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WHENCE COMES SECTION ONE? THE ABOLITIONIST ORIGINS OF THE FOURTEENTH AMENDMENT

Randy E. Barnett¹

ABSTRACT

The contribution of abolitionist constitutionalism to the original public meaning of Section One of the Fourteenth Amendment was long obscured by a revisionist history that disparaged abolitionism, the “radical” Republicans, and their effort to establish democracy over Southern terrorism during Reconstruction. As a result, more Americans know about “carpetbaggers” than they know about the framers of the Fourteenth Amendment. Despite a brief revival of interest stimulated by the writings of Howard Jay Graham and Jacobus tenBroek, abolitionist constitutionalism remains obscure to law professors and even to historians of abolitionism.

This study provides important evidence of the original public meaning of Section One. All the components of Section One were employed by a wide variety of abolitionist lawyers and activists throughout the North, many of whom were instrumental in the formation of the Liberty, Free Soil, and Republican parties. To advance their case against slavery, they needed to appeal to the then-extant public meaning of the terms already in the Constitution. Moreover, their widely-circulated invocations of national citizenship, privileges and immunities, the due process of law, and equal protection made their own contribution to the public meaning in 1866 of the language that became Section One.

The more one reads the forgotten writings of these “constitutional abolitionists,” the better their arguments look when compared with the opinions of the antebellum Supreme Court. But even if the Taney Court was right and the abolitionists wrong about the original meaning of the Constitution, the Thirteenth and

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Fourteenth Amendments were enacted to reverse the Court's rulings. To appreciate fully the public meaning of these Amendments, therefore, we need to know whence they came.

The Fourteenth Amendment is universally presumed to be the outcome of the organized antislavery movement in the United States, yet its modern history continues to be written without reference to the abolitionists. Judges and historians seek an understanding of phrases admittedly designed to secure the "freedom of the slave race" without first examining the tenets of the group which fought longest and hardest to establish that freedom.²

[T]he fight for liberty in this land was begun by the Radical Abolitionists long before the final battle. ... They were followed, however, by a class known as Constitutional Abolitionists; equally bold and brave, but more practical. It was the labor of the latter that accomplished glorious results; fought the good battle to a finish and destroyed the slave power. They were among the organizers of the Republican Party.³

1. INTRODUCTION: THE NEED TO REVISIT ABOLITIONIST CONSTITUTIONALISM

- 1 On April 21, 1866, the Committee of Fifteen on Reconstruction of the Thirty-Ninth Congress met to consider a constitutional amendment. Committee member Thaddeus Stevens "said he had a plan of reconstruction, one not of his own framing, but which he should support. ..." He then submitted the text of a multi-part amendment with the following as its first section: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude" (Kendrick, 1914, 83–84). The fifth section empowered Congress to enforce the amendment, thereby combining a constitutional injunction against the states, akin to others in the Bill of Rights, with a separate congressional power of enforcement.
- 2 Later the same day, Representative John Bingham of Ohio moved that the following language be added as a new section five of the proposed amendment (pushing the enforcement power to a sixth section):

2 Howard Jay Graham ([1950] 1968, pt. 1, 483).

3 Benjamin F. Shaw (1900, 60–62).

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws [Kendrick, 1914, 87].

His motion carried, and for the next four days, Bingham's language coexisted with Stevens's nondiscrimination provision in the same proposal, strongly suggesting what appears obvious from their wording: these provisions had distinct public meanings and Bingham's proposal was not limited to discrimination. 3

On April 25, the motion to strike Bingham's language was made and carried, and he responded by moving it be submitted as a separate amendment, again showing that he, at least, did not believe the meaning of his language was the equivalent of Stevens's anti-discrimination proposal. Bingham's motion failed. Then, on April 28, Bingham moved to replace the nondiscrimination language of Section One with his previously stricken language, and his motion carried (Kendrick, 1914, 106–107). On that day, the committee approved and sent to Congress the amendment with Bingham's Section One. 4

