

Today's Issues Readings for Jan 26 2020

For this Sunday, 1/26/2020, the Today's Issues group will discuss two essays from the January 16 issue of the New York Review of Books.

Page 12, Noah Feldman, "Is Trump Above the Law,"

Page 29, David Blight, "A Doubtful Freedom," a review of "*The War Before the War: Fugitive Slaves and the Struggle for America's Soul from the revolution to the Civil War*," a book by Andrew Delbanco.

The group meets at 9:30 on Sunday mornings in the Parlor of the Religious Education Building next to the Church. Please do the readings and join our lively discussion.

Copies of the readings are attached

Is Trump Above the Law?

Noah Feldman JANUARY 16, 2020 ISSUE

Donald Trump; drawing by Tom Bachtell

Donald Trump's impeachment by the House of Representatives marks just the third time in history that a president of the United States has had to face trial in the Senate. The charges in the articles of impeachment drawn up by the House Judiciary Committee against Trump differ in important ways from those brought against Presidents Andrew Johnson and Bill Clinton, and they deserve close scrutiny. Trump's possible defenses also merit careful analysis. Even if Trump does not send a lawyer to the Senate to defend him, he will be defended by Republican senators. And because it appears highly unlikely that he will be convicted by the requisite two thirds of the Senate, it is also worth exploring the implications of impeachment without removal from office, both for Trump's presidency and for the future of American constitutional democracy.

1.

The first article of impeachment against Trump alleges that he "abused the powers of the Presidency" in that he "solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election." It goes on to delineate three instances of his abuse of office. First, the article says that Trump "corruptly solicited" investigations "that would benefit his reelection," one into former vice president Joe Biden and the other into the "discredited theory...that Ukraine—rather than Russia—interfered in the 2016 United States Presidential election." Second, it says that "with the same corrupt motives," Trump made both the release of \$391 million in military aid to Ukraine and a White House meeting with the Ukrainian president conditional on Ukraine's announcement that it would undertake these investigations. Third, the article says that although Trump released the aid after his actions became publicly known, he

“persisted in openly and corruptly urging and soliciting Ukraine to undertake investigations for his personal political benefit.”

Finally, in a clause that starts with the legal word “wherefore,” the article asserts that Trump “will remain a threat to national security and the Constitution if allowed to remain in office” and that he “has acted in a manner grossly incompatible with self-governance and the rule of law.” It concludes that Trump “thus warrants impeachment and trial, removal from office, and disqualification” from future government service.

The charge of abuse of office for personal gain fits neatly into the sense of high crimes and misdemeanors familiar to the framers when they wrote the Constitution. They were particularly concerned that a sitting president would abuse his office to get reelected.¹

Nevertheless, there is a range of defenses that Trump or his proxies could raise to the charge. One is purely fact-based. The president’s supporters can claim, as some did in the House, that Trump never conditioned aid or a White House meeting on Ukraine’s announcement of the investigations. In short, there was no quid pro quo.

The main trouble with this defense is that the factual record compiled by the House Permanent Select Committee on Intelligence effectively proves that there was a quid pro quo. Ambassador Gordon Sondland testified expressly that there was. He even testified that Trump told him there was no quid pro quo but that he understood Trump to mean that the aid and White House visit were conditioned on announcing investigations—in other words, a quid pro quo. Trump’s supporters are left insisting weakly that Sondland didn’t understand the president correctly, even though he had by that point been a central participant in Trump’s Ukraine policy for months.

A further problem with the “no quid pro quo” defense is that no actual exchange or quid pro quo is necessary to sustain the charge of abuse of power. On its own, the request that Trump made to Ukrainian president Volodymyr Zelensky in his July 25, 2019, phone call qualifies as solicitation under the terms of the article of impeachment. Trump abused his office merely by requesting the “favor” he mentioned in the call. To convict him, the Senate doesn’t have to accept all three instances of abuse of power mentioned in the article. One would suffice.

A different type of fact-based defense would emphasize not Trump’s actions but his motives. The president’s defenders can assert—and did in the House—that he did not seek personal advantage when he solicited the investigations. Rather, they may say, Trump genuinely was concerned about corruption in Ukraine, and held up aid and the White House meeting in order to give Ukraine incentives to take it seriously. In its crudest form, this defense is notably unconvincing. Trump showed no personal interest in corruption generally in Ukraine, or anywhere else, in the period when he was insisting on the announcement of the investigations. Such an announcement would have had an obvious and significant personal benefit to Trump, weakening Biden’s presidential prospects and harming the Democrats. (Indeed, Biden seems to

have been considerably weakened by public discussion of his son's position on the board of directors of the Ukrainian energy company Burisma, even without a formal investigation.)

