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FREDERICK DOUGLASS AS CONSTITUTIONALIST

JACK M. BALKIN & SANFORD LEVINSON*

Frederick Douglass has become a powerful symbol in American constitutional memory; Justice Clarence Thomas has regularly invoked Douglass in his opinions.¹ The casebook that we co-edit reprints Douglass's 1860 speech given in Glasgow, Scotland on constitutional interpretation.² Yet Douglass's views about the American Constitution changed over the course of his career, and were largely ambivalent, sometimes even contradictory.³

In this Essay, we explore Frederick Douglass's constitutional philosophy by contrasting his views about the U.S. Constitution with those of Abraham Lincoln, who was so committed to the Constitution that he accepted slavery where it already existed as the price of constitutional government, and those of John Brown, who led the 1859 raid on Harper's Ferry Virginia to incite an armed revolt against slavery. As we will discover, in many ways Douglass's views about recourse to violence were closer to Brown's than to Lincoln's, and should discomfit those who use him to legitimate and buttress the constitutional order. Indeed, as we point out in the final pages of this Essay, in a famous case the Supreme Court held that people with Douglass's views about violence and the rule of law could be denied admission to the bar.⁴

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1. *McDonald v. City of Chicago*, 561 U.S. 742, 849–50 (2010) (Thomas, J., concurring in part); *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part); *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring). Justice Elena Kagan has also cited Douglass. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2352 (2021) (Kagan, J., dissenting).

2. Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860), in SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, REVA SIEGEL & CRISTINA RODRIGUEZ, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 292 (8th ed. 2022).

3. See *infra* Part II. On Douglass's changing views, see Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican*, 81 MO. L. REV. 1 (2016). For an account emphasizing the consistency of Douglass's thought, see Bradley Rebeiro, *Frederick Douglass and the Original Originalists*, 48 BYU L. REV. 909, 916 (2023) (arguing that Douglass was a "natural rights originalist[t]").

4. See *infra* Part III; *In re Anastaplo*, 366 U.S. 82 (1961).

I. CONSTITUTIONALISTS AND CONSTITUTIONALISM

In our work on constitutional crises, we have argued that one of the most important purposes of constitutions—although certainly not the only one—is that constitutions channel and direct political struggles and struggles for power into politics within the legal confines of a constitution.⁵ Constitutions make politics possible by creating avenues for people to struggle over power and policy within the confines of the constitutional system, rather than resorting to extralegal violence.⁶ In this way, constitutions promote political competition consistent with the rule of law and social peace. A constitutional crisis occurs when a constitution fails at this central task, or people reasonably believe that it is about to fail.⁷ Note that a constitution can continue to perform its central function even if it is amended—or even if it is replaced through a subsequent constitutional convention—as long as the process of amendment or adoption is itself subject to constitutional rules and norms that preserve civil peace. From this perspective, the U.S. Constitution failed in the secession crisis of 1860, leading to the American Civil War, and had to be reconstructed—however imperfectly—in the war’s aftermath.

Now even if preservation of peace and social order is a central purpose of constitutions viewed from a design perspective, it does not follow that the people living under a constitution must accept this value individually. Some people may comply with the constitution out of fear of state sanction. Others may engage in non-violent civil disobedience. And still others might think that their constitution is so unjust, or so resistant to change, that the only reasonable course of action is revolution, insurrection, secession, or civil war.

But if a central goal of constitutional government is civil peace, one must sometimes purchase it by engaging in difficult, perhaps even regrettable, compromises. The Israeli philosopher Avishai Margalit, in his important book *On Compromise and Rotten Compromise*,⁸ distinguishes between unfortunate, albeit acceptable, compromises for the sake of peace, and “rotten compromises” that must be refused even at the risk of war and bloodshed.⁹ All compromises, by definition, involve a willingness of the parties to forego important claims and even betray certain cherished values, in order to achieve greater goods. One gives in order to get. But not anything

5. SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION 26–27, 70, 95 (2019); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 714 (2009) [hereinafter Levinson & Balkin, *Constitutional Crises*].

6. Levinson & Balkin, *Constitutional Crises*, *supra* note 5, at 714–15.

7. *Id.* at 714.

8. AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISE (2010).

9. *Id.* at 1 (“[R]otten compromises are not allowed, even for the sake of peace.”).

goes, Margalit, argues. “Rotten compromises” that violate basic human rights—for example, by engaging in torture—must be rejected out of hand.¹⁰

Interestingly, Margalit offers as a central example of a “rotten compromise” the Philadelphia Convention’s decision in 1787 to accommodate chattel slavery.¹¹ Margalit suggests that this decision was morally indefensible.¹² In fact, several of the delegates to the convention opposed slavery. Benjamin Franklin was president of one of the first American abolition societies,¹³ and Gouverneur Morris gave an eloquent speech at the Convention on the horrors of slavery.¹⁴ Yet both Franklin and Morris ultimately agreed that the most important objective was preserving the precarious American Union by replacing the “imbecili[c]”¹⁵ government established by the Articles of Confederation with the new model of government drafted in Philadelphia, detestable compromises and all.

Indeed, Kermit Roosevelt has recently suggested that a primary motif of American constitutional thought has been that maintenance of the Union takes absolute priority over any and all competing values.¹⁶ The Union, Roosevelt argues, has been the ultimate compelling interest that has justified all sorts of limitations on other fundamental values like equality and liberty.¹⁷ As Madison wrote in *Federalist* 41, “[i]t is in vain to oppose [i.e., put in place] constitutional barriers to the impulse of self-preservation.”¹⁸ As Thomas Hobbes might suggest, *that* impulse is the most basic foundation of politics.¹⁹

10. *Id.* at 61–63 (arguing that political compromises that acquiesce in grave cruelty and humiliation are rotten because they undermine the notion of shared humanity). On the compromises involved in the use of torture, see Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013 (2003).

11. MARGALIT, *supra* note 8, at 54–56.

12. *Id.* at 61 (“My tentative answer is that the Constitution was based on a rotten compromise.”).

13. H.W. BRANDS, *THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN 703–04* (2002).

14. See the texts of Morris’s speeches at *Morris, Constitutional Convention Speeches (1787)*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/gouverneur-morris-constitutional-convention-speeches-july-5-and-11-and-august-8-1787> (last visited July 17, 2023).

15. See THE FEDERALIST NO. 15, at 74 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (referring to “the imbecility of our government”).

16. KERMIT ROOSEVELT III, *THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA’S STORY* 70, 89 (2022).

17. *Id.* at 89.

