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Plain Reading the Constitution: Frederick Douglass, Textualism, and the Pursuit of Racial Justice

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ABSTRACT

In the legal imagination, Frederick Douglass is often viewed as a "constitutional utopian" for his efforts to salvage the prewar Constitution with an antislavery construction. Rejecting the views of both the Taney Court and the followers of William Lloyd Garrison, who saw the Constitution as "a covenant with death, and an agreement with hell," Douglass and other political abolitionists put forward a redemptive view of the Constitution rooted in both the letter and the spirit of the document. For Douglass, the fierce contest over constitutional meaning suggested the amenability of the Constitution's "plain meaning" to abolition and the importance of wresting political power, and thus interpretive power, from pro-slavery forces. The long-term potency of Douglass's adaptive, literalist, and purposive method suggests the importance of his constitutional interpretation for formulating a racial justice jurisprudence today.

The textualism practiced by the current Supreme Court, however, poses multiple challenges to the pursuit of that same goal. The questions that occupied Douglass's day—whether and how to embrace a document tied to foundational injustice—have come to swirl not only around Douglass's legacy but also around contemporary questions of constitutional theory, particularly pertaining to the relation of the text and textual interpretation to racial justice. In this paper, I will argue that Douglass's textualism offers progressive constitutionalists a theory of interpretation that meets originalism on many of its own terms but also insists on a radically revised conception of constitutional meaning, one that centers racial justice first and foremost.

KEYWORDS:
Constitution, Supreme Court, Douglass, racial justice

Plain Reading the Constitution: Frederick Douglass, Textualism, and the Pursuit of Racial Justice

The project of racial justice finds few friends in today's Supreme Court. Equal protection, since its heyday in *Brown v. Board of Education* (U.S. 1954), has been winnowed down and turned on its head to serve claims of "reverse racism" in the name of "color-blind" constitutionalism, a trend that has dismantled a number of civil-rights-era legal victories.[1] At the same time, the rise of originalism prioritizes a past defined, in many ways, by the systematic subordination of Black Americans.[2] With the Court's current conservative majority, many scholars and activists committed to racial justice have turned their attention to state and district courts, disabused of the notion that racial justice might issue from the highest court in the near, or even distant, future.[3]

In the face of these formidable hurdles, this paper turns to a historical moment in which the prospect of racially just constitutionalism appeared far worse in order to urge continued contestation over constitutional meaning. In the mid-nineteenth century, in the decades in which ideological battles raged over whether the Constitution stood as a pro-slavery or antislavery document, a group of abolitionists—the radical antislavery constitutionalists—demonstrated that

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[1] On the retraction and inversion of equal protection jurisprudence, see, respectively, Kenji Yoshino, "The New Equal Protection," *Harvard Law Review* 124, no. 3 (2011): 747–803; Reva B Siegel, "Equality Divided," *Harvard Law Review* 127, no. 1 (2013): 1–94. Lincoln Caplan has argued that "one of Roberts's major projects as Chief Justice" has been "to make the law color-blind so that the country will become color-blind." See Lincoln Caplan, "Thurgood Marshall and the Need for Affirmative Action," *New Yorker*, December 9, 2015, https://www.newyorker.com/news/news-desk/thurgood-marshall-and-the-need-for-affirmative-action. Jeffrey Toobin has similarly posited that "Roberts is clearly moved by the subject of race … His concerns reflect the views that prevailed at the Reagan White House: that the government should ignore historical or even continuing inequities and never recognize or reward individuals on the basis of race." See Jeffrey Toobin, "No More Mr. Nice Guy," *New Yorker*, May 18, 2009, https://www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy. This feature of the Roberts Court, however, is a legacy of the Rehnquist Court; for more on "color-blind" constitutionalism after the Warren Court, see Eric Foner, "The Supreme Court and the History of Reconstruction—and Vice-Versa," *Columbia Law Review* 112, no. 7 (2012): 1598–1600. For an early critique of color-blind constitutionalism, see Neil Gotanda, "A Critique of 'Our Constitution Is Color-Blind,'" *Stanford Law Review* 44, no. 1 (1991): 1–68.

[2] On the connection of originalism and racism, see Jamal Greene, "Originalism's Race Problem," *Denver University Law Review* 88, no. 3 (2011): 517–22.

[3] Other proposals include court-packing and the abolition of judicial review. See, for examples, Jamelle Bouie, "Mad About Kavanaugh and Gorsuch? The Best Way to Get Even Is to Pack the Court," *New York Times*, September 17, 2019, https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html; Samuel Moyn, "The Court Is Not Your Friend," *Dissent* 67, no. 1 (January 9, 2020): 70–75, doi:10.1353/dss.2020.0013.

interpretive doctrine could be wrested from those representing the status quo.[4] Most prominent among them today, Frederick Douglass insisted on a form of textualism that leveraged a "plain reading" of the Constitution on behalf of racial justice. While textualism and originalism are typically viewed as allied interpretive methods, Douglass's turn to plain reading laid claim to a common-sense that emerged at the intersection of text and public—outsider publics in particular—troubling originalism's fixation and constraint theses. At the same time, Douglass's textualism meets originalism on many of its own terms, offering to confront its gaining orthodoxy in novel and potentially disruptive ways.

This paper begins with an overview of the ideological and methodological challenges—color-blind constitutionalism and originalism, respectively—that today's Court's poses to racial justice, and juxtaposes these trends with the strains of racially progressive constitutionalism that remain live in the twenty-first century. It then turns to the historical analogue offered by the mid-nineteenth century, and the ways in which the radical antislavery constitutionalists, Frederick Douglass in particular, developed a textualist hermeneutic that served as a powerful form of popular constitutionalism in the antebellum period—one that has been largely misappropriated, most clearly by Justice Clarence Thomas, today. After endeavoring to recover Douglass's "plain reading" from Thomas's own, and suggesting the ways in which a reworked textualism might prove as compelling to the public as originalism has, the paper closes with a brief return to Douglass in order to reinforce the urgency of his interpretive project.

ORIGINALISM VERSUS PROGRESSIVE CONSTITUTIONALISM: A LOSING BATTLE?

[4] William M. Wiecek, "Radical Constitutional Antislavery: The Imagined Past, the Remembered Future," in *The Sources of Anti-Slavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), 249–75.

The Roberts Court's commitment to color-blind constitutionalism has been paramount. In *Parents Involved in Community Schools v. Seattle School District* (U.S. 2007), the Court held that voluntary integration programs in public school districts in Seattle, Washington, and Jefferson County, Kentucky, violated the equal protection clause of the Fourteenth Amendment; in *Shelby County v. Holder* (U.S. 2013), it struck down a key provision of the Voting Rights Act of 1965; and in *Schuette v. Coalition to Defend Affirmative Action* (U.S. 2014), it upheld a Michigan state constitutional ban on the consideration of race in university admissions decisions. Chief Justice John Roberts's conclusion to the Court's plurality decision in *Parents Involved* represents the ruling logic of this regime's larger approach to racial justice: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[5] This statement represents the "anticlassification" doctrine that predominates within the Roberts Court's equal protection jurisprudence, much as Justice Sonia Sotomayor's rebuttal to Roberts in her *Schuette* dissent—"The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination"[6]—represents the "antisubordination" approach that the Court's majority has come to disregard.[7] Beginning with the Burger Court's decisions in *Washington v. Davis* (U.S. 1976) and *Personnel Administrator of Massachusetts v. Feeney* (U.S. 1979), which overturned disparate impact as a rationale for strict scrutiny, the Supreme Court has come to limit its equal protection jurisprudence to claims of explicit discrimination, with the confounding result that the only facial "discrimination" left on the books takes the form of

[5] Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 748 (2007).
[6] Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).
[7] For more on anticlassification versus antisubordination, see Ruth Colker, "Anti-Subordination Above All: Sex, Race, and Equal Protection," *New York University Law Review* 61, no. 6 (1986): 1003–66; Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review* 43, no. 6 (1991): 1296–9; Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown," *Harvard Law Review* 117, no. 5 (2004): 1470–1547.