There is, however, a more sophisticated form of this defense based on Trump's intentions, namely the argument that he acted with mixed motives: he may have anticipated personal benefit from the investigations, but he also had a legitimate interest in combating corruption. In its strongest form, the argument would insist that it is too difficult to disentangle legitimate from illegitimate motives, and that Trump should not be removed from office for conduct that could have had a legitimate explanation.

The article of impeachment implicitly addresses this defense by repeatedly using the adverb "corruptly" to describe Trump's solicitation of Zelensky to announce the investigations. According to the allegations, what makes Trump's conduct "corrupt" is precisely the motive of personal advantage, which outweighed the national interest. Trump's supporters' legal response would presumably be that there can be no convincing demonstration of corrupt motives in the presence of potentially valid motives.

The best answer to this defense is that the possible existence of a noncorrupt motive for Trump's action doesn't negate the presence of the corrupt motive. If Trump aimed to benefit himself, it should not matter for constitutional purposes whether he also wanted to do good for the country. The principle here is that abuse of office is not mitigated by the possibility that the official conduct might have positive effects.

Consider a classic case of the impeachable offense of abuse of office for personal gain: an officeholder takes outside money to do the job that he is already supposed to perform to earn his government salary. Imagine an attorney general who took a gift from one mobster to influence him to prosecute another mobster. The ensuing mob prosecution might be entirely legitimate and in the public interest. But by taking the gift, the attorney general would have committed an impeachable offense.

It wouldn't matter that the attorney general might be glad to see the mobster he chose to prosecute put in prison, or that the country might benefit from it. The core offense of abuse of office lies in taking the gift, and thereby exploiting the office for personal benefit. Impeachments of this type were common in eighteenth-century England and known to the framers. The impeachable offenses of bribery and what was called "color of office extortion" in the English tradition were committed when a high officeholder took gifts of value to do his job.

It follows that if Trump sought personal advantage in the form of the announcement of the investigations, then his act of soliciting them was ipso facto an abuse of office. It does not matter that he could conceivably also have had a broader public interest in fighting corruption. The abuse of office was committed when he used the power of the presidency to seek personal advantage. On this understanding of abuse of office, it is not necessary to demonstrate that

Trump's motives were primarily or mostly corrupt. The presence of the corrupt motive of self-gain is enough.²

2.

The limits of the factual case in defense of Trump bring us to his possible legal defenses. The first of these, voiced in the House debates and sure to be heard in the Senate, is that impeachment for high crimes and misdemeanors requires a criminal offense as defined by statute or common law, and that the articles of impeachment do not allege one. In its simplest form, this argument can be refuted by observing that in the English tradition there were impeachments for acts that were not forbidden by statutory or common law, and that the framers certainly did not recognize any such limitation. Furthermore, previous impeachments that led to removal from office (not of presidents but of judges) have proceeded based on acts that were not crimes.

There are, however, two better-formulated versions of this defense, one historical and the other philosophical. The historical defense depends on the claim that both Johnson and Clinton were impeached for criminal acts, and that the articles of impeachment against Richard Nixon also invoked statutory crimes. While superficially appealing, this argument turns out to be weak when examined closely.

Johnson was impeached for violating the Tenure of Office Act, a law of very doubtful constitutionality that was enacted by Congress as an impeachment trap for the president. It purported to prohibit him from firing cabinet officials without the approval of the Senate. It then declared that violation would constitute a "high misdemeanor." The phrase was chosen to depict Johnson's anticipated resistance as impeachable. A "high misdemeanor" is not a statutory crime, and the term comes from the Constitution, not ordinary federal statutory law.³ (The law did specify that "upon trial and conviction," anyone violating it would be "punished" by a fine of up to \$10,000 or up to ten years' imprisonment, or both. But it is clear that Congress did not intend the "high misdemeanor" actually to be tried in the federal courts, but only to impeach the president.) Johnson was thus not impeached for violating an ordinary criminal statute, but for the high misdemeanor of firing his secretary of war. It is therefore misleading to say that all the presidents who have been impeached were charged with statutory crimes.

The philosophical defense that the president should only be impeachable for a defined statutory crime is probably the strongest defense available to Trump's supporters. It rests on what is sometimes called the principle of legality, namely that no one should be punished without notice of a crime specified in advance.⁴ As expressed by the House Judiciary Committee's ranking Republican, Doug Collins, the argument is that Democrats should not be able to impeach simply by reciting the words "abuse of power" and then assigning any meaning they want to those words.

The strength of this defense rests on the intuitive sense that it must be unfair to punish someone for conduct he could not have known would merit punishment. Yet impeachment and

removal are not punishments. Any criminal punishment for the president's actions would have to result from a separate criminal trial, at which the principle of legality would apply.

