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THE POLITICAL URGENCY OF BLACK MANHOOD: FREDERICK DOUGLASS ON CONSTITUTIONAL THEORY

John M. Kang*

ABSTRACT

How did Frederick Douglass—one who was born a slave, one who had been denied all formal education, one who had been sundered from his family, one who had been starved, tortured, and, on occasion, nearly killed—manage to muster the courage to do something as bold as challenge the United States Supreme Court? This Article suggests that Douglass, in order to assert his right as an American citizen, first had to assert his right as a man in an explicitly gendered sense. That is, Douglass had to muster a powerful sense of manliness that could elevate him psychologically to assert his right to equal citizenship under the Constitution. He had to generate a potent faith in his own gendered identity in order to overcome the debilitating political stigma that attached to his racial identity. Only by doing this, was Douglass able to make the powerful claim that he was entitled—as an American citizen—to contest the authority of the U.S. Supreme Court.

*Part I sets the historical backdrop by discussing the infamous Supreme Court case of *Dred Scott v. Sandford*. Writing for the Court, Chief Justice Roger B. Taney argued that the Founding Fathers could never have intended to include blacks as citizens because blacks were utterly emasculated victims of the former's masculine imposition of white supremacy. Part II summarizes how there was conspicuous support in the civil society of the South for the racist worldview represented by Chief Justice Taney. What Frederick Douglass encountered, then, was not only a racist Supreme Court headed by Chief Justice Taney but a coterie of racist authorities in Southern society. Part III will introduce a thesis for how Douglass mustered the psychological resources to challenge the racist assertions of Chief Justice Taney and his ilk. Part III delves into Douglass's autobiography for answers. There, one finds a compelling narrative of an adolescent boy who had*

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been born into slavery. Douglass describes how white supremacy, as enacted through the practice of slavery, was designed to prevent a black male child from developing anything resembling a sense of his manhood. Eventually, the young Douglass would find a redemptive manhood through an ordeal of intense violence. It was this crucial event that galvanized him to assert himself as a citizen of the United States, and, hence, as one who was entitled to challenge the Supreme Court's opinion in Dred Scott.

Part IV examines the substance of Douglass's assertions. In lieu of the idiom of hypermasculinity that had been enlisted by Chief Justice Taney, Douglass opted for textualism. As Part IV will discuss, however, Douglass did not completely renounce the idiom of manliness. As he would make clear in his most famous public speech, Douglass reclaimed the image of the Founding Fathers from that sketched by Chief Justice Taney in Dred Scott. What made the Founding Fathers great, Douglass argued, was not their fealty to the hypermasculine anthems of white supremacy. What made them great, he explained, was that they aspired to be morally upright gentlemen who embraced the virtues of equal respect and civility toward all, regardless of race. As Part IV will elaborate, Douglass stressed that the Founding Fathers had failed to fulfill their own ethical aspirations, but the white sons who were listening to him in 1852 could do so by working bravely to end slavery and racism. Douglass thereby propounded a conception of manhood that was compatible with an egalitarian interpretation of the Constitution.

INTRODUCTION

In 1818, he was born into slavery.¹ He endured it for twenty years.² As a young child, he was sundered from his mother and separated from his siblings.³ He was bought and sold.⁴ He was psychologically tortured and physically assaulted by his ostensive owners and their subordinates.⁵

Notwithstanding these ordeals, Frederick Douglass would become perhaps the most important black leader in the history of the United States.⁶ Blessed with a formidable talent for words, Douglass tirelessly published antislavery articles in his

1. See, e.g., DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 9 (2018).

2. See, e.g., FREDERICK DOUGLASS, *My Bondage and My Freedom*, in *AUTOBIOGRAPHIES: NARRATIVE OF THE LIFE, MY BONDAGE AND MY FREEDOM*, LIFE AND TIMES 103, 419 (1994); BLIGHT, *supra* note 1, at xiv, 672.

3. See, e.g., DOUGLASS, *supra* note 2, at 149; BLIGHT, *supra* note 1, at 12, 50.

4. See, e.g., DOUGLASS, *supra* note 2, at 236–37; BLIGHT, *supra* note 1, at 176.

5. See, e.g., DOUGLASS, *supra* note 2, at 260–65, 270–76, 277–87; BLIGHT, *supra* note 1, at 60–66.

6. See, e.g., BLIGHT, *supra* note 1, at xiv–vi; WALDO E. MARTIN, JR., *THE MIND OF FREDERICK DOUGLASS*, at ix (1984).

own newspaper.⁷ Douglass's campaign against slavery was also articulated through his best-selling autobiography where he recounted the personal horrors endured under slavery.⁸ No less important, Douglass was an electrifying speaker and he barnstormed cities, both in the United States and Europe, where he urged audiences to abolish slavery.⁹ Indeed, according to his definitive biographer, Douglass was at once the most important abolitionist in American history and the most sought-after speaker of his time.¹⁰ Government officials took stock of Douglass's power; they had no choice. Eventually, President Abraham Lincoln met directly with Douglass in the White House—the first time that a black person had been so invited. For Lincoln recognized how deeply he depended on Douglass, the one leader who could persuade blacks to support the President's initiatives.¹¹ Douglass, however, was not an unconditional collaborator. He pressed Lincoln to do more to abolish slavery, and, over time, the ex-slave would become a vocal critic of, but also adviser to, Lincoln.¹² A testament to his stature and influence, Douglass has been lauded by diverse audiences. It is telling that, on the one hand, the conservative Justice Clarence Thomas evoked Douglass to reject race-based affirmative action as unconstitutional, while the liberal President Barack Obama plans—as of the writing of this Article—to produce a film to celebrate Douglass's life as a monumental black leader.¹³

There is much in Douglass's life that invites the public's interest, but within the legal academy, scholars have been drawn to his creative interpretation of the U.S. Constitution.¹⁴ More than an exercise in the craft of exegesis, Douglass's interpretation was an acutely personal affair. For Douglass argued that the Constitution, if read correctly, was antithetical to the practice of slavery.¹⁵ Specifically, Douglass insisted that the Constitution, notwithstanding wording to the contrary in some of its sections, treated blacks as entitled to the equal citizenship enjoyed by their white counterparts.¹⁶ What made Douglass's position particularly noteworthy was that he, a slave who had been brutally oppressed, refused to honor the lofty authority of the United States Supreme Court.¹⁷ In the now infamous case

7. See, e.g., BLIGHT, *supra* note 1, at 190–96.

8. See, *id.* at xvii, 137–39.

9. See, e.g., *id.* at 116, 128, 163, 170–77, 185, 188.

10. As Professor Blight comments in his definitive biography of Douglass, “It is likely that more Americans heard Douglass speak than any other public figure of his times.” *Id.* at xiv. For related discussion, see also *id.* at 5, 98, 136, 470.

11. *Id.* at 437.

12. *Id.* at 5–8, 359, 373–74, 436–37.

13. Rachel Yang, *Barack and Michelle Obama Set ‘The Fifth Risk,’ Frederick Douglass Biopic Among Initial Netflix Projects*, VARIETY (Apr. 30, 2019), <https://variety.com/2019/film/news/barack-obama-michelle-higher-ground-productions-announces-seven-upcoming-netflix-projects-1203201329/>.

14. E.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 31, 38, 76, 187, 192 (1988); Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT. L. REV. 1087, 1099–1100 (1993); Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 423, 427 (2012); Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jurgen Habermas in Conversation*, 114 NW. U. L. REV. 335, 373–83 (2019); Asifa Quarishi, *Interpreting the Qur’an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 76 (2006).

15. See *infra* Part IV.

16. See *infra* Part IV.

17. See *infra* Part IV.

of *Dred Scott v. Sanford*, the Court had held that blacks, whether slaves or born free, were never intended by the Constitution's Framers to be recognized as citizens.¹⁸ Writing the Court's judicial opinion, Chief Justice Roger B. Taney declared that blacks, simply by virtue of their race, could be enslaved.¹⁹ Douglass rejected the authority of the Court, and he thereby forwarded the proposition that the Constitution may, and should, be interpreted by the citizens themselves.²⁰ Douglass therefore called into doubt the authority of America's highest Court.²¹ He did it, moreover, with unusual skill and panache. His published arguments were sophisticated and brimmed with a vivacious sarcasm that refused to submit to the claims of white supremacy. That Douglass's arguments were the products of a former slave who had been denied formal education made them the subject of curiosity for legal scholars. Understandably, then, legal scholars have focused on the conceptual coherence of Douglass's statements along with their evidential merits and their rhetorical persuasiveness, things that would be of interest to those trained in the law.

What tends to receive much less attention from legal scholars is the psychological aspects of Douglass's interpretation of the Constitution. Namely, few, if any, legal scholars have examined how Douglass's interpretation was motivated and governed by the logic of *manhood*. The omission is unfortunate. For in his speeches, editorials, and autobiography, Douglass was clearly obsessed with manhood and its associated tropes of patriarchy, emasculation, and violence.²² It was in part through the conceptual prism of manhood that Douglass made sense of why Taney's interpretation of the Constitution was flawed and why an alternative was in order, or so this Article will argue. By choosing to dwell on the theme of manhood, this Article does not foreclose the possibility that Douglass drew from other sources such as natural rights philosophy, Christianity, and Enlightenment principles of equality; for he did, and copiously so.²³ However, this Article will endeavor to supplement the literature relating to Douglass by suggesting that manhood was a salient paradigm by which he came to comprehend the Constitution's meaning.

While the Article is a work of historical retrieval, it is also meant to serve more contemporary interests. For Douglass provides a potentially attractive paradigm of manhood in our present-day culture where too many men have indulged an ethos of what today goes by the name of "toxic masculinity." According to the logic of toxic masculinity, to become a sufficiently masculine man in today's culture entails the fulfillment of a lust for domination and violence as its own end.²⁴ Born in 1818, Douglass would not have heard the exotic neologism of toxic masculinity, but as a slave who had been brutalized by those who were consumed by toxic

18. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426–27 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. For discussion of *Dred Scott*, see *infra* Part I.

19. See *infra* Part IV.

20. See *infra* Part IV.

21. See *infra* Part IV.

22. See *infra* Parts III, IV.

23. MARTIN, *supra* note 6, at 20–21, 144–45, 233.

24. See generally JARED YATES SEXTON, *THE MAN THEY WANTED ME TO BE: TOXIC MASCULINITY AND A CRISIS OF OUR OWN MAKING* (2019); MICHAEL KIMMEL, *GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN* (2009); CLEMENTINE FORD, *BOYS WILL BE BOYS: POWER, PATRIARCHY AND TOXIC MASCULINITY* (2019).

masculinity, he had known too well what it meant as a matter of practice.²⁵ In response, Douglass, over time, developed an alternative account of what it meant to be a proper man, and this account was understood by Douglass as consonant with being a proper citizen of the Constitution.²⁶

Douglass's conception of manhood was animated in large part by two moral tenets. The first tenet entailed that he should abjure the domination of others, but that he should also refuse to accept being dominated.²⁷ The second tenet required him to shun opportunities to inflict violence on others, but required too that he should courageously enlist violence to deflect the violence that was inflicted upon him.²⁸ Douglass thus embodied the virtues of a gentleman in their compound parts: he was gentle in adhering to the norms of civility, but he was also manly in summoning his physical courage.²⁹ Present-day readers may bristle at such seeming celebrations of male identity, but the need to restore one's self-esteem was a desperate priority for a young Frederick Douglass in the mid-nineteenth century. His manhood, one must remember, had been nearly pummeled out of existence by the emasculating forces of slavery.³⁰ In the eyes of white supremacists, a male slave who nurtured a sense of manliness was a slave who would insist on his freedom, and hence a dangerous being who could not be tolerated.³¹

This Article is dedicated to examining the origins of Douglass's manliness and how it relates to his thoughts about citizenship, political rights, and constitutional interpretation. Although the subject of the Article is Frederick Douglass, the Article does not discuss him in earnest until the second half. The reason for this seemingly belated introduction is owing to the Article's desire to furnish for the reader the historical context of slavery. For slavery figures profoundly in Douglass's understanding of manliness and its relationship to the Constitution. Absent such background information, the reader will be left with a woefully incomplete record of what Douglass meant as a theorist of manliness and the Constitution.

Accordingly, Part I sets the historical backdrop by discussing the significance of the aforementioned *Dred Scott v. Sandford*. *Dred Scott* is one of the most famous Supreme Court cases in the history of the United States and almost certainly its most infamous. What the Court decided in *Dred Scott* in effect reinforced Douglass's identity as a slave, and Douglass dedicated much of his adult life to challenging the legitimacy of the Court's holding in *Dred Scott*. After all, *Dred Scott* was no ordinary case. It was the case where the Supreme Court held in 1857 that the Founding Fathers never intended for the U.S. Constitution to include blacks

25. See *infra* Part III.

26. See *infra* Part IV.

27. See *infra* Part III.

28. See *infra* Part III.

29. None of this is to suggest, of course, that courage is a virtue that is limited to men. Women have obviously demonstrated its possession, often in much larger quantities than men, and will continue to do so. However, for better or worse, there is a cultural connection between courage and what it means to be a suitable man. See John M. Kang, *Does Manly Courage Exist?*, 13 NEV. L.J. 467, 467–68 (2013).

