Frederick Douglass's Constitution

James Oakes*

In the summer of 1854, the Massachusetts Anti-Slavery Society sent out word of a large gathering to be held at Harmony Grove in Framingham—sixteen miles from Boston—on the Fourth of July.[1] For fifty cents, picnickers were offered "Special Trains" to and from the grounds. Handbills blared the theme of the meeting—"NO SLAVERY!"—and promised addresses by "Eminent Speakers," among them Sojourner Truth and Henry David Thoreau.[2] But the speech that attracted the most attention and left the most lasting impression was delivered by the great abolitionist William Lloyd Garrison.

Much of what Garrison said was familiar to all opponents of slavery. July 4 is, of course, the anniversary of the Declaration of Independence. Even the most mainstream of mainstream antislavery politicians would have nodded in agreement as Garrison insisted that the famous phrase—"all men are created equal"[3]—meant that every human being was equally entitled to the natural right of freedom and that slavery was a violation of that sacred principle. When Garrison held up a copy of the Fugitive Slave Act of 1850 and set it on fire, those same mainstream politicians might have winced, but they would not have disagreed with the sentiment. They all hated the law. Some wanted it revised, some thought it should be repealed outright, and some thought it was unconstitutional.

But that is where most antislavery folks parted company with Garrison. He did not think the Fugitive Slave Act was unconstitutional. He thought the law was perfectly consistent with the Constitution. He felt the same way about the Kansas-Nebraska Act, passed a few months before, which reopened the Nebraska territory to slavery. And he felt the same way about the rendition of Anthony Burns, a fugitive slave who had recently been marched through the

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1. HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 443–45 (1998).
2. *Id.*
3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

streets of Boston by federal troops returning him to slavery in the face of fifty thousand protestors opposed to the extradition. Most of slavery's opponents thought the Kansas-Nebraska Act was inconsistent with the Constitution. Most believed that Anthony Burns had been deprived of his constitutional rights.[4]

But not William Lloyd Garrison. None of the recent victories of the so-called "Slave Power"—the Fugitive Slave Act, the Kansas-Nebraska Act, the rendition of Anthony Burns—none of these were *violations* of the Constitution, Garrison insisted. If anything, they were *caused* by the Constitution. "The source and parent of all the other atrocities," Garrison declared that day, was the Constitution itself—which he then denounced as "*a covenant with death, and an agreement with hell*."[5] Striking another match, Garrison held up a copy of the U.S. Constitution and set it to flames as well.

Six years later, in Glasgow, Scotland, another great abolitionist, Frederick Douglass, gave a very different speech—different not only from Garrison's but also from speeches Douglass himself had once given. After escaping from slavery in 1838, Douglass had moved to New England, where he joined the Garrisonian branch of the abolitionist movement and argued that the Constitution was a proslavery document. The slave insurrections clause, he said, "converts every [W]hite American into an enemy of the [B]lack man in that land of professed liberty."[6] The Fugitive Slave Clause ensured that any enslaved person escaping to freedom was liable "to be hunted down like a felon and dragged back to the hopeless bondage from which he was endeavoring to escape."[7] "I really cannot be very patriotic," Douglass declared in 1847, when he would hear Americans speak of their "boasted constitution."[8]

Just a few years later, however, Douglass did a complete about-face and argued exactly the opposite—that the Constitution was a radical abolitionist document.[9] His migration to this position can be traced in the pages of his own newspaper; he ended that voyage blaring his change of heart in bold headlines. By the early 1950s, he had leapt, as it were, from one soapbox to another, over and past the mainstream view of the Constitution that had long shaped antislavery politics—the politics of Abraham Lincoln and the Republican Party.

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4. *See generally* JAMES OAKES, THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION (2020).

5. MAYER, *supra* note 1, at 443–45.

6. Frederick Douglass, Farewell to the British People, An Address Delivered in London, England (Mar. 30, 1847), *reprinted in Farewell to the British People*, YALE MACMILLAN CTR., https://glc.yale.edu/farewell-british-people [https://perma.cc/YWC2-GU7Q].