More basically, however, it is often perfectly legitimate to sanction someone for conduct that is obviously morally wrong, even if it has not been clearly delineated in writing in advance. That is why, as a historical matter, common law judges sometimes punished behavior that was not known in advance to be criminal but that they considered morally wrong in itself. It is also surely the reason why constitutional commentators like Supreme Court Justice Joseph Story thought that the words "high crimes and misdemeanors" were intended to be open-ended—and considered that open-endedness perfectly legitimate. Some conduct by a president is so obviously wrong that it does not have to have been specified in advance. Trump, like every president before him, should have known that it would be morally wrong to use the power of his office to solicit a foreign government to investigate his presidential rival for his personal benefit.

3.

The second article of impeachment charges Trump with obstruction of Congress, stating that he "has directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives pursuant to its 'sole Power of Impeachment.'" The three specific acts mentioned include Trump's defying a subpoena to produce documents; directing all executive branch agencies to do the same; and ordering "current and former" executive branch officials not to comply with specific subpoenas, orders obeyed by nine named individuals.

If Trump's abuse of office for personal gain is the epitome of the conduct feared by the framers, his outright refusal to cooperate in any way with the House impeachment inquiry would almost certainly have taken them by surprise. Nothing in the debates at the Constitutional Convention or the ratifying conventions that followed suggests that the framers even began to imagine an executive who would purport to deny the House its power to impeach him. I can find no example of any royal official in England who defied or denied the impeachment power of the House of Commons.

The framers did, however, provide a remedy for a president who refused to cooperate in an impeachment inquiry: impeachment itself. As a matter of basic constitutional logic, the only thing the House of Representatives can do when faced with presidential refusal to cooperate in impeachment is to impeach the president for that same act of obstruction. The Constitution makes this possible because it does not specify any process that the House must use to impeach, or indeed require any investigation at all before impeachment. The House's power to impeach is effectively absolute. All it takes is a majority vote.

If the House lacked the power to impeach on the basis of obstruction of Congress, it is easy to see what the consequences would be. The president could impede any investigation of his conduct initiated within the executive branch, because the entirety of the executive branch answers to him. The view of the Department of Justice is that the president cannot be criminally indicted while in office. Even if that opinion, memorialized in memoranda by multiple

administrations, is constitutionally incorrect, it makes no practical difference—all federal criminal prosecutions must be initiated by the executive branch.⁵

A president who cannot be criminally investigated and also cannot be investigated by Congress would be effectively above the law. That is why it is so constitutionally evident that obstruction of Congress must be a high crime and misdemeanor. Denying Congress's power to conduct an impeachment inquiry subverts the foundation of democratic government.

Trump's first public assertion of his refusal to cooperate with Congress came in a letter from White House counsel Pat Cipollone to congressional leaders dated October 8, 2019. The letter not only refused all cooperation; it went so far as to condemn the House's impeachment inquiry as unconstitutional. Perhaps needless to say, the president cannot be the judge of the constitutionality of an effort to impeach him.

The main defense available to Trump on this charge is that the Supreme Court, in the Nixon tapes case, spoke of a sphere of "executive privilege," in which senior executive branch officials under some circumstances might not be required to answer questions. The case concerned a judicial subpoena rather than a congressional subpoena, but the principle might well be the same. Trump's defenders may say that the president must have the legitimate right to go to the courts to challenge subpoenas against the executive branch, and that doing so should not count as an impeachable offense. According to this view, Trump's directive to the executive branch and its officials is not obstruction of Congress, but rather a justifiable assertion of executive privilege that should be fought out in the courts.

No doubt the Supreme Court's creation of the doctrine of executive privilege affords a president some latitude in challenging congressional subpoenas directed at his personal communications with his senior advisers. But that is distinctly different from a blanket order to stonewall Congress and refuse to comply with any subpoenas at all. To begin with, most officers in the executive branch are not in close personal contact with the president, and executive privilege would not apply to them. As for those to whom it might apply, they ought to appear before Congress and refuse to answer any questions that he or she (or the president) believes violate the privilege. As the federal district court judge Ketanji Brown Jackson has recently held, there is no "absolute immunity" for senior presidential advisers to refuse to appear before Congress, notwithstanding Justice Department memoranda to the contrary.

The upshot is that while it is not obstruction of Congress for Trump to seek judicial review of particular subpoenas—or even to assert "absolute immunity" for senior aides—it is obstruction for him to refuse all of the House's efforts to investigate him for the purpose of impeachment. One of the articles of impeachment against Nixon was for obstruction of Congress. Nixon engaged in far less obstruction than Trump. Despite his refusal to hand over the White House tapes until compelled to do so by the courts, Nixon permitted some executive branch officials to testify and provided some documents requested by Congress.

4.

If the Senate does not remove Trump, what will that mean for his presidency, and for impeachment itself? Although the word “acquittal” is often used to describe the failure to reach the two-thirds vote required to remove the president, that is not the same as a criminal acquittal, which requires jury unanimity. Nonremoval does not amount to vindication.

