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LINCOLN, DOUGLASS, FUGITIVE SLAVE LAW, AND CONSTITUTIONAL EVIL

ROBINSON WOODWARD-BURNS*

Several sections of the antebellum Constitution addressed slavery. Perhaps most contentious was the Fugitive Slave Clause, requiring that fugitive slaves “shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”¹ This Clause never specified whether federal, state, or private actors could recapture fugitives, spurring enforcement disputes. Congress’ 1793 Fugitive Slave Act (“1793 Act”) charged recapture to private agents rather than to state officials,² who, in the North, shielded fugitives from return.³ Heartened by resistance in Massachusetts, Ralph

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1. See U.S. CONST. art. IV, § 2, cl. 3. On other clauses relating to slavery, see, for example, *id.* art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 1. See also PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION’S HIGHEST COURT 11–25 (2018).

2. Per 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 such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

Unlike the Clause, the 1793 Act in Section 3 expressly empowered private agents to recapture fugitives:

[W]hen a person held to labor in any of the United States, or in either of the Territories on the Northwest or South of the river Ohio, under the laws thereof, shall escape into any other part of the said States or Territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor.

The 1793 Act in Sections 1–2 empowered state agents to aid in the recapture of fugitives from justice but did not in Sections 3–4 extend this state authority to the recapture of fugitive slaves. See Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302, 302 (repealed 1864). In the 1842 *Prigg v. Pennsylvania* decision, Justice Story thus ruled the Clause “does not point out any state functionaries, or any state action, to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them.” 41 U.S. (16 Pet.) 539, 615 (1842). The antislavery Justice McLean further recognized in each “state a power to guard and protect its own jurisdiction, and the peace of its citizens.” *Id.* at 673; see also Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIST. 5, 14–15 (1979); Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEG. HIST. 466, 473–80 (1992).

3. For example, Ohio congressman Joshua Giddings held in 1842 that *Prigg* did not affect the “constitutional rights of the Free States.” Joshua R. Giddings, *Pacificus: The Rights and Privileges of the Several States in Regard to Slavery*, in THE LIFE OF JOSHUA R. GIDDINGS 415, 418 (George Washington Julian ed., 1892). Pennsylvania’s legislature in 1847 forbade jailers and judges from

Waldo Emerson held “[t]here was a fugitive law, but it had become or was fast becoming, a dead letter; and, by the genius and laws of Massachusetts inoperative.”⁴ In response, Congress’ 1850 Fugitive Slave Act (“1850 Act”) empowered federal marshals and commissioners to rally private citizens as a *posse comitatus* to summarily capture, put on trial, and return fugitives, while noncompliant bystanders faced a \$1,000 fine and half year in prison.⁵ As Emerson concluded, “[t]he new Bill made [the 1793 Act] operative; required me to hunt slaves; and it found citizens in Massachusetts willing to act as judges and captors.”⁶ Northern legislatures answered by expanding fugitives’ habeas and jury trial rights under “personal liberty” laws, and citing these laws, free state citizens and officials challenged their obligation to the Constitution’s Fugitive Slave Clause.⁷ As Emerson concluded, “[a]n immoral law makes it a man’s duty to break it.”⁸

Constitutions, framed through compromise, bind subjects to compromised, unjust provisions.⁹ The problem of *constitutional evil*, per Mark Graber, arises when subjects are asked to obey unjust practices not clearly authorized by constitutional text or history.¹⁰ The Fugitive Slave Acts

holding alleged fugitives, and in 1846 and 1849 Pennsylvania and New York courts emancipated visiting slaves. *See id.* at 415–19; *In re Kirk*, 4 N.Y. Leg. Obs. 456 (1846); *Commonwealth v. Auld*, 4 Pa. L.J. 515 (1850); *In re Lewis Pierce*, 1 W. Leg. Obs. 14 (Pa. 1849); *Kauffman v. Oliver*, 10 Pa. 514 (1849). Lawmakers cited *Prigg* to protect fugitives—in 1847, New York Governor William Seward held that federal law under *Prigg* did not bind “[s]tate legislatures, direct[ed] no action by them, nor designate[d] any possible occasion for their action.” Argument for the Defense at 33, *Jones v. Van Zandt*, 46 U.S. 215 (1847), <https://www.loc.gov/item/97146902/>; *see also* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 131–45 (1981); DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENTS RELATIONS TO SLAVERY 221–25, 412 n.58 (Ward M. McAfee ed., 2001).

4. Ralph Waldo Emerson, The Fugitive Slave Law (Mar. 7, 1854) [hereinafter Emerson, The Fugitive Slave Law], in EMERSON’S ANTISLAVERY WRITINGS 73, 80 (Len Gougeon & Joel Myerson eds., 1995); *see* Robinson Woodward-Burns, *Rethinking Self-Reliance: Emerson on Mobbing, War, and Abolition*, 83 J. POL. 137 (2020) (on citizen resistance to the 1793 Act).

5. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, 462 (repealed 1864).