affirmative action—laws, policies, and practices themselves designed to respond to legacy discrimination.[8] As the Court strikes down or whittles away the forms of racial classification that enable legislatures to confront racial subordination in the first place (much as its holding on Section 4 of the Voting Rights Act, enabling the federal government to identify problem jurisdictions, renders Section 5 effectively null), it succeeds in leaving that racial subordination systemically intact. "For this reason," as Kenji Yoshino notes, "an equal protection jurisprudence that turns formalistically on facial discrimination will, from an antisubordination perspective, get it exactly backward."[9]

But it is not only the Court's anticlassification doctrine that has distorted racial justice jurisprudence. Methodologically, the Court's turn to originalism also seems to bode ill for racially progressive constitutional interpretation. Once viewed as an intellectually inert approach, particularly after originalist Robert Bork's failed nomination to the Supreme Court, originalism has flourished on the Court and in public discourse.[10] This increasing popularity worries advocates of racial justice not least because originalism maps onto Reagan-era conservative political goals.[11] But more fundamentally, the Constitution's original meaning presupposes a kind of racially regressive logic in a nation in which racial slavery was legal until the ratification of the Thirteenth Amendment in 1865 and racial segregation was constitutional until the Supreme Court decided *Brown v. Board* in 1954. As Jamal Greene writes of originalism's "race problem," "For me, as an African-American, a narrative of restoration is deeply alienating; what America *has been* is hostile to my personhood and denies my membership in its political

[8] Yoshino, "The New Equal Protection," 763–68. See also Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49, no. 5 (1997): 1129–48.
[9] Yoshino, "The New Equal Protection," 767.
[10] For the popular appeal of originalism, see Jamal Greene, "Selling Originalism," *Georgetown Law Journal* 97 (2009): 657–721.
[11] Robert Post and Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," *Fordham Law Review* 75, no. 2 (2006): 545–74.

community. The only way I can call this Constitution my own is to view it through a lens of redemption, the lens that originalism rejects."[12] This problem is especially rooted in originalism's "fixation thesis," or the notion that the Constitution's meaning was fixed in time at the moment of its adoption, which requires a backward-facing orientation that in many ways precludes racially progressive constitutionalism.[13]

The starkest form of this regressive logic in the Court's history lies in *Dred Scott v. Sandford* (1857), which some scholars have argued lays a template for modern originalism.[14] Interpreting the Constitution "according to its true intent and meaning when it was adopted,"[15] Chief Justice Roger B. Taney argued that dominant views at the time of the Constitution's ratification determined subsequent political membership; as a result, Taney's account excludes slaves, former slaves, and their descendants from federal standing and national citizenship:

> In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument…. They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the

[12] Greene, "Originalism's Race Problem," 521.
[13] For originalism's "fixation thesis," see Lawrence B. Solum, "District of Columbia v. Heller and Originalism," *Northwestern University Law Review* 103, no. 2 (2009): 944–46.
[14] See, for instance, Harry Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Regnery Gateway, 1994), 13–28; Eric Foner, "Blacks and the US Constitution," *New Left Review* 183 (1990): 68.
[15] Dred Scott v. Sandford, 60 U.S. 393, 405 (1857). This rationale appears to introduce both original intent and original public meaning; whereas original intent is generally understood to refer to the intentions of the Constitution's framers, original meaning locates public understanding at the time of ratification as authoritative, as ascertained by dictionaries and other prominent contemporary textual documents. See Keith E Whittington, "Originalism: A Critical Introduction," *Fordham Law Review* 82, no. 2 (2013): 378–82; Randy E. Barnett, "An Originalism for Nonoriginalists," *Loyola Law Review* 45, no. 4 (1999): 620–21.

> white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect…[16]

Part of what makes this opinion so racially regressive is the fact that it leverages a narrative of historical subjugation in order to negate the possibility of racial uplift or emancipation at a moment of fierce abolitionist activity. Taney's insistence on the fixity of the historical moment in which the Constitution was ratified enables him to combat the racially progressive reading that had become increasingly visible in his day.

Although the Fourteenth Amendment served to reverse Taney's decision, the specter of its racially regressive potential continues to haunt originalism today. Even as the focus of originalist discourse has shifted from original intent to original public meaning, Taney's opinion suggests that either form of originalist reasoning, both of which appear in *Dred Scott*, only reinforces the racist register of the original Constitution.[17] This likelihood increases considering the extent to which originalists prioritize the original meaning of the 1787 founding moment over that of other "constitutional moments," including the "second founding" entailed by the Reconstruction Amendments.[18]

In addition to the racial implications of originalism's fixation thesis, moreover, its second foundational principle, the constraint thesis—or the notion "that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most

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[16] Dred Scott v. Sandford, 60 U.S. at 407.

[17] As Keith Whittington details, the shift from original intent to original public meaning among originalists arose in response to interpretive difficulties that accompanied the effort to ascertain the unity and authority of the constitutional framers' intentions. See Whittington, "Originalism: A Critical Introduction," 378–82.

[18] For more on the "constitutional moments" of the founding, Reconstruction, and the New Deal, see Bruce A. Ackerman, *We the People: Foundations* (Harvard University Press, 1993). On the revisionary and potentially revolutionary work of the Reconstruction Amendments, see Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," *Harvard Law Review* 101, no. 1 (1987): 1–5; Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (W. W. Norton & Company, 2019).

circumstances"[19]—poses additional problems from a racial justice standpoint.[20] Although historical meaning has long informed constitutional interpretation, modern originalism is unique in deploying original meaning as the "guiding principle" and constitutive limit to constitutional interpretation, often situated in contrast to the malleability of "living constitutionalism."[21] The view of original meaning as determinative serves, in Greene's words, "to deny that unassimilated norms hold legitimate claims to legal authority."[22] This quality of originalism makes it "especially daunting for [a minority community] whose relative discreteness and insularity leads and has historically led it both to be excluded from and to resist normative assimilation."[23] Institutional racial justice remains a largely unassimilated norm of legal interpretation, despite discrete moments of promise, such as the period prior to the narrowing of Fourteenth Amendment jurisprudence in the *Slaughter-House Cases* (1873), for instance, or the time in between the passage of the Civil Rights Act of 1964 and the development of "intent doctrine" in *Davis*. This "jurispathic" quality of the constraint thesis, along with the historical context summoned by the fixation thesis, would seem to preclude racial justice–informed constitutional interpretation from the outset.[24]

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[19] Whittington, "Originalism: A Critical Introduction," 378.

[20] Solum refers to the constraint thesis as the "contribution thesis," a term that I have amended for clarity's sake; see Solum, "District of Columbia v. Heller and Originalism," 954. As Whittington points out, the fixation thesis and the constraint thesis both center modern originalism, but the question of the justification for and extent of constraint continues to drive internal dispute; see Whittington, "Originalism: A Critical Introduction," 378.

[21] As Justice Antonin Scalia has argued, "Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle… I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997), 44–45.

[22] Greene, "Originalism's Race Problem," 522. As Whittington points out, originalists might allow for discretion when original meaning is not "The crucial point of disagreement with nonoriginalists must be with whether courts may also exercise discretion to construct doctrine that does conflict with the original meaning of the Constitution." Whittington, "Originalism: A Critical Introduction," 408.

[23] Greene, "Originalism's Race Problem," 522. Greene to some extent collapses the fixation thesis and the constraint thesis in his focus on the determinative quality of originalist interpretation.

[24] Ibid. For a critique of the "jurispathic," as opposed to "jurisgenerative," quality of courts, see Robert M Cover, "Nomos and Narrative," *Harvard Law Review* 97, no. 4 (1983): 40–44, 53–54.

