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# JOHN BROWN'S CONSTITUTION

ROBERT L. TSAI\*

**Abstract:** It will surprise many Americans to learn that before John Brown and his men briefly captured Harpers Ferry, they authored and ratified a Provisional Constitution. This deliberative act built upon the achievements of the group to establish a Free Kansas, during which time Brown penned an analogue to the Declaration of Independence. These writings, coupled with Brown's trial tactics after his arrest, cast doubts on claims that the man was a lunatic or on a suicide mission. Instead, they suggest that John Brown aimed to be a radical statesman, one who turned to extreme tactics but nevertheless remained committed to basic notions of democratic self-rule. Rather than call Brown simply a terrorist or a common criminal, it is more accurate to understand him as a practitioner of "fringe constitutionalism," in which a patriot turns to unconventional, even violent tactics, on behalf of deep governing principles. Brown straddles traditional cultural and legal categories, taking advantage of such complexities in the name of constitutional transformation.

*In John Brown's house, and in John Brown's presence, men from widely different parts of the continent met and united into one company, wherein no hateful prejudice dared intrude its ugly self—no ghost of distinction found space to enter.<sup>1</sup>*

## INTRODUCTION

A year before John Brown embarked on his assault on Harpers Ferry that fateful October morning in 1859, he did a curious thing. Brown "called a quiet convention," which commenced the morning of May 8, 1858, in Chatham, Canada. At the spring gathering, forty-six men strong, a draft "constitution was brought forward and, after a sol-

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<sup>1</sup> OSBORNE P. ANDERSON, A VOICE FROM HARPERS FERRY 23–24 (Boston 1861).

em parole of honor, was read.”<sup>2</sup> The attendees, thirty-four blacks and twelve whites committed to the abolition of slavery, approved the vast majority of the articles after minor debate.<sup>3</sup> That evening, they elected the officers created by the newly adopted governing instrument. To no one’s surprise, the convention tapped Brown for commander-in-chief.<sup>4</sup> Members of the convention elected two black men—Alfred Ellsworth and Osborne P. Anderson—as congressmen.<sup>5</sup> Each man took his new title with him to Virginia as the group attempted to fulfill their constitutional ambitions.

The John Brown movement’s defeat at Harpers Ferry put an end to its capacity to claim to know the best interests of the people. Once authorities stormed the federal armory and captured John Brown, the Commonwealth of Virginia charged him with treason, insurrection, and murder.<sup>6</sup> From that point on, the document ratified by the Chatham Convention assumed a central role in Brown’s trial. Each participant to the criminal proceedings had occasion to interpret the constitution.<sup>7</sup> The Commonwealth introduced the written instrument into evidence, arguing that the “Provisional Government was a real thing, and no debating society.”<sup>8</sup> Prosecutors repeatedly pointed to the document as proof of a plan to subvert Virginia’s existing form of government, and therefore of Brown’s disloyalty.<sup>9</sup>

Brown’s lawyers, too, wished to lean heavily on the Provisional Constitution to mount a vigorous defense by arguing that their client

<sup>2</sup> W.E.B. DU BOIS, JOHN BROWN 154 (David Roediger ed., Modern Library 2001) (1909).

<sup>3</sup> Hannah Geffert, *They Heard His Call: The Local Black Community’s Involvement in the Raid on Harpers Ferry*, in TERRIBLE SWIFT SWORD: THE LEGACY OF JOHN BROWN 23, 27 (Peggy A. Russo & Paul Finkelman eds., 2005).

<sup>4</sup> PROVISIONAL CONST. AND ORDINANCES FOR THE PEOPLE OF THE UNITED STATES, arts. IV, XXX, reprinted in THE LIFE, TRIAL AND EXECUTION OF CAPTAIN JOHN BROWN 51–52 (Robert M. De Witt ed., New York, Robert M. De Witt 1859) [hereinafter PROVISIONAL CONST.] (creating two separate offices of president and commander-in-chief, the former elected and the second appointed); see *infra* app A. Some, including Frederick Douglass, report that Brown held both offices. See, e.g., STEPHEN B. OATES, TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN 246 (2d ed. 1984). The minutes of the Chatham Convention show that on May 10, 1858, Thomas M. Kinnard was nominated for President, but declined the nomination. ANDERSON, *supra* note 1, at 12. J.W. Loguen’s name was then advanced, but “[t]he nomination was afterwards withdrawn, Mr. Loguen not being present, and it being announced that he would not serve if elected.” *Id.*

<sup>5</sup> OATES, *supra* note 4, at 246.

<sup>6</sup> THE LIFE, TRIAL AND EXECUTION OF CAPTAIN JOHN BROWN, *supra* note 4, at 59.

<sup>7</sup> See, e.g., *id.* at 72.

<sup>8</sup> *Id.* at 92.

<sup>9</sup> See *id.*

was insane at the time of his alleged offenses. Brown refused,<sup>10</sup> leaving his attorneys to argue that the “pamphlet” taken from his body was proof only of a “harmless organization,” “a mere imaginary Government to govern themselves, and nobody else.”<sup>11</sup> In other words, while admitting Brown had undertaken some mobilization project, they played down its real world significance. This defense no doubt sounded feeble and difficult for jurors to credit, given Brown’s notoriety and the reports of violence at Harpers Ferry.

Thus, in a fascinating turn of events, both parties to the criminal action debated the scope and political significance of John Brown’s exercise in constitution writing. There may have been legal questions of culpability and punishment involved, but the very fate of the movement was on trial: its goals, methods, and legacy. Was the political community described therein real or purely fictive? And if the constitution was more than fantasy, did it constitute proof of a desire, as prosecutors argued, “to take possession of the Commonwealth and make it another Hayti[?]”<sup>12</sup> Brown’s lawyers appeared to concede that the instrument represented some effort at self-organization, even if the charter lacked a number of features one might expect.<sup>13</sup> This document and the events surrounding its writing, ratification, and portrayal at trial, remain surprisingly unexplored for its significance in light of democratic norms. If anything, the dominant scholarly assumption is that John Brown acted outside of the law, and that in doing so, he gave up any claim to participate as a democratic citizen. Thus, the literature depicts him as a terrorist or folk hero,<sup>14</sup> martyr or madman—but rarely as a would-be statesman or founder.<sup>15</sup>

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<sup>10</sup> *Id.* at 65 (noting that Brown said “I am perfectly unconscious of insanity, and I reject, so far as I am capable, any attempt to interfere in my behalf on that score”) (internal quotation omitted).

<sup>11</sup> *Id.* at 86, 90. One of Brown’s lawyers, Mr. Chilton, could not help himself from asserting that the document amounted to “ridiculous nonsense—a wild, chimerical production. It could only be produced by men of unsound minds.” *Id.* at 90. Even so, he argued that the document lacked the power to levy taxes, an essential element of any charter of government. *Id.* Brown’s defense strategies thus consisted of describing the Provisional Constitution as an internal policy document, or arguing that the group’s state-building aspirations were flawed or incomplete, or denying that any state-building motives were directed at the federal government, but not the state government.

<sup>12</sup> THE LIFE, TRIAL AND EXECUTION OF CAPTAIN JOHN BROWN, *supra* note 4, at 93.

<sup>13</sup> *See, e.g., id.* at 86–87, 90.

<sup>14</sup> Brown has been variously described as an “insurrectionist,” “insurgent,” and “hero.” *See id.* at 7, 30, 31; *see also* OATES, *supra* note 4, at vii–x (describing the polar views surrounding Brown). One author has described him as the “father of American terrorism.” Ken Chowder, *The Father of American Terrorism*, AMERICAN HERITAGE, Feb.–Mar. 2000, at 81, 81. Those who wished to strip John Brown’s escapade of any higher purpose painted him

This Essay challenges such presentations of the man, his tactics, and objectives by putting his act of constitution writing front and center. Its purpose is to parse Brown's legal and political ideas, to see if they can be squared with the American constitutional tradition. Once this is done, it will become apparent that the actions of the historical John Brown comprise an instance of "fringe constitutionalism."

Practitioners of fringe constitutionalism advocate or employ extra-legal tactics in the pursuit of socially transformative goals.<sup>16</sup> How the processes of law and politics treat such individuals presents challenging issues of democratic citizenship. A fringe constitutionalist's morally questionable or flatly illegal strategies provoke a society's desire to exclude such individuals in the name of self-preservation, to brand them as threats to the rule of law. Members of a governing regime seek to punish these persons, strip them of the aura of citizenship, and cast them as pretenders.

At the same time, what gives fringe constitutionalists a potential claim to democratic legitimacy is a steadfast refusal to renounce their membership in the polity. Through word and deed, such an individual chooses to converse with fellow citizens in democratic idioms, rail against the missteps or corruption of caretakers of communal ideals, and urge others onward toward democratic perfection.<sup>17</sup> The fringe constitutionalist behaves like a rule breaker, but speaks like a law follower. In exploiting the categories of action and justification, the individual invites others to view extreme tactics as proof of patriotism. By initiating the overthrow of one corrupting way of life, the radical hopes to create a more lasting democratic existence. For the vision to be a

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as a common criminal who invaded Virginia "to murder the white men, women and children." MERRILL D. PETERSON, *JOHN BROWN: THE LEGEND REVISITED* 83 (2002) (quoting R.G. HORTON, *A YOUTH'S HISTORY OF THE GREAT CIVIL WAR IN THE UNITED STATES, FROM 1861 TO 1865*, at 61 (New York, Van Evrie, Horton & Co. 1867)); *see also* JOHN ALLEN WYETH, *WITH SABRE AND SCALPEL: THE AUTOBIOGRAPHY OF A SOLDIER AND SURGEON* 94, 124 (1914) (contending that Brown, a personal and professional failure, turned to murder and treason for selfish reasons).

<sup>15</sup> Consider the reaction of Salmon P. Chase, then the Governor of Ohio: "Poor old man! How sadly misled by his own imaginations! How rash—how mad—how criminal then to stir up insurrection which if successful would deluge the land with blood & make void the fairest hopes of mankind!" Letter from Salmon P. Chase to Joseph H. Barrett (Oct. 29, 1859) in *A JOHN BROWN READER* 249 (Louis Ruchames ed., 1959).

<sup>16</sup> *See generally* Susan P. Koniak, *When Law Risks Madness*, 8 *CARDOZO STUD. L. & LITERATURE* 65 (1996) (discussing how the Common Law Movement is a contemporary instance of fringe constitutionalism).

<sup>17</sup> At the Chatham Convention, Brown reportedly unveiled his plan for military action because he wished to "enforce[] the doctrine of destroying the tree that bringeth [*sic*] forth corrupt fruit." ANDERSON, *supra* note 1, at 10.

plausible one, construction must accompany destruction. But the very turn toward illegality or violence is fraught with risk for this political actor's project, lest widespread disgust for extreme tactics drowns out legitimate grievances or empowers existing authorities to stifle opportunities for regime change.

Our initial task is to review John Brown's Provisional Constitution and situate it among John Brown's actions and philosophies, the Harpers Ferry escapade, and his trial.<sup>18</sup> Once historical preliminaries are reached, it then becomes possible to make some observations about the relationship between violence and law,<sup>19</sup> as well as among the different strains of constitutionalism.<sup>20</sup>

### I. A PROVISIONAL CONSTITUTION

An examination of the document titled "Provisional Constitution and Ordinances for the People of the United States" ("Provisional Constitution") refutes any suggestion that it is the work of a madman.<sup>21</sup> The writing is crisp and the words carefully chosen. In many instances the language is more direct than the U.S. Constitution. The preamble laments the nation's addiction to slave labor, which has commenced "a most barbarous, unprovoked, and unjustifiable war of one portion of its citizens upon another portion."<sup>22</sup> Such a sustained act of aggression violated "eternal and self-evident truths set forth in our Declaration of Independence," and justified a repudiation of the existing legal regime and the establishment of another, more perfect, order.<sup>23</sup>

Accordingly:

We, citizens of the United States, and the Oppressed People, who, by a recent decision of the Supreme Court are declared to have no rights which the White Man is bound to respect; together with all other people degraded by the laws thereof, Do, for the time being ordain and establish ourselves, the following PROVISIONAL CONSTITUTION and ORDINANCES, the better to protect our Persons, Property, Lives, and Liberties . . . .<sup>24</sup>

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<sup>18</sup> See *infra* notes 21–73 and accompanying text.

<sup>19</sup> See *infra* notes 74–122 and accompanying text.

<sup>20</sup> See *infra* notes 123–170 and accompanying text.

<sup>21</sup> See PROVISIONAL CONST.; RICHARD J. HINTON, JOHN BROWN AND HIS MEN app. at 619–33 (Arno Press & The N.Y. Times 1968) (1894).

<sup>22</sup> PROVISIONAL CONST. pmbl.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

In their generous usage of the inclusive “we” and the promiscuous co-optation of the rhetoric of American liberation, the drafters announce themselves as a new coalition of insiders and outsiders committed to the public good. Throughout the document, reportedly drawn up in the house of Frederick Douglass,<sup>25</sup> the group’s Christian utopian rhetoric is disciplined by the language of civic republicanism.

It is not a work of fantasy, but rather a sober governing document that tries to manage the problems of an as-yet unrealized, but worldly future and the imperatives of here and now. Despite repeated references to the currently constituted “organization,” many of the provisions express principles of governance that not only guided the group’s efforts to construct a new society, but also would bind the community as a whole should the John Brown movement succeed.<sup>26</sup> Members of the “organization” wished to be seen as a temporary representation of “the people,” who simultaneously authorize a break in historical time and will reconstitute the political community.

Given Brown’s religious upbringing and the role religious beliefs played in shaping his attitude towards slavery,<sup>27</sup> what is surprising is the extent to which constitutional language serves as the primary medium for communicating with fellow citizens. In this respect, the group’s commitment to the idea of a single, national people sets it apart from utopian societies that had no use for a national identity, rule of law values, or democratic institutions. Rather than retreat to a set of parochial norms in the face of manifest injustice, Brown’s company hoped to recreate the nation’s founding experience.

A society remade through this text would express itself as radically egalitarian, neither separated by race, previous or current condition of servitude, or sex:

All persons of mature age, whether Proscribed, oppressed, and enslaved Citizens, or of the Proscribed and oppressed races of the United States, who shall agree to sustain and enforce the Provisional Constitution and Ordinance of this organization,

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<sup>25</sup> *E.g.*, Hannah Geffert, *They Heard His Call*, in *TERRIBLE SWIFT SWORD*, *supra* note 3, at 27.