6. Emerson, The Fugitive Slave Law, *supra* note 4, at 80.

7. Norman L. Rosenberg, *Personal Liberty Laws and Sectional Crisis: 1850–1861*, 17 CIV. WAR HIST. 25, 25–34 (1971); FINKELMAN, *supra* note 3, at 130–31, 177–78; *see also* Jane H. Pease & William H. Pease, *Confrontation and Abolition in the 1850s*, 58 J. AM. HIST. 923, 927–937 (1972) (on citizen resistance to federal fugitive slave law).

8. Emerson, “Address to the Citizens of Concord” on the Fugitive Slave Law (May 3, 1851) [hereinafter Emerson, Address to the Citizens of Concord], in EMERSON’S ANTISLAVERY WRITINGS, *supra* note 4, at 53, 57.

9. *See generally* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1979); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

10. “The problem of constitutional evil, in short, is primarily the problem of when and whether citizens should accommodate more injustice than constitutionally necessary by providing protections for heinous practices not clearly mandated by the constitutional text or history. Slavery and *Dred Scott* present the stark reality of constitutional evil.” MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 3 (2006).

present such a problem. The Fugitive Slave Clause, drafted as a concession to Southern convention delegates,¹¹ endorsed the return of fugitive slaves, a moral evil. But the Clause did not clearly authorize the 1793 or 1850 Act's enforcement provisions, at least according to antislavery Northern thinkers.¹²

Chief among these thinkers were Abraham Lincoln and Frederick Douglass, the latter a former fugitive from slavery. Lincoln and Douglass disagreed on whether the Clause and 1850 Act bound Northern citizens and officeholders. Douglass's narrow reading of the Clause and broad reading of natural law authorized citizen resistance to the 1850 Act. This Essay details his views in Part I. Part II notes how Lincoln believed lawmakers were oath-bound to the Clause and to slaveholders' morally unjust but constitutional right to recapture fugitives under the 1850 Act. Lincoln felt his duty to the Constitution overrode the dictates of natural law, at least until the Civil War let him bend the Constitution to conform to natural law. Part III concludes by noting both Lincoln and Douglass saw that the framers intended the Clause to authorize recapture. Douglass as an essayist and orator hewed to the natural law against the 1850 Act, while Lincoln as a congressman and executive understood himself oath-bound to the positive law under the 1850 Act. This Essay considers Douglass and Lincoln on the 1850 Act, taking them as "representative men," per Emerson's term, who confronted the fundamental constitutional problem of the 1850s.¹³

11. *Id.* at 104–05.

12. The Clause's placement in Article IV, concerning the powers of the states and territories, suggested fugitive law did not belong among congressional powers, which are listed in Article I. *Id.* at 83–84. The debate on congressional powers over fugitive law predated the 1850 Act:

Decisions on controversial issues are often compromises or contain ambiguities that all sides interpret as supporting their underlying positions. *Prigg v. Pennsylvania* stood for the proslavery principle that the Constitution mandated an efficient rendition process and also for the antislavery principle that the federal government could not require free-state officials to help return fugitive slaves.

Id. at 18. Enforcement aside, federal justices uniformly upheld the constitutionality of the 1793 and 1850 Acts. *Id.* at 149–50.

13. Emerson, upon meeting Douglass in August 1844 and Lincoln in February 1862, felt each represented a wing of the abolitionist movement. Douglass, self-liberated, was "the Anti-Slave," and Lincoln, the wartime abolitionist lawmaker, showed "a lawyer's habit of mind." Ralph Waldo Emerson, Journal V (1844–45), in 9 THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON 93, 125 (Ralph H. Orth & Alfred Riggs Ferguson eds., 1971); Ralph Waldo Emerson, Journal WAR: Visit to Washington (Jan. 31, 1862), in 15 THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON 169, 187 (Linda Allardt & David Hill eds., 1982); ANDREW DELBANCO, THE WAR BEFORE THE WAR: FUGITIVE SLAVES AND THE STRUGGLE FOR AMERICA'S SOUL FROM THE REVOLUTION TO THE CIVIL WAR 138–42 (2018) (on Emerson's and Douglass's abolitionism in the early 1840s).

I. DOUGLASS ON RESISTING FUGITIVE SLAVE LAW

Douglass doubted that the Constitution authorized the 1850 Act, though he recognized that the framers intended the Constitution to protect slavery. In a February 1849 open letter, he granted that “the original intent and meaning of the Constitution (the one given to it by the men who framed it, those who adopted, and the one given to it by the Supreme Court of the United States) makes it a pro-slavery instrument.”¹⁴ The framers empowered Congress to regulate the slave trade, suppress slave revolt, and to provide for recapture of fugitives.¹⁵ Douglass observed that the Fugitive Slave Clause “was adopted with a view to restoring fugitive slaves to their masters . . . Under it, and in accordance with it, the Congress enacted the atrocious ‘law of ‘93.’”¹⁶ But the framers’ intent, he held, is “entitled to no respect or consideration in discussing what is the character of the constitution of the United States. I repeat, the paper itself, and only the paper itself, with its own plainly written purposes, is the constitution.”¹⁷

Douglass held the Constitution should be read through “the text and only the text,”¹⁸ which “strictly ‘construed according to its reading,’ . . . is not a pro-slavery instrument.”¹⁹ The “constitution according to its plain reading,”²⁰ did not explicitly mention slavery, contained “no such words as ‘fugitive slaves,’”²¹ and so did not empower Congress to pass a fugitive slave law.²²

14. Frederick Douglass, Letter to C.H. Chase (Feb. 9, 1849) [hereinafter Douglass, Letter to Chase], in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 128, 128 (Philip Foner ed., 1999).

