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# Federick Douglass and the Original Originalists

Bradley Rebeiro

# Frederick Douglass and the Original Originalists

*Bradley Rebeiro*[*]

*Constitutional scholars incessantly grapple over the significance of the Constitution's original meaning. More specifically, they are preoccupied with, on the one hand, what that meaning is (if such meaning exists) and, on the other hand, the exact nature of that meaning's authority (if any) over the Constitution and its interpreters. But this debate is hardly novel. In fact, one of the most compelling voices in U.S. history was immersed in similar debates and, out of the constitutional sparring of his time, forged an arresting theory of constitutional interpretation. Frederick Douglass, once a fierce opponent of the U.S. Constitution, evolved into a defender of the Constitution with a robust theory of constitutional interpretation that addressed the constitutional evil of slavery. For example, in 1847, Douglass stated: "The Constitution I hold to be radically and essentially slave-holding . . . [t]he language of the Constitution is you shall be a slave or die." Yet, five years later in his famous speech, "What to the Slave is the Fourth of July?", Douglass declared: "interpreted as it ought to be interpreted, the Constitution is a glorious liberty document." Because Douglass was primarily a political and constitutional actor that never wrote a treatise of jurisprudence, his understanding of constitutionalism must be gleaned from his many speeches and other writings. I therefore take on the task of welding together these speeches and writings to demonstrate how Douglass's theory fuses historical meaning, established legal rules of interpretation, natural rights principles, and a conception of justice into a cohesive approach that addresses the problem of constitutional interpretation and construction.*

*Though Douglass was one of the most prominent political thinkers and constitutional actors of the 19th century, his constitutional thought has been overlooked by most legal scholars and mostly mischaracterized by*

* Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. For helpful comments, feedback, and/or discussion related to this Article, the author would like to thank Kurt T. Lash, Anthony J. Bellia, Vincent Phillip Muñoz, Michael Zuckert, Randy Barnett, Peter C. Myers, Susan Collins, Stephanie Barclay, Frederick Gedicks, Lael Weinberger, Jarrod Shobe, and Aaron Nielson. The author would also like to thank the BYU Law faculty, as well as participants of the 2021 Rocky Mountain Junior Scholars Forum, James Wilson Institute Senior Seminar, University of Notre Dame Political Theory Workshop, and Institute for Human Studies Graduate Conference.

*political scientists. Due to the aforementioned lack of a singular treatise on the subject, as well as Douglass's constitutional transformation over the course of his life, this comes as no surprise. Legal scholars tend either to dismiss his constitutional theory as incoherent or to assume that Douglass's reformed theory was not sincere, but merely a smokescreen for political purposes. Others have referred to Douglass as a living constitutionalist or offered wholly new categories to explain Douglass's position, such as "reform textualism." However, Douglass's theory, similar to his contemporaries, may be seen as anticipating the modern shift to originalism. But this claim challenges the conventional scholarly wisdom in two ways. First, the current literature mostly characterizes Douglass as, at the very least, anti-originalist. Second, though Douglass's theory shares many elements with originalism, originalism's current formulations leave little room for philosophical inquiry, which Douglass's theory admittedly does. His theory does not fit perfectly into any of the many variations of originalism today, thereby offering present-day originalists new possibilities. I will thus refer to Douglass's theory as "natural rights originalism." Natural rights originalism deviates most importantly in not abandoning the original philosophical principles that animated the Constitution's framing. This theory, the product of an insatiably inquisitive mind, transformed Douglass's constitutional thinking—no longer was the Constitution an instrument of oppression, but one of freedom.*

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## INTRODUCTION

Originalism purports a theory of constitutional interpretation that uses a textual approach, buttressed by a reliance on historical evidence of the Constitution's original public meaning.[1] Two fundamental propositions justify originalist reliance on the original public meaning: first, the Constitution's meaning was fixed at the time of ratification (the fixation thesis), and second, that fixed meaning constrains our understanding of the Constitution (the constraint principle).[2]

Since its rise into modern legal prominence, originalism has been under constant scrutiny, both from its objectors as well as its defenders. But the public's reckoning with the U.S.'s past and present has produced new and somewhat unconventional challenges to originalism. Previous challenges to originalism have been mostly theoretical, whether it be challenging the plausibility of recovering original meaning (if there be such a thing) or challenging the authoritative nature of original meaning should it be recovered.[3] But recent events have cast the nation's founding

1. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 534–35 (2013); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377–78, 380 (2013); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4 (2011); Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 425–26 (2006).

2. Barrett, *supra* note 1, at 1924; Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011); Solum, *supra* note 1, at 456; Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015); Whittington, *supra* note 1, at 378.

3. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007) (challenging originalism in favor of the philosophical approach to interpretation); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) (arguing that strict

in a new light, providing a new avenue through which to dispute originalism. The 1619 Project, for example, was launched in 2019 as an Initiative to "reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative."[4] Its proponents argue that the real foundations of the nation lay not in 1776, or in 1787–88 for that matter, but in 1619, when slavery was first introduced to the continent. The nation's founding, as such, does not deserve our loyalty or respect given its dark, reprehensible nature. The 1619 Project's reframing of the nation's history in terms of slavery and its legacy has influenced the public mind and helped reorient scholarship.[5]

Recent scholarship has attacked originalism on the basis of its connection with perpetuating racial injustice.[6] One article, for instance, casts the rise of originalism as a negative reaction to the ruling in *Brown v. Board of Education*.[7] Another work goes much further into the past, looking at the 1820s–40s, to find the origins of constitutional originalism. In Gilhooley's telling, the true founders of originalism were defenders of slavery seeking to protect their peculiar institution against abolitionist efforts to eradicate slavery

constructionism—in the sense of remaining committed to original meaning—cannot adequately protect rights); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1997) [hereinafter FREEDOM'S LAWS] (promoting a "moral reading" of the Constitution); Adam Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

4. *The 1619 Project*, N.Y. TIMES MAG., https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html (last visited July 8, 2021).

5. *See, e.g.*, NIKOLE HANNAH-JONES & THE NEW YORK TIMES MAGAZINE, THE 1619 PROJECT: A NEW ORIGIN STORY (2021); Paul Finkelman, *America's 'Great Chief Justice' Was an Unrepentant Slaveholder*, THE ATLANTIC (June 15, 2021), https://www.theatlantic.com/ideas/archive/2021/06/chief-justice-john-marshall-slaves/619160/; Ibrahima Thiaw & Deborah L. Mack, *Atlantic Slavery and the Making of the Modern World: Experiences, Representations, and Legacies*, 61 CURRENT ANTHROPOLOGY S145 (2020). *But see* Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, THE ATLANTIC (Dec. 23, 2019), https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093/; PETER W. WOOD, 1620: A CRITICAL RESPONSE TO THE 1619 PROJECT (2020); PHILLIP W. MAGNESS, THE 1619 PROJECT: A CRITIQUE (2020).

6. *See* Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 518–20 (2011) (discussing the problems with African Americans accepting originalism given the Constitution's protection and preservation of slavery at the time of the founding).

7. *See* Calvin Terbeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021).

and the slave trade in D.C.[8] To be sure, in the late antebellum period the struggle over slavery and the nation's relation to it reached a fever pitch, and the Constitution lay directly at the center of the it. But it was not just defenders of slavery that looked to the Constitution's historical meaning as an answer to contemporary constitutional disputes. Anti-slavery advocates also proffered accounts of the Constitution's proper relation to slavery based on its historical meaning. The question was not *whether* historical meaning mattered, but *which* account of the historical meaning was the correct one.

Present-day objections concerning the Constitution's legacy and its original meaning are not truly new, but reincarnated conundrums of the past. As such, it is helpful to look to the past for fresh perspectives on the present, and one answer to this question comes from a source that looms large in U.S. history: Frederick Douglass.

For young Frederick Douglass, a country whose Constitution permitted slavery deserved very little, if any, respect. America's past and present, in Douglass's eyes, was committed to slavery. In 1847, Douglass stated: "The Constitution I hold to be radically and essentially slave-holding . . . [t]he language of the Constitution is you shall be a slave or die."[9] That truth alone sufficed to reject the Constitution on its face—Douglass communicated many times that he was predisposed to have no part in it.[10] Though he might have wished to possess more patriotism, he could not bring himself to adore the U.S., nor the Constitution.[11] Yet, five years later in his famous speech "What to the Slave is the Fourth of July?"[12], Douglass had a completely different tone when discussing the

8. *See* SIMON J. GILHOOLEY, THE ANTEBELLUM ORIGINS OF THE MODERN CONSTITUTION: SLAVERY AND THE SPIRIT OF THE AMERICAN FOUNDING, (2020).

9. Frederick Douglass, American Slavery, Speech Delivered at Market Hall, Syracuse, New York (Oct. 22, 1847), *reprinted in* 1 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 269, 274–75 (Philip Sheldon Foner ed., 1950) [hereinafter *American Slavery*] (The volume set will be referred to as "LW").

10. *See, e.g.*, *id.* at 275 ("We know it is such, and knowing it we are not disposed to have part nor lot with that Constitution.").

11. *See id.* at 276 ("I have no words of eulogy, 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?").

12. Frederick Douglass, The Meaning of July Fourth for the Negro, Speech at Rochester, New York (July 5, 1852), *reprinted in* 2 LW, *supra* note 9, at 181 [hereinafter Fourth of July Speech].

Union and the Constitution. Douglass declared: "[I]nterpreted as it ought to be interpreted, the Constitution is a *glorious liberty* document."[13] Douglass argued that the Constitution was actually an *anti-slavery* document.[14] What accounts for his radical change in disposition toward the Constitution? One possible explanation is that Douglass made this shift for political purposes.[15] A more compelling alternative, however, is that Douglass experienced a genuine change in disposition toward the Constitution because of his newly developed principles of constitutionalism.

Notwithstanding Douglass's intriguing life story and provocative constitutional theory (let alone being one of the most important political and constitutional actors of the antebellum period), legal scholarship on his constitutionalism is surprisingly scarce.[16] Beyond legal scholarship, other disciplines have given some attention to Douglass.[17] The little research dedicated to his constitutional thought may be divided into two fundamental

13. *Id.* at 202.

14. *Id.*

15. *See, e.g.*, Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 80 MO. L. REV. 1, 15 (2016) ("[B]y the 1850s, Douglass was less interested in theoretical consistency than in practical results.").

16. Research revealed few articles in legal scholarship that focus specifically on Douglass's constitutional thought, though there are several that incorporate facets of Douglass's thinking into broader legal topics. *See generally*, Finkelman, *supra* note 15; Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335 (2019); Robert Bernasconi, *The Constitution of the People: Frederick Douglass and the Dred Scott Decision*, 13 CARDOZO L. REV. 1281 (1991); Cedric Melin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823 (2008); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011). Paul Finkelman offers the most extensive treatment, providing a thorough account of Douglass's political and constitutional dealings over the course of his life. Finkelman mostly historicizes Douglass's theory, providing primarily political motivations for Douglass's great shift. While Douglass's political circumstances certainly played a significant role in Douglass's reformed thinking, this Article aims to take Douglass's revised theory more seriously and provide a thorough account of its many features, and how those features fit (and do not fit) in contemporary legal debates.

17. *See, e.g.*, PETER C. MYERS, FREDERICK DOUGLASS: RACE AND THE REBIRTH OF AMERICAN LIBERALISM (2008); Gregory M. Collins, *Beyond Politics and Natural Law: The Anticipation of New Originalist Tenets in the Constitutional Thought of Frederick Douglass*, 6 AM. POL. THOUGHT 574 (2017); Anthony Lister Ives, *Frederick Douglass's Reform Textualism: An Alternative Jurisprudence Consistent with the Fundamental Purpose of Law*, 80 J. POL. 88 (2018); NICHOLAS BUCCOLA, THE POLITICAL THOUGHT OF FREDERICK DOUGLASS: IN PURSUIT OF AMERICAN LIBERTY (2013); CHARLES W. MILLS, BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE (1998); Bill E. Lawson, *Property or Persons: On a "Plain Reading" of the United States Constitution*, 1 J. ETHICS 291 (1997).

positions. The first position I call "Douglass Skeptics";[18] the second position I call "Douglass Apologists."[19] This Article joins the second position but offers a novel interpretation of Douglass's theory.

Douglass Apologists (and to some extent Douglass Skeptics) have represented Douglass as a staunch opponent to originalism.[20] However, a closer investigation of Douglass's speeches reveals a

18. Within the legal scholarship, this is most readily presented by Paul Finkelman. *See* Finkelman, *supra* note 15. Within philosophy, authors such as Charles W. Mills and Bill E. Lawson hold this view. *See* MILLS, *supra* note 17; Lawson, *supra* note 17. It is important to clarify what I mean by "Douglass Skeptics." Douglass Skeptics are skeptical only of Douglass's intellectual commitment to his constitutional arguments post-1850. Most do not challenge his integrity or his intellectual capacity. Rather, they often praise Douglass for his ability to exploit an ostensibly incoherent position through powerful rhetorical devices. *See, e.g.*, Finkelman, *supra* note 15, at 58 ("Douglass's change of direction led to a less intellectually honest but more politically pragmatic reading of the Constitution . . . . He no longer wanted to support the Garrisonian view that the Constitution was proslavery, in part because that was the position of the slaveowners."); MILLS, *supra* note 17, at 175–77 (arguing that what was most important for Douglass was not necessarily the coherence of his position, but rather the synthesis of the Constitution and natural law principles). To be sure, some theoretical skeptics are much more critical than others. Mills and Lawson, for example, are quite critical of Douglass's arguments. They do not find Douglass's bare arguments useful, but make some allowances for the possibility that Douglass did not sincerely hold the views articulated in his speeches. Finkelman is slightly more generous to Douglass, arguing that Douglass knew (or should have known) of the inconsistencies, but exploited them as mostly a rhetorical device.

19. *See, e.g.*, Gowder, *supra* note 16; Ives, *supra* note 17. Douglass Apologists are more sympathetic to Douglass's constitutional theory and, to varying degrees, attempt to construct a coherent theory out of his many speeches. Gowder, for example, argues that Douglass's method employs interpretive tools that closely mirror those used in constitutional law today. He characterizes Douglass as a "claimant critic . . . a person who claims inclusion in a system, where that system is predicated on a set of values, and those values ground the claim for inclusion." Gowder, *supra* note 16, at 375. Ives, meanwhile, characterizes Douglass's theory as "reform textualism," which is a textualist method that emphasizes strict adherence to the text, using interpretive rules to "gain the consent of other individuals." Ives, *supra* note 17, at 91.

20. There are a few exceptions to this. One is Peter C. Myers, who provides an excellent account of Douglass's constitutional thought and how Douglass's constitutionalism fit within his vision of American liberalism. See MYERS, *supra* note 17. That said, Myers does not address the relation between Douglass and originalism. It may be assumed, however, that Myers portrayal of Douglass at least does not put Douglass in open hostility to originalism. The other exception is Randy Barnett, who identified Douglass's method as similar to original public meaning originalism. *See* Barnett, *supra* note 16 at 244–45. In fact, Barnett argues that his own originalist convictions are drawn from the same source that influenced Douglass: Lysander Spooner. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2013). Gregory Collins also finds that Douglass's method closely mirrors original public meaning originalism. *See* Collins, *supra* note 17. This article makes an argument similar to Barnett and Collins but contends that Douglass does not cleanly fit within original public meaning originalism.

continuity with originalism, but with important revisions that answer some of originalism's shortcomings.[21]

Douglass's theory offers a plain reading method of constitutional interpretation that comprised legal rules of interpretation and construction, guided by natural rights principles. I refer to Douglass's method of interpretation as "natural rights originalism." Douglass's jurisprudence is compelling and brings new possibilities to contemporary debates, which has grown more complex than the traditional disputes between originalism and various non-originalist approaches.[22] He offers a form of originalism which has elements of original methods originalism and original public meaning originalism.[23] But natural rights originalism provides several key modifications, particularly in the realm of construction, that set it apart from any other approach within originalism. It supplies a cogent method for addressing constitutional evils through constitutional interpretation, providing a method for interpreters to incorporate an unapologetically moral component in determining original public meaning.

This Article will proceed as follows in expounding natural rights originalism. First, it offers a glimpse into Douglass's past to appreciate his historical context and how he came to understand

21. In a sense, it would be anachronistic to call Douglass an "originalist." In Douglass's era there were no "originalists" as we understand them today. This article seeks to place Douglass within the contemporary debate by drawing comparisons between Douglass's method and those methods espoused by originalists today. A close comparison demonstrates how Douglass's method closely resembles contemporary originalist methods, but with an added philosophical component that warrants the creation of a new category: natural rights originalism.

22. *See supra* notes 1–3, 6–11*;* JAMES E. FLEMING AND SOTIRIOS A. BARBER, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (1991); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019). There has been a recent push to commandeer originalism in favor of ends that would see the Constitution used as an instrument in securing the common good, rather than strictly adhere to the original meaning. *See* Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917 (2021). Other challenges have proposed to do away with originalism altogether, but not in a sense that would replace original meaning with readings that comport with current societal values—rather, replace original meaning with meanings that comport strictly with the natural law. The former pays some deference to original meaning, while the latter pays none at all. *See* ADRIAN VERMUELE, COMMON GOOD CONSTITUTIONALISM (2022).

23. *See, e.g.*, John O. McGinnis and Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018); Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY 12 (Grant Huscroft & Bradley W. Millers eds., 2011).

the Constitution in a new light. Second, it analyzes originalism. Third, it discusses the original originalists, investigating Douglass's constitutional disputes with his contemporaries and how natural rights originalism compares to present-day originalism. Fourth, it considers Douglass's understanding of natural rights and its importance as a political philosophy, as well as the demands of justice and prudence. Finally, it demonstrates how natural rights originalism can be used to address constitutional evils by analyzing Douglass's remarks concerning the *Dred Scott* decision and several constitutional provisions.

