

Response to Professor Blight's *Frederick Douglass and the Two Constitutions: Proslavery and Antislavery*

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In his essay *Frederick Douglass and the Two Constitutions*, Professor David Blight explores the constitutional thought of the nineteenth century's great human rights advocate, statesman, and orator, Frederick Douglass. How should we understand, he asks, Douglass's arrival at a natural rights interpretation of the 1787 Constitution? Given that he was born enslaved and came of age as an outlaw, Douglass's ideas cannot be explained by resort to a conventional narrative about university training, supervised reading of law, or time spent engaging the minds of the nation's high jurists. Douglass enjoyed none of these routes as he developed his thinking about the Constitution.

To understand Douglass's ideas, Professor Blight explains, we must look elsewhere. He discovers, remarkably, how even as a young person toiling under the lash on Maryland's Eastern Shore, Douglass developed natural rights ideas as a counter to the seemingly "absolute" power of slaveholders and their agents who demanded his submission as a matter of body, mind, and law.¹ Long before he commanded the podium or wielded the pen, Douglass was an organic natural rights philosopher whose own confined condition gave birth to liberatory ideas.

Douglass's education continued in the years after he, in 1838, stole himself from enslavement and joined the slaves' cause, an abolitionist movement that

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1. In *State v. Mann*, Thomas Ruffin ruled in favor of a White man charged with committing battery against an enslaved woman. The man shot Lydia from behind as she fled his cruelty, and he remained immune from punishment in Ruffin's view: "The power of the master must be absolute to render the submission of the slave perfect." *North Carolina v. Mann*, 13 N.C. (2 Dev.) 263, 266 (N.C. 1830); see generally Sally Greene, *State v. Mann Exhumed*, 87 N.C.L. REV. 701 (2009).

demanded slavery's immediate and unqualified end. It was time then for Douglass to contend with how many within that movement, notably its head and Douglass's mentor William Lloyd Garrison, regarded the Constitution as "the source and parent of all the other atrocities: 'a covenant with death, and an agreement with Hell.'" In this view, the text was an explicitly proslavery document that could not be recuperated from its ignoble origins.

Douglass never wholly embraced this view of the Constitution. Instead, over and over in the late 1840s and early 1850s, he manifested an openness to an alternative, antislavery view of the text, Professor Blight explains. "The Supreme Court . . . is not the only power in the world," Douglass declared, "but the Supreme Court of the Almighty is greater."² At no moment more so than on that day in March 1857 when the U.S. Supreme Court released its ruling in *Dred Scott v. Sanford*³ did Douglass reach for his resolve that the Constitution necessarily incorporated the laws of nature. Chief Justice Roger Taney, in Douglass's view, had rebuked Black claims to citizenship and, in doing so, betrayed the "higher law" truths of the Constitution.

In this essay, a closer look at Douglass's thinking about *Dred Scott* and the related debates about Black citizenship open an alternative window into Douglass's constitutional thought. Professor Blight traces how natural rights came to be fused with Douglass's views of the Constitution through the *Scott* case. This essay's broader examination of Douglass's thinking about the problem of Black citizenship reveals he was a varied, versatile, and pragmatic thinker when it came to matters of constitutional interpretation.

While Douglass was developing his natural rights view of the Constitution in the 1840s and 1850s, he also practiced a forceful textualism, advocating for a plain meaning approach to the text when explaining Black citizenship. When confronted with Justice Taney's ideas in 1857, Douglass was among those who shot back. But, rather than joining the voices of those within the judiciary who condemned the decision in textualist terms as wrong-headed—and who subsequently declined to enforce it—Douglass moved away from a doctrinal critique and onto a political critique of *Dred Scott*.

Only a short time later, Douglass was there to witness how Civil War and Reconstruction-era lawmakers undid *Dred Scott*, with the 1862 Opinion of the Attorney General Bates on Citizenship,⁴ the Civil Rights Act of 1866,⁵ and the Fourteenth Amendment's ratification in 1868. For many, *Dred Scott* was thus

2. FREDERICK DOUGLASS, TWO SPEECHES, BY FREDERICK DOUGLASS; ONE ON WEST INDIA EMANCIPATION, DELIVERED AT CANANDAIGUA, AUG. 4TH, AND THE OTHER ON THE DRED SCOTT DECISION 31 (Rochester, NY, C. P. Dewey 1857) [hereinafter DOUGLASS, TWO SPEECHES].

3. 60 U.S. 393 (1857).

4. Opinion of Attorney General Bates on Citizenship, Op. Att'ys Gen. (1862).

5. An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, ch. 31, 14 Stat. 27 (1866) [hereinafter Civil Rights Act of 1866].

wholly discredited and relegated to history's tragic dustbin. Not so for Douglass. When it came to that case's notorious denigration of Black citizenship, Douglass was no longer a natural rights thinker. Nor was he a textualist. Instead, he condemned Justice Taney's thinking in political terms.