15. U.S. CONST. art. I, § 8, cl. 15.; *id.* art. I, § 9, cl. 1; *id.* art. IV, § 4; *see also* Frederick Douglass, *The Constitution and Slavery*, NORTH STAR, Jan. 26, 1849 [hereinafter Douglass, *The Constitution and Slavery*], reprinted in FREDERICK DOUGLASS: SPEECHES & WRITINGS 118, 122 (David W. Blight ed., 2022).

16. Douglass, *The Constitution and Slavery*, *supra* note 15, at 123. He later added, citing Madison’s *Notes*, that convention delegates understood “this clause would secure [slaveholders] their property in slaves.” Frederick Douglass, *The American Constitution and the Slave: An Address* (Mar. 26, 1860) [hereinafter Douglass, *The American Constitution and the Slave*], in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 328, 342.

17. Douglass, *The American Constitution and the Slave*, *supra* note 16, at 335.

18. *Id.* at 334.

19. Douglass, Letter to Chase, *supra* note 14, at 128; *see* Douglass, *The American Constitution and the Slave*, *supra* note 16, at 338.

20. Frederick Douglass, *What to the Slave is the Fourth of July?: An Address* (July 5, 1852) [hereinafter Douglass, *What to the Slave is the Fourth of July?*], in FREDERICK DOUGLASS: SPEECHES AND WRITINGS, *supra* note 15, at 166, 190.

21. Frederick Douglass, *The American Constitution and the Slave*, *supra* note 16, at 338.

22. “Neither in the preamble nor in the body of the Constitution is there a single mention of the term *slave* or *slave holder*, *slave master* or *slave state*,” a point he expressly borrows from Gerrit Smith and Lysander Spooner, who, against William Lloyd Garrison, argued the Constitution’s text did not authorize federal protection of slavery. Frederick Douglass, *The Dred Scott Decision: An Address* (May 1857) [hereinafter Douglass, *The Dred Scott Decision*], in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 288, 301; *see also* Douglass, *What to the Slave is the*

Similarly, the antebellum Constitution made no mention of race,²³ but instead made broad promises of liberty, and thus “must be construed strictly in favor of liberty” for all persons, regardless of race.²⁴ Legislators, in passing the 1793 and 1850 Acts, read the Constitution against its promises of liberty, seeking “a malignant purpose in innocent and benevolent language.”²⁵ The Constitution, accordingly, did not clearly empower Congress to pass the 1850 Act.

Further, the 1850 Act violated natural law. The slave was born a “man [in] ‘the image of God’” and thus was a “moral and intellectual being,” unlike the brute chattel animal.²⁶ But slaveholders treated enslaved people as chattel animals. Douglass held that no reasonable person could hold that “such a state of things is natural.”²⁷ Slaveholders “intend to bring you and me and all of us to look upon the slave as a horse or an ox; but it cannot be done.”²⁸ Rather, enslaved people, having natural intellectual and moral capacities, deserved attendant natural liberty and rights. Natural law required the “preservation of the rights, and the security, and the happiness of the race.”²⁹ Fugitive slaves, as humans, held a natural liberty that trumped slaveholders’ supposed constitutional right to recovery of property.³⁰ The 1793 and 1850

Fourth of July?, *supra* note 20, at 188–189 (“In that instrument I hold there is neither warrant, license, nor sanction of the hateful thing; but interpreted as it ought to be interpreted, the Constitution is a glorious liberty document.”) This reflects Douglass’ departure in the 1850s from Garrisonian radicalism. Douglass, *The Dred Scott Decision*, *supra*, at 301–02; Douglass, *The American Constitution and the Slave*, *supra* note 16, at 342–44; Leslie Friedman Goldstein, *Morality & Prudence in the Statesmanship of Frederick Douglass: Radical as Reformer*, 16 *POLITY* 606 (1984); Gregory M. Collins, *Beyond Politics and Natural Law: The Anticipation of New Originalist Tenets in the Constitutional Thought of Frederick Douglass*, 6 *AM. POL. THOUGHT* 574, 584–86 (2017).

23. He noted, “if we the people are included, negroes are included; they have a right, in the name of the constitution of the United States, to demand their liberty.” Douglass, *The American Constitution and the Slave*, *supra* note 16, at 347.