So far as I know, Bingham left no direct record of whence came the language that became Section One of the Fourteenth Amendment. In this article, I revisit the abolitionist origins of each element of Section One by examining, more thoroughly than has previously been attempted, antislavery arguments about the meaning of the Constitution made by Theodore Dwight Weld, Alvan Stewart, Charles Dexter Cleveland, William Goodell, Lysander Spooner, Salmon P. Chase, Benjamin Shaw, James Birney, Joel Tiffany, Horace Mann, Lewis Tappan, Gerrit Smith, Byron Paine, and Frederick Douglass. From the 1830s to the 1850s, a truly remarkable body of constitutional argumentation was developed by these and other abolitionist lawyers and laymen to evaluate the constitutionality of slavery. They denied that the Constitution was a "covenant with death and an agreement with hell" because it sanctioned slavery, as was contended by William Lloyd Garrison (1842, 71) and Wendell Phillips (1844). Instead, these abolitionists read the Constitution as either entirely antislavery or providing important constitutional barriers to its extension. 5

Their largely forgotten books, pamphlets, articles, resolutions, and legal briefs addressed the pressing constitutional disputes of their day: 6

the constitutionality of slavery in the District of Columbia, the constitutionality of slavery in the territories and new states formed therefrom, the constitutionality of the fugitive slave laws of 1793 and 1850, the mistreatment of Northerners—both white and free black—while in the South, and the correctness of the Supreme Court’s decisions in *Prigg v. Pennsylvania*⁴ and *Dred Scott v. Sanford*.⁵ On all these issues, this group of diverse and disputatious writers was remarkably united in their conclusions. On only one issue did they fundamentally disagree: whether slavery was also unconstitutional in the states that comprised the original union.⁶

7 Over a span of twenty years, their constitutional arguments became increasingly sophisticated and robust, eventually evolving to include all four concepts that would comprise the text of Section One. From the beginning, these abolitionists employed the Privileges and Immunities

4 41 U.S. (16 Pet.) 539 (1842).

5 60 U.S. (19 How.) 393 (1857).

6 When discussing antislavery constitutionalism some scholars reserve the term “abolitionist” for those who held that slavery was unconstitutional in the original states. See, e.g., Alexander Tsesis (2008, 1:78):

A third group, which gained the support of politicians like James G. Birney (1792–1857) and Salmon P. Chase (1808–1873), is better characterized as antislavery than abolitionist. This political movement sought to prevent the spread of slavery, but it was deferential to the existing order in slave states. There was not a campaign for the immediate end of all slavery, wherever it existed, but against the continued spread of slavery to U.S. territories.

In the context of antislavery constitutionalism, at least, this semantic distinction is hard to maintain. After all, the Garrisonians are uncontroversially called “abolitionists,” yet they too believed that the Constitution did not touch slavery in the slave states (or anywhere else). There is no reason to believe that any of the antislavery writers discussed here—including both Birney and Chase—opposed immediate abolition in the Southern states, despite their beliefs that its continued existence was constitutional, or that the federal government lacked power to abolish slavery there.

Historian Richard Sewell described as “political abolitionists” those men “who, though never attached to an antislavery society or insistent on *immediate* emancipation, nonetheless embraced non-extension in part because they thought it a perfectly constitutional way to hasten slavery’s downfall” (1980, ix). As Sewell observed, “because attitudes toward slavery were susceptible of nearly infinite variations and permutations, too rigid a dichotomy between ‘abolitionist’ and ‘antislavery’ risks distorting reality.” *Id.* Consequently, I will use the terms antislavery and abolitionist constitutionalism interchangeably.

As we shall see, many of these same figures that Sewell labeled political abolitionists also advanced constitutional arguments. In this respect, they can be considered “constitutional abolitionists,” a term used retrospectively by newspaper publisher Benjamin F. Shaw to distinguish this group from “radical abolitionists” like William Lloyd Garrison and Wendell Phillips. See Benjamin F. Shaw (1900, 59). The very close affinity between “political” and “constitutional” abolitionism merits an historical examination that is beyond the scope of this article.

Clause of Article IV and the Due Process Clause of the Fifth Amendment; they developed the concept of birthright United States citizenship that was eventually incorporated into Section One, and frequently invoked the fundamental right of all persons to the equal protection of their natural rights by the government. Their publications provide important yet largely neglected evidence of the public meaning of the Constitution outside the Supreme Court of Chief Justice Roger Taney in the decades leading up to *Dred Scott* and the Civil War. This is the focus of Part 2 of this article.