<sup>26</sup> *See, e.g.*, PROVISIONAL CONST. arts. XXVIII (property), XL (irregularities).

<sup>27</sup> *See, e.g.*, MARK S. WEINER, *BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE* 161–75 (2004) (describing Brown’s religious upbringing and its influences on his anti-slavery theology). Examining Brown’s writings, Weiner argues that the radical abolitionist adhered to a coherent jurisprudence with three main elements: a theory of religious legitimacy, a theory of civic emasculation, and an account of legal deliverance as redress. *Id.* at 165–69.

together with all minor children of such persons, shall be held to be fully entitled to protection under the same.<sup>28</sup>

The only distinction hinted at is between “mature” persons and “minor children.” Their goal was not “expatriation,” as David Reynolds points out, but rather “integration.”<sup>29</sup> Hence, the community’s aspirations set it apart from those espousing white supremacy, on the one hand, and those advocating early strains of black separatism, on the other.

Beyond the predominant ethic of equality, the chief organizing trait is the priority of work—honest labor, shared by all, for the good of all.<sup>30</sup> In exchange for the protections afforded by the state, each person is obligated by the basic law to “labor in some way for the general good” or risk sanction.<sup>31</sup> Brown himself stated that “all great reforms, like the Christian religion, were based on broad, generous, self-sacrificing principles.”<sup>32</sup> The centrality of labor relations to the Provisional Constitution reflected more than Christian virtue—it also epitomized a rising concern about labor in organized society. Accordingly, his band of anti-slavery activists and fighters were “organized on a less selfish basis” than prevailing forms of civic life.<sup>33</sup>

Here and there optimistic, somewhat fanciful, elements can be found. Article III falls into this category: It provides that Congress shall consist of at least five but no more than ten members.<sup>34</sup> It is little more than an effort to recapture a limited government more suitable to a pastoral society. This idiosyncratic feature aside, post-slavery America would continue to be governed according to a tripartite government by officers whose titles and responsibilities would be recognizable to the common man.<sup>35</sup>

A number of other wrinkles stand out. Brown and his followers believed in strict term limits for non-judicial officers. The President and Vice-President are limited to single three-year terms of office, and are to be selected not by an Electoral College, but through election by “the citizens or members of this organization.”<sup>36</sup> The Senate would be abol-

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<sup>28</sup> PROVISIONAL CONST. art. I.

<sup>29</sup> DAVID S. REYNOLDS, JOHN BROWN, ABOLITIONIST 114 (2005).

<sup>30</sup> PROVISIONAL CONST. art. XXXIX.

<sup>31</sup> *Id.* By all accounts, Brown was raised with Puritan values and conducted himself in ways that prompted the descriptions “austere,” “stern,” and “unyielding.” See, e.g., DU BOIS, *supra* note 2, at 14–18.

<sup>32</sup> DU BOIS, *supra* note 2, at 99 (internal quotation omitted).

<sup>33</sup> *Id.* (internal quotation omitted).

<sup>34</sup> PROVISIONAL CONST. art. III.

<sup>35</sup> *Id.* arts. II, III, IV.

<sup>36</sup> *Id.* art. IV.



ished in favor of a single “Congress or House of Representatives.”<sup>37</sup> These departures from the Constitution of 1787 reflect suspicions among abolitionists, which Brown shared, that certain aristocratic features of the Constitution had allowed slavery to flourish and aided the forces of racial domination, even though the Framers’ original document never explicitly enshrined the institution.<sup>38</sup>

Even more intriguing, the members of the five-member Supreme Court (five in total, including a Chief Justice) would be elected by the citizenry rather than appointed, and there is no explicit provision providing for life tenure based on good behavior.<sup>39</sup> A separate provision authorizes: “Any member of the Supreme Court [may also be impeached,] tried, convicted, or punished by removal or otherwise . . . .”<sup>40</sup> It appeared to be an open question how long judges may serve and on what conditions they might be removed.

As for the Judiciary’s sphere of authority, the cumbersome language of Article III of the U.S. Constitution is bypassed in favor of a single statement conferring general jurisdiction except in cases involv-

<sup>37</sup> *Id.* art. III. Article III provides that:

The legislative branch shall be a Congress or House of Representatives, composed of not less than five, nor more than ten members, who shall be elected by all citizens of mature age and of sound mind, connected with this organization; and who shall remain in office for three years, unless sooner removed for misconduct, inability, or by death. A majority of such members shall constitute a quorum.

*Id.*

<sup>38</sup> See, e.g., REYNOLDS, *supra* note 29, at 96, 251.

<sup>39</sup> PROVISIONAL CONST. art. V (spelling out the office of the “Chief Justice” and specifying the number of Justices arguably make such provisions difficult to abolish or amend).

<sup>40</sup> Compare *id.* art. XV, with *id.* art. XIV. Article XV provides that:

Any member of the Supreme Court tried, convicted, or punished by removal or otherwise, on complaint to the President, who shall, in such case, preside; the Vice-President, House of Representatives, and other members of the Supreme Court, constituting the proper tribunal (with power to fill vacancies); on complaint of a majority of said House of Representatives, or of the Supreme Court; a majority of the whole having power to decide.

*Id.* art. XV. Article XIV provides that:

The members of the House of Representatives may any and all of them be tried, and on conviction, removed or punished, on complaint before the Chief Justice of the Supreme Court, made by any number of the members of said House, exceeding one-third, which House, with the Vice-President and Associate Judges of the Supreme Court, shall constitute the proper tribunal, with power to fill such vacancies.

*Id.* art. XIV.

ing “the Rules of War.”<sup>41</sup> Once the convention anchored all national officers in direct election, concerns of judicial overreaching waned; hence, no effort to create courts of limited jurisdiction. Brown’s response to the *Dred Scott* decision, then, was more nuanced and institutionally conservative than one might expect. Instead of abolishing the judiciary, turning its power over to another institution, or severely curtailing its jurisdiction, the John Brown movement remained committed to judicial review so long as judges remained subject to removal through impeachment.

As it turns out, the Provisional Constitution is aspirational but also concrete. Religion and family life would be given places of honor.<sup>42</sup> The repeated mention of marriage, family, and religion stands in stark contrast to the U.S. Constitution, which makes no general commitment to marriage or family (these being judge-read rights) and makes highly specific mentions of religion (both a negative command forbidding the establishment of religion as well as an affirmative protection of religious exercise).<sup>43</sup> According to John Brown’s Provisional Constitution, marriage would have to be “respected,” and the hours of the Sabbath spent on religious instruction, the education of the less fortunate, or some other form of personal improvement.<sup>44</sup>

These features are reminiscent of Haiti’s 1801 and 1805 Constitutions. The former, authored by the slave leader Touissant L’Ouverture, established a free society based on Catholicism<sup>45</sup> and marriage, a “civil and religious institution . . . distinguished and specially protected by the government.”<sup>46</sup> The version approved four years later affirmed “freedom of worship” and renounced a “predominant religion” within the nation, while asserting that a “Haitian” must be “a good father, good son, a good husband, and especially a good soldier.”<sup>47</sup> John Brown, reportedly impressed with L’Ouverture’s successful slave revolt, may well have been influenced by Haiti’s constitution-writing experience.<sup>48</sup>

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<sup>41</sup> *Id.* art. V.

<sup>42</sup> *See id.* art. XLII.

<sup>43</sup> *See* U.S. CONST. amend. I.

<sup>44</sup> PROVISIONAL CONST. art. XLII.

<sup>45</sup> CONSTITUTION D’HAÏTI tit. III, art. 6 (1801).

<sup>46</sup> *Id.* tit. IV, art. 9. Article 10 declared: “Divorce will not take place in the colony.” *Id.* tit. IV, art. 10. *See generally* C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L’OUVERTURE AND THE SAN DOMINGO REVOLUTION* (2d ed. rev. 1989) (describing the Haitian slave revolt).

<sup>47</sup> CONSTITUTION D’HAÏTI arts. 9, 50–51 (1805).

<sup>48</sup> REYNOLDS, *supra* note 29, at 107–08.

The Provisional Constitution uses the term “rights” exactly twice in passing and does not separately enumerate them.<sup>49</sup> Instead, it freely employs the word “duty.”<sup>50</sup> A number of “protections” afforded by the instrument will seem enlightened, even to the modern mind. The humane treatment of prisoners is expressly required by the Provisional Constitution.<sup>51</sup> Indeed, Article XXXII is surprisingly progressive in how far beyond contemporary protections it goes:

No person, after having surrendered himself or herself a prisoner . . . shall afterward be put to death, or be subject to any corporeal punishment, without first having had the benefit of a fair and impartial trial; nor shall any prisoner be treated with any kind of cruelty, disrespect, insult, or needless severity; but it shall be the duty of all persons, male and female, connected herewith, at all times and under all circumstances, to treat all such prisoners with every degree of respect and kindness that the nature of the circumstances will admit of; and to insist on a like course of conduct from all others, as in the fear of Almighty God, to whose care and keeping we commit our cause.<sup>52</sup>

The document protects female prisoners against “forcible violation” by mandating the death penalty for the offense. Otherwise, it authorizes capital punishment for only a handful of crimes.<sup>53</sup> In comparison, the Eighth Amendment of the Constitution bars only “cruel and unusual punishment,” presumably permitting some forms of state violence that might insult, annoy, or even inflict some measure of pain.<sup>54</sup>

A spirit of conservation animates the Provisional Constitution, no doubt influenced by the scarcity of food, munitions, and supplies faced by the organization, as well as by its members’ attitudes towards the environment: “[N]eedless waste or destruction of any useful property . . . shall not be tolerated at any time or place . . . .”<sup>55</sup> The document fur-

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<sup>49</sup> The word “right” appears in the preamble’s description of the *Dred Scott* decision and in Article XXVII in describing the “right” of civil officers and others to the general protection of the military. PROVISIONAL CONST. pmbl., art. XXVII.

<sup>50</sup> *E.g.*, *id.* arts. XII, XVII, XXXVII.

<sup>51</sup> *Id.* art. XXXII.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* art. XLI. The only death-eligible crimes are: desertion or treason, taking up arms against the community after “having been set at liberty on parole of honor,” and rape of a female prisoner. *Id.* arts. XXXVII, XXXVIII, XLI.

<sup>54</sup> *See* U.S. CONST. amend. VIII.

<sup>55</sup> PROVISIONAL CONST. art. XXXV.

ther bans the “needless” killing of animals.<sup>56</sup> Although they could hardly be called environmentalists in any modern sense, members of the movement found it worthwhile to convert private notions of frugality into public values.

The instrument eschews a general commitment to freedom of speech, much less an absolutist one. Instead, “[p]rofan swearing, filthy conversation, indecent behavior, or indecent exposure of the person, or . . . quarreling” are all prohibited.<sup>57</sup> Laying Article XL side by side with the First Amendment of the U.S. Constitution reveals the socially conservative strain of the group’s precepts, as well as its general sense that liberties need not be spelled out to be honored.<sup>58</sup>

Despite the preamble’s mention of “liberties,” the document’s primary focus is the articulation of obligations citizens owe to one another rather than individual rights, underscoring its republican character.<sup>59</sup> This approach is also true of the Provisional Constitution’s protection of gun use, which characterizes it less as an entitlement than as a suggestion that citizens be “encouraged to carry arms openly.”<sup>60</sup> In one respect, the Provisional Constitution’s protection of guns is facially broader than the Second Amendment to the U.S. Constitution and a number of state constitutions, as it is not tied to the existence of a “militia” nor is it limited to “self defense.”<sup>61</sup> In other respects, the right to own or use a gun is subject to certain conditions: “good character, and . . . sound mind and suitable age,”<sup>62</sup> with concealed weapons further limited to certain constitutional office-holders.<sup>63</sup> Even a radical defender of gun possession such as John Brown envisioned that the privilege would not be unlimited.

The general tenor of the instrument, as well as the word choices throughout, indicate that it would be updated at some later date, though no procedure for amendment is provided.<sup>64</sup> The Chatham attendees were so confident of the ideas of popular sovereignty upon

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* art. XL (providing that “[p]rofan swearing, filthy conversation, indecent behavior, or indecent exposure of the person, or intoxication or quarreling, shall not be allowed or tolerated; neither unlawful intercourse of the sexes”).

<sup>58</sup> Compare *id.* art. XL, with U.S. CONST. amend I.

<sup>59</sup> See, e.g., PROVISIONAL CONST. arts. XXVIII, XXXIX, XLII.

<sup>60</sup> *Id.* art. XLIII.

<sup>61</sup> See, e.g., U.S. CONST. amend. II; *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008) (reading the Second Amendment to articulate an individual, rather than a group right, to possess a gun).

<sup>62</sup> PROVISIONAL CONST. art. XLIII.

<sup>63</sup> *Id.* art. XLIV.

<sup>64</sup> *Cf.* U.S. CONST. art. V (outlining the procedure for amending the Constitution).

which they drew that not even the people's ultimate power of revision is explicitly reserved in the document. The charter's "Provisional" status, concern for the "confiscation" of property, the respectful treatment of "neutrals" and tough treatment of "deserters," the proper procedure for court martial, and the status of individuals who take up arms against the anti-slavery cause after being granted "parole of honor" all reflect the group's sense that they found themselves in a state of "war" against slavery.<sup>65</sup> Members of the convention could imagine a new world without human subjugation, but it existed then only in embryonic form.

The Provisional Constitution had precursors, just as the U.S. Constitution was preceded by a Declaration of Independence and the Articles of Confederation.<sup>66</sup> In the summer of 1856, thirty-five men gathered with Brown in the forests of Kansas and adopted a covenant, pledging themselves and their "sacred honor" to "the maintenance of the rights and liberties of the Free State citizens of Kansas."<sup>67</sup> Bylaws were added, providing for the election of officers, the handling and disposal of booty, trial by jury, and barring profane, uncivil, drunken, or disorderly conduct, as well as theft and waste.<sup>68</sup> Majority rule determined who would become an officer as well as who would sit on a jury of twelve to adjudicate alleged offenses.<sup>69</sup> As evidence of an effort to establish a more lasting community, parties to the covenant bound themselves by requiring a supermajority (two-thirds) to amend or alter any of the articles.<sup>70</sup>

The covenant proved to be a simple governing text, enforced at campfires and in relations between the self-described freedom fighters. Yet it amounted to an early instance of self-governance through writing, and one that inspired the Chatham Convention two years later. On or about this time, Brown also composed a document titled, "A Declaration of Liberty by the Representatives of the Slave Population of the

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<sup>65</sup> See, e.g., PROVISIONAL CONST. arts. XXVIII, XXXIV, XXXVIII.