24. Douglass, *The Dred Scot Decision*, *supra* note 22, at 300. Douglass added that reading “the Constitution from the stand-point thus indicated, and instead of finding in it a warrant for the stupendous system of robbery, comprehended in the term slavery, we shall find it strongly against that system.” *Id.*

25. Douglass, *The American Constitution and the Slave*, *supra* note 16, at 335.

26. Frederick Douglass, *The Nature of Slavery* (1850), in *AUTOBIOGRAPHIES* 419, 420 (Henry Louis Gates ed., 1994) [hereinafter *Douglass, The Nature of Slavery*].

27. Frederick Douglass, *Inhumanity of Slavery* (1850), in *AUTOBIOGRAPHIES*, *supra* note 23, at 425, 427.

28. Frederick Douglass, *No Peace for the Slaveholder: An Address* (May 11, 1853) [hereinafter *Douglass, No Peace for the Slaveholder*], in *FREDERICK DOUGLASS: SPEECHES & WRITINGS*, *supra* note 15, at 210, 211.

29. Frederick Douglass, *Is It Right and Wise to Kill a Kidnapper?*, *FREDERICK DOUGLASS’ PAPER*, June 2, 1854 [hereinafter *Douglass, Is It Right and Wise to Kill a Kidnapper?*], reprinted in *FREDERICK DOUGLASS: SPEECHES & WRITINGS*, *supra* note 15, at 220, 222.

30. Per Nicolas Buccola: “Legalism and constitutionalism occupied important places in Douglass’s political philosophy, but they were always subordinate to the fundamental purpose that gives them value: the protection of natural rights.” Nicholas Buccola, *Frederick Douglass on the*

Fugitive Slave Acts, not clearly authorized under constitutional law and invalid under natural law, obligated Northern citizens to engage in a moral wrong, and thus posed for Douglass the problem of constitutional evil.

Douglass called for citizen resistance. The 1850 Act, requiring Northern citizens recapture fugitives, made fugitive law national: “[I]ts evils are not confined to the Southern States . . . every American citizen is responsible for its existence, and is solemnly required, by the highest convictions of duty and safety, to labor for its utter extirpation from the land.”³¹ Resistance would not come from Southerners, blinded to the evils of slavery,³² or even from most Northerners,³³ but rather from the minority of committed Northern abolitionists attuned to the antislavery natural law.³⁴

Natural law authorized violent resistance.³⁵ During the rescue of Anthony Burns, a fugitive jailed in Boston, abolitionists led by Bronson

Right and Duty to Resist, 5 LIBERTY MATTERS 1, 3 (2017); see also, e.g., NICHOLAS BUCCOLA, THE POLITICAL THOUGHT OF FREDERICK DOUGLASS: IN PURSUIT OF AMERICAN LIBERTY (2012); Collins, *supra* note 22. On the fugitive slave question, Douglass declared he had little patience for “[l]egal hermeneutics [and] constitutional hair-splitting.” Frederick Douglass, *Demands of the Hour*, NEW NAT’L ERA, Apr. 6, 1871, reprinted in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 16, at 591, 591. For Douglass, the duty to resist the 1850 Act was self-evident, not subject to debate: “[M]an’s right to liberty is self-evident. There is no need of argument to make it clear.” Douglass, *The Dred Scott Decision*, *supra* note 22, at 292; see also Douglass, *The Constitution and Slavery*, *supra* note 15, at 120; Goldstein, *supra* note 22, at 608–10, 615 (on how moral concerns trump political ones).

31. Frederick Douglass, *An Anti-Slavery Tocsin: An Address*, in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 146. Douglass elsewhere notes: “Mr. Garrison and his friends have been telling us that, while in the Union, we are responsible for slavery; and in so telling us, he and they have told the truth.” Douglass, *The Dred Scott Decision*, *supra* note 22, at 298.

32. Northern efforts at abolition through “moral suasion” failed as Southern slaveholders, desensitized to the brutality of slavery, ignored moral appeals. Robinson Woodward-Burns, *Solitude Before Society: Emerson on Self-Reliance, Abolitionism, and Moral Suasion*, 48 POLITY 29, 50–51 (2016). Such for Douglass were “the certain effects of slavery upon the moral sense of slaveholding communities.” Douglass, *The Dred Scott Decision*, *supra* note 22, at 299. Emerson agreed: “The habit of oppression cuts out the moral eyes . . . It is not true that there is any exception to that in American slavery.” Emerson, *The Fugitive Slave Law*, *supra* note 4, at 85. British abolitionists had much earlier noted the same. See Ralph Waldo Emerson, *Journal C* (1837), in 5 THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON 277, 437 (Merton M. Sealts, Jr. ed., 1965).

33. Prior to the passage of the 1850 Act, Douglass held that some in “[t]he North are willing to become the body guards of slavery—suppressing insurrection—returning fugitive slaves to bondage.” Douglass, *The Constitution and Slavery*, *supra* note 15, at 124.

34. Antislavery Northerners were bound by moral sense to disobey the 1850 Act:

No laws, no compacts, no covenants, no enactments, of any description, can ever blot out from the moral sense of these Northern States a consciousness of the manhood of the slave, and no man can feel, when he sees a slave escape, as he would do if he saw a stray horse.

Douglass, *No Peace for the Slaveholder*, *supra* note 28, at 211.

