A Political Companion to Frederick Douglass

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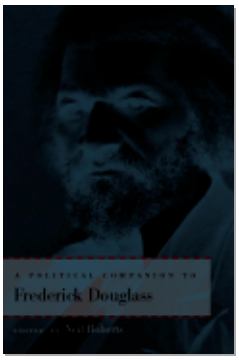

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II

Judgment, Intersectionality, Human Nature

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Douglass and Political Judgment

The Post-Reconstruction Years

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In the 2003 Supreme Court case *Grutter v. Bollinger*, upholding the limited use of affirmative action in higher education, Associate Justice Clarence Thomas opened his dissent with a long quotation from Frederick Douglass. Drawn from the address "What the Black Man Wants" (1865), the quotation reads: "In regard to the colored people, there is always more that is benevolent . . . than just, manifested toward us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice.* The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! . . . If the negro cannot stand on his own legs, let him fall. . . . Your interference is doing him positive injury."[1] Thomas enlists Douglass to oppose government efforts to offset white advantage in educational opportunity, giving the impression that Douglass is an unmitigated libertarian, even a social Darwinist. He exploits Douglass's luster as black America's most famous self-made man to suggest that government correction of material inequalities produced by slavery and Jim Crow is an offense against liberty and a paternalistic insult. Significant in its own right, Thomas's invocation of Douglass marks a larger trend in contemporary American conservatism: appropriation of Douglass to sanction laissez-faire individualism and color-blind constitutionalism.[2]

There is no doubt a libertarian Douglass. Slavery taught him the value of both negative liberty and self-ownership. Peter Myers observes that Douglass defended private property as "a basic natural right and an indispensable practical guarantor of property in one*self*."[3] Preaching self-help and delayed gratification, Douglass channeled the spirit of Benjamin Franklin in exhorting freedpeople, "You cannot make an empty sack stand on end. . . . Pardon me, therefore, for urging upon you, my people, the importance of saving your earnings, of denying yourselves in the present, that you may have something in the future."[4] The conservative interpretation, in these respects, is accurate. But when one surveys Douglass's full corpus, one finds that the complexity of his thought exceeds the libertarian portrait and in many cases contradicts it. This is not to say that Douglass is a progressive or, preposterously, a socialist. His thought is not reducible to any contemporary partisan label. But it is to say that the conservative appropriation of Douglass must be scrutinized because it not only oversimplifies him but also—in crucial respects—betrays him.

In this chapter, I analyze Douglass's post-Reconstruction thought both because it most sharply opposes the conservative reading and because it deserves greater emphasis in its own right.[5] It models an antiracist form of political judgment that can still help us identify forces of white supremacy that disguise themselves as fairness, virtue, and democracy.[6] By "political judgment," I mean the interpretation and evaluation of political phenomena in the absence of criteria adequate to those phenomena. Deciding whether prevailing interpretive and evaluative criteria are adequate to political phenomena is itself an act of judgment, as is formulating judging principles of one's own. On the one hand, political judgment involves intensive attention to particularity, to the unique qualities of an act or situation, without assimilating those particulars into preexisting categories that may not adequately capture their uniqueness. On the other hand, political judgment may also involve inducing from the unprejudiced study of particulars new principles of interpretation and evaluation. Political judgment, in this respect, does not necessarily require interpreting and evaluating forever in the absence of principles; it may build new principles after it has jettisoned old ones. Crucial, however, are maintaining the critical capability that deconstructed the old as well as having the intellectual honesty and courage to turn that critical capability against the new. Only through such critical capability, intellectual honesty, and courage can one ensure that one does

not become captive to any principles of judgment. Only through such critical capability, intellectual honesty, and courage, in other words, can one preserve one's ability to judge one's own principles inadequate when they become so.[7]

In judging post-Reconstruction American politics, Douglass works from a set of assumptions that challenge the prevailing interpretive and evaluative lenses of his time. He does not express these assumptions as principles of political judgment, but they are implicit in his interpretive and evaluative practices, and this chapter aims to draw them out. Most decisively, Douglass works from the assumption that there is a perpetual and fundamental conflict between two political spirits in American political culture—"the spirit of liberty" and "the spirit of slavery" or, more precisely, love of equal freedom and lust for domination (especially racial domination).[8] This conflict has its origins in the antebellum conflict between abolitionism and slavery and maps largely onto the conflict between North and South. But because the spirit of slavery sometimes seduces the North, and because the spirit of liberty sometimes springs up in the South, the conflict between the spirit of liberty and the spirit of slavery is the most basic and the more reliable guidepost for judgment.

Douglass's post-Reconstruction practice of political judgment involves scrutinizing political phenomena to see whether the spirit of liberty or the spirit of slavery animates them. Identifying the spirit of slavery is often challenging because it cloaks itself in liberty's garb. One task of political judgment is therefore to be alert to slavery's liberty-loving pretentions and prepared to expose them. When Southern states were disenfranchising African Americans in the late 1880s and early 1890s, for example, Douglass tore off the mask of those defending disfranchisement on account of "Negro ignorance": "To me this is the veriest affectation. When did we ever hear in any of these southern states of any alarm of this kind because of danger from the ignorant white voters of the south[?]"[9] He then set the "Negro ignorance" argument against a larger historical backdrop of antirepublican politics to help his audience recognize its corrupt and disingenuous nature: "They have taken up an idea which they seem to think quite new, but which in reality is as old as despotism. . . . It is the argument of the crowned heads and privileged classes of the world. It is as good against our Republican form of government as it [is] against the negro."[10] Douglass's critical reinterpretation of the movement to disenfranchise freedmen was necessary

because many Northern whites—in their innocence—had been fooled by white Southern hysterics over "Negro supremacy."[11] Framing the movement as but one battle of the perennial war between freedom and slavery, Douglass demolished that movement's pretentions of innocence and encouraged his audience to share his evaluation of it. Appealing to that audience's general opposition to slavery and general identification with freedom, he cast the movement for disfranchisement as a continuation of not only racial slavery but also Old World antirepublican politics. The argument that freedmen were too ignorant to vote rested on the assumption that a popular majority or even a strong minority may decide who gets a say in political affairs. This idea could be deployed as readily against another class of the rulers' choosing as it could against freedmen. Working to mobilize general identification with republican principles into specific support for federal enforcement of the Fifteenth Amendment, Douglass portrayed the fight for black political equality as a fight for republicanism's general triumph. Such a move would be unnecessary if American republicanism were built on the assumption that the category "citizen" included more than white men. But given the racial circumscription of late-nineteenth-century American conceptions of citizenship, Douglass had to proclaim black equality imperatively and perform black excellence publicly to challenge that circumscription.[12] In doing so, he opened up a world of new meaning for republicanism, transforming it from a herrenvolk ideology into a black liberationist one.[13]

Perhaps the most powerful feature of Douglass's political judgment is its incorporation of both the perspectives of white citizens already secure in their enjoyment of freedom and the perspectives of black freedmen still struggling to make their freedom secure. Nick Bromell calls this Douglass's "perspectivalism"—his sensitivity to the ways "thinking and knowing [are] mediated by point-of-view."[14] Douglass's willingness to imagine and account for the perspectives of both opponents and allies enabled him to achieve what Hannah Arendt, echoing Immanuel Kant, called "enlarged mentality." "The power of judgment," Arendt explains,

> rests on a potential agreement with others, and the thinking process which is active in judging . . . finds itself always and primarily, even if I am quite alone in making up my mind, in an anticipated communication with others with whom I must come to some agreement. . . . This means . . . that such judgment must liberate itself from the "subjective

> private conditions," that is, from the idiosyncrasies which naturally determine the outlook of each individual in his privacy. . . . This enlarged way of thinking, which as judgment, knows how to transcend its own individual limitations . . . needs the presence of others "in whose place" it must think.[15]