The connection between abolitionist constitutionalism and the Republican Party emerges from the backgrounds of many of the figures discussed here. Most were heavily involved in the formation of the antislavery Liberty Party, which led to the Free Soil Party, the Free Democrat Party, and finally the Republican Party. An even more direct connection between abolitionist constitutionalism and the Fourteenth Amendment is not hard to find. Although the Citizenship Clause was added to Section One on the motion of Republican Senator Jacob Howard of Michigan during consideration of the Fourteenth Amendment by the Senate,⁷ the balance of Section One was drafted as a unit by the Joint Committee of Fifteen on Reconstruction. As mentioned above, during the deliberations of the Committee, this specific language was proposed by Committee member and Republican Ohio Congressman John Bingham (Kendrick, 1914, 87).

In the 1850s, Bingham delivered a series of speeches in Congress in which he employed what by then had become the basic tenets of abolitionist constitutionalism. In Part 3 of this study, I examine these speeches to expose the marked continuity between them and the preceding twenty years of abolitionist constitutionalism. Given what has been discovered about Bingham's abolitionist upbringing, environment, and connections, this continuity should not be surprising.

Previous scholarship. The thesis that the origins of Section One lay in abolitionist constitutionalism was introduced into modern constitutional scholarship by historian Howard Jay Graham's 1950 two-part article, "The Early Antislavery Backgrounds of the Fourteenth Amendment,"⁸ and by Jacobus

7 See Garret Epps (2006, 231–236), describing the addition of the Citizenship Clause in the Senate.

8 Graham ([1950] 1968, 610). Reviewing the book that reprinted Graham's 1950 articles, William Van Alstyne wrote that Graham's 1950 articles, along with tenBroek's 1951 book, "effectively rehabilitates the humanity of the fourteenth amendment—the amendment was indeed a constitutional commitment to equal rights. . . ." (1969, 160).

tenBroek's 1951 book, *The Antislavery Origins of the Fourteenth Amendment*.⁹ Since then, while the literature on abolitionism has grown immensely, few have undertaken to carefully examine the abolitionists' constitutional arguments, much less their connection with the Fourteenth Amendment.

11 The most comprehensive and still worthy study was legal historian William Wiecek's book, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (1977). Although Wiecek is a law professor as well as a historian, his study ends at 1848 and does not purport to evaluate how the abolitionists' arguments contributed to the public meaning of the four constituent parts of Section One.¹⁰ One legal scholar who made this connection was Michael Kent Curtis. In his 1986 book, *No State Shall Abridge*, published perhaps not coincidentally while Curtis was still a practicing lawyer, he discussed at some length the influence of abolitionists on the legal theories of the Republican Party.¹¹

12 Why then are law professors today so unfamiliar with abolitionist constitutionalism, notwithstanding these early efforts? Perhaps legal awareness was influenced by the chilly treatment given to abolitionist constitutionalism in two influential works by authors from elite law schools. Just before Wiecek's book appeared, Yale law professor Robert Cover published his acclaimed *Justice Accused: Antislavery and the Judicial Process* (1975), in which he movingly chronicled the shift from natural rights to positivist jurisprudence among the American judiciary in response to the challenge posed by slavery.

13 *Justice Accused* remains an invaluable account of a crucial intellectual retrenchment that persists to this day. But, in an apparent effort to explain why a commitment to positive law entailed a judicial acquiescence to slavery, Cover disparaged abolitionist constitutionalism. Dubbing those who offered constitutional objections to laws sanctioning slavery as "constitutional utopians," Cover dismissed their legal arguments as "a forced reading of positive law instruments" (1975, 154–158).

14 Cover also took direct aim at "men like Jacobus tenBroek and Howard Graham ... who discovered roots for their own constitutional aspirations

9 Jacobus tenBroek ([1951] 1965). Citations refer to the 1965 reprint.

10 The same can be said of the brief but excellent discussions of antislavery constitutionalism in Eric Foner ([1970] 1995, 73–102), and Lewis Perry (1973, 188–208).

