

SYMPOSIUM

FREEDOM SEEKERS: THE TRANSGRESSIVE CONSTITUTIONALISM OF FUGITIVES FROM SLAVERY

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In the years leading up to the Civil War, fugitives from slavery put their lives on the line to improve their own status and that of their families in their quest for freedom. Fugitives from slavery, or “freedom seekers,” engaged in civil disobedience, resisting laws that they believed to be unjust and inhumane. In the North, free black people and their white allies supported the freedom seekers by engaging in civil disobedience of their own. The transgressive actions of freedom seekers sparked constitutional controversy during the antebellum era over issues of interstate comity, federalism, citizenship rights, and fundamental human rights. Their actions were central to the antislavery struggle, and their sacrifices sent a profound moral message which inspired other activists and strengthened their cause. Eventually, the Reconstruction Congress enshrined their claims into constitutional law. Until now, fugitives from slavery have largely been absent from virtually all of the legal scholarship about the antebellum and Reconstruction Era. This Article seeks to remedy that oversight.

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In *The Reconstruction Amendments: The Essential Documents*,¹ Kurt Lash has created an important resource for scholars of the Reconstruction Era. Along with Supreme Court opinions and congressional debates, Lash includes many sources written by advocates for constitutional change. By doing so, Lash acknowledges that constitutional meaning is not created only by courts, or even only by lawyers, but also by political advocates and grassroots movements. As Lash explains, “[t]he nature of the original Constitution, the proper division of national and state power, the meaning of American citizenship and human freedom, and the significance of race—all were subjects of nationwide debate long before the Civil War.”² Several of the documents included in Volume One of the collection were written by free black people who advocated for their own civil rights as well as the end of slavery.³ These are significant documents because they add to our understanding of how constitutional change happens and help

1 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021) [hereinafter LASH, Vol. 1]; 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS (Kurt T. Lash ed., 2021) [hereinafter LASH, Vol. 2].

2 LASH, Vol. 1, *supra* note 1, at 3.

3 See Frederick Douglass, J.M. Whitfield, H.O. Wagoner, A.N. Freeman & George B. Vashon, Address of the Colored National Convention to the People of the United States (July 6–8, 1853), as reprinted in LASH, Vol. 1, *supra* note 1, at 150; DAVID WALKER, WALKER’S APPEAL IN FOUR ARTICLES TOGETHER WITH A PREAMBLE TO THE COLORED CITIZENS OF THE WORLD, BUT IN PARTICULAR AND VERY EXPRESSLY TO THOSE OF THE UNITED STATES OF AMERICA (Boston, David Walker 1829), as reprinted in LASH, Vol. 1, *supra* note 1, at 203.

guide our interpretation of the changes wrought as a result of that advocacy. However, there is a significant perspective missing from *The Essential Documents*—that of the fugitives from slavery who served as catalysts for the constitutional change.

Indeed, until now, fugitives from slavery have largely been absent from virtually all of the legal scholarship about the antebellum and Reconstruction Era.⁴ This Article seeks to remedy that oversight. As William Carter has noted, “[B]y listening to enslaved persons’ voices, we credit them as part of the contemporaneous polity whose understandings should matter in constitutional interpretation, rather than merely as passive beneficiaries to, or forgotten members of, the Second Founding” which took place during the Reconstruction Era.⁵ The transgressive actions of freedom seekers sparked constitutional controversy during the antebellum era over issues of interstate comity, federalism, citizenship rights, and fundamental human rights. Their actions were central to the antislavery struggle, and their sacrifices send a profound moral message which inspired other activists and strengthened their cause.⁶ Eventually, the Reconstruction Congress enshrined their claims into constitutional law.

In the years leading up to the Civil War, fugitives from slavery put their lives on the line to improve their own status and that of their families in their quest for freedom. Fugitives from slavery, or “freedom seekers,”⁷ engaged in civil disobedience, resisting laws that they

4 *But see* William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1066 (2021) (arguing that courts should take the perspective of enslaved people into account when interpreting the Constitution); Guyora Binder, Essay, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMANS. 471 (1993) (arguing that enslaved people should be considered as framers of the Thirteenth Amendment).

5 Carter, *supra* note 4, at 1066.

6 ERIC FONER, GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD 22 (2015) (arguing that fleeing fugitives from slavery “exemplified the political importance of slave resistance as a whole and raised questions central to antebellum politics,” including “the contest over slavery in the broad public sphere”); *id.* at 27 (quoting J. Miller McKim, *Our Philadelphia Correspondence*, NAT’L ANTI-SLAVERY STANDARD, Feb. 3, 1855, at 3) (claiming that those who encountered the fugitives were moved by their stories and celebrated what the 1855 *National Anti-Slavery Standard* called their “acts of sublime heroism”).

7 Because the identity of an enslaved person was much more than their legal status as a slave, I use the term “enslaved person” instead of “slave.” Identifying the proper term for “fugitive slaves” presents additional challenges, since “enslaved person seeking to escape enslavement” is very awkward. The National Park Service has adopted the term “freedom seekers” to describe enslaved people who were fleeing bondage. *See Language of Slavery*, NAT’L PARK SERV, <https://www.nps.gov/subjects/undergroundrailroad/language-of-slavery.htm> [<https://perma.cc/HA7K-JUT7>]. Their website explains, “[w]hile African Americans were in physical bondage, the minds and spirits of these individuals remained free.” *Id.* The terminology used in the “Learn About the Underground Railroad” section

believed to be unjust and inhumane. In the North, free black people and their white allies supported the freedom seekers by engaging in civil disobedience of their own. Many joined the Underground Railroad and helped freedom seekers to escape.⁸ Other free black people engaged in mass demonstrations to protest the kidnapping of those whom slave catchers accused of being fugitives.⁹ Freedom seekers raised concerns related to the fundamental structure of our government, including interstate comity and federalism. They also demanded fundamental human rights, foremost of which was what Hannah Arendt calls “the right to have rights,” to be recognized as human beings who are entitled to legal protection.¹⁰

The transgressive constitutionalism of freedom seekers created tensions between free and slave states which ultimately led to the Civil War.¹¹ Their claims to freedom intensified during the Civil War, when they fled across Union battle lines and demanded not only their freedom, but also their right to fight for their country as citizens.¹² By doing so, they asserted their claim to citizenship and other individual rights, which were then enforced by the Reconstruction Congress.

This Article thus challenges the standard narrative of the abolition of slavery—that of well-meaning white lawmakers bestowing freedom upon grateful enslaved people. In popular culture, President Abraham Lincoln is known as the Great Emancipator, and the Emancipation Proclamation is portrayed as the single act which freed

of this website reflects this freedom of spirit by referring to escaping African Americans as “freedom seekers,” rather than runaways, fugitives or escapees.” *Id.* I agree with their sentiment. Because the purpose of this project is precisely to highlight the agency of those people who resisted the institution of slavery, I prefer to use the term “freedom seekers.” At times in this Article I also use the term “fugitives from slavery” to reflect the fact that people who fled slavery were acutely aware of that aspect of their identity for the rest of their lives, living in fear of being discovered and captured, but also claiming that status to heighten the moral force behind their advocacy. See Angela F. Murphy, “*My Freedom I Derived from God*”: Jermain Loguen’s Rejection of Freedom Purchase 1–2 (unpublished manuscript) (on file with author).

8 See R.J.M. BLACKETT, *THE CAPTIVE’S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY* 145 (2018); FONER, *supra* note 6, at 15 (“[T]he underground railroad represents a moment in our history when black and white Americans worked together in a just cause.”).

9 See BLACKETT, *supra* note 8, at 40; CHRISTOPHER JAMES BONNER, *REMAKING THE REPUBLIC: BLACK POLITICS AND THE CREATION OF AMERICAN CITIZENSHIP* 96 (2020).

10 See Judith Butler, *Bodies in Alliance and the Politics of the Street* (Sept. 2011) (citing HANNAH ARENDT, *THE HUMAN CONDITION* (1958)).

11 See FONER, *supra* note 6, at 26; JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865*, at 7 (2013); PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 4 (1981).

12 See OAKES, *supra* note 11, at 170, 276 (describing freedom seekers fleeing across enemy lines during the Civil War).

enslaved people from their bondage.¹³ Legal scholars tend to focus not only on Lincoln but also on the members of the Reconstruction Congress who debated the constitutional Amendments and statutes that abolished slavery and established individual rights for newly freed slaves.¹⁴ Recently, legal scholars have turned their attention to popular constitutionalism, or constitutional advocacy outside the courts,¹⁵ and some have studied the constitutional impact of antislavery activists and their theories of rights.¹⁶ However, until now, legal scholars have largely overlooked the impact of fugitives from slavery on this crucial period of U.S. constitutional development. By contrast, in the field of history, there is currently an emerging scholarship about freedom seekers and their individual experiences, and their free black allies in the North.¹⁷ This Article builds on this historical scholarship and explores the impact of this activism on how we should think about constitutional development and the meaning of Reconstruction.

This Article thus considers what it means to be a constitutional advocate. Plaintiffs who file lawsuits asserting their rights are clearly constitutional advocates, and they are the focus of much of legal scholarship about constitutional change. Political advocates who rely

13 See Kirt H. Wilson, *Debating the Great Emancipator: Abraham Lincoln and Our Public Memory*, 13 RHETORIC & PUB. AFFS. 455, 455 (2010).

14 See, e.g., REBECCA E. ZIETLOW, *THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION* (2018); GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* (2013); Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589 (2003); Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881 (1988); Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361 (2016); Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389 (2018).

15 See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

16 See, e.g., Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859 (2016) (describing the advocacy of antislavery and antebellum labor movements and how their rights claims influenced the Reconstruction Congress); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275 (2013).

17 See, e.g., BLACKETT, *supra* note 8; BONNER, *supra* note 9; ANDREW DELBANCO, *THE WAR BEFORE THE WAR: FUGITIVE SLAVES AND THE STRUGGLE FOR AMERICA'S SOUL FROM THE REVOLUTION TO THE CIVIL WAR* (2018); FONER, *supra* note 6; MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018); KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION* (2021); NIKKI M. TAYLOR, *FRONTIERS OF FREEDOM: CINCINNATI'S BLACK COMMUNITY, 1802-1868* (2005); FUGITIVE SLAVES AND SPACES OF FREEDOM IN NORTH AMERICA (Damian Alan Pargas ed., 2018) [hereinafter FUGITIVE SLAVES].

on the Constitution to support their claims are also constitutional advocates and the subject of the new scholarship on popular constitutionalism. Fugitives from slavery engaged in both of those forms of constitutional advocacy. Some filed lawsuits claiming their right to freedom, and some actually won those suits.¹⁸ Others engaged in political activism. Some freedom seekers published narratives of their lives, testaments to the cruelty of slavery which persuaded many to join the antislavery cause.¹⁹ Fugitive slaves such as Frederick Douglass served as leaders of the abolitionist movement, especially in the decades leading up to the Civil War.²⁰

The vast majority of freedom seekers, however, did not openly advocate for political change for obvious reasons—they were afraid of being captured and returned to slavery. However, they also engaged in constitutional activism, what I call “performative constitutionalism”—using their bodies and actions to assert constitutional claims. Freedom seekers engaged in a particular form of performative constitutionalism—“transgressive constitutionalism.” By transgressing borders from slave states to free, they asserted their claims to freedom and fundamental human rights with their actions.