Douglass staked the validity of his judgments on enlarged mentality. In contrast to white interpreters, who took their own racial subject position as fully authoritative, he insisted, "No one man can tell the truth. Not even two men of the same complexion, sometimes, can tell it. It requires a white man and a black man—as black as he can be—to [tell] the whole truth."[16] Like Arendt, he encouraged the practice of multiple perspectivalism when formulating judgments; beyond Arendt, he specified that—in the postwar American context—multiple perspectivalism must account for racial subject position. This requires acknowledging that in societies so deeply based on racial slavery—such as the United States—social perspectives are racialized: standing on opposite sides of a major axis of power and powerlessness, white and black populations have sharply divergent understandings of their common world. The main failing of white political judgment during and after Reconstruction was that it insufficiently incorporated the perspective of black freedmen. Integrating the perspectives of both sides of the racial divide, Douglass's racially integrative enlarged mentality strengthened his judgments' claims to validity.[17] The abstraction from personal identity that Kant thought essential to good judgment[18] does not, in light of Douglass, mean abstraction into racelessness; instead, it means abstraction into the subject positions of racial others. This abstraction in turn requires research into the distinctive experiences of racial others. Racially integrative enlarged mentality opposes the conventional wisdom of white supremacist society, its taken-for-granted sense of how things are and how they ought to be. This practice of judgment is antiracist because it calls the invisible white bias of common sense to account and insists on forging a new common sense out of a truly representative sample of citizen experiences. Insofar, in Arendt's words, as "political thought is representative," because it consists in "considering a given issue from different viewpoints,"[19] the more representative quality of antiracist judgment means that it is also more political. Antiracist political judgment brings both the racialization of individuals and the structures and strategies of white supremacy into view and makes them

the subject of political debate. It politically reveals the racial infrastructure of black and white citizens' "common world."[20]

My reconstruction of Douglass's practice of political judgment focuses on four principles of judgment that give that practice shape:

1. Sensitivity to power asymmetries
2. Skepticism toward formalistic arguments that obscure these asymmetries
3. A presumption of the spirit of slavery's continuity in American life
4. The subordination of constitutional forms to substantive political ends[21]

Those who insist that political judgment resists schematic formulation may oppose my attempt to enumerate these principles. Let me make a start at answering this objection. Principles (1) and (2) are fairly indeterminate. They identify self-reflexive interpretive dispositions, incapable of determining judgments but usefully guiding them in otherwise confusing contexts. Identifying such dispositions is hardly tantamount to trying to nail down judgment. Principles (3) and (4) are compensatory measures against countervailing prejudices that, in Douglass's America, hold undue sway. They prepare observers to resist ideological conditioning. Principle (3) especially helps citizens be on the lookout for phenomena that post–Civil War American ideology insists are not there. Principles (3) and (4) together steady the judgment in situations where it would otherwise be overwhelmed by prejudices of time and place. They are antidotes to racial innocence—to willful ignorance—as well as to constitutional idolatry.[22] To qualify as elements of judgment, all four of these principles must be subject to reevaluation and revision; otherwise, the judging faculty will become captive to its own guidelines. In Douglass's case, these principles of judgment fit his time; there is no evidence that they became dogmatic principles that corrupted his sense of reality; on the contrary, the evidence suggests that they enhanced his sense of reality.

Douglass's postwar performances of judgment discredited given framings of political issues and set them in new interpretive contexts to reveal larger historical forces of which they were a part. In this sense, Douglass "readjusted" American patterns of thought to make them responsive to the historical and political perspectives of freedmen. Such readjustment, according to Bryan Garsten, is a hallmark of judgment, "of responding to particu-

lar situations in a way that draws upon our sensations, beliefs, and emotions without being dictated by them in any way reducible to a simple rule."[23] There was a method to Douglass's practice of political judgment, but it was anything but simple: evaluating where a political phenomenon sat within the ongoing conflict between slavery and freedom in the American spirit. The judgment was all the more complex because the conflict unfolded unevenly: there were moments—such as the end of the Civil War—when liberty seemed triumphant; there were others—such as the Supreme Court's decision in 1883 to strike down the Civil Rights Act of 1875—when slavery seemed ascendant; there were still others when there was stalemate, the spirit of liberty ruling in some sectors of American life and the spirit of slavery in others.[24]

This chapter proceeds in two parts. First, it analyzes two speeches given by Douglass in the autumn of 1883 that exemplify his post-Reconstruction practice of political judgment; it distills that practice's four principles and illustrates them by reference to the larger whole of Douglass's post-Reconstruction political thought. Second, it discusses these principles and shows how together they constitute a general model of antiracist political judgment. The conclusion explains how that model may be useful in our own time.

Douglass in 1883: Fighting Formalism

The year 1883 marked a new nadir in postemancipation black experience. In October, the Supreme Court decided the *Civil Rights Cases,* striking down the Civil Rights Act of 1875, which had prohibited racial discrimination in public transportation and accommodation. In his opinion for the court, Associate Justice Joseph P. Bradley declared, "When a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws."[25] Bradley's remark captures the exasperation and moral fatigue felt by both Northern and Southern whites in the aftermath of the Civil War and Reconstruction and in the face of the ongoing struggle for racial justice. Applauding the Court's decision, the *New York Times* remarked that the Civil Rights Act had kept "alive a prejudice against negroes . . . which without it would have gradually died out."[26]

Just weeks before the decision, Douglass delivered an address entitled "Parties Were Made for Men, Not Men for Parties" before the National

Colored Convention in Louisville, Kentucky, laying bare his frustration with the nation's declining moral vigilance. In this address, Douglass first tackled the "seeming incongruity and contradiction" in a National Colored Convention. Impersonating his white interlocutors, he asked rhetorically, "'What more can the colored people of this country want than they now have?' . . . Why keep up this odious distinction between citizens of a common country and thus give countenance to the color line?" Douglass then responded, "The force of the objection is more in sound than in substance. No reasonable man will ever object to white men holding conventions in their own interests, when they are . . . in our condition and we in theirs."[27] He generally condemned popular movements for black cultural "race pride," stating in 1889: "What is the thing we are fighting against[?] . . . What is it, but American race pride; an assumption of superiority upon the ground of race and color? Do we not know that . . . every pretension we set up in favor of race pride is giving the enemy a stick to break our own heads? . . . Let us do away with this supercilious nonsense. If we are proud let it be because we have had some agency in producing that of which to be proud."[28]

But in "Parties Were Made for Men," Douglass defended pragmatic political forms of race consciousness and race solidarity, distinguishing them from biologically essentialist cultural nationalism: "The apology for observing the color line in the composition of our State and National conventions is in its necessity and in the fact that we must do this or nothing. . . . It has its foundation in the exceptional relation we sustain to the white people of the country."[29] The equivalency drawn between white racism and race-conscious solidarity against it, he suggested, is farcical. The exceptionally unequal relationship between African Americans and the general populace demanded consciousness raising and self-organizing measures adequate to it. African Americans had to become aware of themselves as a subordinated, racialized public and commit themselves to collective self-defense and self-assertion: "Why are we here in this National Convention? . . . Because there is a power in numbers and in union; because the many are more than the few; because the voice of a whole people, oppressed by common injustice is far more likely to command attention and exert an influence on the public mind than the voice of single individuals and isolated organizations."[30]

Douglass's defense of political race consciousness and solidarity gives us a glimpse into the first two principles of his political judgment: (1) sensitivity to power asymmetries and (2) skepticism toward formalistic arguments that

obscure them. Moral equality between black and white Americans does not imply equality of political and economic power. The racial nature of African Americans' subordination requires them to cultivate forms of political consciousness and methods of political action that take that racial nature into account. This requirement justifies the use of race-conscious and race-solidaristic measures whose use by a domineering majority would be morally suspect. The test of these measures is whether they substantively reinforce or substantively oppose racial domination. When the color line "will cease to have any civil, political, or moral significance," Douglass argued, "colored conventions will then be dispensed with as anachronisms, wholly out of place, but not till then."[31] Douglass's analysis suggests that observers of racial conflict must judge race consciousness and solidarity not as decontextualized formal features of political institutions and action but in relation to the larger power structures of which they are a part. Race consciousness and solidarity likely to undo racial hierarchy, Douglass contended, is permissible in a way that race consciousness and solidarity likely to reinforce racial hierarchy is not.