## I. FROM SLAVERY TO SELF-OWNERSHIP: A (VERY) BRIEF ACCOUNT OF DOUGLASS'S INTELLECTUAL JOURNEY

Douglass's early animus (if not vitriol) toward the country and the Constitution is understandable, given his remarkable story.[24] Douglass knew what it was to be both a slave and a free man under the Constitution. His early contempt for the Constitution was the natural product of a life of servitude that could hardly be considered "living." Yet, even in his years as a slave, Douglass displayed an insatiable desire for knowledge and learning that would spur Douglass to freedom, as well as a refined understanding of the Constitution. What proceeds is a brief account of his journey, a snapshot of the pivotal moments that led to Douglass's matured constitutional thought.[25]

24. Douglass himself stated: "My first opinions were naturally derived and honestly entertained. Brought directly, when I escaped from slavery, into contact with abolitionists who regarded the Constitution as a slaveholding instrument, and finding their views supported by the united and entire history of every department of the government, it is not strange that I assumed the Constitution to be just what these friends made it seem to be." FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 186 (1892) (Dover ed., 2003).

25. The focus of this article is Douglass's constitutional theory. For those who wish to obtain a fuller sense of Douglass's life, Douglass authored an excellent autobiography that is equal parts informative and moving. *See generally id.* For those who wish to obtain a fuller sense of his constitutional interactions, Paul Finkelman provides an account of Douglass's various dealings with the Constitution. *See generally*, Finkelman, *supra* note 15.

Douglass was born into slavery[26] and was taught from an early age the "naturalness" of his condition.[27] Douglass, in his early years, experienced and witnessed many atrocities committed against slaves.[28] These events ostensibly reinforced what he had been taught as early as he could remember: that his condition was mandated by God. Nevertheless, he continually pondered on the question of slavery's origin and its relation to the divine. In the end, it took only one event to free him from southern slave ideology and to dispel slavery's divine nature. Douglass was only seven or eight when he discovered that his aunt had escaped from slavery. If God destined Blacks to be slaves, how could it be that some are free? Douglass recounted that from that moment on, though his body remained in chains, he became free in spirit.[29]

Douglass's independent thinking in the face of indoctrination drove him ultimately to freedom. Aside from his rejection of southern slave ideology, perhaps the most important moment in the formation of his independent character was learning to read. While in Baltimore, his new "owner," Mrs. Sophia, began teaching him how to read.[30] She was so impressed with his aptitude that she boasted to Hugh Auld of Douglass's capabilities. Upon learning this, Auld immediately put a stop to Douglass's learning, instructing Mrs. Sophia that, if you give a black person "an inch he will take an ell."[31] Auld explained to Mrs. Sophia that teaching a slave to read was one of the most dangerous things she could do—it would make the slave unfit for servitude. Douglass agreed. Thenceforth, Douglass resolved to gain as much knowledge as he could, understanding that the pursuit of such knowledge would make him unfit for slavery—the only viable option left would be freedom.

With his mind keen on learning and persistently evolving, Douglass settled upon his manner of escape. While in Baltimore, Douglass requested permission to hire out his time from Hugh

26. Unfortunately, the exact date is unknown, though it likely was around February 1817. Douglass recounts that he was not entirely sure of his age, observing that "the larger part of the slaves know as little of their age as horses know of theirs." FREDERICK DOUGLASS, THE NARRATIVE AND SELECTED WRITINGS 18 (Michael Meyer, ed., 1984).

27. *See id.* at 21.

28. *See id.*

29. *See* DOUGLASS, *supra* note 24, at 28–29.

30. *Id.* at 47–49.

31. *Id*. at 49.

Auld, a practice common at the time.[32] The arrangement pleased Auld, as it would assure Douglass's profitability but relieve Auld of having to worry about Douglass.[33] What Auld did not know, however, was that Douglass schemed to hire out his time so that he could lay aside the excess proceeds for his bid for freedom. After some time, Douglass escaped to freedom by impersonating a sailor and made his way from Maryland to his eventual destination, New York.[34]

Now a free man, Douglass did what many free men did at the time—look for work. He worked in whatever place needed it. He recalled his first moment working as a free man, a simple task of moving coal into a house, as a moment of elation.[35] Though Douglass's tasks were menial to start, it was not long before Douglass was called to work that would prove vital to the nation. Douglass met William Lloyd Garrison in the summer of 1841 and immediately was swept up into the ranks of the abolitionists. Finding Douglass to be a great orator with a compelling story, the Massachusetts Anti-Slavery Society solicited him to assist in securing subscribers for abolitionist news outlets.[36]

Douglass found friendship amongst the Garrisonians and embraced their abolitionist methods, but his time with them was not without its difficulties. The Garrisonian position toward the Constitution was one of open hostility. Participation in the political system equated to cosigning with the vile slave institution—"No Union with slaveholders" was their slogan.[37] In retrospect,

32. A slave hiring out his or her time was the practice of a slave master releasing the slave to seek employment as the slave saw fit, in return for the promise that the slave would return a set amount of proceeds from the labor to the slave master. Any excess proceeds could be kept by the slave for his or her own pleasure. Such arrangements, however, were illegal at the time. *See* Finkelman, *supra* note 15, at 21. Nevertheless, hiring out one's time was, by Douglass's account, a common practice in Baltimore and other slaveholding areas. *See* DOUGLASS, *supra* note 24, at 131.

33. *See* DOUGLASS, *supra* note 24, at 132–33.

34. *See id.* at 137–40.

35. Douglass's words are poignant and worth quoting in full: "I was not long in accomplishing the job, when the dear lady put into my hand *two silver half-dollars*. To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—*that it was mine*—*that my hands were my own*, and could earn more of the precious coin—one must have been in some sense himself a slave." *Id.* at 147.

36. *Id.* at 151–52.

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

Douglass acknowledged that such a position was easy to embrace, the horrors of slavery being fresh in his mind's eye. However, Douglass's restless mind and independence led to a slow, but deliberate, separation from his new friends. For instance, at conventions, his abolitionist colleagues restrained Douglass in the content of his speeches. They told him: "Give us the facts . . . we will take care of the philosophy."[38] But Douglass recalled that, as he continued to read and think, he became unsatisfied with just the facts—he wanted the philosophy.[39] Time would reveal, however, that the Garrisonians were not entirely without reason in restraining Douglass. The more Douglass spoke from an educated position, the more crowds refused to accept that he had ever been a slave.[40] To dispel rumors that he was never a slave, Douglass published his first autobiography.[41] Publishing the autobiography effectively settled the question of Douglass's origins but also had the consequence of endangering Douglass's life. His past now public in excruciating detail, Douglass found himself ripe for the picking from any slavecatcher cloaked with authority under the 1793 Fugitive Slave Act. To avoid a fate worse than death, Douglass fled to England.[42]

While abroad, Douglass learned through experience two lessons that contributed to his transformed constitutional thinking: first, the full measure of his worth as an individual; and second, the relationship between justice and prudence. Back in America, Douglass experienced discrimination most places he went; even in the North, he was shut out of accommodations and his abolitionist colleagues limited Douglass's participation at conventions. Abroad, however, Douglass found himself welcome in most establishments

Garrison, *Address to the Friends of Freedom and Emancipation in the United States*, 14 LIBERATOR 86 (1844).

38. DOUGLASS, *supra* note 24, at 153.

39. *Id.* This also reveals an important point. Douglass teaches us that, as we look upon the past, bare assertions of fact are inadequate to capture "the truth of the matter." One must think deeply, using reason, to interpret the past and its significance.

40. Douglass recounts that part of the strategy of the Garrisonians was to appeal to the crowd how barbaric slavery was through demonstrating how slaves were devoid of any education (which overall was accurate). When Douglass addressed crowds in an educated and dignified manner, it caused many to doubt his slave origins. *See id.* at 153–54.

41. The title of Douglass's first autobiography is "Narrative of the Life of Frederick Douglass, An American Slave."

42. DOUGLASS, *supra* note 24, at 164 ("It was thus I was led to seek a refuge in monarchical England from the dangers of republican slavery.").

and often was offered an equal seat at the table. Douglass recollected that those abroad "measure and esteem men according to their moral and intellectual worth, and not according to the color of their skin."[43] The hospitality Douglass received abroad helped him realize that the greatest roadblock to achieving abolitionism in America stemmed not from Americans' principles but from their prejudice. So long as Americans assumed black persons were naturally inferior, they "reconciled themselves to his enslavement and oppression as being inevitable, if not desirable."[44] It was not enough for Americans to believe that all persons deserved to be free—they needed to recognize them as equal. However, erasing prejudice would prove difficult. It would require, in Douglass's estimation, a strong example of independent black people that achieved moral and intellectual heights equivalent to that of their white peers.

The second lesson Douglass learned at the tutelage of his time abroad was the relationship between justice and prudence. In America, Douglass subscribed to the Garrisonian position of exact justice—there could be no compromise with the demands of justice. This meant a complete renunciation of the Constitution and political participation. The point was to reject *any* legitimacy in slaveholding. Douglass's time abroad showed him the possibility of a just society, what life *could* be like when treated equally amongst peers. In doing so, it served as a painful reminder that at home he was still considered as property before the law. With his horizon of possibilities defined by the Garrisonian position of "No Union with slaveholders," Douglass assumed there was no escape from slavecatchers "lawful" claim against him. Douglass's friends in England, however, had different convictions. While abroad, some of Douglass's friends contacted Hugh Auld and arranged a commercial transaction that would release any legal claim Auld may have had on Douglass, something the Garrisonians adamantly opposed.[45] Douglass, having reconsidered the nature of justice and

43. *Id.* at 174.

44. *Id.* at 183.

45. *See id.* at 181–82. Douglass, recalling the transaction, stated: "Some of my uncompromising antislavery friends in this country failed to see the wisdom of this commercial transaction, and were not pleased that I consented to it, even by my silence. They thought it a violation of antislavery principles, conceding the right of property in man, and a wasteful expenditure of money." *Id.* at 182.

prudence, did not find the transaction to be unjust; rather, he recognized the prudence in the transaction.[46] Douglass condoned the transaction and was grateful to be able to return to America as a free man, not only in fact but in law as well.

Douglass's independence of thought and divorce from the Garrisonian camp became complete after the founding of his first newspaper, the *North Star*. Douglass's time in England taught him that he needed to change hearts and minds in America by providing an example of black excellence—no better way to do this, he thought, than maintaining a successful newspaper.[47] At the start Douglass published views similar to his early mentor—he denounced the Union and advocated its dissolution. Douglass proclaimed that the language of the Constitution was that "you shall be a slave or die."[48] However, Douglass soon experienced a change in disposition toward the Constitution. He wrote: "My new circumstances compelled me to re-think the whole subject, and to 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."[49] For Douglass, the Constitution was no longer "a covenant with death, an agreement with hell," but a wonderful promise of liberty. One could argue that his restless character and intellect alone destined him to move beyond his mentor's anti-Constitution position to one that embraced a more sophisticated theory of constitutional interpretation.[50]

But while Douglass summarily shifted his conclusion regarding the Constitution in a pithy article titled "Change of Opinion Announced," it took him a bit more time to clarify his methods.[51]

46. "For myself, 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 of economy." *Id.*

47. Douglass recalled: "At that time there was not a single newspaper in the country regularly published by the colored people, though many attempts had been made to establish such, and had from one cause or another failed." *Id.* at 183.

48. *American Slavery*, *supra* note 9, at 274–75.

49. DOUGLASS, *supra* note 24, at 186.

50. *See* Peter C. Myers, *Frederick Douglass's America: Race, Justice, and the Promise of the Founding*, HERITAGE FOUND. (Jan. 11, 2011), https://www.heritage.org/political-process/report/frederick-douglasss-america-race-justice-and-the-promise-the-founding.

51. For this reason, one can understandably misdiagnose Douglass's precise methods, even as one recognizes that he had a change of opinion regarding the Constitution. *See, e.g.*,

Douglass attributed his shift in opinion to Lysander Spooner, Gerritt Smith, and William Goodell.[52] Of all these sources, Spooner likely had the strongest influence on Douglass's method, given that Spooner had the more robust treatment of the relationship between the Constitution and slavery.[53] Spooner understood law to be "the rule, principle obligation or requirement of natural justice," and therefore "*constitutional law, under any form of government, consists only of those principles of the written constitution, that are consistent with natural law, and man's natural rights*."[54] No posited law, at least concerning written constitutions, could violate natural rights and be properly understood as law. This fundamental character of law required that laws be strictly construed in favor of natural rights. Spooner derived this essential rule of interpretation from Chief Justice Marshall's opinion in *U.S. v. Fisher*.[55] Thus, when interpreting the Constitution, the interpreter must construe meaning to reflect, as much as possible, natural rights.[56] But, importantly, the meaning that was to be strictly construed was to be sourced from the people who adopted the legal instrument. Speaking of the Constitution, for example, Spooner suggested that the meaning ought not be derived from the testimonies of delegates to the convention, but from the people who ratified the instrument.[57]

Ives, *supra* note 17 (relying heavily on Douglass's denouncing of any original meaning in his speech "Is the United States Constitution For or Against Slavery" delivered in 1851 shortly after his announced change of opinion, but not taking fully into account his use of original meaning in a later speech with the same title delivered in Scotland in 1860).

52. *See* Frederick Douglass, *Change of Opinion Announced* (May 23, 1851), *in* 2 LW, *supra* note 9, at 155 [hereinafter *Change of Opinion*] ("A careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell, has brought us to our present conclusion.").

53. *See* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1845).

54. *Id.* at 16.

55. *Id.* at 75–76 (quoting *United States v. Fischer*, 6 U.S. (2 Cranch) 358, 390 (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.") (emphasis added).

56. *Id.* at 137 ("*And this rule is, that the language of statutes and constitutions shall be construed, as nearly as possible, consistently with natural law*.").

57. *Id.* at 136 ("The instrument, therefore, is now to be regarded as expressing the intentions of the people at large; and not the intentions of the convention, if the convention had any intentions differing from the meaning which the law gives to the words of the instrument.").

Understood in this way, interpretation could not be divorced from natural law reasoning. One could not parse through the law's public meaning unless one brought natural law to bear on that endeavor.[58] But Spooner made clear that this method of relying upon meaning through the ratifying public's understanding, strictly construed through a natural rights prism, was only controlling for provisions which concerned the government framework.[59] Where the law concerned the natural law or natural rights, natural law alone was controlling—not the ratifying public's understanding.[60] The natural law, Spooner argued, not unlike mathematics, was perfectly knowable; Spooner referred to it as the "*science of justice*."[61] Accordingly, it made as little sense to pass laws that concern natural rights as it did to pass laws concerning mathematical proofs. Where the law concerned some natural right or other proposition of natural law, the true and fullest sense of natural law was dispositive; the positive law, let alone the public's understanding of that law, was subordinate to the natural law in such instances. Spooner argued: "Whether, therefore, written laws correspond with, or differ from, the natural, they are to be condemned. In the first case, they are useless repetitions, introducing labor and obscurity. In the latter case, they are positive violations of men's rights."[62] This led Spooner to suggest that no

58. When it comes to natural law and its relation to the positive law, it mattered not what the people believed the words meant, because

> *no one can know what the written law is, until he knows what it ought to be*; that men are liable to be constantly misled by the various and conflicting senses of the same words, unless they perceive the true legal sense in which the words *ought to be taken*. And this true legal sense is the sense that is most nearly consistent with natural law of any that the words can be made to bear, consistently with the laws of language, and appropriately to the subjects to which they are applied.

*Id.* at 138.

59. *See id.* at 140 ("This condemnation of written laws must, of course, be understood as applying only to cases where principles and rights are involved, and not as condemning any governmental arrangements, or instrumentalities, that are consistent with natural right, and which must be agreed upon for the purpose of carrying natural law into effect.").

60. *Id.*

61. *Id.* at 140–41 ("It is true, it must be learned, like any other science, but it is equally true, that it is very easily learned . . . . *It is the science of justice*.").

62. *Id.*

matter how clear the meaning of posited law, if it did not perfectly reflect natural law principles it did not hold full status of law.[63]

Douglass was smitten by anti-slavery constitutionalism after being introduced to it by Gerrit Smith. The greatest pull for Douglass lay in a practical reality: Why bother reinforcing the image of a pro-slavery Constitution when such efforts only aided slaveholders and hindered the efforts of northern abolitionists?[64] Yet Douglass could not bring himself to fully commit to the anti-slavery version of the Constitution because of the problem of original meaning. Douglass put the dilemma as follows:

> It is this: may we avail ourselves of legal rules which enable us to defeat even the wicked intentions of our Constitution makers? . . . I know well enough that slavery is an outrage, contrary to all ideas of justice, and therefore cannot be law according to Blackstone. But may it not be law according to American legal authority?[65]

Douglass may have struggled with original meaning due to his reliance on the original intentions of the Framers at the height of his Garrisonian advocacy, but equally he could have struggled with Spooner's methods, given that Spooner affords important weight to the ratifying public's understanding in some instances, only to circumvent such understanding completely in favor of natural rights in others. Nevertheless, a few months later Douglass seemed to settle upon the Constitution as an anti-slavery document, even if he did not have the methodology completely worked out.[66]

That Douglass honed his methods over time, even if he had settled upon an anti-slavery Constitution, is evidenced by juxtaposing

63. *See id.* at 144. In a telling passage concerning the precise nature of natural law and its practicableness in comparison to the consistently imprecise nature of positive law, Spooner wrote: "Or suppose, further, that government were *impracticable*, under such a definition of law as makes law synonymous with natural justice; would that be any argument against the definition [of natural law]? or [*sic*] only against government?" Spooner revealed that, within his natural law theory of interpretation, there is a preference for natural law and natural rights that may ultimately *supersede* positive law. Indeed, this latent element in Spooner's thinking may have led him to natural rights anarchism. *See* LEWIS PERRY, RADICAL ABOLITIONISM: ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT (1995).

64. *See* Letter from Frederick Douglass to Gerrit Smith (Jan. 21, 1851), *in* 2 LW, *supra* note 9, at 149 ("I have about decided to let Slaveholders and their Northern abettors have the Laboring *oar* in putting a proslavery interpretation upon the Constitution.").

65. *Id.* at 150.