<sup>66</sup> See generally ARTICLES OF CONFEDERATION of 1781; THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>67</sup> John Brown's Covenant for the Enlistment of His Volunteer-Regular Company (Aug. 1856), reprinted in OSWALD GARRISON VILLARD, JOHN BROWN, 1800-1859: A BIOGRAPHY FIFTY YEARS AFTER app. B, at 661-64 (Peter Smith 1966) (1910) [hereinafter John Brown's Covenant]; see *infra* app. B.

<sup>68</sup> See John Brown's Covenant.

<sup>69</sup> *Id.* at 662-63.

<sup>70</sup> *Id.* at 664.

United States of America,” laying out the legal authority for breaking from the Constitution of 1787.<sup>71</sup>

It should come as little surprise, then, that John Brown refused to allow his lawyers to point to the Provisional Constitution as evidence of insanity. In the cool reflection that jail presented, Brown rejected the opportunity afforded by the law to participate in the public discrediting of his inchoate political enterprise. To claim insanity—and to discredit the document in the process—would by his own hand render the Provisional Constitution the scribbblings of a single man rather than the considered judgment of many virtuous citizens gathering out-of-doors.<sup>72</sup> It would turn the ideals expressed therein into incoherent, mad babbling instead of a principled exercise of public reason.<sup>73</sup> Opting for that trial strategy would destroy any political significance the document could have for Brown's state-building aspirations. This tactical choice, then, is pregnant with communicative significance, and more than that—*constitutional* significance.

## II. THE RELATIONSHIP BETWEEN FORCE AND CONSTITUTIONALISM

Ultimately, one cannot escape John Brown's willingness to employ violence, and the relationship between force and constitutionalism. Two matters must be untangled from each other. The first question concerns the intentions of the historical John Brown, which calls for sifting through credible accounts of his plans. The second is a theoretical inquiry, one that requires an examination of the sacred and secular traditions invoked by this historical figure.

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<sup>71</sup> A DECLARATION OF LIBERTY BY THE REPRESENTATIVES OF THE SLAVE POPULATION OF THE UNITED STATES OF AMERICA, *reprinted in* HINTON, *supra* note 21, app. at 637–43 [hereinafter DECLARATION OF LIBERTY]; *see infra* app. C; *see also infra* notes 107–109 and accompanying text.

<sup>72</sup> *See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 319–28 (W.W. Norton & Co. 1972) (1969) (defining “out-of-doors” as deliberations transpiring outside of the legal representative institutions and illustrating this term with examples from the American Revolutionary era).

<sup>73</sup> The importance of this portrayal of the gathering at Chatham and the subsequent raid was not lost on Brown's supporters. Consider this description of the men solemnly gathered to ratify the Provisional Constitution:

So many intellectual looking men are seldom seen in one party, and at the same time, such utter disregard of prevailing custom, or style, in dress and other little conventionalities. Hour after hour they would sit in council, thoughtful, ready; some of them eloquent, all fearless, patient of the fatigues of business; anon, here and there over the “track,” and again in the assembly . . . .”

ANDERSON, *supra* note 1, at 14.

As to the first matter, despite Brown's war rhetoric and his repeated statements that it was no longer time for talk but for action, he nevertheless tried to temper the use of force.<sup>74</sup> This calibrated resort to violence served a dialogic function. Brown repeatedly cited "The Golden Rule," a principle of temperance against his enemies he derived from Jesus's example.<sup>75</sup> He apparently urged his men repeatedly not to fire unless fired upon,<sup>76</sup> and demanded that prisoners be treated well.<sup>77</sup> During his interrogation and even at trial, Brown consistently stated his design "to free the slaves, and only that."<sup>78</sup> His legal position accords with Article XLVI of the Provisional Constitution, titled, "These articles not for the overthrow of government":

The foregoing articles shall not be construed so as in any way to encourage the overthrow of any State government, or of the general government of the United States, and look to no dissolution of the Union, but simply to amendment and repeal. And our flag shall be the same that our fathers fought under in the Revolution.<sup>79</sup>

It is a surprising disclaimer, one that might strike some observers as little more than a premeditated gambit to avoid criminal liability should the assault on Harpers Ferry end in failure but not death. It was apparently the only provision that generated significant debate at Chatham, with Brown speaking out strongly in favor of its adoption.<sup>80</sup> Some mem-

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<sup>74</sup> See, e.g., REYNOLDS, *supra* note 29, at 104, 150–51.

<sup>75</sup> Brown's Interview with Mason, Vallandigham, and Others, in A JOHN BROWN READER, *supra* note 15, at 119–20.

<sup>76</sup> Brown's charge to the group before it set off for Harpers Ferry included this one:

And now, gentlemen, let me impress this one thing upon your minds. You all know how dear life is to you, and how dear your life is to your friends. And in remembering that, consider that the lives of others are as dear to them as yours are to you. Do not, therefore, take the life of any one, if you can possibly avoid it; but if it is necessary to take life in order to save your own, then make sure work of it.

ANDERSON, *supra* note 1, at 28–29 (internal quotation omitted). It is hard to believe that Anderson could remember Brown's message verbatim, but is possible that he gets the gist of it correct, especially given other corroborating evidence that Brown advocated a principle of moderation in the group's use of force.

<sup>77</sup> See THE LIFE, TRIAL AND EXECUTION OF CAPTAIN JOHN BROWN, *supra* note 4, at 37.

<sup>78</sup> Brown's Interview with Mason, Vallandigham, and Others, *supra* note 75, at 119. Vallandigham asked: "Did you expect a general rising of the slaves in case of your success?" Brown answered: "No, sir; nor did I wish it. I expected to gather them up from time to time and set them free." *Id.* at 123.

<sup>79</sup> PROVISIONAL CONST. art. XLVI.

<sup>80</sup> REYNOLDS, *supra* note 29, at 263–64.

bers of the organization surely hoped for revolt or the outbreak of war, and may have been far more disillusioned than others regarding the nation's ideals. By insisting upon the provision, their new commander-in-chief demanded a group commitment to work within the American tradition of creative "amendment and repeal" rather than to levy a general war against the United States or pro-slavery states.<sup>81</sup>

If the revolutionary's interest lay in commencing a general war or leading a conventional insurrection, then this type of forbearance would be patently unnecessary. Indeed, for the prototypical terrorist, going to violent extremes is important to reveal the alleged powerlessness and depravity of a regime. By contrast, Brown's preoccupation with limiting violence to morally justifiable targets seemed calculated to not only influence public debate, but also to preserve his residual capacity to speak as a member of the political community. No doubt certain opponents and defenders would recoil at the violence and try to deny him that opportunity. Brown's gamble was that by adhering to some principle of moderation, the movement's tactics would be overlooked, their commitment demonstrated for all to see, and the constitutionality of slavery placed at the center of public debate.

A modern example may be instructive. In *The Revolt*, Menachem Begin claims that a member of the Irgun telephoned the King David Hotel before the bomb went off on July 22, 1946, so that employees of the hotel could evacuate civilians.<sup>82</sup> Whether or not the call was made, what appears unassailable is that, judging from the reactions, anyone with pretensions to participate in self-government must abide by a principle of moderation, lest he lose forever the moral high ground. Indiscriminate killing of innocents violates this principle. The Irgun's

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<sup>81</sup> By contrast, Mark Weiner acknowledges that the Provisional Constitution "mak[es] plain [John Brown's] desire to redeem the nation rather than destroy it," but believes Harpers Ferry to be the beginning of a "military campaign that would sweep the South, destroying slavery at the end of the sword." WEINER, *supra* note 27, at 173. On this interpretation, the Blue Ridge Mountains consist of little more than a temporary locale from which to launch further incursions into the South.

<sup>82</sup> MENACHEM BEGIN, *THE REVOLT* 219 (Nash Publ'g 1972) (1948). The Irgun Zvai Leumi was a militant group that used acts of violence targeted at the British in order to gain Israeli independence. WALTER ENDERS & TODD SANDLER, *THE POLITICAL ECONOMY OF TERRORISM* 16 (2006). Menachem Begin was the leader of the Irgun and later served as Israel's prime minister. BEGIN, *supra*, at viii. Begin devotes an entire chapter of his autobiography to explaining how those who planned the attack on the King David Hotel sought to minimize casualties. *See id.* at 212–30. He says that a member of the Irgun called the hotel, local newspapers, and the French Consulate to evacuate the building. *Id.* at 219. They allegedly used a 30-minute timer to allow evacuation to occur before detonation and marked the homemade bomb with signs. *Id.*



advance warning (or Begin's later effort to scrub the historical record) suggests that political violence must be not only morally justified in some way, but also bounded in scope, if its perpetrators hope to be treated one day as liberators rather than common criminals.

The point of this discussion is not whether violence could be effective in turning the tide against slavery, but whether Brown and his compatriots believed that self-restraint could make a difference in how law-abiding Americans understood their actions. Framed this way, both the group's resort to violence and the corresponding desire to tailor its use of force were calculated to ensure its message of constitutional change remained intelligible. The members hoped that their acts of slave-stealing would be perceived as legally justified moments of liberation, pricking the collective conscience of the citizenry.<sup>83</sup> Fellow Americans could reject that vision, and many did, but the strategy was to promote, rather than destroy, the possibility of constitutional deliberation. What Brown himself described as "a discriminating blow at Slavery" would clarify the moral and legal stakes and escalate the pressure on citizens to choose sides.<sup>84</sup>

It is striking that Brown did not turn his back on dialogue. Rather, over time, he became convinced that stronger action was needed to stir average Americans to do away with slavery. In a letter to his brother, Frederick, dated November 21, 1834, Brown conveyed his desire to "do something in a practical way for my poor fellow-men who are in bondage."<sup>85</sup> He mentioned his personal plan to raise and educate a slave "as we do our own."<sup>86</sup> In doing so, he planned to educate others on the importance of egalitarianism by modeling such virtues in his own life.

He then hinted at a more ambitious undertaking:

Perhaps we might, under God, in that way do more towards breaking their yoke effectually than in any other. If the young blacks of our country could once become enlightened, it would most assuredly operate on slavery like firing powder confined in rock, and all slaveholders know it well. Witness their heaven-daring laws against teaching blacks. If once the Christians in the free States would set to work in earnest in teaching the

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<sup>83</sup> See, e.g., REYNOLDS, *supra* note 29, at 278–80.

<sup>84</sup> A document found among John Brown's possessions, titled "Vindication of the Invasion," argued that it had been planned and conducted "in accordance with my settled policy." *Id.* at 303 (internal quotation and emphasis omitted).

<sup>85</sup> Letter from John Brown to Frederick Brown (Nov. 21, 1834), in A JOHN BROWN READER, *supra* note 15, at 42.

<sup>86</sup> *Id.*

blacks, the people of the slaveholding States would find themselves constitutionally driven to set about the work of emancipation immediately.<sup>87</sup>

John Brown may have eschewed traditional politics, but through the exercise of charismatic leadership, he proved to be a shrewd manager of political sentiment. He was a master at writing letters to the editor, cultivating sympathetic news accounts, and spreading his religiously inflected constitutional vision in salons and open meetings alike.<sup>88</sup> He carried support among prominent black intellectuals, less educated freedmen, and white abolitionists and artists.<sup>89</sup> Brown had the personality of a preacher, the mind of a military tactician, and the instincts of a trained advocate.

Far from being an undisciplined, final burst of aggression or the effectuation of a suicide plan, the plan to raid the armory and liberate slaves from the area appeared to be an extension of a broader dialogic effort. Some commentators have pointed out that few slaves could be found in the area as evidence of other motives or poor planning.<sup>90</sup> In fact, a diffuse population in the area enhanced the prospects of guerilla warfare from a fortified community rather than a full-blown insurrection. Brown's past efforts at targeted liberations and the conversion of slave-owning property involved relatively small, mobile groups that might have a chance of eluding pursuers.<sup>91</sup> Thus, the Harpers Ferry plan would seem to be a logical, if bold, next step if Brown's grander state-building ambitions were to be realized.

All of this ultimately leads to the question of whether Brown's resort to force in Harpers Ferry or elsewhere disqualifies him from participating in the constitutional debate. There are two fruitful ways of approaching the matter. One is to ask: from within the constitutional

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<sup>87</sup> *Id.* at 43.

<sup>88</sup> See, e.g., John Brown, Advertisement, *To the Friends of Freedom*, N.Y. TRIB., Mar. 4, 1857, reprinted in A JOHN BROWN READER, *supra* note 15, at 102 (petitioning for funds); John Brown, Letter to the Editor, SUMMIT BEACON (Ohio), Dec. 20, 1855, reprinted in A JOHN BROWN READER, *supra* note 15, at 88–93 (describing pro-slavery forces as “invaders” and stating that “[w]hat now remains for the Free State men of Kansas, and their friends in the State, and the world to do, is to hold the ground they now possess, and Kansas is free”) (emphasis omitted); John Brown, *Old Brown's Parallels*, N.Y. DAILY TRIB., Jan. 22, 1859, reprinted in A JOHN BROWN READER, *supra* note 15, at 114–15 (arguing that the excursion into the Osage settlement to free slaves “forcibly restored [them] to their ‘natural and inalienable rights,’ with but one man killed”).

<sup>89</sup> See, e.g., REYNOLDS, *supra* note 29, at 97–98, 103–04.

<sup>90</sup> See, e.g., PETERSON, *supra* note 14, at 95.

<sup>91</sup> See, e.g., *infra* note 122 and accompanying text.

tradition, does John Brown's resort to violence and law-breaking disentitle him to speak as a citizen of a republic? Another possibility is to ask, from the standpoint of his audience, whether his resort to force would destroy, alter, or change the communicative efficacy of any state-building message?