35. Per Douglass, “when a slave is to be snatched from the hand of a kidnapper, physical force is needed.” Frederick Douglass, *The Ballot and the Bullet*, DOUGLASS’ MONTHLY, Oct. 1859, reprinted in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 315, 316.

Alcott and Thomas Wentworth Higginson returned fire from federal marshals, and in the ensuing struggle killed James Batchelder, one of the marshals.³⁶ To Douglass, the “light of reason” revealed that this “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.”³⁷ Elsewhere, Douglass affirmed that natural law authorized the killing of Batchelder and other slavecatchers in self-defense: “[W]hen men divest themselves of every feeling of humanity, and act as bloodhounds, they should be treated as such.”³⁸ Here, Douglass echoes the natural law theory of John Locke, which held:

*[T]he Fundamental Law of Nature, Man being to be preserved . . . one may destroy a Man who makes War upon him, or has discovered an Enmity to his being, for the same Reason, that he may kill a Wolf or a Lyon; because such Men are not under the ties of the Common Law of Reason . . .*³⁹

By killing slavecatchers, the 1850 Fugitive Slave Act might be voided, bringing positive law in closer conformity to natural law.⁴⁰ For Douglass, “[t]he only way to make the fugitive slave law a dead letter is to make half a dozen or more dead kidnappers.”⁴¹ Douglass equated this resistance to that of the American Revolution. In an early address on the 1850 Act, he held:

If you are . . . prepared to see the streets of Boston flowing with innocent blood, . . . just give in your adhesion to the fugitive slave bill—you, who live on the street where the blood first spouted in defence of freedom; and the slave-hunter will be here to bear the chained slave back, or he will be murdered in your streets.⁴²

36. Buccola, *supra* note 30, at 3; Woodward-Burns, *supra* note 4, at 142.

37. Douglass, *Is It Right and Wise to Kill a Kidnapper?*, *supra* note 29, at 221–23.

38. Frederick Douglass, Do Not Send Back the Fugitive: An Address [hereinafter Douglass, Do Not Send Back the Fugitive], in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 142, 144. Aggressors, including slavecatchers, might under natural law be dispatched like a vicious wolf, but as noted, Douglass carefully distinguished the enslaved person from the chattel animal to which he was often compared by the slaveholder. Douglass, No Peace for the Slaveholder, *supra* note 28, at 211.

39. JOHN LOCKE, LOCKE: TWO TREATISES OF GOVERNMENT 278–79 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

40. Here, Douglass echoes the rhetoric of Henry Highland Garnett, a formerly enslaved minister and occasional ally of Douglass, who drew on the writings of David Walker. See DAVID WALKER, APPEAL TO THE COLOURED CITIZENS OF THE WORLD (Peter P. Hinks ed., 1995) (1829); Henry Highland Garnet, An Address to the Slaves of the United States of America (Aug. 16, 1848), in AMERICAN ANTISLAVERY WRITINGS: COLONIAL BEGINNINGS TO EMANCIPATION 443, 443 (James G. Basker ed., 2012).

41. Frederick Douglass, *The Fugitive Slave Law*, FREDERICK DOUGLASS’ PAPER, Aug. 20, 1852 [hereinafter Douglass, *The Fugitive Slave Law*], reprinted in THE ESSENTIAL DOUGLASS: SELECTED WRITINGS AND SPEECHES 72, 72 (Nicholas Buccola ed., 2016).

42. Douglass, Do Not Send Back the Fugitive, *supra* note 38, at 145. Similarly, “Burns and [the fugitive slave Thomas] Simms, were sent back to the hell of slavery after they had looked upon Bunker Hill, and heard liberty thunder in Faneuil Hall,” a lecture hall that hosted abolitionists and

By drawing on the legacy of the American Revolution, Douglass further legitimated extralegal antislavery action, which might address the problem of constitutional evil posed by the 1850 Act.

II. LINCOLN ON ENFORCING FUGITIVE SLAVE LAW

In campaign speeches and public addresses, Lincoln often supported obedience to the laws. As an Illinois state representative addressing the Springfield Young Men's Lyceum in 1838, Lincoln condemned the "outrages committed by mobs"—mounting nativist mob violence in the mid-1830s targeted convents, freemasons' halls, Catholic schools, and abolitionist society meetings.⁴³ Lincoln also denounced those mobs called by "the pleasure hunting masters of Southern slaves," noting such mobs are not "confined to the slaveholding, or the non-slaveholding States."⁴⁴ For Lincoln, these private slavecatching mobs, not clearly authorized under the 1793 Act, threatened lawlessness.

