

James Oakes, *The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution* (NY: W.W. Norton, 2021)

By the 1850s antislavery politicians commonly based the rights of accused fugitives on Article IV, Section 2, of the Constitution, the privileges and immunities clause. As far back as 1821 a majority of northerners in Congress had been prepared to defend the privileges and immunities of free Blacks, whom they considered citizens of their states. In the 1830s and 1840s northern states had passed a series of "personal liberty" laws based on the assumption that free African Americans, born and raised in the United States, were citizens by birthright and as such were entitled to the "privileges and immunities" of citizenship. The Constitution itself was silent as to what those privileges and immunities were, and there was as yet no federal civil rights law or Fourteenth Amendment to specify them.⁴⁴ But Blacks and whites who were struggling against both slavery in the South and racial discrimination in the North insisted that all citizens had the right to buy and sell property, to sue, to move freely from one state to another, and to make and enforce contracts. They also had the right to trial by jury and habeas corpus.

Early on, birthright citizenship became a staple of Black political thought.⁴⁵ In 1849, citing Article II, Section 1, and Article IV, Section 2, a Convention of the Colored Citizens of Ohio declared that "the Constitution of our common country gives us citizenship." We are "coming for our rights," they added, "coming through the Constitution of our common

country."⁴⁶ These were rights useful in the struggle against racial discrimination as well as slavery. In 1842 Charles Lenox Remond denounced segregated trains and streetcars as a violation of "the rights, privileges and immunities" of citizenship.⁴⁷ In 1853 William Nell organized a petition drive to lift the ban on Blacks in the Massachusetts militia—a ban, the petitioners asserted, that was "at war with the American Constitution."⁴⁸ Three years later a convention of Ohio Blacks demanded the right to vote on the basis of "a proper appreciation of the Declaration of Independence and our Bill of Rights."⁴⁹ For African Americans the Constitution was more than an antislavery document. It also recognized their citizenship as a birthright, one that entitled them to all of citizenship's privileges.⁵⁰

African Americans had important white allies in the entwined struggles against slavery in the South and racial discrimination in the North. In 1838 William Yates specified a number of legal rights he attributed to citizenship in a pioneering essay on "The Rights of Colored Men."⁵¹ Four years later Joshua Giddings issued a radical assault on the Fugitive Slave Act of 1793 in which he argued that "as a citizen of our State" a free African American in Ohio "may defend himself against a person who, without process, attempts to arrest him for a crime."⁵² By the 1850s even relatively conservative opponents of slavery, men like Roger Baldwin, denounced the new Fugitive Slave Act on the grounds that it denied due process rights to free Blacks who were "as much entitled to the rights of citizens as are men of any other color or complexion whatsoever."⁵³ At the other end of the antislavery spectrum, Charles Sumner complained that the 1850 Fugitive Slave

Act denied accused fugitives of the due process rights that "belong to the safeguards of the citizen."⁵⁴ By then the privileges and immunities clause occupied an important place within mainstream antislavery constitutionalism, alongside the Preamble, the guarantee clause, the "needful rules and regulations" and exclusive legislation clauses, the war powers clause, and of course the Fourth, Fifth, and Tenth amendments.



ANTISLAVERY CONSTITUTIONALISM did not rely solely on these various clauses in the text. Its advocates also invoked what they called the "spirit" of the Constitution—the spirit of universal liberty explicitly proclaimed in the Preamble but whose guiding inspiration was the Declaration of Independence. This was a well-established feature of the antislavery constitutional tradition. James Forten was hardly alone when in 1813 he discerned the principle of fundamental human equality embedded within "that glorious fabric of collected wisdom, our noble Constitution."⁵⁵ In 1820 John Taylor invited his fellow congressmen to name "the principles on which the United States Government is founded." Reciting the words of the Declaration of Independence, Taylor pointed out that "Congress, within its sovereignty, has constantly endeavored to prevent the extension of slavery, and has maintained the doctrine 'that all men are born equally free.'⁵⁶ A convention of People of Colour in Philadelphia in 1831 resolved to read both the Declaration of Independence and the Constitution at all future meetings, "believing, that

the truths contained in the former are incontrovertible, and that the latter guarantees in letter and spirit to every free-man born in this country, all the rights and immunities of citizenship."⁵⁷ Two years later the radical abolitionists who met in the same city to form the American Anti-Slavery Society declared that the "corner stone" of the republic was the universal right to freedom, and that "the highest obligations resting upon the people of the free states [was] to remove slavery by moral and political action, as prescribed in the Constitution of the United States." An 1840 "Convention of Colored Citizens" in Albany, New York, resolved that the Declaration of Independence and the Constitution "may be considered as more fully developing the primary ideas of American republicanism, than any other documents."⁵⁸ In 1844 the abolitionist Liberty Party proclaimed in its platform that "no other party in the country represents the true principles of American liberty, or the true spirit of the Constitution of the United States."

African American activists were adamant that the principle of fundamental human equality was the philosophical basis of the Constitution. The "fathers of the Revolution," a Detroit convention of "Colored Citizens" declared in 1840, announced "those noble principles set forth in the Declaration of Independence which declares that 'all men are born free and equal' . . . and thereupon established the Constitution of the United States."⁵⁹ In 1853 a Colored National Convention meeting in Rochester issued an address declaring that "ALL MEN ARE CREATED EQUAL" and that "THE CONSTITUTION OF THE UNITED STATES WAS FORMED TO ESTABLISH JUSTICE, PROMOTE THE

GENERAL WELFARE, AND SECURE THE BLESSING OF LIBERTY TO ALL THE PEOPLE OF THIS COUNTRY.”⁶⁰

Similar fusions of the Declaration of Independence and the Constitution appeared in the platforms of every anti-slavery political party in the 1840s and 1850s. In 1848 the Free Soilers invoked the Declaration of Independence just before paraphrasing the Preamble by declaring that “our fathers ordained the Constitution” in order to “establish justice, promote the general welfare, [and] secure the blessings of liberty.” Eight years later, the new Republican Party did the same thing. With “our Republican fathers,” the party resolved, “we hold it to be a self-evident truth, that all men are endowed with the inalienable right to life, liberty, and the pursuit of happiness, and that the primary object and ulterior design of our Federal Government were to secure these rights to all persons under its exclusive jurisdiction.” So claimed the Republicans in 1856.