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Note to schmooze readers: This paper is longer than the page limit. To condense, read the abstract, then p14 – 17, then p26 to 29.

Abstract: The classical portrait of legal fidelity emphasizes that interpreters should sharply distinguish between their own judgments about morality or public policy, and their judgments about what the law requires. An instrumental approach to legal reasoning violates this basic obligation. This article argues that one of the constitutional heroes most exalted by constitutional theorists, Frederick Douglass, explicitly advocated the instrumental approach to interpretation that the classical concept of fidelity warns against. The implication of this argument is either that Douglass is not a constitutional hero, or that constitutional fidelity is not necessary for constitutional heroes. The argument that constitutional heroism does not require citizens to be faithful to the documents' text requires a reworking of our basic categories of constitutional agency. I conclude by offering a few thoughts on how such a reworking might be achieved if Douglass' status as a constitutional hero is to be maintained.

The classical portrait of legal fidelity emphasizes that interpreters should sharply distinguish between their own judgments of political morality and public policy, and their judgments about what the law requires. In constitutional theory, such textual fidelity is mandated not only by the requirements of legalism (and by the Constitution's identification of itself as the supreme law of the land), but also by the requirements of consent theory. Honoring the consenting moment of constitutional ratifiers, the argument goes, requires interpreters to follow the text of the Constitution, not manipulate that text in service of their own ends. Hence an instrumental approach to legal reasoning (where the reasoning is dictated only by the results the interpreter wishes to arrive at) violates basic obligations towards legal fidelity and the honoring of consent.

This article argues that Frederick Douglass' mature constitutional position advocated precisely that instrumental approach to the interpretation of the US Constitution that the classical concept of legal fidelity warns against. The interpretation of Douglass' thought offered here runs counter to other scholarly treatments of his interpretive position. And for good reason: under classical notions of fidelity, the argument offered in this article should lead us to understand Douglass not as a constitutional hero, but rather as a revolutionary or subversive reformer. But, although scholars are wrong to equate Douglass' position with any reasonable interpretive theory of the Constitution, their desire to hold on to Douglass as a model of constitutional citizenship is well-founded. Far from leading us to reject Douglass' constitutional heroism as heroism, Douglass' example should lead us to revise our classical notions of the relationship between legal fidelity and constitutional fidelity. The essay concludes with thoughts on how such a revision might be accomplished.

Frederick Douglass' mature constitutional position was essentially instrumental in a way that is problematic under the classical conception of constitutional fidelity. I am using the concept of "instrumental" to refer to any interpretive position that is disciplined *only* by the results that the interpreter wishes to achieve, and hence which fails to be disciplined by even the most generous reading of the Constitution's text. This definition purposely excludes a situation where the interpreter is motivated by strategic calculations, but chooses an interpretive theory that is still reasonable in that it does not lead the interpreter to actually ignore the public meaning of explicit constitutional guarantees or mandates. Perhaps because of Douglass' status as a constitutional hero, this dimension of Douglass' thought has been either ignored or seriously downplayed in Douglass

scholarship, and its implications have been ignored in normative constitutional theorizing. Let us turn now to Douglass' constitutional position.

Douglass' constitutional transformation

Frederick Douglass was an escaped slave whose rhetorical and intellectual powers, as well as his fierce dedication to the cause, made him a leading abolitionist within only a few years of his escape from slavery. Sanford Levinson offers him as a model of textualist discipline, in contrast to legal theorists like Ronald Dworkin who "invites anyone engaging in constitutional interpretation to reflect on the changing moral structure of society, including its background unwritten "principles," rather than to rely on written text," and tells us that he could bring himself to sign the constitution in part in honor of Douglass' own faith in the Constitution's language (Levinson 1988, 31; Levinson 2006, 4.) His first political alliance was to radical anti-Constitution abolitionists who called the Constitution (in William Garrison's words) an "agreement with Hell and covenant with death." Prominent within this group was Wendell Phillips, as well as Garrison himself. These radical abolitionists forswore political coercion of any kind and pressed for Northern secession from a corrupt (and corrupting) Union. Resisting the appeals of political abolitionists like Lysander Spooner, William Goodell, Beriah Green, and Gerrit Smith, radical abolitionists emphasized that their principles required them to refuse complicity in the US government even to the extent of refusing to vote or hold office. They instead focused on awakening the conscience of the people through protest and persuasion. Douglass discovered the writings of these radical abolitionists while still a slave, and quickly associated himself with their cause when he achieved freedom. But

his own developing political judgment – as well as his developing friendships with Spooner, Green, and Smith -- soon led Douglass to reject the ideal of non-complicity to the extent of non-voting. In 1851 Douglass publicly announced the change in his allegiance. He now identified himself as a political abolitionist and urged Americans to use the political, as well as moral, powers available to them to resist slavery.[i] This transformation of 1851 was a pivotal moment in abolitionist politics. The switch was publicly momentous, and Douglass was charged with opportunism and roguery—charges which echoed about him for many years after the fact.[ii]

Understanding Douglass' mature constitutional position requires understanding the details his 1851 transformation. Douglass himself insisted that the core of his position had not changed. His firm commitment to abolitionism above all else was a hallmark of his thinking, always—his "grand and commanding object."[iii] What, then, made 1851 such a momentous year?

The first change was to his belief about the kind of constitutional attitude that would best support abolition. Douglass came to believe that Americans would not support abolitionism if doing so meant rejecting the Constitution. He also believed that a reform movement which eschewed the use of political tools like voting risked catastrophic failure—a live option in 1851, given that this was the year when Congress transmitted, by 2/3 approval in each house, a constitutional amendment to the states to explicitly entrench slavery in the states against federal interference. Douglass hence came to believe that the best option for abolitionists was to argue that the Constitution was anti-slavery, and that the political powers granted under the Constitution (including voting) should be used to abolish slavery.

The second change was the content of his position itself. Douglass went from arguing that we could know the Constitution was pro-slavery because of the considerable protections it offered to slaveholders, to an argument that portrayed the Constitution as anti-slavery because it never used the word "slave." We will examine this change at length.

The third change was over a meta-theoretical question of fidelity itself. Douglass' new position was not just motivated by pragmatic political judgments. The instrumentality of his new position went beyond that. Douglass' post-1851 position was self-consciously aware of, and approving of, the instrumental use of constitutional interpretation itself. Although many scholars acknowledge a strategic element of Douglass' transformation, his post-transformation position on constitutional meaning incorporated *into its content* a role for strategic judgment that has been entirely neglected. Douglass didn't just switch interpretive positions for strategic reasons; the new position he adopted was self-consciously aware of, and approving of, the strategic use of constitutional interpretation itself.

