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### Repository Citation

Stephen Kantrowitz, *The Other Thirteenth Amendment: Free African Americans and the Constitution That Wasn't*, 93 Marq. L. Rev. 1367 (2010).

Available at: <http://scholarship.law.marquette.edu/mulr/vol93/iss4/36>

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# THE OTHER THIRTEENTH AMENDMENT: FREE AFRICAN AMERICANS AND THE CONSTITUTION THAT WASN'T

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This essay considers the great legacy of the Civil War, and of Abraham Lincoln: the end of chattel slavery as a constitutional institution and the principle of colorblind national citizenship. We are accustomed to telling this story in full knowledge of how it turned out by 1870, with the constitutional transformations achieved. But I want to think instead about a different history, about the very different and much less encouraging Constitution that confronted African Americans in the years leading up to emancipation. Under the stewardship of a Supreme Court made up of justices appointed by proslavery presidents, with enforcement provisions reflecting proslavery demands, that Constitution seemed both to deny them citizenship and to hold slavery sacrosanct. And lest we think that the election of a Republican to the presidency in 1860 marked a decisive shift, I want to suggest that this appears so only in hindsight. From the perspective of most African-American activists, the declension of the nation from the principles of the Declaration of Independence continued well into the 1860s. Lincoln's words and deeds often seemed to embody, not challenge, that declension.

The constitutional situation of African Americans in the late 1850s and early 1860s approached the level of existential peril. The outlines are familiar. The Fugitive Slave Law of 1850<sup>1</sup> gave real teeth to the guarantees of Article IV of the Constitution;<sup>2</sup> soon afterwards, the Supreme Court's decision in *Dred Scott* in 1857 and, in particular, Chief Justice Taney's dictum that black people had never been (and could not be) citizens—for the black man “had no rights which the white man was bound to respect”—rewrote the history of black citizenship as

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1. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

2. U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

oxymoronic.<sup>3</sup> Yet when writing about Lincoln, the Civil War, or Reconstruction, we generally move quickly over this part of the story in order to highlight the magnitude of the revolution that followed. After a nod to the racist views of Lincoln and other Republicans, we note, correctly enough, that they were considerably less hostile than their opponents to the possibility of African Americans' freedom and participation in at least some spheres of American life. We turn, for verification of this premise, to Frederick Douglass's retrospectively declaring Lincoln "emphatically, the black mans President: the first to show any respect for Their Rights as men."<sup>4</sup> We leave the story somewhere in the period of triumph in the half-decade after Appomattox, as African Americans moved toward what the era considered full political citizenship. Some of us go on to show how egregiously those rights were abridged for generations after, but always with the knowledge of the post-World War II black-freedom movement and the final vindication of those postwar amendments.

Here, by contrast, I am interested in another question: how things looked to the black activists who felt the storm coming in the 1850s but could not know how or where it would leave them. From the perspective of black activists—including but not limited to Frederick Douglass—the situation looked rather different at least until the war broke out, and, to many, for several years after that. From that perspective, the future of the United States looked quite different, in ways that caused even the staunchest friends of the American nation to lose heart.

The Fugitive Slave Law and *Dred Scott* laid the groundwork for the great fear of the 1850s, and it set black activists off in at least three directions: into Republican politics, emigration, or slave revolt. That is, in addition to political engagement, black activists also considered two entirely different avenues of response: flight from the United States or treason against it.

Many, like Douglass, considered all three possibilities—voting, fleeing, and fighting. Douglass famously came to reject the Garrisonian abolitionist view that the Constitution was a proslavery instrument, and

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3. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406–07 (1857).