7. *Id.*

8. *Id.*

9. *See* JAMES OAKES, THE RADICAL AND THE REPUBLICAN: FREDERICK DOUGLASS, ABRAHAM LINCOLN, AND THE TRIUMPH OF ANTISLAVERY POLITICS 14–21 (2007); DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 214–17 (2018).

Once upon a time, I thought this dramatic reversal of opinion was an example of what might be called "soapbox syndrome." But the soapbox metaphor is misleading, because where Douglass ended up turns out to have been closer to mainstream antislavery constitutionalism than I had previously thought. He said so himself. "My position now is one of reform," he explained in 1860, "not of revolution."[10] A proslavery Constitution foreclosed the possibility of any meaningful antislavery politics, which is why Garrison eventually adopted a policy of not voting. But an antislavery Constitution opened Douglass to the possibilities of antislavery politics. It meant that the federal government could adopt policies designed to undermine and ultimately extinguish slavery. Douglass explored those possibilities in brilliant biblical cadences. The beliefs of abolitionists would flow "through their fingers into the ballot-box," he wrote, and through their ballots, they would elect men of "Christian principle and Christian intelligence" to Congress.[11] "[T]hat congress shall crystallise those sentiments into law, and that law shall be in favour of freedom. And that is the way we hope to accomplish the abolition of slavery."[12]

These quotes from Douglass's Glasgow speech of March 26, 1860, were given in reply to another speech delivered a month earlier by prominent British abolitionist George Thompson. Thompson had defended Garrison's view of the Constitution and, in true Garrisonian form, personally attacked Douglass's apostasy in terms Douglass considered personally abusive and vindictive. Early in his address, Douglass spelled out as clearly as anyone could—and few could state things as clearly as Douglass—his fundamental disagreement with the Garrisonians.

> They hold that the constitution is a slave-holding instrument, and will not cast a vote, or hold office under it, and *denounce all who do vote or hold office under it as pro-slavery men*, though they may be in their hearts and in their actions as far from being slaveholders as are the poles of the moral universe apart. I, on the other hand, deny that the constitution guarantees the right to hold property in men, and believe that the way, the true way, to abolish slavery in America is to vote such men into power as will exert their moral and political influence for the abolition of slavery.[13]

10. 2 FREDERICK DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850–1860, at 480 (Philip S. Foner ed., 1950).

11. FREDERICK DOUGLASS, The American Constitution and the Slave, Speech in Glasgow, Scotland (Mar. 26, 1860) [hereinafter DOUGLASS, Speech in Glasgow, Scotland], *in* 3 THE FREDERICK DOUGLASS PAPERS, SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS: 1855–1863, at 340, 366 (John W. Blassingame, Gerald Fulkerson, Richard G. Carlson, John R. McKivigan & Jason H. Silverman eds., 1985).

12. *Id.*

13. *Id.* at 346.

What followed was the most complete statement of Douglass's interpretation of the U.S. Constitution as an abolitionist document. Although this went beyond mainstream antislavery constitutionalism, most of what Douglass had to say could have been said by Abraham Lincoln.

To be sure, there were differences. Mainstream antislavery constitutionalists like Salmon P. Chase interpreted the Constitution in light of the Founders' expectation that slavery would eventually be abolished everywhere in the United States. Lincoln, for example, repeatedly called upon Congress to adopt policies that would put the United States back where the Founders intended, on a course toward slavery's ultimate extinction.[14] By contrast, Douglass had aligned himself with abolitionist constitutionalists, men like Alvan Stewart and William Goodell, who were textual literalists.[15] The Founders' intentions were irrelevant, they argued. All that mattered was the text of the Constitution. "[I]t should be borne in mind," Douglass argued,

> that the mere text of that constitution—the text and only the text, and not any commentaries or creeds written upon the text—is the constitution of the United States. It should also be borne in mind that the intentions of those who framed the constitution, be they good or bad, be they for slavery or against slavery, are to be respected so far, and so far only, as they have succeeded in getting these intentions expressed in the written instrument itself.[16]

This led abolitionists like Douglass to the unusual conclusion that Congress had the power to immediately abolish slavery in the states, a position even Lincoln, the most radical antislavery politician, rejected.

