *supra* note 56, at 39.

521. Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 528–29 (2009).

522. *Jones v. Van Zandt*, 46 U.S. 215, 232 (1847). Chase’s argument is set out in RECLAMATION OF FUGITIVES FROM SERVICE: AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AT THE DECEMBER TERM, 1846, IN THE CASE OF WHARTON JONES VS. JOHN VANZANDT (1847). For a discussion of Chase’s printed brief, see PAUL FINKELMAN, SLAVERY IN THE COURTROOM 70–75 (1985), as well as Chase’s arguments and the Court’s opinion in *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852).

523. DOUGLASS, *Is The Constitution Pro-Slavery?*, *supra* note 405, at 222.

524. *Id.*

525. *Id.* at 222–23.

526. Lincoln came into the presidency with the correct understanding that neither he nor Congress could end slavery in the existing states. Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 354–55 (2009). He understood that slavery was a form of property protected by the

However, no one could know in 1852 that within a decade most of the slave states would leave the Union and the national government would then be able to begin dismantling slavery. In the early 1850s, political activity – rather than agitating for something as unlikely as disunion – seemed to be the best way to attack slavery.<sup>527</sup> The political abolitionists who Douglass joined in the early 1850s were able to confront slavery directly in statehouses, governors' offices, Congress, and in numerous courtrooms. The antislavery lawyer, Salmon P. Chase,<sup>528</sup> for example, developed a viable constitutional theory based on the old English case, *Somerset v. Stewart*,<sup>529</sup> which held that slavery was local and freedom was national. Thus, he argued that without specific legislation, slavery could not exist.<sup>530</sup> Chase's theories led to huge debates in Congress, the courts, and in political campaigns over the status of slavery in the territories.<sup>531</sup> Chase's theories became a key Republican argument in 1856 and 1858 and propelled the nation's first truly antislavery president to the White House in 1860.<sup>532</sup> Equally important, running for office on tickets that endorsed the Constitution as an antislavery document allowed antislavery politicians to win elections and use their offices to fight slavery and protect fugitive slaves and abolitionists. For example, when he was the Governor of Ohio, Chase refused to allow the extradition to Kentucky of Willis Lago, a free black man accused of theft for helping a slave woman escape to Ohio.<sup>533</sup> Chase and his antislavery successor, Governor William Dennison,

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Constitution. *Id.* However, once the slave states left the Union, and made war on the United States, he could use his powers as commander-in-chief to emancipate all slaves who were held in the Confederacy. *Id.* at 360–61.

527. It is also worth noting that the political abolitionists set the stage for ending slavery through their electoral success in 1860, which led to secession by proslavery southern nationalists who feared Lincoln and also saw his election as an opportunity to separate themselves from the increasingly anti-slavery North. See Finkelman, *States' Rights, Southern Hypocrisy*, *supra* note 80, at 452.

528. For discussions of Chase's antislavery constitutional theory, see ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73–102* (1968) [hereinafter FONER, *FREE SOIL, FREE LABOR, FREE MEN*]; JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865*, at 16–28 (2013).

529. 1 Lofft (GB) 499 (1772); 98 Eng. Rep. 499 (1772).

530. OAKES, *supra* note 528, at 17.

531. As David Blight has noted, summarizing the work of numerous scholars, “[b]y the mid-1850s Chase’s view became the constitutional basis of the Republican party’s doctrine of nonextensionism.” BLIGHT, *supra* note 15, at 32. For a discussion of Chase’s constitutional theories and the status of slavery in the territories, see FONER, *FREE SOIL, FREE LABOR, FREE MEN*, *supra* note 528; DAVID M. POTTER, *THE IMPENDING CRISIS, 1848–1861* (1976); and OAKES, *supra* note 528.

532. FONER, *FREE SOIL, FREE LABOR, FREE MEN*, *supra* note 528, at 73–102.

533. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860); Finkelman, *States Rights North and South in Antebellum America*, *supra* note 425, at 125–58.



successfully resisted Kentucky's repeated attempts to have Lago sent across the Ohio River for prosecution.<sup>534</sup>

Ironically, in the end both the old Garrisonian Douglass, and the new politically active Douglass were, in tandem, correct in seeing how to achieve abolition. American slavery would come to an end through disunion and southern secession, thus underscoring the correctness of Garrison's analysis. On the other hand, secession was a direct result of political activism that led to Lincoln's election. That was the kind of political activity Douglass supported in the half decade before the Civil War.