By the 1890s, amidst the rise of Jim Crow's violence, disenfranchisement, and segregation, Douglass returned to *Dred Scott*. Not to only resurrect natural rights arguments, nor to simply review textualist interpretations of the Constitution. Instead, for Douglass, *Dred Scott* endured as a lesson in the very limits of constitutional thinking. The case stood for how politics could override doctrine.

Justice Taney's words re-entered Douglass's political rhetoric as a shorthand for what he viewed as the low point in American legal culture. His public remarks wove a cautionary tale about how low the nation could sink when it came to the rights of Black Americans. When Douglass invoked *Dred Scott*, it was a plea that the nation not return to the time of Roger Taney and his most infamous decision. It is this legacy—that of *Dred Scott* as a political touchstone—that we live with even today.

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Today, we can still hear pundits invoking *Dred Scott v. Sanford*. Whether from the left during arguments in defense of affirmative action or from the right in condemnation of *Roe v. Wade*, the Court's notorious ruling that no Black American could be a citizen of the United States still carries a political punch. On all sides, *Dred Scott* is held out as a cautionary tale, an analogy, and as a shorthand for the worst of the Court's flawed reasoning. The depths of that moment in spring 1857 was a low point, commentators warn, to which we must not return.

Less apparent is the debt which our twenty-first-century political rhetoric owes, when it comes to the invocation of *Dred Scott*, to Frederick Douglass. He was likely the nation's first-best student of the case and the issue of Black citizenship that sat at its center. Douglass, the textualist, had fueled years of debate to which Justice Taney finally replied in his 1857 decision. Douglass, the political agent, condemned the Court's holding in expressly natural rights terms. And even after the Reconstruction-era Congress rendered *Dred Scott* unenforceable—making Black Americans unequivocally birthright citizens—Douglass held on to the case as a reminder to all Americans of how debased courts, and the Constitution they were charged with safeguarding, risked becoming.

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The earliest debates about Black citizenship predated Douglass, getting their start in the so-called Colored Conventions of the 1830s. Black advocates argued that the Constitution on its face made them citizens. They recognized that while the text was generally silent about who precisely was regarded as a citizen

of the United States, they also noted that Article II, Section 1 provided that the President, to hold office, must be a “natural born citizen” of the nation. These words, they reasoned, evidenced that such a category—the natural born or what they more often termed the birthright citizen—was contemplated and even presumed by the Framers. Further, they pointed out that the same text drew no color line between those said to be Black and those said to be White, even as it distinguished between the status of free persons, enslaved people, and “Indians.”⁶ Free Black persons, they pressed, were thus not unlike the President: by virtue of birth, citizens of the United States.

Douglass was a resident in Baltimore City during the very years that Black men there were crafting this textualist view of their citizenship. Among them was educator, newspaper correspondent, and minister of the Sharp Street African Methodist Episcopal Church William Watkins. Starting in the late 1820s, under the auspices of the Legal Rights Association, Watkins and others tested the birthright theory. They consulted with lawyers, such as one-time U.S. Attorney General William Wirt, and queried whether local ordinances that, for example, imposed curfews upon Black, but not White, city residents were constitutionally permissible.⁷ These ideas were alive and generative in Baltimore’s free Black community during the very same critical years that Douglass spent there. Whether he encountered these ideas, we cannot say for certain. But, as Professor Blight suggests, if Douglass met men like Watkins, he surely imbibed their emerging ideas about Black citizenship and a textualist view of the Constitution.⁸

In 1843, the City of Buffalo, in upstate New York, hosted the year’s National Convention of Colored Citizens. The call, issued in May, advised that the convention was necessary “to secure the enjoyment of their inalienable rights.”⁹ Douglass sat among the delegates, listening as Samuel H. Davis, chairman pro tempore, delivered the opening address and decried Black laws as

6. See U.S. CONST. art. I, § 2 (“excluding Indians not taxed” from apportionment of representatives).

7. Baltimore Emigration Society, *From the American, of Sept. 4th, 1824*, GENIUS OF UNIVERSAL EMANCIPATION, Nov. 1824, at 27; Entry of July 21, 1827, in JOHN H. B. LATROBE DIARIES, 1824–40, MS 1677 (Md. Hist. Soc’y ed.) [hereinafter LATROBE DIARIES] (“Watkins a colored man called to know whether the mayor’s proclamation ordering the colored people to be taken up after 11 o’clock pm was constitutional.”); Entry of July 23, 1827, in LATROBE DIARIES; Entry of February 3, 1828, in LATROBE DIARIES (“Received from Hezekiah Grice, on account. \$5.00.”); *The First Colored Convention*, 1 ANGLO-AFRICAN MAG. 1 (1859).