This distinction matters because it shows that impeachment by the House is itself a powerful constitutional act. An impeached president must face trial in the Senate. (And a Senate that refused to hold such a trial would be in violation of the Constitution.) Symbolically, impeachment by the House is the strongest sanction available against a president short of removal from office. It is much stronger than a congressional censure, both because it is apt to come with real-world consequences and because, unlike censure, it is specifically mentioned in the Constitution.

The meaning of impeachment on its own, even without removal, is underscored by the fact that removal is so difficult. By making it possible to impeach with a bare majority of the House while requiring two thirds of the Senate to remove, the framers’ design anticipated the likelihood that impeachments would not result in removal. That structure only makes sense if they considered impeachment itself to be a sanction. Otherwise they could have required a two-thirds vote in the House to impeach, which would have made it much less likely.

Historical experience bears out the consequences of this asymmetric structure. Johnson and Clinton both survived their Senate trials. But both paid a price for the impeachment itself. Johnson, who missed removal by one vote, tried and failed to get the Democratic nomination in 1868, and his historical legacy, already poor, has been further impoverished by his impeachment. Clinton was in his second term, and so reelection was not an issue for him. His impeachment, however, harmed Al Gore, his vice president, who chose to backpedal from his association with Clinton and (narrowly) lost the 2000 election. Clinton’s impeachment probably also harmed the 2016 candidacy of Hillary Clinton: for example, Trump attempted to deflect attention from allegations of sexual assault against him by inviting some of Bill Clinton’s accusers to a presidential debate.

Trump’s supporters have made much of the partisan nature of the current impeachment process. They and Trump can be expected to argue that a party-line vote in the House should vitiate the stigma of impeachment. Trump, who has shown himself impervious to much criticism that would have affected previous presidents, may find himself buoyed by nonremoval. It is even possible that a Senate vote in his favor might help his reelection prospects. If that happens, and Trump is reelected after having been impeached, he may see himself as genuinely above the law, a prospect that is concerning to say the least.

For the long-term strength of the Constitution and the rule of law, much turns on the public perception of why the Senate might choose not to remove Trump. If the public sees nonremoval as purely partisan, it would signal that the Constitution is open to abuse when a party is more

loyal to a president than to the country. But it would not necessarily change the public's belief that impeachment is a serious sanction for dangerously wrongful conduct.

If the public believes the evidence against Trump is insufficient, that would suggest a breakdown in our collective ability to assess facts and draw inferences. It would not, however, meaningfully erode constitutional norms, because it would imply that the public recognizes the gravity of high crimes and misdemeanors in general. From the standpoint of the Constitution, this would actually be the least worst perceived basis for nonremoval.

The most dangerous outcome for constitutional governance would be if the public accepted the facts about Trump's conduct but concluded that it was not impeachable because it was perfectly fine—business as usual. If the American people were to “get over it,” as Trump's acting chief of staff Mick Mulvaney advised in a press conference, it would mean they had accepted the idea that a president may constitutionally abuse his office for personal political gain.

At the Virginia ratifying convention, James Madison explained that no government could “secure liberty or happiness without any virtue in the people.”⁶ The passing of the political virtue necessary for constitutional democracy is terrible to contemplate. But it is not unprecedented in world history.

—December 19, 2019

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I testified to that effect under oath before the House Judiciary Committee on December 4, 2019; see an expanded version of my testimony: “Trump and the Meaning of Impeachment.” ↵

‘A Doubtful Freedom’

David W. Blight JANUARY 16, 2020 ISSUE

The War Before the War: Fugitive Slaves and the Struggle for America's Soul from the Revolution to the Civil War

by Andrew Delbanco

Penguin, 453 pp., \$30.00; \$18.00 (paper)

A Ride for Liberty—The Fugitive Slaves, circa 1862; a painting by Eastman Johnson
Brooklyn Museum

Eastman Johnson: A Ride for Liberty—The Fugitive Slaves, circa 1862

That the United States has been a “nation” since its founding—struggling through slavery, civil conflict, labor strife, economic depressions, and deep ethnic and racial divisions but still surviving as a single polity and people—has long been an article of faith in triumphal versions of our history. “We the People” have often needed a sense of our long continuity if we wished to hold ourselves together. A story, true and false, imagined or otherwise, with remembrance and a good deal of forgetting is perhaps the only thing that can unify a nation. Before he became president, Barack Obama inspired many of us with his clarion call in 2004 that “there is not a

liberal America and a conservative America—there is the United States of America.” In these recent polarized years we’ve seen bitter refutations of this premise, even as its noble impulse survives. Just now the idea of the American nation needs serious attention from historians.