#### X. "THE CONSTITUTION IS AN ANTI-SLAVERY DOCUMENT"<sup>535</sup>

The new Douglass – the politically active Douglass – had to develop a new theory of the Constitution that was consistent with his evolving understanding of the best way to fight slavery. In May 1851, at the annual convention of Garrison's AA-SS, Douglass announced that he changed his views on the Constitution and political activism, and that his newspaper, *The North Star*, was becoming a Liberty Party paper.<sup>536</sup> We have no record of Douglass's speech at that meeting, and it is not clear that he offered any discussion of his new constitutional views.<sup>537</sup>

A year later, at an antislavery convention in Cincinnati, Douglass forcefully explained his new understanding of the Constitution.<sup>538</sup> This gathering included a wide range of opponents of bondage, including "Free Soilers, Garrisonians, and Liberty Party Men."<sup>539</sup> Among the speakers were John Mercer Langston, the first African American to practice law in Ohio – as well as a future Congressman from Virginia and a future dean of Howard Law School – and George W. Julian, the leading antislavery lawyer in Indiana, who later served five terms in Congress as an antislavery Republican during the Civil War and Reconstruction.<sup>540</sup> Douglass was elected a vice president of the Convention.<sup>541</sup> On the last night of this convention, Douglass set out his new Constitutional theories.<sup>542</sup>

He started with a wholesale rejection of the Garrisonian theories that he had been espousing for more than a decade. Explicitly repudiating the argu-

534. See *Dennison*, 65 U.S. (24 How.) 66.

535. DOUGLASS, *Antislavery Principles And Antislavery Acts*, *supra* note 506.

536. *Id.* at 350; see BLIGHT, *supra* note 15, at 28–30, 35.

537. DOUGLASS, *Antislavery Principles And Antislavery Acts*, *supra* note 506, at 350 n.17.

538. FREDERICK DOUGLASS, *Freedom, The Eternal Truth: An Address Delivered In Harveysburg, Ohio, On 2 May 1852*, reprinted in 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at 352–58.

539. DOUGLASS, *Antislavery Principles And Antislavery Acts*, *supra* note 506, at 341–42.

540. *Id.* at 342.

541. *Id.*

542. *Id.*

ments he had made in the Syracuse debate two years earlier,<sup>543</sup> Douglass explained that when he escaped to the North in 1838, he was “rather green” and “knew nothing of law and Constitutions.”<sup>544</sup> Thus, he came under the influence of Garrison and other “noble” abolitionists in part because they were the first whites he ever met who would “treat colored men as *men*.”<sup>545</sup> Douglass praised the Garrisonians for their integrity, their consistent opposition to slavery, and their progressive views on racial equality.<sup>546</sup> But he no longer accepted their constitutional theories.<sup>547</sup> Instead, he urged abolitionists to read the Constitution with “the most favorable construction.”<sup>548</sup> He argued that it was “high time that absurd assumptions of the Slave Oligarchy were exposed” and that “he would devote his energies to wrest from them . . . the Constitution and all supports to which they had no right in reason or conscience.”<sup>549</sup>

He told the Convention that “[a] great obstruction . . . to the spread of action-producing Anti-Slavery principles in the United States is the too general impression that the federal Constitution is a Pro-Slavery instrument—it is *not so!* Judged by the well-settled principles of legal construction, the Constitution is an Anti-Slavery document.”<sup>550</sup> He conceded that some of the delegates to the Constitutional Convention “desired compromises that would favor the interests of slavery,”<sup>551</sup> but that most of the delegates, including “a large number of slaveholders—were earnest antislavery men, and intended to frame a Constitution that would finally secure the equality of *all* the people—all the persons if you please—in these States.”<sup>552</sup> The records of the Constitutional Convention show that most of Douglass’s historical arguments were simply wrong.<sup>553</sup> But, this new set of arguments was mostly about practical politics, political rhetoric, and political strategy, rather than intellectual theory or solid constitutional history. Douglass found it convenient to wrap patriotism and reverence for the Founding Fathers around the antislavery movement.