11 See Michael Kent Curtis (1986, 42–56). Although I could be wrong, I do not believe that this aspect of Curtis's book has been as influential on legal scholars as has its claim that the rights contained in the Bill of Rights were among the privileges or immunities of citizenship to which Section One refers.

in the visions of William Goodell, Lysander Spooner, Joel Tiffany, and Alvan Stewart” (1975, 154).¹² Cover described tenBroek and Graham as part of a “dissenting wing of American constitutional law scholarship,” that “seized upon” these antislavery writers “as prophets of the Fourteenth Amendment and as evidence of that Amendment’s thrust toward racial equality.” According to Cover, the “ulterior motives of the tenBroek-Graham hypothesis distort somewhat the image of the antislavery constitutional utopians” by attributing to their theories more legal “substance” than they merit (1975, 154, 155).

Robert Cover was not alone in dismissing abolitionist constitutionalism.¹³ In his book *The Fourteenth Amendment* (1988), William Nelson, a legal historian and law professor at New York University, purported to transcend the historical debates on the origins of the Fourteenth Amendment to focus instead on its indeterminate meaning.¹⁴ In his brief discussion of the “popular ideology of liberty and equality ... from which section one of the Fourteenth Amendment was ultimately derived,” he emphasized the “amorphous quality” of this antebellum ideology “that imprecisely linked together several ideas. ...” (1988, 13). To make this case, however, Nelson ignored the full range of specific antislavery constitutional arguments,¹⁵ and the possible connection of these legal arguments to the wording of Section One.¹⁶

15

12 Cover defends this characterization of tenBroek and Graham in a footnote: “In a sense I proclaim the motives of tenBroek and Graham with little documentation though I believe they would embrace my description” (1975, 295 n. 9).

13 Indeed, in his 1968 book, Graham recalled that, as he and tenBroek were completing their studies, “more than once we were twitted, derided, dismissed and suffered as ‘the students, the historians of constitutional might-have-been’ by a number of law school and legal ‘positivists.’” Critics characterized them as “the pair who ‘resurrected the Abolitionists,’ ‘revived old fallacies,’ ‘disturbed judicial and constitutional peace’ ‘disturbed an 1877 ‘settlement’” (Graham, 1968, 241).

14 See Nelson (1988, 5), “The study attempts to move historical scholarship on the Fourteenth Amendment beyond this present impasse.”

15 *Id.*, 18, “The most important contribution of the opponents of slavery to ideas underlying the Fourteenth Amendment was their elaboration of the concepts of equal protection used, on occasion, by radical Jacksonians and proslavery Southerners.”

16 For another legal historian who dismisses without analysis Lysander Spooner’s constitutional arguments along with those of other abolitionists, see Paul Finkelman, (2001, 201 n.33), “Spooner’s argument seems more polemical than serious.” See also Finkelman (2008, 354), referring to Spooner as among “a few constitutional outliers” who thought slavery to be unconstitutional in the original states.

16 It is worth noting that, despite their disparagement of abolitionist constitutionalism, neither Cover nor Nelson actually denies its connection with Section One. Cover simply brushes aside tenBroek and Graham's "hypothesis" about the Fourteenth Amendment without attempting to refute it.¹⁷ Nelson's stance is to transcend any such historical connection by characterizing both abolitionist and Republican argumentation as "higher law" rhetoric, rather than as true law.¹⁸ Nevertheless, while failing to confront the work of tenBroek, Graham or Curtis directly, Cover and Nelson's belittling tone could only serve to marginalize the importance of abolitionist arguments for those who had not read them for themselves.

17 The abolitionists who marshaled serious constitutional arguments against laws supporting slavery deserve better. So too do the Republicans in the Thirty-Ninth Congress who amended the Constitution to write this constitutional vision into its text. One way to rehabilitate their memory is to appreciate the seriousness of their constitutional arguments by examining how they developed chronologically.