18. THE FEDERALIST NO. 41, at 201 (James Madison) (Lawrence Goldman ed., 2008).

19. In a society without government, everyone is basically consumed by a “continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.” THOMAS HOBBS, *LEVIATHAN* 82 (Michael Oakeshott ed., Basil Blackwell 1960) (1651). Consumed by a desire “to defend ourselves,” and obedient to a “general rule of reason” to seek peace as a means of avoiding the insecurity, we rationally consent to the rule of an all-powerful ruler. See *id.* at 85.

For purpose of this Essay, we will call those people living under a constitution, just or unjust, who accept that political struggle should occur within the constitution and the rule of law “constitutionalists.” This definition of constitutionalist is broadly Humean. As David Hume explained, “men’s happiness consists not so much in an abundance of [things], as in the peace and security with which they possess them; and those blessings can only be derived from good government.”²⁰ Under the Humean account, a central goal of constitutions is to facilitate cooperation, social coordination, and social peace.²¹ Constitutionalists are willing to make compromises, even deeply regrettable ones, in order to preserve the rule of law, mutual cooperation, and social peace.

But this Humean account is not the only possible definition of a constitutionalist. Under a Lockean vision of constitutions, by contrast, the central goal of constitutions is to protect natural rights.²² If these rights are threatened, then the people have the right “to alter or to abolish,” in the words of the Declaration of Independence, “and to institute new government.”²³ A Lockean constitutionalist, therefore, would be a person who accepted a constitution only so long as it continued to protect people’s rights.

If one is a Machiavellian, the purpose of constitutions (or more broadly, what Machiavelli called *ordini*) is the preservation of a republic constituted for the common good.²⁴ Breaches of civil peace and even insurrection might be necessary to preserve republican values. Indeed, as John McCormick has noted, Machiavelli defended “tumults” generated by popular unrest as a valuable mode of republican politics.²⁵ He did not privilege the “domestic

20. DAVID HUME, *Of Parties in General*, in *ESSAYS, MORAL, POLITICAL, AND LITERARY* 54, 55 (Eugene F. Miller ed., Liberty Fund rev. ed. 1987) (1758).

21. A modern exponent of this approach is Russell Hardin. See RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 13 (1999) (noting Hume’s philosophical contribution to understanding the centrality of social coordination to social order); Russell Hardin, *Why a Constitution?*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 51, 59–60 (Denis J. Galligan & Mila Versteeg eds., 2013) (noting Hume’s dual convention theory of social order and its connection to constitutional government).

22. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 65–66 (C.B. Macpherson ed., Hackett Publ’g 1980) (1690) (arguing that “[t]he great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property” defined as “the mutual preservation of their lives, liberties and estates”).

23. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”).

24. See NICCOLO MACHIAVELLI, *DISCOURSES ON LIVY* 276–77 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chi. Press 1996) (1531) (arguing that a “well-ordered republic” should encourage people to work for the common benefit).

25. See JOHN P. MCCORMICK, *READING MACHIAVELLI: SCANDALOUS BOOKS, SUSPECT ENGAGEMENTS, AND THE VIRTUE OF POPULIST POLITICS* 70 (2018).

tranquility” evoked by the Framers in the Preamble to the U.S. Constitution.²⁶ A Machiavellian constitutionalist, therefore, would be one who accepted a constitution to the extent that the constitutional system encouraged or preserved civic virtue and promoted the public good.

The Humean account of constitutionalists and constitutionalism assumes that constitutions provide valuable goods of social union (to use John Rawls’s term)²⁷ even if they are imperfect, sometimes deeply so. That is, the Humean theory of constitutions argues that large groups of people are, on the whole, better off in imperfect but working constitutions than trying to engage in political struggle outside them—a contestable empirical proposition for which there are many counterexamples throughout human history.²⁸ In fact, Hume himself argued—criticizing John Locke’s theory of the social compact—that new political orders are often created not through consent but through violence.²⁹

II. FREDERICK DOUGLASS AS AN AMBIVALENT CONSTITUTIONALIST

Consider the constitutional views of Abraham Lincoln, John Brown, and Frederick Douglass in light of this discussion. If constitutionalism means adherence to a constitution because of the overall benefits of cooperation and social peace, Abraham Lincoln was certainly a constitutionalist. This is clear in his address to the Springfield Lyceum, which is a paean to the virtues of the rule of law,³⁰ and in his First Inaugural Address, in which he supported the Corwin Amendment that would have protected slavery in existing slaveholding states for all time as the price of preserving the Union.³¹ It is true that Lincoln eventually entered into a war with the Confederate states after they had seceded. But that is because his goal, clearly stated in his First Inaugural Address, was to preserve the Union. Had Lincoln allowed the South to secede, the result would have been a long and difficult-to-defend border with the Southern Confederacy. That would not have been a stable situation; quite the contrary, it might have led to countless struggles over

26. See U.S. CONST. pmb1.

27. JOHN RAWLS, A THEORY OF JUSTICE 459–60 (rev. ed. 1999) (“[I]t is through social union founded upon the needs and potentialities of its members that each person can participate in the total sum of the realized natural assets of the others.”).

28. See HARDIN, *supra* note 21, at 14–18 (explaining that systems of social coordination maintain social order and cause people to act to their mutual advantage, but they may not be perfectly just, and, in some cases, can help maintain very unjust arrangements).

29. DAVID HUME, *Of the Original Contract*, in ESSAYS, MORAL, POLITICAL, AND LITERARY, *supra* note 20, at 465.

30. Abraham Lincoln, *Lyceum Address*, ABRAHAM LINCOLN ONLINE (Jan. 27, 1838), <https://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm>.

31. Abraham Lincoln, *First Inaugural Address*, YALE L. SCH.: AVALON PROJECT (Mar. 4, 1861), https://avalon.law.yale.edu/19th_century/lincoln1.asp.

land, migration, settlement, and natural resources. It was far better to settle these potential future disputes through politics within a single country governed by a single constitution. As he put it in his First Inaugural Address, “[c]an aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens than laws can among friends?”³²

By contrast, John Brown, who led the 1859 raid on Harper’s Ferry, had very different views about constitutions, which were more Lockean than Humean. He believed that the only way to achieve the end of slavery and secure the natural rights of human beings was to incite a slave rebellion, and he conspired with others to produce it.