Until now overlooked by legal scholars, the transgressive constitutionalism of fugitives from slavery served as a crucial catalyst for the constitutional changes which occurred during the Civil War and Reconstruction Era. Perhaps the reason why legal scholars have largely overlooked the transgressive constitutionalism of fugitives from slavery is that they mostly did not make claims in express constitutional terms.²¹ Determining the mindset of those who engaged in transgressive constitutionalism presents additional challenges. Enslaved people were silenced by law, forbidden from advocating for the end of slavery

18 See LEA VANDERVELDE, *REDEMPTION SONGS: SUIING FOR FREEDOM BEFORE DRED SCOTT* (2014); ANNE TWITTY, *BEFORE DRED SCOTT: SLAVERY AND LEGAL CULTURE IN THE AMERICAN CONFLUENCE, 1787–1857* (2016).

19 See MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 421 (2016) (“Fugitive slaves created an authentic, original, and independent critique of slaveholding, one which made their narratives potent antislavery material.”). The most prominent slave narrative was that of Frederick Douglass. See FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* (Dublin, Webb & Chapman 1845). Originally published in 1845, the narrative was widely read and catapulted Douglass to the forefront of the abolitionist movement. See SINHA, *supra*, at 426 (explaining that Douglass’s narrative made him an “instant celebrity”).

20 See FONER, *supra* note 6, at 23. Frederick Douglass was the most prominent fugitive from slavery to lead the abolitionist movement. Other fugitives who played a leading role include Pennington, Henry Highland Garnet, Henry Bibb, Henry Brown, and Harriet Tubman. FONER, *supra* note 6, at 23–24.

21 As mentioned earlier, Lash’s compilation does include documents written by free black activists who made claims in constitutional terms. See *supra* note 1.

or even criticizing those who held them in bondage.²² Enslaved people could not enter into contracts, file lawsuits, testify in court, or petition the government for redress.²³ Laws in slave states prohibited enslaved people from learning to read or write so most were illiterate, unable to write letters or other documents for historians to read.²⁴ Moreover, any attempt to assert any of these rights would jeopardize their lives. Some freedom seekers published fugitive slave narratives that were highly influential during the years leading up to the Civil War.²⁵ However, the only way that most enslaved people could express their natural human rights was to escape their situation and travel across borders to free states.

Regardless of whether freedom seekers viewed themselves as asserting constitutional claims, however, they actually asserted constitutional claims through their actions. By transgressing borders from slave state to free, they claimed freedom for themselves, claimed the soil on which they stood as free soil, and asserted fundamental constitutional rights. By travelling, they asserted the right to travel. By claiming freedom, they claimed the places to which they travelled as free spaces. By resisting federal laws which authorized their capture and re-enslavement, they invoked due process rights and the right of people in states in which they were located to also resist federal authority. Freedom seekers' actions had constitutional implications, and others translated their actions into constitutional claims.

This Article makes four fundamental arguments. First, it argues that freedom seekers were constitutional actors who engaged in multiple formats of constitutional activism. Second, freedom seekers engaged in transgressive constitutionalism, crossing borders to make constitutional claims. Third, by transgressing borders, freedom seekers sparked constitutional controversies over issues of interstate

22 See Annette Gordon-Reed, *Rebellious History*, N.Y. REV. OF BOOKS (Oct. 22, 2020), <https://www.nybooks.com/articles/2020/10/22/saidiya-hartman-rebellious-history/> [<https://perma.cc/MAG2-YHE6>].

23 See Viola Franziska Müller, *Illegal but Tolerated: Slave Refugees in Richmond, Virginia, 1800–1860*, in FUGITIVE SLAVES, *supra* note 17, at 137, 139. In fact, no opponents of slavery could petition the government because slave states enacted laws prohibiting anyone from criticizing slavery. See MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 5 (2000).

24 In his narrative, Frederick Douglass describes how his mistress began to teach him to read and write before her husband stopped her. DOUGLASS, *supra* note 19, at 33. He then befriended the white boys in his Baltimore neighborhood and asked them to teach him to read. *Id.* at 38. Formerly enslaved William Singleton later recalled that he was once “whipped simply because it was thought [he] had opened a book.” WILLIAM HENRY SINGLETON, RECOLLECTIONS OF MY SLAVERY DAYS 10 (Acad. Affs. Libr., Univ. of N.C. at Chapel Hill 2000) (1922).

25 See SINHA, *supra* note 19, at 421.

comity and federalism which exacerbated tensions that led to the Civil War. During the war, they used their bodies and their actions to transform a war to save the union into a war to end slavery. Finally, freedom seekers made individual rights claims that resonated with those made by Northern black civil rights advocates. These claims influenced the Reconstruction Congress who enshrined them into constitutional law. This Article thus challenges the standard narrative of emancipation—that of enslaved people being acted upon by lawmakers without agency of their own. Instead, it recognizes freedom seekers as constitutional actors, engaged in a highly effective form of popular constitutionalism.

I. FREEDOM SEEKERS AS CONSTITUTIONAL ADVOCATES

What does it mean to be a constitutional advocate? Many legal scholars take the answer to this question for granted. They focus primarily on court rulings and the participants in those cases. However, in recent decades legal scholars have begun to explore the question of how constitutional development occurs in greater depth.²⁶ Increasingly, legal scholars are recognizing that constitutional law does not develop in a vacuum, in federal courtrooms isolated from politics. Politics influences constitutional change, and advocates often make political arguments in constitutional terms. This Part explores the different ways in which those who seek constitutional change can bring about that change. In addition to using their voices, I argue that advocates sometimes make constitutional arguments with their bodies and their actions. I call this third type of constitutional advocacy “performative constitutionalism.” Freedom seekers engaged in all of these forms of constitutional advocacy, but arguably they were most effective when they engaged in performative constitutionalism to transgress legal and physical borders.

A. *Litigants in Constitutional Cases*

Litigants in constitutional cases are clearly constitutional actors when they invoke the Constitution to support their legal claims. Constitutional scholars tend to focus on these constitutional actors, and on the court decisions that they engender. In the court-centered field of constitutional law, individuals who seek to assert their rights

²⁶ See, e.g., Jack M. Balkin & Reva B. Siegel, Essay, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73 (2000); Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583 (2005).

need lawyers to translate their concerns into legal causes of action. Judges further abstract their claims when issuing rulings evaluating those claims. Those rulings establish legal principles to guide future litigants, lawyers, and courts. On the ground, however, those rulings have no impact until they are enforced by other government officials. Moreover, litigants in constitutional cases face significant barriers. First, they must be sophisticated enough to recognize that they might have a legal claim. Second, they must have access to lawyers, and the financial resources to pay those lawyers. Finally, individual litigants must have the courage and fortitude to withstand the spotlight if they prevail in controversial cases.

Some freedom seekers filed lawsuits and made legal claims in court.²⁷ Some of their lawsuits were based on individual circumstances, such as claims that their masters had promised to free them. Fugitives from slavery who were captured by slave catchers brought legal challenges to the affidavits brought by slave catchers.²⁸ A significant number of enslaved people, however, made a broader claim—that they had become free when they crossed borders into free states and territories. They asserted what they called the “freedom principle,” that their legal status changed once they transgressed the border into free space.²⁹ In the 1856 case of *Dred Scott v. Sandford*,³⁰ the United States Supreme Court rejected this argument, but prior to *Dred Scott*, some litigants prevailed. In fact, before *Dred Scott*, over 100 enslaved people successfully petitioned for freedom in the city of St. Louis.³¹ In Ohio, an appeals court found that a formerly enslaved woman named Rosetta was free because she had been brought into the free state of Ohio with the consent of her owner.³² The ruling in the Rosetta case only provided partial support for the freedom principle, since it did not apply to enslaved people who fled across state borders against the will of their slaveholders. However, all of these cases illustrate the fact that prior to *Dred Scott*, the freedom principle was a viable legal argument. Moreover, the act of filing lawsuits alone was an assertion of a right to belong, and to be treated as a human being under the law.

27 See generally VANDERVELDE, *supra* note 18; TWITTY, *supra* note 18.

28 See BLACKETT, *supra* note 8, at 61.

29 See FONER, *supra* note 6, at 20 (describing the “freedom principle” [as] the doctrine that once a slave (other than a fugitive) left a jurisdiction where local law established slavery, he or she automatically became free”).

30 60 U.S. (19 How.) 393 (1856).

31 See Lea VanderVelde, *The Dred Scott Case in Context*, 40 J. SUP. CT. HIST. 263, 269 (2015).

32 BLACKETT, *supra* note 8, at 247–48. Rosetta was represented by Salmon Chase and Rutherford B. Hayes. *Id.* at 247.

B. Political Advocacy and Popular Constitutionalism

Political activists who invoke the constitution are a second type of constitutional actor.³³ Often political activists speak in terms of constitutional claims. For example, gun rights activists invoke the Second Amendment.³⁴ Civil rights activists invoke the Thirteenth and Fourteenth Amendments.³⁵ Political activists sometimes make arguments in express constitutional terms, and other times simply invoke constitutional values. They are often successful at convincing political branches to enact legislation enforcing their rights. Arguably, they sometimes influence courts' constitutional interpretation as well. Constitutional gains by political activists are often more enduring, and their enforcement is more widespread, than are court rulings enforcing those rights.³⁶ To be successful, however, political activists need to be well-organized and coordinated. Like constitutional litigants, they need resources to spread their message, and to advocate successfully in the political realm.

Many freedom seekers engaged in political activism. They published narratives and gave speeches which were popular and well attended.³⁷ According to historian Manisha Sinha, “[i]n the two decades before the Civil War, a new generation of black abolitionists, most of them fugitive slaves, came to dominate the movement.”³⁸ The most prominent fugitive from slavery was Frederick Douglass. Douglass, who had escaped from slavery in Maryland as a young man, was a charismatic orator who became a close ally of leading abolitionist William Lloyd Garrison.³⁹ In 1847, Douglass started an antislavery paper, *The North Star*, which “became the voice of black abolitionism.”⁴⁰ In the 1850s Douglass created a sensation when he proclaimed that the Constitution was antislavery, broke his alliance with Garrison, and joined the antislavery constitutionalists who eventually formed the Republican Party.⁴¹ Douglass developed a

33 See, e.g., KRAMER, *supra* note 15; KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION AND THE PROTECTION OF INDIVIDUAL RIGHTS (2006).