8. For an extended discussion of this campaign for Black citizenship, see generally MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018).

9. *The Call*, in NAT’L CONVENTION OF COLORED CITIZENS, MINUTES OF THE NATIONAL CONVENTION OF COLORED CITIZENS; HELD AT BUFFALO; ON THE 15TH, 16TH, 17TH, 18TH AND 19TH OF AUGUST 1843, FOR THE PURPOSE OF CONSIDERING THEIR MORAL AND POLITICAL CONDITION AS AMERICAN CITIZENS 3, 3 (New York, Piercy & Reed 1843) [hereinafter MINUTES OF NAT’L CONVENTION OF COLORED CITIZENS].

the manifestation of “unholy and cruel prejudice.”¹⁰ Davis recognized that there were formerly enslaved people among the delegates, and he reminded them how enslavers cynically held fast to the Constitution, with its guarantee of freedom and equal rights for all, with one hand, and drew blood with the other. Even in New England, he insisted, White men used law to impose “flagrant injustices.”¹¹

The Constitution had yet another purpose, Davis urged. It guaranteed to Black Americans their “happiness in any part of the country” along with “the elective franchise.”¹² Davis rooted his ideas in a claim to citizenship: “This is our own native land . . . we love our country, we love our fellow citizens—but we love liberty more.”¹³ With his remarks later published in pamphlet form, Davis’s ideas became part of a growing creed among Black Americans: they were citizens of the United States by birth.¹⁴

By the 1850s, Douglass was recognized as an independent and influential thinker on many matters, including how to understand the Constitution. He now promoted the birthright theory. At the 1853 Colored National Convention in Rochester, New York, for example, delegates concertedly reviewed the Constitution as a text. Douglass himself headed a committee that positioned Black citizenship as a bulwark against the twin ills of Black laws and colonization in an address “to the people of the United States.”¹⁵

Black Americans were “not as aliens nor as exiles” but “American citizens asserting their rights on their own native soil.”¹⁶ They wrote: “[W]e would, first of all, be understood to range ourselves no lower among our fellow-countrymen than is implied in the high appellation of ‘citizen.’ . . . By birth, we are American citizens; by the principles of the Declaration of Independence, we are American citizens; by the meaning of the United States Constitution, we are American citizens.”¹⁷ Douglass and his companion delegates rested on natural rights and the plain meaning of the text to make their strongest case.

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Justice Taney took his chance to fire back against this textualist interpretation of citizenship and the Constitution in spring 1857. In response to

10. Samuel H. Davis, *Address*, in MINUTES OF NAT’L CONVENTION OF COLORED CITIZENS, *id.*, at 4, 4.

11. *Id.*

12. *Id.*

13. *Id.* at 5.

14. William J. Richardson, *The Life and Times of Samuel H. Davis: An Anti-Slavery Activist*, 33 AFRO-AMS. IN N.Y. LIFE AND HIST. 47, 47–89 (2009); *see generally* MINUTES OF NAT’L CONVENTION OF COLORED CITIZENS, *supra* note 11.

15. Frederick Douglass, *Address of the Colored National Convention to the People of the United States*, in PROCEEDINGS OF THE COLORED NATIONAL CONVENTION HELD IN ROCHESTER, JULY 6TH, 7TH AND 8TH, 1853, at 7, 7 (1853) [hereinafter DOUGLASS, *Address of the Colored National Convention*].

16. *Id.* at 8.

17. *Id.* at 11.

the decision in *Scott v. Sandford*, Professor Blight explains, Douglass “desperately” countered with a claim to natural rights: “The Supreme Court . . . is not the only power in the world,” Douglass urged, “but the Supreme Court of the Almighty is greater.”¹⁸ Justice Taney “could not change the essential nature of things, making evil good, and good evil.”

But was Douglass’s “*Dred Scott* speech,” as Professor Blight suggests, “a bit like whistling in a graveyard?”¹⁹ That view, of the nearly martyred Black activist crushed by Taney’s Court, may have won Douglass attention and even partisans for the antislavery cause. He made important political hay out of Justice Taney’s extreme, poorly argued, and over-reaching decision. But he was hardly alone when critiquing it. Highly placed textualists—judges in state and federal courts—also scrutinized Taney’s reasoning, distinguished the facts before them from those at issue in *Dred Scott*, and preserved a toehold for Black Americans as citizens before the Constitution.²⁰