30. See *infra* Part III.

31. See FREDERICK DOUGLASS, *Narrative of the Life of Frederick Douglass*, in AUTOBIOGRAPHIES, *supra* note 2, at 15; see also DOUGLASS, *My Bondage and My Freedom*, in AUTOBIOGRAPHIES, *supra* note 2, at 297.

as American citizens.³² The *Dred Scott* Court thus also decided that the Constitution never intended for blacks to be afforded those rights and privileges that the Constitution had afforded white citizens.³³ *Dred Scott* thus rendered futile the attempt by blacks to assert standing as American citizens. The result was that blacks who were enslaved could not sue in a federal court based on the claim that their rights as citizens had been denied.³⁴

Given that *Dred Scott* turned on issues of standing in the federal courts, it is logical why legal scholars tend to home in on such issues. Part I will address a different aspect of the case, however, one that is more pertinent for the Article's chosen subject of manhood and its relationship to race. As Part I will discuss, it was not only Douglass who was fixated on manhood. Chief Justice Roger B. Taney, writing for the Court in *Dred Scott*, justified his decision to deny blacks citizenship by turning to the tropes of masculinity. Taney argued that the Founding Fathers could never have intended to include blacks as citizens because blacks were utterly emasculated victims of the former's masculine imposition of white supremacy. In Taney's narrative, whites were entitled to citizenship because they could trace their racial heritage to Anglo-Saxon Founders who had distinguished themselves as heroes by venturing the harrowing journey across the Atlantic to establish a self-governing republic. As Part I will recount, Taney took pains to underscore that blacks had first set foot on America's shores in an entirely different manner, not as heroes, but as a vanquished, and hence degraded, race of slaves. For Taney, the difference was critical, as Part I will explain. According to Taney's judicial opinion in *Dred Scott*, whites, through their exertion of masculine will, had both founded a republic and enslaved a race of blacks to support it. However, for Taney, blacks had shown themselves as a feeble race that had been enslaved by a stronger one. Described in gendered terms, whites for Taney had proven themselves as extraordinarily manly while blacks had shown themselves as emasculated victims, as Part I will suggest. Taney conscripted this ethos of Might Makes Right as the normative platform for his judicial decision in *Dred Scott*, as Part I will show.

In mid-nineteenth century America, Taney and his fellow justices were not alone. Part II summarizes how there was conspicuous support in the civil society of the South for the racist worldview represented by Taney in *Dred Scott*. What made the support particularly noteworthy, Part II will explain, was that it came from leading white intellectuals in the South: sociologists, legal scholars, political figures, and scientists. These experts enlisted the power of their authority to advocate for slavery. Specifically, they insisted that there was ample empirical evidence to establish that blacks were every bit as unmanly as Taney had described. But it was more than unmanliness that was the subject of the pro-slavery advocates. As will be discussed in Part II, a thesis shared among these white supremacists was that the depth of the black's unmanliness was evinced in his yearning for—not his resistance to—slavery, and, in particular, his yearning to be under the authority and protection

32. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

33. *See infra* Part I.

34. *See infra* Part I.

of a white patriarchal master. In the unvarnished propaganda of pro-slavery advocates, slavery was thus reconfigured as a moral remedy, not an immoral vice.

What Frederick Douglass encountered, then, was not only a racist Supreme Court headed by Chief Justice Taney but a coterie of racist authorities in Southern society. Part III will introduce a thesis for how Douglass mustered the psychological resources to challenge the racist assertions of Chief Justice Taney and his ilk. Part III will delve into Douglass's autobiography for answers. There, one finds a compelling narrative of an adolescent boy who had been born into slavery. In his autobiography, Douglass describes how white supremacy, as enacted through the practice of slavery, was designed to prevent a black male child from developing anything resembling a sense of his manhood. Part III will recount the appalling episodes in which Douglass, as a boy, was whipped, pummeled, and threatened for displaying even a hint of autonomy and confidence—traits that white boys his age were encouraged by white society to embrace as manly virtues.

But there was a turning point in Douglass's life, as Part III will summarize. Never quite succumbing to the emasculating forces of slavery, an adolescent Douglass was seen by his master as requiring intensive reform. The master therefore sent the sixteen-year-old to a "slavebreaker" whose job was to destroy whatever vestige of masculine self-assertiveness remained in Douglass. However, as will be recounted in Part III, the slavebreaker's violent methods backfired. Instead of succumbing to the slavebreaker, the young Douglass fought with unforgettable resolve for two hours against both the slavebreaker and his adult male cousin. The resistance instilled in Douglass an incredible and everlasting sense of his manhood, a gendered awareness that he was deserving the respect of others and that he possessed the power to insist on such respect. It was this moment that, according to the mature Douglass who had accomplished so much, imbued him profoundly with the belief that he could battle racism.

An important means by which Douglass battled racism was by publishing arguments that challenged Chief Justice Taney's decision in *Dred Scott*. Part IV will examine the substance of these arguments. Part IV will first review Douglass's tenet that the Constitution is an antislavery document. Douglass's position was especially striking because he justified it by reading the Constitution's text alone, without recourse to the methods of what scholars now call originalism. Douglass's interpretation of the Constitution therefore rejected the approach favored by Taney. Taney had appealed to the authority of the Founding Fathers whom he characterized as proud white supremacists who would never have entertained the possibility that a defeated race of blacks should be admitted into the class of American citizens. In lieu of the idiom of hypermasculinity that had been enlisted by Taney, Douglass opted for textualism.

As Part IV will discuss, however, Douglass did not completely renounce the idiom of manliness. Part IV will parse the famous speech by Douglass, "The Meaning of July Fourth for the Negro," delivered in 1852.³⁵ The speech made copious use of the symbolism of fathers and sons. Douglass reclaimed the image of the Founding Fathers as Taney sketched them in *Dred Scott*. What made the

35. FREDERICK DOUGLASS, *The Meaning of July Fourth for the Negro*, in *SELECTED SPEECHES AND WRITINGS* 188 (Phillip S. Foner & Yuval Taylor eds., 1999).

Founding Fathers great, Douglass argued, was not their fealty to the hypermasculine anthems of white supremacy. What made them great, he explained, was that they aspired to be morally upright gentlemen who embraced the virtues of equal respect and civility toward all, regardless of race. As Part IV will elaborate, Douglass stressed that the Founding Fathers had failed to fulfill their own ethical aspirations, but the white sons who were listening to him in 1852, could do so by working bravely to end slavery and racism. Douglass thereby propounded a conception of manhood that was compatible with an egalitarian interpretation of the Constitution.

I. DRED SCOTT AND RACIAL DOMINATION: WHITE SUPREMACY AS HYPERMASCULINITY

There is no explicit mention of manhood or its related tropes anywhere in the U.S. Constitution.³⁶ More precisely, notwithstanding the enduring idea of the Founding *Fathers*, there is no mention in the Constitution of patriarchy.³⁷ The omission is just as suggestive as its manifestation, however. For the omission signified that the American colonists had rejected a form of government that was founded on patriarchalism.³⁸ This was no mean feat. For governments throughout history had been founded on the premise that the king was the symbolic patriarch of his nation.³⁹ Britain was no different. Even though it was governed by a constitution, its head was a monarch who presented himself as its patriarch and demanded deference from his subjects.⁴⁰

Against the tide of history, the American colonists fashioned a government whose entire authority resided with the people themselves, not a patriarchal king. The Constitution thus begins with the pronouncement that it is written in the people's name: "*We the People* of the United States . . . do ordain and establish this Constitution for the United States of America."⁴¹ Frederick Douglass sought to convince the public that *the People* mentioned in the Preamble were meant to include blacks, whether enslaved or not.⁴² He was thereby arguing that blacks should be treated as citizens, not as property.⁴³ This task was more than an exercise in scholarly exegesis; it was an act of political survival.⁴⁴ By articulating his version of the Constitution, Douglass intended to protect blacks from the terrors of white supremacy.⁴⁵ The substance of Douglass's arguments will be examined in Part IV, but it will suffice for now to note that his reading of the Constitution encountered a grave obstacle. For some of the Constitution's Framers were slaveholders, and far

36. That there is no mention of manhood in the Constitution does not necessarily mean, however, that manhood and its related concepts are irrelevant to the Constitution. See generally John M. Kang, *Manliness and the Constitution*, 32 HARV. J. L. & PUB. POL'Y 261 (2009).

37. *Id.* at 287–91, 325.

38. *Id.*

39. JOHN NEVILLE FIGGIS, *THE DIVINE RIGHT OF KINGS* 17 (1914).

40. Kang, *Manliness and the Constitution*, *supra* note 36, at 277–83.

41. U.S. CONST. pmb. (emphasis added).

42. See *infra* Part IV.

43. See *infra* Part IV.

44. See *infra* Part IV.

45. See *infra* Part IV.

from subsuming their financial interest in slavery, they took pains to insert language in the Constitution to protect it.

Indeed, there was textual evidence to support the view that the Constitution was never intended to include blacks as citizens.⁴⁶ For example, the only time that blacks were directly mentioned by the Constitution was when they were referred to as slaves. Article IV, Section 2, the so-called fugitive slave clause, guaranteed to slaveholders that state governments, regardless of whether they permitted slavery, were required to capture runaway slaves and return them to their owners.⁴⁷ The clause carried the implication that blacks were not entitled to be treated as persons, let alone citizens, even after they had escaped their captors and had spent years living on free soil. Other clauses in the Constitution also lent credence to the view that blacks were excluded from the citizenry. Article I, Section 9 forbade Congress from outlawing the importation of slaves until 1808.⁴⁸ Article I, Section 2 contained the “three-fifths clause” which recognized slaves as “persons,” but only for purposes of federal taxation and congressional representation.⁴⁹ It is easy to infer from such examples that the Constitution was a document of white supremacy, not of racial inclusivity, as Douglass claimed.

Such, at any rate, was the belief held by the United States Supreme Court in the landmark case of *Dred Scott v. Sandford*.⁵⁰ It was *Dred Scott* that established the legal precedent that the Framers never intended for blacks to be treated as citizens like their white counterparts.⁵¹ Before the Article dwells on the Court’s decision, the facts of the case should be limned. In 1834, Dr. John Emerson had taken his slave Dred Scott from Missouri, a slave state, to Illinois, a free one.⁵² While in Illinois, Scott, with Emerson’s consent, married another slave and fathered two daughters.⁵³ In 1838 Emerson took Scott and Scott’s family back to Missouri, and then sold them to John Sanford (whose name was misspelled as “Sandford” by the court reporter). At this point, Scott decided to sue Sanford. Scott argued that because he had domiciled in Illinois he had become a citizen of that state, and therefore free.⁵⁴ The Supreme Court in 1857 declared that Scott lacked standing to sue as a citizen of Illinois. According to the Court, Scott and his family were slaves who belonged to Sanford.⁵⁵

Chief Justice Roger B. Taney authored the Court’s opinion. He explained that there were two places in the Constitution the Court should consult as to whether Scott was a slave or a citizen: the Preamble and Article IV. The Preamble, it bears

46. See generally Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405 (2013).

47. U.S. CONST. art. IV, § 2.

48. U.S. CONST. art. I, § 9.

49. U.S. CONST. art. I, § 2.

50. 60 U.S. 393 (1857). For discussion, see *supra* Part I.

51. See, e.g., Girardeau A. Spann, *Affirmative Inaction*, 50 HOWARD L.J. 611, 653–55 (2006); Irving Joyner, *North Carolina’s Racial Politics: Dred Scott Rules from the Grave*, 12 DUKE J. CONST. L. & PUB. POL’Y 141, 148–51 (2017).

52. 60 U.S. at 397.

53. *Id.* at 397–431.

54. *Id.* at 461–62.

55. *Id.* at 430.

repeating, read: “We the People of the United States, . . . do ordain and establish this Constitution for the United States of America.” A consonant message of self-sovereignty was expressed by Article IV: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” For Taney, the words “[P]eople of the United States” and “citizens” were “synonymous terms, and mean[t] the same thing.”⁵⁶ “They,” said Taney, “both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives.”⁵⁷ Scott, Taney decided, was not a citizen under Article IV nor a constituent part of *We the People* alluded to in the Preamble. According to Taney, Scott was a slave, and would remain so.

Among the arguments which he trundled, Taney’s most conspicuous claim was that blacks could not qualify for citizenship because they were irredeemably unmanly. If one reads Taney’s opinion, one will not find, though, direct mention of manhood, along with its correlates of effeminacy and masculinity. But Taney’s opinion is missing only the explicit terms; his opinion is rife with the themes of submission and dominance, which these terms signify.⁵⁸ Taney suggested that Scott could not be regarded as a free man under the Constitution because his race had been utterly dominated and degraded—in effect, unmanned—by Anglo-Saxons.⁵⁹ As vulgar as Taney’s rhetoric may have been, it resonated with much of his antebellum white audience.⁶⁰ For slavery did more than contort the legal identity of a man into chattel; it also brutally emasculated him.⁶¹ Embedded in this relationship of unequal power was a crude moral axiom: the strong (the manly) had the moral right to dominate the weak (the unmanly). Taney aggressively conscripted this axiom as the foundation of his jurisprudence in *Dred Scott*.⁶² Whites, he said, had earned the right to dominate blacks because the former had dominated the latter; one race had proven itself more masculine than the other.⁶³

Read how Taney framed the legal issue—the central question to be decided by the Court—one which he bluntly dubbed “simply this” in his judicial opinion.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?⁶⁴

56. *Id.* at 404.

57. *Id.*

58. *See supra* Part I.

59. *See supra* Part I.

60. *See infra* Part II.

61. *See infra* Part III.

62. *See infra* Part II.

63. *See infra* Part II.

64. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Not a model of pithiness, this. The paragraph is one indulgently cumbrous question. It is a question in form only, however; substantively, it is a salvo of rhetoric. For Taney's question is a tendentiously laid first plank in an edifice of white supremacy that he committed himself to building in his *Dred Scott* opinion.