34 See, e.g., ZIETLOW, *supra* note 33, at 5. Justice Antonin Scalia acknowledged the claims of Second Amendment activists in a footnote to his opinion in *District of Columbia v. Heller*, holding that the Second Amendment protects an individual right to bear arms. See 554 U.S. 570, 624 n.24 (2007).

35 See ZIETLOW, *supra* note 33, at 98–99.

36 See *id.* at 11.

37 FONER, *supra* note 6, at 24.

38 SINHA, *supra* note 19, at 421.

39 See *id.* at 425.

40 *Id.* at 426.

41 See *id.* at 425.

comprehensive theory of antislavery constitutionalism and became an effective leader of the antislavery cause. In his influential autobiography, Frederick Douglass described his experience as a slave, and his escape from slavery, to illustrate the cruelty of the institution and generate opposition to slavery.⁴² Douglass's lived experience contributed to his effectiveness as an antislavery activist.

Other prominent fugitives from slavery included Henry Bibb, who fled from slavery in Kentucky and moved to Ohio.⁴³ After the passage of the 1850 Fugitive Slave Act, Bibb moved to Canada, where he published his own paper, the *Voice of the Fugitive*.⁴⁴ Living in upstate New York at the time was Jermain Wesley Loguen, who fled slavery in Tennessee to become a minister in the African Methodist Episcopal church and a leader in the Underground Railroad.⁴⁵ By 1860, Loguen became known as the "King of the Underground Railroad."⁴⁶ Douglass, Bibb, Loguen, and other fugitives from slavery also participated in the Northern civil rights movement, advocating for the rights of free black people.⁴⁷

C. Performative Constitutionalism

The third category of constitutional actors are people who use their actions to assert constitutional claims. I call this category "performative constitutionalism." Throughout history, groups of people have engaged in performative constitutionalism, engaging in mass protests and organized demonstrations. In the 1920s and 1930s, millions of labor activists staged strikes to assert their right to organize into unions and bargain collectively.⁴⁸ In the 1950s and 1960s, civil rights activists engaged in many symbolic demonstrations asserting their right to be free of racial segregation and to be treated as equal citizens.⁴⁹ For example, Rosa Parks protested Alabama laws requiring segregation of public transportation by refusing to give up her seat in the front of the bus. Freedom Riders engaged in the same protest

42 See DOUGLASS, *supra* note 19.

43 SINHA, *supra* note 19, at 430–31.

44 See Fred Landon, *Henry Bibb, a Colonizer*, 5 J. NEGRO HIST. 437, 442–43; H. Bibb & J.T. Holly, *Prospectus of the Third Volume of the Voice of the Fugitive*, VOICE OF THE FUGITIVE, Dec. 2, 1852.

45 See Murphy, *supra* note 7, at 1.

46 *Id.*

47 For example, Frederick Douglass was the leading African American advocate for the rights of free black people of his generation. See Bradley Rebeiro, *The Work Is Not Done: Frederick Douglass and Black Suffrage*, 97 NOTRE DAME L. REV. 1513 (2022).

48 See ZIETLOW, *supra* note 33, at 93–95.

49 For an excellent discussion of the constitutional significance of this activism, see CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA* (2018).

while riding interstate buses into southern states. Hundreds of protestors engaged in sit-in demonstrations in restaurants, using their bodies to assert their right to be served equally with white people in a place of public accommodation.⁵⁰ These people engaged in organized political action and used words to articulate their political message. Yet there is no doubt that their willingness to use their bodies, often putting themselves in danger and sometimes risking their lives, strengthened their claims and contributed to their victories in the political process.

In her lecture about the Arab Spring demonstrations in Tahrir Square, Cairo, Judith Butler observed that in that demonstration, “bodies congregate, they move and speak together, and they lay claim to a certain space as public space.”⁵¹ In the lecture, Butler describes how activists used their bodies to assert a claim to public space. Butler argues that “in the case of public assemblies, we see quite clearly not only that there is a struggle over what will be public space, but a struggle as well over those basic ways in which we are, as bodies, supported in the world—a struggle against disenfranchisement, effacement, and abandonment.”⁵² Claiming the space enables the poorest and most disenfranchised people to assert “the right to have rights”⁵³ by using their bodies “against those forces that seek to monopolize legitimacy.”⁵⁴ Like the activists in Tahrir Square, freedom seekers asserted their “right to have rights” when they fled across state borders. Their allies in the North saw aiding fugitives from slavery as a form of “practical antislavery action,” what David Ruggles, secretary of the New York Committee of Vigilance and Underground Railroad leader, called “practical abolition.”⁵⁵

Enslaved people were subject to legal restrictions and lacked basic human rights. They were prohibited from engaging in economic activity without their slaveholder’s permission, they could not travel on or off the plantation without written permission, and they were forbidden to read, write, or testify in court in any case involving a white person.⁵⁶ Slave patrols and state militias arrested enslaved people who violated these rules and brutally punished those who transgressed the

50 *Id.* at 14.

51 *See* Butler, *supra* note 10.

52 *Id.*

53 *Id.* (citing ARENDT, *supra* note 10).

54 *Id.*

55 FONER, *supra* note 6, at 20.

56 *See* HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS 70 (1943); W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, at 10 (1935).

restrictions.⁵⁷ Nonetheless, enslaved people engaged in a myriad of transgressions, acts of resistance against their slaveholders, including sabotage, shamming illness, and individual attempts at assassination of slaveholders.⁵⁸ A significant number of enslaved people engaged in outright rebellion.⁵⁹ With these actions, enslaved people destabilized the institution of slavery and caused slaveholders to fear them and the abolitionists who might incite them to rebel.⁶⁰

Enslaved people who had the courage and fortitude engaged in multiple facets of transgression. First, they crossed from slavery into freedom by transgressing state borders. In the Deep South, where it was not feasible to escape to formally free territory, freedom seekers fled to cities such as New Orleans and Richmond, Virginia, to lose themselves in the free black populations.⁶¹ Others fled to remote rural areas such as the Dismal Swamp where it was relatively easy for them to hide.⁶² Still others fled across national borders, into Canada and Mexico.⁶³ During the Civil War, freedom seekers transgressed battle lines, seeking freedom and asking to fight for the Union.⁶⁴ Thus, freedom seekers sought not only formal freedom in places where slavery was legally abolished, but also informal freedom, where they attempted to live free illegally.⁶⁵ In Southern states, fugitives from slavery undermined the institution and deprived their masters of their labor and a significant source of their wealth.⁶⁶ Wherever they went, fugitives from slavery sought to enforce the freedom principle—that

57 See APTHEKER, *supra* note 56, at 67; Müller, *supra* note 23, at 137, 145.

58 See APTHEKER, *supra* note 56, at 141–43.

59 *Id.* at 11 (arguing that The Nat Turner Rebellion was not an isolated, unique phenomenon, “but the culmination of a series of slave conspiracies and revolts which had occurred in the immediate past”). Aptheke estimates that as many as 250 groups of enslaved people of ten or more plotted or engaged in rebellions. *Id.* at 162.

60 See *id.* at 50–51.

61 See FONER, *supra* note 6, at 16; Müller, *supra* note 23, at 139 (explaining that Richmond, Virginia, “served as a beacon of freedom” to enslaved people in other parts of the state).

62 See FONER, *supra* note 6, at 16; Sylviane A. Diouf, *Borderland Maroons*, in FUGITIVE SLAVES, *supra* note 17, at 168, 190; Damian Alan Pargas, *Seeking Freedom in the Midst of Slavery: Fugitive Slaves in the Antebellum South*, in FUGITIVE SLAVES, *supra* note 17, at 116, 124.

63 See FONER, *supra* note 6, at 137 (pointing out that in Canada, black people were safer and had more rights, including serving on juries, testifying in court, and voting); Mekala Audain, “*Design His Course to Mexico*”: *The Fugitive Slave Experience in the Texas-Mexico Borderlands, 1850–1853*, in FUGITIVE SLAVES, *supra* note 17, at 232, 234–35 (explaining that enslaved people in Texas fled to Mexico because they had learned that Mexico was close, there were economic opportunities, and a greater degree of social acceptance).

64 See DUBOIS, *supra* note 56, at 65–66; OAKES, *supra* note 11, at 146.

65 Pargas, *supra* note 62, at 131.

66 See BLACKETT, *supra* note 8, at 4–5 (pointing out that by transgressing borders freedom seekers collectively cost their “masters” as much as \$200,000 a year).

by fleeing to free soil they would become free. By transgressing borders from slave to free they expanded the scope of free spaces.

Foremost among these freedom seekers was Harriet Tubman, who escaped slavery in Maryland in 1849.⁶⁷ During the 1850s, Tubman made repeated trips to rescue other enslaved people, leading as many as seventy men, women, and children out of bondage.⁶⁸ Tubman also worked with Jermain Loguen and others in the upstate New York Underground Railroad.⁶⁹ Antislavery crusader John Brown used the nickname “General” to refer to Tubman, and she was popularly referred to as “Moses.”⁷⁰ Though generally viewed as a heroic figure in the antislavery movement, Harriet Tubman is not generally considered to be a constitutional actor. She spoke out against slavery, calling slavery “the next thing to hell,” but she did not speak in constitutional terms.⁷¹ Nonetheless, she made constitutional claims with her actions, undermining slavery and sparking constitutional controversy.

Freedom seekers like Harriet Tubman asserted constitutional claims with their bodies and their actions, what historian Christopher Bonner calls “black thought in radical practice.”⁷² Freedom seekers knew little about the law, but they knew the basic essentials—that slavery was allowed and encouraged where they lived but outlawed in other states within the same country. If they were able to reach those states, they believed, their legal status would change, and as a result, they would be free and could live a better life. It is important to note that I am not claiming that all fugitives from slavery were seeking constitutional change. They had a variety of motivations which were primarily personal.⁷³ However, they all had the same fundamental goal—freedom for themselves and their families. For those who hoped to stay within the United States and not escape to Canada, their

67 See SINHA, *supra* note 19, at 438.

68 *Id.*; see FONER, *supra* note 6, at 190.