Brown was not alone in believing that forceful resistance of unjust practices could be compatible with American constitutionalism. Lysander Spooner, a Northern abolitionist who was deeply skeptical of organized religion, argued that slaves had a natural right to liberty, and that they therefore "have the right to take it by stratagem or force."<sup>92</sup> His self-defense theory extended to others who might come to the aid of a vulnerable member of the political community. Spooner rooted the right to use force on behalf of slaves in a "duty of the bystanders to go to his or her rescue, by force, if need, be [when] a human being is set upon by a robber, ravisher, murderer, or tyrant of any kind."<sup>93</sup> Spooner claimed, as Brown did:

The state of Slavery is a state of war. In this case it is a just war, on the part of the negroes—a war for liberty, and the recompense of injuries; and necessity justifies them in carrying it on by the only means their oppressors have left to them.<sup>94</sup>

Although Spooner cautioned against a "general insurrection, or any taking of life, until we of the North go down to take part in it," he heartily advised "the flogging of individual Slave-holders" and "compelling them . . . to execute deeds of emancipation, and conveyances of their property, to their slaves."<sup>95</sup>

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<sup>92</sup> Lysander Spooner, *To the Non-Slaveholders of the South* (1858), reprinted in 4 THE COLLECTED WORKS OF LYSANDER SPOONER (Charles Shively, ed. 1971). See generally JAMES J. MARTIN, *Lysander Spooner, Dissident Among Dissidents*, in MEN AGAINST THE STATE: THE EXPOSITORS OF INDIVIDUALIST ANARCHISM IN AMERICA, 1827–1908, at 167, 180–201 (Ralph Myles Publisher, Inc. 1970) (1953) (describing Spooner's political writings, including those regarding slavery, and his views on the U.S. Constitution); Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977 (1997) (explaining Spooner's life and method of constitutional interpretation).

<sup>93</sup> Lysander Spooner, *A Plan for the Abolition of Slavery* (1858), reprinted in THE COLLECTED WORKS OF LYSANDER SPOONER, *supra* note 92 (emphasis omitted).

<sup>94</sup> Spooner, *supra* note 92 (emphasis omitted).

<sup>95</sup> *Id.*

Resistance of usurpations of government “is a strictly constitutional right,” Spooner argued.<sup>96</sup> “And the exercise of the right is neither rebellion against the constitution, nor revolution—it is a maintenance of the constitution itself, by keeping the government within the constitution.”<sup>97</sup> What is most interesting about his justification of force is that adherence to a constitution is married with an interpretation of the 1787 U.S. Constitution as a pro-slavery document and the possibility of illegal or direct action, but nevertheless constitutional resistance, falling short of revolution or rebellion. Spooner’s endorsement of violence shocked moderate abolitionists and those who subscribed to a more orderly view of democratic change.<sup>98</sup> Spooner and Brown shared a mentor and patron in Gerrit Smith, who helped finance the abolitionist cause.<sup>99</sup> The two men met in Boston just before Harpers Ferry.<sup>100</sup> After Brown’s capture, Spooner came up with related plans of guerilla warfare against slavery, though none were executed.<sup>101</sup> In the writings of Spooner and Brown one can detect efforts to theorize forms of constitutional dissent beyond formal amendment or revolution: alternative reorganization, targeted lawbreaking, and moderated violence.

Within the democratic tradition, there are any number of individuals who advocated extra-legal means of political change, then successfully traversed the categories from dissident to liberator, from lawbreaker to statesman. Think of George Washington, Thomas Jefferson, Touissant L’Ouverture, Menachem Begin, and Yasser Arafat. When the people looked favorably upon their actions, they called them “freedom fighters” rather than common criminals.

Probing the relationship between violence and self-rule shows why. The act of repudiating a constitution or forcefully resisting its usurpation is as much a part of the American political tradition as writing, amending, or construing a constitution. Under Lockean principles of consent,<sup>102</sup> sovereignty and self-defense are intimately connected and

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<sup>96</sup> Lysander Spooner, *A Defense for Fugitive Slaves, Against the Acts of Congress of Feb. 12, 1793, and Sept. 18, 1850*, at 29 (1850), reprinted in *THE COLLECTED WORKS OF LYSANDER SPOONER*, *supra* note 92 (emphasis omitted).

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., REYNOLDS, *supra* note 29, at 101.

<sup>99</sup> See Charles Shively, *Biography*, in 1 *THE COLLECTED WORKS OF LYSANDER SPOONER* 15, 38 (Charles Shively ed., 1971).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 37–38.

<sup>102</sup> See generally Scott John Hammond, *John Brown as Founder: America's Violent Confrontation with Its First Principles*, in *TERRIBLE SWIFT SWORD*, *supra* note 3, at 61 (arguing that John Brown’s actions were compatible with the titles “founder” and “legislator”).

treated as inviolable rights. Recognizing the power to break a contract reaffirms a person's autonomy to make one in the first place. Colonialists took up arms against the King in the name of their God-given liberty, clothing their violent act in natural law principles.<sup>103</sup> We overlook their resort to force not only because they prevailed and wrote winners' history, but also because they defended their behavior in moral and legal terms. That is to say, American revolutionaries' targeted use of violence was subordinated to and constrained by their arguments rather than substituting for them.

Older religious traditions of revolutionary violence have served as inspiration. In the New Testament, the figure of Jesus angrily overturns the moneychangers' tables in the Temple to signal his subversive designs.<sup>104</sup> Despite ushering in a new age founded on *agape*, he warns that the reconstitution of society is an inherently violent act: "I did not come to bring peace, but a sword. For I came to set a man against his father, and a daughter against her mother, and a daughter-in-law against her mother-in-law; and a man's enemies will be the members of his household."<sup>105</sup> Use of the family unit as a trope jars the people into remembering that transforming a political order involves challenging one's most basic allegiances.

Moving decisively to the fringes of society, and strategically leveraging the prophetic tradition,<sup>106</sup> the John Brown movement similarly sought both to dramatize the faulty aspects of the governing document (as construed by the U.S. Supreme Court to deny the humanity of slaves, once and forever)<sup>107</sup> and to authorize a new constitution. By characterizing their project in the American idioms of renewal—which a surviving member of the movement described as "language every where understood by the haters of tyranny"<sup>108</sup>—Brown and his followers contested rather than repudiated established legal norms. In this sense, Brown portrayed himself as the constitutional tradition's most righteous defender.

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<sup>103</sup> See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>104</sup> See, e.g., *Matthew* 21:12–14.

<sup>105</sup> *Id.* 10:34–36.

<sup>106</sup> Brown was described as "another Moses," and, after his execution, in increasingly Christ-like terms. See ANDERSON, *supra* note 1, at 2.

<sup>107</sup> John Brown's "Declaration of Liberty" explicitly calls out the U.S. Supreme Court for its decision in 1856 of *Dred Scott v. Sanford*, which held, among other things, that former slaves could never become citizens, but were at best property as a matter of national constitutional law. See 60 U.S. 393 (1856); DECLARATION OF LIBERTY, *supra* note 71.

<sup>108</sup> ANDERSON, *supra* note 1, at 2.

Consider another document found among Brown's possessions upon his capture: "A Declaration of Liberty by the Representatives of the Slave Population of the United States of America."<sup>109</sup> In it, the undersigned parroted the language of the American Declaration of Independence and "assert[ed] their Natural Rights, as Human Beings, a Native and Mutual Citizens of a free Republic," to "break that odious yoke of oppression, which is so unjustly laid upon them by their fellow countrymen."<sup>110</sup> The document, apparently drafted the summer before the attack on Harpers Ferry,<sup>111</sup> recounts injustices wrought not by an external sovereign, but by pro-slavery lawmakers and jurists. It recapitulated the maneuvers made famous by the Framers themselves: unapologetically criticizing corrupt officials (thus treating them as temporary stewards who have lost their way) while exhibiting fervent loyalty to more enduring ideals (and therefore reaffirming allegiance to the rule of law, broadly understood). As this exercise confirms, the astute radical will take up his political forebears' instruments.

Both of these exercises of self-government through writing—the Provisional Constitution and the Declaration of Liberty—occurred after John Brown's participation in the fight over slavery in Kansas, a bloody affair that tested the anti-slavery coalition.<sup>112</sup> The timing of these events suggests that the documents may have been aimed in part at this audience: sympathizers who suddenly feared a backlash and observers who might yet join the anti-slavery cause, but wondered about the ultimate ends of extra-legal agitation. A Free Kansas, already emerging as a symbol of success in the abolitionist cause, likely inspired the movement to codify certain principles of governance with an eye toward making them public.

By the time Brown led a band of volunteers to defend a free-state settlement, conditions had so degenerated that pro-slavery forces sacked the city of Lawrence.<sup>113</sup> Yet the brutal slaying of unarmed pro-slavery settlers at Pottawatomie in May of 1856 by Brown's men stunned opponents and supporters alike.<sup>114</sup> It appeared to be a calculated act of reprisal for the attack on Lawrence. Although he was not one to voice regret, the writing of political liberation documents in the months fol-

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<sup>109</sup> *E.g.*, REYNOLDS, *supra* note 29, at 300.

<sup>110</sup> DECLARATION OF LIBERTY, *supra* note 71.

<sup>111</sup> REYNOLDS, *supra* note 29, at 300.

<sup>112</sup> See Chowder, *supra* note 14, at 84 (describing the Pottawatomie Massacre in 1856 that "ignited all-out war in Kansas").

<sup>113</sup> See, *e.g.*, REYNOLDS, *supra* note 29, at 156–57.

<sup>114</sup> *E.g.*, *id.* at 174–75.

lowing the bloody days of Kansas might be seen as an effort to back away from the brink of unrestrained violence, to place the extreme events of Kansas in context, and, if possible, to reconfirm the goals of constitutionalism. There is no decisive evidence either way, but the timing is suggestive. If this is correct, we ought to see the John Brown movement's resort to text as an attempt to erase the horrific memory of bloodshed, and, after the chaos of Kansas, as a return to the rule of law.

If there has always been a primal relationship between self-rule and force, the latter risks drowning out the former and sapping it of legitimacy and effectiveness. It is a lesson learned from the French Revolution's descent into popular violence, which consumed any semblance of the rule of law, and has even impacted the reading of the U.S. Constitution in modern times.<sup>115</sup> From within liberal theory itself, a targeted use of force may be compatible with notions of self-defense. Certainly radical abolitionists argued as much in extending protection of the self to the protection of fellow human beings threatened with force. John Brown's program to "free the slaves" but not necessarily to provoke a "revolt" was entirely compatible with this ideology. On the other hand, a turn toward total or unrestrained aggression would arguably deprive the actor of his claim to speak as a citizen—to make one's actions not only unintelligible but also illegitimate. Would Americans accept a creative, temporary redrawing of these lines upon which the radical project depends? The question, at its core, involved whether a political actor has rejected the possibility of the rule of law.

We might understand the tactics of the fringe constitutionalism to consist of: (1) manipulating political traditions in the name of structural change; (2) acting in good faith to realize certain governing ideals; and (3) adhering to a principle of moderation with regard to tactics. Within this model, an advocate turns to calibrated illegality to precipitate a break in historical time while signaling a desire to remain

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<sup>115</sup> As just one example, Justice Hugo Black compared his brethren's decision in *Brown v. Louisiana*, protecting African-American demonstrators in the streets, to France's descent into revolutionary chaos:

Governments like ours were formed to substitute the rule of law for the rule of force . . . . The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in. The holding in this case today makes it more necessary than ever that we stop and look more closely at where we are going.

383 U.S. 131, 168 (1966) (Black, J., dissenting). Presumably, Justice Black made such a provocative statement believing that it would stoke the fears of educated Americans, though surely some would find the comparison strained.

a participant to the broader societal discussion underway. Resorting to constitution writing and deliberative gatherings together conveyed Brown's intentions as a would-be founder.

What is the relationship between constitutionalism, terrorism, and citizenship? Constitutionalism is a practice in which individuals come together and agree to be governed for mutual benefit, usually through the formation of institutions whose powers are limited by certain principles. In the United States, such self-governing principles appear generally, but not exclusively, in writing. The citizen is a subject of such a political arrangement, who has voluntarily or tacitly consented to be bound by a community's principles for self-governance. Terrorism is best defined as the pursuit of symbolic violence by an individual or group to effect a change in governmental policy.<sup>116</sup> As a political strategy, terrorism is usually associated with the lack of resources and formal political power.<sup>117</sup>

These categories overlap but are not conterminous (*Fig. A*). The fringe constitutionalist may also be a terrorist, but need not be. It is possible to pursue unlawful, but nonviolent strategies in resisting governing ideals, and hence avoid the terrorist appellation. Moreover, unlike some extremists (for example, anarchists committed to no particular reconstructive project or theocrats bent on the overthrow of liberal democracy), the fringe constitutionalist remains a creature of the American political tradition. For all of his willingness to test society's

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<sup>116</sup> Most political scientists and policy analysts agree that terrorism entails the use of extra-legal or extra-normal violence in pursuit of political objectives. See, e.g., ENDERS & SANDLER, *supra* note 82, at 3; Brian M. Jenkins, *Statements About Terrorism*, 463 ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1982, at 11, 12–13; David C. Rapoport, *Messianic Sanctions for Terror*, 20 COMP. POL. 195, 196–97 (1988); Achin Vanaik, *Terrorism: Definition and Ethics*, ECON. & POL. WKLY., Oct. 5, 2002, at 4164, 4166. Federal anti-terrorism statutes incorporate some of these insights, particularly the use of violent or illegal actions taken for a political motive, though some limit the scope of regulated activity to attacks on innocents or non-combatants. See 18 U.S.C. § 2331(1) (2006) (defining international terrorism as any violent or life-threatening unlawful act undertaken with specified (generally political) motives; identities of actor and victim irrelevant); 22 U.S.C. § 2656f (d)(2) (2006) (defining terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”); 50 U.S.C. § 1801(c) (2006) (defining international terrorism as including “violent acts or acts dangerous to human life” that are intended “to influence the policy of a government by intimidation or coercion”). Not all definitions of terrorism limit the category to non-state actors. See Walter Laquer, *Reflections on Terrorism*, 65 FOREIGN AFF. 86, 88 (1986) (stating “that terrorism is the use or threat of violence, a method of combat or a strategy to achieve certain goals, that its aim is to induce a state of fear in the victim, that it is ruthless and does not conform to humanitarian norms, and that publicity is an essential factor in terrorist strategy”).

<sup>117</sup> See, e.g., ENDERS & SANDLER, *supra* note 82, at 116–17.



tolerance for violence and disorder, he is committed to the possibility of self-governance according to a written constitution.

A terrorist could be characterized a fringe constitutionalist depending on the scope of his objectives, the degree with which his vision of social change includes lasting institutional transformation as opposed to purely individual or moral reformation, and whether he abides by the principle of moderation. The terrorist usually turns to violence in order to precipitate a change in public policy or cultural values.<sup>118</sup>

Someone who employs extra-legal means merely for transient changes in public policy, as opposed to structural or ethical changes, would likewise be excluded from the category of radical constitutionalism. It is possible to be a terrorist but not a constitutionalist, a person with no intention of creating a new legal-political order based, or abiding by, the maxims of written constitutionalism. For instance, Ted Kaczynski's techno-authoritarian critique of American society led him to an anarchic solution in which the free market would promote liberty in the absence of the state.<sup>119</sup> In spite of resorting to writing, terrorists such as Kaczynski could lay no plausible claim to the tradition of popular revision of constitutional commitments.