Nevertheless, John Brown believed in constitutions. In fact, he drafted a constitution to organize the provisional government that he believed was necessary to carry out his purposes, a constitution under which he would hold the title of Commander-in-Chief.³³ Brown was not a Humean constitutionalist because he did not accept that a central purpose of constitutions was to preserve civil peace and the rule of law. Quite the contrary: For Brown, a constitution might be useful precisely as a means for pursuing justice through violence and insurrection.³⁴

What about Frederick Douglass, who was a friend to both Abraham Lincoln and John Brown? Asking whether Douglass was a constitutionalist—of any variety—turns out to be a very difficult question, not only because Douglass’s views changed over the course of his long career, but also because

32. *Id.* Douglass in fact castigated Lincoln for his willingness to compromise with the Slavocracy. In “The Inaugural Address,” an essay published in *Douglass’ Monthly*, Douglass stated: [Lincoln] denies having the least “*inclination*” to interfere with slavery in the states. This denial of all feeling against slavery, at such a time and in such circumstances, is wholly discreditable to the head and heart of MR. LINCOLN. Aside from the inhuman coldness of the sentiment, it was a weak and inappropriate utterance

Frederick Douglass, *The Inaugural Address*, DOUGLASS’ MONTHLY, Apr. 1861 [hereinafter Douglass, *The Inaugural Address*], reprinted in THE ESSENTIAL DOUGLASS: SELECTED WRITINGS & SPEECHES 148, 150 (Nicholas Buccola ed., 2016) [hereinafter THE ESSENTIAL DOUGLAS].

33. Robert L. Tsai, *John Brown’s Constitution*, 51 B.C. L. Rev. 151, 152 (2010).

34. *Id.* at 154–55, 166–70. At his trial, Brown denied that he was an insurrectionist. Addressing the Court that had sentenced him to hang, he asserted:

In the first place, I deny every thing but what I have already admitted, of a design on my part to *free Slaves*. I intended, certainly, to have made a clean thing of that matter, as I did last winter, when I went into Missouri, and there took Slaves, without the snapping of a gun on either side, moving them through the country, and finally leaving them in Canada. I desired to have done the same thing again, on a much larger scale. *That was all I intended*. I never did intend murder, or treason, or the destruction of property, or to excite or incite Slaves to rebellion, or to make insurrection.

John Brown, Address of John Brown to the Virginia Court, When About to Receive the Sentence of Death (Dec. 1859), <https://www.loc.gov/resource/rbpe.06500500/>. From the standpoint of the U.S. government, however, Brown had done all of these things. He sought to destroy property rights in slaves, and he sought to provoke slaves to rise up against those who had enslaved them.

many of Douglass's actions and statements are subject to conflicting interpretations.

The Frederick Douglass of the 1840s was a follower of William Lloyd Garrison. He believed, like Garrison, that the U.S. Constitution was a "Covenant with Death" and "Agreement with Hell."³⁵ Yet at the same time, he also accepted Garrison's position of non-violent resistance.³⁶ Whatever doubts they expressed about the American constitutional order—or the propriety of participating in that order through running candidates and voting in elections—Garrisonians like Douglass were far less dangerous, from the state's perspective, than those who counseled violent rebellion.

For example, in 1843, the prominent Black leader Henry Highland Garnet presented a dramatic speech to the delegates attending the National Negro Convention, "An Address to the Slaves of the United States." Not only did the speech directly call for a violent uprising by enslaved Americans—inspired, perhaps, by the Haitian Revolution four decades earlier—but it also praised homegrown exemplars of slave revolts, including "[t]he patriotic Nathaniel Turner."³⁷ Nat Turner, Garnet explained, had been "goaded to desperation by wrong and injustice," and he was a genuine hero, even if people did not recognize it: "By Despotism, his name has been recorded on the list of infamy, and future generations will remember him among the noble and brave."³⁸ A majority of the members of the Convention, including Douglass himself, thought Garnet's speech so incendiary that the Convention refused to authorize its publication.³⁹

In today's language, Garnet's speech advocated justice "by any means necessary." That famous phrase comes from Franz Fanon's 1960 Address to the Accra Positive Action Conference that justified the use of violence in

35. See generally Paul Finkelman, *Garrison's Constitution*, NAT'L ARCHIVES (Winter 2000), <https://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-1>. See also MANISHA SINHA, *THE SLAVE'S CAUSE: A HISTORY OF ABOLITION* 471 (2016). Garrison, among other things, strongly supported "disunion" with slaveholders. SINHA, *supra*, at 471. He had no commitment to the Union as such.

36. The best study of Douglass's life, including his varying stances toward the United States Constitution, is DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* (2018). For excerpts from Douglass's writings and speeches outlining his views on Garrison from Douglass's initial support to his dramatic break in the early 1850s, when he developed a more anti-slavery reading of the Constitution, see Douglass, *supra* note 2; Frederick Douglass, *The Dred Scott Decision* (May 14, 1857), in *THE ESSENTIAL DOUGLASS*, *supra* note 32, at 119, 131.

37. HENRY HIGHLAND GARNET, *AN ADDRESS TO THE SLAVES OF THE UNITED STATES OF AMERICA* 9 (1848).

38. *Id.* Nat Turner, for those who might not be fully familiar with his eponymous rebellion, killed not only slavemasters, but also their entire families, including young children.

39. *Id.* at 1.

overcoming colonial oppression;⁴⁰ it was used again in a 1964 speech by Malcolm X that was widely interpreted as rejection of Martin Luther King's insistence on non-violence.⁴¹ One reason why Douglass and other members of the National Negro Convention might have voted against circulating Garnet's 1843 speech was the entirely plausible fear that valorizing Turner would only stoke the fears of slaveowners and cause them to adopt ever more severe measures against enslaved people and against anyone who dared suggest ending the institution of slavery.⁴² If the revolt of enslaved people in Haiti served as an inspiring example to some, it also served as a distinctly cautionary example to many others.

By the 1850s, Douglass had changed his mind and had broken with Garrison. He supported the candidacy of the Republican John Fremont in the 1856 election and the 1860 candidacy of Abraham Lincoln.⁴³ In a notable speech (reprinted in our casebook) given in Glasgow, Scotland in 1860, Douglass insisted that the Constitution, correctly understood, was anti-slavery and, therefore, in need of no repudiation by abolitionists.⁴⁴

One might think that this would have made him somewhat more committed to the American Constitution. But we should not be confused by Douglass's rhetoric in Glasgow. He remained at best an ambivalent constitutionalist. Abraham Lincoln had told his auditors at the Springfield Lyceum in 1838 that the most fundamental tenet of the "political religion" that is American constitutionalism was fidelity to the law—all laws, including, presumably, the Fugitive Slave Laws of 1793 and the later and even more odious law of 1850⁴⁵ that Lincoln had accepted as necessary to maintaining the Union.⁴⁶

40. Frantz Fanon, *Why We Use Violence: Address to the Accra Positive Action Conference* (April 1960), in *ALIENATION AND FREEDOM* 654 (Jean Khalfa & Robert J.C. Young eds., Steven Corcoran trans., 2018).