In 1849, Douglass had emphasized the complicity of the Constitution in supporting slavery. The fugitive slave clause, the power of the federal government to put down insurrections, and the power of slaveholders to move their slave property throughout the Union meant that the entire nation was complicit in the outrage of slavery.[iv] He regarded the Constitution as a "foul curse," and desired to see it "shivered in a thousand fragments."[v] He may have adopted this reading for strategic purposes; in a few 1849 letters, Douglass described his expectation that the more strenuously Southerners insisted on a pro-slavery reading of the Constitution, the sooner Northerners

would be "awakened" to their complicity in slavery.[vi] But whatever Douglass' expectations were, he did not describe his position itself in strategic terms.

The language he did use to describe his position should be familiar to those versed in the classical demands of constitutional fidelity. Douglass was acutely sensitive to the idea that legal obligations could depart from the demands of justice and morality.[vii] He also indicated a respect for the requirements of faithful interpretation that he couched in the language of morality, asking whether it was "good morality to . . . put a meaning upon a legal instrument the very opposite of what we have good reason to believe was the intention of the men who framed it?"[viii] In accordance with the classical position of the faithful interpreter, the pre-transformation Douglass responded to the political abolitionists that they could not "have a stronger wish to turn every *rightful* instrumentality against slavery, than we [the radical abolitionists] have; and if the Constitution can be so turned . . . we shall readily, gladly and zealously turn our feeble energies in that direction. . ."[ix] (emphasis added). Notice Douglass' concern that abolitionists not make political use of instruments that were not 'rightfully' theirs. This concern for the integrity of the constitutional text sits comfortably with the principled approach of the classical faithful interpreter. But, Douglass continued, given the Constitution's support for the practice of slaveholding, to adopt the Constitution's ends as one's own would be to "to become a guilty party to it, and in reply we say—No!" [x]

Although Douglass was rejecting the authority of the antebellum Constitution in particular, he understood his insistence on respecting the Constitution's meaning as a general component of lawfulness. For example, Douglass resisted political abolitionist Gerrit Smith's suggestion that if the government "have a Constitution under which it

cannot abolish slavery, then it must override the Constitution and abolish slavery." This doctrine he found "radically unsound," for a government acting outside "the very charter of the government" would be "nothing better than a lawless mob, acting without any other or higher authority than its own convictions or impulses as to what is right or wrong."[xi] (find date and context) Douglass reflected his abiding concern with the distinction between what was lawful and what was right in other domains as well, and used that distinction to defend his actions in areas where they would seem to require no defense. For example, when Douglass' friends purchased his freedom, some abolitionists criticized Douglass for paying his former owner to secure what was a natural liberty. Abolitionist and pacifist Henry Wright objected that the natural right to self-ownership made the transaction with Thomas Auld, Douglass' former master, illegitimate. Instead of simply refusing to engage the challenge to his behavior from men who could never know or experience the risks of an escape from slavery, Douglass took the opportunity to insist upon and develop the distinction between "legal freedom" and "abstract right and natural freedom."[xii] Prior to his transformation of 1851, this distinction was one that Douglass cared about and spoke about regularly.

In resisting the Constitution's complicity with slavery, the pre-transformation Douglass evoked the familiar language of reluctance, where the interpreter, driven by the demands of fidelity and reason, is (regretfully) required to arrive at conclusions that reveal the text to be unjust and even immoral. (cite Cover 'language of reluctance') Consider the strikingly resonant words with which he introduced one of his most important pre-transformation addresses on slavery:

> Of one thing, however, we can assure our readers, and that is, that we bring to the consideration of this subject no partisan feelings, nor the slightest wish to make ourselves consistent with the creed of either Anti-Slavery party, and that our only aim is to know what is truth and what is duty in respect to the matter in dispute, holding ourselves perfectly free to change our opinion in any direction, and at any time which may be indicated by our immediate apprehension of truth, unbiased by the smiles or frowns of any class or party of abolitionists.[xiii]

Douglass here rhetorically occupied the position of the classical faithful interpreter, whose interpretive practice is bound by reason, but who is left free to accept or reject the ends of the document according to his own moral lights.

In 1851 Douglass announced the change in his position. In the first written defense of his new position, Douglass emphasized, not the capacity of truth and reason to illuminate politically contentious questions, but rather the interpretive "rights" of the people:

> I scout the idea that the question of the constitutionality, or unconstitutionality of slavery, is not a question for the people. I hold that every American citizen has a right to form an opinion of the constitution, and to propagate that opinion, and to use all honorable means to make his opinion the prevailing one. Without this right, the liberty of an American citizen would be as insecure as that of a Frenchman.[xiv]

Read literally, this passage attacks a confused target. Who among his interlocutors believed that the people did not enjoy the right to form an opinion of the constitutionality of slavery? Douglass himself had always apparently considered himself entitled to form and advance such opinions. It is possible that Douglass meant to assert his right to differ from those he admired so greatly, those Garrisonians who had been so vital to his intellectual and political development.[xv] But in emphasizing the "right" to interpret the Constitution, rather than the duty to interpret it according to truth and reason, Douglass

could also have been signaling a change in his conception of the proper relationship between citizen and Constitution.

Douglass then told the American Anti-Slavery Society that he had arrived at the conviction that "the Constitution, construed in the light of well-established rules of legal interpretation, might be made consistent in its details with the noble purposes in its preamble."[xvi] He insisted that the Constitution "be wielded in behalf of emancipation."[xvii] Far from deliberating over whether the Constitution's ends could be his own, Douglass now wished his audience to "wield" the Constitution-- like a tool? His language emphasized not the revelation of constitutional meaning to the faithful interpreter, but rather the interpreter's active management of that meaning—the Constitution was not "revealed" to be consistent with its own preamble, but rather would be "made" to be so. (get 'revealed' pp #)

Douglass emphasized the political necessity of this switch, as well as its integrity. In his editorial pages he emphasized that "[n]ever . . . will the North be roused to intelligent and efficient action against slavery, until it shall become the settled conviction of the people, that slavery is anarchical, unconstitutional, and wholly incapable of legalization."[xviii] He emphasized the significance of the Constitution for the winning the sentiments of Northerners: "The people of the North are a law abiding people. They love order and respect the means to that end . . . While men thus respect law, it becomes a serious matter so to interpret the law as to make it operate against liberty."(where is this from??)