Then there is the category of citizen, who is constituted by respect for the rule of law. An ordinary citizen who breaks the law is called a common criminal. One can be a citizen without being an activist or constitutionalist, just as a citizen can avoid the terrorist label by forswearing non-traditional, illegal, or violent politics. At some point, an individual may, in fact, lose the prerogative to be heard as a citizen. The more that an individual veers toward indiscriminate or total violence, the more likely others will perceive an intention to disaffiliate completely from the political community. At some point, violence no longer teaches, but renders observers mute or painstricken, utterly unable to reason. In that moment, the possibility of democratic constitutionalism vanishes.

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<sup>118</sup> See, e.g., *id.* at 4.

<sup>119</sup> See, e.g., MICHAEL MELLO, THE UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZYNSKI: ETHICS, POWER AND THE INVENTION OF THE UNABOMBER 150–53 (1999) (summarizing Kaczynski's ideology as set forth in his manifesto); see also Unabomber's Manifesto, <http://cyber.eserver.org/unabom.txt> (last visited Nov. 20, 2009) (text of the full manifesto). Kaczynski pled guilty to being the Unabomber, charged with killing and injuring people during an 18-year period and is serving a life sentence. William Glaberson, *The Unabomber Case: The Overview; Ted Kaczynski Avoids a Death Sentence with Guilty Plea*, N.Y. TIMES, Jan. 23, 1998, at A1.

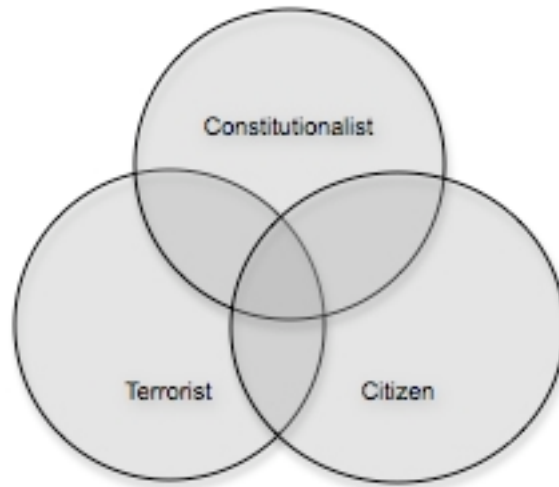


Figure A

John Brown occupied that strange place where the three categories overlap (*Figure A*). Navigating the distinctions between the categories proved to be an important element of his project. He did, in fact, employ force against state actors as well as non-state actors.<sup>120</sup> Unlike slave revolt leaders of the past, however, he found value in articulating the next constitutional order. He believed in the rule of law and was interested in building institutions.

Osborne P. Anderson, the only surviving member of the party that raided Harpers Ferry, explained:

Hark and another met Nat Turner in secret places, after the fatigues of a toilsome day were ended; Gabriel promulg[ated] his treason in the silence of the dense forest; but John Brown reasoned of liberty and equality in broad daylight, in a modernized building, in conventions with closed doors, in meetings governed by the elaborate regulations laid down by Jefferson, and used as their guides by Congresses and Legislatures . . . .<sup>121</sup>

<sup>120</sup> See ANDERSON, *supra* note 1, at 28–29.

<sup>121</sup> *Id.* at 8. Anderson went on to claim that “[i]nsurrection has its progressive side, and has been elevated by John Brown from the skulking, fearing cabal, when in the hands of a brave but despairing few, to the highly organized, formidable, and to very many, indispensable institution for the security of freedom, when guided by intelligence.” *Id.* Twin motivations appear to animate his labors: distinguishing his group from the mob and appealing to the dialogic function fulfilled by its members’ virtuous actions.

Brown turned to violence when ordinary politics and less forceful methods, such as the Underground Railroad and slave stealing,<sup>122</sup> did little to change the basic political, legal, and economic structure that enabled the persistence of slavery. He came to realize that isolated acts of resistance siphoned away and dissipated energy for concerted action. Yet for all one can tell, he never gave up his right to seek redress for the wrongs committed against other human beings in the name of slavery. Brown revealed himself to be a domestic terrorist, a citizen, and—as the legal wrangling at trial confirmed—a dedicated constitutionalist.

### III. THE DIALECTICAL NATURE OF PUBLIC DEBATE

What, then, can be said about the relationship between traditional constitutionalism and its outlier? Practitioners of each brand of politics share a commitment to governance according to the rule of law and the legitimacy and reformative power of communal judgments. They vigorously disagree about the degree to which existing institutions can be reformed, which procedures and tactics are appropriate, and the timing and nature of any popular interventions. The mainstream actor fears that backlash will reverse any progress already made, whereas the radical believes polarization is the only means through which a matter may be resolved once and for all.

More specifically, the relationship between fringe constitutionalism and mainstream constitutionalism is irreducibly dialectical. This is true not only of what participants say, but also what they do. We should not miss this symbiotic relationship even though practitioners of traditional modes of discourse must create space for compromise and political resolution in part by denouncing the radical's tactics. Likewise, even though it is convenient, and even necessary, for the extremist to castigate mainstream tactics as ineffective and unprincipled, in actuality, fringe legal culture depends on mainstream denunciations for the radical critique to be sustained. And although the radical's ultimate vision of political community might not be achieved, he or she may succeed in advancing the timetable for political debate, decisively reframing the human and legal stakes, or empowering mainstream constitutional actors. As one terrorism expert points out, extreme "meth-

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<sup>122</sup> On December 20, 1858, Brown took twenty men into Vernon County, Missouri, and forcibly liberated eleven slaves from two farms. *E.g.*, REYNOLDS, *supra* note 29, at 278–79. Eighty-two days and 1000 miles later, these individuals found freedom in Canada. *Id.* at 287.

ods always provoke outrage, but the paradox is that they can arouse moral support too.”<sup>123</sup>

Take Lysander Spooner's view of the Free Soil Party, whose platform opposed the extension of slavery into new territories. He called “[i]ts ideas . . . foggyish, and tame, and cowardly,” and grouched that the party's leadership was made up of “a few old stereotypes, or rather fossilized Whigs.”<sup>124</sup> In turn, Spooner found himself attacked by mainstream actors for licensing anarchy, as well as by Garrisonians who found his reading of the U.S. Constitution as an anti-slavery document a sign of dangerous accommodation.<sup>125</sup>

Similar themes can be traced in the dealings between two practitioners of democratic constitutionalism on the question of what to do about slavery: John Brown and Frederick Douglass. Although Douglass's views on slavery might not have aligned with the preferences of the median voter or elected official in the mid-nineteenth century, his general commitment to dominant legal and political processes and his refusal to turn to violence merit treating him as a traditional constitutionalist.<sup>126</sup> There is little question that Douglass became increasingly resigned to the prospect that there would be bloodshed before the slavery question could be settled with any measure of finality.<sup>127</sup> Even so, after his split from the Garrisonian wing of the abolitionist movement—which stressed disobedience, abstention from voting, and education of slaveowners about the wrongfulness of slavery<sup>128</sup>—he called for increased engagement through electoral politics and the Article V process for amending the U.S. Constitution.<sup>129</sup>

In a letter dated January 9, 1854, Brown wrote to Douglass, expounding:

[T]he extreme wickedness of persons who use their influence to bring law and order and good government, and courts of

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<sup>123</sup> THE MORALITY OF TERRORISM: RELIGIOUS AND SECULAR JUSTIFICATIONS, at xvi (David C. Rapoport & Yonah Alexander eds., 2d ed. 1989) (emphasis omitted).

<sup>124</sup> Shively, *supra* note 99, at 39 (quoting a letter from Lysander Spooner to George Bradburn (Apr. 19, 1854)).

<sup>125</sup> *Id.*

<sup>126</sup> See WILLIAM S. McFEELY, *FREDERICK DOUGLASS* 189 (1991).

<sup>127</sup> See REYNOLDS, *supra* note 29, at 254.

<sup>128</sup> ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 151 (1975). For a discussion of “radical constitutional antislavery,” see *id.* at 149–58 (discussing the approach of Garrisonians); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 249–75 (1977).

<sup>129</sup> See McFEELY, *supra* note 126, at 253. Douglass later advised President Lincoln and advocated for the passage of the Reconstruction Amendments. See, e.g., *id.* at 233–34, 256.

justice into disrespect and contempt of mankind, and to do what in their power lies to destroy confidence in legislative bodies, and to bring magistrates, justices, and other officers of the law into disrespect amongst men.<sup>130</sup>

The letter evinced a concern for the erosion of the rule of law by public officials who endorse and thereby entrench slavery, despite what Brown believed to be a consensus among the Framers of the Constitution to disfavor the practice.<sup>131</sup> His critique tracked the corruption motif of the Declaration of Independence, which would later reappear in his group's liberation documents.<sup>132</sup>

Brown closed the letter not by seeking to end debate over slavery, but by affirming that his words and actions, although insufficient, may nevertheless enable mainstream advocates to take action:

I am too destitute of words to express the tith of what I feel, and utterly incapable of doing the subject any possible degree of justice, in my own estimation. My only encouragement to begin, was the earnest wish that if I might express, so that it may be understood to all, an important fact, that you or some friend of God and the right, will take it up and clothe it in the suitable language to be noticed and felt. I want to have the enquiry everywhere raised—Who are the men that are undermining our truly republican and democratic institutions at their very foundations? I forgot to head my remarks “Law and Order.”<sup>133</sup>

In the letter, Brown reveals a sophisticated understanding of his role in historical events. He knows his own words and actions may be “incapable” of reaching everyone. And he prays that others with standing in the community will “take it up and clothe it the suitable language to be noticed and felt.”<sup>134</sup>

The Provisional Constitution embodied a maturation of John Brown's thinking, and the final stage of his own evolution from itinerant farmer to guerilla fighter to would-be nation-builder. Consider an exchange between the abolitionist Frederick Douglass and John Brown

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<sup>130</sup> Letter from John Brown to Frederick Douglass (Jan. 9, 1854), in A JOHN BROWN READER, *supra* note 15, at 84.

<sup>131</sup> See *id.* at 84–85.

<sup>132</sup> See, e.g., PROVISIONAL CONST. pmbl.; DECLARATION OF LIBERTY, *supra* note 71.

<sup>133</sup> Letter from John Brown to Frederick Douglass, *supra* note 130.

<sup>134</sup> *Id.*

that reportedly took place in 1847, as reported by W.E.B. DuBois. According to Douglass:

[Brown's] plan as it then lay in his mind had much to commend it. It did not, as some suppose, contemplate a general rising among the slaves, and a general slaughter of the slave-masters. An insurrection, he thought, would only defeat the object; but his plan did contemplate the creating of an armed force which should act in the very heart of the South. He was not averse to the shedding of blood, and thought the practice of carrying arms would be a good one for the colored people to adopt, as it would give them a sense of their manhood. No people, he said, could have self-respect, or be respected, who would not fight for their freedom.<sup>135</sup>

If DuBois's second-hand account is accurate, then Brown dreamed of an armed, constitutionally self-regulating society. It is doubtful that he would have objected to a general slave revolt, but this may have been a welcome byproduct rather than his central goal. Brown apparently continued:

The true object to be sought is first of all to destroy the money value of slavery property; and that can only be done by rendering such property insecure. My plan, then, is to take at first about twenty-five picked men, and begin on a small scale; supply them with arms and ammunition and post them in squads of fives on a line of twenty-five miles. The most persuasive and judicious of these shall go down to the fields from time to time, as opportunity offers, and induce the slaves to join them, seeking and selecting the most restless and daring.<sup>136</sup>

The project to destabilize slavery as an industry (in the words of Spooner, to “[m]ake Slavery unprofitable” and “make Slaveholders objects of derision and contempt”<sup>137</sup>) would take months, if not years. The existence of an alternative community not far from Southern borders, possibly on the move, would help to heighten slave owners' sense of “insecurity” in their human property. Not only could slaves be liberated at any time, but slaves might be motivated to run off and join this egalitarian community.

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<sup>135</sup> DU BOIS, *supra* note 2, at 58 (internal quotation omitted).

<sup>136</sup> *Id.* at 59 (internal quotation omitted).

<sup>137</sup> Spooner, *supra* note 92 (emphasis omitted).

Starting with committed anti-slavery activists and branching out to include slaves interested in reclaiming their liberty, the group would grow itself gradually, then make off into the nearby mountains and hold their ground “despite of all efforts of Virginia to dislodge them.”<sup>138</sup> This conversation revealed a desire not to instigate a general slave revolt, to sack the state government of Virginia, or to levy war against the U.S. government, but rather to destabilize the slave trade on a county-by-county basis and reconstitute a nation elsewhere. Incursions into slave-owning territory would take place “from time to time.”<sup>139</sup> It is a plan that Brown’s eventual captors could not fathom, a goal that is confirmed in Article XLVI of the Provisional Constitution.<sup>140</sup>

How, then, does Harpers Ferry figure in a plan to re-establish constitutional self-rule in egalitarian terms? Brown could easily have hidden in the hills and created a utopian society without launching this particular assault. It is a puzzle, one that has led many observers to throw up their hands and declare Brown and his followers naïve or delusional.<sup>141</sup> Why attack federal property if one did not have designs to levy war against the federal government? Why not just expand the slave stealing enterprise without such a grand statement?

There surely must be complicated strategic reasons for the assault. Many explanations fail to appreciate the logic of terrorism, which is, above all, about manipulating political perceptions in the face of overwhelming resources. No doubt Brown sought a galvanizing statement that would ensure that the slavery question would continue to be a priority. The armory’s location in Virginia, a committed slave state, made it an attractive site for showing that anti-slavery radicals were not afraid to take the fight into the heart of the South, and would not be satisfied with incremental gains on neutral terrain.<sup>142</sup>

An attack on Harpers Ferry fulfilled an added communicative function. Even if the group did not wish to levy war against the United States (and there is no evidence of such a plan),<sup>143</sup> they believed the federal government to be morally implicated in the entrenchment of

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<sup>138</sup> DU BOIS, *supra* note 2, at 59 (internal quotation omitted).

<sup>139</sup> *Id.* (internal quotation omitted).

<sup>140</sup> PROVISIONAL CONST. art. XLVI.

<sup>141</sup> See REYNOLDS, *supra* note 29, at 339–40 (recounting the reactions to Harpers Ferry in Northern papers describing Brown as a madman).