What may have been a technical puzzle regarding federal jurisdiction was reconfigured by Taney as a comparative study in contrasting narratives of immigration. White and black, he wrote, began their American odyssey from opposite ends of the political hierarchy. Scott, "a negro," came from "ancestors [who] were imported into this country, and sold as slaves." Blacks did not *choose* to come here as did the heroic Puritans who braved wind and water to create the fabled City Upon a Hill for all the world to admire and emulate.⁶⁵ White colonists kidnapped blacks—or, as Taney, in a nod to courtroom etiquette, euphemized, "imported" them—and forced them to serve and obey the latter. On the other hand, the white colonists had consummated *their* identity through a manly act of collective self-will. They had forged a "political community," the first of its kind, "formed and brought into existence by the Constitution of the United States." In Taney's imagination, the Founding Fathers had heroically created a republic, but blacks were simply the medium of labor by which the latter did so. As Taney said elsewhere in his legal opinion, blacks were, at the Constitution's adoption, "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race. . . ." ⁶⁶ Thus employed were the motifs of masculinity and emasculation in *Dred Scott*: whites were a *dominant* race who had managed to overpower and enslave—or, in Taney's words, *subjugate* and *subordinate*, a weaker race of blacks. There was no handwringing here. Taney did not contrive moralistic apologies for slavery as an enlightened remedy to improve the downtrodden Negro. He crisply declared that whites had conquered blacks. The manhood of whites had been vindicated, he insisted, and the effeminacy of blacks, proved. No further justification need be appended, Taney implied, for why blacks were never intended to be included among "the People" or "the citizens" mentioned in the Constitution.

From this proudly remorseless platform Taney scaffolded his other statements. Like this one: blacks "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race."⁶⁷ By this, Taney meant that state laws almost never treated blacks as persons entitled to political participation, treating them instead as "a class of beings" who had been "stigmatized" and "upon whom [the states] had impressed such deep and enduring marks of inferiority and degradation."⁶⁸ *Inferiority* and *degradation* need not be confined in their meanings to linguistic approximations for effeminacy or as antonyms for masculinity. Such was the way Taney used them, however. He steeped "inferiority" and "degradation" in the gendered lexicon of power: blacks were inferior and degraded *because* whites had dominated them. Blacks were said to be

65. "City Upon a Hill" refers to how John Winthrop, one of the leaders of the Massachusetts Bay Colony, described said colony. In *A Model of Christian Charity*, Winthrop urged his fellow colonists in 1630, "For we must consider that we shall be as a city upon a hill, the eyes of all people are upon us." MICHAEL PARKER, JOHN WINTHROP: FOUNDING THE CITY UPON A HILL ix (2014).

66. *Scott*, 60 U.S. at 404–05.

67. *Id.* at 407.

68. *Id.* at 416.

“a class of beings” who had been “stigmatized” and “upon whom [the states] *had impressed* such deep and enduring marks of inferiority and degradation.”⁶⁹ Blacks in Taney’s imagination were inferior and degraded—not owing to alleged cultural differences—but simply because they had been dominated by a stronger, more masculine race. This historical record of white supremacy, Taney confidently proclaimed, “show[ed] that a *perpetual* and *impassable* barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power. . . .”⁷⁰

How could Taney immerse himself in such a glorification of racist hypermasculinity in a nation that was founded on the principles of equality articulated in the Declaration of Independence? Did not said principles evince the Framers’ desire for a constitution in keeping with the virtues of tolerance and civility? After all, the Declaration of Independence had famously held, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights. . . .” Taney conceded that these words “would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood.”⁷¹ However, “it is too clear for dispute,” Taney asserted, “that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration. . . .”⁷²

Too clear for dispute. Taney’s conviction was unequivocal. However, his arguments were inadequate. For even if such stout confidence were borne of fidelity to the historical record, Taney would have failed to justify why his generation, about seventy years removed from that of the Founders, should have to defer to what the latter had believed. All he could muster was a gut argument. Taney knew (or said he knew) that the Framers opposed freedom for blacks because, otherwise, the Framers would debase themselves as dishonorable hypocrites, a conclusion Taney refused to accept. “[I]nstead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.”⁷³ We must not forget that “the men who framed this declaration were great men . . . high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting.”⁷⁴ They were gentlemen of the first rank, Taney vouched: trust them. For Taney, what elevated the Founders as “great men” was that they had determined to honor without apology or embarrassment the moralism of white supremacy. He suggested that integrity, however poisoned it may have been by the vile project to which it had yoked itself, was the primary virtue of significance for great men. In exegetical terms, Taney was thus making a crude bid for what today’s scholars call *originalism*, the jurisprudential method that looks to the intent of the Framers to determine the Constitution’s meaning. He was arguing that from the perspective of originalism, the Framers

69. *Id.* (emphasis added).

70. *Id.* at 409 (emphasis added).

71. *Id.* at 410.

72. *Id.*

73. *Id.*

74. *Id.*

seemed to have expressed a strong desire to design a constitution that would serve the ends of white supremacy.

After establishing this claim, Taney circled back to where he started. Namely, he returned to the premise that blacks were denied citizenship because they were politically unmanned and hence socially unmanly. This logic of hypermasculinity, Taney argued, precluded Dred Scott from being a citizen. The Chief Justice thus sketched in coarse strokes a rudimentary theory of the Constitution that, while muscular in its celebration of power, was ethically barbed in its assumptions. For Taney had argued that only those who had enslaved others—only those who had completely deprived others their freedom—were deemed worthy of political freedom as citizens under the Constitution. Rather than denouncing hypermasculinity, Taney embraced it as a prerequisite for political membership. The hypermasculinity that Taney lauded was intrinsically social, a means to glue society together, not to rend it apart. Hypermasculinity, as it was represented in Taney's opinion, discursively organized the identity of white colonists around the ideology of racial supremacy. Taney's judicial opinion helped whites to justify why they should exclude blacks from the constitutional polity.

Taney was not alone in his judgments, and it was vital for him that he was not. For without meaningful support from society at large, Taney's judicial opinion would not have found cultural purchase; it would have been derided as a work of racist prejudice masquerading as a judicial opinion. Fortunately for Taney, other votaries of slavery subscribed to his account of the black race as an unmanly race. Some, like Taney, clung to the idiom of masculinity and domination, while others opted for the overtly moral if insidious claim that the white slaveholder was an indispensable savior to a contemptibly unmanly black race.

II. CULTURAL ARGUMENTS FOR SLAVERY: PROTECTING THE FEEBLE BLACK

Chief Justice Taney was not alone in his contempt for blacks as an emasculated race. In mid-nineteenth-century America, prominent defenders of slavery subscribed to the belief that blacks were woefully unmanly. The disparagement assumed political terms as blacks were alleged to be lacking the qualities one would expect in independent citizens of a self-governing republic.⁷⁵ Blacks were said to be dismally wanting in courage, self-respect, vigor, virility, and a general desire to be their own person.⁷⁶ This collective failing, moreover, was alleged to be the product of biology, an uncomplicated case of nature, not nurture (or in slavery's case, exploitation).⁷⁷ The case for slavery hinged therefore on the conceit that while blacks had the anthropological attributes of mankind, they were sorely destitute—and would always be destitute—the inexorably gendered virtue of manhood. Slavery's defenders accordingly maintained that detached from their white masters, blacks would wallow in their degraded emasculation, and eventually perish.

75. RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN 19TH-CENTURY AMERICA* 12–13, 29, 31, 47–49, 58, 64, 113, 138, 142, 207–08 (1990).

76. See *infra* notes 75–81 and accompanying text.

77. See *infra* notes 83–107 and accompanying text.

The Virginia sociologist George Fitzhugh, a renowned scholar in the South, certainly thought, or at any rate, said so. Writing a few years before the Civil War, he held forth that “from inferiority, or rather peculiarity, of race, almost all negroes require masters, whilst only the children, the women, the very weak, poor, and ignorant, &c., among the whites, need some protective and governing relation of this kind. . . .”⁷⁸ Fitzhugh groups black men with those conventionally regarded as the most helpless and unmanly members of society—children, women, and the pitifully weak. Fitzhugh thereby suggested that black men’s racial identity in effect erased their gender identity; in his view, blackness preempted manhood. So unmanly was the Negro that freedom, an emblem and entitlement of manhood, was anathema for him: “[T]he negro has neither energy nor enterprise, and, even in our sparser population, finds, with his improvident habits, that his liberty is a curse to himself. . . .”⁷⁹

Was not slavery, Fitzhugh inquired, a welcomed remedy? “[O]ur Southern slavery has become a benign and protective institution, and our negroes are confessedly better off than any free laboring population in the world.”⁸⁰ Not only were slaves in America able to subsist under slavery, their minds and morals, Fitzhugh boasted, were improved by their masters.⁸¹ “In Virginia,” for instance, “the slaves have advanced much in morality, religion, and intelligence, and their masters and mistresses, living on the farm with them, naturally become attached to them.”⁸² The latter observation was meant to illustrate Fitzhugh’s belief that slavery as a social institution functioned as a family. “[B]esides wife and children, brothers and sister, dogs, horses, birds and flowers,” Fitzhugh dreamily rhapsodized, “slaves, also, belong to the family circle.”⁸³ Drawing from these blissful reconstructions, he could say without irony that “[h]atred to slavery is very generally little more than hatred of negroes.”⁸⁴

Thomas Cobb also cheerfully maintained that blacks were properly enslaved. And, like Fitzhugh, his were not the ramblings of an obscure crackpot. Cobb was a member of the Confederate Congress and a founder of what would become the University of Georgia Law School; he was the only Southerner to have authored a legal treatise on slavery.⁸⁵ Like Fitzhugh, he too trafficked in narratives of black infantilism. “The prominent defect in the mental organization of the negro, is a want of judgment.”⁸⁶ They were also innately lazy, he alleged—the “negro race are [sic] habitually indolent and indisposed to exertion, whether seen in [Africa]” or

78. GEORGE FITZHUGH, *CANNIBALS ALL! OR SLAVES WITHOUT MASTERS* 201 (C. Vann Woodward ed., 1988).

79. *Id.* at 199.

80. *Id.* at 201.

81. *Id.* at 79.

82. *Id.*

83. *Id.* at 205.

84. *Id.* at 201.

85. *DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH* 143 (Paul Finkelman ed., 2003).

86. 1 THOMAS READ ROOTES COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* 35 (1858).

“in the condition of slavery in America, or as free negroes after emancipation.”⁸⁷ Blacks were also said to be devoid the manly instinct for physical reprisal against those who had violently wronged them. They were, if anything, hopelessly loyal to their masters. “The negro is not malicious.”⁸⁸ “His disposition is to forgive injuries, and to forget the past” and “[h]is gratitude is sometimes enduring, and his fidelity often remarkable.”⁸⁹ Harass the slave all you want, said Cobb; he had no manly fight: “The dance will allay his most poignant grief, and a few days blot out the memory of his most bitter bereavement.”⁹⁰ In general, the black is “passive and obedient, and consequently easily governed.”⁹¹

To this indifferently depraved (or willfully delusional) chorus of white supremacy, additional observations about black submissiveness were ushered by Samuel A. Cartwright, a noted New Orleans doctor in the 1850s. Cartwright, in the *New Orleans Medical and Surgical Journal*, reported in 1851 that blacks “resemble children” because “they are very easily governed by love combined with fear, and are ungovernable, vicious and rude under any form of government whatever, not resting on love and fear as a basis.”⁹² “Like children,” wrote Cartwright, “they [need not] be kept under the fear of the lash; it is sufficient that they be kept under the fear of offending those who have authority over them.”⁹³ And “[l]ike children, they are constrained by unalterable physiological laws, to love those in authority over them, who minister to their wants and immediate necessities.”⁹⁴ Verily, Cartwright continued, the “undoubted fact of the love [the Negroes] bear to their masters [is] similar in all respects to the love that children bear to their parents, which nothing but severity or cruelty in either case can alienate.”⁹⁵

Given their physical ailments (a “defective hematosis,” whatever Cartwright meant by that) and “the want of courage and energy of mind as a consequence thereof,” the Negroes have “an instinctive feeling of dependence on others, to direct them and to take care of them.”⁹⁶ Cartwright elaborated, “Like children, they require government in every thing; food, clothing, exercise, sleep—all require to be prescribed by rule, or they will run into excesses.”⁹⁷ It was therefore the case that “the negro can no more help loving a kind master, than the child can help loving her who gives it suck.”⁹⁸ Cartwright, a physician, made ostentatious resort to the authority of scientific jargon. He posited that “[i]n the anatomical conformation of his knees,” the Negro suffered a condition called “*genu flexit*,” whereby he was

87. *Id.* at 37.

88. *Id.* at 39.

89. *Id.*

90. *Id.*

91. *Id.* at 40.

92. Samuel A. Cartwright, *Report on the Diseases and Physical Peculiarities of the Negro Race*, in DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH, *supra* note 85, at 161.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

“more flexed or bent, than any other kind of man.”⁹⁹ Thus was proof that the Negro was created by God as “*the submissive knee bender*” and that the white man’s efforts to “raise him to a level with himself” was “to oppose the Deity’s will.”¹⁰⁰ So there it was, then: the unmanliness so often ascribed by slavery’s defenders to the black was proved in his abjectly angled legs.

It was also evidenced in his cranium, the slaveholders insisted. The black, they proclaimed, was mentally inferior to the white. A focus on such purported inferiority might seem somewhat afield of the Article’s preoccupation with emasculation. As a sociological phenomenon, however, the former can and has been used to justify outcomes that implicate the latter. For at manhood’s core is a nonnegotiable dictum—you must be your *own man*—but a woefully unintelligent being, or one who lacks mature judgment requires a custodian.¹⁰¹ While such guardianship can be appropriate, it also can render its subject unmanly by depriving him of the requisite autonomy.¹⁰²

The perception that a people, owing to some collective attribute, were incapable of mature and independent deliberation was not only embarrassing, but, if shared by many, downright damning in an American republic founded on self-government. Before the American colonies had announced their independence from Britain, the latter already had a constitutional democracy that was hundreds of years old.¹⁰³ However, America was the first republic to have established a constitutional democracy in which all power derived from the people themselves, not from a parliament, a monarch, or a group of nobles.¹⁰⁴ Naturally, the Founding Fathers could not help but wonder if their critics were right. Hamilton thus remarked in *Federalist I* that the experiment of constitutional democracy would show whether men “are really capable or not, of establishing good government from *reflection* and *choice*, or whether they are forever destined to depend, for their political constitutions, on accident and force.”¹⁰⁵ Back in the mid-eighteenth century, in the new republic, studied reflection about public affairs was elevated to a masculine virtue.¹⁰⁶ And given the precarious circumstances of the Revolution, said reflection could be an act of heroism that had to be marshaled in defense of the fledgling nation and might invite frightening retribution from the British.¹⁰⁷

Thomas Jefferson, however, doubted that blacks could bestir such reflection. The author of the democratic chant in the Declaration of Independence that all men were created equal confided elsewhere that they were not. No doubt, Chief Justice Taney would have glowed with satisfaction to note Jefferson’s remark that “[i]n general, [the blacks’] existence appears to participate more of sensation

99. *Id.* at 165–66.