After 1850, federal law authorized slavecatching mobs. In his 1854 Peoria Address, Lincoln held that the Constitution's Fugitive Slave Clause, without expressly mentioning slavery, empowered Congress to provide for enforcement through the 1793 and 1850 Acts.⁴⁵ He explained that when slaveholders "remind us of their constitutional rights, I acknowledge them, not grudgingly, but fully, and fairly; and I would give them any legislation for the reclaiming of their fugitives."⁴⁶ Lincoln had pragmatic grounds for this. He worried Northern abolitionist resistance to the 1850 Act enflamed Southern secessionism. Thus, he called listeners to "stand AGAINST [the abolitionist] when he attempts to repeal the fugitive slave law. In the latter case, you stand with the southern disunionist."⁴⁷ He nevertheless denied that natural or moral law supported the fugitive slave law. He called for "toleration, ONLY BY NECESSITY," of slavery while rejecting "that there CAN be MORAL RIGHT in the enslaving of one man by another."⁴⁸ Fugitive

prior Revolutionary patriots protesting the Stamp Act. Douglass, *The Dred Scott Decision*, *supra* note 22, at 299; *see also* ROBERT FANUZZI, *ABOLITION'S PUBLIC SPHERE* 75–82 (2003).

43. Abraham Lincoln, Address to the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), *in* ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS 13, 14 (Don E. Fehrenbacher ed., 1992).

44. *Id.*; *see* Woodward-Burns, *supra* note 4, at 138–39.

45. Abraham Lincoln, Speech on the Kansas-Nebraska Act (Oct. 16, 1834), *in* ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS, *supra* note 43, at 93, 95.

46. For Lincoln, a rising Free Soil Republican, this "furnishes no more excuse for permitting slavery to go into our own free territory" under the Kansas-Nebraska Act. *Id.* at 95.

47. *Id.* at 96.

48. *Id.* at 96–97. For Lincoln, the aim was to "turn slavery from its claims of 'moral right,' back upon its existing legal rights and its arguments of 'necessity.'" *Id.* at 99.

recapture, unjust and not clearly constitutionally authorized, thus presented the problem of constitutional evil.

Lincoln elaborated this position of toleration by necessity in his U.S. Senate campaign debates with Stephen Douglas in 1858. In the second debate in late August, while calling for congressional abolition in the territories—authorized under Congress’ plenary constitutional powers over the territories⁴⁹—Lincoln held that “under the Constitution of the United States, the people of the Southern States are entitled to a Congressional Fugitive Slave Law.”⁵⁰ This was an expedient rebuttal of Douglas’s charge that, if elected, he would “stand in favor of the unconditional repeal of the fugitive slave law.”⁵¹ This also reflected his strict constructionism, reading Congress’ powers to include those, and only those, listed in the Constitution—congressional legislation could neither overextend nor restrict the enforcement powers provided by the Fugitive Slave Clause.⁵² He elaborated this position weeks later in the third debate, holding that members of Congress were bound by their oath of office to use their lawmaking power to secure enforcement of the Fugitive Slave Clause.⁵³ This obligation left no room for federal or state legislators to nullify the Clause, as was practice in New York, Vermont, and Wisconsin.⁵⁴ He noted, “although it is distasteful to me, I have sworn to support the Constitution, and having so sworn I cannot conceive that I do support it if I withheld from that right any necessary legislation to make it practical.”⁵⁵ A legislator by oath was bound to the whole Constitution, including the Fugitive Slave Clause, and could not legislate against the Clause. In the final debate the following month, and in his last campaign speech weeks later, he repeated his opposition and obligation to the 1850 Act.⁵⁶

During the secession crisis of 1860–61, as a presidential candidate and then president-elect, Lincoln read enforcement powers even more narrowly. In public speeches to Northern audiences in February and March of 1860, he derided Southern secessionists who demanded appeasement through the

49. U.S. CONST. art. IV, § 3, cl. 2.

50. Abraham Lincoln, From Second Lincoln-Douglas Debate (Aug. 27, 1858), in ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS, *supra* note 43, at 154, 155.

51. *Id.* at 154.

52. Abraham Lincoln, From Third Lincoln-Douglas Debate (Sept. 15, 1858) [hereinafter Lincoln, Third Lincoln-Douglas Debate], in ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS, *supra* note 43, at 164, 169–170.

53. *Id.* at 169.

54. Rosenberg, *supra* note 7.

55. Lincoln, Third Lincoln-Douglas Debate, *supra* note 52, at 170.

56. Abraham Lincoln, From Seventh Lincoln-Douglas Debate (Oct. 15, 1858), in ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS, *supra* note 43, at 190, 195–96; Abraham Lincoln, Last Speech in Campaign of 1858 (Oct. 30, 1858), in ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS, *supra* note 43, at 198, 198.

return of fugitives.⁵⁷ But he did not endorse Northern noncompliance. In a private letter weeks after his election, he reaffirmed his commitment that “the fugitive slave clause of the constitution ought to be enforced—to put it on the mildest form, ought not be resisted.”⁵⁸ And in a separate letter days later, citing his position in his debates with Douglas, he added that Northern personal liberty laws violated the Fugitive Slave Clause, but were not within his authority as president to overturn.⁵⁹ The following March, in his First Inaugural, he asserted that the question of free state nonenforcement “is not a very material one,”⁶⁰ failing to condemn personal liberty laws, unlike his predecessor James Buchanan.⁶¹