69 MILTON C. SERNETT, HARRIET TUBMAN: MYTH, MEMORY, AND HISTORY 78 (2007); SINHA, *supra* note 19, at 439.

70 SINHA, *supra* note 19, at 439; FONER, *supra* note 6, at 191.

71 See SINHA, *supra* note 19, at 439.

72 BONNER, *supra* note 9, at 97. Similarly, in her recent book about the lives of free black people in antebellum Baltimore, legal historian Martha Jones details how they secured their rights by “ordinary acts” such as filing lawsuits and appearing in court, and traveling within the state. See JONES, *supra* note 17, at 101 (“[T]he act of traveling could give rise to a right to travel.”); *id.* at 111 (suing for debts was exercising the right to contract, a right of citizenship later recognized in the 1866 Civil Rights Act).

73 The reasons for fleeing that were reported most commonly by fugitives from slavery were physical abuse, the threat of sale of oneself or one’s family members, and their slaveholders reneging on promises of manumission. See FONER, *supra* note 6, at 198–99; see also Pargas, *supra* note 62, at 119.

freedom would require constitutional change. Those who fled to Canada after the passage of the 1850 Fugitive Slave Act challenged the very identity of the United States as a country which championed freedom, “offer[ing] a jarring counterpoint to the familiar image of the United States as an asylum for those denied liberty in other countries.”⁷⁴

Unlike the civil rights and labor activists, and those activists in Tahrir Square, freedom seekers did not congregate with other people in the open to assert their claims. Freedom seekers travelled in small groups and as clandestinely as possible. However, all of these actors had one thing in common—their use of public space was part of their constitutional claim. Because labor activists had few resources, they needed access to the streets and public parks to congregate and communicate. Activists in Tahrir Square transformed private spaces into public ones, expanding the arena for political protest.⁷⁵ In *Hague v. Committee for Industrial Organization*, the United States Supreme Court held that labor activists had a First Amendment right to assemble peaceably in a public place to express their views.⁷⁶ The *Hague* case established a constitutional right for activists to use public spaces to make rights claims and recognized that making those claims was an act of citizenship.

During the 1950s and 1960s, civil rights protestors used public spaces, including streets, parks, lunch counters, and public transportation, to assert rights claims.⁷⁷ They made those claims not only with their voices, but also with their actions. Sit-in protestors were motivated in part by the desire to have a place to eat while they were out shopping.⁷⁸ But they also sought to be treated with basic human dignity, and they sparked a debate on the meaning of the Constitution and equality.⁷⁹ By asserting claims to public spaces, civil rights activists turned those places into legally contested spaces. Freedom seekers asserted their freedom of mobility by crossing, or transgressing, state lines. By transgressing the borders between slave and free states, they also transformed border states into legally contested spaces that became central to the battle over slavery in the United States.

74 FONER, *supra* note 6, at 26.

75 See Butler, *supra* note 10.

76 307 U.S. 496, 512 (1939); see LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* 227–28 (2016).

77 See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63*, at 129, 145, 271, 766–68 (1988) (describing civil rights' activists' protests at lunch counters, streets, and transportation).

78 See SCHMIDT, *supra* note 49, at 36.

79 *Id.* at 5, 14.

D. *Transgressing Battle Lines*

During the Civil War, thousands of freedom seekers escaped across Union lines and demanded their freedom.⁸⁰ President Abraham Lincoln framed the war as an attempt to save the Union, not to end slavery. However, according to historian James Oakes, “by the time Lincoln was inaugurated, virtually all Republicans believed that secession meant war and war meant immediate emancipation.”⁸¹ At first, enslaved people were not sure how to react to the conflict.⁸² Before long, however, enslaved people realized that the war would provide them with a chance to flee to freedom, and to fight for that freedom. Just before the war, a large number of freedom seekers fled north.⁸³ Gradually those fugitives from slavery “became organized and formed a great labor force for the army.”⁸⁴ “Union troops were a powerful magnet” for freedom seekers.⁸⁵ Many of those who fled requested the right to fight for the Union army, and again after some hesitation the Union agreed. The effort of those former slaves was so valuable to the Union cause that President Abraham Lincoln issued the Emancipation Proclamation as a war measure, affirming that the Civil War would end slavery.

Black people were centerstage in the war from the beginning simply because the war was fought in the South, where over 4,000,000 black people lived, mostly enslaved.⁸⁶ The Confederacy counted on slaves as laborers to raise food and money for the army.⁸⁷ According to historian W.E.B. DuBois, “[w]hen Northern armies entered the South they became armies of emancipation.”⁸⁸ By transgressing Union battle lines, freedom seekers deprived Confederate forces of their labor. Moreover, enslaved people “knew, more clearly and earlier than others, that the Army of Lincoln was to be an Army of Liberation. They, therefore, assisted it.”⁸⁹

The first freedom seekers to cross battle lines did so only a month after Confederate soldiers fired on Fort Sumter. On May 23, 1861,

80 See OAKES, *supra* note 11, at 196.

81 *Id.* at 50.

82 See DUBOIS, *supra* note 56, at 59; see also APTHEKER, *supra* note 56, at 357–58 (explaining that enslaved people saw the impending war and predicted that it would end slavery). Slaveholders feared the same result, and initially strengthened local militias to prevent enslaved people from fleeing or revolting. See OAKES, *supra* note 11, at 85–86.

83 DUBOIS, *supra* note 56, at 59.

84 *Id.*

85 OAKES, *supra* note 11, at 146.

86 DUBOIS, *supra* note 56, at 57.

87 *Id.*

88 *Id.* at 55.

89 APTHEKER, *supra* note 56, at 359.

three fugitives from slavery approached the Union forces at Fort Monroe, Virginia, and asked General Benjamin Butler for asylum.⁹⁰ General Butler met with the freedom seekers and accepted their offer of help.⁹¹ Butler used his military power to “confiscate” enslaved people and grant them their freedom. By the end of July 1861, approximately 900 enslaved people had escaped to Butler’s camp.⁹² Not all Union commanders agreed with Butler, and some cooperated with slave catchers to return freedom seekers to slavery.⁹³ Some rank-and-file soldiers willingly assisted slaveholders, but many did not want to turn fugitives away.⁹⁴ Over time, Union forces realized that they needed to take “the power which slaves put into the hands of the South” in order to win the war.⁹⁵

The transgressive advocacy of fugitives from slavery brought about the end of the hated federal Fugitive Slave Acts. In March 1862, Congress enacted a bill prohibiting the United States military from enforcing the Fugitive Slave Clause.⁹⁶ The new policy made it all but impossible for the army to return fugitives from slavery and put pressure on pro-slavery forces in the Northern border states.⁹⁷ During the war, Congress abolished slavery in the District of Columbia and in the western territories.⁹⁸ By August 1862, President Lincoln had to face the truth—not just that enslaved people ought to be free, but that thousands already were free.⁹⁹ Congress put a stamp of approval on General Butler’s “confiscation” strategy by enacting two Confiscation Acts, which freed all slaves of loyal masters and called for a presidential proclamation that persons still aiding and abetting the rebellion would have their property (including enslaved people) seized by Union forces.¹⁰⁰ Within days of signing the bill, Lincoln drafted the first version of the Emancipation Proclamation.¹⁰¹ Lincoln and his allies in Congress saw emancipation as both a punishment for rebellious

90 OAKES, *supra* note 11, at 95.

91 *Id.*

92 *Id.* at 106.

93 *See id.* at 107, 167, 176–77.

94 *Id.* at 178.

95 DUBOIS, *supra* note 56, at 82.

96 OAKES, *supra* note 11, at 189; *see* CONG. GLOBE, 37th Cong., 2d Sess. 130 (1861); *id.* at 358–59, 956 (1862).

97 OAKES, *supra* note 11, at 191.

98 *See id.* at 328.

99 DUBOIS, *supra* note 56, at 82.

100 Confiscation Act of 1861, ch. 60, 12 Stat. 319; Confiscation Act of 1862, ch. 195, 12 Stat. 589; *see* OAKES, *supra* note 11, at 236–37.

101 OAKES, *supra* note 11, at 237–38.

slaveholders and a reward for the loyalty of the formerly enslaved people who supported the Union cause.¹⁰²

Many freedom seekers who crossed battle lines sought to join the Union Army and fight for their freedom.¹⁰³ At first, Lincoln resisted, unsure of whether formerly enslaved people would make good soldiers and fearing white backlash.¹⁰⁴ However, freedom seekers had been working for the Union Army since the beginning of the war, and they were ready to serve as soldiers.¹⁰⁵ About 180,000 formerly enslaved people served in the Union Army, around 10% of the Union troops.¹⁰⁶ Those soldiers included leaders of the Underground Railroad, including Albert Fountain, Thomas Garrett and Harriet Tubman, who served as a spy for the Union Army.¹⁰⁷ During her service to the Union, Tubman led a raid that liberated over 700 enslaved people on the Combahee River, South Carolina.¹⁰⁸ As freedom seeker William Singleton later explained, “I wore the uniform of those men in Blue, who through four years of suffering wiped away with their blood the stain of slavery and purged the Republic of its sin.”¹⁰⁹ The sacrifices of freedom seekers ensured that the Civil War did end slavery and establish freedom for themselves and their posterity. The Civil War was essential to the abolition of slavery in the United States, and freedom seekers were essential to the success of that effort.

II. THE FREEDOM PRINCIPLE AND SPACES OF CONSTITUTIONAL CONFLICT

The Fugitive Slave Clause of Article IV arguably established a national rule that slaves did not gain their liberty by escaping to free locales.¹¹⁰ However, with their words and their actions, freedom

102 *Id.* at 244.

103 *See, e.g.*, SINGLETON, *supra* note 24, at 7–8 (describing how he fled from the Confederate forces to the Union side in North Carolina).

104 OAKES, *supra* note 11, at 377.

105 *Id.*

106 *Black Civil War Soldiers*, HISTORY, <https://www.history.com/topics/american-civil-war/black-civil-war-soldiers> [<https://perma.cc/PU8D-XG7V>] (Jan. 11, 2022).

107 FONER, *supra* note 6, at 225.

108 *Id.*

109 SINGLETON, *supra* note 24, at 1.

110 *See* FONER, *supra* note 6, at 20. Antislavery constitutionalists disagreed, pointing out that the Clause did not contain the word slave, but only “person[s] held to service or labour,” and argued that enslaved people could not be held to service or labor because they were unable to enter into contracts. *Id.* at 37 (quoting U.S. CONST. art. IV, § 2, cl. 3) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 446 (Max Farrand ed., 1911)); *see also* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (Boston, Bela Marsh 1845), *as reprinted in* LASH, Vol. 1, *supra* note 1, 230, 231; JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE

seekers resisted that interpretation of the Constitution and sought to enforce the “‘freedom principle’—the doctrine that once a slave (other than a fugitive) left a jurisdiction where local law established slavery, he or she automatically became free.”¹¹¹ Freedom seekers thus created spaces of constitutional conflict over the basic structure of our government, revealing the fragility of our constitutional structure. Freedom seekers destabilized the relationship between slave states and free states, creating conflict over comity and interstate relations. When Congress reacted to that conflict by enacting stronger pro-slavery measures, freedom seekers and their allies resisted the authority of the federal government and engaged in a militant states’ rights movement. Finally, and perhaps most obviously, freedom seekers asserted claims to fundamental human rights. By transgressing borders, they asserted the right to travel. When arrested, they claimed due process rights. Most importantly, they asserted the right to have rights—the right to be treated as a human being with protection under the law.