When radical abolitionists challenged his constitutional reading, Douglass deflected their questions about the fugitive slave clause to the larger question of which

interpretive strategy was most likely to abolish slavery, and to the responsibility of citizens to adopt that strategy. Hence he chastised the radical abolitionists for their short-sightedness; they would give up "the firm basis of anti-slavery operation" that the Union provides, while forsaking their responsibility to slaves.[xix] And he emphasized that "[t]he slaveholder has the best of the argument the very moment the legality and constitutionality of slavery is conceded," for such a doctrine "drives conscientious abolitionists from the ballot-box, reduces the masses—who would be practical abolitionists into mere '*Free Soilers*,' and arms the slaveholder with almost the only available power this side of *revolution* to defeat the anti-slavery movement."[xx]

When challenged by the Garrisonians as an inconsistent opportunist, Douglass articulated his understanding of the role of a reform movement: to work from the inside to bring the understanding of the vanguard position to the entire movement. He also emphasized that his consistency was of a higher order than that of the Garrisonians:

> Anti-Slavery consistency itself, in our view, requires of the Anti-Slavery voter that disposition of his vote and his influence, which, in all the circumstances and likelihoods of the case tend most to the triumph of Free Principles in the Councils and Government of the nation. . . Right Anti-Slavery Action is that which deals the severest deadliest blow upon Slavery that can be given at that particular time. Such action is always consistent, however different may be the forms through which it expresses itself.[xxi]

Here Douglass justified his interpretive transformation by reference to the needs of abolitionism. Interpretation itself, or what Douglass now called "influence," had become a political power that citizens had a responsibility to exercise on behalf of abolition.[xxii]

The post-transformation Douglass was willing to chastise Taney's *Dred Scott* decision for reaching the very conclusion that Douglass himself had defended with

Garrison. Douglass' rejection of the "hell-black judgment of the Supreme Court," however, did not engage the legal or constitutional status of *Dred Scott*, but instead appealed to the inherent wrongfulness of slavery. Douglass argued that

> [t]he Supreme Court of the United States is . . . very great, but the Supreme Court of the Almighty is greater. Judge Taney . . . cannot change the essential nature of things—making evil good, and good evil. Happily for the whole human family, their rights have been defined, declared, and decided in a Court higher than the Supreme Court.[xxiii]

In this speech, Douglass demonstrated impatience with legal reasoning, and nowhere challenged the Supreme Court on interpretive questions of the Constitution but instead focused his critique squarely on the morality of the decision itself. Some scholars have called this a natural law approach to constitutional interpretation.[xxiv] Indeed, Douglass' response to the decision emphasized that whether or not "the intention of the law-giver is the law" in fact "depends on whether the *intention* itself is lawful," and that "laws against fundamental morality are void."[xxv] But natural law makes recourse to a higher standard than the Constitution. By failing to relate the commitments of natural law reasoning to the obligations of legal fidelity, Douglass stepped outside of the position of the classical faithful interpreter.

Contrast his approach to *Dred Scott* with that of Lincoln. Lincoln, also sometimes claimed as a natural lawyer, was careful to contextualize his disagreement with *Dred Scott* within a broader constitutional theory that laid out the possibility that he would have to comply with a decision he believed to be strikingly immoral. Lincoln emphasized his compliance with the particular holding of the case as it applied to Dred Scott himself; Lincoln emphasized the distinction between disagreement and outright resistance; and, invoking a constitutional theory that is sensible from within the terms of a classically

faithful practice, Lincoln specifically identified the context that could force him to comply with the decision as authoritative precedent:

> If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.[xxvi]

Although both men rejected the principle of the decision, Lincoln emphasized his positioning as a faithful interpreter by carefully spelling out the formal conditions that could mandate his compliance. Douglass' response offered no such possibility, and instead unapologetically challenged the opinion from the perspective of a political reformer. *Dred Scott* may be wrong as a matter of constitutional interpretation—Taney certainly took great latitude in constructing the framers' original intent, as well as in his reading of citizenship and membership at the time of the Constitution's ratification. But Taney's faulty reasoning does not mean that Douglass' response to it, or the larger interpretive theory behind Douglass' response, was constitutionally correct according to the classical model of fidelity. Douglass did not only change positions on the basis of a strategic judgment; rather, his new position itself was essentially a strategic position, one that called upon the people, the President, and the Supreme Court to interpret the document as a tool for achieving abolition.

I wish to emphasize the depth of this strategic element in order to distinguish Douglass' post-1951 interpretive position from other interpretive theories that contain a significant role for moral evaluation. For example, although Robert Bork and Frederick

Schauer both emphasize the role of law in displacing the independent moral judgments of interpreters, Ronald Dworkin explicitly links a faithful constitutional practice to moral engagement with the Constitution's aspirations. One understanding of Douglass' transformation could be that he simply switched from the originalism of Bork to the aspirational liberal egalitarianism of Dworkin—perhaps for strategic reasons, but still articulating a constitutional position that is not itself essentially strategic.

But what is Dworkin's interpretive position? Dworkin, like Douglass, commits himself to the view that constitutional ambiguities— legal ambiguities—should be filled out according to the best available political morality. Constitutional fidelity means, for Dworkin, a commitment to read the Constitution in its best light. But Dworkin maintains his position as a classical faithful interpreter in two ways, both of which Douglass would reject. Dworkin distinguishes his account from a purely strategic one first through the concept of 'fit.' 'Fit' requires that the interpreters' judgment be tested according to whether it can find a place within the past practices of the nation. If it cannot, the interpretation must be discarded as a constitutional interpretation no matter how otherwise attractive it may be. Second, Dworkin develops a distinction between concepts and conceptions.[xxvii] The 'concepts' that the Constitution engages are held to be inviolable, whereas Dworkin argues that the particular meanings of those concepts should be worked out by reference to a good political philosophy. It matters that 'natural born' for the President refers to citizenship and not to whether the birth is vaginal or Caesarean. But once we know that 'natural born' refers to citizenship and not the birth process, it is not relevant, for Dworkin, to know how the framers constructed the meaning of citizenship, or the conditions under which they believed it was appropriate to award birth

citizenship. (It is for this reason that Dworkin is driven to reject the privacy argument in *Roe v. Wade*. (get cite) The Constitution never invokes the concept of privacy, and so a faithful practice cannot reference that concept either.) Hence, for Dworkin, fidelity means invoking only the concepts given to us by the public meaning of the text, whereas our particular conceptions are subject to legitimate moral dispute and revision.