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543. *Id.* at 349. The debate in Syracuse is found at DOUGLASS, *Is The Constitution Pro-Slavery?*, *supra* note 405, at 217–35.

544. DOUGLASS, *Antislavery Principles And Antislavery Acts*, *supra* note 506, at 349.

545. *Id.*

546. *Id.* at 349–50.

547. *Id.* at 349.

548. *Id.* at 350.

549. *Id.*

550. *Id.* at 349.

551. *Id.*

552. *Id.*

553. FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 38, at 3–45. Similarly, the historical evidence – known then as well as today – is that most of the slave-owners at the Convention were emphatically *not* “earnest antislavery men,” as Douglass disingenuously asserted. *Contra* DOUGLASS, *Antislavery Principles And Antislavery Acts*, *supra* note 506, at 349.

Two months later, he gave his most famous public address, “What to the Slave is the Fourth of July?”<sup>554</sup> to an audience of between 500 and 600 people at Rochester’s Corinthian Hall.<sup>555</sup> This was a powerful indictment of America that in some ways reflected the Garrisonian views Douglass had recently rejected. One could easily imagine Garrison attacking the Declaration of Independence just as he did the Constitution. But, Douglass was no longer a Garrisonian. While he argued that, as a black man and a former slave, the Declaration did not apply to him,<sup>556</sup> he nevertheless spoke of the document and the Founders with respect.<sup>557</sup> He also attributed to them anti-slavery sentiments.<sup>558</sup> “With them, justice, liberty and humanity were ‘final;’ not slavery and oppression.”<sup>559</sup> Rather than Garrisonian invective, he stressed the irony of the Founding and the continued presence of slavery in America.<sup>560</sup> He praised Washington, who “could not die till he had broken the chains of his slaves,”<sup>561</sup> but then noted that the nation Washington created “is built up by the price of human blood,” and ironically “the traders in the bodies and souls of men, shout – ‘We have Washington to *our father*.’”<sup>562</sup> Thus, he asserted that the celebration of Independence and American liberty “are not enjoyed in common.”<sup>563</sup> Blacks did not partake in the “rich inheritance of justice, liberty, prosperity and independence” the Founders gave white Americans.<sup>564</sup> “This Fourth [of] July is *yours*, not *mine*. *You* may re-

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554. DOUGLASS, *What To The Slaves Is The Fourth Of July?*, *supra* note 507, at 359.

555. *What to the Slave is the Fourth of July?*, AM. CLASS (last visited Jan. 4, 2015), <http://americainclass.org/what-to-the-slave-is-the-fourth-of-july/>.

556. DOUGLASS, *What To The Slaves Is The Fourth Of July?*, *supra* note 507, at 367–71.

557. *Id.* at 364.

558. *Id.* at 365.

559. *Id.* (emphasis added). Historically, of course, this was not entirely correct. Many in Congress in 1776 were strong supporters of slavery and the main author of the Declaration, Thomas Jefferson, did virtually nothing in his personal or public life to harm slavery or rein it in. See FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 38, at 193–270.

560. DOUGLASS, *What To The Slaves Is The Fourth Of July?*, *supra* note 507, at 368.

561. *Id.* at 367. This was a reference to the fact that Washington emancipated all of his slaves in his will, even though they would not get their freedom until his widow, Martha, also died. FRITZ HIRSCHFELD, *GEORGE WASHINGTON AND SLAVERY: A DOCUMENTARY PORTRAYAL* 209–23 (1997). For an online copy of Washington’s will with annotations, see *George Washington’s 1799 Will and Testament*, GEO. WASH.’S MOUNT VERNON, <http://www.mountvernon.org/the-estate-gardens/the-tombs/george-washingtons-1799-will/> (last visited Feb. 26, 2016).

562. DOUGLASS, *What To The Slaves Is The Fourth Of July?*, *supra* note 507, at 367.

563. *Id.* at 368.