Nevertheless, both antislavery and abolitionist constitutionalists advocated the same federal policies and referred to the same clauses of the Constitution to justify their politics. There are two ways to think about this: either Douglass was closer to mainstream antislavery thought than we once believed, or mainstream antislavery thought was more radical than we have generally recognized. My sense is that both interpretations are true. Both traditions were antithetical to the Garrisonian denunciation of the Constitution as a proslavery document.

Before examining Douglass's abolitionist interpretation of the Constitution, it is worth summarizing his critique of proslavery constitutionalism. The biggest problem with the Garrisonian attack on the Constitution, Douglass argued, was that it conflated the policies of the existing U.S. government, which were indeed proslavery, with the Constitution itself.

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14. *See* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 249–75 (1977).

15. Here, I borrow the distinction between *antislavery* constitutionalism and *abolitionist* constitutionalism developed in MANISHA SINHA, THE SLAVE'S CAUSE: A HISTORY OF ABOLITION 202–27 (2016).

16. DOUGLASS, Speech in Glasgow, Scotland, *supra* note 11, at 347.

Douglass saw this as a tacit admission of the weakness of the Garrisonian argument: it frequently stepped outside the Constitution to make its case. To the extent that Thompson and the Garrisonians did rely on the text, they focused on four specific clauses. Article I, Section 9, clause 1 (also known as the Slave Trade Clause) protected the African slave trade from a federal ban for twenty years.[17] Article IV, Section 2, clause 3 (also known as the Fugitive Slave Clause) provided for the recovery of fugitive slaves.[18] Article I, Section 2, clause 3 (also known as the Three-Fifths Clause) counted three-fifths of the enslaved population for purposes of representation in the House.[19] And Article I, Section 8, clause 15 (also known as the Domestic Insurrections Clause) empowered the President to use military force to suppress slave insurrections.[20]

Douglass claimed that when Thompson referred to these clauses, apparently quoting the Constitution, Thompson was in fact paraphrasing the text tendentiously and giving a proslavery twist to clauses that—read precisely—could not bear such a reading. The so-called Fugitive Slave Clause, for example, makes no mention of "fugitive slaves." Nor does the Domestic Insurrections Clause refer to "slave insurrections," as Thompson's paraphrase led listeners to believe. Read the text of the Constitution, Douglass urged his listeners, and "[y]ou will notice there is not a word said there about 'slave trade,' not a word said there about 'slave insurrections;' not a word there about 'three-fifths representation of slaves.'"[21]

Douglass himself, however, was not entirely averse to stepping outside the text to interpret the Constitution. Much of his own analysis of the Slave Trade Clause referred to its original meaning—what it was understood to mean when it was written.[22] "At the time the constitution was adopted," Douglass explained, "the slave trade was regarded as the jugular vein of slavery itself, and it was thought that slavery would die with the death of the slave trade."[23] This is what the pioneering abolitionists of the time believed. "Their theory was—cut off the stream, and of course the pond or lake would dry up."[24] So, too, with the men who framed the Constitution. In "making provision for the abolition of the African slave-trade they were making provision for the abolition of slavery itself, and they incorporated this clause in the constitution."[25] Thus the Slave Trade Clause made the Constitution "anti-slavery, because it looked to the abolition of

17. U.S. CONST. art. I, § 9, cl. 1 (expired in 1808).
18. *Id.* art. IV, § 2, cl. 3, *repealed by id.* amend. XIII.
19. *Id.* art. I, § 2, cl. 3, *repealed by id.* amend. XIV.
20. DOUGLASS, Speech in Glasgow, Scotland, *supra* note 11, at 350; U.S. CONST. art. I, § 8, cl. 15.
21. DOUGLASS, Speech in Glasgow, Scotland, *supra* note 11, at 351–52.
22. *Id.*
23. *Id.*
24. *See id.* at 353–54.
25. *Id.* at 354.

slavery rather than to its perpetuity."[26] For anyone interested in what the Founders *thought* they were doing, Douglass argued, the Slave Trade Clause "showed that the intentions of the framers were good, not bad."[27]

But in considering the Framers' intent, Douglass was not necessarily violating his textualist principles. He had allowed that the Founders' intentions could be referenced "only so far" as they were supported by the text, and so Douglass returned to the text. Read literally, the Slave Trade Clause "*said to the states,*—If you would purchase the privileges of this Union, you must consent that the humanity of this nation shall lay its hand upon this traffic."[28] He might have added that this was the first time in the history of the world that any nation had laid its hand upon that nefarious traffic by establishing a legal mechanism for ending the importation of enslaved people.