Frederick Douglass would reject both of these constraints. He almost certainly would reject conceptualizing 'fit' according to a nation's past practices, since a core element of his transformation involved chastening the authority that past practice can claim.[xxviii] He would also reject the idea that constitutional authority rests in the public meaning of the Constitution's concepts. In practice, he was indeed willing to interpret ambiguous clauses in a liberty-promoting direction (for example, he argued that the power to put down insurrections could empower the government not only to repress slave insurrections, but also to abolish slavery itself where its practice was a source of insurrection; he also argued that the prohibition on bills of attainder could serve to abolish slavery.)[xxix] But Douglass was also willing to interpret clauses that indicate clear support for slavery out of their clear meanings.

The most important example is his interpretation of the fugitive slave clause.[xxx] Douglass' interpretation of this clause is the lynchpin of my argument that his approach was strategic and instrumental in a way that classical theories of constitutional fidelity cannot countenance. Let us examine the language of the fugitive slave clause:

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

The clause does not use the term "slave." It instead marks out a class of people who are held to labor under the positive laws of a state, and mandates that this class of people cannot be legally discharged from that labor by "escaping" into another state. After 1851, Douglass argued that the language of the clause could not cover slaves, since slaves' incapacity to enter into contracts meant that "service or labor" could not be "due" from them. And it is true that, according to classic tenants of natural law, labor cannot be "due" from slaves. Douglass furthermore argued that the language instead referred to indentured servants, who could make contracts.

This interpretation contains a fatal mistake. To be plausible, Douglass' interpretation requires ignoring that the relevant clause explicitly qualifies the labor "due" from this class of people with the phrase "under the laws thereof." That language explicitly marks the distinction between positive and natural law and indicates that a positive law reading is appropriate in this case. The clause does not specify that there is a class of people from whom labor is due, but rather that there are people from whom labor is due "under the laws" of one state. Douglass could hardly deny that state laws obligating slaves to their masters in fact existed. Furthermore, the fact that the clause could include servants does not mean that it excludes slaves. If slaves are covered under the category of people from whom "labor may be due" under the laws of the state, then they are covered whether or not servants are also covered. Douglass himself had, prior to his transformation, called it an "absurdity" to exclude slaves from general language that one might have thought relevant to them (for example, the 3/5 clause's invocation of "all other persons").[xxxii]

In addition to his misrepresentation of the meaning of the fugitive slave clause, after 1851, Douglass also constructed the 3/5 clause as a *disability* to slavery because slave states were not able to count their full slave population for the purposes of political representation.[xxxiii] (give exact quotation) But slaves could not vote. Any votes they were apportioned benefited only their oppressors. The true disability to the South – which also would have been an accurate representation of the political status of slaves-- would have been to count slaves as zero. Even worse, the benefit conferred on the South by the 3/5 clause was of serious political consequence. The bolstering of representation of the South in the House of Representatives and Electoral College was pivotal for the passage or defeat of several pieces of key antebellum slavery legislation.[xxxiv] Given that slaves could not vote, any votes they were apportioned would benefit their oppressors, and slaveholders claimed slaves not as humans but as property, Douglass' interpretation of this generous apportionment as a slavery *disability* – a disability which would have been evened had slaves been counted as a full persons– makes no sense at all.

One scholar has characterized these efforts as a form of "naïve textual formalism" meant to resist the "racial cryptography" of the Constitution.[xxxv] But Douglass' hyperliteralism was far from naïve. Douglass was a self-aware interpreter: "[i]n all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction. I will concede nothing. It must be shown that it is so nominated in the bond. The pound of flesh, but not one drop of blood."[xxxvi] Claiming the position of Portia in Shakespeare's *Merchant of Venice*, Douglass criticized Lincoln's Inaugural address: "He will have the pound of flesh, blood or no blood, be it more or less,

a just pound or not. The Shylocks of the South, had they been after such game, might have exclaimed, in joy, and Abraham come to judgment!"[xxxvii]

Douglass' hyperliteralism was a deeply intelligent strategy of resistance to the insinuations of racial domination. But this hyperliteralism also loses touch with public conceptions of meaning so completely that it actually loses contact with the idea of legal fidelity at all. Portia's strategy in the *Merchant of Venice* is a legalistic *subversion*; it is a way of defeating a contract from within. Douglass himself never articulated whether his encounter with the words of the Constitution was subject to any interpretive discipline other than morality itself, or what those disciplining practices would be.

Douglass' post-1851 position does not show concern for the issue of legal fidelity. His failure to address the distinction between legal and natural obligation (a theme that had greatly interested him before); his willingness to speak of the Constitution as a tool to be used for moral purposes; his emphatic arguments about the strategic value of constructing the Constitution in an abolitionist direction; his engagement with constitutional questions like *Dred Scott* in terms, not of constitutional fidelity, but of the direct wrongfulness of slavery; his willingness to misinterpret the content of the Fugitive Slave clause, and to mangle the significance of the 3/5 clause-- all of these make it appropriate to label Douglass' new position self-consciously strategic. Douglass was strategic on behalf of a moral end, and he justified his strategy in terms of what was needed to respond to an overwhelming evil of his time. But strategic constitutional interpretation is distinctive precisely because it undermines the possibility of principled rejection, the rejection of Garrison and Wendell Phillips, and hence, the classical theory claims, the possibility of principled consent.

Consent, Rejection, Fidelity

It is appropriate here to say more on what is at stake in this question of fidelity. The notion of interpretive fidelity is intimately bound to consent, and consent theory probably offers the single most fruitful avenue for thinking about justified coercion that political science has been able to muster. Consent lies at the heart of any classical theory of constitutional authority. The idea that individuals should not be bound to obey except under terms to which they have agreed is expressed in the American founding tradition through the Federalist aspiration to create a constitutional order by "reflection and choice."[xxxviii]

But consent theory requires us to countenance the possibility that citizens might reject the Constitution's commitments, and hence the Constitution itself. There is a link between consent and the possibility of rejection. Consent can only generate political authority if it happens in a context where rejection is a real possibility.[xxxix] Hence Sotirios Barber insists that "genuine reaffirmation is possible only for those who are prepared to reject the Constitution."[xl] The development of the idea of "manufactured consent," a phase coined by Walter Lippman and spun off by Noam Chomsky, is disturbing precisely because it threatens the idea that citizen's consent would be freely given, self-created, and hence authoritative.[xli] For consent to be "manufactured" means that it is not freely given, could not be withdrawn, and hence ceases to be politically authoritative.