We see Douglass's sensitivity to power asymmetries and skepticism toward formalistic arguments that obscure them in his response to the Supreme Court's decision in *Civil Rights Cases.* The Court reasoned that the Fourteenth Amendment empowered Congress to prohibit racial discrimination by the states but not by private corporations or individuals. The Civil Rights Act's barring of racial discrimination in commercial transportation, accommodation, and places of public amusement, the Court argued, was therefore unconstitutional.[32] Douglass lambasted this reasoning as formalistic absurdity. The decision presented the United States "before the world as a Nation utterly destitute of power to protect the rights of its own citizens upon its own soil." It gave "to a South Carolina, or Mississippi, Railroad Conductor, more power than . . . the National Government."[33] Douglass's reasoning coincided with that of the Court's lone dissenter, Associate Justice John Marshall Harlan. The text of the dissent was not yet available when Douglass made his speech,[34] so the two reached their conclusions independently. Said Harlan: "It was perfectly well known [at the time of the Fourteenth Amendment's ratification] that the great danger to the equal enjoyment by citizens of their rights as citizens was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it

was intended by [section 5 of the Fourteenth Amendment] to clothe Congress with power and authority to meet that danger."[35]

The substance of citizenship rights, Harlan suggested, is realized not only in direct encounters between state and citizen but also in seemingly private commercial and civil societal spaces that still fall within the scope of the state's police power. Railroad companies' status as public corporations and inns' and theaters' subjection to state licensing requirements show that they are "*quasi*-public employments": "The innkeeper is not to select his guest. He has no right to say to one, you shall come to my inn, and to another, you shall not, as everyone coming and conducting himself in a proper manner has a right to be received, and, for this purpose innkeepers are a sort of public servants, they having, in return a kind of privilege of entertaining travelers and supplying them with what they want."[36]

This analysis of the public nature of much "private" commercial space led Harlan to conclude, "Discrimination practised by corporations and individuals in the exercise of their public or *quasi*-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment." The Fourteenth Amendment provided additional grounds for the Civil Rights Act: "In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public and are amenable, in respect of their duties and functions, to governmental regulation." Harlan would allow Congress to prohibit racial discrimination in all public space ordinarily subject to regulation. "Exemption from race discrimination" was essential to equal citizenship.[37]

Douglass also believed strongly that equal citizenship meant equal standing, not just in the halls of government but also in the world of commerce.[38] Declaring that the Court's decision gave "joy to the heart of every man in the land who wishes to deny to others what he claims for himself," Douglass suggested that citizens' everyday public experiences of mutual respect were a test of civic equality.[39] In addition to a legal status, citizenship is an intersubjective condition of reciprocal recognition. Harlan's words may best capture the challenge of reciprocal recognition in post-Reconstruction America: "The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment

of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained."[40]

Douglass was generally unimpressed with the political philosophy of federalism behind the Court's decision. The majority portrayed itself as preventing Congress from exceeding the limits of its enumerated powers, from taking "the place of the State legislatures" and "supersed[ing]" them.[41] He contended, however, that American federalism's historical tendency to function as a shield for white supremacy should reduce—if not eliminate—our deference to it. Any institution that interferes with the national government's performance of the paramount duty of protecting freedmen's rights forfeits its claim to respect. "Whatever may have been the true theory of the organic law of the land before the late rebellion," Douglass said in 1889, "the suppression of that rebellion swept away, not only slavery, but the pretension of sovereignty of the individual states, and established a nation."[42] He was especially frustrated that after buttressing the federal government's power before the war to protect slaveholders' property rights, the Court now changed course and limited the federal government's power to protect freedmen's personal rights. "While slavery was the base line of American society, while it ruled the church and the state, while it was the interpreter of our law and the exponent of our religion, it admitted no quibbling, no narrow rules of legal or scriptural interpretations of Bible or Constitution. It sternly demanded its pound of flesh, no matter how much blood was shed in the taking of it." Now, however, the Court "has seen fit in this case, affecting a weak and much-persecuted people, to be guided by the narrowest rules of legal interpretation. It has viewed both the Constitution and the law with a strict regard to their letter, but without any generous recognition of their broad and liberal spirit."[43] The federal powers previously enlisted on behalf of slaveholders, Douglass believed, should now form the basis of federal protection of civil rights. He evaluated the Constitution from the point of view of the vulnerable freedman: "What does it matter to a colored citizen that a State may not insult and outrage him, if a citizen of a State may?"[44] Whatever got in the way of the protection of freedmen's rights was a new emanation of slavery's spirit, no matter how legalistically adorned.

Douglass characterized the Court's decision in the *Civil Rights Cases* "as one more shocking development of that moral weakness in high places which has attended the conflict between the spirit of liberty and the spirit of slavery from the beginning": "Liberty has supplanted slavery, but I fear it

has not supplanted the spirit or power of slavery. Where slavery was strong, liberty is now weak."[45] Eighteen years after the Civil War, the victors were losing—in Lincoln's words—the "firmness in the right" required to achieve a "just" peace.[46] Douglass had been warning the North since the end of Reconstruction that it was squandering victory to a resurgent South still convinced of the justice of its cause.[47] Yet as David Blight has shown, Douglass assigned himself the task of keeping the memory of the moral conflict alive.[48] "I am not indifferent to the claims of a generous forgetfulness," he proclaimed in 1882, "but whatever else I may forget, I shall never forget the difference between those who fought for liberty and those who fought for slavery; those who fought to save the republic and those who fought to destroy it."[49]

Douglass believed that historical memory was an indispensable guide to political judgment: "Man is said to be an animal looking before and after. It is his distinction to improve the future by a wise consideration of the past."[50] Thucydides and Machiavelli made the idea that historical knowledge is essential to political judgment a commonplace of the Western tradition,[51] yet in the context of American racial conflict the idea of historical reflexivity is anything but commonplace; it is subversive, radical. After Reconstruction, the ascendant assumption of American political culture was that the war had engendered "a new birth of freedom"[52] and that postbellum America was discontinuous with the slaveholding republic that preceded it. This assumption made the celebration of sectional reconciliation increasingly appropriate and vigilance on behalf of African Americans decreasingly necessary. Call it the presumption of *discontinuity.* Douglass believed a presumption of *continuity* was more fitting. The presumption of continuity put the burden of proof on the South to show it had secured equality for African Americans and thus purged itself of the spirit of slavery. The presumption of continuity, he insisted, should form the baseline of our political judgment: "Though the rebellion is dead, though slavery is dead, both the rebellion and slavery have left behind influences which will remain with us, it may be, for generations to come."[53]

The presumption of continuity sharpened Douglass's political judgment and enabled him to discern the ways that slavery lived on in the South under freedom's forms. In "Parties Were Made for Men, Not Men for Parties," Douglass assessed the lived conditions of black Southern agricultural laborers and concluded that "there may be a slavery of wages only a little less galling and crushing in its effects than chattel slavery. . . . This slavery

of wages must go down with the other."[54] His analysis of Southern economic conditions and argument for a more just distribution of wealth echoed nineteenth-century labor republicanism:[55] "The labor of a country is the source of its wealth; without the colored laborer to-day the South would be a howling wilderness. . . . This sharp contrast of wealth and poverty, as every thoughtful man knows, can exist only in one way, and from one cause, and that is by one getting more than its proper share of the reward of industry, and the other side getting less."[56]

Douglass's standard for the "proper share of the reward of industry" exceeds a formally negotiated wage. At the very least, the background conditions of negotiation must be such that the laborer has the wherewithal to walk away. "He who can say to his fellow-man, 'You shall serve me or starve,' is a master and his subject is a slave," Douglass insisted.[57] "It is hard for labor, however fortunately and favorably surrounded, to cope with the tremendous power of capital in any contest for higher wages."[58] He stopped short of calling for the abolition of the wage-labor system—the aim of radical labor republican organizations such as the Knights of Labor.[59] It is nevertheless noteworthy how Douglass's assessment of power disparities is not narrowly legalistic but economically realistic. Against the background of economic power disparities, he condemned Southern labor contracts as, for all intents and purposes, involuntary.

Douglass's increasing economic realism helps explain his support for increasingly radical policy measures. Immediately after the Civil War, Douglass's principled commitment to the sanctity of property—which he saw as a corollary of the right of self-ownership—compelled him to oppose proposals by Thaddeus Stevens to confiscate rebel land and redistribute it to freedmen.[60] By 1883, however, Douglass voiced regret over his opposition to these proposals and characterized Stevens as a "far-seeing" statesman who recognized that leaving the freedmen without "a foot of ground from which to get a crust of bread" effectually enslaved them to their former owners.[61] He also hinted at the nation's obligation to provide reparations to freedmen, in the same way that Pharaoh gave jewels to the Hebrews and Russia land to the serfs.[62]

Although Douglass never put forward a new plan for land redistribution,[63] he did advocate a national system of public education: "The ignorance of any part of the American people so deeply concerns all the rest that there can be no doubt of the right to pass a law compelling the attendance

of every child at school. . . . The National Government, with its immense resources, can carry the benefits of a sound common-school education to the door of every poor man from Maine to Texas."[64]

It is important to read Douglass's support of a national system of public education in conjunction with his support of strong federal enforcement of antidiscrimination law. Viewed together, they show the heavy weight he placed on the federal government's responsibility to make freedom effectual in every state and town. In 1888, he said that a government charged with securing liberty in its constitution must "have the power to protect liberty in its administration."[65] "For a nation historically accustomed to federalism," observes Peter Myers, Douglass's "proposals reflected an extraordinarily expansive conception of federal power."[66]