A. Comity

The plight of freed slaves raised issues of interstate comity, notably regarding the relationship between free states and those that authorized slavery, governed by Article IV of the Constitution. Officials in Southern states relied on the Article IV Fugitive Slave Clause to demand cooperation from Northern state officials in retrieving those who were accused of being fugitives.¹¹² Northern state officials claimed that they had the power to recognize free black people as citizens who were entitled to rights under the Article IV Privileges and Immunities Clause. These disputes also raised the question of the extent to which the Full Faith and Credit Clause required states to recognize the legal status of people travelling from other states. Those conflicts were most pressing in the border states as fugitives crossed from slave states to free.¹¹³

FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT (Cleveland, J. Calyer 1849), as reprinted in LASH, Vol. 1, *supra* note 1, at 237, 245–46.

111 FONER, *supra* note 6, at 20.

112 See Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605, 615, 620–27 (1993).

113 BLACKETT, *supra* note 8, at 139, 182, 224 (suggesting that the border of Missouri and Illinois was “one of the zones of maximum conflict that existed along the borders between slave states and Free States”). See generally VANDERVELDE, *supra* note 18 (describing twelve cases in which slaves attempted to win their freedom in St. Louis on the antebellum frontier).

1. The “Fugitive Slave” Clause

When freedom seekers entered states where slavery was not legal, they immediately raised the question of whether their status changed once they stepped on to free soil.¹¹⁴ Proslavery advocates argued that slavery was the law of the land, and that the Fugitive Slave Clause required people in free states to aid in returning people who were accused of being fugitive slaves.¹¹⁵ “Structurally at least, fugitive slave rendition, like privileges and immunities . . . seemed to be a matter of comity.”¹¹⁶ Some freedom seekers filed suits asserting their change of legal status, and prior to the Supreme Court’s ruling in *Dred Scott v. Sandford*, some of these litigants prevailed.¹¹⁷ However, most of the disputes over what to do with people accused of being fugitives played out on the ground.

In Northern cities with large communities of free black people, fugitives from slavery found important allies who helped fugitives to escape and assert legal rights.¹¹⁸ Many free black people felt a commonality of interest with fugitives from slavery, knowing that they could also be captured and accused of being a slave. They formed vigilance societies, provided shelter to fugitives, and offered legal assistance for those fugitives who were captured by slave catchers.¹¹⁹ Members of vigilance societies also took to the street en masse and aided in rescuing fugitives who were detained by law enforcement officers and slave catchers.¹²⁰ Over time they developed a network of support and hiding places for fugitives which became known as the Underground Railroad. In St. Louis, the free black organization Knights of Liberty helped the Underground Railroad.¹²¹ In southern Indiana, free black people were key to its success.¹²² Free black communities in the North attracted fugitive slaves, and residents of those communities protected the fugitives.¹²³ The activism of free black people and their white allies who supported freedom seekers

114 See FINKELMAN, *supra* note 12, at 4.

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

116 Finkelman, *supra* note 112, at 620.

117 See generally VANDERVELDE, *supra* note 18.

118 See FONER, *supra* note 6, at 15.

119 See *id.* at 20, 65; BONNER, *supra* note 9, at 96, 98.

120 See BONNER, *supra* note 9, at 96.

121 See BLACKETT, *supra* note 8, at 142–43.

122 See *id.* at 188.

123 See *id.* at 222 (explaining that the free black settlements in Ohio attracted fugitives).

enforced the freedom principle in Northern states, and made holding slaves in border states like Missouri and Kentucky risky and “unpredictable.”¹²⁴

Renditions of fugitive slaves generally provoked “a firestorm of protest in the cities and towns where they occurred,” including Boston, Detroit, Philadelphia, Chicago and Cleveland.¹²⁵ Abolitionists in Boston insisted that their city would be safe for fugitives.¹²⁶ In Chicago, mobs attacked slavecatchers, making the city a safe haven for fugitive slaves.¹²⁷ Antislavery activists organized demonstrations to resist slave catchers and law enforcement officials who were aiding them. Crowds pushed their way into courtrooms and rescued accused fugitives.¹²⁸ Black crowds often “overwhelmed the authorities’ capacity to control them.”¹²⁹ According to historian R.J.M. Blackett, “[t]hese black crowds were the foot soldiers without whom resistance would have been muted if not impossible.”¹³⁰

Freedom seekers thus forced debate over the divisive issue of comity between free and slave states. Antislavery activists in the North argued that the natural state of man was freedom and that slavery could only be established by positive law.¹³¹ Thus, they insisted that officials in free states had no obligation to assist Southern slavecatchers who travelled into their state even though they were required to do so under the 1793 Fugitive Slave Act.¹³² Slaveholders and their allies in Southern states demanded help from Northern officials to secure and return the fugitives from slavery. They insisted that an enslaved person’s legal status remained the same wherever the enslaved person travelled.¹³³ They rejected the freedom principle and argued that the Article IV Fugitive Slave Clause required national recognition of slavery. Thus, freedom seekers exacerbated the irreconcilable differences that divided the nation.

124 *Id.* at 142, 188 (noting the support offered to slaves escaping from Kentucky by free black communities in southern Indiana).

125 *See id.* at 21, 40, 65–66 (highlighting examples of protests by free black communities in Philadelphia, Cincinnati, Boston, and Detroit).

126 *Id.* at 66.

127 *See id.* at 168.

128 *Id.* at 67.

129 *Id.* at 73.

130 *Id.*

131 *See* ZIETLOW, *supra* note 14, at 39.

132 *See* FINKELMAN, *supra* note 112, at 618.

133 *See* FINKELMAN, *supra* note 11, at 10.

2. The Privileges and Immunities Clause

Freedom seekers also sparked disputes over the meaning of the Article IV Privileges and Immunities Clause.¹³⁴ Slaveholders feared that their slaves might try to escape, and they viewed free black people as a threat. Some Southern states enacted laws asserting the power to capture black people who were travelling into the state and impress them into slavery.¹³⁵ Those laws angered representatives of free states, who asserted their states' power to recognize free black people as citizens with fundamental rights, including the right to travel. They argued that their states' citizens were entitled to those rights under the Article IV Privileges and Immunities Clause.

Not all Northern states recognized the right of free black people to travel. Prompted by fears that Southern states would retaliate to Northern non-compliance by expelling free black people, some Northern border states enacted laws prohibiting free black people from entering the state.¹³⁶ Moreover, Southern states refused to honor the privileges and immunities of Northern free black people who entered their states.¹³⁷ Free black people were thus always in danger of being accused as fugitive slaves, captured, and sold into captivity.¹³⁸ In the decade leading up to the Civil War, this danger extended into the Northern border states.

Freedom seekers and their allies exercised the right to travel and created free spaces in Northern cities and border states. The border city of Cincinnati, Ohio, became a magnet for escaping enslaved people.¹³⁹ After the *State v. Farr* holding that an enslaved woman became free when her master voluntarily took her into the state, abolitionists "inform[ed] slaves of the prospect of freedom as soon as they arrived in the state."¹⁴⁰ This made slaveowners apprehensive about bringing their slaves into Ohio. Settlements of free black people in Ohio also attracted fugitives, and Ashtabula County in northern

134 U.S. CONST. art. IV, § 2, cl. 1.

135 These laws, known as "Seamen's Act[s]," were primarily addressed to free black sailors whose ships docked in Southern ports. *See id.* at 280 & n.118; *see also* Philip M. Hamer, *Great Britain, the United States, and the Negro Seaman Acts, 1822–1848*, 1 J.S. HIST. 3 (1935).

136 *See* BLACKETT, *supra* note 8, at 76 (noting that Indiana enacted legislation to exclude free black people from Southern states).

137 Finkelman, *supra* note 112, at 616–17.

138 *See* Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 933 (2012) (explaining that South Carolina and Georgia statutes required free blacks to prove that they were free).

139 *See* BLACKETT, *supra* note 8, at 222.

140 TAYLOR, *supra* note 17, at 143–44; *see also* BLACKETT, *supra* note 8, at 224 (explaining that "leave-taking fever" followed the success of fleeing enslaved people in Ohio).

Ohio became known as a “no man’s land” for slave catchers.¹⁴¹ The city of Chicago was also known as a safe place for fugitives from slavery. Slaveholders generally stayed away from the Northern city because mobs there often attacked slaveholders and arrested them for kidnapping.¹⁴² Freedom seekers knew that state law enforcement officials would not pursue them or assist in the capture of enslaved people.¹⁴³ In upstate New York, leaders of the Underground Railroad openly bragged about assisting escaping slaves.¹⁴⁴ Thus, to a large extent, freedom seekers enforced the freedom principle prior to 1850. Thus, freedom seekers challenged the legal norms that held together a country which was divided by slavery.

B. Federalism

Fugitives from slavery were the immediate catalyst for the 1850 Fugitive Slave Act, which provoked a states’ rights movement in Northern states.¹⁴⁵ Many Northern officials simply refused to cooperate with Southern slavecatchers, defying the 1793 Act.¹⁴⁶ Over time, slaveholding interests became convinced that the 1793 Fugitive Slave Act’s provisions requiring local officials to assist with the capture of fleeing slaves was ineffective.¹⁴⁷ The 1850 Fugitive Slave Act created the first federal police force, “a massive slavecatching infrastructure for all of the United States.”¹⁴⁸ Like the 1793 Act, the 1850 law contained no procedural protections for those who were accused of being fugitives from slavery.¹⁴⁹ Well before the Supreme Court’s *Dred Scott* decision, Congress had rejected the freedom principle and nationalized slavery.¹⁵⁰ According to historian R.J.M. Blackett, the passage of the new law “was a firebrand thrown into every black community.”¹⁵¹ This 1850 Act “threatened fugitive slaves, free blacks, and abolitionists alike.”¹⁵² The Act inflamed conflicts between the states as well as conflicts between free states and the federal government and precipitated the country’s descent into the Civil War.

141 BLACKETT, *supra* note 8, at 236.

142 *Id.* at 168.

143 *Id.* at 161–62.

144 *See* FONER, *supra* note 6, at 123–24.