The link between authoritative consent and the possibility of rejection is not only a theorist's concern. Jefferson's appeal for periodic revolutions was directly connected to the idea that the Constitution can have no real authority if its rejection or replacement is

not a real possibility for living generations. Virginia and New York explicitly linked their ratification of the Constitution to the people's continued right to withdraw should the Constitution's government prove unworthy of consent.[xlii] It was precisely because of the centrality of principled consent for the general project of self-government that radical abolitionists chose to reject the Constitution's authority, and the logic of their principled stance was accepted even by their opponents. For example, Lysander Spooner, a political abolitionist, agreed that "[i]f abolitionists think that the constitution supports slavery, they ought not to ask for power under it . . . [r]evolution should be their principle."[xliii] Everyone in this game recognized that principled interpretation meant that a great deal was at stake in one's reading of the Constitution; a principled interpreter who arrived at a pro-slavery reading of the Constitution could be put in a position where morality and fidelity conflicted, and hence could be obliged by the demands of fidelity to reject the Constitution's authority wholesale.

Even admitting that consent, to be genuinely authoritative, may require the possibility of rejection, what does this mean for the question of fidelity? Although consent happens from "outside" of a constitutional order and interpretation happens from "within", the concept of fidelity works within the conceptual framework of most theories of constitutional interpretation to preserve the authority of the consenting or ratifying moment. More precisely, because interpretive theories must maintain the possibility of principled rejection as a condition for maintaining constitutional authority, justifying any particular interpretive method always involves demonstrating, at some point, that that interpretive theory allows for the possibility of constitutional rejection. For this reason, Barber writes that the effort to "find interpretations of the Constitution that make it

workable in all circumstances" only leads interpreters to "inadvertently reject the Constitution's authority."[xliv] To preserve the meaning of consent, the constitutionally faithful are asked to be self-disciplined in their interpretive practice: "[r]especting the Constitution, they respect constitutionality—which is to say, the distinction between what is politically desired and constitutionally permitted."[xlv] An instrumental attitude towards the Constitution carries the danger of blurring this distinction: hence, according to Barber, a truly constitutional citizen, one who accepts the Constitution's claim to supremacy, cannot accept the Constitution for mere instrumental reasons but must also accept the Constitution's ends as his or her own.[xlvi] Hadley Arkes, too, mocks the instrumentalism of the constitutional "philistine":

> [When asked about the federal government's authority over discrimination in housing,] [m]y interlocutor reflected on the question for a while—a short while, as I recall—and he conceded that the question did indeed pose an interesting 'academic' problem. But he went on courteously to remind me that he was, after all, in the business of litigating cases. As with many other lawyers, he would fill his brief with references to any part of the Constitution that could offer even a slender connection . . . It was not his business to divine just which one of these clauses or slogans would touch the credulity of the judges and produce the result he was seeking from the court.[xlvii]

Justice Antonin Scalia references this classical ideal when he writes of the possible tensions that could arise between his Catholicism and his oath to the Constitution as a jurist.[xlviii] If Catholocism were stringently anti-death penalty, Scalia believes he would be obligated to use the powers of his office to defeat the death penalty, although as a principled interpreter he does not believe an anti-death-penalty reading to be faithful to the Constitution's text. Because the instrumental use of constitutional interpretation to advance Catholic aims would be for him an act of bad faith, Scalia believes he would be

obligated to resign in this case. (Luckily for him, he does not believe Catholocism to mandate resistance to the death penalty). Barber, Scalia, Bork, Arkes, Rehnquist, Dworkin, Ely – every serious constitutional theorist agrees that constitutional practice is about "reaffirming ideas and provisions thought to have been recognized or established by those who framed and ratified the Constitution and its amendments," not about "altering constitutional norms to conform to changing political demands."[xlix] Every serious interpretive theory squares itself with the possibility of rejection, and tries to show that its methodology can lead the interpreter to judgments about obligations of the constitutional text that deviate from what the interpreter's own political morality would require.

Now, of course, fidelity cannot mean that we never choose interpretive theories with an eye towards the results they are likely to generate. Desired results often play some part in choosing which interpretive theory one adopts. For example, no interpretive theory of the US Constitution today can be a plausible candidate unless it generates the conclusion that the *Brown v. Board of Education* decision went the right way. For some interpreters, any theory that cannot justify a women's constitutional right to an abortion, or an employer's right to freedom of contract, is suspect for that reason. But this concern for results occurs within limits. No interpreter expects to be able to achieve *all* of their most desired outcomes through constitutional reasoning; and no interpreter operating under classical notions of fidelity can be comfortable simply ignoring the textual guarantees of the Constitution, as Douglass did.

Misinterpreting Douglass

It should not be surprising, then, that so many scholars have misinterpreted this instrumentalist element of Douglass' thought. Frederick Douglass is a hero of the Constitution's development, and it seems ungrateful to label him a subversive. Hence his position is continuously misrepresented. David Schrader and Charles Mills have each explored his transformation from the perspective of natural law versus positivism; the varieties of originalism; or the merits of originalism versus textualism; but their extensive readings of his positions nowhere reveal how subversive the strategic element of Douglass' post-transformation position really is from the point of view of a consent-minded theorist.[l]

Douglass is frequently presented as a "textualist": in Robert Bernasconi's discussion of Douglass' position on the fugitive slave clause, Douglass is presented as someone attached to the "plain meaning" of the Constitution's text. But Douglass' interpretive position is not positivist or textualist, because he was in fact willing to explicitly ignore the plain meaning of the text in his reading of that clause. Aileen Kraditor accepts the argument Douglass offered about the fugitive slave clause as an exercise in natural law reasoning, and she characterizes Spooner and Douglass' approach as resting upon an "extreme emphasis on theoretical principles."[li] But Spooner and Douglass' reading can only be understood as a "natural law" reading according to the revolutionary strand of natural law theory. As we have seen, because Douglass did not relate the obligations of natural law to the demands of textual fidelity, his position cannot be understood as a natural law *interpretive* position.[lii] The "theoretical principles" that the position relies upon, then, are not principles of interpretive fidelity.

Another effort involves arguing that Douglass is a faithful interpreter because he is willing to construct constitutional vagueness in favor of liberty. Bernasconi, for example, takes at face value Douglass's assertion that, according to the "well known rules of legal interpretation," the language of law must be construed "strictly in favor of liberty and justice."[liii] But this is simply Douglass' misrepresentation of his own practice. The "well known rule of legal interpretation" that counsels such interpretation is for use in matters where the text is vague. And the fugitive persons clause is not vague.