18 I do not claim that these abolitionist arguments were either correct on the merits, or that they tell us all we need to know about the original meaning of Section One. For one thing, they were dealing with the Constitution as they found it. The wording of the Privileges and Immunities Clause of Article IV differs from the Privileges or Immunities Clause in Section One, and they had no express Citizenship or Equal Protection Clauses to invoke and interpret. Further, although abolitionist writings and arguments were widespread, they are certainly not the only sources that may have influenced the public meaning of the terms of Section One.¹⁹

19 One final caveat. Although these writings are situated in the past, what follows is not history but law. Historians seek, among other things, to expose the intentions, purposes, and motives of actors in an effort to explain why events occurred. Historians rarely assess or acknowledge the

17 See Cover (1975, 155), "Whatever the merits of this Fourteenth Amendment argument. . . ."

18 See, e.g., Nelson (1988, 62), referring to "the old rhetoric of higher law" as "species of political rhetoric, without clear content and clear limits. . . ." To reach this conclusion, Nelson seems to have relied mainly on secondary sources. Most of his references to abolitionist constitutional writings cite either to material reproduced in the appendices of tenBroek's book or to quotations in its text—or, to a lesser extent, to quotations appearing in Cover or Foner—rather than to the original sources in full.

19 For another study of the antebellum constitutional origins of the Privileges or Immunities Clause, see Kurt T. Lash (2010).

legal merits of abolitionist constitutional theory, in part, because the legal merits are outside the scope of purely historical inquiry. While the questions asked by historians about antislavery constitutionalists are deeply interesting, assessing the legal significance of the abolitionists' constitutional claims requires explication of the legal content of their arguments—a task that cannot be accomplished via the historian's normal inquiry into motives, purposes, and causal influences.

My aim is to give abolitionist constitutional theory its proper due as *legal* argumentation. Consequently, in this Article, I focus solely on the legal content of the constitutional arguments made by particular abolitionists, rather than a historical account of why they offered them. So, with each of these authors, I will organize the presentation around the four components of Section One of the Fourteenth Amendment: (1) *The Citizenship Clause*—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." (2) *The Privileges or Immunities Clause*—"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." (3) *The Due Process Clause*—"nor shall any state deprive any person of life, liberty, or property, without due process of law." And (4) *The Equal Protection Clause*—"nor deny to any person within its jurisdiction the equal protection of the laws."

In addition, where the author provides a discussion of interpretive methodology, this will be described as well. In their writings, these abolitionists employed a method of textualism based on the original public or objective meaning of the terms employed rather than the historical or subjective intentions of the drafters who employed them. Readers will see an affinity between their approach and the method of original public meaning interpretation I have advanced in my writings. This is neither a coincidence nor, I believe, an example of my reading my own views of interpretation into the sources. To the contrary, causation runs in the other direction.

Until I first ran across this approach to originalism in Lysander Spooner's *The Unconstitutionality of Slavery*, I myself was not an originalist.²⁰ Reading Spooner's original public meaning approach to interpretation back in the 1990s opened the possibility of an alternative version of originalism that avoided many of the deficiencies of so-called original framers

20 See Barnett (1996), rejecting the view that we are bound by "framers' intent" and the methodology of "channeling the framers."

intent originalism.²¹ As this study shows, Spooner's methodology was widely accepted by constitutional abolitionists. So, far from projecting my own views onto these abolitionists, my views of interpretation result directly from having been exposed to their approach.

- 23 Because they remain largely unknown to legal scholars, the principal purpose of this article is to introduce to a modern audience these much-neglected constitutional arguments about national citizenship, privileges and immunities, the due process of law, and equal protection. They were powerful when originally made and retain their power even in hindsight. Indeed, whether or not they ultimately succeed, they hold their own with the reasoning of Justice Story in *Prigg* and Chief Justice Taney in *Dred Scott*. In my view, they even compare favorably with much of current constitutional argumentation. Of course, this judgment will be in the eye of the beholder.

2. ABOLITIONIST CONSTITUTIONALISM

- 24 Abolitionist constitutionalism can be traced to controversies in the 1830s over the legal treatment and constitutional status of free blacks (Graham, 1968, 157–185). The notorious case of *Crandall v. State*²² involved a Connecticut statute banning the private schooling of free blacks from outside the state without the consent of local authorities. Representing the school mistress Prudence Crandall, attorneys William W. Ellsworth, son of the second chief justice of the United States, and Calvin Goddard argued that the Connecticut statute violated the Privileges and Immunities Clause of Article IV. Ellsworth and Goddard contended that free blacks migrating from other states were “*citizens* of their respective states,” their citizenship deriving from the natural duty of allegiance they owed to their states, which gives “rise to rights and duties between the government and the individual of the gravest importance and most permanent duration.”²³

21 Compare Barnett (1997), describing Lysander Spooner's theory of interpretation, with Barnett (1999, 633), advocating an “originalism for nonoriginalists” relying, in part, on Spooner's *Unconstitutionality of Slavery*.