The United States Circuit Court for Indiana, for example, held that “a negro of the African race born in the United States . . . is a citizen of the United States . . . and entitled as such to sue in its courts.”²¹ In Illinois, Justice John McLean, a dissenter in the decision at the Supreme Court, in the summer of 1857 while sitting on the federal circuit court, limited the scope of *Dred Scott* in the case of *Mitchell v. Lamar*.²² Joseph Mitchell, a free African American from Illinois, brought a suit against Charles Lamar, a White resident of Wisconsin.²³ Lamar had assaulted Mitchell, who sustained significant injuries and thus sought damages.²⁴ Did the federal court have jurisdiction? McLean thought it did and reasoned that Mitchell, a free Black man not descended from enslaved people, was a citizen in that he was “[a] freeman, who has a permanent domicile in a State, being subject to its laws in acquiring and holding property, in the payment of taxes, and in the distribution of his estate among creditors, or to his heirs on his decease.”²⁵ No, Mitchell could not vote like White men could. However, “it is not necessary for a man to be an elector in order to enable him

18. DOUGLASS, TWO SPEECHES, *supra* note 2, at 31.

19. David Blight, *Frederick Douglass and the Two Constitutions: Proslavery and Antislavery*, 111 CALIF. L. REV. 1929, 1937 (2023).

20. Fehrenbacher discusses these cases in *The Dred Scott Case*. See Don E. Fehrenbacher, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 692 nn.91–92 (1978).

21. Roger Brook Taney, *Supplement to the Dred Scott Opinion*, reprinted in SAMUEL TYLER, MEMOIR OF ROGER BROOKE TANEY, LL.D., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 578–79, 598–608 (Baltimore, J. Murphy 1876) [hereinafter Taney, *Supplement*].

22. Martha S. Jones, *Birthright Citizenship and Reconstruction’s Unfinished Revolution*, J. OF THE CIVIL WAR ERA, <https://www.journalofthecivilwarera.org/forum-the-future-of-reconstruction-studies/birthright-citizenship-reconstructions-unfinished-revolution/> [https://perma.cc/8NXX-7RUY]; *Important Decision in the U.S. Circuit Court: James C. Mitchell vs. Charles Lamar*, CHI. DAILY TRIB., July 15, 1857.

23. Jones, *supra* note 22.

24. *Id.*

25. *Id.*

to sue in a Federal Court,” McLean reasoned. “Such a man is a citizen, so as to enable him to sue, as I think, in the Federal Courts.”²⁶

State court judges in Maine and Ohio outright refused to incorporate *Dred Scott*'s logic into their determinations. In Ohio, one court confronted the question when called on to interpret the phrase “citizen of the United States” in the state constitution. Distinguishing Justice Taney's opinion as one limited to descendants of enslaved people, the court declined to hold that a free man of mixed racial descent could never be considered a citizen. In Maine, by the request of the legislature, the justices of that state's high court interpreted a key provision of the state constitution that provided in pertinent part that “[e]very male citizen of the United States, of the age of twenty-one years and upwards . . . shall be an elector.”²⁷ Could free men of color serve under this provision? Yes. “Our constitution does not discriminate between the different races of people which constitute the inhabitants of our state; . . . the term, ‘citizens of the United States,’ as used in that instrument, applies as well to free colored persons of African descent as to persons descended from [W]hite ancestors.”²⁸ At least in some non-slaveholding states, courts declined to afford *Dred Scott* binding weight, even when the terms of U.S. citizenship were at issue.

At least one southern state, Mississippi, was unsure about whether *Dred Scott*'s reasoning was consistent with state law. First, in the spring of 1858, the high court held that a free African American had standing to sue in pursuit of his claims as an heir, holding: “Negroes born in the United States, and free by the laws of the State in which they reside, are in a different condition from aliens.

26. *Important Decision in the U.S. Circuit Court: James C. Mitchell vs. Charles Lamar*, CHI. DEMOCRATIC PRESS, May 15, 1857, reprinted in N.Y. EVENING POST, May 20, 1857, at 3; CHI. DAILY TRIB., July 15, 1857, at 1; and NAT'L ERA, July 30, 1857, at 4; see also *A Case Under the Dred Scott Decision*, N.Y. HERALD, July 13, 1858; *Can Colored Men Sue in the Federal Courts?*, WASH. REP., July 22, 1857, at 2.