And yet, despite the Court's turn to both color-blind constitutionalism and originalism, progressive faith in the Constitution persists.[25] Erwin Chemerinsky, for instance, has recently advocated for a progressive reading of the Constitution rooted in the principles outlined in the Preamble. "If the Preamble is read carefully and taken seriously," he writes, "basic constitutional values can be found within it that should guide the interpretation of the Constitution."[26] Chemerinsky's purposive textualist reading of the Constitution valorizes the Preamble because it serves as the statement of the Constitution's fundamental values that should be seen to enliven each subsequent article and amendment. Firmly repudiating originalism, Chemerinsky nevertheless turns to what he takes as the core of the original text in order to justify reversing *Shelby County*, declaring the death penalty unconstitutional, and recognizing the constitutional right to "minimum entitlements," including food, shelter, health care, and a quality education.[27]

More notable is the constitutional fidelity that persists, according to Dorothy E. Roberts, among generations of Black Americans. As she has argued, "In each historical period, black Americans have been faithful to a Constitution that looked very different from the version espoused by contemporary courts."[28] This faith represents an "instrumental fidelity," one that locates in the Constitution the prospect of equal treatment not for any inherent feature of the document but rather in anticipation of successful political contestation over its meaning.[29] Roberts argues that this prospect follows not from the text of the Constitution but rather "from

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[25] See, for one recent example, Andrea Scoseria Katz, "The Lost Promise of Progressive Formalism," *Texas Law Review* 99, no. 4 (2021): 679–742.
[26] Erwin Chemerinsky, *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* (Picador, 2018), 57.
[27] Ibid., at 97–105, 160–64, 221–30. For other scholars who have turned to the Preamble, see, for examples, Ian Harris, "Professor Dworkin, the American Constitution and a Third Way," *Cambridge Law Journal* 57, no. 2 (1998): 284–300; Eric M. Axler, "The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights," *Seton Hall Legislative Journal* 24, no. 2 (2000): 431–72.
[28] Dorothy E. Roberts, "The Meaning of Blacks' Fidelity to the Constitution," *Fordham Law Review* 65, no. 4 (1997): 1761.
[29] Ibid., at 1763.

the belief in oppressed people's determination to be free."[30] Implicitly, however, it also stems from the core principles that govern the Constitution—and the failure to live up to them that "makes a mockery of the ideals of equality, liberty, and democracy."[31] Indeed, Black Americans "have remained faithful to the Constitution in the struggle for citizenship by relentlessly demanding that its interpretation live up to its highest principles and follow its strictest requirements."[32] Pointing to the document's central principles and the structural features that animate them, Roberts suggests that the Constitution's text, when properly interpreted, does indeed contain the seeds of racial justice. Consequently, hers might be seen as a textual instrumentalism, a mirror-image of Chemerinsky's purposive textualism. The thread that connects the two is the assumption that the Constitution contains a racially progressive meaning if it is read faithfully—"carefully" and "seriously," according to its "highest principles" and "strictest requirements"—and with regard to the values it identifies as well as the structure by which it elevates those values.

In this way, the differences between modern originalism, which prioritizes historical fixity and judicial constraint, and this form of progressive constitutionalism, which closely reads the Constitution's structure and operative principles—map onto those between strict construction and construction. This debate, of course, tracks back to the early nineteenth century and the disputed ambit of federal powers versus those of the states. In the landmark case *Gibbons v. Ogden* (1824), "strict construction" represented the states' interest in reserving all those rights not expressly delineated by the Constitution; Chief Justice John Marshall's conception of

[30] Ibid.
[31] Ibid., at 1765.
[32] Ibid., at 1768.

construction, conversely, upheld the power of the federal government to regulate commerce.[33] As elaborated in his dissent in *Ogden v. Saunders* (1827), Marshall affirmed "that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended."[34] Marshall's insistence on "general" use and received meaning bespeak a fidelity to the text as a purveyor of broad and, to a certain extent, flexible, meaning, as opposed to the narrow and fixed meaning of strict construction.

At the same time, Justice Antonin Scalia, in many ways responsible for reorienting the Supreme Court toward textualism, also troubled the conflation of his brand of textualist originalism with strict construction.[35] In his view, the Constitution "should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[36] Most significantly, Scalia's remark drives a wedge between originalism and "reasonable" or fair-meaning textualism that offers a fundamentally different orientation toward the racial injustices of the past and present. That is not to suggest that his "reasonable" construction necessarily caters to racial justice; to the contrary, in Scalia's hands, this reading has come to underpin the Court's "color-blind" priorities.[37] But its resonance with Marshall's view of construction suggests that the textualism behind the Court's originalism today might remain open to a racially progressive reading, despite such extensive evidence to the contrary.[38]

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[33] Gibbons v. Ogden, 22 U.S. 1, 188 (1824). For more on the context of "strict construction" in this case, see Bernadette Meyler, "Between the States and the Signers: The Politics of the Declaration of Independence before the Civil War," *Southern California Law Review* 89 (2016): 559–63.
[34] Ogden v. Saunders, 25 U.S. 213, 332 (1827) (Marshall, C.J., dissenting).
[35] For more on Scalia's role in introducing a new textualism to the Court, see Jesse D H Snyder, "How Textualism Has Changed the Conversation in the Supreme Court," *University of Baltimore Law Review* 48, no. 3 (2019): 413–34.
[36] Scalia, *A Matter of Interpretation*, 23.
[37] Post and Siegel, "Originalism as a Political Practice: The Right's Living Constitution," 565.
[38] Victoria Nourse has argued that the Court's increasingly grammarian textualism has renounced broad purposive readings in constitutional and statutory opinions. See Victoria Nourse, "Textualism 3.0: Statutory Interpretation after

Contested constitutional interpretation in the mid-nineteenth century provides a historical analogue that should alert us to this possibility. The mid-nineteenth century—the context in which Taney's judgment in *Dred Scott* underpinned an explicitly anti-Black reading of the Constitution—also hosted an alternative, racially egalitarian form of constitutional interpretation advocated by the radical antislavery constitutionalists. Frederick Douglass's "plain reading" textualism, specifically, and his exhortations against constructions imposed upon the Constitution speak to the three features of modern originalism that Jamal Greene argues has made it popular among the lay public: its seemingly objective and elegant simplicity, its populist and anti-elitist (and anti-lawyer) ethos, and its appeal to nationalism.[39] What Douglass's textualism offers the progressive constitutionalist today is a form of interpretation that mirrors these features of originalism while also insisting on a radically revised conception of constitutional meaning that centers racial justice first and foremost.

A Textualism for Liberty and Justice: Douglass and the Radical Abolitionists

Frederick Douglass was one of the nineteenth century's most prominent writers and powerful orators, author of the canonical *Narrative of the Life of Frederick Douglass, an American Slave* (1845) and central architect of the abolitionist cause. Among literary critics, increasingly, he is

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Justice Scalia," *Alabama Law Review* 70, no. 3 (2019): 667–86. Snyder, however, has suggested that textualism has and can serve progressive ends. See Snyder, "How Textualism Has Changed the Conversation in the Supreme Court," 416.

[39] Greene, "Selling Originalism," 708–14. For Douglass's use of "plain reading," see Frederick Douglass, "The Meaning of July Fourth for the Negro, Speech at Rochester, New York, July 5, 1852," in *Frederick Douglass: Selected Speeches and Writings*, ed. Philip Foner and Yuval Taylor (Chicago Review Press, 1999), 188–206; Frederick Douglass, "The Constitution of the United States: Is It Pro-Slavery or Antislavery? Speech Delivered in Glasgow, Scotland, March 26, 1860," in *Frederick Douglass: Selected Speeches and Writings*, ed. Philip Foner and Yuval Taylor (Chicago Review Press, 1999), 379–90. For Douglass's charges of imposed construction, see Frederick Douglass, "The Dred Scott Decision, Speech Delivered before American Anti-Slavery Society, New York, May 14, 1857," in *Frederick Douglass: Selected Speeches and Writings*, ed. Philip Foner and Yuval Taylor (Chicago Review Press, 1999), 357.

better renowned for his second autobiography, *My Bondage and My Freedom*, published ten years after his *Narrative*, in which he reframed his life story based on his personal and political transformations during that decade.[40] Most notable from a political standpoint was his break with the white abolitionist William Lloyd Garrison and his conversion from Garrisonian abolitionism—which took the Constitution as a proslavery document and disavowed the Union (and political participation within it) as an emanation from a fundamentally corrupt contract—to radical political abolitionism, which read the Constitution as an antislavery, and therefore fundamentally redeemable, political instrument.[41] Remarkable for their claim to re-read constitutional meaning against the grain of popular opinion and Supreme Court precedent, the radical abolitionists put forward a view of the Constitution rooted in both the letter and spirit of the document. Douglass's textualism in particular came to be animated by multiple sources of authority—natural law, common law, *stare decisis*, the Preamble, and the Declaration of Independence—and by a sense of the malleability resting behind the text, a result of the power disputes that had inflected its framing and would always shape its interpretation. For Douglass, the fierce contestation over constitutional meaning suggested both the amenability of the black-letter Constitution to abolition and the importance of wresting political power—and interpretive power—from pro-slavery forces. "I have much confidence in the instincts of the slaveholders," he noted in 1860. "They see that the Constitution will afford slavery no protection when it shall

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[40] Hoang Gia Phan, *Bonds of Citizenship: Law and the Labors of Emancipation* (New York University Press, 2013), 145–46.