From these considerations, we can distill two additional principles of Douglass's political judgment: (3) a presumption of the spirit of slavery's continuity in American life and (4) the subordination of constitutional forms to substantive political ends. Most striking about Douglass's reaction to *Civil Rights Cases* is his interpretation of the decision as a symptom of the resurgence of the spirit of slavery. What drove the decision, he insisted, were not federalist scruples or concerns about the distinction between public and private but rather investment in racial domination and resentment of the limits imposed by racial equality. Personal habits of domination practiced in slave society and admired even by those who did not own slaves produced both this investment and this resentment. As Douglass explained in 1885, "Born, educated, and accustomed to the exercise of unlimited power over men, the slaveholder carried his habit of domination wherever he went."[67] The habit of domination persisted after abolition and searched for new legal forms to protect it. Finding new legal forms was, if not essential, then at least convenient because it allowed the spirit of slavery to use a cloak of principle to conceal itself. Ironically, the new principle was the same as the old: state sovereignty. Before the war, state sovereignty protected the right of whites to own blacks without federal interference (indeed, with federal protection); now, state sovereignty protected the right of whites to exclude blacks without congressional meddling. State sovereignty concealed the motive force of white supremacy from opponents and, perhaps just as importantly, from white supremacists themselves; it enabled them to say, "Our concern here is not race, but the forms of liberty." The drive to dominate disguised itself as federalist political philosophy. Wilson Carey McWilliams

reminds us that for conservatives "order is precious and at least a little fragile. Conservatives treat it delicately, observing the forms."[68] Douglass, by contrast, saw constitutional forms not as ends but as means. Federalism had produced the crisis of slavery and war. As a political form, it deserved no deference.[69]

Douglass's Political Judgment

Let us review the four principles of Douglass's post-Reconstruction political judgment:

1. Sensitivity to power asymmetries
2. Skepticism toward formalistic arguments that obscure these asymmetries
3. A presumption of the spirit of slavery's continuity in American life
4. The subordination of constitutional forms to substantive political ends

These principles direct our attention to things that should strike us as obvious but fail to do so because of the ideological corruption of our perception. They specify differences to attend to, appearances to distrust, historical forces to look for, substantive considerations to remember. Sensitivity to power asymmetries requires *some* abstraction: after noting wealth and poverty, connections (or lack thereof) to the politically powerful, and access (or lack thereof) to means of production, the observer must make a synthetic assessment of the parties' strength and weakness. At the same time, as Douglass practiced it, political judgment incorporates information peripheral to the parties' legal status—land ownership, access to economic necessities, education, access to credit, geographical mobility—and is therefore more attuned to differences in the ability to enact one's will than axioms of legal equality can register. After Reconstruction's retreat and the emergence of new systems of racial repression in the Southern states, many white Northerners suggested that black Southerners "make an exodus to the Pacific slope." "With the best of intentions," Douglass noted, "they are told of the fertility of the soil and salubrity of the climate." Yet "if they should tell the same as existing in the moon the simple question, How shall they get there? would knock the life out of it at once. Without money, without

friends, without knowledge, and only gaining enough by daily toil to keep them above the starvation point, where they are, how can such a people rise and cross the continent? The measure on its face is no remedy at all."[70]

Douglass's recognition of the social and financial capital required to migrate west—and freedmen's lack of that capital—enabled him to judge the celebrated promise of the American West as mythical in their case. His forthright acknowledgement of freedmen's abject poverty—and lack of economic mobility—also enabled him to judge the South's new system of wage labor as coercive despite its voluntary appearance: "The man who has it in his power to say to a man you must work the land for me, for such wages as I choose to give, has a power of slavery over him as real, if not as complete, as he who compels toil under the lash. All that a man hath he will give for his life."[71] Good political judgment privileges neither legal status nor formal contractual parity in power assessments; rather, it attends to the social and material prerequisites of free and effective action. Privileging legal status and formal contractual parity at the expense of examining the social and material prerequisites of free and effective action is a trick of both capitalism and white supremacy.[72]

Good political judgment also requires skepticism toward formalistic arguments that obscure power asymmetries. By "formalistic arguments," I mean those that treat moral, legal, and political conflicts as geometry problems or logic games, translating the contributing dynamics into mathematical variables that admit of a neat solution.[73] Formalism tends to impose symmetry upon asymmetry in a way satirized by Anatole France when he reflected, "The majestic equality of the law, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."[74] Formalism flattens out distinctions that its purveyors deem irrelevant. In many conflicts, however, which distinctions are relevant is precisely the issue. When critics of the National Colored Convention of 1883 argued that such conventions were "odious" because they gave "countenance to the color line," they presumed (or pretended) that recognizing the color line was always reprehensible regardless of how precisely it was being recognized. The attendees of the National Colored Convention were recognizing the color line's political reality, yet they were accused of recognizing its biological significance. This conflation obscured the difference between believing in a racial biological fiction and organizing against oppression done in the name of that fiction. What cuts through such conflation is substantive judgment

capable of identifying false equivalencies, of registering relevant differences, and of giving them proper weight. This is not to say that formalistic abstraction is never useful or appropriate; it is to say, however, that we subsume particulars under universals and reify concepts and categories at our peril. We must be reflexive in using such universals, concepts, and categories and remember that they are simplifications meant to clarify analysis, but always at the risk of banishing relevant information.

Because formalistic analysis always involves this risk, it is often a useful tool for power interests bent on excluding certain information from public consideration. The statement "The Negro is free" was true in 1866 in a formalistic legal sense. But stopping the analysis there would miss most of the story. For those who wanted to argue that the nation had done its duty by the Negro and owed him nothing more, the statement was politically convenient. In February 1866, for example, President Andrew Johnson invoked the Negro's formal freedom to defend his veto of a bill extending the life of the Freedmen's Bureau. He argued that the Second Freedmen's Bureau Bill insulted

> the ability of the freedmen to protect and take care of themselves. . . . [A]s they have received their freedom with moderation and forbearance, so they will distinguish themselves by their industry and thrift, and soon show the world that in a condition of freedom they are self-sustaining, capable of selecting their own employment and their own places of abode, of insisting for themselves on a proper remuneration, and of establishing and maintaining their own asylums and schools. It is earnestly hoped that, instead of wasting away, they will, by their own efforts, establish for themselves a condition of respectability and prosperity. It is certain that they can attain to that condition only through their own merits and exertions.[75]

Johnson's analysis rested on background assumptions of economic mobility and fair competition that were willfully oblivious to power inequalities. Is it possible he was ignorant of facts on the ground? Johnson's lifelong familiarity with the South and experience from 1862 to 1865 as military governor of Tennessee make the plea of ignorance unconvincing. His amply demonstrated commitment to keeping America "a country for white men" renders an alternative explanation more likely: Johnson's aim was to keep the Freedmen's Bureau from relieving black economic desperation, thereby strengthening

whites' ability to extort black agreement to exploitative labor contracts preserving white domination.[76] The path of least resistance to defending the veto was to portray the Freedmen's Bureau's assistance as unnecessary. Johnson used the cover of black Americans' formal freedom to deflect attention away from their social and economic subordination and to argue against government intervention on their behalf. One task of political judgment is to see through such half-truth. The point of formalistic argument is sometimes to clarify, but it is just as often used to deflect, to enchant, to obscure. Skepticism toward formalistic argument is essential to good judgment. In his quickness to distinguish "substance" from "sound,"[77] Douglass exemplified this skepticism.

Presuming the spirit of slavery's continuity in American life is the most controversial feature of Douglass's post-Reconstruction political judgment. Good judgment typically involves suspension of belief, the temporary surrender of standing assumptions in order to open the mind to novelty.[78] Presuming the spirit of slavery's continuity could block openness to countervailing evidence. How then was it consistent with good judgment? The answer lies in a twofold recognition of *(a)* that continuity's real existence and depth and *(b)* the overwhelming, all-encompassing force of the opposite presumption. The idea that slavery was not just history but *past* had become so popular in the 1880s that it required an act of will to perceive the continuity of its spirit. Presuming that continuity was an epistemic compensation against a furious zeitgeist of historical denial. As Douglass noted in 1888,

> Every northern man who visits the old master class . . . is told by the old slaveholders with a great show of virtue that they are glad that they are rid of slavery and would not have the slave system back if they could. . . . Thus northern men come home duped and go on a mission duping others by telling the same pleasing story. There are very good reasons why these people would not have slavery back if they could. . . . With slavery they had some care and responsibility for the physical well being of their slaves. Now they have as firm a grip on the freedman's labor as when he was a slave without any burden of caring for his children or himself.[79]