41. Malcolm X, *The Founding Rally of the OAAU* (June 28, 1964), in *BY ANY MEANS NECESSARY: MALCOLM X* 33, 37 (2d ed. 1992).

42. See SINHA, *supra* note 35, at 57 ("Slave resistance inspired by the Haitian Revolution fueled fear [on the part of slaveowners] of rebellion in the United States.").

43. Frederick Douglass, *Fremont and Dayton*, *FREDERICK DOUGLASS' PAPER*, Aug. 15, 1856, reprinted in *THE ESSENTIAL DOUGLASS*, *supra* note 32, at 113. On the election of 1856, see BLIGHT, *supra* note 36, at 274–75. On the 1860 election, see *id.* at 321–27.

44. Douglass, *supra* note 2.

45. The new Fugitive Slave Law, for example, notoriously awarded federal magistrates ten dollars for ruling that the alleged fugitive was in fact a runaway slave and only five dollars for ruling in the alleged fugitive's favor. Fugitive Slave Law of 1850, ch. 60 § 8, 9 Stat. 462, 464 (repealed 1864); see LEVINSON et al., *supra* note 2, at 264.

46. See, for example, Lincoln's Peoria Speech, which, like Webster's Seventh of March Speech, emphasized the propriety of compromise in order to maintain the Union, even as he also denounced the repeal of the Kansas-Nebraska Act which had repealed the Missouri Compromise of 1820. But Lincoln viewed the return of fugitive slaves as part of the bargain made in 1787 that dedicated constitutionalists, like himself, were bound to uphold. Abraham Lincoln, *Speech at*

By contrast, after his break with Garrison, Douglass defended the killing of a deputy U.S. Marshal, James Batchelder, who had taken part in the return of a fugitive slave, Anthony Burns, to a slaveowner's custody.⁴⁷ Returning Burns was a kidnapping, Douglass asserted, and therefore even deadly force was justified to stop it.⁴⁸ Once Batchelder "took upon himself the revolting business of a kidnapper, and undertook to play the bloodhound on the track of his crimeless brother Burns, he labelled himself the common enemy of mankind, and his slaughter was as innocent, in the sight of God, as would be the slaughter of a ravenous wolf in the act of throttling an infant."⁴⁹ Batchelder, Douglass argued, "had forfeited his right to live, and . . . his death was necessary, as a warning to others liable to pursue a like course."⁵⁰

Douglass also explicitly rejected the maintenance of the Union as an overriding political value.⁵¹ Establishing justice was more important. Although he detested *Dred Scott*, he would have scoffed at the idea that the decision's fundamental flaw was that it hastened the coming of civil war.⁵² That, for Douglass, was a feature, and not a bug, of the decision.

After the Emancipation Proclamation, Douglass became a genuine friend of Abraham Lincoln. But Douglass had harshly criticized Lincoln's

Peoria, Illinois (Oct. 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 247 (Roy P. Basler ed., 1953); see Daniel Webster, The Constitution and the Union, Address in the Senate (Mar. 7, 1850), <https://www.senate.gov/artandhistory/history/resources/pdf/Webster7th.pdf>. Similarly, in *Prigg v. Pennsylvania*, the anti-slavery Justice Joseph Story upheld the constitutionality of the 1793 Fugitive Slave Law as necessary and proper to enforce the bargains made in Philadelphia. 41 U.S. (16 Pet.) 539, 611 (1842) ("The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been formed.").

47. Frederick Douglass, *Is It Right and Wise to Kill a Kidnapper*, FREDERICK DOUGLASS' PAPER, June 2, 1854, reprinted in THE ESSENTIAL DOUGLASS, *supra* note 32, at 76, 76–79. Batchelder was "a twenty-four-year-old Irish-born Custom House truckman" who had been ordered to guard Burns. *Id.* at 76 n.60. See Spencer Buell, *He Died Guarding a Captured Slave in Boston. Does He Really Deserve a Memorial?*, BOSTON MAG. (Dec. 27, 2019), <https://www.bostonmagazine.com/news/2019/12/27/marshals-memorial-fugitive-slave-act/> (noting that the U.S. Marshal Service lists Batchelder as one of "more than 200 marshals who 'have given their lives in service to their nation' dating back to 1794").

48. Douglass, *supra* note 47, at 78.

49. *Id.*

50. *Id.*

51. Frederick Douglass, *The Dissolution of the American Union*, DOUGLASS' MONTHLY, January 1861, reprinted in THE ESSENTIAL DOUGLASS, *supra* note 32, at 141, 141–145 ("As against compromises and national demoralization, welcome, ten thousand times over, the hardships consequent upon dissolution of the Union.").

52. One might question this assertion as an empirical matter. See, e.g., KENNETH STAMPP, AMERICA IN 1857: A NATION ON THE BRINK (1990) (giving priority to the political consequences of "bleeding Kansas"). However, assigning *Dred Scott* causal significance with regard to the onset of war has, rightly or wrongly, become something of a cliché among non-specialists, and it is important to note Douglass's own positive view of the War. See Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49 (2007).

First Inaugural precisely because it embraced the compromise instantiated in the “original” Thirteenth Amendment—the Corwin Amendment—that would have placed in the text of the Constitution the “federal consensus” that held that Congress was wholly without power to touch slavery in the states where it already existed.⁵³

Moreover, whatever Douglass’s genuine admiration and affection for Lincoln, one must remember that he began his great speech in 1876 on the occasion of the dedication of a monument to Lincoln with the reminder that he was always the “white man’s president, entirely devoted to the welfare of white men.”⁵⁴ Consistent with Derrick Bell’s famous interest convergence thesis,⁵⁵ Lincoln’s achievements on behalf of African-Americans largely converged with his understanding of white interests. We do not know exactly what Lincoln’s Reconstruction policy would have been had he lived. But his final speech delivered from the White House on April 11, 1865 was cautious and circumspect.⁵⁶ By contrast, Douglass’s own speech in 1867 set out an ambitious account of necessary constitutional change, a far more radical vision than even what we now call “radical Reconstruction.”⁵⁷

To understand Douglass’s views about the American Constitution and his views about legal obligation, we must understand his relationship to another—and far closer—friend, John Brown. Brown and Douglass regularly stayed at each other’s homes, and Douglass was deeply impressed by Brown’s moral courage and conviction.⁵⁸

53. Douglass, *The Inaugural Address*, *supra* note 32; David W. Blight, *Lincoln, Douglass and the ‘Double-Tongued Document’*, N.Y. TIMES: OPINIONATOR (May 6, 2011, 9:30 PM), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2011/05/06/lincoln-douglass-and-the-double-tongued-document/> (describing Douglass’s reaction to the speech as a “brutal critique”); *see also* BLIGHT, *supra* note 36, at 336–37.