66. Letter from Frederick Douglass to Gerrit Smith (May 1, 1851), *in* 2 LW, *supra* note 9, at 152–53.

his early pro-Constitution speeches with his later ones. Early on, Douglass can be seen as taking the more extreme line of reasoning apparent in Spooner, namely that public understanding has *no* authority where natural rights are concerned. In his first rendition of the speech "Is the U.S. Constitution for or Against Slavery," Douglass summarily rejects the significance of history in the context of slavery and the Constitution.[67] Such a "grave constitutional question," Douglass argued, was not to be decided by history or tradition.[68] To be sure, one could find historical evidence in favor of the anti-slavery reading of the Constitution.[69] But, when it came to natural rights, it mattered not what the past brought to bear on the question. Rather, "[o]n the side of nature, right, liberty and humanity, the judge, jury and advocate may make the circuit of the globe for evidence."[70] There was no room for historical inquiries in such methods.[71]

Slowly, however, Douglass began making more space for historical inquiries. A couple years after his first anti-slavery Constitution speech, Douglass argued that there were three *distinct* routes by which to arrive at an anti-slavery Constitution. [72] First (and likely first in priority), legal rules of interpretation "as old as the *science* of law itself";[73] second, contemporaneous history, a route Douglass importantly clarified that is *less* direct than the first; and third, a plain reading of the Constitution. Douglass gave pride of place to legal interpretation completely divorced from history, even

67. *See* Frederick Douglass, Is the United States Constitution for or Against Slavery (July 24, 1851), *reprinted in* 5 LW, *supra* note 9, 191 [hereinafter Anti-Slavery Constitution (1851)]. Here Douglass addressed an argument in favor of the pro-slavery interpretation of the Constitution, which marshaled historical arguments of not only the Framers' intent, but also that of the adopters.

68. *Id.* at 195.

69. *See id.* at 196.

70. *Id.* at 199.

71. Ives uses this speech extensively, along with sundry quotes from other speeches, to demonstrate Douglass's aversion to history, and he is right—in a sense. *See* Ives, *supra* note 17, at 92–95. Douglass did have a rather strong aversion to history at this point that followed Spooner's more radical claims concerning natural rights and positive law, but Douglass later tethered his natural rights interpretation to history in a more prominent way. This was likely due to Douglass understanding justice to be a real phenomenon, but, unlike Spooner, not one that was knowable with the same degree of precision as mathematics. This will be explained in greater detail in section IV.B.

72. 5 LW, *supra* note 9, at 284.

73. *Id.* (emphasis added). The reference to the "science" of law could reflect Spooner's influence on Douglass, Spooner having referred to the natural law as the science of justice.

if he thought a historical account could be given. Later, however, when speaking of the Fugitive Slave Act of 1850, Douglass argued that the past *controls* man's actions so long as those prior constitutional actors acted within the range of their authority.[74] From 1851 on, the maturation of Douglass's thought regarding the Constitution's relation to philosophy, government, and rules of interpretation can be seen in his many speeches and articles.[75] But Douglass would finally incorporate all three distinct routes into one, cohesive, interpretive method when he delivered the most well-known version of his anti-slavery Constitution speech in Glasgow, Scotland, in 1860.[76] Here, Douglass fused legal rules of interpretation focusing on natural rights, historical evidence of original public meaning, and a plain reading of the Constitution.

Douglass's constitutional thinking experienced a major shift, but that shift was not sudden—rather, it was well thought out and developed over time. Most importantly, he shifted from Garrisonian anti-constitutionalism to a pro-Constitution position. He was influenced by many, but his early pro-constitutionalism closely mirrored Spooner's more radical elements of constitutional interpretation. Over time, as he figured out for himself how history "fit" in constitutional interpretation, Douglass settled upon a theory that did not give original meaning pride of place, but that also did not completely elide history in favor of natural rights interpretation.

Interestingly, the major shift in Douglass's thought mirrors the evolution in originalism. While with the Garrisonians, Douglass championed a theory of interpretation that mirrored original intent

74. Frederick Douglass, The Fugitive Slave Law, Speech to the National Free Soil Convention at Pittsburgh (Aug. 11, 1852), *in* 2 LW, *supra* note 9, at 206, 208 [hereinafter Fugitive Slave Law Speech].

75. Chronologically, see Frederick Douglass, *Is Civil Government Right?* (Oct. 23, 1851), *reprinted in* 5 LW, *supra* note 9, 208 [hereinafter *Is Civil Government Right*] (explaining his understanding of natural rights philosophy and government); Frederick Douglass, Important Truths (May 7, 1852), *in* 5 LW, *supra* note 9, 223 (explaining rules of interpretation) [hereinafter Important Truths]; Fourth of July Speech, *supra* note 12 (giving a historical account of the Founding consistent with anti-slavery objectives); Frederick Douglass, The U.S. Constitution and Anti-Slavery (June 24, 1853), *in* 5 LW, *supra* note 9, at 284 (suggesting that there are three distinct routes to an anti-slavery Constitution) [hereinafter Anti-Slavery Constitution (1853)].

76. Frederick Douglass, The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery? (Mar. 26, 1860), *in* 2 LW, *supra* note 9, at 467 [hereinafter Anti-Slavery Constitution (1860)]. How exactly these modalities can be fused into one method will be explained in section III.D.

originalism: the Constitution's meaning was best derived from the intentions of its Framers, whether those intentions were public or private. Douglass moved beyond this position to advocate a theory of interpretation that featured elements we might associate with original public meaning originalism: the Constitution's meaning was best derived from the public's original understanding of the plain text. Yet, though it was similar to original public meaning originalism in seeking original meaning based on public understanding, its method in doing so differed significantly. As Douglass continued to consider the Constitution's meaning, he departed from his Garrisonian colleagues, and the embryo of natural rights originalism began to take shape.

## II. ORIGINALISM

Before we make the case that Douglass and his contemporaries were the "original originalists" and see where Douglass provides a novel account for the originalist enterprise, we must make some sense of originalism as it is practiced today. Originalism as a movement in jurisprudence took flight in the 1980s.[77] Originalism's focal case is two-fold: first, the Constitution's meaning was fixed at the time of ratification (the fixation thesis), and second, that fixed meaning constrains our understanding of the Constitution (the constraint principle).[78] Originalism today is not monolithic, nor immune to change; it is multi-faceted and continually evolving.[79]

77. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 4 (2015). Recently, however, scholars have argued that originalism's practice predates the 1980s significantly. *See, e.g.*, ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM (2017) (arguing that the idea of originalism can be seen as early as the debates between James Madison and Thomas Jefferson, where Madison reminds Jefferson that the dead, by drafting the Constitution, form a debt against the living). Gilhooley marks the beginning of modalities similar to originalism as early as the 1820s. *See* GILHOOLEY, *supra* note 8, at 23–41.

78. Solum, *supra* note 77; LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 48 (2019). The two core ideas (the fixation thesis and the constraint principle) are taken from Solum, but the language of the "focal case" is borrowed from Strang.

79. *See* STRANG, *supra* note 78, at 10–12, 40–42. Lee J. Strang has recently synthesized many articulations of originalism into a manageable whole. He also attempts to provide a normative, philosophical justification for the use of originalism in his book. He argues that we ought to use originalism (as it is presently constituted) as the sole method of constitutional interpretation because it satisfies the demands of the natural law. Douglass's position offers significant revisions to Strang's position for the same purposes—providing a

Nevertheless, most iterations of originalism adhere to the focal case, though in varying degrees.[80] Originalism's many versions may be bifurcated into two broad categories: the old originalism, which focuses on original intent, and the new originalism, which focuses on original public meaning.[81] Originalists have mostly abandoned original intent methodology, it being the primary target of early critics.[82] For this reason, I will focus on the new originalism, which features original public meaning methodology.[83]

### *A. Original Public Meaning*

There are various methods that originalists use today to discover the original public meaning, but most agree on what it is in theory. Put simply, the original public meaning "is the public meaning of the Constitution's text at the time of its authorization."[84] Originalists seek to discover the original public meaning through myriad sources and methods, whether it be probing documents publicly accessible at the time, surveying public use of pertinent terminology, or consulting constitutional records of the time, including drafting history, ratification debates, or early practices.[85] Some originalists seek to discover the original public meaning by using the same interpretive methods that would have been used at the time of the Constitution's adoption.[86] This latter method is similar to Douglass's method, who called for a "plain reading" of

method of constitutional interpretation that satisfies the demands of the natural law, or natural rights.

80. As will be discussed, different versions of originalism approach both ascertaining original meaning and how that meaning constrains constitutional meaning. Among originalists, the first prong is usually the most contested—how to ascertain the original meaning. *See* McGinnis & Rappaport, *supra* note 23; Solum, *supra* note 23, at 4–6; Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018). Between originalists and non-originalists, the second prong of the fixation thesis—that the original meaning constrains the Constitution's meaning—is perhaps the most contested. *See, e.g.*, Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 30–31 (2009).

81. *See* Keith E. Whittington, *The New Originalism*, 2 GEO J.L. & PUB. POL'Y 599 (2004).

82. *See* Solum, *supra* note 23, at 1–2.

83. That said, for reasons that will be made clear in Part III, it will be helpful to maintain the distinction between original intent and original public meaning.

84. STRANG, *supra* note 78, at 27.

85. *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (2018).

86. *See* McGinnis & Rappaport, *supra* note 23.

the Constitution, using "certain rules of interpretation, for the proper understanding of all legal instruments" which were "well established" at the time.[87]

The original public meaning is the Constitution's "communicative content," which is derived from the "original conventional meaning supplemented by the rules of syntax and grammar."[88] The communicative content is an amalgamation of the words' original conventional meaning and their original semantic meaning. The various methods employed (whether it be exploring public documents or investigating the original interpretive methods at the time) all aim to ascertain these two meanings to determine the Constitution's communicative content. Poring through contemporary public documents assists the interpreter in understanding the original conventional meaning—how certain words were understood at the time of adoption. But words often have multiple uses or meanings even at one time in history. For this reason, discovering the original semantic meaning is also important, for it aids the interpreter in understanding what *sense* of the word was conveyed in the Constitution. For instance, the word "establishment" might convey a particular sense when used in conjunction with "of religion."[89] In a sense, the goal is to accomplish a plain reading of the text based on how the ratifiers of the Constitution would have understood it.

The combination of a plain textual reading with certain rules of interpretation are the *original methods* of interpretation that were

87. Fourth of July Speech, *supra* note 12 at 202; *see also* Anti-Slavery Constitution (1860), *supra* note 76, at 470 ("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.").

88. STRANG, *supra* note 78, at 27; Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 487, 494 (2013) (describing semantic meaning as "a function of the semantic meaning of the component units of meaning (the words and phrases) and the rules of syntax and grammar that enable combination of these units into larger units (i.e., sentences)."). Solum further distinguishes between what the "communicative content" of a phrase may be as opposed to its "legal content," which is richer in content than a collection of words' "communicative content." This second distinction is pertinent to issues stemming from constitutional construction, which will be discussed in section III.C. *See id.* at 511–13.

89. *See, e.g.*, Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006) (arguing that "establishment" has been incorrectly understood as "no-establishment," and that a truer sense of how the word was originally used would only limit the federal government, not the states, from creating laws aimed at aiding (or not aiding) religious institutions).

utilized at the time of the Constitution's adoption.[90] These methods were inherited from William Blackstone's legal commentaries.[91] Blackstone's rules required interpreting words "in their usual and most known signification" (i.e., plain reading), understanding the subject matter, determining the "effects and consequence" of different interpretations, and understanding "the reason and spirit of [the law]; or the cause which moved the legislator to enact it" (i.e., the law's purpose).[92] The purpose of these rules was to discover the legislation's *fixed* meaning.[93] Inasmuch as original intent might matter, these rules tie the Framers' intent into original public meaning under the presumption that the Framers drafted the Constitution well aware that these interpretive practices would be dispositive in determining the Constitution's meaning.[94]

Originalists support their textualism with "contextual enrichment," which situates a text in a place and time, "modif[ying] semantic meaning in order to facilitate communication in a particular context."[95] Contextual enrichment may include a provision's "long-term and immediate historical background,"[96] as well as general practices of the time.[97] Put simply, the context in which words are adopted matters. The interpreter's main role here is, when there are multiple plausible original meanings, to weigh the evidence and decide which meaning is more persuasive.[98]

90. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751 (2009).

91. *See* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007) (explaining the importance of original interpretive methods); McGinnis & Rappaport, *supra* note 90, at 751–802 (identifying Blackstone as "the leading legal theorist before the enactment of the Constitution", who "listed a variety of rules for interpreting laws when the words were unclear, including reference to context, subject matter, effect, and the reason and spirit of the law."); Letter from Frederick Douglass to Gerrit Smith (Jan. 21, 1851), *in* 2 LW, *supra* note 9, 149, at 150.

92. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 59–62 (1765).

93. See STRANG, *supra* note 78, at 13.

94. *See id.* at 45; THE FEDERALIST NO. 78 (James Madison) (arguing that the Constitution's meaning would be "liquidate[d]" over time through practice).

95. STRANG, *supra* note 78, at 28; *see* Solum, *supra* note 88, at 487–88.

96. STRANG, *supra* note 78, at 29.

97. *See id.* at 215.

98. *See id.* at 29 ("[T]he question for originalist scholars is which group's evidence is most persuasive.").

How a constitutional provision was implemented in time close to adoption would provide important evidence of that provision's original meaning.[99]

Finally, locking in the original public meaning is essential because of the fixed nature of the Constitution's meaning. This is why originalists adhere to the constraint principle. The Constitution's meaning does not change—it must be consistent from the time of ratification. This claim relies heavily on a theory of consent; change is only appropriate where the people's consent grants it.[100] The ratification represents *the* moment in time where the people consented to the Constitution's meaning, and thus the meaning remains moored to that moment in perpetuity. To change the Constitution's meaning would also require consent, a circumstance that the Constitution provides for through the amendment process.[101] The Constitution has a fixed meaning that does not change at the behest of constitutional or political actors. Discovering the original public meaning, therefore, is key in deciding legal outcomes.

Nevertheless, the original public meaning, even with contextual enrichment, may not always produce clear-cut solutions to constitutional inquiries. After all, new problems often reveal some degree of indeterminacy in the original public meaning despite using original methods.[102] It is in this area of indeterminacy that constitutional interpretation is insufficient, requiring constitutional construction.

99. *See, e.g.*, Michael W. McConnell, *Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457 (1995).

100. *See* STRANG, *supra* note 78, at 1–4. This theory of consent has been the foundation of most normative justifications for originalism.

101. U.S. CONST. art. V.

102. There are many instances in which new problems may test the limits of original meaning. For example, whether the Constitution authorizes the establishment of an Air Force may not be readily understood based solely on the original meaning, especially when that original meaning is restricted by general practices at the time of ratification. *See, e.g.*, Samuel Issacharoff, *Meriwether Lewis, The Air Force, and the Surge: The Problem of Constitution Settlement*, 12 LEWIS & CLARK L. REV. 649 (2008) (attempting to reconcile the notion of an Air Force and maintaining fidelity to the original meaning of the Constitution); Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1 (2016) (arguing, in part, that originalists may have to live with certain "super precedents," such as the Air Force).

### *B. Construction*

Often the original public meaning runs dry or is indeterminate; some originalists contend that, under such circumstances, the Constitution must be constructed.[103] But originalists disagree on exactly what construction is[104] and how it ought to be done.[105] Perhaps the least controversial definition of construction is the process of supplementing constitutional meaning in a way that is consistent with the original public meaning.[106] In other words, construction is a gap filler. Those who condone construction do not

103. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 120–31 (2004); JACK M. BALKIN, LIVING ORIGINALISM 4–6 (2011). McGinnis and Rappaport (to name just a couple) do not find construction appropriate, especially when it comes to judges. *See* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919 (2021); McGinnis and Rappaport, *supra* note 91; JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 152–53 (2013).

104. It seems that most agree that interpretation is the activity of discovering the semantic meaning of a word in a particular context, while construction is the activity of *applying* that meaning to particular circumstances. *See, e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 65–66 (2011). Solum, however, has provided a broader conception of construction that, along with "application," also includes giving a text legal meaning. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 468 (2013).

105. Solum identifies two theories of who may permissibly enter the "construction zone." The first is the "Moral Readings Theory," which permits any government actor to fill gaps based on political morality. The second is the "Originalist Thayerian Theory," which denies judges the ability to fill gaps due to the activity of gap-filling being essentially political in nature. *See* Solum, *Originalism and Constitutional Construction*, *supra* note 104, at 472–73; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 7 (1999) ("Constitutional interpretation is essentially legalistic, but constitutional construction is essentially political."). Originalists are spread out on a spectrum between "Moral Reading Theory" and "Originalist Thayerian Theory." *See* Barnett, *supra* note 104, at 70 (explaining that originalists disagree on how to engage in construction primarily due to their normative reasons for preferring originalism); BARNETT, *supra* note 103, at 122–23 (judges construing constitutional meaning is permissible); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 125–29 (2010) (revising an earlier position that barred judges from construing the Constitution, but nevertheless expressing concerns with the prospect); STRANG, *supra* note 78, at 84–90, 195–96 (suggesting that Congress, rather than the Court, is the proper place for construction). We will find that Douglass fits the "Moral Readings Theory," but he is very specific about *what* morality ought to be used in constitutional construction. It matters not what the judge *personally* finds to be correct. The judge may personally reject natural rights theory, but the Constitution requires it to be the guiding principle in construction.

106. See BARNETT, *supra* note 103, at 123–27. Solum refers to this notion of construction as the "construction zone." *See* Solum, *Originalism and Constitutional Construction*, *supra* note 104, at 469–73.

abandon the fixation thesis; in the realm of interpretation, the Constitution's meaning is still fixed. Construction is an activity engaged only when the activity of interpretation is exhausted, but the legal answer remains unclear. Due to commitment to fixed original public meaning, those who permit construction do so under very limited circumstances—when the meaning is so ambiguous or indeterminate so as to not permit any plausible interpretation.

Construction's limited nature requires the interpreter to first determine what legal norm is presented by the text. Each constitutional provision embodies one of three possible legal norms: rules, standards, or principles.[107] Determining whether the constitutional provision embodies a rule, standard, or principle is empirical in nature, not normative.[108] The interpreter must determine the proper legal norm because the room for construction depends on the norm in question; the interpreter ought to choose the norm that requires the least amount of construction but still fits the provision's original meaning. Rules require the least construction; where a provision requires Presidents to be at least 35 years of age, it requires exactly that.[109] Standards, such as the Necessary and Proper Clause, are slightly more elastic, requiring the application of a set of predetermined factors.[110] "Necessary" and "proper" intrinsically will not produce an input-output scenario that rules tend to produce (i.e., if you are at least 35 years of age, you can run for president; if you are not, you cannot). Yet, despite their vagueness, "necessary" and "proper" do provide enough meaning to *construct* possible factors. Chief Justice John Marshall provided the most famous example of addressing the word "necessary" in *McCulloch v. Maryland*.[111] Marshall was presented with two plausible constructions of "necessary." One defined necessary as indispensably requisite; the other as convenient, useful, or essential. Marshall opted for the latter, stating that "[t]o employ the means necessary to an end, is generally understood as employing any means calculated to produce the end."[112] The standard "necessary" permitted a limited scope of

107. BALKIN, *supra* note 103, at 6; STRANG, *supra* note 78, at 209–10.

108. STRANG, *supra* note 78, at 213.

109. U.S. CONST. art. II, § 1.

110. *See* STRANG, *supra* note 78, at 212; U.S. CONST. art. 1, § 8, cl. 18.

111. McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

112. *Id.* at 413–14.

possibilities, and Marshall chose one based on a textual analysis of "necessary" as it appears in the Constitution.[113]

Principles are highly elastic and allow significant discretion in exercising judgment. A constitutional provision is usually identified as conveying a principle where the language is general.[114] The principles conveyed by a constitutional provision often are not stated in the text itself, hence the need for construction. The phrase "cruel and unusual" in the Eighth Amendment might be said to present such a situation, where the phrase admits a principle that allows a great degree of latitude in determining its meaning.[115] Another example might be the phrase "equal protection of the laws" found in the Fourteenth Amendment, some having argued that it conveys principles prohibiting class legislation or arbitrary distinctions between citizens.[116]

Depending on the principle, the interpreter needs to consult history to a greater or lesser degree. Principles can provide either abstract conventional moral reasons (such as preventing abuse of power through the separation of powers) or critical moral reasons (such as preserving and promoting liberty or equality).[117]

113. Barnett provides a thorough analysis of the historical development of "necessary" and how it relates to the interpretation-construction distinction. *See* BARNETT, *supra* note 103, at 160–87.

114. *See* BALKIN, *supra* note 103, at 263. Balkin has a chapter devoted to how to identify and implement principles. *See id.* at 256–73. He has an approach similar to Douglass in that he suggests the historical evidence be used to identify the principles underlying a specific provision. However, Douglass has a primacy of place for natural rights principles as the guide for understanding the Constitution that Balkin does not.

115. *See* U.S. CONST. amend. VIII.

116. *See* BALKIN, *supra* note 103, at 220–26. This point, however, is contested. *See, e.g.*, Earl A. Maltz, *The Concept of Equal Protection of the Laws – A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985) (arguing that the Equal Protection Clause was not meant to protect against classifications, but only the discrete right of protection of the laws); Melissa Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997) (arguing that the Equal Protection Clause was meant to provide equal benefit to the laws). This, in part, demonstrates the fracture amongst originalists when it comes to construction.

117. *See* STRANG, *supra* note 78, at 213–14. Determining whether a principle is an abstract conventional moral principle or a critical moral principle is an empirical question. If the principle is a conventional moral principle, then the interpreter ought to determine the precise meaning of that principle at the time of adoption. If the principle is a critical moral principle, then the interpreter ought to determine and apply "the best conception of the critical moral norm in question." Critical morality is objective, eternal, and independent of society's understanding. Douglass was a partisan of this viewpoint. *See* Important Truths, *supra* note 75, at 223 ("There is no new truth—truth is eternal."). Conventional morality, conversely, has meaning based on society's subjective conception of morality. For further

Where the principle is based on conventional moral reasons, historical evidence is useful. If the principle is separation of powers, for example, the interpreter should investigate how the Framers understood powers and the role separation of powers played in preventing its abuse. For matters that concern critical moral reasons, such as liberty or equality, interpreters should determine and apply "the best conception of the critical moral norm in question."[118] In either case, principles provide a general guide for interpreters in reaching constitutional conclusions. The most important, and perhaps only, limiting principle in constructing constitutional principles is that the construction cannot contradict the text.[119]

Despite being an empirical endeavor, deciding whether a constitutional provision entails a rule, standard, or provision can grant a great deal of discretion to the interpreter. Indeed, the interpreter may be tempted to identify all places of underdetermined meaning as a principle, thus allowing the greatest room for construction. Strang provides a tool to reduce this possibility: abduced-principle originalism.[120] The purpose of this tool is to enhance part of originalism's focal case—constraint based on original meaning. Abduced-principle originalism determines original meaning where "there was a societal consensus only on a discrete set of practices."[121] The discrete set of practices establishes the boundaries for determining whether the constitutional provision entails a rule, standard, or principle. Thus, historical practices guide but do not necessarily bind future decision-making.[122] This tool simultaneously increases our understanding of the original meaning and limits otherwise underdetermined principles, replacing them with meaning based on practices.

discussion of the significant difference between critical morality and conventional morality, see Santiago Legarre, *A New Natural Law Reading of the Constitution*, 78 LA. L. REV. 877, 886–87 (2018); H.L.A. HART, LAW, LIBERTY AND MORALITY 20 (1963).

118. STRANG, *supra* note 78, at 214. This is similar to Dworkin's counsel to make the Constitution the "best it can be." RONALD DWORKIN, LAW'S EMPIRE 248 (1986).

119. *See* BALKIN, *supra* note 103, at 270–73.

120. STRANG, *supra* note 78, at 215–17.

121. *Id.* at 215.

122. *Id.* at 216.

## III. THE ORIGINAL ORIGINALISTS

As stated earlier, originalism gained prominence in the 1980s, but the influence of its focal case in constitutional jurisprudence dates back to constitutional debates two centuries earlier. Anti-slavery advocates and defenders of slavery alike were fixated on the question of the Constitution's original meaning and its relation to slavery. The way in which they disputed that original meaning was similar: Was the original meaning to be determined by the intent of the Constitution's framers, or by some other method? Garrisonians and defenders of slavery looked to the original intent of the Framers to determine the Constitution's true meaning, finding there an intent evincing a pro-slavery Constitution. Douglass, along with other abolitionists, however, buttressed his plain reading of the text with evidence of the public's original understanding. Thus, in discussing Douglass's relation to his peers, it will be helpful to refer to present-day distinctions. Neglecting the distinction between original intent and original public meaning, for instance, causes most scholars to misrepresent Douglass as either an advocate of original intent or a staunch opponent of originalism.[123] While Douglass rejected what resembles contemporary original intent, his constitutionalism closely resembled original public meaning. But it was not a perfect match. The way Douglass used public meaning, for instance, differed from originalists today. To that end, I will refer to Douglass's method of ascertaining original meaning as discovering *an* original understanding rather than *the* original public meaning. These differences provide the basis for natural rights originalism's deviation from originalism as it is currently constructed. Although certain originalist interpretive methods are closely adhered to, construction contemplates an expanded role for philosophical inquiry into how we ought to understand original meaning.

### *A. Original Intent*

Labeling Douglass as an originalist is not novel; some Douglass Skeptics have made this claim, often as a criticism of Douglass's

123. Randy Barnett is an exception, identifying Douglass as a proponent of original public meaning originalism. *See* Barnett, *supra* note 16, at 244–46. However, Barnett does not examine Douglass's position to the extent this article does.

constitutional thought.[124] Though they correctly placed his constitutionalism within the scope of originalism, they failed to recognize the nuance in Douglass's relation to originalism.[125] Their most inaccurate claim is that Douglass was a champion of original intent, something Douglass denounced on many occasions.[126] Original intent contends that the proper interpretation of any constitutional provision is the Framers' intended meaning.[127] Understanding the Framers' original intent requires investigating what they said about constitutional provisions, during the constitutional convention or later expositions on the matter.[128] The Garrisonians relied heavily on original intent methodology in their claims that the Constitution was unreservedly pro-slavery. The publication of James Madison's Notes of the Constitutional Convention in 1840 served to bolster the Garrisonians' claims that the Framers' original intent, among other things, was to preserve and protect slavery.[129] Douglass, however, rejected original intent methodology because it often would lead to replacing the *actual*

124. *See, e.g.*, MILLS, *supra* note 17, at 176; David E. Schrader, *Natural Law in the Constitutional Thought of Frederick Douglass*, *in* FREDERICK DOUGLASS: A CRITICAL READER 93 (Bill E. Lawson & Frank M. Kirkland eds., 1999); Lawson, *supra* note 17, at 295.

125. To be fair, several accounts did not have the advantage of originalist scholarship that differentiated original intent from original public meaning as a result of the many criticisms non-originalists have since raised. *See* STRANG, *supra* note 78, at 23–26; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609–610 (2004); Solum, *supra* note 78, at 15.

126. See MILLS, *supra* note 17, at 176; Schrader, *supra* note 124, at 93; Lawson, *supra* note 17, at 295. Ives, on the other hand, recognizes Douglass's rejection of original intent methodology, but mistakenly infers Douglass's refutation of original intent as a refutation of originalism in its entirety. *See* Ives, *supra* note 17, at 92–93.

127. Whittington, *supra* note 125, at 603; *see also* Whittington, *supra* note 1, at 379 n.34 (2013). Whittington astutely identifies that, for the most part, the pursuit of subjective original intent was "more often emphasized by critics than proponents of originalism." *Id.* The argument for adhering to original intent has recently been revived by Donald Drakeman. *See* DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY (2020).

128. For example, in the context of the Fourteenth Amendment, Raoul Berger relies extensively on the congressional record to discover original meaning. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 4–8 (Harv. Press 1977) (contending that the meaning of the Constitution is best determined through ascertaining the "original intention" of the framers through an extensive investigation of the legislative record).

129. These notes revealed information, previously unknown to the public, that vindicated the pro-slavery Constitution position. WENDELL PHILLIPS, THE CONSTITUTION A PRO-SLAVERY COMPACT; OR EXTRACTS FROM THE MADISON PAPERS, ETC. (1856). *See* Barnett, *supra* note 16, at 203.

meaning of a constitutional provision with some supposed or secret intention.

Douglass's critique of original intent, shared by contemporary critics,[130] has two main components—that an original intent is impossible to discover and that, even if it were possible to discover, it would not be a dispositive source of meaning. The first criticism is shared by scholars such as Dworkin, who stated that "there is no such thing as the intention of the Framers waiting to be discovered, even in principle."[131] Douglass illustrated this point through James Madison's commentary, which the Garrisonians relied upon religiously, concerning the purported Fugitive Slave Clause.[132] Douglass noted that a popular contention during his time was that several delegates of the constitutional convention (namely Butler and Pinckney of South Carolina) especially wanted the provision as an assurance against run-away slaves.[133] Madison was cited in support of this position, arguing at ratification conventions that the provision was meant to secure property in slaves. Yet, Madison was also cited as affirming that the word "servitude" was struck from the provision in the convention because the Constitution should not expressly protect property in slaves.[134] This contradiction alone, where a single figure could be cited as evidence for two separate intentions, demonstrated the futility of deriving any single, cohesive original intent from an entire body of framers.[135]

Second, even if original intent were possible to discern, it would not be a dispositive source of meaning.[136] Douglass pointedly asked:

130. *See, e.g.*, Solum, *supra* note 23, at 10–11 (noting some of the difficulties with "group intention").

131. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981).

132. *See* Anti-Slavery Constitution (1860), *supra* note 76, at 474–75; Barnett, *supra* note 16, at 203–04.

133. Anti-Slavery Constitution (1860), *supra* note 76, at 474.

134. *Id.* at 474–75. For evidence that this account is not entirely irreconcilable, even if paradoxical, see SEAN WILENTZ, NO PROPERTY *IN* MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING (2018).

135. Anti-Slavery Constitution (1860), *supra* note 76, at 475.

136. Though Douglass was no fan of secret intentions, he was not shy about providing evidence of intentions to combat the pro-slavery vision of the Constitution. For instance, in his Dred Scott Speech, Douglass provided several examples of Framers that had an intention to rid the Union of slavery, not to mention perhaps his greatest remonstrance in the Fourth of July Speech, where he excoriated American citizens for not living up to the ideals of the Framers. *See* Frederick Douglass, The Dred Scott Decision, Speech Delivered Before American Anti-Slavery Society, New York (May 11, 1857), *supra* note 9, at 407, 422–23 [hereinafter Dred Scott Speech]. *See generally* Fourth of July Speech, *supra* note 12.

"What will the people of America a hundred years hence care about the intentions of the scriveners who wrote the Constitution? These men are already gone from us."[137] This statement ostensibly related directly to the "dead hand" problem well-articulated by many non-originalists.[138] However, Douglass here was more concerned with the problem of relying upon the "secret motives or unexpressed intentions" found in the constitutional convention, noting that the debates were "*purposely* kept out of view, in order that the people should adopt . . . the simple text of the paper itself."[139] This critique was precisely Douglass' main contention against Taney's *Dred Scott* decision. Taney interpreted the Constitution "in the light of a secret and unwritten understanding of its framers," employing "supposed intentions—intentions nowhere expressed in the Constitution, and everywhere contradicted in the Constitution."[140] Douglass understood that the meaning of the Constitution was not found in the uncommunicated intentions of the Framers, but in the plain text understood through its original public meaning.

Douglass' denunciation of original intent has recently been interpreted as a wholesale rejection of originalism.[141] This misstep in discerning Douglass' relation to originalism fails to fully grasp Douglass' constitutional theory. While Douglass would not have endorsed original intent, he likely would have endorsed originalism's focal case and more specifically original public meaning, albeit with some important modifications.

### *B. Original Understanding*

Douglass turned away from the Garrisonian original intent methodology, turning instead toward original public meaning methodology. Yet it would be erroneous to state simply that

137. Anti-Slavery Constitution (1860), *supra* note 76, at 469.

138. *See, e.g.*, Ives, *supra* note 17, at 91; Samaha, *supra* note 3.

139. Anti-Slavery Constitution (1860), *supra* note 76, at 469. This criticism fits well with some originalists. Lee Strang elaborates further that, because the Framers knew "their audiences would not have access to their individual or collective *privately*-intended constitutional meaning," the Framers "took great care crafting the Constitution." STRANG, *supra* note 78, at 45 (emphasis added).

140. Dred Scott Speech, *supra* note 136, at 420. Strang has a similar critique of *Dred Scott*. *See* STRANG, *supra* note 78, at 289.

141. *See* Ives, *supra* note 17, at 93 (claiming that Douglass "insists that history, either as a record of tradition, administrative practice, or intention, is not sufficient" to determine whether the Constitution was for or against slavery).

Douglass was interested in original public meaning in the same way present-day originalists might understand the term.[142] Rather, it would be more accurate to say that Douglass was interested in recovering a specific original *understanding*. This distinction is noticeable in how Douglass sought to locate original meaning, but is most distinguishable in the realm of construction.

Douglass promoted an approach similar to original methods originalism primarily to ensure that wicked, *secret* intentions could not shelter themselves under "fair-seeming and virtuous language."[143] The people did not consent to secret intentions, but rather to the text's shared, public meaning. The intentions of the framers mattered inasmuch as those intentions were properly conveyed to the public through the Constitution's text. Douglass similarly cited Blackstone on this point. There were clearly established rules of interpretation for ascertaining the legislature's intentions, and these rules required a plain reading of the text that would approximate how the public, not its drafters, might understand the words of the document.[144]

Where Douglass and originalists might split hairs is the process of contextual enrichment. Douglass would likely endorse contextual enrichment, but he would not give it the full weight originalists might. Douglass' approach employed similar methods. Douglass often supported his plain reading of constitutional provisions with a historical analysis of the sentiments of the general public at the time of ratification.[145] That said, though he was willing

142. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 380 ("Originalist theory has now largely coalesced around original public meaning as the proper object of interpretive inquiry."). This move has prompted the phrase "the new originalism," which encompasses the move from original intent to original public meaning, but also the acceptance of the interpretation-construction distinction. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467 (2013).

143. Anti-Slavery Constitution (1860), *supra* note 76, at 470.

144. Letter from Frederick Douglass to Gerrit Smith (Jan. 21, 1851), *supra* note 9, *in* 2 LW, *supra* note 9, at 150; Fourth of July Speech, *supra* note 12, at 202.

145. *See, e.g.*, Dred Scott Speech, *supra* note 136, at 421 ("It is a fact, a great historic fact, that at the time of the adoption of the Constitution, the leading religious denominations in this land were anti-slavery . . . . The church of a country is often a better index of the state of opinion and feeling than is even the government itself."); Anti-Slavery Constitution (1860), *supra* note 76, at 473 (discussing the original meaning of the purported "Slave Trade Clause," he said, "All regarded slavery as an expiring and doomed system, destined to speedily disappear from the country."). It is not pertinent to this article whether Douglass employed

to consider it, Douglass did not grant much weight to historical practices as a useful measure of meaning.[146] Yet, even if Douglass may not have employed the same exact methods for determining original public meaning used by scholars today, he was certainly concerned with ascertaining some measure of the Constitution's original public meaning.[147]

Somewhat similar to the constraint principle, Douglass sought to lock in the Constitution's meaning, only Douglass did so in his time to preserve its anti-slavery nature. To Douglass, defenders of slavery were attempting to import a *new* meaning on the Constitution. This is most readily displayed in Douglass's critique of Justice Taney's *Dred Scott* opinion. Douglass believed that Taney was attempting to rewrite the Constitution by imputing historical meaning that was inconsistent with the Constitution's true aims. As will be discussed, the substance of Douglass's critique was not that Taney attempted to use history to discover constitutional meaning, but that he did so in the wrong way. No matter how much defenders of slavery wanted to change the Constitution's meaning to abide their peculiar institution, its meaning was resolutely fixed in favor of ultimate abolition. The Constitution has a fixed meaning that does not change at the behest of constitutional or political actors. Discovering the original public meaning, therefore, is key in deciding legal outcomes.

Some have argued wrongly that Douglass was no friend to fixed meanings, but rather that he advocated for a completely open interpretation of the Constitution.[148] This interpretation of Douglass is based on his statement in the Fourth of July Speech, where he states "every American citizen has a right to form an opinion of the Constitution, to propagate that opinion, and to use all honorable means to make his opinion the prevailing one."[149]

the exact methodology for validating historical evidence that originalists advocate today; the important point is that Douglass regularly engaged in similar inquiries in support of his arguments. However, one important point where Douglass deviates from original meaning regards the judge's role in looking at evidence of original meaning through contextual enrichment. This will be further explained in section III.D. of this article.

146. This point will become more apparent when discussing Douglass's departure from most originalists when it comes to principles. See *infra* Section III.D.

147. As will be discussed, Douglass would likely take exception to originalism's use of general practices at the time, as well as the exact nature of the interpreter's role in determining original public meaning.