Douglass turned next to what was alleged to be a slave insurrections clause. In truth, he began, "there is no such clause in the constitution."[29] No doubt the Constitution empowered Congress to "suppress insurrections" or repel invasion,[30] but it did not specify "slave" insurrections. On the contrary, the clause authorized the federal government to *emancipate* slaves in the very process of suppressing insurrections. Echoing an interpretation of the Constitution made famous by John Quincy Adams in 1836, Douglass explained that "the right to suppress an insurrection carries with it also the right to determine by what means the insurrection shall be suppressed."[31] If a rebellion erupted in the slave states and the President concluded that the cause was slavery—"a constant source of danger"—it would be his duty "*not only to put down the insurrection, but to put down the cause of the insurrection*."[32] These were, by 1860, familiar arguments among antislavery politicians, and indeed the war powers were to become the constitutional basis of military emancipation. Barely a year after Douglass gave his speech in Glasgow, Republican policy-makers were claiming that the war powers authorized the federal government not only to emancipate slaves, but also to destroy the institution that caused the rebellion.[33]

Douglass's reading of the Fugitive Slave Clause was less convincing. He gave a misleading account of its origins at the Constitutional Convention, and in so doing violated his own rule against referring to the convention debates. Douglass was responding to Thompson's own misleading rendering of the debate at the Constitutional Convention. According to Thompson, two South

26. *Id.*
27. *Id.*
28. *Id.* at 354.
29. *Id.* at 354–55.
30. U.S. CONST. art. I, § 8, cl. 15.
31. DOUGLASS, Speech in Glasgow, Scotland, *supra* note 11, at 354.
32. *Id.*
33. *See generally* JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865 (2012).

Carolina delegates, Charles Pinkney and Pierce Butler, "moved that the constitution should require fugitive slaves and servants to be delivered up like criminals."[34] Their proposal was to be appended to the Criminal Extradition Clause.[35] By treating enslaved people like criminals, the Constitution would obligate the states to enforce fugitive slave renditions. Thompson claimed that "the clause, as it stands in the constitution, was adopted."[36] Douglass denounced this rendering of the debate as a "*downright* UNTRUTH"[37]—and, in truth, Thompson's account left out several crucial details.

Thompson had quoted the Pinkney-Butler motion accurately, but he did not mention that James Wilson of Pennsylvania immediately objected that it "would oblige the Executive of the State to [return slaves] as a public expense."[38] This was a crucial objection, because the Criminal Extradition Clause to which Pinkney and Butler would attach their motion contained an enforcement provision requiring state authorities to cooperate.[39] Wilson did not want the Constitution to obligate states to enforce fugitive slave renditions. Roger Sherman of Connecticut objected on similar grounds. He "saw no more propriety in the public seizing and surrendering a slave or servant, than a horse."[40] States were obliged to return criminals, but neither Wilson nor Sherman thought states should be obliged to return fugitive slaves. Sherman added the suggestion that the northern public should not have to treat slaves like property.

The South Carolinians immediately withdrew the motion and returned the next day with what became a separate fugitive slave clause. This clause replaced the explicit enforcement provision of the Criminal Extradition Clause with the more ambiguous stipulation that fugitives "shall be delivered up."[41] (*Delivered by whom?* would become a major source of contention.) Thompson's account was misleading. It made no reference to the objections raised by Wilson and Sherman. It also implied, incorrectly, that the clause was adopted unchanged when, in fact, the Fugitive Slave Clause was divorced from the Criminal Extradition Clause, and the unambiguous requirement that states enforce fugitive slave renditions was removed from the final version.[42]

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34. Thompson's speech is mentioned in FREDERICK DOUGLASS, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery* [hereinafter DOUGLASS, *The Constitution of the United States*], *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467 (Philip S. Foner ed., 1950).