Notwithstanding differences in legal form, the intensities of exploitation between slavery and "freedom" were continuous. Presuming the general continuity of the spirit of slavery protected judgment from an unfounded and

imperious presumption of discontinuity. In certain contexts, strong substantive presumptions are necessary to counterbalance their opposites' ideological aggression. Observers can guard against self-delusion by remembering that compensatory presumptions are precisely that—presumptions. One's commitment to them must be provisional, reflexive, and intellectually strategic. One must remain open to the possibility of their invalidity. But one should also be firm in holding them against corrupt attempts to displace them. As late as 1889, Douglass maintained: "It is still the battle between two opposite civilizations—the one created and sustained by slavery, and the other framed and fashioned in the spirit of liberty and humanity, and this conflict will not be ended until one or the other shall be completely adopted in every section of our common country."[80]

Subordinating constitutional forms to substantive political ends should be commonsensical, but constitutional idolatry runs so deep in US history that this precept must be made explicit.[81] The subject is complicated by the fact that Douglass exploited constitutional idolatry for his own purposes. Starting in the 1850s, he insisted that the US Constitution was an antislavery document.[82] After the war, he glorified the Thirteenth, Fourteenth, and Fifteenth Amendments, especially their strong enforcement clauses.[83] In 1886, he upheld the preamble to the Constitution as a general standard for judging national life.[84] On this occasion, Douglass explained that the Founders "set forth six definite and cardinal objects to be attained" by the Constitution: "These were: First. 'To form a more perfect union.' Second. 'To establish justice.' Third. 'To provide for the common defense.' Fourth. 'To insure domestic tranquility.' Fifth. 'To promote a general welfare.' And sixth. 'Secure the blessings of liberty to ourselves and our posterity.' Perhaps there never was an instrument framed by men at the beginning of any national career designed to accomplish nobler objects than those set forth in the preamble of this constitution."[85]

Notice Douglass's focus on the "objects" of the Constitution rather than on the "instruments" designed to realize those objects. In contrast to contemporary norms of constitutional interpretation—which treat the preamble as too vague to be helpful[86]—Douglass treated the preamble as a decisive interpretive compass that ought to orient our understanding of the Constitution's federal structure and institutional mechanisms.[87]

Douglass's response to *Civil Rights Cases* provides a specific example of this interpretive approach. The Court held that the Civil Rights Act

of 1875 was invalid because in prohibiting private parties from engaging in racial discrimination, Congress exceeded its authority: the Fourteenth Amendment empowered Congress to prohibit states but not citizens or corporations within those states from engaging in racial discrimination. Strictly constructed, the language of the Fourteenth Amendment vindicates the Court's position. The language of section 1 focuses on states and no other entities: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Douglass, however, argued against strict construction: "Inasmuch as the law in question is a law in favor of liberty and justice, it ought to have had the benefit of any doubt which could arise as to its strict constitutionality."[88] Judgment of the law's favorability to liberty and justice should precede—and to a large extent direct—judgment of whether the law adheres to the Constitution. Douglass thus stood against the reverence for constitutional forms that McWilliams identifies as a hallmark of the conservative temperament. Reverence for constitutional objects must displace reverence for forms, even if—especially if—doing so opens up debate about substantive political ends. Such debate unavoidably threatens order, but it expresses liberty and is essential to justice.

The four principles of Douglass's political judgment interact in important ways. Sensitivity to power asymmetries helped Douglass discern the spirit of slavery's continuity, the pervasiveness of relationships in which one man can say to another, "You shall serve me or starve," rendering the former an effectual master and the latter an effectual slave. Skepticism toward formalistic arguments enabled Douglass to speak of postwar black economic life as a form of (neo)slavery. As he declared in 1889, "Slavery can as really exist without law as with it, and in some instances more securely, because less likely to be interfered with. . . . No man can point to any law in the United States by which slavery was originally established. The fact of slavery always precedes enactments making it legal. Men first make slaves and then make laws affirming the right of slavery."[89]

Sensitivity to power asymmetries also helped Douglass resist the charms of legal formalism. Because he judged laws from the perspective of freedmen vulnerable in their efforts to realize freedom, he recognized the hollowness of distinctions, say, between state and nonstate acts of racial dis-

crimination. The "effect" on the freedman "is the same."[90] Douglass's practice of judging from the perspective of vulnerable citizens also bolstered his general disposition to prioritize moral and political substance over legal forms. What matters most is not the symmetry, harmony, and orderliness of the legal structure but rather that structure's effects on citizens' lives.

Douglass's post-Reconstruction political judgment was self-confident and intellectually self-reliant. His firsthand knowledge of slavery grounded his understanding of freedom's requirements: robust state protection of life and liberty as well as socially guaranteed opportunity for education and property accumulation, secured through equal citizenship.[91] Citizenship, for Douglass, names not only legal status but also equal standing. Routinized respect of citizens by all of a nation's civil and commercial institutions gives that standing meaning. Douglass's interpretation of freedom's requirements oriented his political judgment. Staying sensitive to power asymmetries, being vigilant against formalistic arguments that obscure them, acknowledging the spirit of slavery's continuity in American life, and subordinating constitutional form to political substance were essential to the larger work of universalizing freedom. The project of universalizing freedom thus also grounded Douglass's political judgment. That project rested on a prior moral judgment that all men and women deserve to be free.

Specifying the grounds of this moral judgment would require a chapter in its own right. But our identification of it reminds us of an important general lesson about political judgment: political judgment both formulates commitments and discloses them. In the act of judgment, we not only announce our own view but also reveal the basic commitments that constitute us. Here Arendt's words are apt: "Wherever people judge the things of the world that are common to them, there is more implied in their judgments than these things. By his manner of judging, the person discloses to an extent also himself."[92] Judging politically, she argues, lies at the heart of acting politically, of pronouncing positions on political things, of disclosing oneself before one's peers on behalf of principles one holds dear.[93]

Yet judgment for Douglass was more than an outlet for self-disclosure or an opportunity for exhilarating action; it was essential to claiming humanity. Born into a world that told him he was less than human, he had to judge that world mistaken, even corrupt, just to claim humanity. The political actors analyzed by Arendt were either born free (Athenian citizens, American colonists) or suffered oppression that fell short of racial slavery

(the French Revolutionaries). Socrates, Adams, Jefferson, and the French Revolutionaries—all challenged their society's boundaries of political authority, but all could nevertheless assume that they shared with their oppressors if not a common status as citizen or Englishman, then at least a common humanity. Douglass's judgments challenged his society's boundaries of the human, requiring perhaps even more daring than Socrates's challenges to the Athenians, Adams's and Jefferson's challenges to the British, or the French Revolutionaries' challenges to the ancien régime. Douglass stared down racial slavery before the Civil War and called it a violation of his human dignity. After the Civil War, he stared down the spirit of slavery—even as it masqueraded as the spirit of freedom—and called it by its proper name. His identification of a general spirit of domination lurking in the heart of American political culture was essential to his effort to make sense of white supremacy's stubborn tenacity after emancipation. His identification of that spirit is essential for *us* because it pinpoints a truth we are reluctant to recognize: it is an open question whether love of freedom or lust for domination predominates our national life.[94]

Antiracist Political Judgment

In *Shelby County v. Holder* (2013), the Supreme Court invalidated section 4 of the Voting Rights Act of 1965, neutralizing the Justice Department's ability to prevent states and localities with a history of racial discrimination from infringing the right to vote. Despite a vast legislative record showing that black voter disfranchisement still abounds, predominantly in the states of the Old Confederacy,[95] Chief Justice John Roberts declared, "Our country has changed," making section 4 an unjust imposition on states' "equal sovereignty."[96] Roberts's opinion expresses a triumphalist narrative of racial progress that casts those still fighting for strong federal intervention on behalf of racial justice as overly invested in outdated racial grievance. "History," Roberts wrote, "did not end in 1965."[97]

Roberts's outlook in *Shelby County v. Holder* closely parallels that of Justice Bradley in *Civil Rights Cases.* Recall Bradley's statement, "When a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws." Both Roberts and Bradley see federal legislation specifically geared to counteract the legacies of slavery and the

wrongs of racism as decreasingly necessary. Both assume that the harms of slavery and racism gradually diminish with time. Both pay greater heed to axioms of limited government than to recurring obstacles to black citizens' struggle for equal liberty. It is easy to see, in retrospect, that Bradley's prognosis was inaccurate and his prescription unfair. The history of Jim Crow exposes the error of his racial optimism. Bradley's example should be a warning to those today professing similar racial optimism. Is Roberts's racial optimism better warranted?