100. *Id.* at 166.

101. Kang, *Manliness and the Constitution*, *supra* note 36, at 276–83.

102. *Id.*

103. John M. Kang, *Patriarchy and Constitutional Origins*, in CONSTITUTIONS AND GENDER 501, 501 (Helen Irving ed. 2017) [hereinafter Kang, *Patriarchy and Constitutional Origins*].

104. *Id.* at 508.

105. THE FEDERALIST NO. 1, at 1 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (emphasis added).

106. Kang, *Manliness and the Constitution*, *supra* note 36, at 318–26.

107. *Id.*

than reflection.”¹⁰⁸ Jefferson elaborated: “[I]t appears to me, that in memory they are equal to the whites; in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid; and that in imagination they are dull, tasteless, and anomalous.”¹⁰⁹ Other times, Jefferson said that a black’s imagination “is wild and extravagant [and] escapes incessantly from every restraint of reason [and] leaves a tract of thought as incoherent and eccentric, as is the course of a meteor through the sky.”¹¹⁰ “[The Negro’s] subjects,” Jefferson complained, “should often have led him to a process of sober reasoning; yet we find him always substituting sentiment for demonstration.”¹¹¹ And, please, Jefferson objected, do not throw blame at slaveholders for the black’s vulgar shortcomings. For Roman slaves, Jefferson hastened, were their society’s “rarest artists” and they “excelled in science, insomuch as to be usually employed as tutors to their master’s children.”¹¹² But these were *Roman* slaves, mind you—they “were of the race of whites”—and could count among them “Epictetus, Terence, and Phaedrus.”¹¹³ That was why the Romans could afford to emancipate their slaves; the latter’s interbreeding with free citizens would be benign if not salutary for both.¹¹⁴ “[W]ith us,” though, the black slave was, if freed, “to be removed beyond the reach of mixture.”¹¹⁵

Jefferson’s words were penned in 1782. But his was more than a relic of bygone times. The ideology of white supremacy that organized them continued to endure into the 1850s when Frederick Douglass was busily fighting for the cause of abolition. Indeed, in 1857, Edmund Ruffin, the cantankerous Virginia state senator, would not even go so far as to entertain the idea of freeing black slaves. Keep them enslaved, he urged. Known for firing the first shot against Fort Sumter, Ruffin acknowledged that “[t]he owner of negro slaves is interested in obtaining from them the greatest amount of continued useful labor and service.”¹¹⁶ This interest, mind you, was not raw greed, not quite, Ruffin wished the reader to know. For blacks lacked the intelligence of mature men, and thus resembled infants, Ruffin defended; without slavery’s paternal protections, how would they survive?¹¹⁷ Abolitionists had promised repeatedly, Ruffin noted with impatience, that “with full opportunity and facilities, and sufficient time for improvement, the negro could be raised to be equal to the white man in mental acquirements—or, at least, to the capacity for self-government, and self-support and preservation.”¹¹⁸ Ruffin dismissed such optimism

108. Thomas Jefferson, Notes on Virginia, in WRITINGS, AUTOBIOGRAPHY, NOTES ON THE STATE OF VIRGINIA, PUBLIC AND PRIVATE PAPERS, ADDRESSES, LETTERS 123, 265 (Merrill D. Peterson ed., 1984).

109. *Id.* at 266.

110. *Id.* at 267.

111. *Id.*

112. *Id.* at 268.

113. *Id.*

114. *Id.* at 270.

115. *Id.*

116. EDMUND RUFFIN, THE POLITICAL ECONOMY OF SLAVERY, OR, THE INSTITUTION CONSIDERED IN REGARD TO ITS INFLUENCE ON PUBLIC HEALTH AND THE GENERAL WELFARE 3, 20 (n.p., Lamuel Towers 1857).

117. *Id.*

118. *Id.* at 15.

as absurd. In the North, public schools “are open to the children of the blacks as freely as to the whites—many [blacks] have received collegiate education—and nothing but the immutable decree of God, fixing on them mental inferiority, has prevented high grades of intellect and of learning, being displayed in numerous cases.”¹¹⁹

The sole occasion when blacks demonstrated authentic intelligence, Ruffin was pleased to share, was when they sobered to the undeniable truth that they were better suited for slavery under whites than for self-government with their black peers. For Ruffin, then, the only time that blacks did something broaching manhood—deliberation being an instance of independence, and thus manly—was, ironically, when they manfully marched to the conclusion that they were not manly at all. Rather than spitting in their oppressor’s eye, as genuine manhood would have prompted them to do, the best blacks, in Ruffin’s account, meekly “acknowledged the inferiority of their race.”¹²⁰ “One of the results of this acknowledged inferiority,” Ruffin pointed out, “is the well known general unwillingness of negroes to be governed by men of their own race, compared to their usual submissive obedience and docility to the government of white rulers.”¹²¹ Thus described, blacks were the unmanly antithesis of the valiant Englishmen represented in the philosopher John Locke’s boast, made in the seventeenth-century, that “[s]lavery is so vile and miserable an Estate of Man, and so directly opposite to the generous Temper and Courage of our Nation; that ‘tis hardly to be conceived, that an *Englishman*, much less a *Gentleman*, should plead for’t.”¹²²

According to Ruffin, Black slaves will

in most cases exhibit unwillingness to be commanded by the most worthy and respectable of their fellows, even if allied to them by ties of blood and friendship, and sometimes will proceed to disobedience, and even mutinous conduct, when they would have submissively obeyed and respected any white man as their overseer, even if, in truth, less respectable as a man, and less lenient and less intelligent in exercising the deputed authority of the master.¹²³

For Ruffin, blacks were wanting in nearly every regard save one: they appreciably recognized their own inferiority such that they would worship at the feet of their white masters than promote black leaders of their own choosing. Blacks, Ruffin implied, did not aspire to the manly respect of democratic citizenship; they wanted to be dominated. In lieu of manly resistance, they reputedly craved victimization.

Such arguments were presented in the forum of public opinion, not in a court of law. They nonetheless served as the cultural ballast that was necessary for Chief Justice Taney’s judicial opinion in *Dred Scott* to succeed. Edmund Ruffin, George Fitzhugh, Samuel Cartwright, and Thomas Cobb had supplied what they

119. *Id.*

120. *Id.* at 16.

121. *Id.*

122. JOHN LOCKE, *First Treatise*, in TWO TREATISES OF GOVERNMENT 141, 141 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

123. RUFFIN, *supra* note 116, at 16–17.

styled the evidence from sociology that helped to underwrite Taney's judicial pronouncements. Like the Chief Justice, these others had attempted to justify the enslavement of blacks by harping on an ideology of hypermasculinity that celebrated the domination of lesser races by whites. In such a context, Taney's judicial opinion not only seemed legitimate, but, in the grand narrative of history, almost inevitable.

It would be up to Frederick Douglass, a fugitive slave without any formal education, to articulate a forceful critique of Taney and his ilk. The substance of Douglass's critique will be introduced in the next section. Thereafter, an explanation rooted in a theory of manhood will be proffered for why Douglass may have felt prompted to articulate his critique.

III. A CHALLENGE TO WHITE PATRIARCHALISM

The coterie of white supremacists who were discussed in the previous section had reassured their fellow whites that the enslavement of blacks was none too difficult. According to their explanations, the slavishness natural to the Negro's race had rendered him utterly dependent on white masters.

Against these robust accounts of black emasculation, Frederick Douglass used his autobiography to supply a pointedly opposing narrative. Douglass's autobiography was no ordinary narrative. For his autobiography, one of the most iconic in American history, contains a firsthand narrative of slavery that challenges the descriptions of placid patriarchy forwarded by slavery's most prominent advocates. The autobiography thus doubles as a political statement that prepares the reader for Douglass's formal arguments against slavery along with Douglass's formal arguments advocating why blacks were owed by whites equal citizenship. In place of the helplessly docile Negro who was affectionately protected by his patriarchal master, an article of propaganda advocated by Fitzhugh and others, Douglass's autobiography limned a picture of white masters who did their utmost to control every aspect of a slave's existence, lest the latter resist. Not familial love, suggested Douglass, but an insatiable paranoia bordering on terror was the organizing mood of the master. Douglass argued that masters were in fact wracked with fear at the prospect that their slaves could murderously overthrow them at any time and, in the interim, vengefully fantasized about doing so.

At the heart of the master's campaign of oppression was the aim of obliterating a slave's sense of self-worth, a prerequisite for manhood.¹²⁴ For, indeed, you could not adhere to the manly virtue of being "independent in spirit"—or, condensed to maxim, of being your own man—if you were coerced to forego knowledge of yourself as a self-respecting being entitled to a measure of autonomy. No wonder slaveholders endeavored to keep the slave in bleak ignorance of his identity as a human being. Hence, Douglass confessed, "I have no accurate

124. Interested readers may consult other publications by the author relating to the topic of manliness. The accounts of manliness offered in these publications are consonant with those being offered in this Article. See, e.g., JOHN M. KANG, OLIVER WENDELL HOLMES AND FIXATIONS OF MANLINESS (2018); John M. Kang, *The Burdens of Manliness*, 33 HARV. J.L. & GENDER 477 (2010); John M. Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POL'Y 261 (2009).

knowledge of my age, never having seen any authentic record containing it.”¹²⁵ Most slaves, he rued, “know as little of their ages as horses know of theirs, and it is the wish of most masters within my knowledge to keep their slaves thus ignorant.”¹²⁶ Because even “white children could tell their ages,” Douglass was permanently stunted in an ambiguous infantility.¹²⁷ His master treated the slave’s questions about his birth as evidence of “impudent curiosity,” the upshot of a surly impulse for one who was “[b]orn for another’s benefit.”¹²⁸

To reinforce Douglass’s ignorance, the law prohibited him from learning to read. He did manage in snatches to glean shards of information from mischievously kind white children in Baltimore.¹²⁹ Even then, he was beset by a sense of futility. “You will be free as soon as you are twenty-one,” he told his young companions, “*but I am a slave for life!*”¹³⁰ White children could outgrow their infantility, but Douglass was forever condemned to it. Sophia, the wife of Douglass’s master, Hugh Auld, also tried, for reasons that are obscure, to teach him to read.¹³¹ Whatever Sophia’s motivations, Hugh sharply chastened her with this vulgar but illuminating warning:

If you give a n****r an inch, he will take an ell. A n****r should know nothing but to obey his master—to do as he is told to do. Learning would *spoil* the best n****r in the world. Now . . . if you teach that n****r [Douglass] how to read, there would be no keeping him.¹³²

Auld admonished his wife that if Douglass were armed with the knowledge of reading, he would want to become his own man:

It would forever unfit him to be a slave. He would at once become unmanageable, and of no value to his master. As to himself, it could do him no good but a great deal of harm. It would make him discontented and unhappy.¹³³

Here was an unintended, but unequivocal, homage to the power of knowledge to emancipate the slave. With the knowledge of reading, the slave would “at once become unmanageable, and of no value to his master.” He may grow “discontented” and “unhappy.” The feelings bespoke dissatisfaction, and the dissatisfaction derived from the slave’s newly acquired conclusion that he deserved

125. FREDERICK DOUGLASS, *Narrative of the Life of Frederick Douglass*, in AUTOBIOGRAPHIES, *supra* note 2, at 15.

126. *Id.*

127. *Id.*

128. FREDERICK DOUGLASS, *My Bondage and My Freedom*, in AUTOBIOGRAPHIES, *supra* note 2, at 147.

129. FREDERICK DOUGLASS, *Narrative of the Life of Frederick Douglass*, in AUTOBIOGRAPHIES, *supra* note 2, at 39, 41.

130. *Id.* at 41.

131. *Id.* at 37.

132. *Id.* I have inserted asterisks in this passage and others, not to soften the racism expressed in the excerpt, but to avoid unnecessarily offending readers.

133. *Id.*

better. By being able to read, he became his master's equal at the level of intellect. Instead of deferring to his master, the slave felt that he could glean truth for himself.¹³⁴ After hearing Auld's speech, Douglass "now understood what had been to [him] a most perplexing difficulty—to wit, the white man's power to enslave the black man."¹³⁵ Auld, far from assuming that Douglass was mentally feeble, fretted that he very much was not. In his remorselessly racist fashion, Auld was in effect subverting the arguments on offer by the likes of Edmund Ruffin and George Fitzhugh. Auld did not comfortably bask in the assumption that blacks were a mentally docile race. Instead, he confessed his terror that they were not. The purpose of slavery for Auld was not to accommodate a mentally dependent race, but to coerce an independent-minded race to accept their lot as chattel.

The adolescent Douglass, while bereft a formal education, learned on his own that slavery operated as a regime of coerced ignorance, and the master, far from being confidently masculine, was absorbed with fear and perhaps gripped by the effeminate vice of cowardice.

Even in its threadbare guises, the manhood of the slave was downright criminal in his master's eyes because it threatened the master's legally unfettered dominion of hypermasculine power. Notwithstanding the soothing reports of black submissiveness furnished by Thomas Cobb, Esq. and Dr. Samuel Cartwright, Douglass argued that any look, tone, or gesture by the slave suggestive of independence of spirit would be punished as part of a campaign to induce an entrenched infantilization.