54. Frederick Douglass, *Oration of Frederick Douglass Delivered on the Occasion of the Unveiling of the Freedmen’s Monument in Memory of Abraham Lincoln* (Apr. 14, 1876), in *THE ESSENTIAL DOUGLASS*, *supra* note 32, at 239, 241. *See id.* at 241 (“He was ready and willing at any time during the first years of his administration to deny, postpone, and sacrifice the rights of humanity in the colored people to promote the welfare of the white people of this country.”).

55. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

56. Abraham Lincoln, *Last Public Address*, ABRAHAM LINCOLN ONLINE (Apr. 11, 1865), <http://www.abrahamlincolnonline.org/lincoln/speeches/last.htm> (“It is also unsatisfactory to some that the elective franchise is not given to the colored man. I would myself prefer that it were now conferred on the very intelligent, and on those who serve our cause as soldiers.”).

57. Frederick Douglass, *Sources of Danger to the Republic*, ST. LOUIS MO. DEMOCRAT, Feb. 8, 1867, *reprinted in* *THE ESSENTIAL DOUGLASS*, *supra* note 32, at 199.

58. *See* FREDERICK DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* (1893), *reprinted in* *FREDERICK DOUGLASS: AUTOBIOGRAPHIES* 453, 715 (Henry Louis Gates, Jr. ed., 1994) (explaining that he had accepted an invitation “to spend a night and a day under the roof of a man [Brown] whose character and conversation, and whose objects and aims in life, made a very deep

In fact, Douglass gave his great speech on the Constitution in Glasgow because he had fled the United States when it appeared that he might be indicted as a conspirator in Brown's ill-fated attack on Harper's Ferry.⁵⁹ Brown entreated Douglass to join him, and as Douglass writes in his *Life and Times*, "my discretion or my cowardice made me proof against the dear old man's eloquence—perhaps it was something of both which determined my course."⁶⁰ Yet his discretion did not prevent him from conveying money from fellow abolitionists to Brown, something that today's anti-terrorism statutes would call "material support."⁶¹ And the fact that it could be proved that Douglass conveyed money to Brown was a powerful reason to leave the country for Great Britain in the immediate aftermath of Brown's raid on Harper's Ferry.

Thus, although one might understand Douglass's prudence in refusing to take up arms with John Brown and court martyrdom, it does not follow that Douglass rejected the idea that violence might be necessary "to purge this land with blood"⁶² to overthrow the American system of chattel slavery. For example, Douglass never considered informing the authorities of Brown's plans. Jean-Jacques Rousseau once condemned what he called "the preferences of friendship" because they might lead people to betray the

impression upon my mind and heart"); *see also id.* at 754 (noting that from 1847 on, "our relations were friendly and confidential").

59. For the saga of Brown's attempts to recruit Douglass for the ill-fated raid at Harper's Ferry and Douglass's (wise) decision to refuse, though not before leaving evidence that might have been used against him in a trial for being one of Brown's co-conspirators, see BLIGHT, *supra* note 36, at 280–309. Indeed, Douglass acknowledges that "numerous letters and documents" were found in Brown's carpetbag that "directly implicated" a number of prominent abolitionists "and myself. This intelligence was soon followed by a telegram saying that we were all to be arrested." DOUGLASS, *supra* note 58, at 748. During his flight from the United States, Douglass asked a friend in his hometown of Rochester, New York, to "secure" a variety of papers that were locked in his desk; i.e., to ensure that the authorities would not find them. *Id.* at 749.

60. *Id.* at 760.

61. *Id.*; *see* 18 U.S.C. § 2339B (making it unlawful to "provide[] material support or resources to a foreign terrorist organization"). Douglass admits that he had helped Brown in various ways:

[M]y enemies . . . could prove that I was in correspondence and conspiracy with Brown against slavery; they could prove that I brought Shields Green, one of the bravest of his soldiers, all the way from Rochester to him at Chambersberg [Pennsylvania]; they could prove that I brought money to aid him, and in what was then the state of the public mind I could not hope to make a jury of Virginia believe I did not go the whole length which he went

DOUGLASS, *supra* note 58, at 760. Under these circumstances, it would have been imprudent indeed for Douglass not to try to leave the United States and travel to Great Britain.

62. STEPHEN B. OATES, *TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN* (1984). Brown's last words, slipped in a note to a janitor on the way to the gallows, were "I, John Brown, am now quite certain that the crimes of this guilty land will never be purged away, but with blood." *Purged Away with Blood: John Brown's War*, AM. BATTLEFIELD TRUST, <https://www.battlefields.org/learn/articles/purged-away-blood> (last visited Aug. 28, 2023).

“fatherland” that good republicans should always support.⁶³ Yet as Douglass reports in his *Life and Times*, it was likely only Douglass’s prudence that led him to say no to his friend’s dangerous plan for an insurrection—one that was both likely to fail and likely to reinforce the belief of slavery’s defenders that slave states had to be ever more vigilant and militant in suppressing any hint of opposition.⁶⁴

Indeed, in December 1860, following his trip to Great Britain, Douglass gave a speech in Boston commemorating the anniversary of the raid on Harper’s Ferry and openly praising Brown’s use of violence. “I endorse,” Douglass explained, “all methods of proceeding against slavery, politics, religion, peace, war, Bible, Constitution, disunion, Union—[laughter]—every possible way known in opposition to slavery is my way.”⁶⁵ In particular, he supported what he called “the John Brown way.”⁶⁶ Douglass argued that “we must . . . reach the slaveholder’s conscience through his fear of personal danger. We must make him feel that there is death in the air about him, that there is death in the pot before him, that there is death all around him.”⁶⁷

“I rejoice in every uprising at the South,”⁶⁸ Douglass continued. “This element will play its part in the abolition of slavery. I know that all hope of a general insurrection is vain.”⁶⁹ But “[w]e do not need a general insurrection to bring about this result. We only need the fact to be known in the Southern States generally, that there is liberty in yonder mountains, planted by John Brown.”⁷⁰ All that was necessary, Douglass maintained, was that Southern slaveholders feared the existence of vigilantes like Brown hidden in the wilderness “who will sally out . . . and conduct their slaves from the chains and fetters in which they are now bound. . . . Let, I say, only a thousand men

63. See Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631.

64. DOUGLASS, *supra* note 58, at 748–49. Bradley Rebeiro argues that Douglass’s prudence was part of his larger natural rights philosophy: “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.” Rebeiro, *supra* note 3, at 959. Douglass was not entirely consistent in this view, however; he defended James Batchelder’s killing and celebrated John Brown’s raid at Harper’s Ferry. See text accompanying *infra* note 47 and *supra* note 65.