148. *See, e.g.*, Ives, *supra* note 17, at 91.

149. Fourth of July Speech, *supra* note 12, at 202.

Here, Douglass ostensibly opened the door to any and all meanings, acquiescing to whichever interpretation obtains the most support. However, prior to this statement, Douglass claimed that the enterprise of interpretation was governed by "certain rules," which are "plain, common-sense rules . . . [that] all of us, can understand and apply."[150] The true gravity of this claim is that one does not need to obtain a professional degree to understand the *plain meaning* of the Constitution, and that natural rights, which are necessary for understanding that meaning, are readily accessible to the average person through reason. The Constitution, in this sense, does not belong to the drafters or the Supreme Court, but to the people in the fullest sense.[151] There is a fixed meaning and a right answer to legal questions available to the average citizen. The people may consent to change the meaning of a provision, but only through proper constitutional mechanisms.[152]

The divide between natural rights originalism and original public meaning originalism comes, however, when (and under what conditions) historical evidence presents multiple plausible meanings or is otherwise underdetermined. Where Originalists seek to limit construction, Douglass welcomed it with open arms. It is here that Douglass's method most clearly warrants a new category of originalism: natural rights originalism. Douglass

150. *Id.*

151. *See id.*; *see also* THE FEDERALIST NO. 78 (Alexander Hamilton). Alternatively, Ives suggests that Douglass is proposing that the Constitution be interpreted "according to one's own lights." Ives, *supra* note 17, at 91. Ives' theory is only limited by what may "be accepted by a majority of one's fellow citizens." *Id.* at 92. For this reason, Ives argues, Douglass suggests rules of interpretation—a way for someone to get the consent of others for their constructed meaning. This would mean that there are no "right answers," but only answers that a majority will or will not accept. Inasmuch as Ives may be right, it is that there is a practical sense to government. Its administration in a particular way requires *actual* government actors to pursue certain ends. Thus, the right answer to a legal question still requires, at the very least, government actors (who are chosen through majority rule) to implement them. *See* Anti-Slavery Constitution (1860), *supra* note 76, at 468 ("[T]he way to abolish slavery in America is to vote such men into power as well use their powers for the abolition of slavery."). However, Douglass is merely stating the principle that every citizen has a right to see that this happens. This does not, in turn, subject the *actual* meaning of the Constitution to whatever the majority can be convinced of, or whatever prevailing conventional morality of the times demand.

152. Following Douglass's rules, the intention that the Constitution be changeable based on changing conventional morality is plainly recorded in the procedures for constitutional amendment. U.S. CONST. art. V.

expanded construction, both in terms of the conditions necessary for it and how it ought to be implemented.

### *C. Natural Rights Originalism: An Alternative Formula for Construction*

Douglass's alternative method for constitutional construction is more expansive than what most originalists would allow. Originalists only permit construction where the historical evidence does not admit of any plausible original public meaning. Where there is potential ambiguity, originalists go to great lengths to decrease the scope of constitutional construction through what may be termed a preponderance of the evidence method.[153] This way the interpreter stays within the realm of interpretation.[154] Douglass, however, did not hesitate to enter the realm of construction. Where there is potential ambiguity, instead of remaining strictly in the realm of interpretation, the interpreter enters the construction zone. She must put a thumb on the scale, favoring the meaning that best reflects natural rights principles. Because of the presumption favoring plausible original meaning (regardless of its relative evidentiary "weight"), the interpreter is not overly concerned with reducing constitutional provisions to rules that did not require construction; she is comfortable with the discretionary nature of construction because natural rights principles provide a firm basis for the interpreter to make critical constitutional decisions.

Douglass's interpretive rules required the Constitution to be construed in favor of freedom and natural rights.[155] Similar to originalists, he found that after using rules of *interpretation* to understand the original meaning of a provision,[156] there may remain some degree of indeterminacy as to that provision's meaning. It was here that the interpreter turned to *construction* rules. Construction filled in gaps by giving definitive meaning to

153. *See* Barnett, *supra* note 104, at 71 (resolving ambiguity through historical context which "allows us to identify which of multiple competing senses of a term is its most likely public meaning."); STRANG, *supra* note 78, at 215–17 (the process of collecting and evaluating data to see which hypothetical definition has the best "fit" to explain the data). Abduced-principle originalism is a good example of this exercise.

154. *See* Barnett, *supra* note 104, at 66 ("It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition [interpretation] is *empirical*, not normative.").

155. *See* Important Truths, *supra* note 75, at 227.

156. *See supra* Section III.D.

constitutional provisions that were ambiguous, or when there was more than one plausible meaning.[157]

Douglass's construction rules are simple. First, "where [there are] two interpretations, an innocent and a guilty can be given, the innocent should always be taken."[158] The second, somewhat an appendage of the first, is "[w]here it is sought to sustain anything against the rights of man we are to be confined to the strict letter of the instrument authorizing it"[159]—in other words, the law restricting liberty must do so with "irresistible clearness."[160] Douglass placed the origin of these rules (again) in the common practices of the time[161] and identified the preamble as the justification for using them. The preamble stated that the Constitution's purpose was to establish justice and secure liberty.[162] Douglass therefore imposed a strong presumption against any proposed meaning that would deprive an individual of liberty. Justice and liberty required constitutional construction, where permissible, to favor natural rights and freedom over the deprivation thereof.

How Douglass and originalists might engage in construction differently can be seen through addressing the general question of the Constitution and slavery.[163] For the constitutional evil of slavery, Douglass established two points that made construction indispensable. First, the Constitution did not contain the term "slave" or "slavery" anywhere in it. The conclusion that the plain meaning of the Constitution protected slavery required evidence

157. *See* Important Truths, *supra* note 75, at 227.

158. *Id.*; *see also* Anti-Slavery Constitution (1860), *supra* note 76. There may be some who would contend that this first rule is one of interpretation, rather than construction. *See* Barnett, *supra* note 16, at 195–97 (noting the difficulties of discussing constitutional abolitionists' use of the term "construction" in the context of present-day distinctions between interpretation and construction). However, Douglass's construction rules seem to fit the modern conception of construction in the sense that it requires the interpreter to exercise "judgment or choice," rather than solely investigating the meaning of words based on historical evidence.

159. Important Truths, *supra* note 75, at 227.

160. Anti-Slavery Constitution (1860), *supra* note 76, at 476.

161. *See* United States v. Fischer, 6 U.S. (2 Cranch) 358, 390 (1805).

162. U.S. CONST. pmbl. The preamble states the Constitution's aims include establishing justice, promoting the general welfare, and securing the blessings of liberty. These aims, Douglass claims, are achieved through the protection and promotion of natural rights. *See generally* Fourth of July Speech, *supra* note 12; *Is Civil Government Right*, *supra* note 75.

163. More specific applications will be provided below. *See infra* Part V.

*beyond* the words in the text or any interpretation thereof. This ambiguity raised the question of competing, plausible meanings, forcing the interpreter to turn to construction. That said, originalists might attempt to resolve this dilemma by resorting to evidence provided by contextual enrichment. For example, in Article I, the Constitution refers to "free persons," persons "bound to [s]ervice for a [t]erm of [y]ears," and "other [p]ersons."[164] Reading the term "other persons" in the context of the clause, as well as considering the historical backdrop of the Constitution's adoption, a plausible meaning for "other persons" could be "slaves." Originalists would likely follow the evidence and conclude, granted that the preponderance of the evidence supports it, that the Constitution contemplated slaves. Such a finding would then supplement the rest of the Constitution wherever similar language may be found.

We can see that, even in the first step, Douglass's method begins to set the stage for construction, while originalists today might resist the temptation. It is at this juncture, where Douglass's second point comes into play, that his unique use of construction in comparison to present-day originalists shines. Douglass, despite contextual enrichment, contended that the original public meaning's relation to the slavery question was ambiguous—it was open to at least two plausible interpretations.[165] Because there was not a specific reference to the word "slave," a word available to the drafters and ratifiers of the Constitution, the ambiguity could be deemed intentional, requiring all meanings to be seriously considered.[166] Having established the text's ambiguity toward the question of slavery, the rules of construction take over, which favors the interpretation that supports natural rights and freedom over one that supports injustice and oppression.

Douglass also differs when considering the weight of societal practices as evidence of original public meaning. Some originalists rely on societal practices to supplement original meaning and reduce construction, such as Strang's abduced-principle originalism. Douglass, however, would have rejected abduced-principle

164. U.S. CONST. art. I, § 2.

165. *See infra*, Section V.B.

166. Indeed, there is strong evidence that the ambiguity *was* intentional. *See* WILENTZ, *supra* note (arguing that the Framers painstakingly left the word "slave" out of the Constitution so as to avoid lending any credence to the legitimacy of holding property in man).

originalism as a legitimate method to supplement original meaning. While Douglass was concerned with arriving at the objective, fixed meaning of the Constitution, he was not overly concerned with reducing principles to a concrete set of practices. Douglass differentiated between practice and principle often in his speeches. He explained the basic truth that a population was capable of committing acts that are incommensurate with their stated beliefs:

> [T]he American Government and the American Constitution are spoken of in a manner which would naturally lead the hearer to believe that one is identical with the other; when the truth is, they are distinct in character as is a ship and a compass. The one may point right and the other steer wrong. A chart is one thing, the course of the vessel is another. The Constitution may be right, the Government is wrong.[167]

The Constitution had meaning, in other words, that was independent of government practices. This flowed naturally from the premise that the Constitution was the supreme law of the land;[168] the government was beholden to it, not the opposite. It was not reasonable to craft a constitutional rule, standard, or principle based solely on practices—those very practices might have (and often did) violated the very principle they were supposedly evidence of! Evidence that certain practices were taking place at the time of ratification, or even soon thereafter, was no more than just that—evidence that certain practices existed. Though this evidence could be used to *assist* in constructing or understanding principles,[169] it could not be used to create final constitutional rules.[170]

Following these refined rules of construction and guidance concerning the weight of historical evidence, natural rights originalism theory gives the interpreter more license in construction than other originalists, but it does not present a blank check. Rather, it provides basic, fixed principles for the interpreter to incorporate when deciding between *plausible* meanings of a legal instrument. The interpreter cannot simply construct a meaning believed to be

167. Anti-Slavery Constitution (1860), *supra* note 76, at 467.

168. U.S. CONST. art. VI.

169. For example, Douglass contested Taney's claim in *Dred Scott* that blacks were never intended to be citizens through evidence of blacks being able to vote in eleven out of thirteen colonies at the time of ratification. Dred Scott Speech, *supra* note 136, at 424.

170. *Id.* at 423 ("The Constitution is one thing, its administration is another").

just. For example, even Douglass admitted that laws were capable of being unjust—if the Constitution was unjust, no construction would save it.[171] But for laws to carry patently unjust effects, that unjust law had to be "irresistibly clear." Douglass gave an example of this, citing a Connecticut legislature that deemed it fit to require people of color to carry lanterns at night so they may be more readily seen in the dark.[172] In response, those targeted by the law carried lanterns with no candles. When brought to trial, the alleged offenders were acquitted because the law said nothing of candles. The law was not struck down because of its inanity nor constructed to carry a new meaning. Rather, the law was constructed strictly according to the plain meaning least restrictive to liberty. The law was then revised to require candles inside the lanterns, and people of color responded in kind by simply not lighting the candles within the lanterns. Again, they were acquitted. This example demonstrates how, when construing a statute that may carry multiple meanings, the meaning that favors liberty ought to be preferred. But that meaning must be one that is plausible. It must fit the text.[173]

Because construction required ambiguities to be resolved in favor of natural rights, a proper construction of the Constitution would reveal, in Douglass's words, that "America is false to the past, false to the present, and solemnly binds herself to be false to the future."[174] Given the proper purpose of the Constitution, the Constitution was inexorably anti-slavery. Importantly, the Constitution did not only fail to justify slavery, but it was openly

171. *See id.* at 415 ("If I felt the Union to be a curse, I should not be far behind the very chiefest of the disunion Abolitionists in denouncing it."); *see also* Anti-Slavery Constitution (1851), *supra* note 67, at 192 ("If, instead, the Constitution be for slavery . . . we freely admit that reason, humanity, religion and morality alike demand that we do spurn and fling from us, with all possible haste and holy horror, that accursed Constitution, and that we labor, directly and earnestly, for revolution, at whatever cost and at whatever peril."). The principles of individual sovereignty and consent allow for the possibility that a society chooses to be governed by unjust laws. *See* Anti-Slavery Constitution (1860), *supra* note 76, at 475–76 ("In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness . . . [i]t must be shown that it is so nominated in the bond.").

172. *See* Important Truths, *supra* note 75, at 228–29.

173. This is similar to originalists contention that constructions—regardless of how they are chosen—must not contradict the original public meaning. BARNETT, *supra* note 103, at 123–27; BALKIN, *supra* note 103, at 270–73.

174. Fourth of July Speech, *supra* note 12, at 190.

opposed to the whole enterprise. Interpreted and constructed properly, the Constitution would be a force to *actively* eradicate slavery.

Natural rights originalism, in keeping with Douglass, relies on a philosophical approach for construction and notably lacks the emphasis on practices and weighing of evidence prominent in originalism. Rather than deciding which original meaning is accompanied by the most convincing evidence, the interpreter considers the nature of each proposed original meaning and determines which best preserves natural rights and freedom. It is worth emphasizing, however, that this philosophical approach does not warrant limitless discretion—the interpreter still must work within the realm of plausible original meanings.[175] Even so, the interpreter must understand natural rights and freedom if she is to interpret the constitution correctly.

## IV. NATURAL RIGHTS AND JUSTICE: THE FOUNDATIONS OF NATURAL RIGHTS ORIGINALISM

Douglass employed natural rights as a compass that guides constitutional construction. He started from understanding the Constitution as an instantiation of principles articulated in the Declaration of Independence—most importantly the principles that all men are created equal and endowed with certain inalienable rights from their Creator, among which are life, liberty, and the pursuit of happiness.[176] The Constitution, accordingly, is properly constructed in light of these principles. Douglass relied on natural

175. One cannot simply imagine a meaning that does not have *any* real evidence to support it. There must be at least some evidence that the population plausibly would have recognized the proposed original meaning, even if a majority may have rejected it in favor of some other meaning. This point is what sets Douglass's position apart from methods similar to Dworkin's "moral reading", despite the interpreter's shared philosophical role under both approaches. FREEDOM'S LAWS, *supra* note 3, at 1–15; *see* Gowder, *supra* note 16, at 378 (drawing a similar connection between Douglass's method and Dworkin's "moral reading").

176. This is similar to Justice Thomas, who understands the limited role of original intent in interpretation as the fulfillment of the ideals of the Declaration of Independence, a sentiment shared by Douglass, Lincoln, and the Founders. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 985 (1987) (regarding a "plain" reading); *see also* Abraham Lincoln, Fragment on the Constitution and the Union (Jan. 1, 1861), *available at* https://teachingamericanhistory.org/library/document/fragment-on-the-constitution-and-union/ ("The assertion of that principle, at that time, was the word "fitly spoken" which has proved an "apple of gold" to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn and preserve it. The picture was made for the apple—not the apple for the picture.") (emphasis omitted).

rights as well as principles of justice that demand nothing less than a natural rights construction of the Constitution. Natural rights are derived from the natural law. The natural law is discovered through reason and serves as the basis for positive law, which is adopted by reflection and choice.[177] Only positive law properly constrains man's actions; but the positive law must reflect the natural law, for its violation of the natural law constitutes grounds for nullification. For this reason, it is not enough to recognize that natural rights exist. Douglass turned to justice as a normative force that demands the realization of natural rights. But justice cannot act as a boundless claim through which positive law is changed or voided. Such would result in the abrogation of the rule of law, for there is no end to the possible claims which any person can have against the positive law—every perceived wrong would provide grounds for nullifying the law and thereby produce anarchy.[178] For this reason, while natural rights are often self-evident, or otherwise readily discernible through reason, the exact nature of justice is less precise. Because of justice's imprecise nature, prudence acts as a mediating element that guides constitutional actors as they pursue justice; constitutional actors must remember that not every harm has a constitutional remedy. Nevertheless, natural rights and justice demand that the text be read as a whole, resolving ambiguities by recurring to the Constitution's animating natural rights principles. Prudence operates in the background as a guide to the constitutional

177. *See Is Civil Government Right*, *supra* note 75, at 212 ("[A] government is instituted by all, and rests upon all for support and direction."); *see also*, THE FEDERALIST NO. 1 (Alexander Hamilton) ("It has been frequently remarked that it seems to have been reserved to the people of this country . . . to decide the important question, whether societies of men are really capable or not of establishing good government from *reflection and choice*, or whether they are forever destined to depend for their political constitutions on accident and force.") (emphasis added). Buccola provides an analysis of Douglass's understanding of natural rights and human dignity, as well as its harmony with the Enlightenment tradition and the political thought of John Locke in particular. Nicolas Buccola, *"The Essential Dignity of Man as Man": Frederick Douglass on Human Dignity*, 4 AM. POL. THOUGHT 228, 244 (2015).

178. Henry C. Wright challenged Douglass on the premise that there can be *no* just government—labeling any government as "just" would necessarily imply that the government's accompanying acts of injustice would suddenly become just, which is not logical. Douglass, however, argued that Wright missed the main purpose of civil government—namely that it is meant to protect natural rights through positive law. Humans need government because they cannot enjoy their natural rights without it. There may be instances of injustice, but it is a necessary sacrifice to achieve the legitimate ends of protecting natural rights. *See generally Is Civil Government Right*, *supra* note 75.

actor who seeks proper ends within the permissible realm of fixed constitutional meaning.

### *A. Natural Rights*

Natural rights emerge from an immutable law of nature that governs all societies. It is the ultimate aim of all human institutions to emulate that immutable law for the welfare of society. The natural law is "*moral*, *rational*, and *universal* in scope."[179] It simultaneously teaches human beings the natural order of the world and how they should live. Douglass found these principles epitomized in the Declaration of Independence by men whose "statesmanship looked beyond the passing moment . . . . They seized upon *eternal* principles, and set a glorious example in their defense."[180] The natural law teaches human beings that all are equal and have the natural right to life, liberty, and property.[181] It demonstrates human beings' natural equality by providing a descriptive account of human beings' "natural powers," such as their ability to reflect, understand objective moral principles, and exercise free will.[182] These natural powers demonstrate that human beings have certain capacities, which leads to the idea of self-ownership—human beings' fitness for self-rule. Human beings' fitness for self-rule in turn provides the foundation for establishing positive law, or government by consent.[183] But what sort of government should humans consent to? Douglass argued that government was legitimate only when founded for the purpose of preserving natural rights.[184] To this end, it was

179. Peter C. Myers, *Seed-Time and Harvest-Time: Natural Law and Rational Hopefulness in Frederick Douglass's* Life and Times, 99 J. AFR. AM. HIS., 56, 57 (2014).