[41] See, among many accounts, Philip S. Foner, *Frederick Douglass: A Biography* (Citadel Press, 1964), 136–54; Waldo E. Martin, Jr., *The Mind of Frederick Douglass* (University of North Carolina Press, 1984), 31–40; David W. Blight, *Frederick Douglass' Civil War: Keeping Faith in Jubilee* (Louisiana State University Press, 1989), 30–35; T. Gregory Garvey, "Frederick Douglass's Change of Opinion on the U.S. Constitution: Abolitionism and the 'Elements of Moral Power,'" *ATQ* 9, no. 3 (1995): 229–43; Gregg D. Crane, "Cosmopolitan Constitutionalism: Emerson and Douglass," in *Race, Citizenship, and Law in American Literature* (Cambridge University Press, 2002), 104–30; Jason Frank, "Staging Dissensus: Frederick Douglass and 'We the People,'" in *Constituent Moments: Enacting the People in Postrevolutionary America* (Duke University Press, 2010), 209–36; Phan, *Bonds of Citizenship*.

cease to be administered by slaveholders. They see, moreover, that if there is once a will in the people of America to abolish slavery, there is no word, no syllable in the Constitution to forbid that result."[42] Reading the law for the ethical and political imperatives that resulted from its "plain meaning," Douglass's practice of plain reading was a flexible, literal, and purposive textualism that suggests the importance of his constitutional interpretation today.

The radical antislavery constitutionalists relied on a number of textual authorities. By way of John Locke, they highlighted the priority of such natural rights as liberty, property, and security from oppression, which they took to inform and take precedence over positive law.[43] From the English common law, they drew on such precedent as *Somerset v. Stewart* (1772), which held that slavery in England was not supported by the common law, and anti-repugnancy provisions in colonial charters, which American abolitionists interpreted as antislavery doctrine.[44] From American precedent, they surfaced Marshall's interpretive principle in *United States v. Fisher* (1805): "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."[45] If support for slavery did not appear "with irresistible clearness" in the Constitution, its depredations could not be supported by law or equity. And indeed, the radical antislavery constitutionalists read the omission of the words "slave" and "slavery" in the document as a crucial omission.

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[42] Douglass, "The Constitution of the United States," 388.
[43] Wiecek, "Radical Constitutional Antislavery," 259–61. For more on the place of natural rights in the American constitutional tradition, and in particular the reworking of Locke in the American prerevolutionary context, see Dan Edelstein, "Natural Constitutionalism and American Rights," in *On the Spirit of Rights* (University of Chicago Press, 2019), 143–71.
[44] Wiecek, "Radical Constitutional Antislavery," 261–62.
[45] United States v. Fisher, 6 U.S. 358, 390 (1805).

Lysander Spooner's *The Unconstitutionality of Slavery* (1845) exemplifies this approach. Following the constitutional construction outlined by Marshall in *Ogden*—"that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended"[46]—Spooner identified a number of rules for constitutional interpretation: words must be given "meaning appropriate to the subject matter of the instrument itself," in accordance with the consent of all parties; ambiguous articles should be guided by reference to the Preamble and the rest of the document, with special avoidance of contradiction and fraud and particular attention to liberty and international law; and, finally, "*we are never unnecessarily to impute to an instrument any intention whatever which it would be unnatural for either reasonable or honest men to entertain*."[47] Spooner insisted that it was

> a rule of law, in the construction of all statutes, contracts and legal instruments whatsoever … that where words are susceptible of two meanings, one consistent, and the other inconsistent, with liberty, justice and right, that sense is always to be adopted, which is consistent with right, unless there be something in other parts of the instrument sufficient to prove that the other is the true meaning.[48]

Interpreting the Constitution in this light, Spooner looked to its governing principles—its focus on "liberty, justice, and right"—to reject any pro-slavery reading as antithetical to the document, natural law, and legal interpretation.

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[46] Lysander Spooner, *The Unconstitutionality of Slavery* (Bela Marsh, 1853), 82.
[47] Ibid., at 165, 182–88, 198–205. Many of these principles might be seen to align with equitable construction in statutory interpretation; while Spooner does pay extensive attention to statutes, however, he only mentions equity in passing quotations.
[48] Ibid., at 44.

The fusion of natural law, common law, and the emerging American tradition also made the Declaration of Independence a useful resource for the radical antislavery constitutionalists, who treated the revolutionary document as the enunciation of "the fundamental 'elements and principles' … the vital essence, the pith, the marrow … the living spirit and substance" of the Constitution.[49] According to Wiecek, this placement of the Declaration at the center of constitutional interpretation was a radically novel move at the time: it not only imported natural law into constitutional meaning but also enabled the radical abolitionists to claim that the Declaration's logical and chronological priority to the Constitution rendered slavery unconstitutional from the outset. Reading such ambiguous clauses as the Fifth Amendment's Due Process Clause, the Privileges and Immunities Clause, and the Guarantee Clause through the prism of natural law, common law, the Declaration, and the Preamble (often understood, particularly in its establishment of a republican form of government, as a bridge between the Declaration and the Constitution), the radical antislavery constitutionalists identified abolitionist meaning across almost the entire document.[50] As Douglass argued in 1860:

> The Constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury, the privilege of the writ of habeas corpus—that great writ that put an end to slavery and slave-hunting in England—it secures to every State a republican form of government. Any one of these provisions, in the hands of abolition statesmen, and backed up by a right moral sentiment, would put an end to slavery in America.[51]

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[49] William Goodell, *Views of American Constitutional Law: In Its Bearing Upon American Slavery* (Lawson & Chaplin, 1845), 138.
[50] Wiecek, "Radical Constitutional Antislavery," 264–74.
[51] Douglass, "The Constitution of the United States," 388.

For Douglass, each of these antislavery provisions operated metonymically, as a component of a structure integrated by liberty, justice, and republican democracy. It was for this reason that he was particularly drawn to the Preamble, the objects of which he understood to be "in harmony with the Declaration of Independence" and the natural law and common law it contained.[52]

Douglass was notable for emphasizing political power alongside interpretive principle. As he concluded in *My Bondage and My Freedom*, "if the declared purposes of an instrument are to govern the meaning of all its parts and details, as they clearly should, the constitution of our country is our warrant for the abolition of slavery in every state of the American Union."[53] With a purposive textualism focused on the integrity of structural principle and semantic detail, Douglass considered the hermeneutic question solved; the problem that remained was electing the right "abolition statesmen" and ensuring them of the legitimacy of the antislavery interpretation.[54] This task required the dogged review of not only the Constitution's liberty-oriented provisions but also the five constitutional clauses understood as historical concessions to the institution of slavery: the Three-Fifths Clause (Art. I, §2), the clause empowering Congress to "suppress Insurrections" (Art. I, §8), the clause forbidding the abolition of the slave trade until 1808 (Art. I, §9), the Fugitive Slave Clause (Art. IV, §2), and the clause proffering federal protection "against domestic Violence" to state governments (Art. IV, §4). Some radical antislavery constitutionalists acknowledged these provisions as compromises to be worked around, while others took pains to uncover their ostensible antislavery meaning.[55] Douglass, for his part, came to represent both views, holding out the possibility of the utopian position while addressing the concerns of political realists. The Three-Fifths Clause, for instance, might be

[52] Douglass, "The Dred Scott Decision," 353.
[53] Frederick Douglass, *My Bondage and My Freedom* (Miller, Orton & Mulligan, 1855), 397–98.
[54] Douglass, "The Constitution of the United States."
[55] Wiecek, "Radical Constitutional Antislavery," 273–74.