4. Frederick Douglass, Eulogy on Abraham Lincoln (June 1, 1865), *digitized on Frederick Douglass Papers*, Manuscript Division, No. al0177 (Libr. of Cong.), available at <http://www.myloc.gov/Exhibitions/lincoln/vignettes/lincolnanddouglass/ExhibitObjects/FrederickDouglassDescribingLincoln.aspx>.

the consequent withdrawal from party politics under its terms.<sup>5</sup> He believed instead, as did most of his comrades across the black North, that the Constitution in various ways affirmed both the illegality of slavery and the power of the federal government to abolish it by legislation. He became a Liberty man, then a member of the Radical Abolitionist party.<sup>6</sup> At the same time, he believed that slaves had a right of revolution against a government that ignored their natural rights and republican citizenship. Although Douglass was only a peripheral member of John Brown's conspiracy to overthrow slavery in 1859, he fled the country one step ahead of an arrest warrant.<sup>7</sup> He wrote home to deny that he was or could be a "traitor" to the United States: the government Douglass was accused of rebelling against was not his own, for "[a]llegiance and protection are said to go together, and depend upon each other. When one is withdrawn"—as *Dred Scott* had withdrawn protection from Douglass and his peers—"the other ceases."<sup>8</sup>

The rejection of black citizenship appeared to be on the rise at the state level as well. A succession of territorial legislatures, including those under Republican governments, voted on constitutions that formally excluded black residents.<sup>9</sup> Even more dramatically, as the 1850s waned, movements to expel or reenslave free blacks gained traction in a number of Southern state legislatures.

For most of the 1850s, black Northern activists kept the faith in one crucial way: while insisting on their natural rights, including the right of revolution to preserve those rights, most remained friends in principle of the *idea* of the United States. They vigorously opposed a renewed emigration movement, championed by Henry Highland Garnet, Martin Delany, and others, which imagined different avenues to citizenship and belonging, in Africa, Hayti (as it was then called), or Canada.<sup>10</sup> Instead, black activists such as Newport, Rhode Island's George Downing refigured their moment of trial as something transcendent—as an expression, in fact, of the founding principles of the nation. The United

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5. See DAVID W. BLIGHT, *FREDERICK DOUGLASS' CIVIL WAR: KEEPING FAITH IN JUBILEE* 30–35 (1989).

6. See *id.* at 35, 50–51.

7. BRIAN MCGINTY, *JOHN BROWN'S TRIAL* 328 (2009).

8. Frederick Douglass, *To My American Readers and Friends*, 2 *DOUGLASS' MONTHLY* (Rochester, N.Y.) 162 (1859).

9. See RICHARD H. SEWELL, *BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES, 1837–1860*, at 97–98, 173–74, 323 (1976).

10. See MARTIN R. DELANY: A DOCUMENTARY READER 1–22 (Robert S. Levine ed., 2003); STERLING STUCKEY, *SLAVE CULTURE: NATIONALIST THEORY AND THE FOUNDATIONS OF BLACK AMERICA* 138–92 (1987).

States, Downing said in 1859, was divinely destined to “work out in perfection the realization of a great principle, *the fraternal unity of man*.”<sup>11</sup> African Americans were essential to that process, for their presence, as oppressed slaves or nominally free, forced the question of how deeply Americans were committed to their founding ideals. As the country at last reckoned with that great contradiction, “[a]ll of the great principles of the land are brought out and discussed in connection with the Negro.”<sup>12</sup> Downing therefore urged his compatriots not to consider emigration, for if they departed, “[t]he great ethical school of the times, would be closed for the want of a subject.”<sup>13</sup> In the war over the meaning of American liberty, equality, and republicanism, he explained, “We are the alphabet; upon us, all are constructed.”<sup>14</sup>

But the events of the secession winter, and in particular the congressional moves to appease Southern slaveholders, challenged even this provisional, processual patriotism. After Lincoln’s election, the outgoing president, James Buchanan, told Congress that unless Northern states repealed their Personal Liberty Laws, Southern states “would be justified in revolutionary resistance to the Government of the Union.”<sup>15</sup> Meanwhile, numerous compromise proposals circulated through Congress. Two of them bear close attention. The Crittenden Compromise imagined the permanent reestablishment of the Missouri Compromise line, with slavery inviolable below that line.<sup>16</sup> But despite the continuing drama surrounding its proposals, it was not the Crittenden proposals that passed Congress. Instead, a proposed Thirteenth Amendment, the Corwin Amendment, would have prohibited any amendment to the Constitution giving Congress the power to interfere with or abolish slavery where it was currently lawful.<sup>17</sup> On the eve of Lincoln’s inauguration, the Corwin Amendment passed both houses of Congress by the requisite two-thirds majority and was sent on to the states for ratification.<sup>18</sup> Maryland and Ohio even ratified

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11. George T. Downing, President, New England Colored Citizens Convention, Address Before the New England Colored Citizens Convention (Aug. 1, 1859), in 29 *LIBERATOR* (Boston) 132 (1859).