Douglass offered these examples of culpable offenses by a slave.

Refusing to show cheerful servility:

"Does a slave look dissatisfied with his condition? It is said, that he has the devil in him, and it must be whipped out."¹³⁶

Refusing to show solemn submissiveness:

"Does he forget, and omit to pull off his hat, when approaching a white person? Then, he must, or may be, whipped for his bad manners."¹³⁷

Expressing manly confidence:

"Does he answer loudly, when spoken to by his master, with an air of self-consciousness? Then, must he be taken down a button-hole lower, by the lash, well laid on."¹³⁸

Vindicating manly honor:

134. *Id.*

135. *Id.*

136. FREDERICK DOUGLASS, *My Bondage and My Freedom*, in *AUTOBIOGRAPHIES*, *supra* note 2, at 295.

137. *Id.*

138. *Id.*

“Does he ever venture to vindicate his conduct, when harshly and unjustly accused? Then, he is guilty of impudence, one of the greatest crimes in the social catalogue of southern society. To allow a slave to escape punishment, who has impudently attempted to exculpate himself from unjust charges, preferred against him by some white person, is to be guilty of great dereliction of duty.”¹³⁹

Outwardly, these examples might be read as solicitations for pity. Perhaps they were, although one must be mindful of Douglass’s skeptical judgement that “[h]uman nature is so constituted, that it cannot *honor* a helpless man, though it can *pity* him, and even this it cannot do long if signs of power do not arise.”¹⁴⁰

A more subversive and plausible reading is that Douglass was enlisting his examples as indictments of contempt for white male insecurity and as evidence for implicit recognition by whites for the black’s dormant manhood. If the white race were magnificently masculine, as Chief Justice Taney, George Fitzhugh and others had boasted, why would white masters be so prickly about the most innocuous signs of black autonomy?

The depth of the slaveholder’s paranoia regarding his slave’s bid for manhood was made clear by one last illustration that Douglass proffered, this one involving not the insolent slave, but the solicitous. Suppose our slave struck the pose of a sycophant. Next, suppose some marvelous idea had visited this slave, an idea that would have effortlessly profited his owner. In anticipation of reward (or, perhaps to project the consoling fantasy of merry collaboration), assume that the slave eagerly confided said bright idea to his master. This would have been a very risky gesture, Douglass feared. For while a slave who was smart could not help being so, if he attempted to share that prodigious intelligence with his master, the slave would chance to compare his mental powers to those of the latter, and that would serve inadvertently as its own form of manly challenge. If the slave “ever venture to suggest a better way of doing a thing, no matter what,” wrote Douglass, he is considered “altogether, too officious—wise above what is written—and he deserves, even if he does not get, a flogging for his presumption.”¹⁴¹ Douglass existed, therefore, in a world where a slave’s manhood, however tempered, was made illegal.¹⁴²

The violence which the slaveholder frequently and fiercely inflicted on Douglass in a ritual of the former’s hypermasculinity would nearly kill the latter. But it was the same violence that, according to Douglass, would also awaken his nascent manhood and embolden him to become, years later, the great abolitionist leader whom we have come to know. It is thus worth dwelling on the details of this transformation.

139. *Id.*

140. FREDERICK DOUGLASS, *Life and Times of Frederick Douglass*, in AUTOBIOGRAPHIES, *supra* note 2, at 591.

141. FREDERICK DOUGLASS, *My Bondage and My Freedom*, in AUTOBIOGRAPHIES, *supra* note 2, at 295.

142. “Manhood” and “manliness” are used interchangeably in this Article.

The story begins with Douglass's master marching him to a "slavebreaker" named Edward Covey.¹⁴³ As his rough moniker portended, Covey's expertise was in smashing the will of a slave, making him absolutely compliant to the claims of white supremacy.¹⁴⁴ The real business of slavery, therefore, did not rely on the putatively compliant nature of the Negro, as someone like Thomas Cobb had casually reassured, but on the vigilant practice of organized terror and socialized degradation.

Douglass would toil one year on Covey's farm. Covey was about twenty-eight years old, and Douglass, sixteen. The gap was not big in absolute numbers, but measured by the quantum of manhood, it was cavernous.¹⁴⁵ The slavebreaker immediately went to work on the teenaged Douglass. Douglass drily quipped, "Perhaps he thought that by coming to blows at once we should mutually better understand our relations to each other."¹⁴⁶ "I had not been in his possession three whole days before he subjected me to a most brutal chastisement."¹⁴⁷ "Under his heavy blows," remembered Douglass, "blood flowed freely, and wales were left on my back as large as my little finger."¹⁴⁸ "The sores from this flogging continued for weeks, for they were kept open by the rough and coarse cloth which I wore for shirting."¹⁴⁹

During Douglass's one-year stay with Covey, "I was whipped, either with sticks or cow-skins, every week."¹⁵⁰ The weekly cycle of torture trapped the young Douglass in a perverse life trajectory. As most white sixteen-year-old boys were maturing into adulthood, and savoring its burgeoning pleasures of autonomy and power, Douglass was being pummeled into relinquishing both—his was a regressive infantilization. Under such circumstances, work, something that conventionally instills freemen with manly self-esteem, operated as a grinding diurnal ritual meant to erode Douglass's dignity and will. Covey "worked me steadily up to the point of my powers of endurance."¹⁵¹ This entailed working in the field "[a]t certain seasons" until "eleven and twelve o'clock at night."¹⁵² "At these times," Douglass noted, "Covey would attend us in the field and urge us on with words or blows. . . ." ¹⁵³

One beating, in particular, harshly reinforced for the adolescent a poignant lesson about his decrepit position in the world. Douglass had failed to tame a wild ox as Covey had ordered him to do. It was a nearly impossible task for the teenager who lacked the strength and, as an ordinary farm hand, the know-how; Douglass failed to subdue the hulking beast who smashed a gate and an oxcart. As punishment, Covey "w[ore] out on [Douglass's] back the heavy goads which he had cut from the

143. FREDERICK DOUGLASS, *Narrative of the Life of Frederick Douglass*, in AUTOBIOGRAPHIES, *supra* note 2, at 54.

144. *Id.*

145. FREDERICK DOUGLASS, *Narrative of the Life of Frederick Douglass*, in AUTOBIOGRAPHIES, *supra* note 2, at 65; *Life and Times*, in AUTOBIOGRAPHIES, *supra* note 2, at 566.

146. FREDERICK DOUGLASS, *Life and Times*, in AUTOBIOGRAPHIES, *supra* note 2, at 565.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 569.

151. FREDERICK DOUGLASS, *Life and Times*, in AUTOBIOGRAPHIES, *supra* note 2, at 569.

152. *Id.*

153. *Id.*

gum tree.”¹⁵⁴ The sixteen-year-old Douglass gained a precociously despairing insight: “I now saw, . . . several points of similarity with that of the oxen. They were property, so was I; they were to be broken, so was I. Covey was to break me, I was to break them; break and be broken—such is life.”¹⁵⁵ The boy was being unmanned in two respects. He was emasculated by being dominated by Covey, and, by being broken like oxen, he was reduced to a beast, and hence treated as something outside the family of man. Covey was in essence treating the adolescent Douglass with a brutality that would have been completely agreeable to a Polyphemus towards an Odysseus. Covey, moreover, was also gratifying the hypermasculine passions that Locke had condemned as emblematic of the beasts like wolves and lions who prey on humans.

After about six months, Douglass “broke down.”¹⁵⁶ “[M]y strength failed me; I was seized with a violent aching of the head, attended with extreme dizziness, and trembling in every limb.”¹⁵⁷ “I had by this time crawled away in the shade,” Douglass narrated, “under the side of a post-and-rail fence, and was exceedingly ill.”¹⁵⁸ Covey spotted the idle Douglass.¹⁵⁹ “He gave me a savage kick in the side which jarred my whole frame, and commanded me to get up.”¹⁶⁰ Douglass, after six months of intimidation and abuse, had been so cowed by then that he would have done anything to placate Covey: “The monster had obtained complete control over me, and if he had commanded me to do any possible thing I should, in my then state of mind, have endeavored to comply.”¹⁶¹ Yet he could not: “I made an effort to rise, but fell back in the attempt before gaining my feet.”¹⁶² Covey “gave me another heavy kick, and again told me to rise.”¹⁶³ Douglass, again, could not, and that was when Covey struck him, inflicting “a large gash, and caused the blood to run freely, saying at the same time, ‘If you have got the headache I’ll cure you.’”¹⁶⁴ Helpless to rise, Douglass half hoped that Covey would kill him, which “might put me out of my misery.”¹⁶⁵ But Covey was paid to be a slavebreaker, not a slave killer; he left Douglass alone to bleed.¹⁶⁶

Douglass then lit upon a very perilous decision to return to Master Auld—without Covey’s permission. Auld, young Douglass was well aware, cared nothing for him as a person, but Douglass was going to appeal to his master’s base concern for him as an expensive investment.¹⁶⁷ Once at the house, Douglass warned Auld that

154. *Id.*

155. FREDERICK DOUGLASS, *My Bondage and My Freedom*, in AUTOBIOGRAPHIES, *supra* note 2, at 263.

156. FREDERICK DOUGLASS, *Life and Times*, in AUTOBIOGRAPHIES, *supra* note 2, at 576.

157. *Id.*

158. *Id.*

159. *Id.* at 576.

160. *Id.* at 577.

161. FREDERICK DOUGLASS, *Life and Times*, in AUTOBIOGRAPHIES, *supra* note 2, at 577.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 578.

Covey was destroying him—Auld’s property; would not Auld permit Douglass to return home?

No, he would not. Auld furiously rejected Douglass’s request: “He did not believe I was sick; I was only endeavoring to get rid of work. My dizziness was laziness, and Covey did right to flog me as he had done. . . . [Auld] fiercely demanded what I wished *him* to do in the case!”¹⁶⁸ While emotionally crushed, Douglass knew “I must not assert my innocence of the allegations he had piled up against me, for that would be impudence.”¹⁶⁹ “The guilt of a slave,” as a matter of course, “was always and everywhere presumed, and the innocence of the slaveholder, or employer, was always asserted.”¹⁷⁰ That is, the issue for Auld was not whether Douglass or any other slave was speaking truthfully. It was rather that the slave had no right to speak, period: “‘Do you dare to contradict me, you rascal?’ was a final silencer of counter-statements from the lips of a slave.”¹⁷¹ The tyrannical rebuke was of a piece with slavery’s mission to emasculate blacks.

Auld commanded Douglass to march back to Covey, and so he did.¹⁷² Back at Covey’s farm, the slavebreaker awaited to give Douglass—just a sixteen-year-old, remember—an unforgettable lesson about departing without permission; even by slave standards, Douglass was in for the beating of a lifetime. “[Covey] was provided with a cowskin and a rope, and he evidently intended to *tie me up*, and wreak his vengeance on me to the fullest extent.”¹⁷³ Afraid, Douglass darted into the woods. “I was in the wood, buried in its somber gloom and hushed in its solemn silence; hidden from all human eyes; shut in with nature and with nature’s God, and absent from all human contrivances.”¹⁷⁴ Here, thought Douglass, “was a good place to pray; to pray for help, for deliverance—a prayer I had often before made.”¹⁷⁵

In a mood befitting the theme of manhood, Douglass in this particular moment of crisis in the woods of Maryland did not seek solace from God. Part of the reason was that Douglass had never known divine assistance. Douglass’s view of religion also had been soured by the fact that slaveholders were among the most ostentatious and ardent Christians.¹⁷⁶ Covey, for instance, was “a professor of religion—a pious soul—a member and a class-leader in the Methodist church.”¹⁷⁷ For Covey, “[a] long prayer at night made up for the short prayer in the morning; and few men could seem more devotional than he, when he had nothing else to do.”¹⁷⁸

So, secluded in the woods, Douglass wondered forlornly:

168. *Id.* at 580.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 581.

173. *Id.* at 582.

174. *Id.* at 583.

175. *Id.*

176. *Id.* at 587.

177. FREDERICK DOUGLASS, *Narrative of the Life of Frederick Douglass*, in *AUTOBIOGRAPHIES*, *supra* note 2, at 54.

178. FREDERICK DOUGLASS, *My Bondage and My Freedom*, in *AUTOBIOGRAPHIES*, *supra* note 2, at 266.

[H]ow could I pray? Covey could pray—Capt. Auld [my master] could pray. I would fain pray; but doubts arising, partly from my neglect of the means of grace and partly from the sham religion which everywhere prevailed, there was awakened in my mind a distrust of all religion and the conviction that prayers were unavailing and delusive.¹⁷⁹

No divine patriarch to guard him, the teenaged Douglass confronted a glum reality. “Life in itself had almost become burdensome to me,” he observed.¹⁸⁰ “I must stay here and starve, or go home to Covey’s and have my flesh torn to pieces and my spirit humbled under his cruel lash. These were the alternatives before me.”¹⁸¹

Eventually, an empathic older slave named Sandy found Douglass and persuaded the latter to come home with him. After feeding the boy, Sandy turned the talk to the consolations of magic, not an unusual topic for slaves who had been denied formal learning and subject to every variety of violation and anguish. Sandy assured Douglass that Covey could not hurt him if Douglass carried a magical herbal root; no white man, Sandy vouched, had ever laid a hand on him as long as he kept the root.¹⁸² Gibberish, thought Douglass—“very absurd and ridiculous”—but who was he, a semi-fugitive sixteen-year-old slave with nowhere to go, to question Sandy’s wisdom? After mulling it over, and in the warm hearth of Sandy’s home, Douglass could not help but believe that his companion was making “a powerful argument just then.”¹⁸³ Douglass took the root, and he reluctantly trudged back to Covey’s farm; he braced himself for Covey’s pending fury.