180. Fourth of July Speech, *supra* note 12, at 186–87 (emphasis added).

181. JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. 2, § 6 (Lee Ward ed., 2016) (1689) [hereinafter TT; the Second Treatise shall be referred to as ST].

182. *Is Civil Government Right*, *supra* note 75, at 209 ("[M]an is endowed with reason and understanding capable of discriminating between good and evil, right and wrong, justice and injustice."); *see* Buccola, *supra* note 177, at 235 (describing several natural powers that Douglass identifies in his defense of women's right to vote.).

183. *Id.* at 246.

184. *See* Fugitive Slave Law Speech, *supra* note 74, at 208 ("Human government is for the protection of rights; and when human government destroys human rights, it ceases to be a government."); *Is Civil Government Right*, *supra* note 75, at 209–10 ("Finally, that whatever serves to increase the happiness, to preserve the well-being, to give permanence, order and attractiveness to society, and leads to the very highest development of human perfection,

Douglass's great hope and life mission to "hasten the day when the principles of liberty and humanity expressed in the Declaration of Independence and the constitution of the United States shall be the law and the practice of every section, and of all the people of this great country."[185]

Douglass's theory of natural rights closely followed the Enlightenment tradition, and particularly the theory of John Locke.[186] The foundation of Douglass's natural rights theory has been described as a "capacities-based account." Natural rights are derived from the foundation of human dignity. This dignity is characterized by human beings' "capacity to reason (the rational capacity), the capacity to comprehend morality (the moral capacity), the capacity to choose how to act (the volitional capacity), and the capacity to conceive of the self as a subject with a past, present, and future (the temporal subjective capacity)."[187] These capacities, or "natural powers," demonstrate that human beings are fit for freedom.[188] Locke similarly identified these natural powers as the primary source of dignity and freedom. In particular, the "capacity to conceive of one's own subjectivity" is the quintessential aspect of human beings' fitness for freedom.[189] In other words, human beings' temporal subjectivity is what sets

is . . . esteemed innocent and right."); Buccola, *supra* note 177, at 230 ("Douglass's capacities-based account of dignity served as a crucial moral bridge in his rhetoric between the *descriptive* claim that human beings have certain 'natural powers' that distinguish them from other creatures and the *normative* claim that human beings have rights that ought to be respected and protected.").

185. BUCCOLA, *supra* note 17, at 1.

186. *See* Buccola, *supra* note 177, at 244.

187. *Id.* at 229.

188. *See* ST, *supra* note 181, at ch. 6, § 63. Ives astutely notes that each person's capacity for reason is an important aspect of why the Constitution must be read to treat all "members of the American community as individuals capable of dignity and rational choice." Ives, *supra* note 17 at 98. However, Ives mistakenly argues that the source of slavery's immorality is not because of breach of an "external moral law—of either divine or human origin." *Id.* Douglass is clear on this point—the violation is one of natural rights, which *are* grounded in an external, immutable law. *See* Important Truths, *supra* note 75; Anti-Slavery Constitution (1860), *supra* note 76, at 476 ("The very nature of law is opposed to all . . . wickedness . . . . Law is not merely an arbitrary enactment with regard to justice, reason, or humanity."); Dred Scott Speech, *supra* note 136, at 417 ("I hold it is our duty to remain inside this Union, and use all the power to restore to enslaved millions their precious and God-given rights."); Myers, *supra* note 179, at 57.

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

human beings apart from other creatures and proves that human beings ought to rule rather than be ruled.

The capacity for temporal subjectivity leads to the idea of self-ownership, which is the foundation for self-governance and the primacy of natural rights. Douglass highlighted this point when he juxtaposed his life as a slave with his life as a freeman. When Douglass was a slave, he was robbed of his temporal subjective capacity—he had no say over his past, present, or future.[190] He did not own his own labor and could not make fundamental life decisions outside of a master's approval. Thus, his first day working for his own sake was something of a new life.[191] Douglass was truly born the day he became free; life before that day was almost a fiction—it was not truly living. Locke similarly bases his theory of natural rights on self-ownership. Human beings are born into a state of perfect freedom where their labors are properly their own.[192] By Locke's account, before political society, natural rights permitted all to prosper by using labor to obtain property.[193] All were equal in their ownership of their labor. Each could labor in nature as they saw fit, subject to natural limits.[194] These limits augment human capacity to prosper and pursue ends that produce "happiness." Douglass had a similar strain of thought, identifying self-owned labor as the basis for human flourishing. Without this basic freedom, Douglass argued, there can be no sense of human flourishing.[195]

When founding a political society, positive laws are rational so long as they respect natural rights, thereby allowing individuals

190. *See generally* Finkelman, *supra* note 15, at 15–24 (detailing Douglass's experience as a slave and the effect exposure to free Blacks had on Douglass during his time in Maryland).

191. *See supra* note 35.

192. *See* ST, *supra* note 180, at ch. 2, § 4; *id.* at ch. 5, § 27.

193. *Id.* at ch. 5, § 27.

194. *See id.* at ch. 2. Some of the limits found in the law of nature restricted men from taking more than they could consume, taking so much that it did not leave enough for others, and taking that which was transformed into property by another.

195. Frederick Douglass, *Agriculture and Black Progress*, NEW NAT'L ERA & CITIZEN, Sept. 18, 1873 ("[W]ithout property, there can be no leisure. Without leisure, there can be no thought. Without thought, there can be no invention. Without invention, there can be no progress."). Douglass's emphasis of self-owned labor and acquisition of property is fitting, given his own past experience as a slave and the general influence of Enlightenment thinking at the time. *See generally* THOMAS WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM (Cambridge Univ. Press) (2017).

to flourish. The positive law establishes the necessary conditions for individuals to exercise their faculties to find "the best uses to which life can be put in this world, and in the exercises of these uses to build up worthy character."[196] This is best achieved through preserving natural rights.[197] Similar themes are found in Locke's treatise, where Locke states that proper laws will "direct[] . . . a free and intelligent agent to his proper interest, and prescribe[] no farther than is for the general good of those under that law."[198] The law ought to protect natural rights, thereby fostering freedom and permitting all to pursue their proper interests within the general good of rational beings.[199] Proper interests, in part, consist of acting in a manner that does not inhibit or abrogate the natural rights of others. Individual liberty under the law, in this respect, entails freedom from "restraint and violence from others."[200]

The positive law is necessary because the natural law, though it teaches human beings their natural rights and fitness to rule, only provides a descriptive account. As mentioned earlier, natural law has force only through human reflection and action.[201] Though the reality of human beings' possession of natural rights establishes a strong presumption in favor of political society that honors and protects these rights, people must still make it so. Positive law, established through consent, is the only means of preserving natural rights in political society.[202] Douglass, in his later years, lauded America for recognizing natural rights in its nascent moments.[203] He contended that the American project used natural rights as the locus of its aims—the Declaration of Independence designated "Life, Liberty, and the pursuit of Happiness" as

196. Frederick Douglass, Self-Made Men, *in* THE ESSENTIAL DOUGLASS: SELECTED WRITINGS AND SPEECHES 332, 335 (Nicholas Buccola ed., 2016). *See* Buccola, *supra* note 177, at 250 (citing Douglass's speech Self-Made Men).

197. *See generally Is Civil Government Right*, *supra* note 75.

198. ST, *supra* note 181, at ch. 6, § 57.

199. *See* Frederick Douglass, *What Should Be Done with Emancipated Slaves?* (Jan. 1862), *in* 3 LW, *supra* note 9, at 188–89 [hereinafter *Emancipated Slaves*]. Douglass argues that reason teaches human beings that the natural law is one of liberty and gives them a natural desire for freedom.

200. ST, *supra* note 181, at ch. 6, § 57.

201. *See* Buccola, *supra* note 177, at 244.

202. This line of reasoning parallels William Baude's argument for the preeminence of originalism over other forms of constitutional interpretation. *See generally* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

203. *See generally* Fourth of July Speech, *supra* note 12.

inalienable rights common to all men.[204] However, it was clear that a descriptive proclamation of rights was insufficient—the natural law requires not only human reflection, but *action*. Douglass here turned to principles of justice to establish why people ought to establish societies that are based on, and actively pursue, natural rights. The demands of justice require societies to *bend toward justice* as much as is permitted within the realm of consent.

### *B. Justice*

Though Douglass's natural law produces rights that closely resemble (if not parallel) Locke's, his theory of justice has a more imminent role in society.[205] As natural rights establish the conditions for humans to flourish, justice demands that society sufficiently preserves natural rights. Societies must do more than use empty rhetorical devices favoring natural rights.[206] Justice gives the natural law a normative force that cannot be denied. Indeed, Douglass's understanding of justice, at least in part, motivates the need for interpreters to put a thumb on the scale in favor of interpretations that preserve natural rights.[207] Justice requires "that what men sow they will reap, and that there is no way to dodge or circumvent the consequences of any act or deed."[208] Thus, while natural law educates people as to how they should live, justice acts as a compulsive element. Justice requires that humans act in accordance with nature—if they act according to nature, they are promised some measure of happiness and fulfillment. Conversely, if they do not act according to nature, they may expect to receive punishment for their actions—justice demands as much.

Douglass's notable departure from Locke on this point stemmed partially from Douglass's recognition of human beings' sociability. Locke has generally been interpreted as a defender of

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

205. Peter Myers astutely draws attention to this crucial distinction. *See generally* Myers, *supra* note 179.

206. Or worse, as in the U.S.'s situation, hiding malicious intent behind ostensibly innocuous terms that favor natural rights.

207. Douglass's understanding of justice may warrant the conclusion that, when there are competing plausible meanings, a meaning that does not support natural rights is not binding on individuals. *See* Fugitive Slave Law Speech, *supra* note 74, at 208 ("The binding quality of law, is its reasonableness. I am safe, therefore, in saying, that slavery cannot be legalized at all.").

208. Myers, *supra* note 179, at 57 (citing DOUGLASS, *supra* note 24, at 583).

individualism—people are fundamentally self-interested and the common good is best achieved by doing no more than allowing each person to pursue individual interests without harming others.[209] Injustice only arises where an individual infringes on the natural rights of another. Douglass, on the other hand, argued that human beings' self-interest does not stop at personal fulfillment; rather, their natural capacities further teach them that each individual has a duty to *protect* the natural rights of fellow human beings. All have a general duty to protect against injustice, or the violation of natural rights.[210] Douglass argued that the individual who reflects on his or her nature "finds no rest to his soul while any portion of his species suffers from a recognized evil."[211] This view was quite radical when compared to Locke, since this view of justice would ostensibly condemn individuals who were not the direct perpetrators of injustice. Where some measure of injustice exists, all carried some degree of responsibility.[212]

Justice compels human beings through meting out rewards and punishments for actions that are, respectively, just and unjust. This line of reasoning is similar to the view of Ralph Waldo Emerson, who stated that "[a]ll things are moral . . . every crime is punished,

209. *See* ST, *supra* note 181; Michael P. Zuckert, *On Constitutional Welfare Liberalism: An Old-Liberal Perspective*, 24 SOC. PHIL. & POL'Y, 266, 267 (2007) (arguing that that, though there are many versions of liberalism that have individualistic underpinnings, it would be erroneous to associate every iteration with Locke's liberalism); Patrick J. Deneen, *A House Divided: Peter Lawler's America Rightly Understood*, 37 PERSP. ON POL. SCI. 147, 147 (2010) (expressing deep misgivings about the implications of Lockean individualism, arguing that it upholds individual autonomy as "the norm and standard of human good."). Thomas West contests this point, arguing that protecting natural rights requires much more than simply allowing each person to pursue individual interests as long as they do not harm others. *See* WEST, *supra* 195.

210. *See Is Civil Government Right*, *supra* note 75, at 209 ("[M[an is a social as well as an individual being . . . individual isolation is unnatural, unprogressive, and against the highest interests of man; and that society is required, by the natural wants and necessities inherent in human existence.").

211. Frederick Douglass, It Moves, or the Philosophy of Reform, Address Delivered in Washington D.C. (Nov. 20, 1883), *in* THE ESSENTIAL DOUGLASS, *supra* note 196, at 286, 289 [hereinafter It Moves]. Buccola explains well that Douglass contends that "[w]ell-formed human beings care about one another . . . not because of mere instinct, but because they are able to identify reasons why they should care about one another." Buccola, *supra* note 177, at 242.

212. *See* Buccola, *supra* note 177, at 246. Buccola identifies at least some scholars who would argue that Douglass's radical views question the utility of such a position when considering political morality.

every virtue rewarded."[213] But justice presents a problem—there is not an exact science of how these rewards and punishments are realized.[214] Douglass articulated this position most clearly at Harpers Ferry:

> The universe, of which we are a part, is continually proving itself a stupendous whole, a system of law and order, eternal and perfect. Every seed bears fruit after its kind, and nothing is reaped which was not sowed. The distance between seed time and harvest, in the moral world, may not be quite so well defined or as clearly intelligible as in the physical, but there is a seed time, and there is a harvest time, and though ages may intervene . . . yet the harvest nevertheless will surely come.[215]

Here Douglass revealed an important point about the operation of moral justice and the natural law. Though the principles of freedom and equality derived from natural law are self-evident, justice is not equally intelligible. It is unclear what rewards or punishments will be meted or *when* they will be meted. The only sure thing is that institutions[216] will *inevitably* reap what they sow. Indeterminacy remains, which precludes understanding justice as an exact science. This reality prevents any society from ever being just in the fullest sense.

Be that as it may, for Douglass, justice in the U.S. context had at least one definite imperative: freeing the slave. If the U.S. was to do

213. Myers, *supra* note 179, at 57 (citing RALPH WALDO EMERSON, THE WORKS OF RALPH WALDO EMERSON IN ONE VOLUME: INCLUDING THE POEMS, PHILOSOPHIC AND INSPIRATIONAL ESSAYS, AND BIOGRAPHICAL STUDIES, 115, 117–18 (N.Y.C. 1925)). Myers notes that Douglass was familiar with Emerson's work, but that Douglass's primary influence in this area (by Douglass' own admission) was George Combe, who held similar views regarding the moral law and the immediacy of just deserts.

214. This is in contradistinction to Spooner, who suggested that there was a "science of justice," just like there was a science to math. This difference is likely why, unlike Spooner, Douglass was not keen on supplanting the positive law completely in favor of natural law. *See supra* note 61.

215. Frederick Douglass, John Brown, Address Delivered at Storer College, Harper's Ferry, W. Va. (May 30, 1881), *available at* http://129.71.204.160/history/jbexhibit/bbspr05-0032.html.

216. It is unclear whether Douglass intends for the proper subject of this principle to be both individuals and institutions. Evidence suggests that Douglass had both in mind, but would speak of one or the other given the context of his speech. For example, he referred to individuals in the It Moves Speech, but referred to institutions in the Union Speech. That said, institutions seem to be the proper subject of speech at Harpers Ferry, as it alludes to the prospect that judgement may not come for "ages." In this sense, Douglass is clear that institutions that are not just are destined to fail. *See American Slavery*, *supra* note 9, at 275–76.

justice with respect to the slave, then the answer had to be to "do nothing with them; mind your business and let them mind theirs. Your *doing* with them is their greatest misfortune."[217] What may seem counterintuitive becomes clear when considering that Douglass was addressing political society's proper role. His main point was that the laws ought not strip individuals of their natural freedom but should foster it. A proper understanding of nature and the principles derived therefrom considers all persons to have an equal ability to provide for their own well-being. The only concern in the state of nature is when one *interferes* with another in their pursuit of that well-being. Thus, the purpose of government is to limit the interference that takes place, and to allow for all to pursue freely proper interests. The grievous situation of the slave was due to government's failure to honor its chief responsibility to ensure freedom for all. Douglass implored the government to restore the natural state of self-ownership for all.[218] The slave, just as any other, had the right to work, to learn, and, most importantly, to the fruits of his own labor.[219]

Justice's indeterminant nature requires constitutional actors to be prudent in pursuing it. In his later years, Douglass often allowed for some measure of injustice, not as a matter of right but of reality. He stated that "No people can prosper unless they have a home, or the *hope* of a home . . . to have a home [one] must have a country."[220] A society cannot prosper unless there is a place that its people can rightly call home or *rationally hope* to call home. Justice in this sense is not always immediate, but often serves as an "aspirational idea."[221] As long as there is some progress or orientation toward the goal of achieving legitimate freedom, then the oppressed individual has a proper hope or pride in his or her country. Though society may necessarily be imperfect, its arc must bend toward justice, rather than away from it.[222] Thus, Douglass's thought does

217. *Emancipated Slaves*, *supra* note 199, at 189.

218. *See id.* ("[l]et us stand upon our own legs, work with our own hands, and eat bread in the sweat of our own brows.").

219. *Id.*

220. Myers, *supra* note 50 (emphasis added) (citing FREDERICK DOUGLASS, *Why Is the Negro Lynched?*, *in* 4 LW, *supra* note 9, at 514).

221. Buccola, *supra* note 177, at 246. For an interesting study of Douglass's rhetoric and its aspirational character, see Lucy Williams, *Blasting Reproach and All-Pervading Light: Frederick Douglass's Aspirational American Exceptionalism*, 9 AM. POL. THOUGHT 369 (2020).

222. Myers, *supra* note 179, at 68.

not give a free pass to unjust societies. Instead, it urges them to correct for injustices where possible. This facet of Douglass's thought places a key role in his understanding of how to use construction prudentially when addressing constitutional evils.