22 *Crandall v. State*, 10 Conn. 339 (1834).

23 *Report of the Arguments of Counsel in the Case of Prudence Crandall* (1834), 5, 6.

They carefully traced the recognition of this citizenship on judicial decisions, state constitutions, and the Articles of Confederation, before turning attention to Article IV, section 2: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” This provision, they maintained, barred discrimination against citizens from another state with respect to “the right of education, [which] is a *fundamental right*.”²⁴ Among other authorities, they quoted at length from the list of privileges or immunities identified by Justice Bushrod Washington in *Corfield v. Coryell*.²⁵

25

In 1835, the Ohio Anti-Slavery Convention used the same argument to impeach the constitutionality of myriad Ohio statutes discriminating against free blacks who had emigrated from other states. In its report, it invoked the Ohio constitution’s injunction that: “We declare, that ALL are born *free and independent*, and have certain natural inherent inalienable rights, among which are the enjoying and defending life and liberty, *acquiring, possessing and protecting property*, and *pursuing and attaining happiness and safety*.” With this affirmation of fundamental rights, they then cited Article IV, section 2 to conclude that “those enactments, in the Ohio legislature, imposing disabilities upon the free blacks, emigrating from other states, *are entirely unconstitutional*.”²⁶

26

In both instances, Article IV was viewed as a bar to discrimination against citizens from other states with regard to their fundamental rights. It was the design of the Constitution, as evidenced in Article IV, wrote Ellsworth, “to declare a citizen of one state to be a citizen of every state, and as such, to clothe him with the *same fundamental rights*, be he where he might, which he acquired by birth in a particular state. . . .”²⁷

27

When they turned their attention from the plight of free blacks to laws touching upon slavery itself, abolitionists offered a panoply of constitutional arguments. Because my goal is to trace the origins of the

28

24 *Id.*, 8 (quoting U.S. Constitution, art. 4, sec. 2), 12.

25 *Id.* While their constitutional objections were rejected by the lower court, ultimately, the *Crandall* prosecution was dismissed by the Supreme Court of Connecticut for failing to aver in the information that the school was unlicensed, which was a convenient way to avoid the constitutional issue.

26 *Report on the Laws of Ohio* (1835), 37, 39.

27 *Report of the Arguments of Counsel in the Case of Prudence Crandall* (1834, 8) (emphasis added).

four moving parts of Section One, I will be limiting my focus in this Part to their invocation of the antecedents of these clauses. I will deliberately be ignoring their many other constitutional arguments concerning slavery.

- 29 My object is not to assess whether these writers were ultimately correct in their various claims about the Constitution, but to examine important evidence of the original public meaning of terms that eventually constituted Section One. Lengthy as it is, the list of abolitionist writers surveyed here does not purport to be exhaustive. The more I read, the more I discover how widespread such thinking was. Still, I hope that the evidence presented is comprehensive enough for readers to appreciate the pervasiveness of certain arguments.

2.1. Theodore Dwight Weld, 1837

- 30 Born in Hampton, Connecticut, raised near Utica, Theodore Dwight Weld (1803–1895) was converted to abolitionism while a student at Oneida Institute in Ohio by his professor, the lawyer and preacher Charles Finney, who had been among the signatories of the 1835 *Report on the Laws of Ohio*.²⁸ He was also deeply influenced by Lewis Tappan, who will be discussed briefly below. While studying for the ministry at Lane Seminary, Cincinnati, a vigorously antislavery institution, Weld “organized a series of antislavery debates between leading ministers and intellectuals” (Lowance, ed., 2003, 91). Having “created a platform for voicing his own abolitionist sentiment” (*id.*) in 1834, the charismatic Weld led a walkout of the majority of Lane’s students after the Board of Trustees banned such student projects. Shortly thereafter, his group of activists founded Oberlin College in northern Ohio where “instruction was open equally to men and women regardless of race” (Stewart, 1997, 60). Declining a professorship there, Weld instead became a full time antislavery activist, operating mainly in New York. In 1838, he married Angelina Grimké, the noted abolitionist and women’s rights advocate.
- 31 In December 1837 and January 1838, Weld’s essay, “The Power of Congress over the District of Columbia,” appeared in installments in the *New York*