He likewise said little on federal obligations. He recognized that the Constitution let Congress regulate or abolish slavery in arsenals and dockyards, the territories, and the District of Columbia, but as president, he claimed no authority to legislate to this end.⁶² And similarly, his First Inaugural held that members of Congress were oath-bound to legislate in accordance with the Fugitive Slave Clause, but that he as president did not hold this legislative authority.⁶³ Lincoln’s scrupulously narrow construction of his powers, and of those of Congress, recalls Emerson’s description of Daniel Webster, author of the 1850 Act, who accepted “the Constitution [as] settled. What he finds already written, he will defend.”⁶⁴ Noting Lincoln’s support for the Act, Douglass put it more directly in December 1860: “Whoever lives through the next four years will see Mr. Lincoln and his Administration attacked more bitterly for their pro-slavery truckling, than for doing any anti-slavery work. He and his party will become the best protectors

57. The secessionist would only be satisfied when Northerners “arrest and return their fugitive slaves with greedy pleasure.” Abraham Lincoln, From Speech at New Haven, Connecticut (Mar. 6, 1860), in *ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS*, *supra* note 43, at 253, 259. Much of this appears earlier in his Cooper Union Address. Abraham Lincoln, From Address at Cooper Institute (Feb. 27, 1860), in *ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS*, *supra* note 43, at 240, 249–51.

58. Abraham Lincoln, Letter to William Kellogg (Dec. 11, 1860), in *ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS*, *supra* note 43, at 273, 273.

59. Abraham Lincoln, Letter to John Gilmer (Dec. 15, 1860) [hereinafter Lincoln, Letter to Gilmer], in *ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS* *supra* note 43, at 273, 274.

60. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) [hereinafter Lincoln, First Inaugural], in *ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS*, *supra* note 43, at 284, 285–286.

61. DELBANCO, *supra* note 13, at 343–45.

62. Lincoln, Letter to Gilmer, *supra* note 59, at 274.

63. Lincoln, First Inaugural, *supra* note 60, at 285–86. He repeated this in his second message to Congress in December 1862.

64. Emerson, Address to the Citizens of Concord, *supra* note 8, at 66.

of slavery[.]” adding “the South has now no such cause for disunion. The present alarm and perturbation will cease.”⁶⁵

Only with Southern secession and war did Lincoln remake fugitive law. Through field orders and the Confiscation Acts, Lincoln affirmed that the Constitution recognized secessionists’ fugitive slaves as contraband property subject to emancipation by Union troops.⁶⁶ Importing the logic of the Confiscation Acts into the Emancipation Proclamation, Lincoln forbade Union forces from aiding in the return of fugitives.⁶⁷ Meeting Lincoln in February 1862, Emerson praised Lincoln’s creativity in turning the written law against the intent of its framers. In his journal, Emerson noted, “The force of the [Confiscation] act is that it commits the country to this justice; that it compels the innumerable officers, civil, military, naval, of the Republic, to range themselves on the line of this equity.”⁶⁸

III. CIVIL DISOBEDIENCE AND CONSTITUTIONAL EVIL

The Fugitive Slave Clause did not expressly empower federal, state, or private agents to recapture fugitive slaves. This recapture, unjust and not clearly authorized by constitutional text or history, presented the problem of constitutional evil. Antislavery thinkers differed on whether to read the Clause to endorse federal, state, or private recapture of fugitives. Lincoln held that he and other lawmakers were oath-bound to support the Clause and consequently the 1793 and 1850 Acts. Douglass felt the Constitution’s text, largely silent on the fugitive slave question, did not authorize recapture and thus he condemned president-elect Lincoln’s public “slave-catching and slave-killing pledges.”⁶⁹ He felt Lincoln was not expressly bound to the Clause or Acts—years earlier in a Free Soil convention he explained this objection to Lincoln’s approach: “[I]t has been said that this [Fugitive] law is constitutional—if it were, it would be equally the legitimate sphere of government to repeal it.”⁷⁰ To his point, nothing in the Constitution strictly

65. Douglass added that while Lincoln supported the 1850 Act, his election might embolden Northerners, spreading a “popular disinclination to execute the cruel and merciless Fugitive Slave Law.” Frederick Douglass, *The Late Election*, DOUGLASS’ MONTHLY, Dec. 1860 [hereinafter Douglass, *The Late Election*], reprinted in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 356, 357, 359.

66. See Confiscation Act of 1861, ch. 60, 12 Stat. 319; Confiscation Act of 1862, ch. 195, 12 Stat. 589.

67. Abraham Lincoln, *Preliminary Emancipation Proclamation* (Sept. 22, 1862), in ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS, *supra* note 43, at 345, 346.

68. Ralph Waldo Emerson, *The President’s Proclamation* (Oct. 12, 1862), in EMERSON’S ANTISLAVERY WRITINGS, *supra* note 4, at 129, 131.

69. Douglass, *The Late Election*, *supra* note 65, at 358; see Goldstein, *supra* note 22, at 621 (on Douglass’s criticism of Lincoln’s fugitive slave policy).