Even the legal historian Jack Balkin, probably the most sensitive interpreter of Douglass' position from the point of view of legal fidelity, elides the depth of this subversive element of Douglass' thought. Balkin is the scholar who has come closest to recognizing what is at stake in Douglass' position, but his excavation of Douglass' thought is only suggestive and ultimately collapses Douglass' position back into what is, for most normative constitutional theorists, a domain of defensible interpretive strategies. Balkin writes that Douglass read the Constitution "literally," but he puts the word in quotes without indicating how exactly he means to qualify that term.[liv] Balkin also suggests that "one wants to dismiss [Douglass' fugitive slave clause argument] legally as off the wall," but it turns out that Balkin's reason for dismissing it is that Douglass' interpretation ran counter to so much of what American lawyers at the time believed.[lv] Many plausible constitutional interpretations run counter to what contemporary lawyers believe; what is important about Douglass' position is that it runs counter to the explicit text. Balkin does label Douglass as "the most extreme example of [the] tendency" to "remedy the positive law of the Constitution of its existing defects" through the project of "ideal constitutionalism,"[lvi] and he also calls Douglass' position an "overextension" of a

"charitable" interpretive attitude.[lvii] But the impact of this critique is again evaded when we discover that for Balkin, "ideal constitutionalism" only means the effort to deal with ambiguity by "conforming the object of our interpretation to our sense of what is just," a project which should be criticized because it would "separate the true Constitution or the best interpretation of the Constitution from its various historical interpretations." (Balkin suggests here that the true Constitution cannot be separated from its various historical interpretations, a position which undercuts the major premise of normative constitutional theory, namely that even broadly-shared interpretations can be legally indefensible.) According to Balkin, then, Douglass is misguided because he was willing to stretch the Constitution's meaning so far away from what his contemporaries believed it to mean. This, again, misses the more serious problem.

Balkin speaks of Douglass as a constitutional "redeemer," as I will do later in this article; but when he writes of "redemption," Balkin does not mean to countenance the possibility that interpreters would purposefully misconstrue the Constitution's meaning. In his article on constitutional redemption, Balkin asks us to "commit ourselves to the constitutional project" with an understanding that this project "contains the resources for its own redemption,"[lviii] and he writes that "one reason why our Constitution is redeemable is that parts of it were designed to be redeemable—it contains language that can be adapted to changing times and circumstances and it contains moral and political principles that demand the continual improvement of our institutions."[lix] But he makes it clear that "adapting" this language does not include misconstruing its public meaning--for example, he argues that, redemption project notwithstanding, Article IV section 4's guarantee that the states will be protected from "domestic violence" cannot refer to

assault within a home, nor can that section's guarantee of a "Republican" government to the states be read as a guarantee that state governments will be controlled by members of the Republican party.[lx] For Balkin, then, redeemability does not mean jettisoning classical notions of interpretive fidelity. It means working within a classically faithful interpretive practice to achieve justice using the Constitution's text, values, and institutions: he in fact links redemption and classical fidelity when he writes that "interpretive fidelity requires faith in the redeemability of the Constitution over time."[lxi] Hence, although Balkin intriguingly gestures towards concepts that are critical for understanding Douglass' thought, he ultimately does not present the contours of the serious problem Douglass poses for the classical conception of constitutional fidelity.

There is one more possibility for arguing that Douglass' position is faithful. This would involve arguing that Douglass' position is plausible because it is congruent with the spirit of the Constitution as manifest in its Preamble and in the Declaration. Just as Lincoln suggested that we read the Constitution as the "picture of silver" framing the "apple of gold" found in the Declaration of Independence, perhaps Douglass' efforts are consistent with a faithful interpretive practice that understands the true meaning of the Constitution to reside in its aspirations towards liberty.[lxii] But ultimately this effort, too, must fail. Lincoln offered these suggestions as a way of responding to interpretive ambiguity; under classical notions of fidelity, it is not a faithful interpretive practice to argue that because (1) the Preamble directs the establishment of "prosperity," and (2) "prosperity" would include the equal distribution of property, that (3) we should ignore away any explicit Constitutional guarantees of property rights or guarantees against uncompensated takings. Nor can the Declaration's aspiration towards "equality" – or the

14th Amendment, for that matter-- mean that the federal government is constitutionally justified in abolishing the Senate on the grounds that that institution violates the principle of equal representation. To select certain parts of the Constitution to ignore on behalf of other parts is not fidelity. In the words of Jack Balkin, "being a little bit unfaithful is like being a little bit pregnant. If one is to exercise the virtue of constitutional fidelity, it must be to the entire document, not just a part."[lxiii]

Redeeming Douglass

According to dominant accounts of constitutional fidelity, the argument presented here should mean that Douglass was a faithless interpreter—a justified revolutionary, perhaps, or a savvy reformer, but not a faithful constitutional citizen. But Douglass' considerable moral and political authority should lead us to scrutinize carefully whether this conclusion is warranted. For many citizens, the route to constitutional affiliation lies precisely through an identification with Douglass. The Constitution is redeemed for them through an appreciation of what it was used to achieve.[lxiv] Sanford Levinson explicitly connects his personal Constitutional ratification with Douglass' efforts, writing that "I was convinced by Douglass . . that the Constitution offers us a language by which we can protect those rights that we deem to be important. . . So I was willing in effect to honor the memory of Douglas and the potential that was—and is—available in our Constitution, and I added my signature to the scroll endorsing the 1787 Constitution."[lxv] But why should we honor Douglass' memory by ratifying a document that Douglass himself was driven to subversively misconstrue? Are citizens like Levinson who affiliate to the Constitution through Douglass deeply confused? Or is there anything plausible in their

attitude? A true redemption of Douglass as a faithful constitutional citizen—one that takes seriously the challenge he poses-- may lie through a reworked understanding of the relationship between consent theory and constitutional practice.

I would like to offer a few considerations that might allow us to redeem a constitutional position like that of Douglass'. If there is a way to claim Douglass as a faithful interpreter, the route goes through an understanding of the distinctiveness of the political office he was exercising. Frederick Douglass was not a judge or official interpreter. After his freedom was purchased, he became a free man and then a citizen of New York.