27. ME. CONST. art. II, § 1 (repealed).

28. *Opinions of the Just., on Question Propounded by the Senate.*, 44 Me. 505, 508 (1857) (declining to apply *Dred Scott* when interpreting the phrase “citizen of the United States”); *Anderson v. Millikin*, 9 Ohio St. 568, 577 (1859) (“The question is not, what the phrase ‘citizen of the United States’ means in the light of the decision in the case of *Dred Scott v. Sandford*, but what the framers of our [state] constitution intended by the use of that phrase, and what, in the connection in which it is found, and with the light and knowledge possessed when it was used, it was intended to mean.”); see also *Opinion of the Just.*, 41 N.H. 553, 553 (1857) (affirming constitutionality of “[a]n act to secure freedom and the rights of citizenship to persons in this State,” which was passed by the New Hampshire House of Representatives on June 26, 1857). For an example in which a local court declined to follow the reasoning in *Dred Scott* to bar an African American from suing, see generally Richard F. Nation, *Violence and the Rights of African Americans in Civil War-Era Indiana: The Case of James Hays*, 100 IND. MAG. HIST. 215, 215–30 (2004). The court was required to interpret an 1851 amendment to the state's constitution, changing its requirement for electorship to “[W]hite male citizen of the United States” from “[W]hite male inhabitants.” The latter, originally used in the state's 1802 constitution, had been widely interpreted to include not only White males but also free men of mixed-race descent whose bloodline was less than half Black. *Anderson*, 9 Ohio St. at 569–70, 572, 577; *Opinions of the Just.*, 44 Me. at 507; Fehrenbacher, *supra* note 20, at 688 n.53.

They are natives, and not aliens. Though not *citizens* . . . they are *inhabitants* and *subjects* of the State, owing allegiance to it, and entitled to protection by its laws and those of the United States.”²⁹ However, when confronted with similar facts the following spring, the court did an about-face, embraced Justice Taney’s reasoning, and deemed free Black people “alien strangers, of an inferior class, incapable of comity, with which our government has no commercial, social, or diplomatic intercourse.”³⁰

In Maryland, home to both Douglass and Taney, the high court decided *Hughes v. Jackson*.³¹ There, hints surfaced of how *Dred Scott* might function less as doctrine and more as a cultural-legal perspective that rationalized denying Black citizenship and access to the courts. The attorney for William Hughes, looking to defeat Samuel Jackson’s money claims, suggested that in Maryland, legal remedies for Black residents were out of reach. His argument was not tightly woven, relying neither upon specific citizenship language in the Maryland state constitution nor upon any necessary relationship between state and federal citizenship. Instead, Hughes’s counsel referred summarily to the “opinion of Chief Justice Taney in the *Dred Scott* case” to support the view that Black people were without standing to sue.³² The court declined to follow Justice Taney’s lead.

Declaring that Black Marylanders enjoyed a broad right to sue and be sued, Chief Justice John Carroll Legrand reasoned by way of history: “From the earliest history of the colony,” he explained, “free negroes have been allowed to sue in our courts and to hold property, both real and personal, and at one time, they having the necessary qualifications, were permitted to exercise the elective franchise.”³³ Legrand looked ahead and suggested that “so long as free negroes remain in our midst, a wholesome system induces incentives to thrift and respectability, and none more effective could be suggested than the protection of their earnings.”³⁴ Justice Legrand concluded by affirming the lower court judgment and obliging William Hughes to pay Samuel Jackson the \$750 due him.³⁵

Justice Taney’s reasoning, these cases made clear, was not unassailable. Not only did Black Americans manage to access some federal and state courts even after *Dred Scott*. Judges knowingly, openly even, distinguished subsequent cases from that which had been before the Supreme Court. The Chief Justice

29. *Shaw v. Brown*, 35 Miss. 246, 315 (1848).

30. *Heim v. Bridault*, 37 Miss. 209, 224–25 (1859).

31. 12 Md. 450 (1858).

32. *Id.* at 455; *see also id.* at 462 (describing the question presented to the court as “whether a negro can maintain an action in this State, without first averring in his pleadings, and establishing by proof, his freedom”); Argument of Appellee at 1857–58, *Hughes v. Jackson*, 12 Md. 450 (1858) (No. S375-21).

33. *Hughes*, 12 Md. at 464.

34. *Id.*

35. *Id.* at 464, 451.

grew despondent over the resistance to his decision. The ordinarily taciturn Taney wrote to his confidante David Perine to ask: "Have you read the opinion of the court in this case of *Scott v. Sanford*? I hope you find it all right."³⁶ He went so far as to, in 1858, pen a rebuttal opinion that few read until after his death. Privately, Justice Taney reargued only one facet of the case, that of Black citizenship. He wrote confidentially: "If the question comes before the Court again in my lifetime, it will save the trouble of again investigating and annexing the proofs."³⁷ That chance never came.