In 1830 the Massachusetts senator Daniel Webster famously pronounced his dedication to “Liberty and Union, now and forever, one and inseparable,” under the tremendous pressure of sectional division between North and South over tariffs, states’ rights, and slavery. In the midst of the 1832 nullification crisis, a confrontation over South Carolina’s resistance to federal tariffs and fear of how they would affect cotton prices, Webster warned that disunion would mean “states dissevered, discordant, belligerent; on a land rent with civil feuds, or drenched...in fraternal blood.”¹ Twenty years later, he stood in the Senate to support the Fugitive Slave Act—a law, widely loathed in his state, requiring that all citizens and officials of free states cooperate in returning escaped slaves to their masters through special new magistrates—while trying to save the Union in the Compromise of 1850.

The Compromise grew out of westward expansion following the Mexican War in the late 1840s, which raised the question of whether slavery would exist in California or any new state formed in the vast southwest territories gained from Mexico. In close sectionalized rather than partisan votes, Congress admitted California as a free state, set new borders for Texas, and opened up the entire southwest to the possible expansion of slavery, while ending slave-trading in the District of Columbia. Congress also passed the Fugitive Slave Act, which allowed Southerners to think that they had secured a federal legal system by which to retrieve their runaway “property.” The Compromise, however, was a weak and untenable settlement of the slavery question, and it backfired by stimulating a more militant antislavery movement. This time, the patriotic urge for union ultimately failed, and a decade later the nation collapsed and descended into civil war.

A United States? Has it ever been truly thus? Well, yes, at times, depending on whom you ask. Was it united before the cataclysm of the Civil War and its aftermath prompted the crafting of a second American Constitution in the Thirteenth, Fourteenth, and Fifteenth Amendments—amounting to a second republic, out of the ashes of slavery and bloodshed? In *The War Before the War*, Andrew Delbanco replies with a determined no to the question of whether antebellum America had ever been truly united.

Delbanco, a distinguished literary historian, argues that, compared with all the other crises facing the young American republic, nothing produced an irresolvable “maelstrom of contradiction” more than the question of fugitive slaves. The existence of slavery was challenge enough to the integrity of the Union, but what crystalized its threat from the beginning was the clash between “feeling” and “duty,” between morality and law regarding what to do about escaping slaves. Did they belong to the slaveholders and therefore need to be retrieved and returned according to the laws governing private property, or were they to be treated as human beings exercising the same natural rights the founders had claimed as justification for their revolt against Britain?

Delbanco writes lyrically and with presentist passion about this basic American paradox, which threatened national comity for almost the first hundred years of the Union. “The fugitive slave story,” he contends, “is a rhyming story. It is impossible to follow it without hearing echoes in our own time.” But also, in his own personal way, he respects those in the middle, the compromisers like Webster who could never resolve this struggle on the country’s journey to national shipwreck. It might seem odd that moderates could be not only tragic losers but also flawed heroes. Compromise, once an honored American tradition for better or for worse (and it produced both), is no longer an esteemed political practice. Delbanco argues for respect for the “miserable centrists” of history (Isaiah Berlin’s phrase for certain of his cold war contemporaries), even as he chastises the hypocrisy of slaveholding advocates of liberty.

Delbanco also writes with a genuine sense of tragedy, and no small dose of indignation, about this story. The founders who crafted the Constitution had compromise “in their DNA.” Yet among the thirty-nine signers of the Constitution, nothing animated the interests of the many slaveholders from the South in their midst more than the right to retrieve their fugitive slave “property,” thus forcing concessions from Northern nonslaveholders. Delbanco contends that without the fugitive slave clause, as Article 4, Section 2, Clause 3 of the Constitution has become known, the whole document could not have been achieved in 1787. The founders’ complicity with slavery while they embraced “liberty” and created a republic is not quite what Delbanco calls the “compulsory question with no satisfactory answer.” The great historian Edmund Morgan concluded that these slaveholding republicans believed deeply in white liberty and black unfreedom, and as eighteenth-century landowners understood their own dire need for a permanent, dependent labor force to sustain their economic world.² The awful contradiction within the inception of the American nation is not so mysterious when we examine its nexus of racism and greed.

Many bargains characterized the original Constitution. Delbanco looks carefully at James Madison’s work in imagining the structure of the Constitution, noting that the slaveholding Virginian, who would later bring some of his own slaves to Washington, D.C., as president, left this remarkable claim in private notes: “It would be wrong to admit in the Constitution the idea that there could be property in men.” It can be painful to read Madison’s tortured assertions that slaves were, in his view, both property and persons. A slave was “compelled to labor, not for himself...vendible by one master to another master,...restrained in his liberty and chastised in his body.” But, Madison maintained, the slave was not “degraded from the human rank...[was] protected...not as a part of the irrational creation...[but] as a moral person.” Delbanco calls such positions “a perverse version of the founders’ vaunted ideal of the ‘prudent mean.’”

At the same time, today we need the reminder that the nature of federalism—the attempted balancing of state and federal power—at the heart of the Constitution is itself rooted in the protection of slavery. Our ongoing struggle over states’ rights owes much to its origins in Madison’s and other founders’ insistence on local control of their chattel in moral persons.