35. U.S. CONST. art. IV, § 2, cl. 2.

36. DOUGLASS, *The Constitution of the United States*, *supra* note 34, at 467.

37. *Id.*

38. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 545 (1787).

39. *See* U.S. CONST. art. IV, § 2, cl. 2.

40. MADISON, *supra* note 38, at 545–46.

41. U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause), *repealed by* U.S. CONST. amend. XIII.

42. MADISON, *supra* note 38, at 545.

Douglass pounced on Thomson's defective account and offered instead his own misleading narrative of what happened in the convention. He exaggerated the reaction to the Pinkney-Butler motion, claiming it "was met by a storm of opposition in the convention; members rose up in all directions."[43] He said the motion was sent back to committee with explicit instructions to use "the word *'servitude,' so that it might apply* NOT *to slaves,* but to freemen."[44] This is absurd. There was no committee and no such instruction. Pinkney withdrew his own motion, amended it, and returned the next day with the clause that became part of the Constitution. Douglass insisted that the Fugitive Slave Clause did not refer to slaves at all, a claim that would strike most people, then and now, as eccentric at best.

But it may also have been clever. By deliberately reading the Constitution in the most literal possible way, Douglass was making a serious legal point about the implications of ambiguous constitutional language. The Fugitive Slave Clause does not refer explicitly to "fugitive slaves."[45] This matters because, according to Douglass, the standard rules of legal or constitutional interpretation prohibit ambiguous language from being read as proslavery. Rather, if the language is unclear, "the law must be construed strictly in favor of justice and liberty." He did not make that doctrine up; he quoted Chief Justice John Marshall in support of it.[46] Even so, Douglass's claim that the Fugitive Slave Clause had nothing to do with fugitive slaves was quite a stretch. Even if the text itself was ambiguous, the original meaning of the clause was clear. If nothing else, Douglass's approach suggests the limits of a purely textualist approach to constitutional interpretation.

What, then, did Douglass make of the notorious Three-Fifths Clause? Most antislavery folks resented it because they read it as giving the slave states extra power in the House of Representatives and the electoral college. Lincoln, for example, argued that because the Three-Fifths Clause favored the slave states in a way that was humiliating to the free states, the latter had a direct interest in preventing the admission of any new slave states by banning slavery from the territories. On the other hand, proslavery southerners sometimes claimed that the Three-Fifths Clause discriminated against the slave states. At the constitutional convention itself in 1787, the slave states demanded that all the slaves, five-fifths, be counted. They didn't get what they wanted, and by the 1850s, some proslavery southerners were calling for the *repeal* of the Three-Fifths Clause. Repeal would enhance the South's power because, in a constitution that otherwise based representation on population, removing the clause would mean that all the slaves—five-fifths—would be counted.

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43. *See* DOUGLASS, Speech in Glasgow, Scotland, *supra* note 11, at 357.
44. *Id.*
45. *See* U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.
46. DOUGLASS, Speech in Glasgow, Scotland, *supra* note 11, at 359.

Douglass, as usual, started from the premise that the Three-Fifths Clause had nothing to do with slavery because it referred not to "slaves" but to "other persons."[47] But even assuming "the very worst construction," that the Three-Fifths Clause *did* refer to slavery, the question remained: "what does it amount to?"[48] It was, Douglass argued, a standing rebuke to the slave states, a punishment for the enslavement of millions—and a built-in constitutional incentive for the slave states to increase their political power by abolishing slavery. According to Douglass, "A [B]lack man in a free State is worth just two-fifths more than a [B]lack man in a slave State . . . . Therefore, instead of encouraging slavery, the constitution encourages freedom, by *holding out to every slaveholding State the inducement of an increase of two-fifths of political power by becoming a free State*."[49]

In truth, hardly anyone in the larger antislavery movement agreed with Douglass's interpretation of the Three-Fifths Clause or the Fugitive Slave Clause. Clearly there was (and is) no such thing as *the* "abolitionist" interpretation of the Constitution. Douglass's abolitionist reading clearly differed from that of George Thompson and the Garrisonians, but it differed from the antislavery constitutionalism of the Republican Party as well. Douglass himself acknowledged that hardly any of slavery's opponents had accepted the abolitionist—as opposed to the antislavery—interpretation of the Constitution. And yet . . .