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A short time later, by the early 1860s, Douglass was drawn into scenes in which constitutional interpretation—both natural rights and textualist approaches—collided with politics. He bore witness to the deliberate undoing of *Dred Scott*. Even before the Civil War's end, the tide shifted on Black citizenship. The first sign came in November 1862 when Edward Bates, Abraham Lincoln's attorney general, was asked to render an opinion about the citizenship of a Black seaman who, if found to be a noncitizen, would be barred from commanding a schooner off the coast of New Jersey.³⁸

Bates plainly restated the matter: "Who is a citizen? What constitutes a citizen of the United States?"³⁹ He scoured court decisions and the "action of the different branches of our political government."⁴⁰ Discovering no clear answer there, Bates penned his own that echoed ideas developed in the Colored Conventions: "every person born in the country is, at the moment of birth, *prima facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the 'natural born' right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance."⁴¹ In the case of the free Black seaman from New Jersey, Bates was unequivocal: he could rightly command the vessel in question as a citizen of the United States.⁴²

Douglass wrote admiringly of Bates's decision, dubbing it a "recent important opinion"⁴³ crafted by way of "elaborate and exhaustive reasoning" and

36. Letter from Roger Brooke Taney to David Perine (June 16, 1857) (on file with the Maryland Historical Society); Fehrenbacher, *supra* note 20, at 687 n.42 (citing Letter from Taney to Caleb Cushing (Nov. 9, 1857) (on file with the Library of Congress, Washington, D.C.)).

37. Roger B. Taney, *Statement on the Historical Fact in the Opinion of the Supreme Court of the United States in the Dred Scott Case*, in MD. CTR. FOR HIST. & CULTURE, PERINE FAMILY PAPERS, box 9; Taney, *Supplement*, *supra* note 21, at 578.

38. Bates, *supra* note 4, at 3.

39. *Id.*

40. *Id.*

41. *Id.* at 12.

42. *Id.* at 22–23.

43. *Citizenship of Colored Person, Etc.*, DOUGLASS' MONTHLY, Mar. 1863, at 813.

“remarkable on many grounds.”⁴⁴ Here Douglass did not emphasize natural law, though he did see a manifestation of the “great principles of justice and freedom.”⁴⁵ He affirmed Bates’s interpretation of the Constitution’s “citizen” in textualist terms, pointing out how Congress had declined to limit citizenship to the nation’s White inhabitants only. But in this moment, Douglass leveled history as the best weapon against the Court’s “extra-judicial decision in that far-famed case of Dred Scott.”⁴⁶ The historical record, he explained, established that in the state of Massachusetts, Black Americans had always been citizens, exposing the lie in Justice Taney’s historical account.⁴⁷

Bates’s opinion was the subject of a meeting at Brooklyn’s Bridge Street African Methodist Episcopal Church, and Douglass used the pages of his paper, *Douglass’ Monthly*, to share its resolutions widely. There were echoes of long-standing natural rights thinking expressed: “It is presumed that [our government’s] founders intended the Constitution to secure the end of justice, and that presumption must prevail.”⁴⁸ This blended with textualism: the presumption of justice “cannot be overthrown by facts or arguments drawn from any source other than the words of the document itself.”⁴⁹

Douglass learned anew the power of the Constitution when, as White Southerners got to work on imposing a slavery-like regime on the newly freed people, Congress promulgated the Civil Rights Act of 1866. It opened with a declaration of citizenship as a birthright: “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”⁵⁰ For Black Americans, now neither race nor color nor “previous condition of slavery or involuntary servitude” disqualified them from claiming new, affirmative rights: “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by [W]hite citizens.”⁵¹

A new Fourteenth Amendment put birthright citizenship on more secure footing—insulating it from the changing winds of politics and the shifting minds of subsequent sessions of Congress. It also affirmed the constitutional thinking that Douglass and Black activists broadly had been advocating for since the 1820s. Getting there required that Congress pass the Reconstruction Act of 1867,

44. *Id.* at 797.

45. *Id.*

46. *Id.*

47. See generally *Citizenship of Colored Person, Etc.*, *supra* note 43; *Citizenship of Colored Americans*, DOUGLASS’ MONTHLY, Feb. 1863.

48. *Citizenship of Colored Person, Etc.*, *supra* note 43, at 813.

49. *Id.*

50. Civil Rights Act of 1866, *supra* note 5, § 1.

51. *Id.*

which mandated the establishment of new governments in the South. The Act also made Black men eligible to vote and hold office, and required ratification of the Fourteenth Amendment as a condition for Southern states' readmission into the Union. The lesson here was about how neither an insistence upon a natural law constitution nor a strict textualist read of the document was sufficient to resolve the question of Black citizenship. It took just over two years, until 1868, for the requisite twenty-eight states to approve the amendment's ratification, in a process that was as much politics as it was jurisprudence. Douglass had been right all along to ground his advocacy in both realms of action.

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By the 1880s, Jim Crow's violence, disenfranchisement, and segregation led Douglass to return to *Dred Scott* and engage in a new form of constitutional thinking, one that held up the Court's blunder to shed light on the challenges of a new era. Neither to resurrect natural rights arguments nor to review a textualist interpretation of the Constitution, instead Douglass invoked *Dred Scott* to warn that politics again threatened to override doctrine.