Behind all interpretive accounts of the Constitution lies an implicit understanding of who is doing the interpreting. Most interpretive theories are addressed to judges, and the substance that they offer reflects this distinctive positioning of the interpreter. For example, the major works of constitutional interpretation by Dworkin, Ely, Bork, Posner, Tribe, and so forth are almost entirely preoccupied by questions that judges face. These theories devote a great deal of energy to making sure that the mistakes judges may make do not bear unfavorably on the democratic process. They are heavily informed by the distinctive institutional positioning of the judiciary. For example, if they were offering interpretive theories for legislatures, the content of their theories would presumably be less affected by a concern for the countermajoritarian difficulty.

But the office of "citizen" is distinctive from the office of judge, and consent theory tells us why. The office of citizen is privileged in consent theory. Although this office is constitutionally codified (the Constitution specifies and constructs the political identity of the "voter", for example), the position of that office is distinctive because the

authority of the document as a whole is believed to rest on its public ratification. Judges and legislators owe their political and legal authority to the Constitution under which they serve. Furthermore, they have a representational responsibility which circumscribes the interpretive space that might otherwise be available to them. But citizens do not owe their political authority to the document and citizens are not charged with representing others. It is the Constitution that owes its authority to the consent of the people. The people's political freedom regarding whether or not to consent is absolute. Perhaps under certain conditions they face a similar freedom in the question of how they might consent.

This relationship might make it more justifiable for citizens to engage in politically-motivated and deeply strategic relationships to the text that they have not chosen. Perhaps a faithful constitutional practice is precisely one that allows for a flawed constitutional order to be redeemed, that makes the document consent-worthy even as we understand that actual legal consent is almost never legally relevant to the lives of actual citizens or to the life of the polity. In that case, the moral appeal of the vision itself—and the moral appeal of the institutional relationships that vision implies—might properly be the primary interpretive constraint that citizens and moral reformers face.

The ongoing success of the constitutional project cannot be separated from the moral relationships that that constitutional order manages to sustain. If constitutional success is evaluated according to a constitution's ongoing contribution to the effort for political justice, then a constitutional practice in which citizens understand themselves as relatively unfettered from the interpretive positions of past generations might allow for a more successful constitutional practice than one in which dead-hand concerns weighed heavily on all interpreters all the time. Under this possible conception of fidelity, judges,

legislators, and presidents would owe deference to the public understandings of the text when ratified and when amended (as spelled out in the classical conception of fidelity), but the primary deference of citizens would be to the moral appeal of the interpretive position itself. The work of citizens would be not to represent the positions of others but rather to generate public conceptions of the document that are more praiseworthy, from a justice point of view, than the conceptions that they received.

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[i] Foner and Taylor (1999), 173

[ii] James A. Colaiaco, *Frederick Douglass and the Fourth of July Oration* (New York: Palgrave Macmillan, 2006), 77.

[iii] I.357

[iv] Frederick Douglass, "My Slave Experience in Maryland," speech delivered before American Anti-Slavery Society, May 6 1845, in Foner and Taylor (1999), 11-14, 13.

[v] Frederick Douglass, "The Right to Criticize American Institutions," speech delivered before American Anti-Slavery Society, May 11 1847, in Foner and Taylor (1999), 76-83, 77.

[vi] I.355

[vii] "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?" Frederick Douglass, "To Gerrit Smith, Esqr." January 21st, 1851, Rochester, in Foner and Taylor (1999), 171.

[viii] Frederick Douglass, "To Gerrit Smith, Esqr." January 21st, 1851, Rochester, in Foner and Taylor (1999), 171.

[ix] Frederick Douglass, "The Constitution and Slavery," *The North Star*, March 16, 1849, in Foner and Taylor (1999), 129-133, 133.

[x] Ibid., 133.

[xi] Philip Foner, *The Life and Writings of Frederick Douglass* (New York: International Publishers. In four volumes, 1950-55). Vol. I, p. 375 (1849) as cited in Leslie Friedman Goldstein, "Violence as an Instrument for Social Change: The Views of Frederick Douglass (1817-1895)," *The Journal of Negro History* v 61 n 1 (Jan 1976), 61-72, 63

[xii] Frederick Douglass, "To Henry C. Wright," *Fred Douglass Selected*, p51

[xiii] Ibid., 129.

[xiv] Frederick Douglass, "The Meaning of July Fourth for the Negro," Speech at Rochester, New York, July 5, 1852, in Foner and Taylor (1999), 188-206, 204.

[xv] See John R. McKivigan, "The Frederick Douglass-Gerritt Smith Friendship and Political Abolitionism in the 1850s," *Frederick Douglass: New Literary and Historical Essays*, Eric J. Sundquist, ed. (Cambridge: Cambridge University Press, 1990)

[xvi] Foner and Taylor (1999), 173.

[xvii] Ibid., 173.

[xviii] Frederick Douglass, "The True Ground Upon Which to Meet Slavery," *Frederick Douglass' Paper*, August 24, 1855, in Foner and Taylor (1999), 333-334, 333.

[xix] Frederick Douglass, "The Dred Scott Decision," speech delivered before American Anti-Slavery Society, New York, May 14 1857, in Foner and Taylor (1999), 344-358.

[xx] Frederick Douglass, "The True Ground Upon Which to Meet Slavery," *Frederick Douglass' Paper*, August 24, 1855, in Foner and Taylor (1999), 333-334.

[xxi] Frederick Douglass, "Fremont and Dayton," *Frederick Douglass' Paper*, August 15, 1856, in Foner and Taylor (1999), 338-342, 339.

[xxii] This movement towards the use of strategic language to describe his constitutional vision was accompanied by a growing emphasis on the possible value (and constitutionality) of "total war" for emancipation. Douglass seemed to be revealing a growing impatience with the normal institutions of constitutional resolution in general.

[xxiii] Frederick Douglass, "The Dred Scott Decision," speech delivered before American Anti-Slavery Society, New York, May 14 1857, in Foner and Taylor (1999), 347-8.

[xxiv] David E. Schrader, "Natural Law in the Constitutional Thought of Frederick Douglass," in Lawson and Kirkland (1999).

[xxv] Frederick Douglass, "The Inaugural Address," *Douglass' Monthly*, April 1861, in Foner and Taylor (1999), 432-439, 436.

[xxvi] Abraham Lincoln, "Speech on the Dred Scott decision," June 26, 1857.

[xxvii] See Ronald Dworkin, *Law's Empire*, (Cambridge, Mass: Harvard University Press, 1986), 70-72.