65. Frederick Douglass, Speech on John Brown (Dec. 3, 1860), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 417, 417 (Philip S. Foner & Yuval Taylor eds., 1999).

66. *Id.*

67. *Id.* at 418–19.

68. *Id.*

69. *Id.*

70. *Id.*

be scattered in those hills, and slavery is dead. It cannot live in the presence of such a danger.”⁷¹

One of Douglass’s most remarkable lectures in a career of memorable speeches occurred in 1881, when he offered a retrospective on the life and contributions of his friend John Brown.⁷² Brown, he argued, deserved credit for “begin[ning] the war that ended slavery . . . and made this a free republic.”⁷³ Until Brown acted:

[T]he prospect for freedom was dim, shadowy and uncertain. The irrepensible conflict was [merely] one of words, votes and compromises. When John Brown stretched forth his arm the sky was cleared. The time for compromises was gone—the armed hosts of freedom stood face to face over the chasm of a broken Union—and the clash of arms was at hand.⁷⁴

To paraphrase Chairman Mao, the abolition of slavery, like political power more generally, had to grow out of the barrel of a gun;⁷⁵ that was true even if Brown’s plan was foolhardy.

Brown’s use of violence, Douglass argued, should not blind us to the “pure, disinterested benevolence” of a man who was willing, indeed eager, to sacrifice his life—and the lives of his sons and friends who joined him at Harper’s Ferry—for the freedom of the enslaved.⁷⁶ Douglass unabashedly celebrated the “hero of Harper’s Ferry” as a role model for others, including himself.⁷⁷

Douglass’s remarkable speech requires later generations to ask how we should understand John Brown’s rejection of the American constitutional order and his belief that violence was necessary (and proper) to redeem American democracy. It asks us to decide whether we should view John Brown as an honored member of the American pantheon—as many Union soldiers did.⁷⁸ There is no easy answer to this question: However much

71. *Id.*

72. Frederick Douglass, John Brown: An Address (May 30, 1881) [hereinafter Douglass, John Brown], in THE ESSENTIAL DOUGLASS, *supra* note 32, at 258.

73. *Id.* at 275.

74. *Id.*

75. MAO ZEDONG, QUOTATIONS FROM CHAIRMAN MAO TSETUNG 61 (Foreign Language Press 1972).

76. Douglass, John Brown, *supra* note 72, at 267.

77. *Id.* at 263, 265.

78. During the Civil War, and for many years thereafter, John Brown was a folk hero and the subject of numerous “John Brown” songs. *History of “John Brown’s Body”*, PBS <https://www.pbs.org/wgbh/americanexperience/features/brown-history-john-browns-body/> (last visited July 31, 2023).

Americans fall over themselves to praise Frederick Douglass,⁷⁹ they remain uneasy about John Brown.

III. COULD FREDERICK DOUGLASS HAVE BEEN ADMITTED TO THE BAR?

Could a person with Douglass's views about the Constitution be admitted to the bar? Lawyers, the Supreme Court has informed us, are expected to uphold "the orderly processes that lie at the roots of this country's legal and political system."⁸⁰ After the Civil War, when slavery was abolished, President Rutherford B. Hayes appointed Douglass a United States Marshal and presumably, like other officers, he swore an oath to defend the U.S. Constitution.⁸¹ But what about the pre-Civil War Douglass, who supported John Brown's raid on Harper's Ferry?

Consider the case of George Anastaplo, who sought to join the Illinois Bar and was rejected because of his views about when people are justified in discarding the Constitution.⁸² According to Justice John Marshall Harlan's opinion in *In re Anastaplo*, Anastaplo was "an instructor and research assistant at the University of Chicago [who had] previously passed his Illinois bar examinations."⁸³ "The son of Greek immigrants from downstate Carterville, Anastaplo was a World War II veteran—he had navigated B-17 and B-29 bombers—and a top student at the University of Chicago Law School."⁸⁴ By all accounts he was a dedicated student of the American polity and loyal to what he considered its fundamental principles. He had multiple letters and affidavits of endorsement from a number of lawyers and academics.⁸⁵

So, what was the problem? Basically, it boiled down to his taking the lessons of the American past too seriously. In a lengthy hearing before the Illinois Bar's Committee on Character and Fitness, Anastaplo could not persuade his interlocutors that he could "conscientiously . . . swear support

79. Or, perhaps more accurately, Douglass as they understand him.

80. *In re Anastaplo*, 366 U.S. 82, 89 n.10 (1961).

81. The modern version of the oath appears at 5 U.S.C. § 3331:

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

82. See *Anastaplo*, 366 U.S. at 83–85.

83. *Id.* at 83.

84. Richard Mertens, *One Door Closes*, U. CHI. MAG. (Mar. - Apr. 2012), <https://mag.uchicago.edu/law-policy-society/one-door-closes#>.

85. *Anastaplo*, 366 U.S. at 105–07 (Black, J., dissenting).

of the Federal and State Constitutions, as required by the Illinois attorneys' oath."⁸⁶ The reason was that he "undertook to expound and defend, on historical and ideological premises, his abstract belief in the 'right of revolution,' and to resist, on grounds of asserted constitutional right and scruple, Committee questions which he deemed improper."⁸⁷ Among those questions was whether Anastaplo had ever been a member of the Communist Party. There was no evidence that he had, but Anastaplo refused to answer the question on the ground that it violated his First Amendment rights of freedom of speech and freedom of association.⁸⁸

The Bar Committee denied his application because Anastaplo had refused to answer questions about the Communist Party. The Supreme Court upheld the Bar's decision, in a 5-4 decision. It acknowledged that the members of the Committee had no evidence that Anastaplo lacked the requisite character and fitness to be a lawyer. Nevertheless, citing its decision in *Konigsberg v. State Bar*,⁸⁹ decided the same day, it held that state bar committees have the right to prevent applicants from obstructing their inquiries into character and fitness by refusing to answer "material" questions.⁹⁰ Questions about whether Anastaplo was a member of the Communist Party—or any other organization—were material because of "their bearing upon the likelihood that a bar applicant would observe as a lawyer the orderly processes that lie at the roots of this country's legal and political systems."⁹¹ Employing a balancing test, also taken from *Konigsberg*, the Court held that "the State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of speech and association."⁹²

Justice Black wrote a dissenting opinion emphasizing that there were in fact no doubts about Anastaplo's good character. He was joined by Chief Justice Warren, Justice Douglas, and Justice Brennan.⁹³

Anastaplo seems to hold that bar committees may require applicants to the Bar to ascribe to a particular kind of constitutionalism—one that "observe[s] . . . the orderly processes that lie at the roots of this country's legal and political systems."⁹⁴ If so, that might suggest that lawyers may not adhere to a full-throated Lockean theory that justifies violent overthrow of

86. *Id.* at 85 (majority opinion).