Whether this was a matter of principle or politics for Madison may be beside the point. Delbanco shows how the Constitution's main author embodied the contradiction at the same time that he may have provided later abolitionists a means to harness, rather than only condemn, the founding document. Many, especially Frederick Douglass, did just that, hoping to get the authority of the Bill of Rights and the plea for a "more perfect union" on the side of the antislavery cause. We have never stopped arguing about whether the Constitution was fundamentally proslavery—in effectively sustaining the system—or whether it contained antislavery elements that were revealed over time.³ What we do know is that eventually a strong segment of political abolitionists forged an antislavery interpretation of the Constitution that energized the original Republican Party and helped foment disunion.

Delbanco wrote a marvelous biography of Herman Melville, among other works in literary history.⁴ He often alludes to poets and novelists in this history of strife over the fate of fugitive slaves. As a literary scholar, Delbanco values ambiguity, the confounding character of irony. When it comes to responsibility for slavery's overwhelming power in our national history, he rejects simple fables of good and evil. The book is laced with lines such as this, from Melville's 1849 novel *Mardi*: "Humanity cries out against this vast enormity, but not one man knows a prudent remedy."

Before the war, when Douglass was a radical abolitionist, his solutions for slavery could rarely be called prudent. Delbanco uses the words of this great master of rhetoric as a leitmotif in the book to illustrate the sheer savagery of the irony about slavery in a new country that celebrated itself for its historic freedoms. "We could see no spot this side of the ocean, where we could be free," wrote Douglass in his first autobiography, in which he described his own experience of having been born into slavery. "We knew nothing about Canada.... At every gate through which we were to pass, we saw a watchman—at every ferry a guard—on every bridge a sentinel—and in every wood a patrol." In Douglass's voice one finds the heart of this American tragedy: "On the one hand, there stood slavery, glaring frightfully upon us.... On the other hand, away back in the dim distance, under the flickering light of the north star...stood a doubtful freedom—half frozen—beckoning us to come." For fugitives like Douglass, the nation's devotion to prudence and the law became irrelevant.

Delbanco concludes that slavery in America constituted a "maximum-security prison" for a race of black people in a land where most whites were free to pursue happiness and their constitutional rights. Fugitive slaves were the moving, breathing, bleeding refutations of a unified America. They had few weapons other than their courage and their bodies in their "war" against an emergent disunited nation.

Fugitive slaves, their place on the legal road to disunion, and their actual experiences, expressed in the tradition of the slave narratives, have long interested historians of antebellum America. In a recent book, *The Captive's Quest for Freedom*, R.J.M. Blackett brilliantly and painstakingly probes the story of fugitive slave escapes in the border states as well as the system of adjudication put in place by the 1850 Fugitive Slave Act that was designed to return

them to slavery.⁵ His book complements Delbanco's sweeping story with individual tales of the work of the "commissioners" established by the act, magistrates appointed to prosecute runaways at the demands of their alleged owners. Under the law, many fugitives were returned to slavery either without due process or after a hearing, while almost as many were forcefully freed by the black community, ransomed by abolitionists, or, in a few cases, "acquitted" of their crime of flight. Blackett too finds it inevitable that the fugitive slave crisis first made the federal Union insecure and eventually impossible to sustain. After 1850, the resulting conflict fundamentally challenged the idea of the rule of law, fomented widespread mob violence by black and white Northerners attempting to rescue jailed runaways, and strongly affected social order. Delbanco writes:

The inconsistencies and paradoxes of the fugitive slave problem were by no means limited to the sphere of politics. Men and women from all walks of life were pulled into a maelstrom of contradiction as they tried to come to terms with it.... One judge who sent fugitives back to their masters countenanced the harboring of runaways in his own home.

Delbanco is interested in what he calls the "felt significance" of the fugitive slave crisis on a national scale. Runaway bondsmen cost slaveholders money, but their importance "grew far out of proportion to their numbers or the dollars they represented." In a telling line, he adds, "In the grim work of tabulating the human cost of slavery, cold calculations never tell much about the heat of feeling." Feeling is at the heart of politics, and fugitive slaves became big politics. In the early 1850s a great number of fugitive slave stories made the news, including the highly publicized rescue cases of Shadrach Minkens (successful) and Anthony Burns (unsuccessful) in Boston, or the Christiana "riot" in Pennsylvania that ended in the death of a slaveholder and his bondsmen's escape to Canada, or the rescue and flight north of the border of a bondsman known as Jerry from Syracuse, New York.