An odd spectacle awaited him. Covey, dressed in his Sunday’s best, was strolling with his wife to church, both “smiling as angels,” and neither, upon seeing Douglass, flashed anything broaching a frown.¹⁸⁴ Indeed, Douglass thought, “[t]here was something really benignant in his countenance.”¹⁸⁵ Perhaps the root’s magic was working, Douglass ventured; Jesus, on this Sabbath day, was perhaps protecting him. These surmises were fleeting, though: “I suspected, however, that the *Sabbath*, not the root, was the real explanation of the change.”¹⁸⁶ By “Sabbath,” Douglass was not suggesting that Covey’s was an enactment of godly intervention. Rather, Covey’s actions, Douglass guessed, stemmed from a twisted religious zealotry that was obsessed with the pleasures of ceremony, not genuine faith. Covey’s “religion hindered him from breaking the Sabbath, but not from breaking my skin on any other day than Sunday.”¹⁸⁷ Covey “would cut and slash my body during the week,” but “he would on Sunday teach me the value of my soul, and the way of life and salvation by Jesus Christ.”¹⁸⁸ As practiced by Covey, the Sabbath betokened for Douglass not salvation, but bumptious hypocrisy. Religion represented for the sixteen-year-old a

179. FREDERICK DOUGLASS, *Life and Times*, in AUTOBIOGRAPHIES, *supra* note 2, at 583.

180. *Id.*

181. *Id.*

182. *Id.* at 585.

183. *Id.* at 586.

184. *Id.*

185. *Id.*

186. *Id.* at 587.

187. *Id.*

188. *Id.*

creed that could be manipulated and made to service the justifications for evil. Nonetheless, on that Sunday, Douglass, wracked with terror and exhaustion, profited from a much-needed day of rest.

Things were wholly different on Monday. Covey “sneaked into the stable” and “seiz[ed] me suddenly by the leg, he brought me to the stable-floor, giving my newly-mended body a terrible jar.”¹⁸⁹ The magic roots had failed Douglass; God apparently had failed Douglass; and Christianity, in the repulsive form of Covey and his wife, had revealed itself as farce. The sixteen-year-old Douglass realized he had only himself. His unaided manhood would be tested. “I now forgot all about my roots, and remembered my pledge to stand up in my *own* defense.”¹⁹⁰

Covey tried to put a slip-knot on Douglass’s legs but “[h]e was defeated in his plan of tying me.”¹⁹¹ “While down,” Covey “seemed to think that he had me very securely in his power.”¹⁹² Covey “little thought he was—as the rowdies say—in’ for a ‘rough and tumble’ fight; but such was the fact.”¹⁹³

What followed was the most important event in Douglass’s life: he found his manhood.

Two hours. That is how long Douglass’s now storied brawl with Covey lasted.¹⁹⁴ The details of the ordeal will follow. What will be stressed is how the narrative of the brawl was much more than an ordering of events. It was meant to persuade a white readership that the black man was deserving of equal citizenship. Specifically, the narrative was meant to illustrate in compelling terms the thesis that the black man was *both* manly *and* gentlemanly. Douglass, through his account of the fight that would change his racial worldview, sought to prove to white America that he could muster a heroic violence to defend himself against a tyrant, but that he would never breach the norms of the self-restraint characteristic of a gentleman who cherished civility and its attendant ideals. By demonstrating that he could be both simultaneously civil (like a gentleman) and assertive (like a warrior), Douglass thus embodied and acted out, quite literally, the moral principles that were demanded by the Constitution’s logic of self-government. In essence, Douglass’s summary of his fight with Covey was made to do the work of politics. Douglass sought to enlist the narrative, which had been polished over three different versions of his autobiography, to demonstrate to a white audience that his identity as both man *and* gentleman rendered him splendidly qualified for the privilege and responsibility of equal citizenship. Such was the political backdrop for Douglass’s narrative of the brawl.

Return to the action. Covey, Douglass told the reader, “little thought he was—as the rowdies say—in’ for a ‘rough and tumble’ fight; but such was the fact.”¹⁹⁵ An ominous forecast had been delivered by Douglass. While the hint of violent resistance was palpable, Douglass was suggesting something more subtle in this sentence. He was taking pains to accentuate that while he would immerse himself

189. *Id.*

190. *Id.* at 587–88 (first emphasis omitted and second emphasis added).

191. *Id.* at 588.

192. *Id.*

193. *Id.*

194. *Id.* at 590.

195. *Id.* at 588.

in violence, he was not a hypermasculine brute. Consider the insertion of the nested quotation in the latter excerpt to enclose the phrase “rough and tumble.” These were words that Douglass himself would not use, he wished his reader to know; it was the vernacular of “the rowdies.”¹⁹⁶ *Rough and tumble* was the chosen idiom of a vulgar, coarser class of men who, as suggested by their very name *rowdies*, was given to hypermasculine impulses. Therefore, even as Douglass sought to participate in a “rough and tumble” fight, he clearly sought to distance himself from a culture of hypermasculinity. He would fight to save himself, but fight as a gentleman, not as a “rowdy.”

Part of the reason why he was able to do so was because Douglass, from the beginning of the fight with Covey, was fully in charge. Right from the start, Douglass wanted to reassure his reader that he “felt as supple as a cat, and was ready for [Covey] at every turn.”¹⁹⁷ Note the animal metaphor that Douglass chooses for himself: a cat. Felines are conventionally associated with femininity; while cats do look for prey in rodents and birds, they are not usually considered beasts of prey in the vein of wolves and lions, frightening beasts that can prey on men. Wolves and lions, indeed, can serve as symbols of hypermasculinity. Significantly, no blows were delivered by Douglass. There is a dramatic moment, it is true, when Douglass held Covey’s throat. Douglass “held [Covey] so firmly by the throat that his blood followed my nails.”¹⁹⁸ Even, here, though, Douglass did not enjoy any advantage. “He held me, and I held him.”¹⁹⁹ At this point “[a]ll was fair thus far, and the contest was about equal.”²⁰⁰ By thus seizing Covey, Douglass, as a boy, saw his actions in a larger political light. “I found my strong fingers firmly attached to the throat of the tyrant, as heedless of the consequences, at the moment, as if we stood as equals before the law.”²⁰¹ “The very color of the man was forgotten,” he concluded.²⁰²

They were merely holding each other, but it was enough to terrify Covey, who, in Douglass’s narrative, revealed himself a coward. The slavebreaker was seized by the very terror that he had casually doled out to his adolescent captive: “My resistance was entirely unexpected and Covey was taken all aback by it.”²⁰³ Covey, once menacing, now “trembled in every limb,” and lamely bayed at Douglass, “*Are you going to resist, you scoundrel?*”²⁰⁴ At this point, the reader would expect Douglass to repay Covey for his sadism or to at least to proffer a duly angry retort that would have been received by Covey as unpardonably insolent. Douglass did no such thing. Instead, he acted the perfect gentlemen, even including a respectful honorific, a gesture bordering on the incredulous. “*Yes sir,*” Douglass retorted, “steadily gazing my interrogator in the eye, to meet the first approach or dawning of the blow which I expected my answer would call forth.”²⁰⁵

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

No such blow arrived. In its stead came an admission of effeminate helplessness. The 28-year-old slavebreaker screamed for assistance from his cousin. “Covey soon cried lustily for help; not that I was obtaining any marked advantage over him, or was injuring him, but because he was gaining none over me, and was not able, single-handed, to conquer me.”²⁰⁶ Douglass carefully qualified that he was not, in any way, threatening Covey’s life. Douglass was not “obtaining any marked advantage over him” or “injuring him.” As far as Douglass was concerned, he was fine with the deadlock. Covey, on the other hand, continued to adhere to the psychology of a tyrant by trying to “conquer” Douglass. After Covey called for him, Covey’s cousin Hughes darted to subdue Douglass.

Now it was *two* grown men conspiring against the lone youngster. Douglass had been essentially on the defensive before Hughes showed up, but, outnumbered, he had to take preemptive steps, or, rather, punches. Nevertheless, these were thrown, he stressed, because he had no choice, not because he enjoyed the pleasures of hypermasculinity. “I was *compelled* to give blows, as well as to parry them.”²⁰⁷ Suggestively, Douglass, at this point, does not align himself with the likes of a wolf or lion. Instead, Douglass, even as he was fighting off Covey analogizes himself to an animal that is the prey: “. . . I felt (as the musty proverb goes) that I ‘might as well be hanged for an old sheep as a lamb.’”²⁰⁸ The reference to being “hanged” was not a hyperbole; slaves could be executed for physically assaulting their masters. Even as Douglass was asserting himself valiantly against Covey, the slave was also condemning himself to death. Douglass thereby cast himself as a potential victim, not an aggressor. While just a boy, he was preparing himself to be a gentleman by adopting the mindset of a helpless martyr, not a wolfish belligerent. Douglass suspected that he would be hanged for his assault against Covey, but he refused to give vent to any hypermasculine passions for fierce revenge. In Douglass’s telling, he remained a gentleman who accorded himself as civilly as possible under the circumstances. Douglass continues his story: “I was still defensive toward Covey, but aggressive toward Hughes, on whom, at his first approach, I dealt a blow which fairly sickened him.”²⁰⁹ Hughes “went off, bending over with pain, and manifesting no disposition to come again within my reach,” but then tried “to catch my right hand, . . .”²¹⁰ Douglass then “gave [Hughes] the kick which sent him staggering away in pain, at the same time that I held Covey with a firm hand.”²¹¹ Again, Douglass had no craving for hypermasculine revenge; his reactions were wholly defensive. Even as he was besieged by two men, the boy behaved like a gentleman who, to the extent possible, remained astonishingly civil.

Regardless, Covey was beat. “Taken completely by surprise, Covey seemed to have lost his usual strength and coolness,” and he “was frightened, and stood puffing and blowing, seemingly unable to command words or blows.”²¹² When Covey “saw that Hughes was standing half bent with pain, his courage quite gone,

206. *Id.*

207. *Id.* (emphasis added).

208. *Id.* at 588–89.

209. *Id.* at 589.

210. *Id.*

211. *Id.*

212. *Id.*

the cowardly tyrant asked if I ‘meant to persist in my resistance.’”²¹³ Douglass very much did: “I told him I ‘*did mean to resist*, come what might; that I had been treated like a brute during the last six months, and that I should stand it no longer.”²¹⁴ *I should stand it no longer*. Douglass’s declaration was a portent of manly violence, but it did not share the dangerous passions of a culture of hypermasculinity. Douglass, after all, did not wish to hurt Covey; the former only wished to “resist.” This was not the indulgence of a hypermasculine brute who, like the philosopher John Locke’s *Beast of Prey*, knew “no other Rule, but that of Force and Violence.” Indeed, it was the sentiment of one who sought to *justify* his actions before Covey, his oppressor, a being who, unlike Douglass, *was* a veritable personification of Locke’s *Beast of Prey*. Further, with the words *I should stand it no longer*, Douglass was warning his slavebreaker that the young slave would give the former one final chance to desist.

Arriving like a necessary intervention in a narrative of drama, Covey, almost as if taking stage direction from Douglass himself, unwisely bent to grab a stick to hit the latter. It was the perfect provocation. For it afforded Douglass the opportunity to fulfill through action what he meant by the ominous promise *I should stand it no longer*. In pledging that he would no longer *stand it*, Douglass was in effect challenging the argument by Samuel Cartwright that the Negro was “the submissive knee bender.” When attacked by Covey with the stick, “I seized him with both hands by the collar,” Douglass stated, “and with a vigorous and sudden snatch brought my assailant harmlessly, his full length, on the not over-clean ground, for we were now in the cow-yard.”²¹⁵

Douglass wanted to stress, yet again, that he was a gentleman. Yes, he was “vigorous” but his actions towards Covey were “harmless.” Nevertheless, their symbolic import was undeniable. The narrative of Covey being thrown into the “cow-yard” represented how a racist hierarchy built on ruthless exploitation was turned on its head, literally. Douglass, a slave relegated by law and social practice to the very bottom of society, physically toppled Covey, our herald of white supremacy; Douglass threw him into the “not over-clean ground,” into the “cow-yard.” The takedown succinctly symbolized Douglass’s transformation from boy to man. The sixteen-year-old had inverted the received axioms of social reality: he won his (teenaged) manhood by defeating two grown white men, including a notorious slavebreaker. He demonstrated to himself and them that he was not the emasculated figure of contempt supposed by slavery’s defenders.

Douglass thus mused, decades later, in the third iteration of his autobiography that “[t]his battle with Mr. Covey, . . . was the turning-point in my ‘life as a slave.’”²¹⁶ The battle, he declared with satisfaction and some wonder, “revived a sense of my own manhood”, and “I was a changed being after that fight.”²¹⁷ The extent to which the brawl altered him was made unequivocal by Douglass in these lines: “I was *nothing* before; *I was a man* now. [My physical

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 591.

217. *Id.*

victory over Covey] recalled to life my crushed self-respect, and my self-confidence, and inspired me with a renewed determination to be a *free man*.”²¹⁸ Here was a direct refutation of the arguments presented by slavery’s proponents, including by Thomas Cobb, who had reassured his white readers that the Negro was “passive and obedient, and consequently easily governed.”²¹⁹

It was paramount, however, that Douglass convince his white audience that the sum of his manhood amounted to a propensity for violence. To that end, it is important to note how the celebration of violence in Douglass’s narrative, while evident, is also studiously tempered by his desire to be thought of as a gentleman who values civility. One therefore does not find any boasting on Douglass’s part for having defeated a sadistic tyrant. The brawl, despite its unequivocal success for Douglass, did not instill in him a taste for bloodlust. Rather, the experience of having beaten *two* grown men in a fight for his life, an otherwise glorious achievement of masculinity, engendered in young Douglass an effect which was morally ameliorative. It “inspired” him to pursue “a renewed determination to be a *free man*.” The event thus emboldened him to assert his right to be treated with dignity, a crucial lesson for one who would become the most important abolitionist in America.