understood to refer simply to foreign nationals in its formulation of "all other persons," but it might also be taken as a political tax, or discount on representation, imposed on slave states. The 1808 clause, similarly, contained its own tax on slavery—"a Tax or duty may be imposed on such Importation"—as well as an expiration date on the slave trade itself, but it might equally have referred to the transport of indentured servants, omitting any mention of slaves altogether. Indentured servants could also form the subject of the Fugitive Slave Clause, referring simply to persons "held to Service or Labour in one State," particularly considering the slave's legal position, which precluded contract formation and therefore, Douglass argued, the fulfillment of any duty of service or labor. In any case, Madison had expressly struck the word "servitude" from the clause, a sign, at the very least, of his deep ambivalence toward slavery.[56] In response to insurrection (and implicitly, domestic violence), finally, the power of interpretation lay in the eye of the beholder: whether the slave or the slave owner provided a greater threat to national security and domestic tranquility largely depended on whether the president of the United States remained in favor of slavery's continuation and propagation or against it.[57]

Most of these interpretations appear counterintuitive even today. Wiecek describes such efforts to grapple with these clauses as "obviously the weakest part of the radicals' argument" and construes the larger project of radical antislavery constitutionalism as "a failure," at least in the short term.[58] Charles H. Cosgrove concludes that "few find any merit in the antislavery constitutionalists' interpretation of the Constitution" today.[59] Robert Cover dubs the radical

[56] Douglass, "The Constitution of the United States," 386.
[57] Ibid., at 384–85.
[58] Wiecek, "Radical Constitutional Antislavery," 274.
[59]Charles H. Cosgrove, "The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis," *University of Richmond Law Review* 32, no. 1 (1998): 122. Waldo Martin's biography similarly disregards the claims of the radical antislavery constitutionalists: "while Douglass and other political abolitionists interpreted these clauses as explicitly antislavery, they were at best only implicitly antislavery, and actually dealt with basic freedoms. The literal constitutional perspective of the political abolitionists, therefore, was quite loose. At

constitutionalists "constitutional utopians" whose "position that slavery, itself, was unconstitutional was so extreme as to appear trivial."[60] At the same time, Cover elsewhere acknowledges the "immense growth of law"[61] for which the prolific and pragmatic radical antislavery constitutionalists were responsible. Other constitutional scholars, such as Jacobus tenBroek, have located the radical abolitionists as the source of the language of the Fourteenth Amendment, particularly the Due Process, Equal Protection, and Privileges and Immunities Clauses.[62] More recently, Frederick Douglass has been treated as a practitioner (and proponent) of popular constitutionalism, one whose participation in public contestation over constitutional meaning contributed to novel forms of interpretation in the short and long term.[63] Wiecek himself notes the long-term influence of the movement, particularly in its invocation of natural rights, which he locates in late-twentieth- century libertarian constitutionalism.[64]

Indeed, despite the substantial and wide-ranging impact Douglass has had on constitutional discourse over the past century and a half, citations of his claims within Supreme

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least the constitutional arguments of their Garrisonian antagonists had more direct relevance, though thinly veiled, to slavery." See Martin, Jr., *The Mind of Frederick Douglass*, 38.

[60] Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, 1975), 154, 156.

[61] Cover, "Nomos and Narrative," 39.

[62] See Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (University of California Press, 1951).

[63] Reva Siegel, for instance, situates Frederick Douglass and such radical abolitionists as Lysander Spooner within her analysis of constitutional culture and social movement conflict and finds, "Considered in long enough units of political time, Frederick Douglass' appeal to the antislavery constitution was richly jurisgenerative." See Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era," *California Law Review* 94, no. 5 (2006): 1354. For another perspective on Douglass's personal and popular contestation of constitutional norms, see Wayne D. Moore, "Toward Constitutional Citizenship: Unofficial Commitments," in *Constitutional Rights and Powers of the People* (Princeton, New Jersey: Princeton University Press, 1996), 37–65. As Douglass himself insisted, "I scout the idea that the question of the constitutionality, or unconstitutionality of slavery, is not a question for the people. I hold that every American citizen has a right to form an opinion of the constitution, and to propagate that opinion, and to use all honorable means to make his opinion the prevailing one." See Douglass, "The Meaning of July Fourth for the Negro, Speech at Rochester, New York, July 5, 1852," 204. For more on popular constitutionalism, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004).

[64] In Wiecek's words, "Ideas of substantive due process, equal protection of the laws, paramount national citizenship, and the privileges and immunities of that citizenship were all first suggested by the radicals." See Wiecek, "Radical Constitutional Antislavery," 275.

Court opinions are rare and largely restricted to one justice: Justice Clarence Thomas.[65] Yet, notwithstanding Wiecek's appraisal or Thomas's use, Douglass's constitutional hermeneutic offers more than a libertarian insistence on freedom from government. Its "plain reading" textualism, more specifically, models a racial justice jurisprudence that has been both neglected and misunderstood.

FINDING THE PLAIN TEXT: FREDERICK DOUGLASS BEYOND CLARENCE THOMAS

Many have noted Thomas's fondness for Douglass.[66] Particularly salient is Thomas's opinion in *Grutter v. Bollinger*, which opens with a quotation from Douglass. "Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority," Thomas begins:

> "[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us…. I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall!... And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to

[65] Mark Tushnet, "Clarence Thomas's Black Nationalism," *Howard Law Journal* 47, no. 2 (2004): 323; Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (W. W. Norton & Company, 2005), 97; Corey Robin, *The Enigma of Clarence Thomas* (Metropolitan Books, 2019), 48.
[66] Douglass's portrait reportedly hangs behind Thomas's desk; see Kevin Merida and Michael Fletcher, *Supreme Discomfort: The Divided Soul of Clarence Thomas* (Crown/Archetype, 2007), 278.

> stand on his own legs! Let him alone!... [Y]our interference is doing him positive injury."[67]

A number of scholars have pointed out that Thomas omits choice sections of this quotation, enabling him to offer up a deliberately distorted version of Douglass's views in order to further his anti–affirmative-action agenda, fundamentally contrary to Douglass's own.[68] Cedric Merlin Powell, for instance, points out that this quotation, when fully cited and restored to its original context, demonstrates that "Douglass is not pleading for the government to 'let him alone' so that African-Americans will be free from the 'stigmatizing' effects of race-conscious remedies"—rather, he is vociferating against racial segregation and disenfranchisement.[69] Douglass's antisubordination argument, in other words, has become an anticlassification argument in Thomas's hands.[70]

Thomas takes more from Douglass and the radical antislavery constitutionalists than Powell acknowledges, however. In his concurring opinion to *Adarand Constructors, Inc. v. Pena* (1995), another affirmative action case, Thomas emphasizes the importance of the Declaration of Independence to constitutional meaning:

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[67] Grutter v. Bollinger, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part).
[68] See, for examples, andré douglas pond cummings, "Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: The Sun Don't Shine Here in This Part of Town," *Harvard Blackletter Law Journal* 21, no. 1 (2005): 1–74; Ronald Turner, "Grutter and the Passion of Justice Thomas: A Response to Professor Kearney," *William & Mary Bill of Rights Journal* 13, no. 3 (2005 2004): 821–40; Cedric Merlin Powell, "Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory," *Cleveland State Law Review* 56, no. 4 (2008): 823–94.
[69] Powell, "Rhetorical Neutrality," 889. Douglass, according to Powell, continues: "If you see him on his way to school, let him alone, don't disturb him! If you see him going to the dinner table at a hotel, let him go! If you see him going to the ballot-box, let him alone, don't disturb him!" Frederick Douglass, *The Frederick Douglass Papers: Volume Four, Series One: Speeches, Debates, and Interviews, 1864-80*, ed. John W. Blassingame and John R. McKivigan IV (Yale University Press, 1991), 68.
[70] Thomas has indeed shown himself to be committed to anticlassification doctrine; as he concurred in *Missouri v. Jenkins* (1995), "At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny." See Missouri v. Jenkins, 515 U.S. 70, 120 (1995) (Thomas, J., concurring).