12. *Id.*

13. *Id.*

14. *Id.*

15. THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861*, at 202 (1974) (quoting *CONG. GLOBE*, 36th Cong., 2d Sess. App. 2 (1861)).

16. See *The Crittenden Compromise*, *N.Y. TIMES*, Feb. 6, 1861, at 4.

17. See 12 Stat. 251.

18. See *id.*; *CONG. GLOBE*, 36th Cong., 2d Sess. 1285, 1403 (1861) (reflecting votes).

it in conventions.<sup>19</sup> In his inaugural address, the new president referred to the Corwin Amendment as nothing new or objectionable, merely an explicit statement of what he called “implied constitutional law.”<sup>20</sup>

As bad as this was for proponents of an antislavery Constitution, it could have been worse, and very nearly was. The Corwin Amendment was offered in part because the Crittenden proposals displeased proslavery Democrats, who rejected any limit on the spread of slavery. To make the Crittenden proposals more palatable to this constituency and bring them forward as a constitutional settlement of the slavery question, Stephen Douglas crafted stringently and explicitly anti-black supplementary articles which were introduced in both houses.<sup>21</sup> The first of these struck fear in the hearts of men such as Frederick Douglass and George Downing. It declared: “The elective franchise and the right to hold office, whether federal, State, territorial, or municipal, shall not be exercised by persons who are, in whole or in part, of the African race.”<sup>22</sup> This rendered explicit that the United States was to be a white man’s polity, dashing the hopes of most free blacks and doing a positive constitutional injury to those in Massachusetts and elsewhere who voted and even aspired to political office. The second of the Illinois senator’s articles was even more ominous:

The United States shall have power to acquire from time to time districts of country in Africa and South America, for the colonization, at expense of the federal treasury, of such free negroes and mulattoes as the several States may wish to have removed from their limits, and from the District of Columbia, and such other places as may be under the jurisdiction of Congress.<sup>23</sup>

Consider again the specifics: colonization “of such free negroes and mulattoes *as the several States may wish to have removed.*” Colonization here dropped its paternalist mask of gradualist civilizationism and made its true desire explicit: the involuntary deportation of free African Americans. When presented in the House as a substitute measure for the Corwin Amendment, the Crittenden Compromise plus these

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19. 1862 Md. Laws 22; 1861 Ohio Laws 190.

20. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 270 (Roy P. Basler et al. eds., 1953).

21. CONG. GLOBE, 36th Cong., 2d Sess. 183 (1861).

22. 36 J. OF THE HOUSE OF REPRESENTATIVES OF THE U.S., 1860–61, at 217–18 (1860) [hereinafter HOUSE JOURNAL].

23. *Id.*

proposals failed, but only by a margin of 80–113—and this after many slave-state representatives had already resigned to join the Confederacy.<sup>24</sup>

For people who imagined themselves as political citizens of a perfected United States, these were existential threats. And they raised the question anew for African Americans: was the United States a good idea? By the early months of 1861, fewer and fewer were able to answer the question decisively in the affirmative. Black Northerners began to lose heart. George Downing no longer sounded the defiantly optimistic tones of 1859, when he proudly identified black Americans with the nation's divine project. Now, in *An Appeal to the White Citizens of the State*, he pleaded with his countrymen not to abandon that common destiny: "Drive us not to an inhospitable land, either soon to die of fever or deteriorate in intellect, under the influence of a superstitious religion."<sup>25</sup> But he spoke now from fear and despair more than conviction. Downing's editor presented him as having "no doubt that the North would sacrifice the whole race of colored people to save the Union."<sup>26</sup>