In 1883, following on the heels of the *Civil Rights Cases*, Douglass spoke to a crowd in Washington, D.C., where he wove *Dred Scott* into a historical narrative of injustices: "The cause which has brought us here to-night[, the *Civil Rights Cases*,] is neither common nor trivial. It has swept over the land like a moral cyclone, leaving moral desolation in its track. We feel it, as we felt the furious attempt, years ago, to force the accursed system of slavery upon the soil of Kansas, the enactment of the Fugitive Slave Bill, the repeal of the Missouri Compromise, the *Dred Scott* decision."⁵²

Douglass drew upon his thinking as a textualist to explain the depths of the past: "In the dark days of slavery, this Court, on all occasions, gave the greatest import to intention as a guide to interpretation. The object and intention of the law, it was said, must prevail. Everything in favor of slavery and against the negro was settled by this object and intention. . . . When we said in behalf of the negro that the Constitution of the United States was intended to establish justice and to secure the blessings of liberty to ourselves and our posterity, we were told that the words said so, but that was obviously not its intention; that it was intended to apply only to [W]hite people, and that the intention must govern."⁵³

At other times, Douglass credited *Dred Scott* with bringing the nation around to the antislavery cause: "It was a sorry day for slavery when . . . the

52. Frederick Douglass, *Speech of Hon. Frederick Douglass*, in PROCEEDINGS OF THE CIVIL RIGHTS MASS MEETING HELD AT LINCOLN HALL, OCTOBER 27, 1883, at 4, 4 (Washington D.C., C.P. Farrell 1883).

53. *Id.* at 10 (emphasis omitted). The Civil Rights Act of 1875 protected equal access to public accommodations and facilities and to serve on juries. On October 15, 1883, the Supreme Court struck down the Act. The next day, Douglass and several other leaders organized a mass meeting in D.C.

cold, merciless, and shocking decision of Chief-Justice Taney in the *Dred Scott* case [was issued] . . . [a link in the] chain of events that finally roused the loyal nation to the point of resistance to the aggressive spirit of slavery . . . ”⁵⁴

Dred Scott still haunted Douglass and his audiences in the 1890s, and he took time to defeat its logics over and again, especially as they resurfaced in law, but also in politics and culture. He mocked Taney when telling of an accomplished Black architect: “This [B]lack man . . . a man whom, a few years ago, some of our learned ethnologists would have read out of the human family and whom a certain Chief Justice would have turned out of court as a creature having no right which [W]hite men were bound to respect, was one of the very best draftsmen and designers in the state of New York.”⁵⁵

Americans, Douglass urged, must ward off any return to the era of *Dred Scott*. The case was a cautionary tale about how low the nation could sink: “Chief Justice Taney truly described the condition of our people when he said in the infamous *Dred Scott* decision, that they were supposed to have no rights which [W]hite men were bound to respect. White men could shoot, hang, burn, whip and stare them to death with impunity. They were made to feel themselves as outside the pale of all civil and political institutions.”⁵⁶

Douglass invoked Taney’s thinking to reveal how Americans, especially the agents of Jim Crow’s rise, were working pursuant to the same old threadbare ideas that had once animated *Dred Scott*. His words dripped with sarcasm: “In fact, there has been no end to the problems of some sort or other, involving the negro in difficulty. Can the negro be a citizen? Was the question of the *Dred Scott* decision. Can the negro be educated? Can the negro be induced to work for himself, without a master? Can the negro be a soldier? Time and events have answered these and all other like questions.”⁵⁷

Of lynchers, Douglass explained, “A dead negro is with them a common just. They care no more for a negro’s right to live than they care of his right to

54. Frederick Douglass, *The Great Agitation*, 7 COSMOPOLITAN 365 (1889), reprinted in FREDERICK DOUGLASS, 1 THE FREDERICK DOUGLASS PAPERS, SERIES FOUR: JOURNALISM AND OTHER WRITINGS 433, 439–40 (John R. McKivigan ed., 2021). Also, the SUNDAY DEMOCRAT GAZETTE, Mar. 24, 1889, series generally examined the abolitionist movement. Just a few months before, Douglass had been appointed minister plenipotentiary to Haiti. Douglass admired the abolitionist movement, but also explained how the “bad cause [of slavery] destroyed itself.” Douglass, *The Great Agitation*, *supra*.

55. Frederick Douglass, *Self-Made Men: An Address Delivered in Carlisle, Pennsylvania* (Mar. 1893), reprinted in FREDERICK DOUGLASS, THE SPEECHES OF FREDERICK DOUGLASS: A CRITICAL EDITION, 414, 443–44 (John R. McKivigan, Julie Husband & Heather L. Kaufman eds., 2018) [hereinafter THE SPEECHES OF FREDERICK DOUGLASS].