The distinguishing elements of Douglass's political judgment—which together constitute a compelling general model of antiracist political judgment—counsel against an affirmative response. In not only *Shelby* but also *Parents Involved v. Seattle* (2007), Roberts failed to attend to the asymmetrical racial power relations that diminish black civic equality. In the latter case, he held that state agencies may use race-conscious public policy to correct the aftereffects of de jure educational segregation but may not do so to combat de facto educational segregation, even when that segregation is a product of previously state-sanctioned residential segregation and even when it demonstrably harms nonwhite children. Consistency with the principle of color blindness—"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[98]—trumps the imperative of dismantling a distribution of good public schooling still biased in favor of whites.

In *Shelby,* Roberts's opposition to section 4 of the Voting Rights Act on the grounds of states' equal sovereignty is—from the perspective of Douglass's writings—startling. Douglass argued that the principle of equal state sovereignty has historically functioned to give "the spirit of slavery" safe harbor. Roberts makes that principle the basis for insulating states and municipalities with deep and documented histories of disenfranchising black and brown voters from federal oversight. Roberts would, of course, reject any suggestion that his judicial actions accommodate the spirit of slavery, but Douglass would encourage us to judge those actions from the perspectives of America's most vulnerable, racialized citizens—many of whom justifiably see equal state sovereignty as a banner for domination.[99] Perhaps what accounts for Roberts's failure to give this viewpoint due weight is a failure to sufficiently incorporate African American worldviews into his own interpretive judgment. Compared to that of Frederick Douglass, the mentality of John Roberts is insufficiently enlarged.

The spirit of slavery may not today manifest itself in any actual effort to reestablish "the peculiar institution," but it does still manifest itself in the dismantlement of public policies that take direct aim at racial inequality; the net effect is to conserve the de facto white dominance born of slavery and Jim Crow. In using doctrines such as equal state sovereignty to restrain federal efforts to prevent racial injustice, Chief Justice Roberts extends the life of white supremacy under the cover of legal formalism. Such formalism permits the chief justice to project himself as a man of clarity, principle, and intellectual rigor even as he substantively reinforces racial hierarchy. "It is remarkable how rare in the history of tyrants is an immoral law," wrote Ralph Waldo Emerson. "Some color, some indirection was always used."[100] Roberts is a master of such "indirection." But hope is not lost so long as antiracist political judgment survives. Such judgment helps us see the "indirection" for what it is: the will of white supremacy to reproduce itself.

Notes

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1. *Grutter v. Bollinger* 539 US 306 (2003), at 349–50. For the sake of brevity, I have condensed the quotation. The original can be found in Frederick Douglass, "What the Black Man Wants" (1865), in *Frederick Douglass Papers. Series One*: *Speeches, Debates, and Interviews*, 5 vols., ed. John W. Blassingame and others (New Haven, CT: Yale University Press, 1979–1992), 4:68. *Frederick Douglass Papers, Series One*, is hereafter cited as *FDP1*, followed by volume and page numbers.

2. Sean Coons, "Frederick Douglass: New Tea Party Hero?!" *Salon*, July 3, 2013, at http://www.salon.com/2013/07/03/frederick_douglass_new_tea_party_hero/.

3. Peter C. Myers, *Frederick Douglass: Race and the Rebirth of American Liberalism* (Lawrence: University Press of Kansas, 2008), 145, emphasis in original.

4. Frederick Douglass, "West India Emancipation: Extract from a Speech in Elmira, New York, 1 August 1880," in *Life and Times of Frederick Douglass, Written by Himself* (1893), in *Autobiographies,* ed. Henry Louis Gates Jr. (New York: Library of America, 1994), 935. "You cannot make an empty sack stand on end," echoes Franklin's literary persona "Poor Richard": *"'Tis hard for an empty Bag to stand upright"* (Benjamin Franklin, "Poor Richard Improved, 1758," in *Autobiography, Poor Richard, and Later Writings,* ed. J. A. Leo Lemay (New York: Library of America, 1987), 561, emphasis in original. See also Rafia Safar, "Franklinian Douglass: The Afro-American as Representative Man," in Eric J. Sundquist, ed., *Frederick Douglass: New Literary and Historical Essays* (Cambridge: Cambridge University Press, 1990), 99–117.

5. The literature on Douglass as a political thinker focuses preponderantly on his antebellum political thought. Exceptions are David W. Blight, *Frederick Douglass' Civil War: Keeping Faith in Jubilee* (Baton Rouge: Louisiana State University Press, 1989), chaps. 9 and 10; Tommy L. Lott, "Frederick Douglass and the Myth of the Black Rapist," in Bill E. Lawson and Frank M. Kirkland, eds., *Frederick Douglass: A Critical Reader* (Malden, MA: Blackwell, 1999), 313–38; Angela Y. Davis, "From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System," in Lawson and Kirkland, eds., *Frederick Douglass,* 339–62; Peter C. Myers, "Frederick Douglass' Natural Rights Constitutionalism: The Postwar, Pre-Progressive Period," in John Marini and Ken Masugi, eds., *The Progressive Revolution in Politics and Political Science: Transforming the American Regime* (Lanham, MD: Rowman and Littlefield, 2005), 73–101; Gene Andrew Jarrett, "Douglass, Ideological Slavery, and Postbellum Racial Politics," in Maurice S. Lee, ed., *The Cambridge Companion to Frederick Douglass* (Cambridge: Cambridge University Press, 2009), 160–72; Jack Turner, *Awakening to Race: Individualism and Social Consciousness in America* (Chicago: University of Chicago Press, 2012), chap. 3. I limit my focus to the post-Reconstruction period because that is when Douglass's political judgment—the theme of this chapter—becomes sharpest. The retreat from Reconstruction forced him to look more deeply into the abyss of white supremacy than he had ever before. Coming to terms with white supremacy's power elicited his keenest insight into the ways it perpetuated itself under benign appearances.

6. Desmond Jagmohan also analyzes Douglass's political judgment in his impressive dissertation "Making Bricks without Straw: Booker T. Washington and the Politics of the Disfranchised," Cornell University, 2014. His interpretation focuses specifically on practical judgments relating to opportunities for political action. This chapter, however, focuses on interpretive and evaluative judgments relating to understanding political phenomena. For a powerful recent discussion of Douglass's

antebellum practices of denunciation as a form of political judgment, see Nolan Bennett, "To Narrate and Denounce: Frederick Douglass and the Politics of Personal Narrative," *Political Theory* 44 (2) (2016): 240–64.

7. My definition of political judgment is based on my readings of Hannah Arendt's, Jennifer Nedelsky's, and Linda M. G. Zerilli's astute analyses of the subject. See Hannah Arendt, "The Crisis in Culture: Its Social and Its Political Significance" and "Truth and Politics," in *Between Past and Future: Eight Exercises in Political Thought* (1961; reprint, New York: Penguin, 2006), 194–222, 223–59, and *Lectures on Kant's Political Philosophy,* ed. Ronald Beiner (Chicago: University of Chicago Press, 1992), 1–85; Jennifer Nedelsky, "Judgment, Diversity, and Relational Autonomy," in Ronald Beiner and Jennifer Nedelsky, eds., *Judgment, Imagination, and Politics: Themes from Kant and Arendt* (Lanham, MD: Rowman and Littlefield, 2001), 103–20; Linda M. G. Zerilli, *Feminism and the Abyss of Freedom* (Chicago: University of Chicago Press, 2005), chap. 4, and *A Democratic Theory of Judgment* (Chicago: University of Chicago Press, 2016). I have also benefitted from Seth Trenchard, "The Pleasure of Judgment and Its Use: Rethinking the Aesthetic Subject in Aesthetic Judgment," master's thesis, University of Washington, 2014. On the idea of interpretation, I am most indebted to Charles Taylor, "Interpretation and the Sciences of Man," *Review of Metaphysics* 25 (1) (1971): 3–51.

8. Douglass thus anticipates Desmond King and Rogers Smith's claim that "American politics has been historically constituted, in part, by two evolving but linked 'racial institutional orders': a set of 'white supremacist' orders and a competing set of 'transformative egalitarian' orders" ("Racial Orders in American Political Development," *American Political Science Review* 99 [1] [2005]: 75).

9. Frederick Douglass, "One Country, One Law, One Liberty for All Citizens: An Interview in Washington, D.C., in January 1889," in *FDP1,* 5:402.

10. Frederick Douglass, "Lessons of the Hour: An Address Delivered in Washington, D.C., on 9 January 1894," in *FDP1,* 5:593.

11. Frederick Douglass, "The Negro Problem: An Address Delivered in Washington, D.C., on 21 October 1890," in *FDP1,* 5:448.

12. On the racial circumscription, see Rogers Smith, *Civic Ideals*: *Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997), chaps. 10 and 11. On performative speech as a claim to dignity, see Melvin L. Rogers, "David Walker and the Power of the Appeal," *Political Theory* 43 (2) (2015): 208–33.