In Glasgow, Douglass trained nearly all his ammunition at Garrison's proslavery interpretation of the Constitution. By contrast, he was surprisingly receptive to mainstream antislavery constitutionalism. He referred to the Republicans as "the anti-slavery party" and looked forward to their imminent victory at the polls.[50] "The slaveholders have ruled the American government for the last fifty years," he declared; "let the anti-slavery party rule the nation for the next fifty years."[51] Proslavery men in control of the Supreme Court have "given the constitution a pro-slavery interpretation," he argued; "let us by our votes put men into the Supreme Court who will decide, and who will concede, that the constitution is not [pro-]slavery."[52] Douglass understood that for all the differences between abolitionist and antislavery constitutionalism, the two approaches had a great deal in common.[53]

Nowhere was this overlap clearer than in the rejection of the proslavery claim that the Constitution protected slave ownership as a right of property. Here,

47. *Id.* at 352.
48. *Id.*; *see id.* at 365–66.
49. *Id.* at 352.
50. *Id.* at 365.
51. *Id.*
52. *Id.*
53. *See id.* at 365–66.

even Douglass's anomalous reading of the Fugitive Slave Clause was based on a premise shared by virtually all antislavery politicians. They emphasized that the clause referred to enslaved individuals as "persons" rather than "property." This had major implications for antislavery politics. If the Constitution recognized enslaved individuals as persons, the Fugitive Slave Clause could not be enforced without disregarding the due process rights to which all "persons" were constitutionally entitled. The Fifth Amendment decrees that "No person shall be deprived of life, liberty, or property without due process of law."[54] The 1860 Republican Party platform quoted the Fifth Amendment, and so did Frederick Douglass.

Abraham Lincoln called for a revision of the despised Fugitive Slave Law of 1850 to ensure that no person would be deprived of the privileges and immunities to which all citizens were entitled. He specifically called for jury trials for accused fugitives. Douglass said the same thing in Glasgow. "The constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury; it also declares that the writ of *habeas corpus* shall never be suppressed."[55] The Fifth Amendment would have been irrelevant if the Constitution referred to enslaved people as property rather than persons.

The constitutional personhood of enslaved people was a core precept of antislavery constitutionalism. It was a major theme of Abraham Lincoln's famous Cooper Union address, delivered in New York a month before Douglass's Glasgow speech. Douglass thus stood firmly within the antislavery mainstream in his denunciation of the supposed right of "property in man." Despite his garbled interpretation of the origins of the Fugitive Slave Clause at the Constitutional Convention, he was correct to point out that Charles Pinckney seemed to be trying to get something into the Constitution that would recognize enslaved persons as property. He cited James Madison's objection to "*the idea that there could be property in men*" described anywhere in the document.[56] Douglass's reading is supported by recent scholarship highlighting that the references to enslaved individuals as "persons" throughout the Constitution were more than a euphemistic evasion by the Founders who were embarrassed by their own compromises.

What *was* in the constitutional text was a preamble that seemed to rule out the legitimacy of slavery. The purpose of the government, it declared, was to "secure the blessings of liberty" to everyone.[57] Republicans quoted it all the time, although less often than they quoted the promise of fundamental human equality in the Declaration of Independence. But Douglass had a powerful reading of the

54. U.S. CONST. amend. V.
55. DOUGLASS, Speech in Glasgow, Scotland, *supra* note 11, at 362.
56. *Id.* at 357.
57. U.S. CONST. pmbl.