564. *Id.*

joice, *I must mourn.*"<sup>565</sup> He noted the "mockery and sacrilegious irony" of "drag[ging] a man in fetters into the grand illuminated temple of liberty."<sup>566</sup> He excoriated the Fugitive Slave Act, which "makes MERCY TO THEM, A CRIME."<sup>567</sup>

But, no longer a Garrisonian, Douglass did not use this speech to attack the Constitution or the Founders. Rather, he declared, "I differ from those who charge this baseness on the framers of the Constitution of the United States. *It is a slander upon their memory.*"<sup>568</sup> He refused to go into a long discussion of the Constitution, but instead simply endorsed the views of men like Salmon P. Chase, William Goodell, and Gerrit Smith, that the Constitution "*ought to be interpreted*" as "a GLORIOUS LIBERTY DOCUMENT."<sup>569</sup> He pointed out that the words slave, slavery, and slaveholding were not in the Constitution, and he argued that "plain, common-sense rules" should be used to read the Constitution as an antislavery document.<sup>570</sup> This, of course, contrasted with Douglass's speeches for more than a decade in which he had argued that the lack of the word slavery was irrelevant.<sup>571</sup> Douglass finished his constitutional analysis with a narrow linguistic argument: "Now, take the constitution according to its plain reading, and I defy the presentation of a single pro-slavery clause in it. On the other hand it will be found to contain principles and purposes, entirely hostile to the existence of slavery."<sup>572</sup>

Two years earlier, Douglass would have eviscerated such an analysis with withering logic, careful analysis of the plain meaning of the proslavery clauses of the Constitution, and a thorough history of the Constitutional Convention.<sup>573</sup> He would have noted that every political thinker and politician at the founding understood the meaning of such parts of the Constitution as the fugitives from labour clause, the three-fifths clause, and the domestic insurrections clause. In 1852, he could "defy the presentation of a single pro-slavery clause"<sup>574</sup> only by ignoring the history and constitutional development of the United States since 1787, the plain understanding of virtually every constitutional scholar, jurist, and politician since the Constitution was adopted, and his own speeches and writings from the early 1840s to 1851.

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565. *Id.*

566. *Id.*

567. *Id.* at 375.

568. *Id.* at 384.

569. *Id.* at 385.

570. *Id.*

571. For example, in his debate in Syracuse, Douglass dissected the Fugitive Slave Clause and concluded, "the slave is fitly, amply, completely described." DOUGLASS, *Is The Constitution Pro-Slavery?*, *supra* note 405, at 232.

572. DOUGLASS, *What To The Slaves Is The Fourth Of July?*, *supra* note 507, at 386.

573. DOUGLASS, *Is The Constitution Pro-Slavery?*, *supra* note 405, at 232.

574. DOUGLASS, *What To The Slaves Is The Fourth Of July?*, *supra* note 507, at 386.

But Douglass was not interested in history, logic, or law, and he had openly and forthrightly renounced his previous constitutional analysis. He was interested in political action that would undercut the Fugitive Slave Act of 1850 and slavery itself.<sup>575</sup> He wanted a usable constitutional theory to get to his result and was not going to be burdened by either logic or history. He argued that the disunionist position of Garrison “expresses no intelligible principle of action, and throws no new light on the pathway of duty.”<sup>576</sup> Rather, he argued, “it leads to false doctrines, and mischievous results.”<sup>577</sup> He wanted to claim the Constitution as his own and use it for his own purposes. He was, after all, an activist and an agitator, not a lawyer, a judge, or a professor. A year and a half later, he argued that antislavery men “have too easily given up the Constitution to slavery.”<sup>578</sup> Now, Douglass conceded that the Founders might have “introduced a clause” into the Constitution “for the purpose to return the bondman,” but such a clause “transcended their authority,” because no one had the right to make anyone else a slave.<sup>579</sup> This, of course, was not an argument about the Constitution or history, but rather an attempt to defeat the proslavery Constitution with an appeal to natural law and natural justice.

The logic of Douglass’s constitutionalism now rested on notions of fundamental justice – what some politicians called a higher law – and what modern lawyers might call human rights law. As his new constitutional theory matured, he opposed “any construction” of the Constitution “applying its language to mean ‘slaves,’ suggesting that the phraseology of that instrument should be used instead of the words slaves.”<sup>580</sup> The implication here was he could undermine the proslavery clauses of the Constitution by simply refusing to use the word “slave” when talking about the clauses of the Constitution which were associated with slavery. Douglass offered the following rationale for such an approach to the Constitution:

By all rules of construction, where human rights are infringed, or where the general principles of law are departed from, the intent of the law maker must be clearly distinct. Or where an enactment can bear

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575. *Id.* at 375.