145 *See id.* at 25.

146 *See* Finkelman, *supra* note 112, at 620–23.

147 *See id.* at 622; BLACKETT, *supra* note 8, at 5–6.

148 BONNER, *supra* note 9, at 116–17.

149 *See* TAYLOR, *supra* note 17, at 155.

150 *See* BONNER, *supra* note 9, at 117 (explaining that the 1850 Act obligated all people in the United States to support slavery).

151 BLACKETT, *supra* note 8, at 44.

152 TAYLOR, *supra* note 17, at 155.

With the 1850 Fugitive Slave Act, the federal government adopted an aggressive pro-slavery presence in Northern states. The Fugitive Slave Act of 1850 “created the first federal law enforcement bureaucracy in the nation’s history.”¹⁵³ The law provided for the appointment of a federal commissioner in every county of the nation, authorized federal marshals to aid in the capture of fugitive slaves, thus “plac[ing] the prestige of the national government behind the rendition of fugitive slaves.”¹⁵⁴ Commissioners were expected to conduct hearings with few procedural protections for the accused, and were paid \$10 if they ruled in favor of the slave-catcher but only \$5 if they ruled against, creating an obvious incentive to rule in favor of slave-catchers.¹⁵⁵

It would be difficult to exaggerate the devastating impact that the 1850 Fugitive Slave Act had on free black communities in the United States, as well as the freedom seekers among them. Especially in border cities like Cincinnati the Act “made it easier to kidnap free blacks with impunity.”¹⁵⁶ Because of the Act’s weak evidentiary standard and the far-reaching nature of federal enforcement, free black people now lived in constant danger of being kidnapped and sold into slavery.¹⁵⁷ Many freedom seekers who had settled into Northern states now fled to Canada, which they saw as the only safe place to be.¹⁵⁸ Black people who were not fugitives from slavery also fled to Canada to escape the danger of being kidnapped.¹⁵⁹ Former slave and Underground Railroad leader Henry Bibb moved to Canada and established a paper, *Voice of the Fugitive*, in which he wrote editorials urging others to follow his example.¹⁶⁰

Antislavery activists were not deterred from their mission and became increasingly militant as they resisted the 1850 Act. Indeed, passage of the 1850 Act “reinvigorated and radicalized the

153 See Paul Finkelman, *A Political Show Trial in the Northern District: The Oberlin-Wellington Fugitive Slave Rescue Case*, in JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO 37, 39 (Paul Finkelman & Roberta Sue Alexander eds., 2012).

154 See Finkelman, *supra* note 112, at 664.

155 BLACKETT, *supra* note 8, at 53.

156 TAYLOR, *supra* note 17, at 155.

157 See FONER, *supra* note 6, at 134.

158 *Id.*

159 *Id.* at 136–37.

160 FONER, *supra* note 6, at 136. Said Bibb, “This paper was started immediately after the passage of the atrocious fugitive slave bill by the Congress,” causing British North America to be the only truly safe haven for fugitives. According to Bibb, the *Voice of the Fugitive* would serve as “the indignant Voice of the thousands of [slavery’s] escaped victims who are now developing themselves under the genial influence of civil and religious liberty,” to combat the pro-slavery influence of the United States on Canada and engage “in the great battle of liberty and equality.” Bibb & Holly, *supra* note 44.

[U]nderground [R]ailroad.”¹⁶¹ Throughout the North, people organized rallies to condemn the law.¹⁶² Liberty Party founder and 1848 presidential nominee Gerrit Smith held such a rally in upstate New York which was attended by 2,000 people, about fifty of whom were openly identified as fugitives from slavery.¹⁶³ The meeting endorsed a “Letter to the American Slave” which labeled freedom seekers as prisoners of war and promised to “plunder, burn, kill” to help them escape.¹⁶⁴ Frederick Douglass was reported to have told a meeting of the American Anti-slavery Society in Syracuse, New York, that the best way to resist the Fugitive Slave Act would be to kill two or three slaveholders.¹⁶⁵

Efforts to assist fugitives thus took a violent turn, and no longer only in the borderlands.¹⁶⁶ In October 1850, armed black people gathered at a Detroit jail where a fugitive was held.¹⁶⁷ In September 1851, an armed, predominantly black crowd in Christiana, Pennsylvania, fought a group of slave catchers, including a federal marshal and a Maryland owner.¹⁶⁸ The federal government tried to prosecute members of the crowd, but the jury would not convict.¹⁶⁹ In Boston, antislavery activists resisted the arrests of alleged fugitives with armed mobs and attacked the federal courthouse on May 24, 1854, to try to save Anthony Burns, an alleged fugitive from slavery.¹⁷⁰ Free black advocates and their allies knew that “physical confrontations with authorities could do important work toward securing legal change.”¹⁷¹

Northern resistance to the Act prompted federal officials to step up and militarize enforcement.¹⁷² In turn, the aggressive federal enforcement of the Act prompted antislavery activists to invoke states’ rights.¹⁷³ The 1850 Act led to resistance in Northern states where people hadn’t thought much about slavery before and inspired a Northern states’ rights movement.

161 FONER, *supra* note 6, at 145.

162 BLACKETT, *supra* note 8, at 14.

163 FONER, *supra* note 6, at 123–24; *Gerrit Smith*, NAT’L PARK SERV., <https://www.nps.gov/wori/learn/historyculture/gerrit-smith.htm> [<https://perma.cc/C4CK-TCGM>] (Feb. 26, 2015).

164 *Id.* at 124.

165 BLACKETT, *supra* note 8, at 79.

166 FONER, *supra* note 6, at 146.

167 *Id.* at 145.

168 *Id.* at 145–46; TAYLOR, *supra* note 17, at 156.

169 FONER, *supra* note 6, at 146.

170 TAYLOR, *supra* note 17, at 156.

171 BONNER, *supra* note 9, at 96.

172 BLACKETT, *supra* note 8, at 68.

173 See Jeffrey Schmitt, *Rethinking Ableman v. Booth and States’ Rights in Wisconsin*, 93 VA. L. REV. 1315, 1318 (2007).

Free Northern black people and their white allies rallied to the cause of their enslaved brethren and engaged in civil disobedience to disrupt federal officials enforcing the 1850 Act.¹⁷⁴ Their resistance was effective. “By the end of the first year of the [1850 Act’s] operation it was clear to all dispassionate observers that, rather than quieting agitation over slavery as so many of its proponents had hoped, it had stirred passionate opposition and defiance.”¹⁷⁵ So many people in Northern communities condemned the federal commissioners that many of them refused to take the position or resigned.¹⁷⁶ Freedom seekers sparked the 1861 victory for states’ rights in *Kentucky v. Dennison*, when the Court ruled that the federal government could not require the governor of Ohio to enforce the 1793 Fugitive Slave law by returning people who were accused of being slaves that escaped from Kentucky.¹⁷⁷ The state’s rights movement gained momentum in Northern states such as Ohio and Wisconsin.

For example, in 1858 in Oberlin, Ohio, civic leaders participated in the rescue of John Price, a local black resident from the custody of a slavecatcher who accused him of being a fugitive slave.¹⁷⁸ The federal prosecutor indicted thirty-seven men for violating the 1850 Act.¹⁷⁹ The case turned into a political show trial and a forum for the rescuers to voice their antislavery beliefs.¹⁸⁰ In the midst of the slavecatcher’s testimony, the Lorain County deputy sheriff walked into the courtroom and arrested him for kidnapping.¹⁸¹ Thousands of people protested outside the Cleveland jail where the protestors were held.¹⁸² In the end, federal and state officials entered into a compromise. The federal officials dropped charges against the remaining rescuers, and the state officials dropped kidnapping charges against the slavecatchers.¹⁸³ The Oberlin resisters’ trial publicized the plight of fugitive slaves and sparked more resistance to federal authorities.¹⁸⁴

A dispute over the plight of a freedom seeker in Wisconsin led to a United States Supreme Court decision, *Ableman v. Booth*.¹⁸⁵ In March

174 See BLACKETT *supra* note 8, at 143.

175 *Id.* at 86.

176 *Id.* at 59.

177 See 65 U.S. (24 How.) 66, 107 (1860) (“And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it . . .”).

178 See Finkelman, *supra* note 153, at 38–39.

179 *Id.* at 38.

180 *Id.* at 47, 58.

181 *Id.* at 60.

182 *Id.* at 68.

183 *Id.* at 68.

184 See *id.* at 68–70.

185 62 U.S. (21 How.) 506 (1858).

of 1854, a man named Joshua Glover was captured, accused of being a fugitive, and held in Milwaukee jail.¹⁸⁶ News of his arrest quickly spread, and a large crowd stormed the jail.¹⁸⁷ Local abolitionist Sherman Booth addressed the crowd: “Citizens of Milwaukee! Shall we have Star Chamber proceedings here? [A]nd shall a Man be dragged back to Slavery from our Free Soil, *without an open trial of his right to Liberty?*”¹⁸⁸ The federal marshal arrested Booth for assisting fugitive slaves.¹⁸⁹ The district court’s commissioner found probable cause that Booth had violated the 1850 Act.¹⁹⁰ While jailed, Booth turned the tables on our system of federalism and filed a habeas petition in state court.¹⁹¹ “For the people of Wisconsin . . . the federal prosecution made the danger and injustice of the Fugitive Slave Act take on a new meaning.”¹⁹² Public opinion swayed in Booth’s favor and sparked support for state sovereignty.¹⁹³

The Wisconsin Supreme Court agreed with Booth and ordered him released from federal custody.¹⁹⁴ In doing so, the Wisconsin Supreme Court expressed an extreme states’ rights position and example of antislavery constitutionalism. Of course, the United States Supreme Court overturned the Wisconsin Supreme Court. Chief Justice Taney’s opinion in the case reaffirmed the supremacy of federal law and the authority of the United States Supreme Court to interpret that law.¹⁹⁵ However, Chief Justice Taney’s opinion was not persuasive to the citizens of the state of Wisconsin, who continued to advocate for states’ rights. Like the *Dred Scott* decision of the same year, *Ableman v. Booth* exacerbated tensions between opponents and proponents of

186 Schmitt, *supra* note 173, at 1323.

187 *Id.* at 1324–25.

188 *Id.* at 1324.

189 *Ableman*, 62 U.S. (21 How.) at 507.

190 Schmitt, *supra* note 173, at 1328.

191 *Ableman*, 62 U.S. (21 How.) at 507–08.

192 Schmitt, *supra* note 173, at 1339.

193 *Id.* at 1340.

194 *Ableman*, 62 U.S. (21 How.) at 511; *see* Schmitt, *supra* note 173, at 1316.