> There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").[71]

Thomas's citation of the Declaration in *Adarand* has attracted note largely because Justice John Paul Stevens also turns to the Declaration in his dissent. Quoting his own prior opinion in *Wygant v. Jackson* (1986), Stevens notes, "There is … a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority … The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle."[72] Justice Thomas and Stevens converge insofar as they see the Declaration elevating equality, but they diverge in their understanding of the federal government's role in promoting that equality. For Stevens, who aligns the Declaration's egalitarian principle with the Equal Protection Clause of the Fourteenth Amendment, equality is an aim that requires positive governmental action to overcome entrenched forms of discrimination; Thomas, in contrast, maintains a negative conception of equality, one that requires protection against governmental interference.[73] This

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[71] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

[72] Ibid., at 248 n.6 (Stevens, J., dissenting). Douglass, for his part, would likely agree with Stevens; as he said in an 1883 speech after the *Civil Rights Cases*, "The difference between colored and white, here, is, that that the one, by reason of color, needs legal protection, and the other, by reason of color, does not need protection." See Frederick Douglass, "The Civil Rights Case, Speech at the Civil Rights Mass-Meeting Held at Lincoln Hall, Washington, D.C., October 22, 1883," in *Frederick Douglass: Selected Speeches and Writings*, ed. Philip Foner and Yuval Taylor (Chicago Review Press, 1999), 688.

[73] This view is typically described as libertarian; see Frank I. Michelman, "The Ghost of the Declaration Present: The Legal Force of the Declaration of Independence Regarding Acts of Congress," *Southern California Law Review* 89, no. 3 (2016): 595, n.80. For another view of Thomas's understanding of the government's "negative task of ensuring equal protection before the law," see Cosgrove, "The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis," 158–60. Thomas's own memoir also makes continued reference to self-reliance, as espoused by his grandfather, the Nation of Islam, and the economist Thomas Sowell, as opposed

dispute suggests the flexibility of the Declaration's meaning, as many scholars have noted.[74] But it also points to Thomas's interest in the Declaration as a source of natural law.[75]

Prior to his appointment to the Supreme Court, Thomas advocated for an originalist "plain reading" of the Constitution guided by the principles derived from "the link between the Constitution and the Declaration of Independence."[76] The Declaration served Thomas in sidestepping the pro-slavery compromises of 1787, as Corey Robin argues, much as it did for the radical antislavery constitutionalists.[77] Indeed, Thomas explicitly draws on those abolitionists who treated the Declaration as both structurally and substantively integral to constitutional meaning in order to redeem the original text. Differentiating his own originalism from Taney's, Thomas argues that "'the jurisprudence of original intention' cannot be understood as sympathetic with the *Dred Scott* reasoning, *if* we regard the 'original intention' of the

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to the, in his view, paternalistic governmental institutions that incentivize dependency. Clarence Thomas, *My Grandfather's Son: A Memoir* (Harper, 2008), 60, 105–7. It is also important to note that Thomas's libertarian view of the Declaration nevertheless still elevates the Fourteenth Amendment; see *Grutter v. Bollinger* (2003): "It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to '[d]o nothing with us!' and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated." Grutter v. Bollinger, 539 U.S. at 378. As Corey Robin's study of Thomas suggests, Thomas's originalism does at times attach to the Constitution of the Reconstruction Amendments; see Robin, *The Enigma of Clarence Thomas*, 167–87.

[74] See Cosgrove, "The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis," 160; Lee J. Strang, "Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?," *Penn State Law Review* 111, no. 2 (2006): 463; Katie R. Eyer, "The Declaration of Independence as Bellwether," *Southern California Law Review* 89 (2016): 442.

[75] Thomas's memoir draws attention to natural law as key to his thinking, particularly after 1986. Natural law is encapsulated by the Declaration of Independence, Thomas thinks, insofar as it indicates a commitment to self-evident moral truths that law must adhere to: "all law is based on some sense of moral principles inherent in the nature of human beings." Black liberation is also at the root of Thomas's interest in natural law; as he writes, "Why shouldn't a federal judge be interested in what the Founders thought about natural law—and why shouldn't a black man be interested in the fact that the philosophical underpinnings of the Constitution had been in direct conflict with the peculiar institution of slavery, thus fueling the earliest efforts to free my forebears?" See Thomas, *My Grandfather's Son*, 188, 221–22, 231. Corey Robin claims that Thomas's actual jurisprudence shows little interest in natural law; Scott Douglas Gerber, in contrast, argues that Thomas's civil rights jurisprudence is deeply invested in natural rights and "liberal originalism." Robin's account nevertheless affirms the importance of natural law to Thomas's preparation for the Court; see Robin, *The Enigma of Clarence Thomas*, 150–51; Scott Douglas Gerber, *First Principles: The Jurisprudence of Clarence Thomas* (New York University Press, 1999).

[76] Clarence Thomas, "Toward a Plain Reading of the Constitution: The Declaration of Independence in Constitutional Interpretation," *Howard Law Journal* 30, no. 4 (1987): 983.

[77] Robin, *The Enigma of Clarence Thomas*, 148–49.

Constitution to be the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it."[78] Thomas's justification for reading the Declaration into the Constitution begins with the text of the Constitution itself: Article VII, he notes, refers to 1776 rather than 1787 as the nation's origin point.[79] He also relies on Lincoln and Douglass's subsequent interpretation of the Declaration as central to the American project.[80] But the core of Thomas's argument lies in the natural rights and anti-slavery intentions that the Declaration allows him to read into the Constitution.

From a racial justice perspective, the problem with Thomas's "plain reading" lies in the limitations that attach to natural-rights discourse. The Lockean view of natural rights has, in the American context, underpinned a libertarian conception of the role of government. In the context of the antebellum period, and particularly after the passage of the Fugitive Slave Law of 1850, the protection of natural, unalienable rights—individual life, liberty, property, dignity—served the abolitionist cause insofar as enslaved Americans were patently denied those self-evident rights. In the late-twentieth and early-twenty-first centuries, by contrast, the libertarian pursuit of natural rights, particularly individual liberty and property rights, tends to disregard the ways in which non-governmental entities infringe upon the natural and civil rights of racial minorities, and the ways in which the federal government may ameliorate those conditions through redistributive programs and policies.[81]

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[78] Thomas, "Toward a Plain Reading of the Constitution," 985.
[79] Ibid., at 987. In a separate article, Thomas points out as well that we "should never lose sight of the fact that the last words of the original Constitution as written refer to the Declaration of Independence, written just eleven years earlier." Clarence Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," *Harvard Journal of Law & Public Policy* 12, no. 1 (1989): 65.
[80] On Lincoln's role in centering the Declaration in the American canon, see Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (Simon and Schuster, 1992).
[81] For a counterview of Thomas's merits as a libertarian justice, see Nancie Marzulla, "The Textualism Of Clarence Thomas: Anchoring The Supreme Court's Property Rights Jurisprudence to the Constitution," *American University Journal of Gender, Social Policy & the Law* 10, no. 2 (2002): 351–79.

The elevation of natural-rights discourse in Thomas's jurisprudence, and the historical inheritance of that discourse, is elucidating. For one thing, it highlights the heterodox quality of Thomas's own originalism, which, unlike other forms of originalist methodology that restrict their consideration to the written Constitution, potentially views the Declaration as substantive law.[82] For another, it helps to resolve the "enigma" of Thomas's view of racial justice.[83] Unlike Chief Justice Roberts, who in *Shelby County* insisted on the insignificance of voting discrimination in the present-day, Thomas acknowledges the persistent force of racial discrimination; as he writes in *Grutter*, "No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years."[84] Yet, Thomas insists, group-based remediation policies infringe on the unalienable dignity of the individual.[85] In this regard, it is important to note the aspirational quality of Thomas's view of natural rights, despite his arguably cynical perspective on civil rights. As he urges in "Toward a Plain Reading of the Constitution" (1987), "It is vital that Black Americans especially demand that the Constitution and the nation it forms be interpreted in its highest, not simply as an efficiently functioning

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[82] Frank I. Michelman, for instance, has suggested that Thomas views the Declaration as primary law, which would in turn require a "strictly negative-libertarian reading of the Fourteenth Amendment, lest the amendment itself be found undeclarational." Michelman, "The Ghost of the Declaration Present," 596. For a view that disputes the inclusion of the Declaration in an originalist consideration of the written Constitution, see Strang, "Originalism, the Declaration of Independence, and the Constitution"; Lee J. Strang, "Originalism's Subject Matter: Why the Declaration of Independence Is Not Part of the Constitution," *Southern California Law Review* 89, no. 3 (2016): 637–72.