No wonder, then, that as the spring began, even the most strident of the anti-emigrationists despaired. If the North were indeed ready to "sacrifice the whole race of colored people," then, Frederick Douglass concluded, it might be time to consider other alternatives. Douglass's rhetoric took a new turn. "If we go any where, let us go to Hayti," he wrote in January 1861, and that conditional "if" quickly moved toward personal interest.<sup>27</sup> Within a few months, Douglass announced on the front page of his newspaper that he was about to depart for a tour of the black republic, in part to investigate the island as a possible home. He acknowledged what many of his readers across the North were thinking:

During the last few years the minds of the free colored people in all the States have been deeply exercised in relation to what may be their future in the United States. . . . At the North there are, alas! too many proofs

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24. See R. Alton Lee, *The Corwin Amendment in the Secession Crisis*, 70 OHIO HIST. Q. 1 (1961); HOUSE JOURNAL, *supra* note 22, at 407–13 (recording the House's Feb. 27, 1861 vote on the Crittenden proposals); CONG. GLOBE, 36th Cong., 2d Sess. 1260–61 (1861) (same).

25. George T. Downing, *An Appeal to the White Citizens of the State*, in *Protest of Colored Citizens*, 31 LIBERATOR (Boston) 31 (1861).

26. *Id.*

27. Frederick Douglass, *Emigration to Hayti*, 3 DOUGLASS' MONTHLY (Rochester, N.Y.) 386 (1861).

that the margin of life and liberty is becoming more narrow every year. . . . The apprehension is general, that proscription, persecution and hardships are to wax more and more rigorous and more grievous with every year; and for this reason they are now, as never before, looking out into the world for a place of retreat, an asylum from the apprehended storm which is about to beat pitilessly upon them.<sup>28</sup>

Pleas, remonstrances, elections, and revolts—all had failed to turn the hearts of white Americans. Perhaps, finally, the time had come to look elsewhere.

While the outbreak of war changed Douglass's calculation, it did not immediately change prevailing Union views of black citizenship. President Lincoln, as we have seen, argued that the Constitution under which he was going to war countenanced the inviolability of slavery where it existed.<sup>29</sup> General Benjamin Butler arrived in Maryland, promising to defend the state's citizens in the event of a possible slave revolt, as implied by the Constitution.<sup>30</sup> And Abraham Lincoln greeted a delegation of black leaders in 1862 with urgings to lead their people out of the country: "Go where you are treated the best, and the ban is still upon you."<sup>31</sup> Of this fact he said, "I cannot alter it if I would."<sup>32</sup>

We know the end of this story: how slaves and free blacks forced themselves upon an unwilling Union, made themselves essential to military victory, and created the legacy of military service that prompted Lincoln, then Congress, then the states to imagine them as free, as citizens, and even as voters. In concluding our account of the Civil War era with that story, we have naturalized the arc of events into an inevitable triumph of right over wrong, one that, in constitutional terms, would survive the end of Reconstruction and the imposition of Jim Crow. Yet, in losing sight of how close the nation came to a constitutional order guaranteeing the survival of slavery, we lose sight of how tenuous the nation's claim on African-American patriotism had become, and of how hard it was for black activists to reconcile

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28. Frederick Douglass, *A Trip to Hayti*, 3 DOUGLASS' MONTHLY (Rochester, N.Y.) 449–50 (1861).

29. See *supra* note 20 and accompanying text.

30. HOWARD P. NASH, *STORMY PETREL: THE LIFE AND TIMES OF GENERAL BENJAMIN F. BUTLER, 1818–1893*, at 89 (1969); cf. U.S. CONST. art. IV, § 4.

31. *Refuge of Oppression: The President on African Colonization*, 32 LIBERATOR (Boston) 133 (1862).

32. *Id.*

themselves to the Union. Frederick Douglass now stands in as the representative African-American founder of the nation and the moral counterweight to Lincoln's political genius, but it is all too easy to forget how close even he came to rethinking his allegiances, let alone how many of his compatriots wavered or even departed in the last bitter years before emancipation and Reconstruction. Free African Americans' dogged, persistent hope that the United States was, for them, a good idea, turned out to be essential: essential to Union victory, to the establishment of nonracial citizenship, to the remaking of the Constitution. We forget at our peril that that very hope was, across all of our national history, perhaps the single greatest collective leap of faith.