To be sure, Douglass’s glee in recounting his victory over Covey was plain, and he took relish in sharing its details with the reader. Most notably, Douglass eagerly shared with the reader a moment of poignant humiliation suffered by Covey. “I seized him with both hands by the collar,” Douglass wrote, “and with a vigorous and sudden snatch brought my assailant harmlessly, his full length, on the not over-clean ground, for we were now in the cow-yard.”²²⁰ Douglass took pleasure in telling the reader that a mere lad of sixteen had thrown the monstrous Covey into cow dung. Even here, though, Douglass wants his reader to know that he behaved as a gentleman. Douglass brought Covey down “harmlessly,” and no express gloating attended the description.

For reasons that remain somewhat mysterious, Covey never reported Douglass’s assault to the police. Douglass thus managed to avoid what would surely have been a capital crime. One reason why Covey remained silent may have been owing to the fact that he would have imperiled his profession as a slavebreaker if the scandalous news had spread that it was he, not Douglass, who had been in a sense “broken” by the black adolescent. Regardless, the fight with Covey was a coming-of-age moment for Douglass. It taught him to be manly, but, also, gentlemanly. Douglass, as an adult, would deliberate this event many times, and it would sustain him in moments of doubt and embolden him to become the magnificent leader that he became.

But the victory over Covey, standing alone, did not resolve whether Douglass interpreted the Constitution as including blacks as citizens. But he would offer a forceful answer, when he grew into his adulthood, decades removed from his fight with Covey.

218. *Id.*

219. COBB, *supra* note 86, at 40.

220. DOUGLASS, *supra* note 2, at 589.

IV. THE CONSTITUTION IS AN ANTISLAVERY DOCUMENT

Chief Justice Taney had decided in 1857 that blacks were never intended by the Founding Fathers to be included as citizens in the Constitution. The reader will recall that Taney had employed a version of originalism that went beyond a professional interest in discerning the meaning of the Constitution's text. Taney's originalism had allied itself to the political mission of glorifying the hypermasculinity of the Anglo-Saxon race. Taney's judicial opinion thus functioned not simply as a document of exegesis but a celebration of white supremacy. He had argued in *Dred Scott* that the white race had arrived on the shores of America as heroic founders of a great republic. By contrast, blacks had arrived on the same shores as a conquered race of slaves, Taney had stated. The white race, Taney had explained, had proven their worth as citizens whereas the black race had failed abjectly to do so. Therefore, insisted Taney, the Founding Fathers would never have acquiesced the proposal that the Constitution meant to include blacks as citizens. To suggest otherwise, according to Taney, would be tantamount to an implicit acknowledgement that the Founding Fathers were magnificent hypocrites who enslaved blacks, on the one hand, and saw them as citizens, on the other. This, Taney refused to do.

If Frederick Douglass wished to argue that the Constitution did in fact include blacks as citizens, he would need to respond to what Taney had written. Douglass's first order of business was to discredit Taney's particular reliance on originalism. He announced, "What will the people of America a hundred years hence care about the intentions of the scribes who wrote the Constitution?"²²¹ After all, Douglass explained, "These men are already gone from us. . . ." ²²² The Constitution's framers "were for a generation, but the Constitution is for ages."²²³ Douglass added:

Whatever we may owe to them, we certainly owe it to ourselves, and to mankind, and to God, to maintain the truth of our own language, and to allow no villainy, not even the villainy of holding men as slaves . . . to shelter itself under a fair-seeming and virtuous language.²²⁴

The passage is suggestive. Douglass stated that the Constitution has a meaning independent of what the Framers believed. He also declared that the people themselves—his contemporaries—owed it to *themselves* to get the Constitution's meaning right.

What Douglass proposed as an alternative to originalism was a form of textualism that was animated by an ethos of racial egalitarianism. He articulated his ideas in a speech delivered in Scotland in 1860, three years after the Supreme Court's decision in *Dred Scott* and eight years after his alternative account of the Constitution

221. FREDERICK DOUGLASS, *The Constitution of the United States: Is It Pro-Slavery or Antislavery*, in *SELECTED SPEECHES AND WRITINGS*, *supra* note 35, at 380, 382.

222. *Id.* at 382.

223. *Id.*

224. *Id.*

as an antislavery document.²²⁵ The speech was appropriately titled “The Constitution of the United States: Is It Pro-Slavery Or Antislavery?”²²⁶ For Douglass, the answer was unequivocal: the great document was antislavery.²²⁷ Douglass began his explication by emphasizing the importance of reading the text of the Constitution, rather than deferring to the intent of the Founding Fathers. “What, then, is the Constitution?” he posed.²²⁸ It was not the property of the Founding Fathers, he suggested. Douglass elaborated that the Constitution “is a great national enactment done by the people, and can only be altered, amended, or added to by the people.”²²⁹ For good measure, he added a statement that seemed a nearly direct rebuke of Taney’s originalism: “It would be the wildest of absurdities, and lead to endless confusion and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it.”²³⁰

Having dissuaded the reader from consulting the intent of the Framers, Douglass then urged the reader to consult the text of the Constitution itself. The reader would then find a meaning that transcended the racist practices of some of the Founding Fathers, reassured Douglass. Douglass began by examining Article I, Section 9, Clause 1. This was the clause that seemed to guarantee to slaveholders the right to traffic in human beings until 1808. The clause read:

The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importations, not exceeding 10 dollars for each person.²³¹

There were those who believed that this clause was evidence of the Constitution’s support for slavery.²³² For the clause appeared to them to “provid[e] for the continuance of the African slave trade for 20 years, after the adoption of the Constitution.”²³³ But Douglass criticized this interpretation as wrongheaded. He urged:

It should be remembered that this very provision, if made to refer to the African slave trade at all, makes the Constitution anti-slavery rather than for slavery, for it says to the slave States, the price you will have to pay for coming into the American Union is,

225. *Id.* at 380.

226. *Id.*

227. Douglass had not always believed this to be true. As a votary of the white abolitionist William Lloyd Garrison, Douglass, following his mentor, had maintained the view that the Constitution was a proslavery document. See MARTIN, *supra* note 6, at 23, 31–32, 37–38, 182.

228. DOUGLASS, *The Constitution of the United States*, in SELECTED SPEECHES AND WRITINGS, *supra* note 35, at 381.

229. *Id.*

230. *Id.*

231. U.S. CONST. art. I, § 9.

232. DOUGLASS, *The Constitution of the United States*, in SELECTED SPEECHES AND WRITINGS, *supra* note 35, at 383.

233. *Id.* at 382.

that the slave trade, which you would carry on indefinitely out of the Union, shall be put an end to in twenty years if you come into the Union.²³⁴

More to the point, the clause “looked to the abolition of slavery rather than to its perpetuity.”²³⁵ This, of course, was not the interpretation adopted by Taney in *Dred Scott*.

Nor was Douglass’s interpretation of the infamous “three-fifths compromise” in Article I, Section 2, Clause 3.²³⁶ There too, one finds mention of slavery, as signified by the reference to “all other persons”:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.²³⁷

Douglass stated in a surprising move that even if the clause were given the “very worst construction,” such construction would amount to “a downright disability laid upon the slaveholding States; one which deprives those States of two-fifths of their natural basis of representation.”²³⁸ Therefore, Douglass explained, “instead of encouraging slavery, the Constitution encourages freedom by giving an increase of ‘two-fifths’ of political power to free over slave States.”²³⁹ For Douglass, the three-fifths clause “leans to freedom, not to slavery.”²⁴⁰ After all, he suggested, “for, be it remembered that the Constitution nowhere forbids a coloured man to vote.”²⁴¹ Douglass’s reading thus turned the three-fifths clause on its head, as a kind of aspiration for racial equality.

Such imaginative interpretation was extended to the so-called “fugitive slave clause” in Article IV, Section 2, Clause 2.²⁴² The clause read:

A person charged in any state with treason, felony, or other crime, who shall flee justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.²⁴³

234. *Id.* at 384.

235. *Id.*

236. *Id.* at 383.

237. U.S. CONST. art. I, § 2, cl. 3.

238. DOUGLASS, *The Constitution of the United States, in SELECTED SPEECHES AND WRITINGS*, *supra* note 35, at 384.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 383.

243. U.S. CONST. art. IV, § 2, cl. 2.

Douglass argued that the aforementioned clause “applies to indentured apprentices and others who had become bound for a consideration, under contract duly made, to serve and labour.”²⁴⁴ “To such persons,” he stressed, “this provision applies, and only to such persons.”²⁴⁵ What Douglass meant by this was that the clause only applies to those “bound to service.”²⁴⁶ He elaborated, “Its object plainly is, to secure the fulfillment of contracts for ‘service and labour.’”²⁴⁷ As far as Douglass was concerned, the clause only applies to “indentured apprentices, and any other persons from whom service and labour may be due.”²⁴⁸ Therefore, “[t]he legal condition of the slave puts him beyond the operation of this provision.”²⁴⁹ The slave, argued Douglass, “is a simple article of property” and “does not owe and cannot owe service.”²⁵⁰ The slave “cannot even make a contract.”²⁵¹ The slave, in other words, “can no more make such a contract than a horse or an ox can make one.”²⁵² The slave is accordingly “exempted from the operation of this fugitive provision.”²⁵³

The basis for Douglass’s interpretation rested on the belief that the Constitution, being a written document, invited the people to discern its meaning for themselves. “It is no vague, indefinite, floating, unsubstantiated, ideal something, coloured according to any man’s fancy, now a weasel, now a whale, and now nothing.”²⁵⁴ For Douglass, the Constitution “is a plainly written document, not in Hebrew or Greek, but in English . . .”²⁵⁵ With this remark, Douglass thereby made the tacit suggestion that institutional authorities like Chief Justice Taney did not enjoy greater epistemic authority than the average lay reader. The effect of Douglass’s argument was to discredit Taney’s reliance on originalism and his celebration of the Founding Fathers.

By opting for literalism and by rebuking originalism, Douglass would seem to have rejected the Founding Fathers as a source of interpretive authority, and, by extension, the manhood associated with them, as a source of morality. Such inference would be unwarranted, however. For Douglass elsewhere had developed a robust account of how the Founding Fathers should in fact be admired, albeit with critical reflection, as moral authorities for successive generations. Douglass’s argument took the form of a speech that he gave on July 5, 1852. That speech would be remembered by future generations as his most famous. The speech was titled “The Meaning of July Fourth for the Negro,” and it was delivered before a mostly receptive crowd of

244. DOUGLASS, *The Constitution of the United States, in SELECTED SPEECHES AND WRITINGS*, *supra* note 35, at 386.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 381.

255. *Id.*

white abolitionists in Rochester, New York.²⁵⁶ The substance of Douglass's speech differed from what he would say eight years later regarding the Constitution as an antislavery document. For in the latter, Douglass seemed to have adopted the position that the Founding Fathers were extraneous to the aims of uncovering the meaning of the Constitution. However, in his earlier speech in Rochester, Douglass appeared to have embraced the view that the Founding Fathers were worthy of emulation. The title of Douglass's Rochester speech, "The Meaning of July Fourth for the Negro," implied that his topic of choice was not manhood, but race; the speech, in fact, was very much about race. Yet a conspicuous trope that organized his ruminations about race and slavery was gender. In particular, Douglass dwelled on the crucial relationship between sons and fathers, and its implications for political freedom and justice.

In "The Meaning of July Fourth for the Negro," Douglass started by touching upon the political significance of the Fourth of July. "It is the birthday of your National Independence, and of your political freedom," he declared.²⁵⁷ This much was obvious to the audience, of course. But in his speech, Douglass attributed new meaning to the familiar terms "National Independence" and "political freedom." He used these terms to signify something more than occasions for collective self-congratulation by white colonists. Specifically, Douglass desired for his white audience to reflect on the uncomfortable question of what the Fourth of July meant as a moral matter for "the Negro." Douglass sought to prompt such reflection by calling upon the white audience to recall the Fourth of July as a day of *deliverance*. This special day, Douglass announced, "carries your minds back to the day, and to the act of your great deliverance; and to the sign, and to the wonders, associated with that act, and that day."²⁵⁸ Douglass uses the word "deliverance" in a manner that was meant to recall the Old Testament story of Moses. In fact, Douglass makes the connection explicit. The Fourth of July, he declared, "is what the Passover was to the emancipated people of God." God had delivered Moses and the Jews from Pharaoh's enslavement, but, who, according to Douglass, had delivered the American colonies from British tyranny?

Douglass was ready with an answer: the fathers of the men who were listening to his speech. He thus introduced the thesis that the "National Independence" and the "political freedom" solemnized by the Fourth of July were a *patrimony*, a gift from fathers to their sons. The Fourth of July was, according to Douglass, a day for sons to honor the fathers who risked life and limb to give the former an extraordinary patrimony. Yet if Douglass's account was true, the idea of National Independence and political freedom also raised questions about *patriarchalism*, the belief that fathers, rather than sons, deserved to rule, along with the corollary belief that sons should defer to the epistemic authority of fathers.²⁵⁹ After all, if the fathers were capable of doing something that was comparable to what God had done for Moses, should not the sons pledge their unqualified obedience to

256. DOUGLASS, *The Meaning of July Fourth for the Negro*, in *SELECTED SPEECHES AND WRITINGS*, *supra* note 35, at 188.

257. *Id.* at 189.

258. *Id.*

259. See Kang, *Manliness and the Constitution*, *supra* note 36, at 276–83; see generally Kang, *Patriarchy and Constitutional Origins*, *supra* note 103, at 501.

such heroic fathers in much the same vein that Moses and the Jews had done for God with respect to His Ten Commandments?

As far as Douglass was concerned, the analogy was fundamentally flawed. For the fathers of the men listening to him in 1852 had established a precedent of refusing to honor political patriarchs. Indeed, these fathers had refused to abide the British king, a being who styled himself a patriarch to the colonists. “Your fathers,” Douglass told the audience, “esteemed the English Government as the home government; and England as the fatherland.” Britain, like a father toward his infant son, controlled the colonists, Douglass said.