[83] See Robin, *The Enigma of Clarence Thomas*. Robin points to Black nationalism and Black conservatism as core features of Thomas's judicial philosophy.

[84] Grutter v. Bollinger, 539 U.S. at 376. As Roberts writes in *Shelby County*, "Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, '[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.'" Shelby County v. Holder, 570 U.S. 529, 531 (2013) (citation omitted).

[85] This logic is readily apparent in Thomas's dissent in *Obergefell v. Hodges* (2015), which begins, "The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits…. [the majority] rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government." Obergefell v. Hodges, 576 U.S. 644, 721 (2015) (Thomas, J., dissenting).

instrument that parcels out goods to different competing interest groups."[86] This framing echoes Dorothy Roberts's claim that Black Americans have expressed faith in the Constitution "by relentlessly demanding that its interpretation live up to its highest principles and follow its strictest requirements." Invoking the Constitution's "highest" and "strictest" purpose, both Thomas and Roberts implicitly invoke a form of higher law, which in the American tradition may be seen to encapsulate both natural law and racial equality.

While for Thomas the Constitution's race-conscious higher law begins and ends with natural law, Douglass's example suggests another direction for a "plain reading" of the Constitution. While Douglass surfaced the natural rights that he and the radical antislavery constitutionalists located in the Declaration and Preamble, and while, much like Spooner, he also invoked common law and precedent, Douglass was especially interested in the Constitution's ontological status as a text.[87] As he insisted in his 1960 oration on the Constitution as an antislavery document:

> Before looking for what it means, let us see what it is… It is no vague, indefinite, floating, unsubstantial, ideal something … On the contrary, it is a plainly written document, not in Hebrew or Greek, but in English, beginning with a preamble, filled out with articles, sections, provisions, and clauses, defining the rights, powers, and duties to be secured, claimed, and exercised under its authority. It is not even like the British Constitution, which is made up of enactments of Parliament, decisions of Courts, and the

[86] Thomas, "Toward a Plain Reading of the Constitution," 989.
[87] Douglass references both natural law and common law in a number of his speeches. For two respective examples: "I … deny that the Constitution guarantees the right to hold property in man," and, "They reverse the common law usage, and presume the Negro a slave unless he can prove himself free." Douglass, "The Constitution of the United States," 380, 387.

> established usages of the Government. The American Constitution is a written instrument full and complete in itself.[88]

As this opening analysis makes clear, Douglass valorized the Constitution's status as a written, accessible, and unified document, an approach that suggests the motivations behind his textualist formalism. Foregrounding its written quality enabled Douglass to highlight the Constitution's omissions and inclusions at a literal level: "Its language is 'we the people,'" he says of the Preamble, "not we the white people, not even we the citizens, not we the privileged class, not we the high, not we the low, but we the people."[89] His insistence on the plain meaning of this written language combatted arguments with regard to the intentionalist arguments of Taney and others.[90] It also reinforced the populist dimensions of the Constitution, "a great national enactment done by the people" that "can only be altered, amended, or added to by the people."[91] His focus on the Constitution's self-contained integrity, finally, enabled him to surface the contradictions embedded in the nation's founding, in which the Constitution's potential as a "glorious liberty document" was belied by the political perpetuation of slavery.[92] These contradictions themselves made the case for political transformation: "All that is necessary to be

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[88] Ibid., at 381.
[89] Ibid., at 387.
[90] As Douglass notes in response to intentionalist arguments:

> It would be the wildest of absurdities, and lead to endless confusion and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it. It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say. Bear in mind, also, and the fact is an important one, that the framers of the Constitution sat with closed doors, and that this was done purposely, that nothing but the result of their labours should be seen, and that that result should be judged of by the people free from any of the bias shown in the debates. It should also be borne in mind, and the fact is still more important, that the debates in the convention that framed the Constitution, and by means of which a pro-slavery interpretation is now attempted to be forced upon that instrument, were not published till more than a quarter of a century after the presentation and the adoption of the Constitution.

Douglass, "The Constitution of the United States," 381.
[91] Ibid.
[92] Douglass, "The Meaning of July Fourth for the Negro, Speech at Rochester, New York, July 5, 1852," 204.

done," as Douglass wrote in the *Atlantic Monthly* in 1866, "is to make the government consistent with itself."[93] Textual integrity and self-consistency provided a metaphor for a political integrity and consistency that were plain to see, and plainly missing.

As a result of the formalism evident in much of his writing and oratory, a number of literary critics have engaged with Douglass's revolutionary hermeneutics.[94] Most generative has been the understanding that Douglass's formalism is at once "immanent to the text and a reader's interpretive engagement with it."[95] As T. Gregory Garvey writes, "Since the Constitution could be read either as a pro- or an anti-slavery text, the authority that it exerts over the nation has its roots neither in tradition, as the moral suasionists argued, nor in the text itself, as the political abolitionists argued, but in public understanding of the meaning of the text," a public understanding that Douglass understood could change.[96] Hoang Gia Phan argues that this conception of public meaning emerged from a specific vantage point that Douglass developed: the view of the outsider, or "a man from another country."[97] As Douglass wrote in an 1849 rebuttal of John C. Calhoun, "Suppose a man from another country should read that clause of the American Constitution which Calhoun alleges refers to fugitive slaves, with no other knowledge of the character of American institutions than what he derived from the reading of that

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[93] Frederick Douglass, "Reconstruction," *The Atlantic*, 1866, https://www.theatlantic.com/magazine/archive/1866/12/reconstruction/304561/. Jason de Stefano has similarly argued that Douglass's textual formalism proceeds from this desire. See Jason de Stefano, "Persona Ficta: Frederick Douglass," *ELH* 85, no. 3 (2018): 775–800.

[94] See, for instance, Priscilla Wald, "Neither Citizen Nor Alien: National Narratives, Frederick Douglass, and the Politics of Self-Definition," in *Constituting Americans: Cultural Anxiety and Narrative Form* (Durham: Duke University Press Books, 1995), 14–105; Garvey, "Frederick Douglass's Change of Opinion on the U.S. Constitution: Abolitionism and the 'Elements of Moral Power'"; Crane, "Cosmopolitan Constitutionalism: Emerson and Douglass"; Phan, *Bonds of Citizenship*; de Stefano, "Persona Ficta."

[95] de Stefano, "Persona Ficta," 780.

[96] Garvey, "Frederick Douglass's Change of Opinion on the U.S. Constitution: Abolitionism and the 'Elements of Moral Power,'" 240.

[97] Phan, *Bonds of Citizenship*. For a foundational view of outsider jurisprudence, see Mari J. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations Minority Critiques of the Critical Legal Studies Movement," *Harvard Civil Rights-Civil Liberties Law Review* 22, no. 2 (1987): 323–400.

instrument, will anyone pretend that the clause in question would be thought to apply to slaves? We think not."[98] The "man from another country," Phan argues, reads the Constitution with decontextualized sense; he is familiar with the English language and logic but not with the particular history surrounding constitutional ratification or with Supreme Court precedent since.