### *C. Prudence: A Mediator Between Natural Rights and Justice*

Douglass's constitutionalism led to the conclusion that the Constitution was anti-slavery. Properly interpreted and enacted to the full extent of its grand aims, the Constitution was a tool for eradicating slavery in all the states. However, the latter condition—that the Constitution be enacted to its full extent—was by no means guaranteed. Douglass argued that the "Constitution is one thing, its administration is another,"[223] meaning a principle and its lived practice may be (and often are) asymmetrical. For this reason, constitutional actors must be prudent. Unlike the Garrisonians, who denied any compromise with principle, Douglass recognized the need for prudence in pursuing justice. Douglass's break with the Garrisonians on this point could be seen as early as Douglass's final days in England, up until the point where he completely separated himself from the Garrisonian camp on matters of constitutional interpretation. Douglass accepted incremental change, so long as that change was oriented toward justice. One example Douglass provided of how to properly pursue justice was Abraham Lincoln. Despite Lincoln's unwillingness to undo slavery in every way Douglass would have preferred, Douglass praised Lincoln for his statesmanship. Douglass's prescriptions suggest that constitutional actors ought not to be irresponsible in pursuing justice. Rather, they should exercise caution in constructing the Constitution, staying within their realm of authority to achieve the politically possible.

Recall that, in his early years of freedom, Douglass did not always take prudence into account. He was a strong disciple of the imprudent Garrison, who stated that the Constitution was "the most bloody and heaven-daring arrangement ever made by men."[224] The proposed remedy was to seek abolition at any cost.

223. Dred Scott Speech, *supra* note 136 at 423.

224. William Lloyd Garrison, *On the Constitution and the Union*, THE LIBERATOR, Dec. 29, 1832, *available at* http://fair-use.org/the-liberator/1832/12/29/on-the-constitution-and-

That cost, under Garrison's guidance, very well could have included the Union—anything was expendable in the pursuit of freedom for all. Dissolution may even have been most desirable, since the Constitution itself violated the laws of God such that it was "null and void from the beginning."[225]

While Douglass was in England, however, his understanding of justice and prudence evolved. Recall that several friends abroad sought to purchase Douglass's freedom. Douglass found this result desirable, since it would enable him to freely return home and resume his abolitionist activities in the northern states. The Garrisonians, however, saw this transaction as a validation of slavery's lawfulness and expressed their disappointment in Douglass acquiescing to the transaction. The Garrisonians would have *no* compromise with slavery. Douglass's response to the Garrisonians illuminated his new understanding of the relation between justice and prudence. In a letter addressed to Henry C. Wright, Douglass argued that the payment was made "not because he [Hugh Auld] had any *just* claim to it [the payment], but to induce him to give up his *legal* claim to something which they deemed of more value than money."[226] Douglass differentiated between the justice of the claim and the legality of it. Individuals might comply with an unjust claim and yet refrain from sanctioning that claim through compliance.[227] Douglass wrote succinctly: "[D]id I sanction or justify this wicked proscription? Not at all. It was the best I could do. I acted from *necessity*."[228]

Douglass's shift on this point certainly guided his journey to his refined constitutional theory, calling for the preservation of the Union rather than its demise. Where the Garrisonians advocated for abstaining from political participation in a purportedly corrupt

the-union (last visited July 8, 2020); *see also American Slavery*, *supra* note 9, at 269–70 ("I like to gaze upon these two contending armies [slaveholders and Abolitionists], for I believe it will hasten the dissolution of the present unholy Union, which has been justly stigmatized as 'a covenant with death, an agreement with hell.'").

225. Garrison, *supra* note 224.

226. Letter from Frederick Douglass to Henry C. Wright (Dec. 22, 1846), *reprinted in* 1 LW, *supra* note 9, at 199, 202 (emphasis added).

227. This conclusion is reminiscent of Wilentz' findings concerning the constitutional convention and slavery: the Framers also had a sense that there was a difference in providing certain necessary protections for slavery and sanctioning the practice. *See generally*, WILENTZ, *supra* note 134.

228. Letter from Frederick Douglass to Henry C. Wright, *supra* note 226, at 204 (emphasis added).

system, Douglass encouraged *increased* action. The sure way to remove the stain of slavery "is to vote such men into power as [will] use their powers for the abolition of slavery."[229] The Constitution, in the hands of any committed to end slavery, would carry the necessary grants of authority to quit slavery in the several states. Not only did the Constitution demand such action, but prudence suggested that, if the Garrisonians' true goal was justice and freedom for all, preserving the Union through political participation was the *only* way to achieve those ends.[230] Dissolving the Union would rob the North of any vantage point from which to eradicate slavery. Douglass wisely stated: "To desert the family hearth may place the recreant husband out of the presence of his starving children, but this does not free him from responsibility."[231] Citizens had a duty to act politically to ensure that natural rights and freedom were secure for all. It was not enough to merely secure one's own rights, one's own freedom.[232]

Critics may reject Douglass's position as wishful thinking, given that the Constitution's first seventy years or so of practice permitted, and at times explicitly protected, slavery.[233] But Douglass was not ignorant of this practical reality. It is well documented that Douglass's approach to political matters recognized political realities and incorporated a great deal of prudence.[234] This is partly why, for Douglass, adhering to a constitutional theory that has elements resembling originalism was important for constitutional legitimacy. Natural rights and justice, though undeniable, have no actual force except through human reflection and action—through consent. The Constitution has a fixed meaning based on the consent of the governed. While meaning

229. Anti-Slavery Constitution (1860), *supra* note 76, at 468.

230. Finkelman argues, alternatively, that the Garrisonians had it right. He notes that, in a sense, the Civil War was a fulfilling of the Garrisonian prophecy. *See* Finkelman, *supra* note 15, at 62 ("[T]he Garrisonians were ironically for more practical and theoretically correct. They believed that disunion would destroy slavery. Ultimately, they were right. They might even have predicted that their pro-slavery enemies would initiate the disunion.").

231. Anti-Slavery Constitution (1860), *supra* note 76, at 479.

232. *See* Dred Scott Speech, *supra* note 136, at 416 ("Slavery lives in this country not because of any paper Constitution, but in the moral blindness of the American people, who persuade themselves that they are safe, though the rights of others may be struck down.").

233. *See, e.g.*, Fugitive Slave Act, Pub. L. No. 2-7. 1 Stat. 302 (1793); Fugitive Slave Act, Pub. L. No. 31-60. 9 Stat. 462 (1850).

234. *See* Buccola, *supra* note 177, at 246.

cannot be altered, it ought to be understood according to natural rights, which animated the Constitution's initial framing. For this reason, Douglass often used hopeful language when describing the Union's future. The Constitution had a posture towards freedom, and slavery was a self-contradictory institution destined to fail.[235] Douglass called for a *moral* revival to remind the nation of its aims and the dictates of its own Constitution. In this regard, "the conscience of the nation must be roused . . . the hypocrisy of the nation must be exposed."[236] Douglass further proclaimed: "[N]otwithstanding the dark picture I have this day presented, of the state of the nation, I do not despair of this country. There are forces in operation which must inevitably work the downfall of slavery . . . I, therefore, leave off where I began, with hope."[237] Douglass's hope was based on a proper interpretation of the Constitution, coupled with the prospect of statesmen that would help realize the country's nascent promise of freedom for all.

Douglass's "Oration in Memory of Abraham Lincoln"[238] provided the most insight into how his hope for a brighter future and the demands of the Constitution transformed into a prescription for constitutional actors. Lincoln, though not perfect, presented the key moment for constitutional change. Unlike Douglass, Lincoln operated on a constitutional theory of containment rather than one of immediate abolition.[239] He was primarily concerned with keeping the Union together, though he believed that the Constitution had set slavery on the ultimate course of extinction.[240] Lincoln's platform initially focused on preventing the spread of slavery into the federal territories, but war forced the issue's scope to widen to the several states. Douglass recalled that Lincoln needed "all the latitude of time, phraseology, and every honorable device that statesmanship might require for the achievement of a great and beneficent measure of liberty and progress."[241] Douglass lauded Lincoln for

235. *See* Myers, *supra* note 179, at 60.

236. Fourth of July Speech, *supra* note 12, at 192.

237. *Id*. at 203.

238. Frederick Douglass, Oration in Memory of Abraham Lincoln (April 14, 1876), *in* 4 LW, *supra* note 9, at 309 [hereinafter Funeral Oration].

239. *See* Abraham Lincoln, Speech on the Repeal of the Missouri Compromise (Peoria Address) (Oct. 16, 1854), TEACHING AM. HIST., https://teachingamericanhistory.org/library/document/speech-on-the-repeal-of-the-missouri-compromise/ (last visited Oct. 4, 2022).

240. *See id.*

241. Funeral Oration, *supra* note 238, at 315.

being "swift, zealous, radical, and determined" in his effort to bring about both the preservation of the Union, as well as the freedom of the slaves.[242] Perhaps Lincoln's greatest achievement on that front was his use of the executive power to enact the Emancipation Proclamation, an act that abolished slavery in the rebel states.[243] Nevertheless, in this same speech Douglass called Lincoln "the white man's President, entirely devoted to the welfare of white men."[244] Douglass noted that Lincoln was ready and willing to preserve slavery, as well as to faithfully execute the Fugitive Slave Act—both efforts antithetical to the Constitution's grand aims. Yet, Douglass took a "comprehensive view of Abraham Lincoln."[245] It was enough that Lincoln was sympathetic to the cause of freedom, and though "faith in him was often taxed and strained to the uttermost . . . it never failed."[246]

Douglass's support for Lincoln was grounded in Lincoln's commitment to natural rights and wisdom to achieve the politically possible. Lincoln was committed to natural rights in principle, yet he operated prudentially to achieve the eventual eradication of slavery. Lincoln's example provided a formula for addressing entrenched constitutional evils. His actions did not demonstrate a disingenuous commitment to natural rights principles—rather, they were a path forward to the eventual realization of natural rights. So long as there is a hope for a brighter future, the political actor should act feasibly within constitutional limits in favor of natural rights and freedom.

As the example of Lincoln partially highlights, the question of prudence also presents the conundrum of *who* ought to use constitutional means to achieve natural rights ends. Importantly, Douglass did not limit the task of constitutional construction to the executive branch. This illustrates an important distinction between natural rights originalism and other originalists—who

242. *Id.* at 316.

243. *See* Emancipation Proclamation, 78 Fed. Reg. 855 (1863). Lincoln issued the proclamation as a war measure, claiming that the Constitution granted him power to do so as "Commander-in-Chief" of the armed forces. Whether this constituted a plausible construction of his war-time powers has been disputed. *See* Adam M. Carrington, *Running the Robed Gauntlet: Southern State Courts' Interpretation of the Emancipation Proclamation*, 57 AM. J. LEGAL HIST. 556, 557 (2017).

244. Funeral Oration, *supra* note 238, at 312.

245. *Id.* at 313.

246. *Id.*

can construct. Originalists differ on who ought to construe constitutional provisions; most are comfortable with political branches (Executive or Legislature) engaging in construction.[247] Evidence suggests that Douglass would have found it permissible for *any* branch to engage in construction, each within their constitutionally mandated roles.[248] For instance, the President or Congress could construct the Insurrection Clause to grant executive power to put an end to slavery.[249] The Supreme Court, on the other hand, could construct the Bill of Rights or the Bill of Attainder Clause to rid the Union of any laws that effect inherited servitude.[250] Equally commensurate with Douglass's approach (though not mentioned by him), Congress could inhibit slavery significantly through regulating interstate slave trade.[251]

For matters of constitutional interpretation, the constitutional actor must take into account natural rights principles and justice, all while prudentially navigating what is politically possible. This is a tall order for any constitutional actor, but especially a judge, who is constantly under scrutiny to not overstep the boundaries set by Article III. But by no means would Douglass expect the judge to shrink away from such a task. However, part of the power of natural rights originalism is that it does not unduly burden judges alone with this great task. Rather, the onus lies on *all* constitutional actors: the executive, legislators, judges, and even citizens. Indeed, certain aspirational goals may be a matter solely for practical legislation, rather than constitutional mandate.[252] So long as basic natural rights principles are upheld, citizens should operate within the framework of their government to remedy injustice where

247. This is due to the claim that construction is essentially "political" in nature. *See supra* note 105.

248. As will be discussed in greater deal in the following section, this strategy resembles Lincoln's departmentalism approach—each branch has an equal duty to contribute to constitutional meaning. *See* Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decisions: The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86.

249. *See* Anti-Slavery Constitution (1860), *supra* note 76.

250. *See* Dred Scott Speech, *supra* note 136.

251. This strategy was explored by other constitutional abolitionists who shared Douglass's approach to the Constitution. See JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 68–70 (1951).

252. *See generally*, STRANG, *supra* note 78, at 239–78.

it is found.[253] But, justice's indeterminacy ought to give some pause to those who seek it, for resolving every injustice may be a fool's errand, or, worse still, it may create new or greater injustices in the insatiable pursuit of justice.[254] The demands of justice ought to be carefully considered, and prudence ought to guide its pursuit. Bearing this in mind, along with due respect to consent,[255] when constructing the Constitution, the interpreter ought to favor natural rights where a plausible original meaning permits it.

## V. NATURAL RIGHTS ORIGINALISM IN ACTION: *DRED SCOTT* AND OTHER CONSTITUTIONAL EVILS

As noted earlier, Douglass's rules of interpretation focus on ascertaining the Constitution's plain meaning.[256] Douglass claimed that these rules were not novel, but rather well known to all who engage in the practice of legal interpretation.[257] These methods were inherited from William Blackstone's legal commentaries.[258] These legal rules presume that there is a right answer to legal questions and act as a guide to discover the correct interpretation,

253. However, failure to actively pursue such ends could lead society to inevitable destruction. There is a "downward spiral" of chronic injustice that "engenders vice among its victims, and the vices of the victims are taken in turn to justify the continuation of the injustice." Myers, *supra* note 179, at 67. Without proper correction, societies will continually be fragmented until they are ultimately torn apart, a consequence alluded to in the Union Speech. *See American Slavery*, *supra* note 9, at 269.

254. *See* Frederick Douglass, *Reconstruction*, *in* 2 THE RECONSTRUCTION AMENDMENTS 294 (Kurt Lash, ed., 2021). During Reconstruction, Douglass warned that, though equal rights was imperative and should be vigorously sought after, the Civil Rights Bill of 1866 and the Fourteenth Amendment were not a sufficient answer to the problem at the time, that problem being the equality of all. He further warned that the problem could *not* be fully addressed constitutionally, lest the whole government change to something like a "despotic government[]," which, according to Douglass, would be the worst-case scenario. *See Is Civil Government Right*, *supra* note 75. Rather than never-ending equality pursuits through the Constitution, Douglass claimed that only one solution could produce the proper results: equal political power.

255. *See* Leslie F. Goldstein, *Original Meaning, Precedent, and Popular Sovereignty?:* Whittington et al. v. Lincoln et al., 82 FORDHAM L. REV. 783 (2013); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1444 (2007).

256. *See* Anti-Slavery Constitution (1860), *supra* note 76, at 467-70.

257. *See, e.g.*, Fourth of July Speech, *supra* note 12 at 202 ("Now, there are certain rules of interpretation, for the proper understanding of all legal instruments. These rules are well established."). Hamilton also noted that legal rules of interpretation were consistent and well cemented. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

258. *See* BLACKSTONE, *supra* note 92.

which in turn leads to proper outcomes. The purpose of these rules is to discover the target legislation's *fixed* meaning.[259]

We can get a sense of natural rights originalism and how to go about finding the right answer to difficult legal questions through Douglass's critique of the infamous *Dred Scott* decision and discussion of the (purported) slave clauses.

### *A.* Dred Scott

The *Dred Scott* controversy involved an alleged slave who claimed to be free after being brought to the federal territories and subsequently returned to Missouri.[260] Dred Scott argued that his sojourn in the federal territories made him free. The majority opinion, written by Justice Taney, reached two important holdings: first, that the Missouri Compromise of 1820 was unconstitutional, which limited the federal government's ability to regulate slavery in the territories; second, that persons of African descent could not be properly recognized as citizens of the United States.[261] Taney grounded his conclusion on an interpretation of the original intent of the Framers. Taney argued that the Declaration of Independence, which proclaimed that all men were created equal, did not include persons of African descent in its grand principles. This truth, Taney argued, lies in the fact that the Framers held slaves; men of such great intellect and ability would not have espoused principles they themselves did not live by.[262]

Douglass vigorously attacked Taney's opinion using his rules of constitutional interpretation, as well as principles of human nature and natural rights. Douglass argued that Taney could not, by judicial fiat, "change the essential nature of things."[263] Taney's opinion uses a method of "discrediting and casting away as worthless the most beneficent rules of legal interpretation; by

259. *See* STRANG, *supra* note 78, at 13.

260. Dred Scott v. Sandford, 60 U.S. 393 (1857).

261. *See generally id*.

262. *Id.* at 410. As will be demonstrated, part of Douglass's essential argument is that Taney has replaced the original meaning of the Constitution with a *contemporary* meaning of the Constitution. *See* Ives, *supra* note 17, at 91 (Ives's understanding of how constitutional meaning may change through consent). The Constitution's original meaning contradicts Taney's opinion. *See generally* Dred Scott Speech, *supra* note 136; Fourth of July Speech, *supra* note 12. It matters not that a majority of the Union came to embrace a pro-slavery Constitution. The fixed original meaning, not contemporary meaning, is what matters.

263. Dred Scott Speech, *supra* note 136, at 411.

disregarding the plain and common sense reading of the instrument itself."[264] Taney relied on "supposed" or "secret" intentions rather than the plain meaning of the instrument consistent with the shared public understanding.[265] Thus, as a matter of interpretation, before even considering constitutional construction, Taney simply got it wrong. What is more, Taney's opinion failed to properly account for matters of construction when it dismissed basic natural rights principles. Man's right to liberty, according to Douglass, is self-evident.[266] Laws are made to protect this basic truth. All laws, in their very nature, are "opposed to wrong," and laws must therefore "everywhere be presumed to be in favor of the right."[267] Thus, Taney's failure was two-fold: he failed to discover the original meaning, and completely disregarded natural rights when construing the Constitution.