13. On herrenvolk republicanism, see David Roediger, *The Wages of Whiteness*: *Race and the Making of the American Working Class,* new ed. (London: Verso, [1991] 2007). Both Jason Frank and Linda M. G. Zerilli note the way Douglass's rhetoric creatively reinterprets old political watchwords and infuses

them with new meaning. See Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham, NC: Duke University Press, 2010), chap. 7, and Zerilli, *Democratic Theory of Judgment,* 153–59. For Christopher S. Parker's interpretation of Douglass as an exemplar of a distinctive black republican tradition, see *Fighting for Democracy: Black Veterans and the Struggle against White Supremacy in the Postwar South* (Princeton, NJ: Princeton University Press, 2009), 86.

14. Nick Bromell, "A 'Voice from the Enslaved': The Origins of Frederick Douglass's Political Philosophy of Democracy," *American Literary History* 23 (4) (2011): 699, 698.

15. Arendt, "Crisis in Culture," 217. See also Arendt, *Lectures on Kant's Political Philosophy,* 42–43, 71, 73.

16. Frederick Douglass, "Good Men Are God in the Flesh: An Address Delivered in Boston, Massachusetts, on 22 September 1890," in *FDP1,* 5:432. See also Frederick Douglass, "Parties Were Made for Men, Not Men for Parties: An Address Delivered in Louisville, Kentucky, on 25 September 1883," in *FDP1,* 5:98, and Douglass, "Lessons of the Hour," 5:576.

17. Douglass's racially integrative enlarged mentality, in this sense, stands as a useful corrective to Arendt's own practice of political judgment. However valuable her general theoretical reflections on judgment, her failures to sufficiently integrate the perspectives of black citizens into her own judgments of American politics led to such misfires as "Reflections on Little Rock" (1959). On these misfires, see Danielle Allen, *Talking to Strangers: Anxieties of Citizenship since* Brown v. Board of Education (Chicago: University of Chicago Press, 2004), chap. 3; Jill Locke, "Little Rock's Social Question: Reading Arendt on School Desegregation and Social Climbing," *Political Theory* 41 (4) (2013): 533–61; and Kathryn T. Gines, *Hannah Arendt and the Negro Question* (Bloomington: Indiana University Press, 2014).

18. Arendt, *Lectures on Kant's Political Philosophy,* 71.

19. Arendt, "Truth and Politics," 237.

20. On judgment as a political faculty that brings the "common world" into view, see Zerilli, *Democratic Theory of Judgment,* 8–9.

21. In personal correspondence, Sharon Krause reminded me that there is a fifth major principle of Douglass's political judgment that works in tandem with these other four: the belief in natural right. Major elements of natural right include equality of persons, inalienable human rights, and individual self-ownership. Because the idea of natural right in Douglass has already been extensively analyzed, I bracket it in this essay and limit my focus to the qualities of judgment needed to respect natural right in a complex world of historical inheritance and power inequality. Excellent sources on Douglass and natural right include Myers, *Frederick Douglass,* chap. 2; Nicholas Buccola, *The Political Thought of Frederick Douglass:*

In Pursuit of American Liberty (New York: New York University Press, 2012), chap. 2; and Gregg Crane, "Human Law and Higher Law," in Lee, ed., *Cambridge Companion to Frederick Douglass,* 89–102. For Krause's dazzling interpretation of Douglass, see *Liberalism with Honor* (Cambridge, MA: Harvard University Press, 2002), 144–59.

22. On racial innocence, see Lawrie Balfour, *The Evidence of Things Not Said: James Baldwin and the Promise of American Democracy* (Ithaca, NY: Cornell University Press, 2001), chap. 4, and George Shulman, *American Prophecy: Race and Redemption in American Political Culture* (Minneapolis: University of Minnesota Press, 2008), chap. 4.

23. Bryan Garsten, *Saving Persuasion*: *A Defense of Rhetoric and Judgment* (Cambridge, MA: Harvard University Press, 2006), 7–8.

24. This is consistent with King and Smith's "racial orders" thesis (see "Racial Orders in American Political Development").

25. *Civil Rights Cases,* 109 US 3 (1883), at 25.

26. Quoted in Heather Cox Richardson, *The Death of Reconstruction*: *Race, Labor, and Politics in the Post–Civil War North, 1865–1901* (Cambridge, MA: Harvard University Press, 2001), 151.

27. Douglass, "Parties Were Made for Men," 5:88, 91.

28. Frederick Douglass, "The Nation's Problem: An Address Delivered in Washington, D.C. on 16 April 1889," in *FDP1,* 5:411–12.

29. Douglass, "Parties Were Made for Men," 5:91–92. In the final edition of *Life and Times,* Douglass characterized himself as a "race-man" in a distinctly political sense: "My cause first, midst, last, and always, whether in or out of office, was and is that of the black man; not because he is black, but because he is a man, and a man subjected in this country to peculiar wrongs and hardships" (954). For discussion, see Turner, *Awakening to Race,* 47–48, and Douglas A. Jones Jr., "Douglass' Impersonal," *ESQ*: *A Journal of the American Renaissance* 61 (1) (2015): 25.

30. Douglass, "Parties Were Made for Men," 5:90. On the idea of a racialized public becoming conscious of itself, see Eddie S. Glaude Jr., *In a Shade of Blue: Pragmatism and the Politics of Black America* (Chicago: University of Chicago Press, 2007), intro. and chap. 6.

31. Douglass, "Parties Were Made for Men," 5:94.

32. *Civil Rights Cases,* 109 US, at 3–26.

33. Frederick Douglass, "This Decision Has Humbled the Nation: An Address Delivered in Washington, D.C., on 22 October 1883," in *FDP1,* 5:120, 115–16.

34. Ibid., 5:111–12.

35. *Civil Rights Cases,* 109 US, at 54.

36. Ibid., at 41.

37. Ibid., at 43, 58–59, 56.

38. On citizenship as standing, see Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1991). Shklar also argues that Douglass conceived of citizenship as standing, but she roots her interpretation in Douglass's reflections on the franchise. I root my interpretation in his reflections on the need to prohibit racial discrimination in everyday commercial life.

39. Douglass, "This Decision Has Humbled the Nation," 5:122.

40. *Civil Rights Cases,* 109 US, at 61.

41. Ibid., at 13.

42. Douglass, "One Country, One Law, One Liberty," 5:400. Harlan did not go as far as to say that the Civil War eradicated any and all legislative prerogatives of individual states, but he did affirm that the Civil War amendments made "exemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government [into] a new right, created by the nation, with express power in Congress, by legislation, to enforce" (*Civil Rights Cases,* 109 US, at 56, emphasis in original).

43. Douglass, "This Decision Has Humbled the Nation," 5:120, 119. Harlan also remarked that the Court's opinion in *Civil Rights Cases* "proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism" (*Civil Rights Cases,* 109 US, at 26).

44. Douglass, "This Decision Has Humbled the Nation," 5:113, 120. On Douglass's expansive conception of federal power under the Constitution, see Myers, "Frederick Douglass's Natural Rights Constitutionalism," and *Frederick Douglass,* 144–45.

45. Douglass, "This Decision Has Humbled the Nation," 5:113, 120.

46. Abraham Lincoln, "Second Inaugural Address" (1865), in *Speeches and Writings, 1859–1865,* ed. Don E. Fehrenbacher (New York: Library of America, 1989), 687.

47. See Frederick Douglass, "There Was a Right Side in the Late War: An Address Delivered in New York, New York, on 30 May 1878," in *FDP1,* 4:480–92.

48. Blight, *Frederick Douglass' Civil War,* chap. 10; David W. Blight, *Race and Reunion*: *The Civil War in American Memory* (Cambridge, MA: Harvard University Press, 2001), 92–93, 316–17.

49. Frederick Douglass, "We Must Not Abandon the Observance of Decoration Day: An Address Delivered in Rochester, New York, on 30 May 1882," in *FDP1,* 5:47. See also Douglass, "There Was a Right Side in the Late War," 4:489.

50. Douglass, "There Was a Right Side in the Late War," 4:491. See also Douglass, "We Must Not Abandon the Observance of Decoration Day," 5:45–46, 48.

51. Thucydides, *The Peloponnesian War* (c. 400 BCE), trans. Richard Crawley, rev. T. E. Wick (New York: Modern Library, 1982), 1.22; Niccolò Machiavelli, *The Prince* (1532), in *The Portable Machiavelli,* ed. and trans. Peter Bondanella and Mark Musa (New York: Penguin, 1979), 78.

