

Comment on *Frederick Douglass and the Two Constitutions: Proslavery and Antislavery*

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Thank you for inviting me to participate in this symposium. I want to thank David Blight, in particular, for this rich and provocative Essay. It was fascinating for me to learn that he has come over to the position of my friends James Oakes and Sean Wilentz, with whom I have argued about the concept of the antislavery American Constitution. Countering influential works that have treated the Constitution as manifestly proslavery,¹ both men have written books arguing that the Constitution was antislavery or had antislavery aspects.² I have had to grapple with the powerful advocacy of all three of these esteemed historians for this view, but I am not yet persuaded they are right.

First, I am reminded in reading this Essay just what an extraordinary person Frederick Douglass was. If one can give credence to the designation of “greatest American,” he would certainly fit the bill for me. At the same time, as Douglass himself suggested while discussing the importance of formal schooling, his course in life reminds us of how much talent has been lost over the centuries because of slavery and a doctrine of white supremacy that destroyed opportunities and the very lives of millions. Douglass was indeed a singular figure, but he was singular by design of a system that was meant to hold him, and people like him, down. He worked with all of his might, through his writings and advocacy, to change that system, and he lived to see the institution of legalized slavery destroyed.

This Essay will consider what we are to make of the trajectory of Douglass’s thoughts on the question of slavery and the American Constitution.

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1. See, e.g., GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDER’S UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (2011); DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION FROM REVOLUTION TO RATIFICATION* (2010).

2. JAMES OAKES, *THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION* (2021); SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND THE ANTISLAVERY AT THE NATION’S FOUNDING* (2018).

Douglass began his formal career as an Abolitionist, believing, along with his friend and mentor William Lloyd Garrison, that the Constitution was a proslavery document. The famous compromise in Philadelphia left the institution intact and recognized that enslavers had the right to recapture enslaved people who escaped to free states in the new Union. As his career progressed, Douglass rejected that understanding.

Douglass's Intellectual Underpinnings and the Institution of Slavery

As David's paper details, Douglass thought a lot about the nature of slavery and its relationship to the American republic, which was still in its early childhood when he was born. I especially loved the idea of Douglass learning the philosophy of natural rights through his time in slavery:

America's founding documents, the Declaration of Independence and the Constitution, were indispensable to his life, his thought, his mental survival.

But the young abolitionist, contrary to the ways conservative intellectuals use him today, did not come by his natural rights solely from Jefferson's creeds and the "genius" of the Constitution. Slavery taught him what it sought to destroy: a firm belief that his humanity; his essential rights, came from God and nature, even as humans could steal, brutalize and destroy those rights – by law – when nothing stopped them.³

Douglass was certainly not alone in this. Enslaved people and former enslaved people during the nineteenth century were among the biggest proponents of an idealistic vision of America based on notions of natural rights, which they, and all human beings, possessed.⁴ The people who had been deprived of liberty knew its true worth and wanted to uphold the values of the American Declaration of Independence and its statement about the equality of mankind.⁵

German historian Hannah Spahn shows in a soon-to-be-published work that Blacks in the nineteenth century helped create the Declaration of Independence as the American creed.⁶ While I am sure there must have been others who joined Douglass in his eventual view of the Constitution as a liberating document, for most of American history, the Declaration was touted for argument to end

3. David Blight, Lecture at the Berkeley Law Jorde Symposium: Frederick Douglass and the Two Constitutions: Proslavery and Antislavery (Nov. 15, 2022) [hereinafter Blight].

4. See generally *The Declaration at 250*, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/history-resources/curriculum/declaration-250> [<https://perma.cc/4559-XRHP>] (compendium of primary documents created by Blacks in the 19th Century referencing the importance of the Declaration).

5. *Id.*

6. HANNAH SPAHN, *AMBIDEXTROUS PHILOSOPHY: THE JEFFERSONIAN ENLIGHTENMENT IN THE AFRICAN AMERICAN TRADITION* (Univ. Va. Press forthcoming).

slavery and, in later years, the practice of treating Blacks as second-class citizens.⁷

Was the Pre-Civil War Constitution Antislavery?

My own position has been more in line with David's and Douglass's original stance: that the Constitution protected slavery and was not an antislavery document. Perhaps I will migrate, but I don't think so. This is despite that, as David shows so well, Douglass's views on this matter changed over time. The central problem with the idea that the Constitution was, in its original formulation, antislavery is the text itself and the context in which it was written.

As for the text, the Constitution ratified in 1788 explicitly contained provisions that protected the institution—the Three-Fifths Clause and, more directly and importantly, the Fugitive Slave Clause. The ban on the importation of slaves, effective after 1808, did take up the proto-abolitionist dream that the end of the trade would somehow result in the ultimate demise of the institution. But by then, it should have been clear that the Louisiana Purchase would open up lands to White southerners going west with enslaved people.

As for the context, the deliberations over the Constitution nearly came apart because of concerns about interference with the institution. Southern delegates, including notoriously those from South Carolina, would never have agreed to come into a Union that could do away with the institution of slavery.