<sup>142</sup> See *id.* at 296.

<sup>143</sup> Even though Brown attacked federal property and federal troops came to apprehend Brown, the federal government allowed the Commonwealth to try him on state charges, arguably in part to aid the narrative that would be produced that Brown was a common criminal and the state was more than capable of restoring public order. See *id.* at 337.

slavery. Attacking federal property sent a message that the national government—and Americans collectively—could no longer sit on the sidelines, crafting temporary compromises. The point here is not to romanticize the group, but to understand how its members saw themselves as constitutional actors. If the taxpayers' resources were being utilized on behalf of pro-slavery forces, then why not secure some of these resources for anti-slavery advocates? Finally, the group was also likely short on munitions, and it might have been easier to arm nearby slaves and carry remaining munitions into the hills rather than transport necessary weaponry such a long distance. Each man “had forty rounds apiece when [they] went to the Ferry,”<sup>144</sup> and two men were sent to secure a local rifle factory. These goals seemed to coalesce into an audacious plan, given coherence by dreams of a new experiment in self-rule.

Osborne P. Anderson makes a revealing admission in his recounting of the events at Harpers Ferry: “It was no part of the original plan to hold on to the Ferry, or to parley with prisoners; but by so doing, time was afforded to carry the news of its capture to several points, and forces were thrown into the place, which surrounded us.”<sup>145</sup> Brown ordered three men to stay behind at the Kennedy Farm as sentinels, under instructions to guard arms and supplies, and to move them to a nearby schoolhouse when rejoined by men from the assault company.<sup>146</sup> Thus, the raid was never intended as an end-game, but rather as a major next step in securing a shared constitutional vision. Holding the town temporarily was consistent with the group's plan to make a symbolic statement with the raid, replenish supplies, and free nearby slaves. Survivors of the raid were to meet up with their comrades and liberated slaves before moving on. Tactical mistakes during its execution, however, made escape and further construction of the political community impossible.

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<sup>144</sup> ANDERSON, *supra* note 1, at 48.

<sup>145</sup> *Id.* at 38. Anderson's account of the events is deeply influenced by his personal stake in John Brown's legacy. Nevertheless, on this point, that the actions of the group departed from original planning seems reliable, given that it does not necessarily portray the group in a positive light.

<sup>146</sup> REYNOLDS, *supra* note 29, at 307.



With a free state flourishing in the mountains,<sup>147</sup> perhaps others tainted by participation in a thoroughly corrupt system would see reason to join the new community and thereby become educated in a new life bathed in radical egalitarianism. Organized according to the rule of law and a familiar political iconography, a nation within a nation could serve as an inspiration to others. Brown's repeated disavowal of treasonous motivations, coupled with his turn toward constitutional methods, suggest a general strategy to claim his natural born citizen's right to contest the meaning of the original Constitution—even to break it—so others might see that the time had come for renewal.

They likely hoped to recreate life at the Kennedy Farm, located “in a mountainous region” in Maryland about four miles from Harpers Ferry.<sup>148</sup> There, the group lived out many of the precepts of the Provisional Constitution, beginning each day with prayer and “cooking, washing, and other domestic work[,] . . . no one being exempt, because of age or official grade in the organization.”<sup>149</sup> It was there that much of the preparations took place for the raid. On Sunday morning, October 16, Brown led a solemn reading of the Provisional Constitution and oaths were sworn before leaving the Farm and setting off for Virginia.<sup>150</sup>

Interdicted before it had any chance of success, the plan to establish a utopian society and engage in guerilla warfare seemed ill-conceived.<sup>151</sup> Still, is it possible that democratic faith in its purest form

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<sup>147</sup> Wisely or not, the mountains surrounding Harpers Ferry figure prominently in the group's plans. Anderson's account of his own harrowing escape confirms these suspicions about a tactical advantage the group would gain from the topography. See ANDERSON, *supra* note 1, at 48. Anderson recounts the ordeal:

A few minutes before dark, the troops came in search of us. They came to the foot of the mountains, marched and counter-marched, but never attempted to search the mountains; we supposed from their movements that they feared a host of armed enemies in concealment . . . . Being further in the mountains, and more secure, we could see without personal harm befalling us . . . . I was loth [sic] to leave him, as we both knew that danger was more imminent than when in the mountains around Harpers Ferry. At the latter place, the ignorant slaveholding aristocracy were unacquainted with the topography of their own grand hills . . . .

*Id.* at 48, 52, 53.

<sup>148</sup> *Id.* at 20; see also REYNOLDS, *supra* note 29, at 297–98.

<sup>149</sup> ANDERSON, *supra* note 1, at 24–25.

<sup>150</sup> REYNOLDS, *supra* note 29, at 307.

<sup>151</sup> Robert Jewett, for example, finds the raid “a farcical affair, so poorly planned and executed that the anticipated slave uprising could not possibly have occurred.” ROBERT JEWETT, *THE CAPTAIN AMERICA COMPLEX: THE DILEMMA OF ZEALOUS NATIONALISM* 85 (1973). He points to the event, characterized by “Brown's disdain for rational planning,” as one of the “definitive expressions of hot zeal in the American experience.” *Id.* Even so,

has been mistaken for divinely-inspired lunacy? For the strategy of modeling through self-constitution, as the parable of the mustard seed teaches, depends on equal measures hard work and blind hope.<sup>152</sup> We shall never know how long a nascent free democratic society might have survived if Brown and his men had escaped, nurtured by northern resources and the occasional infusion of newly freed slaves. We will never get to see whether through more traditional forms of persuasion, such as pamphlets and impromptu conventions, the community might have won new converts from among those who wished to disaffiliate from the existing political regime.

Brown and his followers could imagine a temporal community—indeed, they believed they were living out its principles already and bringing the community to fruition in their relationships with one another and the rest of society. Correctly or not, they felt that this constitutional transformation could take place without bringing the group into direct legal conflict with the existing U.S. Constitution.

John Brown's trial at Charlestown proved to be the ultimate test of his brand of fringe constitutionalism. As Robert Ferguson puts it, the man's "performance was part of his cultural transformation."<sup>153</sup> Deprived of an insanity defense after initially proposing it, Brown's lawyers did their best to respect his grand plan to be treated as a patriot.<sup>154</sup> They did so by seizing on legal technicalities (such as the elements of each crime, as well as the fact that Brown was not a citizen of Virginia) to make broader political arguments.<sup>155</sup> His attorneys argued: "There is a manifest distinction" between seeking to free slaves and citing them

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Jewett finds that the "remarkable thing about hot zeal has been its power to inspire establishment and antiestablishment figures alike, to give shape to behavior patterns on both the right and the left in American politics." *Id.* at 87.

<sup>152</sup> See *Matthew* 13:31–:32 ("The kingdom of heaven is like a mustard seed that someone took and sowed in his field; it is the smallest of all the seeds, but when it has grown it is the greatest of shrubs and becomes a tree, so that the birds of the air come and make nests in its branches.")

<sup>153</sup> ROBERT A. FERGUSON, *THE TRIAL IN AMERICAN LIFE* 137 (2007).

<sup>154</sup> See STEVEN LUBET, *NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH* 65, 79–80 (2001). Steven Lubet recounts how Brown's first set of lawyers obtained a letter from his family to suggest that insanity was hereditary in his family, but their client quickly put a stop to this defense. *Id.* at 65. In Lubet's view, Brown's lawyers "dissembled" by obscuring his true intentions, which he "virtually repudiated when he came to trial." *Id.* at 58, 85. According to my reading of the event, the lawyers did what they could within the constraints of Brown's broader constitution vision, which he did his best to preserve by rejecting the insanity defense and permitting his lawyers to limit the apparent scope of conflict between his provisional government and Virginia law.

<sup>155</sup> *E.g., id.* at 79.

“to rebellion and insurrection.”<sup>156</sup> People died during the Harpers Ferry raid, it was admitted, but in the larger scheme of things such regrettable deaths should not be treated as “murder” within the terms of Virginia law.<sup>157</sup> *Mens rea* was manipulated less to afford him a real chance of acquittal than to portray his motives in a virtuous light and preserve his capacity to speak against slavery as a virtuous citizen.

The prosecution evidently treated this gambit seriously, and the defendant’s effort to capitalize on the trial for the antislavery cause was met squarely. With rights came duties, lead prosecutor Andrew Hunter pointed out:

Let the word treason mean breach of trust, and did he not betray that trust with which, as a citizen, he is invested when within our borders? By the Federal Constitution, he was a citizen when he was here, and did that bond of Union—which may ultimately prove a bad bond to us in the South—allow him to come into the bosom of the Commonwealth, with the deadly purpose of applying the torch to our buildings and shedding the blood of our citizens.<sup>158</sup>

The state’s efforts to discredit Brown’s republican project continued. His professed self-restraint, a central theme of his lawyers’ questioning of the witnesses, was mocked by the prosecution: “[T]he idea that Brown shed blood only in self-defense was too absurd to require argument.”<sup>159</sup> Yet the Commonwealth’s agents felt compelled to counter the idea. Stripping Brown of his claim to civic virtue, the Commonwealth insisted that his agenda was no different than any other criminal plan to steal, maim, kill, or otherwise act with malice aforethought against another human being:

The 46th section [of the Provisional Constitution] has been referred to, as showing it was not treasonable, but . . . [t]he whole document must be taken together. The property of slaveholders was to be confiscated all over the South, and any man found in arms was to be shot down . . . . When you put pikes in the hands of the slaves, and have their masters captive, that is advice to slaves to rebel, and punishable with death.<sup>160</sup>

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<sup>156</sup> THE LIFE, TRIAL AND EXECUTION OF CAPTAIN JOHN BROWN, *supra* note 4, at 87.

<sup>157</sup> *See id.* at 88–89.

<sup>158</sup> *Id.* at 92.

<sup>159</sup> *Id.* at 93.

<sup>160</sup> *Id.* at 92.

Through legal arguments and the execution of a death sentence, the government attacked the brand of constitutionalism Brown pursued as much as the substantive principles for which he labored. Brown's speech at his sentencing recapitulated his general message. He invoked his own earlier, celebrated act of slave stealing as a way of trying to recover his credibility:

I deny everything but what I have all along admitted, of a design on my part to free the slaves. I intended certainly to have made a clean thing of that matter, as I did last winter when I went into Missouri, and there took slaves without the snapping of a gun on either side, moving them through the country, and finally leaving them in Canada. I designed to have done the same thing again on a larger scale.<sup>161</sup>

In the end, the would-be statesman sought to transcend the proceedings that confined and therefore distorted his goals:

I feel entirely satisfied with the treatment I have received on my trial. Considering all the circumstances, it has been more generous than I expected. But I feel no consciousness of guilt. I have stated from the first what was my intention, and what was not. I never had any design against the liberty of any person, nor any disposition to commit treason or excite slaves to rebel or make any general insurrection.<sup>162</sup>

The man's concluding words emphasized that popular sovereignty underwrote the project: "Not one but joined me of his own accord, and the greater part at their own expense. A number of them I never saw, and never had a word of conversation with till the day they came to me, and that was for the purpose I have stated."<sup>163</sup> The faceless people of untold numbers, willing to make sacrifices in the name of democratic justice, had freely come together for an enlightened cause. Brown's final message: they would rise again.

Months before, the final interactions between John Brown and Frederick Douglass presaged the tensions in the American political tradition made public during trial. The Provisional Constitution found on Brown's body had been drafted in the home of Douglass, designing what William McFeely calls an "Appalachian state."<sup>164</sup> It appears that

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<sup>161</sup> *Id.* at 94.

<sup>162</sup> THE LIFE, TRIAL AND EXECUTION OF CAPTAIN JOHN BROWN, *supra* note 4, at 95.

<sup>163</sup> *Id.*

<sup>164</sup> McFEELY, *supra* note 126, at 190, 192.

Brown had traveled to Douglass's home with the goal in mind of writing at that location, hoping for the black leader's input and to persuade him to join the cause as a founding father.<sup>165</sup> The historical record is not clear whether Douglass seriously entertained the idea, but he was later heard to brag that he possessed a copy of the instrument in Brown's hand.<sup>166</sup>

When Douglass urged once again that they might yet "convert the slaveholders" through peaceful methods alone, Brown became animated, convinced that masters had to be "induced" to give up their way of life.<sup>167</sup> Brown had come to believe that the rhetoric of national leaders had become beautiful but useless, and that only concerted local action could cause a material change in the status of the oppressed. But his receptivity to more extreme forms of action did not mean giving up on the possibility of political fellowship or self-rule according to a written instrument. Rather, his rejection of accommodation meant the continuation of constitutional discourse through other, riskier means. Though in the end Douglass decided not to join Brown's plan or condone it after his execution, the abolitionist came away moved by the words of the fringe constitutionalist. Douglass found John Brown's "zeal," his "display of rigid virtue," to be as "real as iron or granite."<sup>168</sup> He emerged from these interactions "less hopeful of [slavery's] peaceful abolition."<sup>169</sup> And yet, despite the fact Douglass kept to conventional modes of persuasion as Brown struck his symbolic blow for freedom, Douglass found his own writings and speeches "more and more tinged by the color of this man's strong impressions."<sup>170</sup>

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<sup>165</sup> *Id.* at 192.

<sup>166</sup> *Id.*

<sup>167</sup> DU BOIS, *supra* note 2, at 60 (internal quotation omitted).

<sup>168</sup> *Id.* (internal quotation omitted).

<sup>169</sup> *Id.* (internal quotation omitted).

<sup>170</sup> *Id.* (internal quotation omitted).

## APPENDIX A

PROVISIONAL CONSTITUTION AND ORDINANCES FOR THE  
PEOPLE OF THE UNITED STATES

## PREAMBLE.

Whereas, slavery throughout its entire existence in the United States, is none other than a most barbarous, unprovoked, and unjustifiable war of one portion of its citizens upon another portion, the only conditions of which are perpetual imprisonment and hopeless servitude or absolute extermination; in utter disregard and violation of those eternal and self-evident truths set forth in our Declaration of Independence: Therefore

We, citizens of the United States, and the Oppressed People, who, by a recent decision of the Supreme Court are declared to have no rights which the White Man is bound to respect; together with all other people degraded by the laws thereof, Do, for the time being ordain and establish ourselves, the following PROVISIONAL CONSTITUTION AND ORDINANCES, the better to protect our Persons, Property, Lives, and Liberties; and to govern our actions:

## ARTICLE I

Qualifications for membership.