The War Before the War presents a clear narrative of the legal and political history of an increasingly polarized dispute over fugitives. This is what he means by "the war before the war," starting with the Constitution, through the Northwest Ordinance (which had its own escaped slave provision), to early resistance from Northern states in personal liberty laws that defied federal enforcement, and to the highly divisive Fugitive Slave Act and the subsequent explosion of rescues and political turmoil. A stark divide emerged in the early 1850s between the more visible morality of the panting runaway and the South's demand to enforce the "law" and return their "property." As Delbanco puts it, "before the fugitive slave law, northerners could pretend that slavery had nothing to do with them. After the fugitive slave law, there was no evading their complicity." Delbanco notes that some of the South's most ardent defenders of slavery were "wary" of the law: "Because slave owners thought of themselves as a besieged 'minority' vulnerable to the expansion of federal power, there was risk in allowing the federal government 'to assume control over the slave property.'"

Delbanco contends that however much they tried, America's political institutions—parties, Congress, the courts, and successive presidents—could not contain a conflict demanding two

separate futures. He implies more support for the right of secession than likely existed in the general population by the late 1850s. Americans were surely divided, but secession was a revolutionary act, as the leaders of the Confederacy were to learn. Extreme advocates of the Tenth Amendment who claimed to be defending merely the principle of states' rights would have their deeper imperatives exposed as proslavery ideology and white supremacy once the question was tested in war.

Delbanco invokes Alexis de Tocqueville's observation that the United States was really only "twenty-four little sovereign nations." He nicely uses Ralph Waldo Emerson's description of the Fugitive Slave Act: an attempt to affirm "an intimate union between two countries, one civilized & Christian & the other barbarous." Emerson described that hated law as a "university to the people" in the North for its galvanizing effects, converting many overnight to some level of antislavery or anti-Southern sentiment. After Henry Clay's famous presentation of the Fugitive Slave Act in the Senate in 1850, the young Walt Whitman published a poem in *The New York Evening Post*, "Song for Certain Congressmen":

Beyond all such we know a term,
Charming to ears and eyes,
With it we'll stab young Freedom,
And do it in disguise;
...That term is "compromise."

And even the conservative, anti-abolitionist Nathaniel Hawthorne, writing to Henry Wadsworth Longfellow in 1851, admitted that "this Fugitive Law is the only thing that could have blown me into any respectable degree of warmth on this great subject of the day."

So steeped is Delbanco in the literature of the American Renaissance that one might mistakenly think it is not necessary to look at Congress or presidents at all to follow the road to disunion. His reading of Harriet Beecher Stowe's *Uncle Tom's Cabin* (1852) as a source for understanding public opinion about fugitive slaves is, however, particularly splendid. Delbanco shows how Stowe used Christian iconography—the escaped slave Eliza fleeing with her baby over the ice floes, and Tom as the suffering Christ—in order "to overcome the obstruction of sympathy by reason." Stowe herself had used the language of iconography in proposing the book to her publisher: "My vocation is simply that of painter," she wrote, because "there is no arguing with pictures." Delbanco quotes Douglass discussing the power of imagery to change minds, and notes that *Uncle Tom's Cabin* evokes "through word-pictures the pathos of a hunted mother and the pity of a god-man crucified." Eliza as a fictional character was, we must remember, the most famous runaway slave in America, more so even than Douglass. Delbanco asserts that "implicit in every word of [Stowe's] devastating book" was the idea that slavery could only die in violence.

In an intriguing aside, he contends that Melville based Captain Ahab directly on the figure of John C. Calhoun, the South's and slavery's most notorious defender and a crucial proponent of

the Fugitive Slave Law. One of the most interesting aspects of the book is Delbanco's serious engagement with and analysis of Calhoun's place in history—the political philosopher of proslavery ideology as well as the “two nations” conception of America. Ahab has been likened to everyone from Hitler to terrorists. But by arguing for Calhoun as the model for Ahab, Delbanco suggests that the slavery crisis was woven through Melville's philosophical masterpiece about the human condition.

So determined is Delbanco to make this history a template for our current political condition that he uses familiar analogies throughout the book. Most succeed. In effect, he is having a conversation with his reader about today's deeply divided society, by means of the fugitive slave issue and the way it tore America apart more than 150 years ago. Slaveowners of the early republic were “like opponents of gun-control laws today”; they opposed any restriction of slave-trading lest it lead to general abolition. To Delbanco, a fugitive walking about the free black community of early-nineteenth-century Philadelphia faced the same fearful prospect of any “young African American man” now who “lowers his gaze, walks in the shadows, suppresses his rage if frisked by police”; he “relives in some measure the demeaning—or deadly—experience of his forebears.” Still, likening the Georgian Alexander H. Stephens's speech in Congress condemning the Mexican War in 1846 as an overextension of American power to opposition to George W. Bush's Iraq War is a bit of a stretch. And to understand the nature and reach of the “Slave Power” in the South's quest for expansion, readers may not necessarily need an analogy to the Nazis' “quest for Lebensraum.”