576. *The Anti-Slavery Movement: An Address Delivered In Rochester, New York, On 19 March 1855*, reprinted in 3 DOUGLASS, PAPERS SERIES ONE, *supra* note 509, at 42.

577. *Id.*

578. 2 FREDERICK DOUGLASS, *God’s Law Outlawed: An Address Delivered In Manchester, New Hampshire, On 24 January 1854*, reprinted in 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at 459.

579. *Id.*

580. 2 FREDERICK DOUGLASS, *Slavery The Live Issue: Address Delivered In Cincinnati, Ohio, On 11–13 April 1854*, reprinted in 2 DOUGLASS, PAPERS SERIES ONE, *supra* note 324, at 465.

two interpretations, one accomplishing an innocent purpose, and the other a criminal one, it is proper to take the innocent one.<sup>581</sup>

Douglass declared that a “[v]illainous intention should be expressed in villainous language” and since the Founders did not do this “by this interpretation” they “did not mean slavery” in such provisions as the Fugitive Slave Clause or the three-fifths clause.<sup>582</sup>

Such an analysis defied history, the records of the Constitutional Convention, the records of the ratification debates, all constitutional and political development since 1787, and any plain reading of the Constitution.<sup>583</sup> It is hard to imagine how anyone could read the language of the three-fifths clause, the slave trade clause, or the Fugitive Slave Clause and think they referred to anything but slaves. Douglass and other radical antislavery constitutional theorists could do this only by radically and intentionally misreading the Constitution.

Most historians view William Lloyd Garrison as a truly radical abolitionist<sup>584</sup> and certainly the most important radical abolitionist, because he denounced the Constitution and advocated disunion and he was so successful at organizing the AA-SS.<sup>585</sup> But in terms of constitutional analysis, Garrison was almost mainstream. He saw the Constitution as overwhelmingly proslavery, and it is hard to argue that he was wrong. Virtually all antebellum politicians, lawyers, and judges agreed with him that slavery was protected by the Constitution.<sup>586</sup> Such an interpretation had been around since the writing of the Constitution.<sup>587</sup> In urging his state to ratify the Constitution, General Charles Cotesworth Pinckney, who had led the South Carolina delegation at the Convention, argued:

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581. *Id.* It is hard to imagine, however, how anyone could honestly have read the slave trade clause, the Fugitive Slave Clause, and three-fifths clause in a way that did not implicate and help slavery. Their plain meaning was clear, and those activists who argued otherwise, most notably Lysander Spooner, did so by flagrantly ignoring the text and history of the Constitution and purposefully misreading the document. LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 81–88 (1845) (ignoring all contemporary history and all the debates over the Constitution including the notes taken by Madison that the Migration and Importation Clause of Article I, Section 9 of the Constitution was not about the slave trade).

582. DOUGLASS, *Slavery The Live Issue*, *supra* note 580, at 465–66.

583. See Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1125 (2012).

584. See ROBERT MCGLONE, *JOHN BROWN'S WAR AGAINST SLAVERY* 8–9 (2009). This view of Garrison is strongest regarding the period of time before John Brown's ill-fated attempt to make war on slavery. *Id.*

585. See generally JAMES BREWER STEWART, *WILLIAM LLOYD GARRISON AND THE CHALLENGE OF EMANCIPATION* (1992).

586. See Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *FORDHAM L. REV.* 153, 167–68 (2004).

587. Perea, *supra* note 583.

We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.<sup>588</sup>

Few serious constitutional theorists, lawyers, or judges would subsequently challenge this.

Justice Joseph Story, who came from Massachusetts and thought slavery was morally wrong, found slavery to be a constitutionally protected form of property in his overwhelmingly proslavery decision in *Prigg v. Pennsylvania*.<sup>589</sup> Chief Justice Roger B. Taney's equally proslavery opinion in *Dred Scott v. Sandford* was consistent with the Garrisonian view that the Constitution protected and preserved slavery.<sup>590</sup> Even Justice John McLean, the only antislavery member of the antebellum Court, conceded that the Fugitives from Labour Clause referred to slaves and guaranteed that masters could recover their fugitive slaves.<sup>591</sup> Abraham Lincoln described himself as "naturally antislavery" and said he could "not remember when" he "did not so think, and feel."<sup>592</sup> Nevertheless, in his first inaugural address, he agreed with Garrison, as well as southern proslavery political thinkers, that the national government had no power to interfere with slavery in the South. Thus, he declared: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."<sup>593</sup> Garrison's solution – disunion – was radical, but his analysis of the Constitution as protecting slavery was thoroughly mainstream.