Douglass, of course, knew the history of the famous struggle in Philadelphia over the place of slavery in the new republic. As David notes, Douglass began his journey interpreting the Constitution on the question of slavery firmly in the camp of his mentor, William Lloyd Garrison, who famously referred to the American Constitution as a “covenant with death and an agreement with hell.”⁸ But as he moved away from Garrison, he changed his mind about the document. He wanted to find “a way to see law as an aid and not an enemy.”⁹ So, how does Douglass get around the reality of the Constitution's important textual protections of slavery? He relies, in part, on what is not in the document. Blight notes that during a tour through Glasgow, Scotland, Douglass used the opportunity to enlist James Madison's declaration against “‘property in man’ in the antislavery Constitutional cause.”¹⁰ The Constitution makes no mention of the word “property,” not even in the document's Fugitive Slave Clause:

7. See, e.g., Letter to Thomas Jefferson from Benjamin Banneker (Aug. 19, 1791), NAT'L ARCHIVES FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-22-02-0049> [<https://perma.cc/YB8U-Z5WS>] (articulating, perhaps, the most famous early example of a Black person referencing the language of the Declaration of Independence as supporting antislavery sentiment).

8. Blight, *supra* note 3.

9. *Id.* at 105.

10. *Id.* at 133.

No Person held to Service or Labour in one State under the law thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.¹¹

The “party” who has a “Claim” to the “Service or Labour” of the “Person” who escaped into another state must have had a basis for the claim. Whatever Madison may have said or meant about there being no “property in man,” the claim must have rested on some kind of interest in the enslaved person who ran away. Only contract or property could give rise to the type of interest that would allow such a thing. No one would argue that enslaved people and their enslavers were in a contractual relationship. The only thing left would be some form of property interest that could be vindicated by allowing the person to recapture an individual who had escaped from their service. Reticence about using the word “property” does not mean that enslavers’ interest in recapturing enslaved persons was not a property interest.

The disinclination to use the word “property” was not merely an American quirk. Even the omission of the word “slave”—the Constitution refers to “persons held to service” rather than “slaves”—followed a European example. Throughout the eighteenth century, in prerevolutionary France, the Parliament charged with approving new laws refused to register laws that had the word “esclave” (slave) in them.¹² That did not mean, of course, that there was no such thing as French slavery. It meant that in the Age of Enlightenment there was a degree of discomfort with the brutal admission that Europeans were enslaving people—not enough discomfort to do away with slavery, but enough to try to hide what they were doing. The American Framers obviously had a similar view. But reticence about using the words “property” or “slavery” did not mean that the enslaved were not considered property or that there were no enslaved people in the United States. We are far enough into the world of legal realism to call things as they are, rather than what those who would hide reality would have us say they are.

So, how are we to respond to Douglass’s views of the Constitution in the face of its text and our knowledge of the struggle over its crafting? That Douglass became “sick and tired” of arguing things from the slaveholders’ side¹³ does not change the history. The document that created a federal Union allowed some states to pass gradual emancipation statutes while other states were allowed to hold onto the institution that existed in all thirteen colonies when the Union was born. There was never an idea that all laws had to be the same. I think David’s, Jim Oakes’s, and Douglass’s earlier position that the Constitution “was

11. U.S. CONST. art. IV, § 2, cl. 3.

12. See ANNETTE GORDON-REED, *THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY* 175 (2008).

13. Blight, *supra* note 3, at 125.

essentially proslavery in its foundation” is more correct. The Constitution did not mandate that every state should have slavery, but it recognized and accounted for the fact that some states would be allowed to have it. The southerners would not have come into the Union without that assurance. That a number of people were deeply committed to the antislavery position does not change the meaning, and the effects, of those provisions.

This in no way is to dismiss Douglass as a deeply committed “political thinker.”¹⁴ I just believe he was engaging in what David first thought the proponents of the antislavery Constitution were doing—trying to find a pragmatic way to argue for change in the United States.¹⁵ As Alexis de Tocqueville and others have noted, America is a place where law matters greatly.¹⁶ It is natural for law-minded people to look to law for solutions. Douglass, who saw himself as an American, and wanted Blacks to be seen as Americans, would naturally wish to use the supreme law of the land as a text to emancipation of his people. But it did not. The Constitution was, instead, the product of a compromise over the institution into which Douglass was born. What destroyed that institution was not law, but a war, and when the dust settled three amendments were added to the Constitution. They sought to and achieved what Douglass and others suggested was already provided for by the original Constitution.

What of the Antislavery Constitution?

This brings us to the main question—why does it matter to us whether the Philadelphia Constitution was proslavery or antislavery? David’s paper seems to suggest that our future hinges in some way on how we answer this question. I have my doubts about that, and I wonder why the Constitution as it became after the war is not our focus. That Constitution achieved Douglass’s main goal: the end of slavery. It also gave us the tools to make the promise of the Declaration of Independence, as interpreted by Blacks from the beginning, real. That Constitution has also helped make modern America possible in so many ways. Do we keep coming back to this debate because we know that Americans fixate on the Founding generation as the only true and legitimate creators of this country?

If we move beyond that mentality, the argument takes on a different cast. By any measure, Douglass should be considered a Founder of the country, along with Lincoln and all the other people who insisted on the end of slavery and made attempts to bring Black people into full citizenship in America. We should encourage members of the public to move beyond, though not totally away from, reading the minds of Madison and his Philadelphia cohort.

14. *Id.* at 135.

15. *Id.*

16. *See generally* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2002) (1835).

Douglass's evolving thoughts about the Constitution are well worth understanding. His struggle with this issue provides a rich look into the political realities of his time. In the end, however, I think the end result of his writings and advocacy, the sacrifice of soldiers in the U.S. Army, and the political actions of those committed to writing a new chapter in American history after the Civil War, give us the most important lessons for our future.