[xxviii] See especially Frederick Douglass, "The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?", Glasgow, Scotland, March 26, 1860 in Foner and Taylor (1999), 380-392.

[xxix] Frederick Douglass, "The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?", Glasgow, Scotland, March 26, 1860 in Foner and Taylor (1999), 380-392, 385.

[xxx] Douglass was not the only one with this interpretation of the clause. The interpretation was developed by Lysander Spooner, and political abolitionists all advanced it.

[xxxi] US Constitution, Article IV Section 2.

[xxxii] Frederick Douglass, "The Constitution and Slavery," *The North Star* (February 9,1849) Foner p131

[xxxiii] Douglass, "The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?" in Foner and Taylor (1999).

[xxxiv] Check—William W. Freehling, "The Road to Disunion: Secessionists at Bay 1776-1854" (1990) at 442-3, 461-62, 508-9

[xxxv] Charles W. Mills, "Whose Fourth of July? Frederick Douglass and 'Original Intent," in Lawson and Kirkland (1999), 115.

[xxxvi] Douglass, "The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?" in Foner and Taylor (1999), 386.

[xxxvii] Frederick Douglass, "The Inaugural Address," *Douglass' Monthly,* April 1861, in Foner and Taylor (1999), 432-439, 435.

[xxxviii] Federalist xx.

[xxxix] This is the problem with tacit consent. For the government to require people to move away in order to escape being constructed as having offered their consent already presupposes sufficient political authority to extract such costs from non-consenting subjects. Tacit consent is unsatisfying as a portrait of authentic consent precisely because the concept does not create adequate space for rejection.

[xl] Sotirios A. Barber, *On What the Constitution Means* (Baltimore: The Johns Hopkins University Press, 1984), 8.

[xli] Edward Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 1988). The phrase is from Walter Lippman, and his use of it equally rests on consent theory for its capacity to disturb readers. See Lippmann, *Public Opinion* (New York: MacMillan ed., 1960), especially p. 1-47.

[xlii] Virginia's ratification on June 26, 1788 contains the statement that: "the powers granted under the Constitution, being derived from the people of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them and at their will . . ." (The Avalon project, http://www.yale.edu/lawweb/avalon/const/ratva.htm, Accessed September 21, 2007). New York affirmed in its ratification of July 26, 1788 that "all Power is originally vested in and consequently derived from the People . . .[and] That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness" (The Avalon Project, http://www.yale.edu/lawweb/avalon/const/ratny.htm, accessed September 21, 2007)

[xliii] Lysander Spooner, *The Unconstitutionality of Slavery*, pp. 290n, 291, 290, as cited in Aileen S. Kraditor, *Means and Ends in American Abolitionism: Garrison and His Critics on Strategy and Tactics, 1834-1850* (New York: Pantheon Books, 1967), p. 187

[xliv] Barber (1984), 160

[xlv] Berns (1987), 13.

[xlvi] Barber (1984), 58.

[xlvii] Hadley Arkes, *Beyond the Constitution* (Princeton: Princeton University Press, 1990), 4.

[xlviii] Justice Antonin Scalia, "Religion, Politics, and the Death Penalty" at *A Call for Reckoning: Religion and the Death Penalty*, sponsored by the Pew Forum, January 25, 2005 (available at http://pewforum.org/deathpenalty/) (Accessed July 3, 2007)

[xlix] Barber (1984), 61.

[l] See, for example, David E. Schrader, "Natural Law in the Constitutional Thought of Frederick Douglass" and Charles W. Mills, "Whose Fourth of July? Frederick Douglass and 'Original Intent'" in *Frederick Douglass: A Critical Reader*, Bill E. Lawson and Frank M. Kirkland, eds. (Oxford, UK: Blackwell Publishers, 1999)

[li] Aileen S. Kraditor, *Means and Ends in American Abolitionism: Garrison and His Critics on Strategy and Tactics, 1834-1850* (New York: Pantheon Books, 1967), p. 194, 195

[lii] For a natural law interpretive position see Robert George, John Finnis.

[liii] Robert Bernasconi, "The Constitution of the People: Frederick Douglass and the *Dred Scott* Decision," 13 *Cardozo Law Review* 1281 (1991-1992), 1289-90. Citing Douglass, "The Dred Scott Decision," Foner p. 353.

[liv] J.M. Balkin, "Agreements with Hell and Other Objects of Our Faith," 65 *Fordham Law Review* 1703 (1996-97), p. 1716

[lv] J.M. Balkin, "Agreements with Hell and Other Objects of Our Faith," 65 *Fordham Law Review* 1703 (1996-97), p. 1710

[lvi] J.M. Balkin, "Agreements with Hell and Other Objects of Our Faith," 65 *Fordham Law Review* 1703 (1996-97), p. 1710

[lvii] J.M. Balkin, "Agreements with Hell and Other Objects of Our Faith," 65 *Fordham Law Review* 1703 (1996-97), p. 1709

[lviii] Jack M. Balkin, "Original Meaning and Constitutional Redemption," Constitutional Commentary, Vol. 24, 2007. (Available at SSRN: http://ssrn.com/abstract=987060, accessed October 16, 2007), p. 14, 16

[lix] Jack M. Balkin, "Original Meaning and Constitutional Redemption," Constitutional Commentary, Vol. 24, 2007. (Available at SSRN: http://ssrn.com/abstract=987060, accessed October 16, 2007), p. 17

[lx] Jack M. Balkin, "Original Meaning and Constitutional Redemption," Constitutional Commentary, Vol. 24, 2007. (Available at SSRN: http://ssrn.com/abstract=987060, accessed October 16, 2007), p. 5

[lxi] Jack M. Balkin, "Original Meaning and Constitutional Redemption," Constitutional Commentary, Vol. 24, 2007. (Available at SSRN: http://ssrn.com/abstract=987060, accessed October 16, 2007), p. 15

[lxii] Abraham Lincoln, Fragment on the Constitution and the Union,. See Gary Jeffrey Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (1993)

[lxiii] J.M. Balkin, "Agreements with Hell and Other Objects of Our Faith," 65 *Fordham Law Review* 1703 (1996-97), p. 1706

[lxiv] Consider Barbara Jordan, who said, "My faith in the Constitution is whole; it is complete; it is total" during the hearings over Nixon's impeachment. Her expression of faith was explicitly grounded in her appreciation for the efforts of those who expanded the scope of constitutional membership.

[lxv] Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We The People Can Correct It)* (Oxford, Oxford University Press, 2006), 4