After 1852, Douglass and those he learned from, like Gerrit Smith, Salmon P. Chase, and William Goodell, were the constitutional radicals.<sup>594</sup> They wanted to turn constitutional interpretation on its head, reading the doc-

588. 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 286 (William S. Hein & Co., Inc. 1996, reprint of 1891 ed.).

589. See Finkelman, *Story Telling on the Supreme Court*, *supra* note 291, at 6. See also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

590. 60 U.S. (19 How.) 393, 395 (1857).

591. Finkelman, *supra* note 521, at 528–29, 547. For McLean's circuit court opinions and jury charges, see *Jones v. Van Zandt*, 13 F. Cas. 1040 (C.C.D. Ohio 1843); *Driskell v. Parish*, 7 F. Cas. 1100 (C.C.D. Ohio 1845); *Norris v. Newton*, 18 F. Cas. 322 (C.C.D. Ind. 1850); *Ray v. Donnell*, 20 F. Cas. 325 (C.C.D. Ind. 1849); *Miller v. McQuerry*, 17 F. Cas. 335 (C.C.D. Ohio 1853).

592. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 281 (Roy P. Basler ed., 1953).

593. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262–63 (Roy P. Basler ed., 1953).

594. See WIECEK, *supra* note 36, at 249–75.

ument in ways most lawyers and politicians found absurd.<sup>595</sup> They rejected history, the explicit intentions of the Framers, and the voluminous records of the Convention and the ratification struggle in favor of a constitutional interpretation that was radical and jurisprudentially disconnected from precedent, politics, and history.

But Douglass and these other political abolitionists were not interested in history or “correct” constitutional analysis. They wanted to campaign against slavery while wrapping themselves in the Constitution and praising the Founding Fathers. This proved to be politically shrewd and, to some extent, electorally successful. As early as 1848, some of these men won political office as Free Soilers, Free Democrats, and Liberty Party candidates.<sup>596</sup> Chase, for example, won a seat in the U.S. Senate because a small group of Free Soilers held the balance of power in the Ohio legislature.<sup>597</sup> Starting in 1854, Chase and others moved into the Republican Party, where Douglass would end up a few years later.<sup>598</sup> There, they formed a radical wing of the Party that argued that freedom was “national” and slavery was local. Chase and his colleagues – which ultimately included Lincoln – did not believe they had the constitutional power to end slavery in the states – unlike the more extreme antislavery theorists like Lysander Spooner<sup>599</sup> – but they did believe the national government could withdraw much of its support for slavery by banning it from the territories, repealing the fugitive slave laws, abolishing it in Washington D.C., aggressively suppressing the already prohibited African slave trade, and even considering ending the interstate trade. Once in power in the early 1860s, the Republicans accomplished many of these goals.<sup>600</sup>

## XI. FROM ANTISLAVERY THEORY TO AN ANTISLAVERY NATION

While he was in bondage, Douglass's master correctly warned that education would spoil him as a slave.<sup>601</sup> And indeed, learning to read *had* spoiled Douglass as a slave. So too did Douglass's experience hiring himself out and living in Baltimore.<sup>602</sup> Once he tasted a little self-determination, he wanted more.<sup>603</sup> Thus, knowledge combined with experience, brought Douglass to freedom. Similarly, the knowledge he gained by living in Great

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595. *See id.* at 254–55.

596. JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 115–23 (1995).

597. *Id.* Before the adoption of the 17th Amendment the state legislatures elected U.S. Senators. U.S. CONST. amend. XVII.

598. NIVEN, *supra* note 596, at 158.

599. SPOONER, *supra* note 581, at 57.

600. Much of this Republican legislation is discussed in MASUR, *supra* note 64, at 13–100; Finkelman, *supra* note 526, at 355; and Paul Finkelman, *Lincoln v. The Proslavery Constitution: How a Railroad Lawyer's Constitutional Theory Made Him the Great Emancipator*, 47 ST. MARY'S L.J. 63, 102–08 (2016).