52. Abraham Lincoln, "Address at Gettysburg, Pennsylvania" (1863), in *Speeches and Writings,* 536.

53. Douglass, "We Must Not Abandon the Observance of Decoration Day," 5:46. See also Frederick Douglass, "We Are Confronted by a New Administration: An Address Delivered in Washington, D.C., on 16 April 1885," in *FDP1,* 5:178, and "Great Britain's Example Is High, Noble, and Grand: An Address Delivered in Rochester, New York, on 6 August 1885," in *FDP1,* 5:201. On presumptions of continuity and discontinuity in contemporary racial politics, see Robert C. Lieberman, "Legacies of Slavery? Race and Historical Causation in American Political Development," in Joseph Lowndes, Julie Novkov, and Dorian T. Warren, eds., *Race and American Political Development* (New York: Routledge, 2008), 206–33.

54. Douglass, "Parties Were Made for Men," 5:97.

55. On the labor republican tradition, see Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* (Cambridge: Cambridge University Press, 2014).

56. Douglass, "Parties Were Made for Men," 5:98–99.

57. Douglass, "West India Emancipation," 932. See also Douglass, "Parties Were Made for Men," 5:100–101.

58. Douglass, "Parties Were Made for Men," 5:99.

59. Gourevitch, *From Slavery to the Cooperative Commonwealth,* chap. 4.

60. Waldo E. Martin Jr., *The Mind of Frederick Douglass* (Chapel Hill: University of North Carolina Press, 1984), 71–72; Myers, *Frederick Douglass,* 145–46. At the same time, Nicholas Buccola suggests that Douglass thought "the mode of holding" property and "the amount held" were properly subject to political regulation (*Political Thought of Frederick Douglass,* 53).

61. Douglass, "Parties Were Made for Men," 5:100–101. Douglass voiced regret for his previous opposition to Stevens's plan, in fact, as early as 1880 ("West India Emancipation," 932–33).

62. Douglass, "Parties Were Made for Men," 5:101.

63. In 1869, however, Douglass drew up a plan for the National Land and Loan Company, which would buy land throughout the South and lease or sell it to freedmen. Nothing, however, ever came of the proposal. See Frederick Douglass, "Plan to Buy Land to Be Sold to Freedmen," in Philip Foner, *Frederick Douglass: A Biography* (New York: Citadel Press, 1964), 254. For discussion, see Turner, *Awakening to Race,* 57–58.

64. Douglass, "Parties Were Made for Men," 5:103. Consult also Buccola, *Political Thought of Frederick Douglass,* 148–55.

65. Frederick Douglass, "Continue to Wave the Bloody Shirt: An Address Delivered in Chicago, Illinois, on 19 June 1888," in *FDP1,* 5:390.

66. Myers, "Frederick Douglass's Natural Rights Constitutionalism," 79.

67. Douglass, "Great Britain's Example," 5:205.

68. Wilson Carey McWilliams, "Ambiguities and Ironies: Conservatism and Liberalism in the American Political Tradition" (1995), in Patrick J. Deneen and Susan J. McWilliams, eds., *Redeeming Democracy in America* (Lawrence: University Press of Kansas, 2011), 178.

69. Douglass would probably recognize some devolution of power to the states as legitimate insofar as it enhanced public liberty and was administratively convenient. But he would understand such devolution as precisely that—the transfer of power from central authority to a subsidiary. This is the unavoidable implication of his contention that the Civil War abolished "sovereignty of the individual states" ("One Country, One Law, One Liberty," 5:400).

70. Frederick Douglass, "Strong to Suffer, and Yet Strong to Strive: An Address Delivered in Washington, D.C., on 16 April 1886," in *FDP1,* 5:232.

71. Douglass, "Parties Were Made for Men," 5:100.

72. Karl Marx, "On the Jewish Question" (1844), in *Selected Writings,* ed. Lawrence H. Simon (Indianapolis, IN: Hackett, 1994), 1–26; Kimberlé Williams Crenshaw, "Race, Reform, and Retrenchment," *Harvard Law Review* 101 (7) (1988): 1331–87.

73. For illuminating discussion of formalism, see Morton White, *Social Thought in America: The Revolt against Formalism,* new ed. (Boston: Beacon Press, [1947] 1957).

74. Quoted in *Parents Involved in Community Schools v. Seattle School District No. 1* et al., 551 US (2007), at 799 (Justice Stevens dissenting).

75. Andrew Johnson, "Veto of the Second Freedmen's Bureau Bill" (1866), in Bruce Frohnen, ed., *The American Nation: Primary Sources* (Indianapolis, IN: Liberty Fund, 2008), 97.

76. W. E. B. Du Bois, *Black Reconstruction in America, 1860–1880* (1935; reprint, New York: Free Press, 1992), chap. 8; Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper and Row, 1988), 176–84; Linda Faye Williams, *The Constraint of Race: Legacies of White Skin Privilege in America* (University Park: Pennsylvania State University Press, 2003), chap. 1.

77. Douglass, "Parties Were Made for Men," 5:91.

78. Dana R. Villa, "Thinking and Judging," in *Politics, Philosophy, Terror: Essays on the Thought of Hannah Arendt* (Princeton, NJ: Princeton University Press, 1999), 89.

79. Frederick Douglass, "In Law, Free; in Fact, a Slave: An Address Delivered in Washington, D.C., on 16 April 1888," in *FDP1,* 5:364.

80. Douglass, "The Nation's Problem," 5:423.

81. Jefferson anticipated this. See Thomas Jefferson to Samuel Kercheval, July 12, 1816, in *Jefferson*: *Political Writings,* ed. Joyce Appleby and Terence Ball (Cambridge: Cambridge University Press, 1999), 215–16.

82. Frederick Douglass, "The American Constitution and the Slave: An Address Delivered in Glasgow, Scotland, on 26 March 1860," in *FDP1,* 3:340–66.

83. Douglass, "Lessons of the Hour," 5:604; Frederick Douglass, "This Democratic Conversion Should Not Be Trusted: An Address Delivered in New York, New York, on 25 September 1872," *FDP1,* 4:341.

84. Douglass made similar interpretive moves with the preamble before the Civil War. See James A. Colaiaco, *Frederick Douglass and the Fourth of July* (New York: Palgrave MacMillan, 2006), 103–4; Frank, *Constituent Moments,* 222–23.

85. Douglass, "Strong to Suffer," 5:217–18.

86. Liav Orgard, "The Preamble in Constitutional Interpretation," *International Journal of Constitutional Law* 12 (2) (2014): 718–21.

87. In this respect, Douglass was far more radical than Harlan. See Harlan's opinion for the Court in *Jacobson v. Massachusetts,* 197 US 11 (1905): "Although the Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments" (at 22).

88. Douglass, "This Decision Has Humbled the Nation," 5:114.

89. Douglass, "The Nation's Problem," 5:421.

90. Douglass, "This Decision Has Humbled the Nation," 5:121.

91. For Douglass's explanation of government's role in ensuring (substantive) equal opportunity, see "In Law, Free; in Fact, a Slave," 5:369, and "The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894," in *FDP1,* 5:626.

92. Arendt, "Crisis in Culture," 220.

93. On the self-disclosing quality of political action, see Hannah Arendt, *On Revolution* (1963; reprint, New York: Penguin, 2006), 272–73.

94. For excellent discussion of this problem, see Jason Frank, "Pathologies of Freedom in Melville's America," in Romand Coles, Mark Reinhardt, and George Shulman, eds., *Radical Future Pasts*: *Untimely Political Theory* (Lexington: University Press of Kentucky, 2014), 435–58.

95. Ellen D. Katz, "What Was Wrong with the Record?" *Election Law Journal* 12 (3) (2013): 329–31; Keith G. Bentele and Erin E. O'Brien, "Jim Crow 2.0? Why

States Consider and Adopt Restrictive Voter Access Policies," *Perspectives on Politics* 11 (4) (2013): 1088–116.

96. *Shelby County v. Holder*, 570 US _____ (2013), at 24, 23, 15. See also Jack Turner, "The Racial Innocence of John Roberts," *The Contemporary Condition*, October 17, 2013, at http://contemporarycondition.blogspot.com/2013/10/the-racial-innocence-of-john-roberts.html.

97. *Shelby County v. Holder*, 570 US, at 20.

98. *Parents Involved v. Seattle*, 551 US, at 748.

99. Michael C. Dawson, *Black Visions: The Roots of Contemporary African-American Political Ideologies* (Chicago: University of Chicago Press, 2001), 258, 264.

100. Ralph Waldo Emerson, "Address to the Citizens of Concord" (1851), in *Emerson's Antislavery Writings*, ed. Len Gougeon and Joel Myerson (New Haven, CT: Yale University Press, 1995), 57.