All persons of mature age, whether Proscribed, oppressed, and enslaved Citizens, or of the Proscribed and oppressed races of the United States, who shall agree to sustain and enforce the PROVISIONAL CONSTITUTION AND ORDINANCE of this organization, together with all minor children of such persons, shall be held to be fully entitled to protection under the same.

## ARTICLE II.

Branches of government.

The provisional government of this organization shall consist of three branches, viz.: Legislative, Executive, and Judicial.

## ARTICLE III.

## Legislative.

The legislative branch shall be a Congress or House of Representatives, composed of not less than five, nor more than ten members, who shall be elected by all citizens of mature age and of sound mind, connected with this organization; and who shall remain in office for three years, unless sooner removed for misconduct, inability, or by death. A majority of such members shall constitute a quorum.

## ARTICLE IV.

## Executive.

The executive branch of this organization shall consist of a President and Vice-President, who shall be chosen by the citizens or members of this organization, and each of whom shall hold his office for three years, unless sooner removed by death, or for inability or misconduct.

## ARTICLE V.

## Judicial.

The judicial branch of this organization shall consist of one Chief-Justice of the Supreme Court, and of four Associate Judges of said Court; each constituting a Circuit Court. They shall each be chosen in the same manner as the President, and shall continue in office until their places have been filled in the same manner by election of the citizens. Said court shall have jurisdiction in all civil or criminal causes, arising under this constitution, except breaches of the Rules of War.

## ARTICLE VI.

## Validity of enactments.

All enactments of the legislative branch shall, to become valid during the first three years, have the approbation of the President and of the Commander-in-Chief of the Army.

## ARTICLE VII.

## Commander-in-chief.

A Commander-in-Chief of the army shall be chosen by the President, Vice-President, a majority of the Provisional Congress, and of the Supreme Court, and he shall receive his commission from the President, signed by the Vice-President, the Chief-Justice of the Supreme Court, and the Secretary of War; and he shall hold his office for three years, unless removed by death, or on proof of incapacity or misbehavior. He shall, unless under arrest (and till his place is actually filled as provided for by this constitution) direct all movements of the army, and advise with any allies. He shall, however, be tried, removed, or punished, on complaint of the President, by, at least, three general officers, or a majority of the House of Representatives, or of the Supreme Court; which House of Representatives (the President presiding); the Vice-President, and the members of the Supreme Court, shall constitute a court-martial, for his trial; with power to remove or punish, as the case may require; and to fill his place as above provided.

## ARTICLE VIII.

## Officers.

A Treasurer, Secretary of State, Secretary of War, and Secretary of the Treasury, shall each be chosen for the first three years, in the same way and manner as the Commander-in-Chief; subject to trial or removal on complaint of the President, Vice-President, or Commander in-Chief, to the Chief-Justice of the Supreme Court; or on complaint of the majority of the members of said court, or the Provisional Congress. The Supreme Court shall have power to try or punish either of those officers; and their places shall be filled as before.

## ARTICLE IX.

## Secretary of War.

The Secretary of War shall be under the immediate direction of the Commander-in-Chief; who may temporarily fill his place, in case of arrest, or of any inability to serve.



## ARTICLE X.

Congress or House of Representatives.

The House of Representatives shall make ordinances providing for the appointment (by the President or otherwise) of all civil officers excepting those already named; and shall have power to make all laws and ordinances for the general good, not inconsistent with this Constitution and these ordinances.

## ARTICLE XI.

Appropriation of money, etc.

The Provisional Congress shall have power to appropriate money or other property actually in the hands of the Treasurer, to any object calculated to promote the general good, so far as may be consistent with the provisions of this Constitution; and may in certain cases, appropriate, for a moderate compensation of agents, or persons not members of this organization, for any important service they are known to have rendered.

## ARTICLE XII.

Special duties.

It shall be the duty of Congress to provide for the instant removal of any civil officer or policeman, who becomes habitually intoxicated, or who is addicted to other immoral conduct, or to any neglect or unfaithfulness in the discharge of his official duties. Congress shall also be a standing committee of safety, for the purpose of obtaining important information; and shall be in constant communication with the Commander-in-Chief; the members of which shall each, as also the President, Vice-President, members of the Supreme Court, and Secretary of State, have full power to issue warrants returnable as Congress shall ordain (naming witnesses, etc.) upon their own information, without the formality of a complaint. Complaint shall be made immediately after arrest, and before trial; the party arrested to be served with a copy at once.

## ARTICLE XIII.

## Trial of President and other Officers.

The President and Vice-President may either of them be tried, removed, or punished, on complaint made to the Chief-Justice of the Supreme Court, by a majority of the House of Representatives, which House, together with the Associate Judges of the Supreme Court, the whole to be presided over by the Chief-Justice in cases of the trial of the Vice-President, shall have full power to try such officers, to remove or punish as the case may require, and to fill any vacancy so occurring, the same as in the case of the Commander-in-Chief.

## ARTICLE XIV.

## Trial of members of Congress.

The members of the House of Representatives may any and all of them be tried, and on conviction, removed or punished, on complaint before the Chief-Justice of the Supreme Court, made by any number of the members of said House, exceeding one-third, which House, with the Vice-President and Associate Judges of the Supreme Court, shall constitute the proper tribunal, with power to fill such vacancies.

## ARTICLE XV.

## Impeachment of Judges.

Any member of the Supreme Court tried, convicted, or punished by removal or otherwise, on complaint to the President, who shall, in such case, preside; the Vice-President, House of Representatives, and other members of the Supreme Court, constituting the proper tribunal (with power to fill vacancies); on complaint of a majority of said House of Representatives, or of the Supreme Court; a majority of the whole having power to decide.

## ARTICLE XVI.

## Duties of President and Secretary of State.

The President, with the Secretary of State, shall immediately upon entering on the duties of their office, give special attention to secure from amongst their own people, men of integrity, intelligence, and good business habits and capacity; and above all, of first-rate moral and reli-

gious character and influence, to act as civil officers of every description and grade, as well as teachers, chaplains, physicians, surgeons, mechanics, agents of every description, clerks, and messengers. They shall make special efforts to induce at the earliest possible period, persons and families of that description, to locate themselves within the limits secured by this organization; and shall, moreover, from time to time, supply the names and residence of such persons to the Congress, for their special notice and information, as among the most important of their duties, and the President is hereby authorized and empowered to afford special aid to such individuals, from such moderate appropriations as the Congress shall be able and may deem it advisable to make for that object. The President and Secretary of State, and in cases of disagreement, the Vice-President shall appoint all civil officers, but shall not have power to remove any officer. All removals shall be the result of a fair trial, whether civil or military.

#### ARTICLE XVII.

Further duties.

It shall be the duty of the President and Secretary of State to find out (as soon as possible) the real friends, as well as enemies of this organization in every part of the country; to secure among them, innkeepers, private postmasters, private mail-contractors, messengers, and agents; through whom may be obtained correct and regular information, constantly; recruits for the service, places of deposit and sale; together with all needed supplies; and it shall be matter of special regard to secure such facilities through the Northern States.

#### ARTICLE XVII.

Duty of the President.

It shall be the duty of the President, as well as the House of Representatives, at all times, to inform the Commander-in-Chief of any matter that may require his attention, or that may affect the public safety.

#### ARTICLE XIX.

Duty of President—continued.

It shall be the duty of the President to see that the provisional ordinances of this organization, and those made by the Congress, are

promptly and faithfully executed; and he may in cases of great urgency call on the Commander-in-Chief of the army, or other officers for aid; it being, however, intended that a sufficient civil police shall always be in readiness to secure implicit obedience to law.

#### ARTICLE XX.

The Vice-President.

The Vice-President shall be the presiding officer of the Provisional Congress; and in cases of tie shall give the casting vote.

#### ARTICLE XXI.

Vacancies.

In case of the death, removal, or inability of the President, the Vice President, and next to him the Chief-Justice of the Supreme Court, shall be the President during the remainder of the term; and the place of the Chief-Justice thus made vacant shall be filled by Congress from some of the members of said court; and the places of the Vice-President and Associate Justice thus made vacant, filled by an election by the united action of the Provisional Congress and members of the Supreme Court. All other vacancies, not heretofore specially provided for, shall, during the first three years, be filled by the united action of the President, Vice-President, Supreme Court, and Commander-in-Chief of the army.

#### ARTICLE XXII.

Punishment of crimes.

The punishment of crimes not capital, except in case of insubordinate convicts or other prisoners, shall be (so far as may be) by hard labor on the public works, roads, etc.

#### ARTICLE XXIII.

Army appointments.

It shall be the duty of all commissioned officers of the army to name candidates of merit for office or elevation to the Commander-in-Chief, who, with the Secretary of War, and, in cases of disagreement, the President, shall be the appointing power of the army; and all commis-

sions of military officers shall bear the signatures of the Commander-in-Chief and the Secretary of War. And it shall be the special duty of the Secretary of War to keep for constant reference of the Commander-in-Chief a full list of names of persons nominated for office, or elevation, by the officers of the army, with the name and rank of the officer nominating, stating distinctly but briefly the grounds for such notice or nomination. The Commander-in-Chief shall not have power to remove or punish any officer or soldier; but he may order their arrest and trial at any time, by court-martial.

#### ARTICLE XXIV.

Courts-martial.

Courts-martial for Companies, Regiments, Brigades, etc., shall be called by the chief officer of each command, on complaint to him by any officer, or any five privates, in such command, and shall consist of not less than five nor more than nine officers, non-commissioned officers, and privates, one-half of whom shall not be lower in rank than the person on trial, to be chosen by the three highest officers in the command, which officers shall not be a part of such court. The chief officer of any command shall, of course, be tried by a court-martial of the command above his own. All decisions affecting the lives of persons, or office of persons holding commission, must, before taking full effect, have the signature of the Commander-in-Chief, who may also, on the recommendation of, at least, one-third of the members of the court-martial finding any sentence, grant a reprieve or commutation of the same.

#### ARTICLE XXV.

Salaries.

No person connected with this organization shall be entitled to any salary, pay, or emolument, other than a competent support of himself and family, unless it be from an equal dividend, made of public property, on the establishment of peace, or of special provision by treaty; which provision shall be made for all persons who may have been in any active civil or military service at any time previous to any hostile action for Liberty and Equality.

## ARTICLE XXVI.

Treaties of peace.

Before any treaty of peace shall take full effect, it shall be signed by the President and Vice-President, the Commander-in-Chief, a majority of the House of Representatives, a majority of the Supreme Court, and a majority of all the general officers of the army.

## ARTICLE XXVII.

Duty of the military.

It shall be the duty of the Commander-in-Chief and all officers and soldiers of the army to afford special protection when needed, to Congress, or any member thereof; to the Supreme Court, or any member thereof; to the President, Vice-President, Treasurer, Secretary of State, Secretary of Treasury, and Secretary of War; and to afford general protection to all civil officers, or other persons having right to the same.

## ARTICLE XXVIII.

Property.

All captured or confiscated property, and all property the product of the labor of those belonging to this organization and of their families, shall be held as the property of the whole, equally, without distinction; and may be used for the common benefit, or disposed of for the same object; and any person, officer, or otherwise, who shall improperly retain, secrete, use, or needlessly destroy such property, or property found, captured, or confiscated, belonging to the enemy, or shall willfully neglect to render a full and fair statement of such property by him so taken or held, shall be deemed guilty of a misdemeanor and, on conviction, shall be punished accordingly.

## ARTICLE XXIX.

Safety or Intelligence Fund.

All money, plate, watches, or jewelry, captured by honorable warfare, found, taken, or confiscated, belonging to the enemy, shall be held sacred, to constitute a liberal safety or intelligence fund; and any person who shall improperly retain[,] dispose of, hide, use, or destroy such money or other article above named, contrary to the provisions and

spirit of this article, shall be deemed guilty of theft, and, on conviction thereof, shall be punished accordingly. The Treasurer shall furnish the Commander-in-Chief at all times with a full statement of the condition of such fund and its nature.

#### ARTICLE XXX.

The Commander-in-Chief and the Treasury.

The Commander-in-Chief shall have power to draw from the Treasury the money and other property of the fund provided for in Article twenty-ninth, but his orders shall be signed also by the Secretary of War, who shall keep strict account of the same; subject to examination by any member of Congress, or general officer.

#### ARTICLE XXXI.

Surplus of the Safety or Intelligence Fund.

It shall be the duty of the Commander-in-Chief to advise the President of any surplus of the Safety and Intelligence Fund; who shall have power to draw such surplus (his order being also signed by the Secretary of State) to enable him to carry out the provisions of Article Seventeenth.

#### ARTICLE XXXII.

Prisoners.

No person, after having surrendered himself or herself a prisoner, and who shall properly demean himself or herself as such, to any officer or private connected with this organization, shall afterward be put to death, or be subject to any corporeal punishment, without first having had the benefit of a fair and impartial trial; nor shall any prisoner be treated with any kind of cruelty, disrespect, insult, or needless severity; but it shall be the duty of all persons, male and female, connected herewith, at all times and under all circumstances, to treat all such prisoners with every degree of respect and kindness that the nature of the circumstances will admit of; and to insist on a like course of conduct from all others, as in the fear of Almighty God, to whose care and keeping we commit our cause.

## ARTICLE XXXIII.

## Voluntaries.

All persons who may come forward and shall voluntarily deliver up their slaves, and have their names registered on the Books of the organization, shall, so long as they continue at peace, be entitled to the fullest protection of person and property, though not connected with this organization, and shall be treated as friends, and not merely as persons neutral.

## ARTICLE XXXIV.

## Neutrals.

The persons and property of all non-slaveholders who shall remain absolutely neutral, shall be respected so far as the circumstances can allow of it; but they shall not be entitled to any active protection.

## ARTICLE XXXV.

## No needless waste.

The needless waste or destruction of any useful property or article, by fire, throwing open of fences, fields, buildings, or needless killing of animals, or injury of either, shall not be tolerated at any time or place, but shall be promptly and properly punished.

## ARTICLE XXXVI.

## Property confiscated.

The entire and real property of all persons known to be acting either directly or indirectly with or for the enemy, or found in arms with them, or found willfully holding slaves, shall be confiscated and taken, whenever and wherever it may be found, in either free or slave States.

## ARTICLE XXXVII.

## Desertion.

Persons convicted, on impartial trial, of desertion to the enemy after becoming members, acting as spies, or of treacherous surrender of property, arms, ammunition, provisions, or supplies of any kind, roads,



bridges, persons, or fortifications, shall be put to death and their entire property confiscated.

#### ARTICLE XXXVIII.

Violation of parole of honor.