Preamble. He pointed out that it listed six different objects, or purposes, of the nation: union, defense, welfare, tranquility, justice, and liberty. "Slavery is not among them."[58] Proslavery southerners, Douglass noted, denied that the promise of liberty applied to enslaved people. "Who says this?" he asked.

> The constitution does not say they are not included . . . . The constitution says "We the people;" the language is "we the people;" not we the [W]hite people, not we the citizens, not we the privileged class, not we the high, not we the low . . . but "we the people;" not we the horses, sheep, and swine, and wheelbarrows, but we the human inhabitants; and unless you deny that negroes are people, they are included within the purposes of this government.[59]

In this refrain, Douglass echoed themes long familiar to slavery's critics. They began with a simple question: in the constitutional debate over slavery and freedom, why don't the clauses protecting freedom carry at least as much weight as the clauses referring to slavery? After all, there are far more clauses protecting freedom. It came down to a simple precept, repeated often among antislavery politicians: within the plain text of the Constitution, freedom is the rule; slavery is the exception.[60] Unlike Douglass, most antislavery politicians accepted that the Fugitive Slave and Three-Fifths Clauses referred to slavery.[61] But they agreed with Douglass that the Slave Trade Clause was an antislavery victory and that the Insurrections Clause empowered the government to emancipate slaves.[62] They agreed that the Preamble made liberty, not slavery, a fundamental purpose of the nation. They agreed that the Constitution recognized slaves as persons, not as property, and they agreed that all persons were entitled to the due process rights guaranteed by the Fifth Amendment. From these constitutional premises, abolitionists and antislavery politicians committed themselves to a set of federal policies designed to put slavery on a course toward its ultimate extinction.[63] As far back as the 1780s, northern states passed laws protecting the due process rights of accused fugitives and withheld state support for fugitive slave renditions. Most northern congressmen held that the Constitution empowered Congress to ban slavery from the territories, to require a territory to abolish slavery as a condition of admission to the Union, and to abolish slavery in Washington, D.C. Many argued that the Constitution empowered Congress to ban the Atlantic slave trade and the domestic coastwise slave trade. The Republican Party was the ideological heir to this antislavery constitutional and political tradition. Knowing this, Douglass was right to describe it as an antislavery party. He had good reason to look forward to its ascendancy.

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58. *See* OAKES, *supra* note 4, at 26–53.
59. DOUGLASS, Speech in Glasgow, Scotland, *supra* note 11, at 361.
60. *See* OAKES, *supra* note 4, at 26–53.
61. *Id.*
62. *See id.*
63. OAKES, *supra* note 4, at xix.

I once thought that William Lloyd Garrison read the Constitution right when he burned it in public. It is now clear to me that when he stepped up onto that soapbox, Garrison made himself an outlier rather than a representative of the abolitionist movement. Abolitionist constitutionalism—the genuinely radical reading of the Constitution by men like William Goodell, Lysander Spooner, and Gerrit Smith—was at least as popular among antislavery radicals as Garrison's reading of the Constitution as a proslavery document. Abolitionist constitutionalism was certainly more influential and, as such, much closer to mainstream antislavery constitutionalism. Many of the constitutional arguments developed by radicals in the 1830s and 1840s were later adopted by antislavery politicians in the 1850s.[64]

To be sure, when Frederick Douglass claimed that the Three-Fifths Clause punished rather than rewarded the South, and when he denied that the Fugitive Slave Clause referred to fugitive slaves, he was saying things that virtually no antislavery politician would have said. But when Douglass denied that the Constitution protected a right of "property in man," when he invoked the Fifth Amendment's right of due process, and when he cited the "blessings of liberty" promised by the Preamble, Douglass stood squarely in the mainstream of antislavery politics (which by then had become far more radical). All of this is to say that when Frederick Douglass switched sides, he was not jumping from one extreme to another. Rather, he was moving closer to the vast army of antislavery men and women who, even as he spoke at Glasgow in 1860, were poised to take control of the federal government and put slavery, once and for all, on a course of ultimate extinction.

64. Various scholars have traced the origins of the Fourteenth Amendment to abolitionist constitutionalism. *See generally* JACOBUS TENBROEK, EQUAL UNDER LAW (1965); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021).