Delbanco is right to remind us that the distrust, invective, and sheer hatred in politicians' debates, “even in the age of Trump,” are not as bad as they were in the slavery crises of the 1850s. He demonstrates how the basic value of civility, a decent respect for the humanity of one's political opponents, and a willingness to accept policy defeat died in the late 1850s. “Comity,” Delbanco argues, “is as fragile as it is precious. In America, in the 1850s, it collapsed.”

He is also right to compare today's persistent flow of refugees, whether in the Middle East or at America's southern border, to the frightened, intrepid migrants on fugitive slave routes into the North or to Canada. The urge to escape bondage, war, starvation, and terror is universal throughout human history. Delbanco is correct that one of the “most demanding challenges” of writing history is “explaining how people in the past could have failed to see what seems so clear to us in retrospect.” He writes with great zeal, while trying to empathize with losers and winners, and even with the prophets of evil.

A major strength of this book is the writing itself. After quoting Douglass's haunting expressions about being essentially motherless in his early youth—“never having enjoyed...her soothing presence”—the historian channels the voice of the former slave to convey his message. “Slavery robs mothers of their motherhood,” writes Delbanco,

and thereby stunts the souls of their sons. It turns motherless black boys into heartless black men. Beware of the dark millions headed toward manhood: they will grow into potency with no sense of empathy or love. Slavery is a factory for manufacturing monsters.

Such grim language will not please everyone in today's climate, but it wakes you up. By the 1840s, living, breathing fugitive slaves enlivened and reshaped the typical antislavery meeting. These meetings took on the tenor, in Delbanco's words, of "a secular communion in which the sacramental moment arrives when a flesh-and-blood runaway stands before the congregation as a living crucifix and begins to speak."

The *War Before the War* also delivers a strong analysis of the role of slave narratives—for example, the best-sellers written by Josiah Henson, William Wells Brown, Solomon Northup, and of course Douglass—in the public crisis over fugitive slaves. Douglass in particular broke through to a large audience and established trust in these extraordinary, unusual texts. Delbanco's claim that the narratives were "more than propaganda but less than literature" will get firm disagreement from other literary historians. But he shows how the slave narratives were crucial to public debate: "They moved public opinion" and assured that their legions of readers could never again "browse through the runaway newspaper ads" without knowing their deeper meaning—these were human beings risking all to be free. And some of them, like Douglass, wrote in unforgettable, lyrical prose.

Delbanco's ultimate aim is to trace how, in his view, the fugitive slave question made a genuine nation, rooted in unity and comity, "impossible" from the beginning. That conclusion needs more measure, more careful attention to events over time. In Isaiah Berlin's famous essay "Historical Inevitability," the philosopher cautioned that history does not unfold like machinery. There are many forces at play in shaping history, and no one of them is "ultimately responsible for everything." Historians do search for and explain "patterns," but each time we find one we ought to expect it to flow into and out of the next. Beware our certainties, Berlin demands; history seeks no "goal." We should especially beware an "irresistible rhythm," even when we find one as telling as the persistent conflict over slavery and escaped slaves before our Civil War.⁶

This is not an ideologically deterministic book. But the "war" before the Civil War had so many political, legal, and human skirmishes that we ought never to see the actual war as completely inevitable. Inevitable when and why? Strife and conflict, moral and legal, became unstoppable. But the war between armies is another matter. This indeed may be Delbanco's point in this sweeping and fascinating book, despite his title and his own use of the language of inevitability. His is a long, festering story of political disunion, mapped through many voices. But if we do not stop frequently on this road to disunion and dwell on the details, we will miss what Lincoln meant in 1855 when he remarked, "The great body of the Northern people do crucify their feelings, in order to maintain their loyalty to the constitution and the Union." Self-tortured by the slavery question, a "nation" descended into disunion.

Daniel Webster debated Robert Y. Hayne in the US Senate, 1830. The Webster–Hayne debate famously engaged states' rights, nullification, and the nature of the Union. ↵

2

Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (Norton, 1975). “To a large degree it may be said that Americans bought their independence with slave labor,” wrote Morgan. “The paradox is American, and it behooves Americans to understand it if they would understand themselves.” ↵

3

See the review in these pages by Nicholas Guyatt of Sean Wilentz, *No Property in Man* (Harvard University Press, 2018), June 6, 2019, and the subsequent exchange of letters between Wilentz, Guyatt, and James Oakes, June 27, 2019. ↵

4

See the review of *Melville: His World and Work* (Knopf, 2005) by Frederick C. Crews in these pages, December 1, 2005. ↵

5

Cambridge University Press, 2018; reviewed in these pages by James Oakes, “The Power of Running Away,” December 6, 2018. ↵

6

“Historical Inevitability,” in Isaiah Berlin, *The Proper Study of Mankind: An Anthology of Essays*, edited by Henry Hardy and Roger Hausheer (Farrar, Straus and Giroux, 1997), p. 131. ↵

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