195 *Ableman*, 62 U.S. (21 How.) at 515 (“[N]o one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year . . . if offences against its laws could not have been punished without the consent of the State in which the culprit was found.”). The Court affirmed judicial supremacy: “And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it” *Id.* at 518; *see also id.* at 524 (“No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him.”).

slavery and contributed to the election of Abraham Lincoln as president two years later and the Civil War that followed.¹⁹⁶

III. INDIVIDUAL RIGHTS AND THE RECONSTRUCTION AMENDMENTS

By transgressing borders, freedom seekers asserted their own claims to national citizenship and fundamental human rights. The commonality of interests between freedom seekers and free black activists helped to shape the rights claims made by those activists and strengthened the effectiveness of those claims.¹⁹⁷ Black Northerners lived in a “precarious freedom.”¹⁹⁸ According to historian Viola Müller, “[t]he threat of slavery was ever-present to the enslaved, the free and the illegal alike.”¹⁹⁹ As Müller points out, “the very meaning of freedom was framed within experiences of captivity or the threat thereof.”²⁰⁰ Like enslaved people, free black people lacked basic citizenship rights and were vulnerable to exploitation.²⁰¹ Northern states’ black laws prohibited them from testifying in cases involving whites, voting, serving on juries, and exercising other essential civil rights.²⁰² The very real danger of being kidnapped and losing everything colored their everyday experience but also spurred them on to activism.²⁰³ Antislavery activists, including free black activists, made rights claims that resonated with freedom seekers’ transgressive constitutionalism.

After the Civil War, the Reconstruction Congress enforced the rights of formerly enslaved people with the Thirteenth, Fourteenth, and Fifteenth Amendments. The Thirteenth Amendment abolished slavery and involuntary servitude throughout the country,²⁰⁴ enforcing the freedom seekers’ right to be free people with fundamental human rights. The Fourteenth Amendment’s Citizenship Clause conveyed birthright citizenship to formerly enslaved people and protected their

196 Schmitt, *supra* note 173, at 1348.

197 See TAYLOR, *supra* note 17, at 147 (arguing that free black people in Cincinnati felt an “implicit racial obligation” to help freedom seekers); Müller, *supra* note 23, at 147 (“[I]n practice virtually the entire African American community [in Richmond, Virginia.] functioned as a receiving society for runaway slaves in need.”).

198 BONNER, *supra* note 9, at 95.

199 Müller, *supra* note 23, at 148.

200 *Id.*

201 See *id.* at 139 (pointing out that like fugitives from slavery, free blacks in Richmond Virginia were “vulnerable and undocumented residents”).

202 See MASUR, *supra* note 17, at xi; TAYLOR, *supra* note 17, at 30.

203 See FONER, *supra* note 6 at 19–20 (describing vigilance committees in New York City); JONES, *supra* note 17, at 98 (describing free black activists’ advocacy for the right to travel).

204 See U.S. CONST. amend. XIII, § 1.

rights of citizenship,²⁰⁵ including the right to travel, which had been asserted by freedom seekers with their bodies. The Fourteenth Amendment's Due Process Clause ensures that all "persons" who are deprived of their liberty are entitled to due process of law,²⁰⁶ which had been denied to freedom seekers accused of being fugitive slaves. This Part briefly discusses the provisions of the Reconstruction Amendments and statutes which enforced the rights and claims that had been raised by freedom seekers and their free black allies.

A. *The "Right to Have Rights"*

Enslaved people had "no rights that anybody was bound to respect."²⁰⁷ With their transgressive constitutionalism, however, freedom seekers asserted their "right to have rights"—to be free and to be treated as human beings with fundamental human rights.²⁰⁸ Over time, fugitives from slavery and free black people began to see themselves as one race, united against their oppressors—they increasingly believed in "their collective right to be free."²⁰⁹ Advocates often invoked natural rights in their arguments against slavery and for the rights of free black people. For example, in 1835 the Ohio Anti-Slavery Society issued a statement citing the Declaration of Independence and making universalistic rights claims, arguing that black laws abridged the fundamental rights of African Americans in the state.²¹⁰ In the words of formerly enslaved William Singleton, freedom seekers sought "not to be treated as things without souls any more, but as human beings."²¹¹

In published narratives, fugitives from slavery invoked the Declaration of Independence as a source of their right to life, liberty, and property. For example, freedom seeker William Craft claimed that having heard the words of the Declaration of Independence that

all men are created equal; that they are endowed by their Creator with certain inalienable rights . . . we could not understand by what right we were held as "chattels." Therefore, we felt perfectly justified in undertaking the dangerous and exciting task of

205 *Id.* amend. XIV, § 1.

206 *Id.*

207 SINGLETON, *supra* note 24, at 1.

208 *See* OAKES, *supra* note 11, at 194 (noting that after 1840 some abolitionists started referring to fleeing as self-emancipation, recovering their natural right to freedom); SINGLETON, *supra* note 24, at 6 ("And we were anxious to be free too.").

209 *See* Müller, *supra* note 23, at 148–49.

210 *See* MASUR, *supra* note 17, at 93–94.

211 SINGLETON, *supra* note 24, at 9 (describing the effect of the Emancipation Proclamation); *see also id.* at 10 ("As a slave I was only property, something belonging to somebody else. . . . Now I am treated as a man. I am a part of society.").

“running a thousand miles” in order to obtain those rights which are so vividly set forth in the Declaration.²¹²

Similarly, antislavery activists invoked the Declaration of Independence as they argued that slavery violated natural law.²¹³ For example, journalist and Liberty Party founder James Birney invoked the Declaration to support his argument that slavery violated the “right to liberty that can never be alienated.”²¹⁴ Abolitionist and member of the United States House of Representatives Gerrit Smith agreed that “men are born with an equal right to use what is respectively theirs.”²¹⁵

In the Reconstruction Congress, supporters of the Thirteenth Amendment agreed that slavery violated the natural rights of man, and that by abolishing slavery they would restore those rights.²¹⁶ Immediately after the Thirteenth Amendment became law, the Reconstruction Congress acted to codify those natural rights, affirming the humanity of formerly enslaved people.²¹⁷

1. Citizenship Rights

By travelling across state borders, freedom seekers implicitly claimed one of the basic rights of citizenship—the right to travel and the right to security of the person. The rights of citizenship were central to what historian Kate Masur calls America’s first “civil rights movement”—advocacy for the rights of free black people in Northern states.²¹⁸ Citizenship was considered a gateway to rights, and a recognition of belonging on the part of the state.²¹⁹ There was widespread agreement about the importance of whether free black people were citizens, and in the antebellum era the issue was highly contested.²²⁰ In 1820, the congressional debate over the Missouri Compromise centered around issues of citizenship.²²¹ In the 1840s, free black advocates and their allies argued that the South Carolina

212 See WILLIAM CRAFT & ELLEN CRAFT, *RUNNING A THOUSAND MILES FOR FREEDOM; OR, THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY* iii (London, William Tweedie 1860).

213 See Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 425 (2012).

214 JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 304 (1951) (quoting James G. Birney, *Can Congress, Under the Constitution, Abolish Slavery in the States?*, ALBANY PATRIOT, May 12, 19, 20 & 22, 1847).

215 CONG. GLOBE, 33d Cong., 1st Sess. app. 521 (1854) (statement of Rep. Smith).

216 See Zietlow, *supra* note 213, at 429.

217 See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 234 (2001).

218 See MASUR, *supra* note 17, at xiii.

219 See JONES, *supra* note 17, at 11.

220 See *id.*

221 See *id.* at 27; ZIETLOW, *supra* note 33, at 26.

Seamen's acts, which authorized the kidnapping of free black sailors who entered South Carolina ports, violated those sailors' citizenship rights under the Article IV Privileges and Immunities Clause.²²² As discussed above, disputes over citizenship rights raised issues of comity that heightened tension between free and slaves states.²²³ Free black advocates and their allies also argued that citizenship was a source of individual rights.²²⁴ Their rights claims were similar to the claims made by fugitives from slavery.

Many free black people saw the popularity of the colonization movement in the 1840s and 1850s as a threat.²²⁵ Just as they feared being kidnapped into slavery, free black people also feared that they would be forced to colonize against their will²²⁶: "Free African Americans framed personal security as a key aspect of citizenship."²²⁷ They insisted that they belonged in the United States, and as citizens, were entitled to the protection of the government. In 1852, prominent African American abolitionist Martin Delany wrote a treatise in which he claimed that free black people were citizens of the United States by virtue of their birth on U.S. soil.²²⁸ Free black advocates relied on the concept of citizenship to fight colonization and disenfranchisement.²²⁹

Black people also used the history of black military service, especially their service in the Revolutionary War, to claim their rights as citizens.²³⁰ This history proved not only that free black people had lived in the country at its inception, but also that they were loyal citizens entitled to the rights of citizenship.²³¹ Eventually over 200,000 black soldiers, both born free and formerly enslaved, fought for the Union Army, proving their loyalty to the Union and exercising their

222 See BONNER, *supra* note 9, at 41; ZIETLOW, *supra* note 33, at 27–28.

223 See *supra* Section II.A.

224 See BONNER, *supra* note 9, at 2–3; JONES, *supra* note 17, at 11; MASUR, *supra* note 17, at xiii.

225 See BLACKETT, *supra* note 8, at 96–97; FONER, *supra* note 6, at 53 (explaining that "[m]ost black Americans . . . rejected" colonization and viewed it "with alarm").

226 See JONES, *supra* note 17, at 46–47. Roger Taney's brother, Octavius, argued that free black people in Maryland sowed seeds of slave unrest. *Id.* He proposed "radical colonization"—forced colonization of free black people who would be held "to service for a term of years" as a stopgap. *Id.* at 47.

227 BONNER, *supra* note 9, at 95.

228 See JONES, *supra* note 17, at 89 (citing MARTIN ROBISON DELANY, THE CONDITION, ELEVATION, EMIGRATION, AND DESTINY OF THE COLORED PEOPLE OF THE UNITED STATES (Philadelphia, Martin Robison Delany 1852)).

229 See BONNER, *supra* note 9, at 11.

230 See *id.* at 151; SINGLETON, *supra* note 24, at 1 (explaining that Singleton was born a slave "not so many years, you see, after the adoption of the Declaration of Independence and the winning of the Revolutionary War").