601. DOUGLASS, NARRATIVE, *supra* note 28, at 29.

602. *Id.* at 26–27.

603. *See id.* at 27.



Britain strengthened Douglass's analysis of the Constitution, but the freedom he found living in Great Britain also undermined his commitment to Garrisonian theory and its lack of direct action. Meanwhile, actually gaining his legal freedom while in Britain made it impossible for him to remain a patient moral and intellectual purist. In England, he had seen politics successfully used to fight bondage and injustice. He brought that knowledge back to the United States.<sup>604</sup>

From 1851 until his death nearly a half century later, Douglass was ready to use the Constitution – with all its imperfections – to fight slavery and racism. Thus, he was transformed in a decade or so from a Garrisonian disunionist to a radical antislavery constitutionalist. But, by the end of the decade, he had abandoned the impractical antislavery constitutionalism of Gerrit Smith and his cohorts for the serious political activism of Salmon P. Chase, William H. Seward, and eventually Abraham Lincoln. Douglass was thus transformed into a Republican activist and a Lincoln Unionist.

Lincoln's election, the Civil War, and the Emancipation Proclamation turned Douglass into a full-fledged Unionist, recruiting northern blacks – including two of his sons – to fight to preserve the national government and save the very Constitution he had once denounced.<sup>605</sup> As a recruiter for black troops, Douglass was involved in the practical process of dismantling slavery. As a free man and a political activist, he agitated for the adoption of the Civil War Amendments, to end slavery, make blacks citizens, and give them equal access with whites to the ballot box. Thus, Douglass became a committed Constitutionalist.

After 1868, Douglass – who was now “citizen” Douglass under the Fourteenth Amendment – no longer had to debate the meaning of the Constitution, or its theory. The new amendments answered those questions. After the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Constitution had secured the blessings of liberty to blacks on the same basis as whites. The issues after that were about political strategy and the best way to implement the remade Constitution. He spent the last half of his life railing against those who refused to respect, accept, or enforce the Amendments.

Douglass's constitutional journey was long. He started as an object of the Constitution, became a Garrisonian disunionist, a radical antislavery constitutionalist, a loyal unionist, a Republican Party activist, and eventually a solid supporter of the new antislavery Constitution. He ended his career as a public servant under the Constitution. His first and last official positions were in the diplomatic corps – as a U.S. Commissioner to Santo Domingo in 1871 and as the U.S. minister to Haiti from 1889 to 1891.<sup>606</sup> The former slave – the former chattel under the Constitution who was once unable to obtain a passport – ended his public career as an officer of the federal agency that issued such documents, and in possession of a diplomatic passport. In

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604. OAKES, *supra* note 1, at 15.

605. BUCCOLA, *supra* note 512, at 3.

606. *Id.* at 3–4; BARNES, REFORMER AND STATESMAN, *supra* note 4, at 133.

accomplishing this long transition and transformation, Douglass was never tied to a historical or linguistic understanding of the Constitution. In the 1850s, he jettisoned the intellectually honest and historically accurate Garrisonian critique of the Constitution – what Garrison aptly called a Covenant with Death and an Agreement in Hell – for a more pragmatic reading of the Constitution. Douglass wanted a usable past that would serve his political agenda. As he argued in the *North Star* when he first announced his rethinking of the Constitution: “[I]t is the first duty of every American citizen, whose conscience permits to do so, [was] to use his *political* and well as his *moral* power” to “overthrow” slavery.<sup>607</sup> He was later willing to compromise on policies to support politicians who were not perfect, who might even have been unsympathetic to racial equality, in order to further his antislavery agenda. He recruited troops to preserve the Union, even though slavery was legal and constitutionally protected in those states which had not seceded. Eventually, the Republican Party and the national government caught up with Douglass on issues of complete emancipation, legal equality, and black suffrage. In the space of ten years, Douglass saw slavery abolished, former slaves made into citizens, civil rights laws passed to protect their new status, and former slaves serving in Congress and in other public positions. Thus, from the time he escaped from slavery until he went to Washington D.C. to deliver New York’s electoral votes for the reelection of President Ulysses S. Grant, Douglass constantly remade his own constitutional views, and in the process helped remake the Constitution itself.

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607. Douglass, *Change of Opinion Announced*, *supra* note 96, at 156.