This home government, you know, although a considerable distance from your home, did, in the exercise of its parental prerogatives, impose upon its colonial children, such restraints, burdens and limitations, as, in its mature judgment, it deemed wise, right and proper.²⁶⁰

While Britain may have thought its policy toward the colonists “wise, right and proper,” the suggestion that Britain was the father to the colonists was also a precarious one to embrace for the latter. For the fathers of the men who were listening to Douglass were not infants; they were grown men. As grown men, they as a group presumptively possessed the powers of reason and mature judgment. But the king, without consultation from these grown men, had imposed the “restraints, burdens and limitations” befitting children. There was, then, a glaring difference between the British king and the God of the Old Testament. God had liberated the Jews; the British king had infantilized the colonists.

As much as they may have “esteemed” the “fatherland,” the colonists themselves were fathers, and they would not abide such infantilization from Britain. As adult men who wished to think for themselves, the fathers of the men listening to Douglass’s speech rebuked as unjust the king’s actions. “[Y]our fathers, who had not adopted the fashionable idea of this day, of the infallibility of government, and the absolute character of its acts, presumed to differ from the home government in respect to the wisdom and the justice of some of those burdens and restraints.”²⁶¹ Your fathers, Douglass reminded, “went so far in their excitement as to pronounce the measures of government unjust, unreasonable, and oppressive, and altogether such as ought not to be quietly submitted to.”²⁶²

This was no easy feat. For “there was a time when, to pronounce against England, and in favor of the cause of the colonies, tried men’s souls.”²⁶³ Douglass elaborated, “To say now that America was right, and England wrong, is exceedingly easy.”²⁶⁴ However, “there was a time when, to pronounce against England, and in favor of the cause of the colonies, tried men’s souls.”²⁶⁵ For “[t]o side with the right against the wrong, with the weak against the strong, and with the oppressed against

260. DOUGLASS, *The Meaning of July Fourth for the Negro*, in *SELECTED SPEECHES AND WRITINGS*, *supra* note 35, at 190.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

the oppressor! here lies the merit, and the one which, of all others, seems unfashionable in our day.”²⁶⁶ The fathers who hastened the momentous events of the Revolution were undaunted, Douglass told his audience. “Feeling themselves harshly and unjustly treated, by the home government, your fathers, like men of honesty, and men of spirit, earnestly sought redress.”²⁶⁷ But, Douglass stressed, they did so with the civility becoming of *gentlemen*. “They petitioned and remonstrated: they did so in a decorous, respectful, and loyal manner.”²⁶⁸ This was an important detail because it suggested that colonial men were mature and self-disciplined, not the purported children whom Britain assumed they were.

Sensing that legal measures were ineffective, the fathers sought more assertive means. “Oppression makes a wise man mad,” Douglass foreboded.²⁶⁹ “Your fathers were wise men, and if they did not go mad, they became restive under this treatment.”²⁷⁰ The fathers “felt themselves the victims of grievous wrongs, wholly incurable in their colonial capacity.”²⁷¹ Yet “[w]ith brave men there is always a remedy for oppression.”²⁷² “Just here,” Douglas exclaimed, “the idea of a total separation of the colonies from the crown was born!”²⁷³ It was an idea that terrified lesser men. “The timid and the prudent (as has been intimated) of that day were, of course, shocked and alarmed by it.”²⁷⁴ With these words, Douglass provided a tacit response to the question of what was the relationship between *patrimony* and *patriarchalism* in the context of “National Independence” and “political freedom.” He in effect suggested that the patrimony bequeathed by American fathers toward their sons were the gifts of National Independence and political freedom, gifts that were wrought by overthrowing an authoritarian patriarchalism as a bane to self-government. In essence, the patrimony given by the fathers to their sons was the overthrowing of patriarchalism as a formal basis for political authority in the colonies.

Yet the Fourth of July was not an unqualified gift for the sons. It also represented a burden for them, one that Douglass urged they should willingly bear. For, in Douglass’s mind, the Fourth of July was more than an event. It was the enactment of an aspiration to establish a republic founded on political freedom. The best way for the sons to honor their fathers, Douglass argued, was by furthering their aspirations for political freedom by eradicating slavery and giving legal rights to blacks.

How Douglass intended to distill these arguments from the theme of the Fourth of July required time and was made gradually. He started by paying what appeared to be standard homage to the heroism of the republic’s fathers. This was a somewhat paradoxical move for one who had disclaimed patriarchalism in its authoritarian guise. It was necessary, however, because Douglass needed to establish

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

that the republic's fathers were paragons of moral manliness who deserved to be emulated by the sons. "Fellow Citizens," he announced, "I am not wanting in respect for the fathers of this republic."²⁷⁵ Far from it, reassured Douglass. "The signers of the Declaration of Independence were brave men," he said. "They were great men, too—great enough to give frame to a great age."²⁷⁶ Moreover, Douglass added, "It does not often happen to a nation to raise, at one time, such a number of truly great men."²⁷⁷ What rendered them "truly great men" was not simply that they had procured America's independence from Britain. In Douglass's telling, the fathers of the Founding Generation almost took on the cast of romantic dreamers who were willing to die for freedom as its own end. "Your fathers staked their lives, their fortunes, and their sacred honor, on the cause of their country."²⁷⁸ Douglass continued, "In their admiration of liberty, they lost sight of all other interests."²⁷⁹ Elaboration followed:

With them, nothing was "settled" that was not right. With them, justice, liberty, and humanity were "final"; not slavery and oppression. You may well cherish the memory of such men. They were great in their day and generation. Their solid manhood stands out the more as we contrast it with these degenerate times.²⁸⁰

Consider what Douglass was saying. The sons lived in "degenerate times," a shameful transgression from the paradigm of "solid manhood" created by their fathers. The fathers' glorious manhood was founded on the moral commitment to the principle of freedom. According to Douglass, the fathers of the republic were opposed to "slavery and oppression." To be sure, the terms "slavery" and "oppression," as Douglass used them, were not meant to describe the enslavement of blacks or *their* oppression. Douglass was referring to the "slavery and oppression," such as they were, that the white fathers suffered at the hands of Britain.

Nevertheless, the parallels that he was trying to draw from the political "slavery" imposed on the white colonists to the totalitarian slavery suffered by blacks were plain. Douglass was implying that white fathers had created for their sons the moral precedent of embracing freedom and fighting oppression. The fathers had pledged their lives to honor "eternal principles" about freedom. It was the sort of heroic selflessness that white politicians in Douglass's own time would not make, he rued.

How circumspect, exact and proportionate were all their movements! How unlike the politicians of an hour! Their statesmanship looked beyond the passing moment, and stretched away in strength into the distant future. They seized upon *eternal*

275. *Id.* at 192.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

principles, and set a glorious example in their defence. Mark them!²⁸¹

According to Douglass, it was chiefly a nonnegotiable yearning for freedom itself, rather than monetary gain or even a desire to repel cruelty, that motivated the fathers of the republic to overthrow British tyranny.

The exquisite moral example set by these heroic fathers was not a luxury to be savored by the sons, Douglass admonished. It was a call for the sons to fulfill the moral duty to live up to their father's aspirations. "Your fathers have lived, died, and have done their work, and have done much of it well."²⁸² Now the obligation fell to the sons:

You have no right to enjoy a child's share in the labor of your fathers, unless your children are to be blest by your labors. You have no right to wear out and waste the hard-earned fame of your fathers to cover your indolence.²⁸³

If political freedom was a patrimony, it was one that came with grave expectations for the sons to extend in their own time and render robust its substance.

It was fashionable, hundreds of years ago, for the children of Jacob to boast, we have "Abraham to our father," when they had long lost Abraham's faith and spirit. That people contended themselves under the shadow of Abraham's great name, while they repudiated the deeds which made his name great. Need I remind you that a similar thing is being done all over this country to-day?²⁸⁴

What was this "similar thing" that Douglass referred to? The mention of *Abraham* and *Jacob*, signal characters in the narrative of the Old Testament, should have alerted the reader. Douglass explained:

Need I tell you that the Jews are not the only people who built the tombs of the prophets, and garnished the sepulchers of the righteous? [George] Washington could not die till he had broken the chains of his slaves. Yet his monument is built up by the price of human blood, and the traders in the bodies and souls of men shout—"We have Washington to *our father*."—Alas! that it should be so; yet so it is.²⁸⁵

Note how Douglass humanizes the immortal Washington. Instead of paying uncritical homage to the great man, Douglass portrays the Founding Father as both moral gentleman *and* hypermasculine brute. Washington "could not die till he had broken the chains of his slaves." He was therefore a splendid gentleman. Yet Washington also left behind a legacy of racial exploitation that was built on "human blood." By thus casting Washington—the Father of His Country—as both a splendid

281. *Id.*

282. *Id.* at 193.

283. *Id.*

284. *Id.*

285. *Id.* at 193–94.

gentleman *and* a brute, Douglass was preparing his audience for the proposition that both they and their fathers occupied the same morally barbed position. Both the fathers and sons acknowledged the priority of freedom, but both also benefited from the tyrannical practice of slavery. As such, the fathers and the sons showed themselves as hypocrites. Both the fathers and sons therefore suffered the moral vice that Chief Justice Taney staunchly refused to attribute to the Founding Fathers. Not only were the Founding Fathers like Washington hypocrites, Douglass argued, so too were *all* of the white fathers and *all* of the white sons who, like gentlemen, championed the cause of freedom on the one hand but, like tyrants, benefited from slavery on the other.

Douglass made his thesis explicit, and, in doing so, he finally clarified the central thesis of his speech, “The Meaning of July Fourth for the Negro.”

What, to the American slave, is your 4th of July? I answer; a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass fronted impudence. . . .²⁸⁶

The condemnation reached a crescendo.

[Y]our shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to [God], mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practices more shocking and bloody than are the people of the United States, at this very hour.²⁸⁷

Here was Douglass, someone whose race had been disparaged by white supremacists as savage, calling the whites themselves “savages” and citizens of a nation that was “more shocking and bloody” than any nation “on the earth.” That these rebukes were delivered on the Fourth of July made them all the more damning. Douglass was calling upon his white male audience to resolve the terrible hypocrisy that soiled their achievement of “National Independence” and “political freedom.” He was, in essence, calling upon white men to fulfill their role as gentlemen and to reject their hypermasculine impulses for domination.

In “The Meaning of July Fourth for the Negro,” Douglass did not directly discuss issues of constitutional interpretation. He did not mean to introduce a method of jurisprudence when he spoke before the large crowd in Rochester in 1852. A political activist, he was trying to rouse them to support the cause of civil rights for blacks. Be that as it may, what Douglass did furnish in his speech in effect served as a compelling alternative to Chief Justice Taney’s theory of originalism. Taney had proudly affirmed that blacks were never intended by the Founding Fathers to be

286. *Id.* at 196.

287. *Id.* at 196–97.

included in the *We the People*, the beings in whose name the Constitution was written. The basis for his opinion was that he could not accept the conclusion that the Founding Fathers were hypocrites. Taney explained that the Founding Fathers' decision to enslave blacks was not hobbled by moral regret. According to Taney, slavery of black people was the rightful expression of the ideology of white supremacy. Slavery of blacks was the natural and morally legitimate outcome of a powerful white race whose instincts impelled it to dominate and exploit a weaker black race.

Douglass, on the other hand, had argued that the Founding Fathers were magnificent hypocrites. From his vantage, they had supported a practice of chattel slavery that was incongruous with the very principles of freedom and independence on which they professed to have founded their republic. Douglass suggested that it fell to the sons to resolve this contradiction by ridding America of slavery. In other words, Douglass in his "The Meaning of July Fourth for the Negro" had fashioned the theory that the Founding Fathers had created principles of freedom that they expected their sons to honor on behalf of blacks even as the Founders themselves failed to realize fully.

CONCLUSION

The year was 1968. It was the year that the Supreme Court handed down its decision in *Jones v. Alfred H. Mayer Co.*²⁸⁸ In that case, the Court upheld the constitutionality of a federal law that forbade racial discrimination in real estate transactions.²⁸⁹ The Court's decision was handed down about 150 years after Frederick Douglass's birth. Yet the power of the great man's words endured. For he was invoked as a moral authority by one of the Court's justices, William O. Douglas, whose surname was, in a stroke of serendipity, nearly identical to Frederick Douglass's, missing only the additional *s* in the latter's name. In his concurrence, Justice Douglas recited Douglass's words from "The Color Line," a speech from 1881.²⁹⁰ These words from "The Color Line" were included in Justice Douglas's concurrence:

Of all the races and varieties of men which have suffered from this feeling, the colored people of this country have endured most. They can resort to no disguises which will enable them to escape its deadly aim.²⁹¹

Justice Douglas also excerpted from "The Color Line" Douglass's mention of manhood as a political trope.

[The black man] may not now be bought and sold like a beast in the market, but he is the trammled victim of a prejudice, well

288. 392 U.S. 409 (1968).

289. *Id.* at 413.

290. *Id.* at 446-47.

291. *Id.* at 446.

calculated to repress his manly ambition, paralyze his energies,
and make him a dejected and spiritless man²⁹²

Justice Douglas did not call attention to Douglass's reference to "manly ambition." For the case before him did not require Justice Douglas to reflect formally on the meaning of manliness.

Nevertheless, as this Article has suggested, manliness formed an integral part of Douglass's understanding of racial justice and the Constitution. An invigorated sense of his manhood was what had helped Douglass to challenge the brutality of the slavebreaker Covey, and, later, to challenge the Supreme Court itself. When Justice Douglas quoted Douglass's reference to manhood, the former was in effect invoking something more powerful and salient to constitutional interpretation and ideas of justice than may have been apparent to the Court.

292. *Id.* at 447.