231 See BONNER, *supra* note 9, at 151.

rights as citizens.²³² As historian Christopher Bonner explains, “Joining the war effort would allow black people to make their strongest claims yet to rights as citizens.”²³³

Antislavery advocates also invoked citizenship to support their opposition to slavery and support for the rights of free black activists.²³⁴ According to antislavery constitutionalists, in return for the allegiance of its citizens, the government had a duty to protect them.²³⁵ Thus, security of the person is the most fundamental right of citizenship. Freedom seekers sought protection from the free states into which they escaped. Free black people in those states also sought protection. They saw slavecatchers entering their states as a “visceral threat.”²³⁶ However, states were providing inadequate protection for them, so many resorted to self-protection.²³⁷ They formed vigilance societies not only to protect fugitives from slavery who travelled through their communities, but also to protect themselves.²³⁸ Members of vigilance societies helped to liberate hundreds of freedom seekers by providing them shelter, aid, and legal assistance.²³⁹

Eventually these societies evolved into the Underground Railroad, a loosely connected network of white and black activists who aided freedom seekers that extended throughout the Northern states.²⁴⁰ They called freedom seekers “self-emancipated slaves” and some leaders of the movement openly bragged about providing protection for the fugitives.²⁴¹ As historian Nikki Taylor explains, “[h]arboring and forwarding fugitives was an empowering form of antislavery

232 See *id.* at 160.

233 *Id.* at 154.

234 See Zietlow, *supra* note 16, at 430–31.

235 See *id.* at 432.

236 See BONNER, *supra* note 9, at 103.

237 See, e.g., Editorial, *Look Out For Kidnappers*, VOICE OF THE FUGITIVE, Apr. 23, 1851, https://libraries.udmercy.edu/archives/special-collections/index.php?collectionCode=baa&record_id=946 [<https://perma.cc/APV2-EL6K>] (arguing that black people in Michigan, especially Detroit, need to be on the lookout for slavecatchers who might kidnap them). “[R]emember that you have no law to protect you, but the law of self-defense.” *Id.*

238 See FONER, *supra* note 6, at 64–65 (noting that most active participants in vigilance committees were black, as kidnapping threatened all black families).

239 See BONNER, *supra* note 9, at 118.

240 See BLACKETT, *supra* note 8, at 145; FONER, *supra* note 6, at 15 (arguing that the “underground railroad represents a moment in our history when black and white Americans worked together in a just cause”); TAYLOR, *supra* note 17, at 138 (“The Cincinnati Underground Railroad was characterized by communitywide networks and patterns of cooperative assistance to runaways.”); *id.* at 151 (explaining that white abolitionists, including Salmon Chase, James Birney, and Gamaliel Bailey, also harbored and forwarded fugitives).

241 See FONER, *supra* note 6, at 83 (noting that the New York Vigilance Committee regularly held meetings to report on aid to what it called “self-emancipated slaves”).

activism” and “a direct and immediate blow to the institution”—and it created networks of advocacy for their own rights as free citizens of color.²⁴²

Like freedom seekers, free African Americans faced severe restrictions on their right to travel, restrictions which intensified as tension grew over the plight of fugitives from slavery. In the early 1850s, the border state of Indiana enacted a new constitution which excluded free black people and prohibited them from entering into contracts.²⁴³ Slaveholders in Missouri enacted laws restricting the movements of free black people.²⁴⁴ In the State of Maryland, laws which restricted mobility and prohibited free black people from entering the state dated back to 1780.²⁴⁵ In the 1840s and 1850s the state tightened restrictions on free black people’s ability to travel.²⁴⁶ Free black people were required to obtain permits to travel which required the endorsement of “respectable white persons.”²⁴⁷ Activists argued that these restrictions violated their rights as free citizens. Some sought passports to travel abroad and prove their citizenship.²⁴⁸ Like the freedom seekers, they sought to secure their rights by “ordinary acts.”²⁴⁹ As legal historian Martha Jones explains, “the act of traveling could give rise to a right to travel.”²⁵⁰

Free black activists also sought other rights of citizenship, including the right to appear in court and enter into contracts.²⁵¹ Courthouses became important places for shaping and establishing rights.²⁵² Jones explains, in courthouses “Black petitioners looked more like rights-bearing people than the degraded subjects they were intended to be.”²⁵³ They argued that they were citizens, and thus entitled to basic civil rights.

In early 1866 black activists in the Pennsylvania State Equal Rights League sent a message to Congress demanding “legal change that would give texture to black freedom” after the Thirteenth Amendment.²⁵⁴ They wanted laws to ensure their right to travel and

242 TAYLOR, *supra* note 17, at 139.

243 See BLACKETT, *supra* note 8, at 102–04.

244 *Id.* at 151.

245 JONES, *supra* note 17, at 25.

246 *See id.* at 98–99.

247 *See id.*

248 See BONNER, *supra* note 9, at 81.

249 See JONES, *supra* note 17, at 101.

250 *Id.*

251 *See id.* at 111.

252 *See id.* at 70.

253 *Id.*

254 BONNER, *supra* note 9, at 168.

their right to vote.²⁵⁵ They argued that people who had just been freed from slavery were citizens with civil, political, *and* social rights.²⁵⁶ Other black activists did the same and made the same claims.²⁵⁷ Prior to the Civil War, “the national government largely ignored” the Privileges and Immunities Clause.²⁵⁸ However, after the Civil War the Reconstruction Congress established freed slaves as birthright citizens, recognized their fundamental human rights as citizens with the 1866 Civil Rights Act and the Fourteenth Amendment, and included the “privileges or immunities of citizens” in the rights protected by that Amendment.²⁵⁹ When Congress enacted measures creating birthright citizenship and citizenship rights, they made the same constitutional arguments that black activists had made²⁶⁰ and that freedom seekers had asserted with their actions.

2. Due Process Rights

When freedom seekers and free black people were kidnapped and accused of being fugitives from slavery, they argued that they were entitled to due process of law when defending themselves from that accusation.²⁶¹ Many battles over the status of fugitives from slavery centered around their lack of due process rights when they were accused of being fugitives. Even before 1850, Northern states had enacted their own laws establishing procedural rights for those accused of being fugitives from slavery.²⁶² Some of those state laws directly conflicted with the federal act. For example, the Pennsylvania Personal Liberty Act provided that babies born in the state to fugitive slaves are free and that any person attempting to remove a “negro or mulatto” from the state was guilty of kidnapping.²⁶³ A Vermont law claimed fugitive slaves as “citizen[s]” with a right to habeas corpus.²⁶⁴ In the case of *Prigg v. Pennsylvania*, the United States Supreme Court

255 *See id.*

256 *See id.*

257 *See id.* at 170.

258 Finkelman, *supra* note 112, at 616.

259 *See* U.S. CONST. amend. XIV, § 1; Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1983 (2018)).

260 BONNER, *supra* note 9, at 171–72.

261 *See, e.g.*, Schmitt, *supra* note 173, at 1325–27.

262 BLACKETT, *supra* note 8, at 36; *see, e.g.*, Act of Mar. 25, 1826, ch. 50, 1826 Pa. Laws 150.

263 *See* 1847 Penn. Laws 206–08, as reprinted in LASH, Vol. 1, *supra* note 1, at 234; McKanders, *supra* note 138, at 928.

264 BLACKETT, *supra* note 8, at 36–37 (noting that the Vermont law was widely condemned as extreme).

affirmed Congress's power to enact the 1793 Fugitive Slave Act, and struck down the Pennsylvania Personal Liberty Law.²⁶⁵

However, activists continued to protest the rendition of slaves without adequate procedural rights and to insist that those accused of being fugitives were entitled to those rights. Antislavery activists also argued that slavery itself denied enslaved people of their liberty without due process of law. "James Birney asked rhetorically, 'By what "due process of law" is it, that two millions of "persons" are deprived every year of the millions of dollars produced by their labor? By what ["due process of law"] is it that 56,000 "persons," the annual increase [of] the slave population, are annually deprived of their liberty?'"²⁶⁶ With the Fourteenth Amendment, the Reconstruction Congress established a constitutional right to due process of law for all persons who, like enslaved people, were deprived of their liberty.

3. The Right to Free Labor

Freedom seekers also claimed their right to free labor. Said Jourden H. Banks, "[t]he slaves, moreover, not only desire, but they look confidently for the day of their emancipation. Nor do they expect when free to spend their time in idleness. They all know they will have to work, but like other men they wish to have the benefit of the labour of their hands."²⁶⁷ Similarly, freedom seeker Peter Randolph explained that "[a]ll that [escaped slaves] need is—first, freedom—next, encouragement and a fair reward for their labor, and a suitable opportunity to improve themselves—without which, no people, black or white, can reasonably be expected to be industrious laborers or enlightened citizens."²⁶⁸

Antislavery activists often argued that slavery violated the fundamental the right to free labor.²⁶⁹ The Thirteenth Amendment established a right to free labor for all workers by abolishing slavery and involuntary servitude.²⁷⁰ The Reconstruction Congress enforced that right with, among other measures, the 1866 Civil Rights Act, which prohibited race discrimination in all contracts, including employment

265 See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

266 ZIETLOW, *supra* note 14, at 33 (quoting James G. Birney & Gamaliel Bailey, Jr., Editorial, *Abolitionism Reviewed*, PHILANTHROPIST (Cin.), Jan. 13, 1837, at 2 (alterations to match original)).

267 JOURDEN H. BANKS, A NARRATIVE OF EVENTS OF THE LIFE OF J.H. BANKS, AN ESCAPED SLAVE, FROM THE COTTON STATE, ALABAMA, IN AMERICA 90–91 (Liverpool, M. Rourke 1861).

268 See PETER RANDOLPH, SKETCHES OF SLAVE LIFE: OR, ILLUSTRATIONS OF THE "PECULIAR INSTITUTION" 3–4 (Boston, Peter Randolph 1855).

269 See Zietlow, *supra* note 16, at 871.

270 *Id.* at 877.

contracts,²⁷¹ and the 1867 Anti-Peonage Act, which outlaws all forms of involuntary servitude.²⁷² The transgressive constitutionalism of freedom seekers was essential to achieving this goal.

CONCLUSION

Recognizing the agency of freedom seekers, their contribution to the downfall of slavery and to fundamental constitutional change in our country, is important not only for symbolic reasons. It strengthens the claims of their descendants asserting the rights that were achieved as the result of their struggles. Enslaved people did not wait passively for the Great Emancipator to bestow freedom on them and give them rights. Freedom seekers played an active role in bringing down the institution of slavery and establishing the rights that their descendants, and other people of color, seek to assert today. Thus, recognizing the agency of freedom seekers bolsters the case for reparations for the harm that generations of slavery and racial discrimination wrought against them and their descendants. Perhaps most importantly, it undermines white supremacists' claims of racial superiority and commands respect for those who played an active role in fighting that supremacy even though they had almost no resources to do so. Finally, it is an essential step towards understanding how constitutional change occurs, not through top-down mandates, but through grassroots struggle and boots on the ground.

271 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1983 (2018)).

272 Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. § 1581 and 42 U.S.C. § 1994 (2018)).