87. *Id.*

88. *Id.* at 85 n.5.

89. 366 U.S. 36 (1961).

90. *Anastaplo*, 366 U.S. at 88.

91. *Id.* at 89 n.10.

92. *Id.* at 89.

93. *Id.* at 97 (Black, J., dissenting).

94. *Id.* at 89 n.10 (majority opinion).

the government if necessary to protect people's natural rights. And yet, the committee seemed to suggest that merely holding a Lockean theory of constitutionalism did not undermine Anastaplo's ability to practice law. The Committee conceded:

[W]ith respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, [Anastaplo's views] are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and [these views] do not in and of themselves reveal any adherence to subversive doctrines.⁹⁵

The problem, it appears, was that the Bar Committee believed that adherence to the doctrines of the Communist Party was especially subversive. Revolution to promote liberty and equality was a doctrine "held by many patriotic Americans both at the present time and throughout the course of this country's history"⁹⁶—although there is no evidence that the Illinois Bar Committee on Character and Fitness asked Anastaplo about either John Brown or Frederick Douglass. But a violent revolution to achieve communism, at least in 1957, was a bridge too far.

It is worth asking what the 1850s equivalent of Communism would have been. For example, suppose someone like John Brown—or even Frederick Douglass—asserted that violent revolution was necessary to rid the nation of its original sin of slavery, not merely in the federal territories, but in the states that had chosen it. Was this position as subversive in the 1850s as Communism seemed in the 1950s? Surely many Southerners thought so. And not just Southerners. In *Prigg v. Pennsylvania*,⁹⁷ the Supreme Court asserted that the return of escaped slaves was necessary to the establishment and preservation of the Union. In *Dred Scott v. Sanford*,⁹⁸ the Supreme Court held that the Constitution offered special protection to the institution of slavery. And as we have seen, in his First Inaugural Address, Lincoln argued that maintaining slavery in the states that adopted it was the price of having a Constitution for the entire United States.⁹⁹ A decade later, however, the nation had abolished slavery, albeit at the cost of hundreds of thousands of lives.

A puzzling feature of *Anastaplo* is that in 1943, the Court had rejected the notion that adherence to a communist system of government by itself was

95. *Id.* at 87.

96. *Id.*

97. 41 U.S. (16 Pet.) 539 (1842).

98. 60 U.S. 393 (19 How.) (1856).

99. See *supra* note 31 and accompanying text.

inconsistent with “attach[ment] to the principles of the Constitution.”¹⁰⁰ In *Schneiderman v. United States*,¹⁰¹ the Supreme Court, in a 6-3 decision, refused to denaturalize a leader of the Communist Party on the grounds that his commitment to the goals of the party was inconsistent with the naturalization oath’s requirement of “attach[ment] to the principles of the Constitution.”¹⁰² The Court argued that advocating major changes in American government could be consistent with the Constitution so long as one did not advocate bringing them about by the violent overthrow of the existing government. Advocating, say, amendment through Article V was perfectly acceptable.¹⁰³ “Whatever attitude we may individually hold toward persons and organizations that believe in or advocate extensive changes in our existing order,” Justice Murphy explained:

[I]t should be our desire and concern at all times to uphold the right of free discussion and free thinking to which we as a people claim primary attachment. To neglect this duty in a proceeding in which we are called upon to judge whether a particular individual has failed to manifest attachment to the Constitution would be ironical indeed.¹⁰⁴

The Court made clear that there was no evidence that Schneiderman had advocated achieving the political goals of communism through violence.¹⁰⁵ By contrast, Anastaplo *did* seem to endorse the theoretical possibility of violent overthrow of the United States government under some conditions; as he explained to the Bar Commission, pointing to the language of the Declaration of Independence, “if a government gets bad enough, the people have a ‘right of revolution.’”¹⁰⁶ In such cases one should be as willing to go “[a]s far as Washington did, for instance.”¹⁰⁷ So apparently what we can draw from *Anastaplo* is that although one can advocate either communism or revolution and still be attached to the Constitution, one cannot advocate both.

100. *Schneiderman v. United States*, 320 U.S. 118, 141–43 (1943).

101. 320 U.S. 118 (1943).

102. *Id.* at 129, 142.

103. *Id.* at 136–39. See the extended discussion of the case in SANFORD LEVINSON, CONSTITUTIONAL FAITH 126–54 (2d ed. 2011). The Court stopped short of accepting what it called the “extreme position” that “since Article V contains no limitations, a person can be attached to the Constitution no matter how extensive the changes are that he desires, so long as he seeks to achieve his ends within the framework of Article V.” *Schneiderman*, 320 U.S. at 140. But it did not specify where the line should be drawn.

104. *Schneiderman*, 320 U.S. at 139.

105. *Id.* at 146.

106. *In re Anastaplo*, 366 U.S. 82, 100 & n.3 (1961).

107. *Id.* at 100 n.3.

Anastaplo is justifiably seen today as a relic of the suppression of dissent during the McCarthy Era.¹⁰⁸ The case reminds us that one could not count on the Supreme Court to protect a patriot like George Anastaplo from the ideological zeal of 1950's bar committees. That being said, *Anastaplo* has never been overruled, although a four-Justice plurality chipped away at it in 1971 in *Baird v. State Bar of Arizona*.¹⁰⁹ Thus the issue raised in *Anastaplo* remains today: What is the relationship between being an admirable American—and a person fit to be an American lawyer—and one's views about the Constitution? In order to be a member of the bar, must one reject all resort to violence, even to achieve such valuable objectives as, say, the end of chattel slavery (or American independence from the British Empire)?

It is hardly surprising that the official code adopted by the American Bar Association to regulate the conduct of lawyers includes the anodyne reminder that “[a] lawyer’s conduct should conform to the requirements of the law.”¹¹⁰ But that admonition makes sense only against a background assumption that the law, even if not perfect, is sufficiently close enough to a just system, or can be made so through peaceful and legal methods of reform.

But lawyering within fundamentally unjust systems that show no sign of amelioration is another matter.¹¹¹ And, not to put too fine a point on it, whether the United States of 1850, or 1890, or even today, was or is deeply unjust is a matter of some controversy. The question remains what one should believe about a system that one is convinced is rotten, or, in Margalit’s phrase, rests on rotten compromises.