Persons proven to be guilty of taking up arms after having been set at liberty on parole of honor, or, after the same, to have taken any active part with or for the enemy, direct or indirect, shall be put to death and their entire property confiscated.

#### ARTICLE XXXIX.

All must labor.

All persons connected in any way with this organization, and who may be entitled to full protection under it; shall be held as under obligation to labor in some way for the general good; and persons refusing, or neglecting so to do, shall, on conviction receive a suitable and appropriate punishment.

#### ARTICLE XL.

Irregularities.

Profane swearing, filthy conversation, indecent behavior, or indecent exposure of the person, or intoxication or quarreling, shall not be allowed or tolerated; neither unlawful intercourse of the sexes.

#### ARTICLE XLI.

Crimes.

Persons convicted of the forcible violation of any female prisoner shall be put to death.

#### ARTICLE XLII.

The marriage relation—schools—the Sabbath.

The marriage relation shall be at all times respected; and families kept together as far as possible; and broken families encouraged to re-unite, and intelligence offices established for that purpose, schools and

churches established, as soon as may be, for the purpose of religious and other instructions; and the first day of the week regarded as a day of rest and appropriated to moral and religious instruction and improvement; relief of the suffering, instruction of the young and ignorant, and the encouragement of personal cleanliness; nor shall any persons be required on that day to perform ordinary manual labor, unless in extremely urgent cases.

#### ARTICLE XLIII.

Carry arms openly.

All persons known to be of good character, and of sound mind and suitable age, who are connected with this organization, whether male or female, shall be encouraged to carry arms openly.

#### ARTICLE XLIV.

No person to carry concealed weapons.

No person within the limits of the conquered territory, except regularly appointed policemen, express officers of the army, mail carriers, or other fully accredited messengers of the Congress, President, Vice-President, members of the Supreme Court, or commissioned officers of the army—and those only under peculiar circumstances—shall be allowed, at any time, to carry concealed weapons; and any person not specially authorized so to do, who shall be found so doing, shall be deemed a suspicious person, and may at once be arrested by any officer, soldier, or citizen, without the formality of a complaint or warrant, and may at once be subjected to thorough search, and shall have his or her case thoroughly investigated; and be dealt with as circumstances, on proof, shall require.

#### ARTICLE XLV.

Persons to be seized.

Persons within the limits of the territory holden by this organization, not connected with this organization, having arms at all, concealed or otherwise, shall be seized at once; or be taken in charge of some vigilant officer; and their case thoroughly investigated; and it shall be the duty of all citizens and soldiers, as well as officers, to arrest such parties as are named in this and the preceding Section or Article, without the

formality of complaint or warrant; and they shall be placed in charge of some proper officer for examination, or for safe keeping.

#### ARTICLE XLVI.

These Articles not for the overthrow of government.

The foregoing Articles shall not be construed so as in any way to encourage the overthrow of any State Government, or of the General Government of the United States, and look to no dissolution of the Union, but simply to Amendment and Repeal. And our flag shall be the same that our Fathers fought under in the Revolution.

#### ARTICLE XLVII.

No plurality of offices.

No two of the offices specially provided for, by this Instrument, shall be filled by the same person, at the same time.

#### ARTICLE XLVIII.

Oath.

Every officer, civil or military, connected with this organization shall, before entering upon the duties of his office, make solemn oath or affirmation to abide by and support this Provisional Constitution and these Ordinances. Also every Citizen and Soldier, before being fully recognized as such, shall do the same.

Schedule.

The President of this Convention shall convene, immediately on the adoption of this instrument, a convention of all such persons as shall have given their adherence, by signature, to the constitution, the President of this convention presiding, and issuing commissions to such officers elect; all such officers being thereafter elected in the manner provided in the body of this instrument.

## APPENDIX B

JOHN BROWN'S COVENANT FOR THE ENLISTMENT OF HIS  
VOLUNTEER-REGULAR COMPANY. August, 1856

—Kansas Territory, A.D. 1856

I. *The Covenant.*

We whose names are found on these & the next following pages do hereby enlist ourselves to serve in the Free State cause under John Brown as commander during the full period of time affixed to our names respectively: and we severally pledge our word and sacred honor to said Commander; and to each other, that during the time for which we have enlisted we will faithfully and punctually perform our duty (in such capacity or place as may be assigned to us by a Majority of all the votes of those associated with us or of the companies to which we may belong as the case may be) as a regular volunteer force for the maintenance of the rights and liberties of the Free State citizens of Kansas: and we further agree that as individuals we will conform to the *by Laws of this association* & that *we will insist* on their regular and punctual *enforcement* as a first and last duty; and in short that we will observe and maintain a strict an[d] thorough military discipline at all times until our term of service expires.

Names, dates of enlistment, and term of service on next Pages. Terms of service omitted for want of room (principally for the War.)

2. *Names and date of enlistment.*

- Aug. 22. Wm. Partridge (imprisoned), John Salathiel, S. Z. Brown,  
John Goodell, L. F. Parsons, N. B. Phelps, Wm. B. Harris.  
Aug. 23. Jason Brown (son of commander; imprisoned.)  
Aug. 24. J. Benjamin (imprisoned)  
Aug. 25. Cyrus Tator, R. Reynolds (imprisoned), Noah Frazee (1<sup>st</sup>  
Lieut.), Wm.  
Miller, John P. Glenn, Wm. Quick, M.D. Lane, Amos  
Alderman, August  
Bondie, Charles Kaiser (murdered Aug. 30),  
Freeman Austin (aged 57 years),  
Samuel Hauser, John W. Foy,  
Jas. H. Holmes (Capt).  
Aug. 26. Geo. Partridge (killed Aug. 30), Wm. A. Sears.  
Aug. 27. S. H. Wright.  
Aug. 29. B. Darrach (Surgeon), Saml. Farrar.

Sept. 8. Timothy Kelley, Jas. Andrews.  
Sept. 9. W. H. Lehman, Charles Oliver, D. H. Hurd.  
Sept. 15. Wm. F. Harris.  
Sept. 16. Saml. Geer (Commissary).

3. *Bylaws of the Free-State regular Volunteers of Kansas enlisted under the command of John Brown.*

Article 1st. Those who agree to be governed by the following articles & whose names are appended will be known as the Kansas regulars.

Article 2d. Every officer connected with this organization (except the Commander already named) shall be elected by a majority of the members *if* above a Captain; & if a Captain or under a Captain, by a majority of the company to which they belong.

Article 3d. All vacancies shall be filled by a vote of the majority of members; or companies as the case may be: & all members shall be alike eligible to the highest office.

Article 4th. All trials of officers or of privates for misconduct shall be by a jury of Twelve chosen by a majority of members of company or companies as the case may be. each Company shall try its own members.

Article 5th. All valuable property taken by honorable warfare from the enemy, shall be held as the property of the whole company or companies as the case may be equally, without distinction; to be used for the common benefit, or be placed in the hands of responsible agents for sale: the proceeds to be divided as nearly equally amongst the company or *companies* capturing it as may be. except that no persons shall be entitled to any dividend from property taken before he entered service; and any person guilty of desertion, or convicted of gross violations of his obligations to those with whom he should act, whether officer or private, shall forfeit his interest in all dividends made after such misconduct has occurred.

Article 6th. All property captured shall be delivered to the receiver of the force or company, as the case may be; whose duty it shall be to make a full inventory of the same (assisted by such person, or persons as may be chosen for that purpose), a copy of which shall be made into the books of this organization and held subject to examination by any member, on all suitable occasions.

Article 7th. The Receiver shall give his receipts in a book for that purpose for all moneys & other property of the Regulars placed in his

hands and keep an inventory of the same and make copy as provided in Article VI.

Article 8th. Captured articles when used for the benefit of the members shall be receipted for by the Commissary the same as moneys placed in his hands. the receivers to hold said receipts.

Article 9th. A disorderly retreat shall not be suffered at any time and every officer and private, be, and is by this article fully empowered to prevent the same by force if need be, & any attempt at leaving the ground be and during a fight is hereby declared disorderly, unless the consent or direction of the officer then in command have authorized the same.

Article 10th. A disorderly attack or charge shall not be suffered at any time.

Article 11th. When in camp a thorough watch both regular and picket shall be maintained both by day and by night, and visitors shall not be suffered to pass or repass without leave from the Captain of the Guard and under common or ordinary circumstances it is expected that the Officers will cheerfully share this service with the privates for examples sake.

Article 12th. Keeping up fires or lights after dark, or firing of guns pistols or caps, or boisterous talking while in camp shall not be allowed except for fires and lights when unavoidable.

Article 13th. When in camp neither officers nor privates shall be allowed to leave without consent of the Officer then in command.

Article 14th. All uncivil, ungentlemanly, profane, vulgar talk or conversation shall be discountenanced.

Article 15th. All acts of petty theft needless waste of property of the members or of citizens is hereby declared disorderly, together with all uncivil and unkind treatment of citizens or of prisoners.

Article 16th. In all cases of capturing property, a sufficient number of men shall be detailed to take charge of the same, all others shall keep in their position.

Article 17th. It shall at all times be the duty of the Quarter master to select ground for encampment subject however to the approbation of the commanding officer.

Article 18th. The Commissary shall give receipts in a book for that purpose, for all moneys provisions, and stores put into his hands.

Article 19th. The Officers of Companies shall see that the arms of the same *are in constant good order* and a neglect of this duty shall be deemed disorderly.

Article 20th. No person after having first surrendered himself a prisoner shall be put to death or subjected to corporeal punishment, without first having had the benefit of an impartial trial.

Article 21st. A wagon master and an assistant shall be chosen for each Company whose duty it shall be to take a general oversight and care of the teams, wagons, harness and all other articles of property pertaining thereto: and who shall both be exempt from serving on guard.

Article 22d. The ordinary use, or introduction into the camp of any intoxicating liquors, as a beverage: is hereby declared disorderly.

Article 23d. A majority of Two thirds of all the Members may at any time alter or amend the foregoing articles.

## APPENDIX C

A DECLARATION OF LIBERTY BY THE REPRESENTATIVES OF  
THE SLAVE POPULATION OF THE UNITED STATES OF AMERICA.

When in the course of Human events, it becomes necessary for an oppressed People to Rise, and assert their Natural Rights, as Human Beings, as Native and Mutual Citizens of a free Republic, and break that odious yoke of oppression, which is so unjustly laid upon them by their fellow countrymen, and to assume among the powers of Earth the same equal privileges to which the Laws of Nature, and nature's God entitle, them; A moderate respect for the opinions of Mankind, requires that they should declare the causes which incite them to this Just & worthy action.

We hold these truths to be Self Evident; That all men are created Equal; That they are endowed by the Creator with certain unalienable rights. That among these are Life, Liberty; & pursuit of happiness . . . .

The history of Slavery in the United States, is a history of injustice and cruelties inflicted upon the Slave in every conceivable way, and in barbarity not surpassed by the most savage Tribes. It is the embodiment of all that is Evil, and ruinous to a Nation; and subversive of all Good. In proof of which; facts innumerable have been submitted to the People, and have received the verdict and condemnation of a candid and Impartial World. Our Servants; Members of Congress; and other servants of the People, who receive exorbitant wages, from the People; in return for their unjust Rule, have refused to pass laws for the accommodation of large districts of People, unless that People, would relinquish the right of representation in the Legislation, a right inestimable of them, and formidable to tyrants only. Our President and other Leeches have called together legislative, or treasonable Bodies, at places unusual, uncomfortable, and distant from the depository of our public records; for the sole purpose of fatigueing us into compliance with their measures. They have desolved Representative houses, for opposing with manly firmness, their invasions of the rights of the people.

They have refused to grant Petitions presented by numerous and respectable Citizens, asking redress of grivances imposed upon us, demanding our Liberty and natural rights. With contempt they spurn our humble petitions; and have failed to pass laws for our relief. . . . They



have abdicated government among us, by declaring us out of their protection, and waging a worse than cruel war upon us continually.

The facts and full description of the enormous sin of Slavery, may be found in the General History of American Slavery, which is a history of repeated injuries, of base hypocrisy; A cursed treasonable, usurpation; The most abominable provoking atrocities; which are but a mockery of all that is Just, or worthy of any people. Such cruelty, tyranny, and perfidy, has hardly a parallel, in the history of the most barbarous ages.

Our Servants, or Law makers; are totally unworthy the name of Half Civilized Men. All their National acts, (which apply to slavery,) are false, to the words Spirit, and intention, of the Constitution of the United States, and the Declaration of Independence. . . .

In every stage of these oppressions, we have petitioned for redress, in the most humble terms, Our repeated petitions have been answered only by repeated Injury. A Class of oppressors, whose character is thus marked by every act which may define a Tyranical Despotism, is unfit to rule any People. Nor have we been wanting in attention, to our oppressors; We have warned them from time to time, of attempts (made by their headlong Blindness,) to perpetrate, extend, strengthen, and revive the dying elements of this cursed Institution. We have reminded them of our unhappy condition, and of their Cruelties. We have appealed to their native Justice and magnanimity, we have conjured them by the ties of our common nature, our Brotherhood, & common Parentage, to disavow these usurpations, which have destroyed our Kindred friendship, and endangered their safety. They have been Deaf to the voice of Justice & Consanguinity. We must therefore acquiece in the necessity, which denounces their tyranny & unjust rule over us. Declaring that we will serve them no longer as slaves, knowing that the "Laborer is worthy of his hire." We therefore, the Representatives of the circumscribed citizens of the United States, of America in General Congress assembled, appealing to the supreme Judge of the World, for the rectitude of our intentions, Do in the name, & by authority of the oppressed Citizens of the Slave States, Solemnly publish and Declare: that the Slaves are, & of right ought to be as free & and independent as the unchangable Law of God, requires that All Men Shall be. That they are absolved from all allegiance to those Tyrants, who still presist in forcibly subjecting them to perpetual Bondage, and that all friendly connection between them & such Tyrants, is, & ought to be totally desolved, And that as free, & independent citizens of these states, they have a perfect

right, a sufficient & just cause, to defend themselves against the tyranny of their oppressors. To solicit aid from & ask the protection of all true friends of humanity & reform, of whatever nation, & wherever found; A right to contract Alliances, & to do all other acts & things which free independent Citizens may of right do. And for the support of Declaration; with a firm reliance on the protection of Devine Providence; We mutually Pledge to each other, Our Lives, and Our Sacred Honor. Indeed; I tremble for my Country, when I reflect; that God is Just; And that his Justice; will not sleep forever &c. &c. Nature is mourning for its murdered, and Afflicted Children. Hung be the Heavens in Scarlet.