70. Douglass, *The Fugitive Slave Law*, *supra* note 41, at 73.

“construed according to its reading,” mandated the expansive 1850 Act or prohibited its repeal or nonenforcement.⁷¹ To Douglass, natural law also invalidated the framers’ Fugitive Slave Clause and the 1850 Act: “It has been said that our fathers entered into a covenant for this slave-catching. . . . If they made a covenant that you should do that which they have no right to do themselves, they transcended their own authority, and surely it is not binding on you.”⁷² In Douglass’s view, the illegitimate Clause did not empower or bind lawmakers, Lincoln included, to provide for the recapture of fugitive slaves.

During the War, the fugitive slave matter became a question of contraband law. Douglass, a critic of Lincoln’s early administration of the War, objected when Lincoln in August 1861 relieved Major-General John C. Frémont for declaring fugitive slaves emancipated contraband.⁷³ Years later, Douglass held that Lincoln, “when he revoked the proclamation of emancipation of General Frémont,” showed that he “was willing to pursue, recapture, and send back the fugitive slave to his master, and to suppress a slave rising for liberty, though his guilty masters were already in arms against the Government.”⁷⁴ In so doing, Lincoln revealed he was “preeminently the white man’s President.”⁷⁵ Similarly, in a July Fourth address in 1862, Douglass faulted Lincoln for failing to enforce the Confiscation Acts’ promise of liberty to fugitives.⁷⁶ Only the eventual enforcement of the Confiscation Acts and Emancipation Proclamation convinced Douglass that the Lincoln Administration had brought some limited “reprobation upon slave-hunting.”⁷⁷ This “immortal paper which, though special in its language, was general in its principles and effect, making slavery forever impossible in the United States.”⁷⁸

71. See Douglass, Letter to Chase *supra* note 14, at 128; Douglass, What to the Slave is the Fourth of July?, *supra* note 20, at 190.

72. Douglass, *The Fugitive Slave Law*, *supra* note 41, at 72–73; see Buccola, *supra* note 30, at 3 (discussing Douglass’s response to the Fugitive Slave Act).

73. Frederick Douglass, *The Real Peril of the Republic*, DOUGLASS’ MONTHLY, Oct. 1861, reprinted in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 405, 407; Frederick Douglass, *Signs of the Times*, DOUGLASS’ MONTHLY, Oct. 1861, reprinted in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 409, 411.

74. Frederick Douglass, Oration in Memory of Abraham Lincoln: An Address (Apr. 14, 1876) [hereinafter Douglass, Oration in Memory of Abraham Lincoln], in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 605, 608–09.

75. *Id.* at 608.

76. Frederick Douglass, The Slaveholders’ Rebellion: An Address (July 4, 1862), in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 442, 457–58.

77. Frederick Douglass, The Mission of the War: An Address (Jan. 13, 1864), in FREDERICK DOUGLASS: SPEECHES & WRITINGS, *supra* note 15, at 529, 546.

78. Douglass, Oration in Memory of Abraham Lincoln, *supra* note 74, at 611.

Southern secession let Lincoln bring positive law closer to antislavery natural law. When Confederate slaveholders seceded, opening a period of rebellion, Lincoln could finally turn their supposed right to property in man into a tool for abolition through seizure of contraband property. To Emerson, Lincoln through the Emancipation Proclamation had finally shown willingness to interpret the Constitution flexibly: “All our action now is new & unconstitutional, & necessarily so. . . & enough to drive a strict constructionist out of his wits.”⁷⁹ For Lincoln, as for Douglass, war allowed abrogation of the 1850 Fugitive Slave Act. Douglass in 1850 predicted abolition would come through war, quoting Jefferson: “It was the sage of the Old Dominion that said . . . ‘God *is just*, and that his justice cannot sleep forever.’”⁸⁰ Lincoln, in the same jeremiad tradition, concluded his second inaugural:

Yet, if God wills that it continue, until all the wealth piled by the bond-man’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said “the judgments of the Lord, are true and righteous altogether.”⁸¹

Lincoln and Douglass differed on their obligations to do constitutional evil under the 1850 Fugitive Slave Act. This was perhaps because they held different relationships to the law. Douglass, never oath-bound to the Constitution,⁸² freely condemned the document in his essays and speeches on broad natural rights grounds. Lincoln, obligated by oath to uphold the Constitution, understood himself as bound to enforcement of the whole Constitution, Fugitive Slave Clause included—perhaps as a Unionist position early in the secession crisis—until secession and the Confiscation Acts empowered him to emancipate fugitives. Lincoln and Douglass’ different positions might be reduced to their different obligations under the law.

79. Ralph Waldo Emerson, Journal VA (1862) in 15 THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON, *supra* note 13, at 301.

80. Douglass, *The Nature of Slavery*, *supra* note 26, at 430.

81. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS, *supra* note 42, at 449, 450.

82. However, Douglass, in an August 10, 1863, meeting with Lincoln, did accept a military commission—ultimately undelivered—which would have bound him by oath to protect and defend the Constitution. NAT’L PARK SERVS., *Confronting a President: Douglass and Lincoln*, <https://www.nps.gov/frdo/learn/historyculture/confronting-a-president-douglass-and-lincoln.htm> (last visited Aug. 31, 2023).