Douglass's alternative sought to understand the law's intention as well as its end or purpose. First, "the *intention* of legal instruments must prevail."[268] Taney failed to correctly identify the Constitution's intention. This intention is collected from the words' plain meaning; not from supposed or secret intentions of any particular drafter. This simple rule *prima facie* rules out a pro-slavery Constitution—nowhere in the Constitution is there mention of the word "slavery." Douglass stated that legal rules of interpretation "bear me out in this stubborn refusal to see slavery where slavery is not, and only to see slavery where it is."[269] Second, constitutional construction, where needed, would require that the interpreter consider natural rights and justice. This orients the Constitution's purpose toward the inclusion of *all* in its grand design. The Preamble states "We the *People* of the United States."[270] Douglass wisely noted that "We, the people" is quite different from "We, the white people – [] we, the citizens, or the legal voters" or any other restrictive formulation.[271] Legal rules of interpretation assume that if the drafters wanted a more restrictive account of

264. *Id.* at 420.
265. *Id.*
266. *Id.* at 411.
267. *Id.* at 418.
268. *Id.* (emphasis added).
269. *Id*.
270. U.S. CONST. pmbl. (emphasis added).
271. Dred Scott Speech, *supra* note 136, at 419.

who ought to be included within the Constitution's protections, they would have chosen such language.

Though the prima facie case for the white supremacist, pro-slavery Constitution may be defeated, there is the potential that the original meaning could salvage its case. However, Douglass found original meaning to also favor natural rights over and against Taney's interpretation from original intent.[272] Douglass argued that, at the time of ratification, "the leading religious denominations in this land were anti-slavery;" he highlighted this point because "[t]he church of a country is often a better index of the *state of opinion and feeling than is even the government itself*."[273] Furthermore, Douglass noted that there was also evidence that political practices were mostly consistent with the plain reading of "We the People"; in as many as "eleven out of the old thirteen States, colored men were legal voters at the time of [ratification]."[274] Douglass's process demonstrated how the original intentions of a legal instrument are best determined not through the secret or supposed intentions of the drafters, but through evidence of the plain words' shared public meaning. Furthermore, practices, while potentially relevant, are not equivalent to meaning.[275] Even though Douglass found evidence of practices consistent with African-Americans having citizenship (and even voting), he found meaning better represented in opinions and feelings than in government practices.

Douglass and Taney presented evidence of two plausible interpretations of the Constitution and the Declaration of Independence. When there were two plausible interpretations, construction required the interpreter to choose the one that favors natural rights. Indeed, Douglass found that "the judge, jury and advocate may make circuit of the globe for evidence" in favor of

272. Douglass characterized Taney's opinion as both a "devilish perversion of the Constitution, *and* a brazen misstatement of the facts of history." *See id.* at 421 (emphasis added).

273. *Id.* (emphasis added).

274. *Id.* at 424. According to Justice Curtis's dissent, that figure was closer to five out of the thirteen original states. *See* Scott, 60 U.S. at 539. Though Curtis's number seems more plausible, the main thrust of Douglass's argument remains valid—that there was a substantial practice of Black enfranchisement at the time of ratification. For Douglass's method, this would be sufficient to establish an original meaning which would include people of color as U.S. citizens.

275. *See* Anti-Slavery Constitution (1860), *supra* note 76 (regarding administration of practices).

natural rights, while "villainy is an exception, and the rules of interpretation hem it in on every side."[276] This view was consistent with Douglass's irresistible clearness rule—if a rule was to restrict natural rights, it had to do so with an unassailably clear meaning.

Douglass's rules of interpretation and construction not only provided a ruling in favor of Dred Scott's freedom and citizenship, but also addressed the constitutional evil of slavery at large. It was one thing to prove that the Constitution does not promote slavery; it was another to say that the Constitution was *anti*-slavery. Douglass takes this leap forward by addressing the purported slave clauses, arguing in favor of the Constitution as it *ought* to be interpreted—with its original meaning oriented toward natural rights.

### *B. Constructing the (Purported) Slave Clauses*

From the Constitution's inception, slavery was practiced with constitutional impunity. The Garrisonians argued that the Constitution made this possible through several slave provisions. What is more, this relationship between slavery and the Constitution was strengthened through the 1850 Fugitive Slave Act.[277] Yet, Douglass maintained that the Constitution was not just ambivalent toward slavery—the Constitution was "a glorious liberty document."[278] Douglass Skeptics find Douglass's claims at best ignorant, at worst disingenuous.[279] However, Douglass's claims were genuine and supported by a rigorous theory of Constitutional interpretation. Even after Douglass's change in position, he stated that if the Union (and, by extension, the Constitution) were a curse, he would be the first to abandon it. Nevertheless, Douglass firmly believed that overcoming the evil of slavery and its perpetuation lay not in rejecting the Constitution or through altering its meaning. Douglass proved his case by turning to each purported slave provision in the Constitution and demonstrating how it *ought* to be constructed in favor of natural rights.

276. Anti-Slavery Constitution (1851), *supra* note 67 at 421.

277. Fugitive Slave Act, Pub. L. No. 31-60, (1850).

278. Fourth of July Speech, *supra* note 12, at 202.

279. *See, e.g.*, MILLS, *supra* note 17, at 181.

A few years after the *Dred Scott* decision, Douglass took on the problem of slavery and the Constitution in his Anti-Slavery Constitution Speech, arguing that the Constitution *actively* opposed slavery. As he stated in the *Dred Scott* Speech, intentions cannot be read into the Constitution absent express language—there must be some grounding in the text for any purported intention.[280] The word "slavery" being absent thus becomes significant, as it presumably precludes slavery's advocates (such as Calhoun) and opponents (such as Garrison) alike from supporting in good faith the notion of a pro-slavery Constitution. Douglass proceeded to give an account of how several provisions that had often been interpreted as protecting slavery, ought to be interpreted in favor of natural rights and freedom through proper rules of construction.

First, Douglass addressed the notorious three-fifths clause. Article I, Section 2, governs representation and the apportionment of taxes among the several states.[281] The language states that "[r]epresentatives and direct [t]axes . . . shall be determined by adding to the whole number of free [p]ersons . . . and . . . three-fifths of all other [p]ersons."[282] The likely original meaning was that the reference to "other [p]ersons" referred to slaves.[283] Douglass did not contest this claim. However, Douglass gave a reasonable construction of that original meaning—one that demonstrated its operation against slavery. He argued that this provision "is a downright disability laid upon the slaveholding States; one which deprives those States of two-fifths of their natural basis of representation."[284] The Constitution effectively stripped slaveholding states of a portion of their political power. Implicit in the idea of self-ownership was equal representation. If apportionment was done on an equal basis, slaveholding states ought to have had one vote for *all* persons, including slaves. However, representatives of free states were not keen on granting full representation to states that denied basic natural rights. Eventually a compromise was made, which would grant *some* political power to slaveholding states attributable to their slaves

280. *See generally* Dred Scott Speech, *supra* note 136; Anti-Slavery Constitution (1860), *supra* note 76.

281. *See* U.S. CONST. art. I, § 2.

282. *Id.*

283. WILENTZ, *supra* note 134.

284. Anti-Slavery Constitution (1860), *supra* note 76 at 472.

but would ultimately deny them full representation. There are competing claims as to the motives behind the compromise.[285] Nevertheless, Douglass argued that, despite its original meaning recognizing slavery, the provision "at its worst, . . . still leans to freedom, not slavery."[286] Those states that allow for all to be free gain political power accordingly. Thus, even the compromise bespoke a preference for freedom. In this way the Constitution *condemned* slavery, while promoting freedom through increased political power where it exists.

Second, Douglass addressed what is generally referred to as the slave trade clause.[287] Douglass noted that this clause, though it protected the slave trade for twenty years, became a dead letter over a half century before his speech. As such, the clause "binds no man's conscience for the continuance of any slave trade whatsoever."[288] Further, the purpose of the clause was to ensure the *death* of slavery, not its survival. The original meaning was straightforward—the rationale at the time was: "Cut off the stream, and the pond will dry up."[289]

Douglass here revealed the limits of construction. Though construction keeps the founding generation and the Constitution under the most favorable light, it also can highlight their shortcomings. Following Douglass's construction, we must determine that the original meaning of the provision was to bring an end to slavery. The clause looked to "the abolition of slavery rather than its perpetuity."[290] Yet, Douglass alluded to the misguided nature of such thinking.[291] Douglass suggested that the Framers did not anticipate the robust interstate slave trade and the

285. *See generally* GILHOOLEY, *supra* note 8; Joshua Michael Zeitz, *The Missouri Compromise Reconsidered: Antislavery Rhetoric and the Emergence of the Free Labor Synthesis*, 20 J. EARLY REPUBLIC 447-49 (2000); WILENTZ *supra* note 134.

286. Anti-Slavery Constitution (1860), *supra* note 76, at 472.

287. U.S. CONST. art. I, § 9.

288. Anti-Slavery Constitution (1860), *supra* note 76, at 472 Here Douglass expressly denounces the theory that the original meaning referred to the slave trade but does not provide an alternative interpretation. Douglass foregoes doing so because there is no need—even granting the interpretation still leads to an anti-slavery Constitution.

289. *Id.* at 473.

290. *Id.*

291. *Id.* ("Wilberforce and Clarkson, *clear-sighted as they were*, took this view; and the American statesmen, in providing for the abolition of the slave trade, thought they were providing for the abolition of slavery.").

Fugitive Slave Act that would plague America.[292] Though the slave trade clause provided evidence of a disdain for slavery and its eventual extinction, it did not simultaneously provide a means for prompt abolition. The provision was a rule whose meaning eventually ran out. While there may have been wisdom in other provisions, the interpreter could not stretch this provision to establish a means for abolishing slavery. No amount of legitimate construction could morph the provision into such a grant of power.

Third, Douglass combatted the notion of the "slave insurrection clause," which guaranteed to the states "protection . . . against domestic violence."[293] Douglass firmly rejected the idea that the clause referred to slavery. He boldly stated that the clause had no part or parcel with slavery any more than the "suppression of popular outbreaks has to do with making slaves of you and your children."[294] Rather, the plain reading of the clause reveals that the law only governs the suppression of riots and insurrections; how that law ought to be made effective is a matter of construction.[295]

Security is the ultimate goal intended in granting the government power to quell insurrections. If slavery was the source of insurrection, then "the Constitution would be best obeyed by putting an end to slavery."[296] The rationale behind such construction may resemble the following: the original meaning of how to resolve domestic violence is ambiguous; the provision's purpose is to guarantee a republican form of government; freedom and self-governance are essential for republican government; natural rights favor freedom and self-governance; therefore, the provision requires action that will guarantee the natural rights and freedom of all; slavery, being opposed to natural rights, inhibits freedom; in the event of a slave uprising, the State seeking assistance from the federal government will receive aid that will reinstate republican government—namely, the abolition of slavery.

292. Let alone the basic human truth that people reproduce, and that slaveholders would use their odious tools of oppression to ensure that parents and offspring alike would remain enslaved.

293. *See* U.S. CONST. art. IV, § 4.

294. Anti-Slavery Constitution (1860), *supra* note 76, at 473.

295. This is akin to Solum's identification of "strict construction," where construction is "the activity of determining the legal effect given to the text." Solum, *Originalism and Constitutional Construction*, *supra* note 104, at 468.

296. Anti-Slavery Constitution (1860), *supra* note 76, at 473.

Fourth, Douglass took umbrage with the so-called Fugitive Slave Clause,[297] providing an alternative "fugitive provision" reading. Here Douglass clearly juxtaposed original public meaning and original intent. As mentioned earlier, advocates of the "fugitive slave" reading cited Madison as evidence, claiming that Madison stated that "the clause would secure . . . property in slaves."[298] However, Douglass cited the same Madison as claiming that the word "servitude" was struck from the provision because it applied to slaves. For this reason, evidence of secret intentions provides little utility when construing this provision. Instead, Douglass discussed the meaning of the provision "*when adopted*."[299] He focused on the phrase "bound to service . . . [or] labor." Those "bound to service or labor" could include many forms of service: at-will employment, indentured servitude, and slavery, to name a few. Construction led Douglass to choose those meanings which favored liberty and freedom. Douglass argued that the provision contemplated "persons who had come to America . . . and had, *for a consideration duly paid*, become bound to 'serve and labour' for the parties [to] whom their service and labour was due."[300] The plain reading demonstrated that the provision could only apply to those persons "bound to service" through mutual contractual obligations. A slave, on the other hand, could not make contracts—the slave was "a simple article of property. He does not owe and cannot owe service."[301] The slave, therefore, was exempt from the "fugitive provision."

Douglass's conclusion regarding the Fugitive Slave Clause provides perhaps the sharpest contrast with original public meaning originalism methodology. While they likely would concede to Douglass that the words "held to service or labor" within the 1780s–90s vernacular contemplated servants who were bound to service through mutual contractual obligations, originalists would find it an odd move to exclude slaves from the umbrella of those who were "held to service or labor." Historical evidence amply

297. U.S. CONST. art. IV, § 2.

298. Anti-Slavery Constitution (1860), *supra* note 76, at 474.

299. *Id.* at 475.

300. *Id.*

301. *Id.* Finkelman provides extensive evidence on this point. *See, e.g.*, Finkelman, *supra* note 15, at 21 (discussing how a slave "hir[ing] his own time" was a common practice, but "illegal and legally impossible because a slave could never be a party to a contract.").

demonstrates that fugitive slaves were contemplated in the clause, and ratifiers likely understood the same.[302] It would be disingenuous to argue that the original meaning of the clause did not contemplate the return of runaway slaves. But Douglass's main point here was not to rewrite history, but to demonstrate how history ought to be brought to bear on constitutional interpretation. Historical evidence of original meaning provides the range of possibilities, but natural rights principles determine outcomes.

Douglass further argued that the clause prohibiting bills of attainder would, properly enforced, defeat slavery everywhere.[303] Bills of attainder are laws that impose punishments on individuals without any conviction in the ordinary course of judicial proceedings.[304] Douglass expanded on this definition, stating that the restriction on bills of attainder included "a law entailing upon the child the disabilities and hardships imposed upon the parent."[305] Thus, inherited slavery (let alone slavery in the first instance) would be instantly nullified should the Supreme Court construct the provision to its fullest extent.

One interesting construction that follows Douglass's method (but not mentioned by Douglass specifically) is use of the Commerce Clause to combat slavery. Douglass noted that one of the pervasive problems of slavery in his time was the growth of the interstate slave trade; he remarked how the internal slave trade was "one of the peculiarities of American institutions."[306] This form of trade was nothing short of "murderous traffic."[307] Indeed, the internal slave trade's very presence was one of the main dangers that threatened the perpetuation of the Union. Following Douglass's formula for construction, the interstate commerce clause may have been a legitimate means for the federal government to regulate the internal slave trade. The slave market led to the sale of slaves from states that increasingly saw little use

302. *See* WILENTZ, *supra* note 134.

303. Anti-Slavery Constitution (1860), *supra* note 76, at 478.

304. *See* Duane L. Ostler, *The Forgotten Constitutional Spotlight: How Viewing the Ban on Bills of Attainder as a Takings Protection Clarifies Constitutional Principles*, 42 U. TOL. L. REV. 395, 395 (2011). This is in keeping with historical understanding of bills of attainder. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1338 (1833).

305. Anti-Slavery Constitution (1860), *supra* note 76, at 478*; see also* Ostler, *supra* note 304.

306. Fourth of July Speech, *supra* note 12, at 193.

307. *Id.* at 195.

for them to states that had more need.[308] Recognizing the dangerous (or, in Douglass's words, "murderous") aspects of the internal slave trade, Congress could have passed legislation that would forestall, or completely prohibit, the internal slave trade between states. If Congress had regulated these cross-state-border transactions, slavery amongst the several states would at least have been diminished, or possibly even eradicated.

Douglass's construction of these clauses provided an avenue whereby the Constitution, properly administered, would bring an end to slavery. Yet, his declarations came at a time when the constitutional evil of slavery seemed commensurate with the Union itself. Recognizing this, Douglass admonished his audience in the Fourth of July Speech for not adhering to the nation's founding and the proper original meaning of the Constitution. After all, correctly interpreting the Constitution and its proper administration are two separate phenomena.[309] Justice demands that each person honor their duty to ensure not only their own rights, but those of their fellow human beings. But the nature of law and consent inhibits the perfect realization of justice. Constitutional actors must use prudence and ensure that the arc of the Constitution bends toward justice, even if it will never fully accomplish such lofty goals.

## CONCLUSION

At a time in which constitutional disputes extend beyond the court of law and into the public sphere, it is beneficial to look to the past for similar patterns that may reveal viable solutions for the present. Not only the outcome of individual cases, but the very character of the Constitution and how the people relate to it moving forward is at stake. The late antebellum period was rife with constitutional contestation over the historical meaning of slavery and its relation to the Constitution. Indeed, the future of the nation rested on the answer to that question. Our time is no different.

Douglass is a particularly helpful voice to turn to, both because of his experience as a former slave turned constitutional abolitionist and because of the unique constitutional methods he used to promote an anti-slavery Constitution. Rather than predicting the

308. *See generally* 1 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT (7th ed. 1991).

309. *See* Dred Scott Speech, *supra* note 136, at 423.

dissolution of the Union as an inevitable consequence of "a covenant with death, an agreement with hell," Douglass offered a more moderate prospect of a Union destined to become just based on its founding principles. Using a natural rights construction, natural rights originalism reconciles original meaning's darker implications with its brightest possibilities through construction. Remedying constitutional evils became plausible; the Constitution remaining moored to its original meaning did not equate to the nation remaining trapped in the mire of slavery. The Constitution required constitutional actors, whether it was the President, legislators, judges, or even just citizens, to ensure that the arc of the Union bent toward justice.

Nevertheless, some may still ask: Was Douglass *really* an originalist? His theory had many elements that present-day constitutional scholars would associate with originalism, but it also had several inconsistencies, some of which may cause originalists today to balk at the notion that Douglass's theory could be associated with originalism. But careful consideration of it in conjunction with contemporary trends suggests that even if we cannot properly consider Douglass an originalist, his theory offers a challenge to originalism's tenets. It may be possible to have a theory that abides the fixation and constraint principle, while nevertheless maintaining a moral component in pinpointing the Constitution's fixed meaning.

Future scholarship will provide more concrete, contemporary examples of how natural rights originalism might be used to resolve constitutional disputes. Douglass provided an example for future political actors to follow as they secure the blessings of natural rights and freedom for all. His method gives us pause to reconsider how historical evidence is used to arrive at originalist conclusions. Using this method will not only uphold the rule of law but ensure we do not repeat the mistakes of the past. Indeed, Douglass understood that natural rights and freedom for a few would never be fulfilled until *all* were able to partake in its promise—until "We the People" ceased to be restricted by hidden original intentions and carried the full import of its plain reading.