The "man from another country," significantly, is not a rhetorical flourish. Douglass himself traveled to England, Ireland, and Scotland shortly after publishing his *Narrative*, partly in order to avoid re-capture as a fugitive slave. There, he not only reached a wide, enthusiastic audience and developed his early craft as an orator, but he also confronted, and ventriloquized, the foreign perspective on the American Constitution. In his "Farewell Speech to the British People," delivered in London in 1847, Douglass confronted his audience with the "domestic insurrection" clause of the Constitution, its pro-slavery meaning hidden from the outsider's view: "Of course, all Englishmen, upon a superficial reading of that clause of the constitution, would very readily assent to the justice of the proposition involved in it."[99] With regard to the Fugitive Slave Clause, similarly, they might approve of its surface meaning: "Upon the face of this clause there is nothing of injustice or inhumanity in it. It appears perfectly in accordance with justice, and in every respect humane. It is, indeed, just what it should be, according to your English notion of things and the general use of words. But what does it mean in the United States?"[100] Douglass draws this distinction between surface and contextual meaning prior to his conversion to radical antislavery constitutionalism; in 1847, he was still intent on proving the Constitution "a most cunningly-devised and wicked compact, demanding the most constant and earnest

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[98] Frederick Douglass, "The Address of Southern Delegates in Congress to Their Constituents; or, the Address of John C. Calhoun and Forty Other Thieves, North Star, 9 February 1849," in *The Life and Writings of Frederick Douglass*, ed. Philip S. Foner (New York: International, 1950), 356; Phan, *Bonds of Citizenship*, 2–3.
[99] Frederick Douglass, "Farewell Speech to the British People, at London Tavern, London, England, March 30, 1847," in *Frederick Douglass: Selected Speeches and Writings*, ed. Philip Foner and Yuval Taylor (Chicago Review Press, 1999), 56.
[100] Ibid., at 57.

efforts of the friends of righteous freedom for its complete overthrow."[101] As a result, he draws out the difference between appearance and reality in order to focalize the hypocrisy of American slavery for his English audience. Nevertheless, this strategy comes to form the crux of his own antislavery constitutionalism. What the "man from another country" can see in the Constitution, Douglass comes to find, offers the disenfranchised American a view of his own promised liberty and equality. This perspective in turn depends on a written text that is both legible to a wide audience and self-contained in scope.

Curiously, Douglass (along with the other radical antislavery constitutionalists) described this interpretive approach through the lens of "strict construction." "In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction," he insisted in 1860.[102] Here, strict construction—narrow interpretation by the letter of the law—follows from natural law, which constrains the possibility of unjust legal interpretation. But there remains a sense in which Douglass's textualism evades the confines of natural law. What is "binding" about the law, as he argues in 1852 in response to the Fugitive Slave Law of 1850, "is its reasonableness."[103] Reasonableness is an emergent property of language, according to Douglass: "Common sense, and common justice, and sound rules of interpretation all drive us to the words of the law for the meaning of the law."[104] Strict construction, in this sense, suggests not a narrow reading but a plain one. Plain reading is open to the lay public, Douglass insists; the rules of interpretation he identifies "are plain, commonsense rules, such as you and I, and all of us, can understand and apply, without having passed years in

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[101] Frederick Douglass, "The Constitution and Slavery, The North Star, March 16, 1849," in *Frederick Douglass: Selected Speeches and Writings*, ed. Philip Foner and Yuval Taylor (Chicago Review Press, 1999), 130.
[102] Douglass, "The Constitution of the United States," 386.
[103] Frederick Douglass, "The Fugitive Slave Law, Speech to the National Free Soil Convention at Pittsburgh, August 11, 1852," in *Frederick Douglass: Selected Speeches and Writings*, ed. Philip Foner and Yuval Taylor (Chicago Review Press, 1999), 208.
[104] Douglass, "The Constitution of the United States," 382.

the study of law."[105] It is also self-evident: what it says to the common man—the outsider—is what it means. Plain reading is finally patriotic, despite the dialectic, transnational view it courts. Douglass notes that in addition to pursuing common sense, plain reading's other prevailing principle "requires us to look to the ends for which a law is made, and to construe its details in harmony with the ends sought."[106] He locates these ends in the Preamble, itself "in harmony with the Declaration of Independence." Rooting the purposive dimensions of his plain reading doctrine in the Preamble enables him to incorporate not only the natural rights and "saving principles"[107] of the Declaration but also to invoke both the Preamble and the Declaration as quintessentially American texts in a bid to nationalist sentiment.[108]

Douglass's textualism thus exceeds Thomas's insofar as it encompasses far more than natural rights; it also matches Scalia's in its appeal to a lay public with a straightforward, authoritative, distinctively American conception of constitutional interpretation. At the same time, however, it hinges on the presupposed contributions from the "man from another country." The view to justice—and racial justice in particular—that this dialectic opens up is not quite the veil of ignorance, because the interlocutors are in fact self-consciously situated—one is foreign and the other is national. Nor does it subscribe to comparative constitutionalism, which has long been anathema to American publics.[109] It simply takes into consideration the view from abroad, both because the legibility of the nation-state is situated within an international context and because a dialectic view enables a corrective to contemporary biases and entrenched forms of oppression. Rather than look to history as a corrective to modern blind spots, as the originalists

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[105] Douglass, "The Meaning of July Fourth for the Negro, Speech at Rochester, New York, July 5, 1852," 204.
[106] Douglass, "The Dred Scott Decision," 353.
[107] Douglass, "The Meaning of July Fourth for the Negro, Speech at Rochester, New York, July 5, 1852," 191.
[108] For more on the Declaration as a "national classic," see Cosgrove, "The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis," 143–52.
[109] See Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877* (Yale University Press, 2017).

tend to do, Douglass looks to the outsider—both imagined and real—for a clearer view on what justice means according to the language by which it is defined. This pivot to the margins serves because the answer, Douglass insists, lies hidden in plain sight. Racial inequality fundamentally contradicts the principles on which the Constitution turns.

From "Wicked Compact" to "Glorious Liberty Document": Re-reading Douglass's Turn

In the modern era, the conception that the Constitution of 1787 is a flawed document remains prevalent in many progressive circles. Some, perhaps most prominently Justice Thurgood Marshall, have rejected the first Constitution but embraced the second, conceiving of the Reconstruction Amendments as fundamentally re-constituting the nation.[110] Others, such as Aziz Rana, find the "creedal story" offered by the Constitution and the Declaration, in which inherently egalitarian documents foster the progressive distribution of equal rights to all, deeply problematic. Not surprisingly, Rana locates Douglass in this school of thought: "It was Frederick Douglass," he writes, "who took the creedal story to its logical conclusion."[111] Charles W. Mills has similarly critiqued Douglass for his assimilationism and reliance on "a naïve textual formalism (what the text says) that ignores the standard principles of interpretation of the text that would have obtained at the time, and which would have given it its actual contextual meaning."[112]

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[110] Marshall, "Reflections on the Bicentennial of the United States Constitution."
[111] Aziz Rana, "Race and the American Creed," *N+1*, 2016, https://nplusonemag.com/issue-24/politics/race-and-the-american-creed/.
[112] Charles W. Mills, "Whose Fourth of July? Frederick Douglass and 'Original Intent,'" in *Frederick Douglass: A Critical Reader*, ed. Bill Lawson and Frank Kirkland (Wiley, 1999), 115.

It is certainly true that Douglass employed a textualism that took the nation's creedal narrative at its word. But it is important to note that Douglass also operated under the tacit concession that power, not hermeneutics alone, governs constitutional doctrine. Fundamental to his constitutional faith was a commitment to the election of abolitionists to office and to a revolution of public sentiment, both enabled, in part, by the plain reading he offered up for public view. Scholars have pointed to a number of precipitating factors behind Douglass's shift from moral abolitionist to political abolitionism; perhaps central to each is Douglass's sense that his engagement with the terms and in the arena of power would better serve Black Americans than an abdication of them.[113] In a moment in which racial inequality remains at an unconscionable level, and with many legal and institutional stacked against its remediation, it would nonetheless seem ill-advised to disengage from the stage on which many of these interpretive battles are fought. Thomas's use of Douglass may neglect the crux of Douglass's form of plain reading, but we would be unwise to leave Douglass—or textualism—alone for that reason. As Douglass demonstrated in an American nadir, the text, when viewed from the proper distance, says it plain. Of course, no interpretive contest will be won without the political groundwork necessary to elect and appoint governmental officials who prioritize racial justice. But part of political activism is also the creative and public activity of interpretation: reading our legal and political documents for the common-sense justice manifest on their surface.

[113] See, for instance, Martin, Jr., *The Mind of Frederick Douglass*; Garvey, "Frederick Douglass's Change of Opinion on the U.S. Constitution: Abolitionism and the 'Elements of Moral Power'"; Bill E. Lawson, "Property or Persons: On a 'Plain Reading' of the United States Constitution," *The Journal of Ethics* 1, no. 3 (1997): 291–303.