

Frederick Douglass Changed My Mind about the Constitution

James Oakes

Frederick Douglass changed my mind about the Constitution—no small irony in view of the fact that Douglass himself so dramatically and publicly changed his own mind. Like many historians of slavery, I had long viewed the Constitution as a problem—not necessarily the compact with Satan that William Lloyd Garrison thought it was, but not all that far from historian Paul Finkelman, who isolated a dozen or so passages in the Constitution that implicitly recognized slavery.

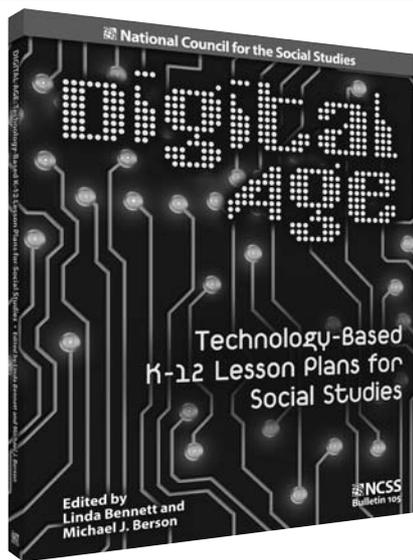
Writing a book on Abraham Lincoln and Frederick Douglass forced me to reconstruct carefully three very different positions on slavery and the Constitution. The first was the view shared by the slaveholders and the Garrisonians, to which Douglass initially subscribed, that the Constitution was a proslavery document; the second was Douglass's "strong" antislavery constitutionalism, which interpreted the Constitution as an antislavery document; and the third was Lincoln's "weak" antislavery constitutionalism, which held that the Constitution recognized slavery in a couple of ways, but only out of necessity, while allowing Congress to restrict slavery in other ways. Having worked my way through these three interpretations I found myself persuaded by Lincoln, and I'm still inclined in that direction.

But shortly after finishing the book, I got myself wrapped up in an Internet discussion of the three-fifths clause and went back to a speech Frederick Douglass gave in Scotland on the eve of the Civil War. He argued, for example, that the

fugitive slave clause does not actually mention slaves, and that there's no reason to give the slaveholders the benefit of the doubt on the matter. Douglass was invoking a principle of constitutional interpretation that holds that the text itself is all that matters, that the intentions of the framers are irrelevant. This allowed him to argue—contrary to everything that most Americans at the time believed and that most historians today believe—that the three-fifths clause punished, rather than rewarded, the South for slavery. Douglass's argument was disarmingly simple: take away the three-fifths clause and *all* the slaves would have been counted for purposes of representation, since the default position in the Constitution was that representation would be based on the entire population. By this reading the Constitution reduced the South's representation by counting three-fifths rather than five-fifths of the slaves. Moreover, by inserting the three-fifths clause, the founders had planted in the Constitution an incentive for the slave states to increase their representa-

tion in Congress by emancipating their slaves. There is nothing in the actual *text* of the Constitution to justify any other reading, Douglass argued.

I had no easy answer to Douglass other than to invoke a different strand of constitutional interpretation, one in which the intentions of the framers did matter. But the more I dug into it, the messier things looked. The debates at the Constitutional Convention revealed a jumble of mixed motives and complicated intentions. The proposal to count three-fifths of the slave population was not part of either of the two main proposals, the Virginia plan and the New Jersey plan. In that sense, the three-fifths clause came out of nowhere, tossed into the discussions in Philadelphia as part of the debate over the treatment of large versus small states. Supporters and opponents of the three-fifths did not break down along pro- and anti-slavery lines, since most of the delegates expressed antislavery sentiments. Those who complained that the clause rewarded the South were often conservatives who resented southern political power, and their position was not that slavery should be abolished but that slaves should count for *nothing* for purposes of representation. Then, too, there is the other three-fifths clause in the Constitution, less well known, relating to taxation of slaves versus other forms of



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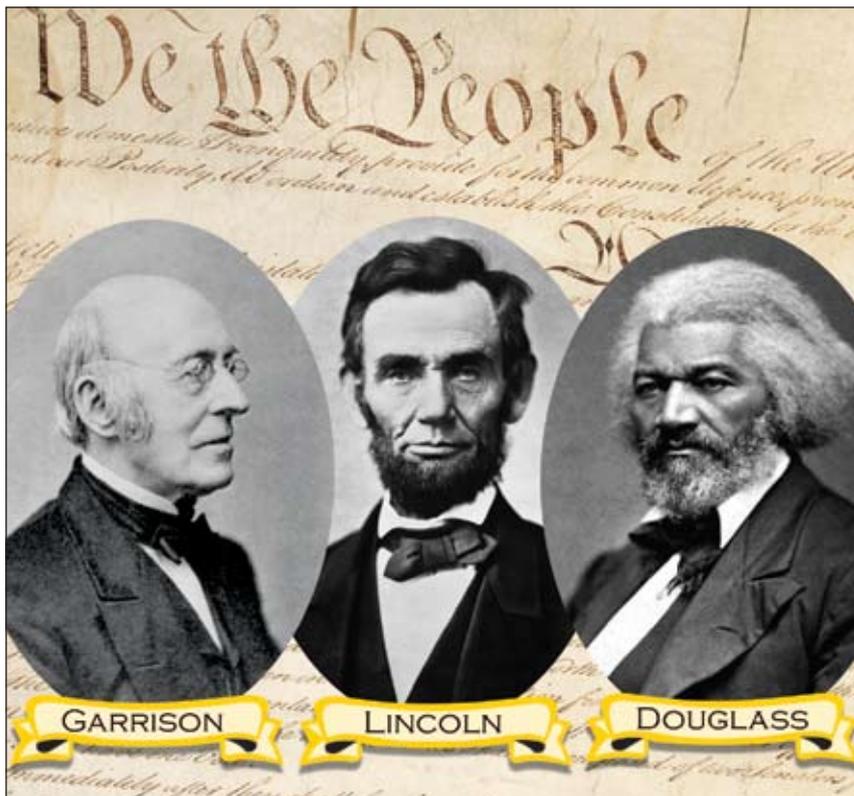
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property. This clause ultimately had no practical consequences, but the discussion of it suggests that it was inspired by the classical economic critique of slavery's alleged economic inefficiency. That is, slaves were less efficient than free laborers and should therefore be taxed at a lower level. Most of those who supported both of the three-fifths clauses were opposed to slavery, and most believed that antislavery politics would ultimately be strengthened by the new Constitution.

I'm not sure I actually believe this argument. I'm quite sure that the men who wrote the Constitution *intended* the fugitive slave clause to apply to slaves, despite the fact that they deliberately kept the word "slave" out of the document itself. On the three-fifths clause, I'm a lot less certain than I used to be. Right from the start, critics complained that it rewarded the South, but they did so on the assumption that slaves were not citizens and should not be counted at all. So here, too, the framers' *intentions* don't really clarify matters.

But I am persuaded that Lincoln's "weak" antislavery constitutionalism

put him closer to Douglass than to Garrison. And in the long run it was Lincoln's position that prevailed. The Constitution gave the federal government more power than the Articles of Confederation to interfere with slavery, and under the right circumstances—southern secession—it empowered the federal government to abolish slavery entirely. After 75 years of inflamed debate over what the federal government could do with slavery, the issue was finally decided by the Civil War: invoking the powers authorized by the Constitution drawn up in 1787, the federal government abolished slavery. Realizing that he had been wrong, that the Constitution did give the government the power to emancipate the slaves after all, William Lloyd Garrison strongly supported Lincoln's re-election in 1864. 📖

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