108. See generally LARRY TYE, *DEMAGOGUE: THE LIFE AND LONG SHADOW OF SENATOR JOE MCCARTHY* (2020).

109. 401 U.S. 1, 6 (1971) (plurality opinion) (holding that “[t]he First Amendment’s protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs.”). *But see id.* at 9 (Stewart, J., concurring in the judgment). Justice Stewart’s limiting concurrence argued that the First Amendment may not protect “knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization’s illegal goals.” *Id.*

In the companion case of *In re Stolar*, 401 U.S. 23 (1971), four Justices held that the First Amendment did not allow a bar committee to inquire about an applicant’s beliefs and associations, *id.* at 31, while Justice Stewart’s limiting concurrence held that that bar admission committees could ask only about knowing membership in organizations that advocate the violent overthrow of the Government, *id.* at 31 (Stewart, J., concurring in the judgment).

110. MODEL RULES OF PRO. CONDUCT pmb. ¶ 5 (AM. BAR ASS’N 1983).

111. See, e.g., DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY* (2d ed. 2010) (focusing on role of the judge in apartheid South Africa).

CONCLUSION: FREDERICK DOUGLASS IN CONSTITUTIONAL MEMORY

These days, Randall Kennedy writes, “everyone wants a piece of Frederick Douglass.”¹¹² Conservative Republicans are delighted to remind people that Douglass was a Republican.¹¹³ Early in his presidency Donald Trump remarked:

I am very proud now that we have a museum on the National Mall where people can learn about Reverend [Martin Luther] King [, Jr.], so many other things Frederick Douglass is an example of somebody who’s done an amazing job and is getting recognized more and more, I notice.¹¹⁴

Indeed, like Martin Luther King, Jr., it has become Frederick Douglass’s fate to provide a usable past for many different parts of the contemporary American ideological spectrum. That is because both figures said and wrote many different things that later generations can mine for different purposes. No one, of course, illustrates the malleability of collective memory better than Abraham Lincoln.

That should hardly surprise us. Politicians and lawyers, like historians, are shapers of memory. Indeed, they are memory entrepreneurs.¹¹⁵ They tell stories about the past to claim authority and legitimacy in the present. And what they choose to forget is as important as what they choose to remember.

Pictures of both King and Douglass appear in the 1776 Project, a report published in the waning days of the Trump Administration.¹¹⁶ It was offered as a right-wing answer to the famous 1619 Project that described the role of white supremacy in the country’s founding and subsequent development.¹¹⁷ If both the 1619 Project and Donald Trump’s 1776 Project can honor King and Douglass, that is because the two projects are talking about very different versions of each man.

“Ironically,” Kennedy writes, “[Douglass’s] popularity is also due to ignorance. Some who commend him would probably cease doing so if they

112. Randall Kennedy, *The Confounding Truth About Frederick Douglass*, ATLANTIC (Dec. 2018), <https://www.theatlantic.com/magazine/archive/2018/12/the-confounding-truth-about-frederick-douglass/573931/>.

113. *Id.*

114. Dan Merica, *Trump: Frederick Douglass ‘Is Being Recognized More and More’*, CNN (Feb. 2, 2017, 2:11 AM), <https://www.cnn.com/2017/02/02/politics/donald-trump-frederick-douglass/index.html>.

115. Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 316–19, 323, 330, 345 (2022).

116. PRESIDENT’S ADVISORY 1776 COMM’N, THE 1776 REPORT, at 7 (2021), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf>.

117. See NICOLE HANNAH-JONES, THE 1619 PROJECT: A NEW ORIGIN STORY (2022).

knew more about him.”¹¹⁸ In cultural memory, these aspects of Douglass’s life may tend to be sanitized or even airbrushed away so that Douglass can be a culture hero for both the left and the right. Similarly, Martin Luther King’s most radical views about the United States have been airbrushed and sanitized for present day use so that he can be championed as the avatar of color-blindness by contemporary conservatives.¹¹⁹

Not surprisingly, then, contemporary admirers may tend to downplay—or not even be aware of—Douglass’s ambivalent relationship to the Constitution, Douglass’s defense of the killing of federal officials trying to recapture slaves in 1854, and Douglass’s praise of John Brown, both immediately after Brown’s execution and then twenty years later. Yet one of Douglass’s most famous speeches—on the Fourth of July—emphasized that the Declaration of Independence was only a declaration for white people—and that its promise of equality had been systematically denied by the American constitutional order that followed.¹²⁰ Black people, Douglass argued, had little reason to celebrate the Fourth of July.

Sanitizing through selective quotation is much harder to do for Douglass’s hero, John Brown—a man best known for his willingness to resort to violence to vindicate the rights of Black people. But the more we remember about the real Frederick Douglass, the more complicated it becomes to honor Douglass and reject Brown.

American society has long debated how to think about Robert E. Lee and other “heroes” of the Confederacy, who made war against the Union in order to preserve slavery. These men are slowly being removed from memorials and other positions of honor. An interesting question is whether figures like John Brown or Nat Turner, who sought to end slavery through violence, will ever be as honored in the way that Confederate generals, who employed violence to defend slavery, once were.¹²¹

The unsanitized version of Frederick Douglass—both the man who fought for abolition and the man who supported John Brown and the murder of a U.S. Marshal—should be important to us today. It should be important,

118. Kennedy, *supra* note 112.

119. HAJAR YAZDIHA, *THE STRUGGLE FOR THE PEOPLE’S KING: HOW POLITICS TRANSFORMS THE MEMORY OF THE CIVIL RIGHTS MOVEMENT* 5 (2023) (“[T]he domesticated memory of the civil rights movement has transformed into a vacated, sanitized collective memory celebrating color-blindness and individualism, as if racism is a figment of the past.”).

120. Frederick Douglass, *What to the Slave Is the Fourth of July?* (July 5, 1852), in *THE ESSENTIAL DOUGLASS*, *supra* note 32, at 50. *See generally* SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* (2d ed. 2018).

121. Brown and Turner have not been completely ignored, however. There is a statue of John Brown in Kansas City, Kansas, a John Brown museum in Osawatomie, Kansas, and two of his homes have been preserved as state historical or archaeological sites. There is a statue of Nat Turner in an anti-slavery monument in Richmond, Virginia and a Nat Turner park in Newark, New Jersey.

among other reasons, because it raises the question of whether those who doubted their attachment to the Constitution, or even rejected it outright, might still play an important role in the American political and constitutional tradition.

If we celebrate Frederick Douglass, who was at best an ambivalent constitutionalist, how should we think about John Brown? Is he an idealistic fool or a genuine hero, as Douglass believed? Should the story of American democracy celebrate only defenders of the Constitution, like Lincoln, or should it also include those who were deeply ambivalent about the Constitution, like Douglass, and those who were willing to discard it, like John Brown? If so, then what we celebrate is not the Constitution itself, but certain present-day values that the Constitution has only fitfully protected during the course of its long history.