56. Ida B. Wells, Frederick Douglass, Irvine Garland Penn & Ferdinand Barnett, *Introduction to THE REASON WHY THE COLORED AMERICAN IS NOT IN THE WORLD’S COLUMBIAN EXPOSITION* 3, 7 (1893).

57. Frederick Douglass, *Lessons of the Hour: An Address Delivered in Washington, D.C.* (Jan. 9, 1894), reprinted in THE SPEECHES OF FREDERICK DOUGLASS, *supra* note 55, at 454, 496.

liberty, or his rights to the ballot. Chief Justice Taney told the exact truth about these people when he said: ‘They did not consider that the [B]lack man had any rights which the [W]hite men were bound to respect.’ No man of the South ever called in question that statement and they never will.”⁵⁸

Inserting *Dred Scott* into the political debates of the 1890s, Douglass did not fear that the case might be good law or that its express terms would be resurrected by the courts. In this sense, Justice Taney’s ideas indeed lay in history’s dustbin. At the same time, Douglass exploited the consensus that came to enshroud the decision—it had been argued in error, wrongly decided, and demonstrated how far the Court could stray from sound interpretation, be that driven by a natural rights or a textualist approach. Douglass understood, we might say he invented and then promoted, *Dred Scott*’s political meaning. Americans must remember the case not to emulate it, but to avoid the advent of a similarly debased chapter in their history.

* * *

Today, we can credit Frederick Douglass with firmly installing *Dred Scott* into our political parlance. He despised Justice Taney’s decision from the start, but over time saw the value of keeping that case fresh in the minds of Americans, especially when they were on the brink of committing constitutional wrongs that paralleled Justice Taney’s denial of Black American citizenship. The case, it turns out, is today not only a weapon in the rhetoric of pundits and commentators, but also, until very recently, was still a touchstone for the Court itself.

In the 2000 case *Boy Scouts of America v. Dale*, the Court permitted the Scouts to exclude a gay man from its membership despite a state law that required the equal treatment of LGBT Americans.⁵⁹ Chief Justice Rehnquist wrote for the majority while Justice John Paul Stevens was at work drafting a scathing dissent.⁶⁰ Joan Biskupic in a recent CNN analysis explained that Justice Stevens in making his case decried the majority’s analytic flaw in deploying “its habitual way of thinking about homosexuals.”⁶¹

In an early draft, Stevens insisted that the Court’s carving out an exception to the First Amendment for gay and lesbian Americans was nothing if not “a constitutionally prescribed pink triangle,” a reference to the Nazi regime’s

58. *Id.* at 475. Douglass had called earlier versions of this speech “The Negro Problem,” turning on its head the view of Black illiteracy or maladjustment to instead blame the problem on brutal, antidemocratic practices among Whites. The problem was a national one, a state of lawlessness in the South. It was a critique of fellow Republicans who were failing to act. See generally FREDERICK DOUGLASS, WHY IS THE NEGRO LYNCHED? (Bridgewater, England, John Whitby and Sons 1893).

59. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000).

60. *Id.* at 644; *id.* at 663 (Stevens, J., dissenting).

61. Joan Biskupic, *Behind the Scenes in 2000 when Supreme Court Liberals Thought Nazi and Dred Scott References in Gay Rights Dissent Were Distracting*, CNN POL. (May 18, 2023), <https://www.cnn.com/2023/05/18/politics/gay-rights-stevens-ginsburg-supreme-court-boy-scouts> [<https://perma.cc/555R-9JJM>].

practice of singling out queer detainees by affixing a patch of pink, triangular cloth to their shirts.⁶² That was not all. The Court was, Justice Stevens warned, relegating itself to historical irrelevance and worse.

The majority decision in *Boy Scouts v. Dale* and the “prejudices” reflected therein, Justice Stevens warned, “will fade away completely . . . like *Bradwell* [*v. Illinois*] and *Dred Scott* before it.”⁶³ All that would be left, he regretted, was the Court’s shame in having promoted the Boy Scouts’ position at all. In the end, his fellow dissenters persuaded Justice Stevens to drop the *Dred Scott* reference from his text (and at least one, Justice Stephen Breyer, expressed near relief that he did so).⁶⁴ Still, these behind-the-scenes exchanges between justices revealed how even in the twenty-first century, *Dred Scott* carried hefty rhetorical weight, even as it was not credited with an insightful view of the Constitution. Instead, like Frederick Douglass before him, Justice Stevens understood that invoking the case was to level a slur that no school of interpretation could account for.

62. *Id.*

63. *Id.* (citing *Bradwell v. Illinois*, 83 U.S. 130 (1872), which upheld excluding a woman from practicing law).

64. *Id.*