28 For a brief biographical sketch of Theodore Dwight Weld, describing him as “one of the most influential figures of his generation,” see Graham (1968, 165–173). For a study that situates Weld in the antislavery constitutionalism of the 1830s, see Helen J. Knowles (2007).

Evening Post under the pseudonym “Whythe.”²⁹ In 1838, he published an expanded version as a pamphlet (Weld 1838). Jacobus tenBroek described this piece as “a restatement and synthesis of abolitionist theory as of that time.”³⁰ Weld offered a wide-ranging analysis of the power of Congress over slavery in the District of Columbia, but I will confine my attention to his treatment of the concepts that came to be included in Section One.

“*Due process of law.*” Modern constitutional law has two competing conceptions of the “due process of law.” “Procedural due process” is limited to following the established *procedures* by which a law is promulgated by the legislature and then applied to particular individuals. “Substantive due process” refers to judicial scrutiny of whether a law violates fundamental or *substantive* rights. The nature of the judicial inquiry is to identify these rights and, once found, protect them by using the same degree of scrutiny that is afforded such enumerated rights as the freedom of speech. 32

But there is a third conception of the “due process of law” that straddles the modern dichotomy: the *process* by which a law is applied to individuals includes a judicial assessment of whether the substance of a statute was within the *jurisdiction* or *power* of the legislature to enact.³¹ Although this inquiry presupposes the existence of fundamental rights, it focuses instead on the justification for a statute, and whether its restrictions are irrational, arbitrary, or discriminatory, rather than on closely identifying and defining the rights that may have been infringed.³² This inquiry into the “rationality” of a statute is not to be confused with the modern “rational basis” scrutiny, as adopted by the Supreme Court in the 1955 case, 33

29 The publication dates ranged from December 29, 1837, to January 30, 1838.

30 tenBroek ([1951] 1965, 243). Although thrice citing this work by Weld as it appears in tenBroek’s appendix, Nelson omits any reference to Weld’s Due Process Clause argument. See Nelson (1988, 18, 25–26). So too does Cover. See Cover (1975, 155).

31 For purposes of exposition, I wish I had a pithy name to describe this traditional conception of due process. “Jurisdictional due process,” “powers due process,” “justificative due process,” just don’t grab.

32 See Victoria F. Nourse (2009, 761): “To understand the forgotten constitutional discourse of the early twentieth century, one must begin with power, not right. The professional lawyer of the day believed that almost everything in constitutional law depended upon power—the ‘police power,’ that is.”

Williamson v. Lee Optical.³³ Instead, it more closely resembles the methodology employed by the district court in that case.³⁴

34 That legislative power or authority is so limited was famously reiterated by Justice Samuel Chase in *Calder v. Bull*: “An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”³⁵ For example, “a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.”³⁶ In this way, Chase connected fundamental principles of justice to the consent of the governed. Such consent is presumed or implied rather than express, and it cannot be presumed that anyone would have consented to entrusting the legislature with such power.

35 As Frederick Gedicks has explained, to assume that any properly-enacted statute is a binding law, “implicitly projects an anachronistic positivist meaning onto the term ‘law’ in the crucial phrase ‘due process of law’” (2009, 642).³⁷ According to Gedicks, calling “a legislative act ‘law’ during that era did not mean that the act merely satisfied constitutional requirements for lawmaking, but rather signified that it conformed to substantive limitations on legislative power represented by natural and customary rights.” This conception of “the Due Process Clause required that a congressional deprivation of life, liberty, or property be accom-

33 See *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487–88 (1955): A “law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that *it might be thought* that the particular legislation was a rational way to correct it.” [emphasis added]. In *Williamson*, the Court relied solely on hypothetical justifications for the various aspects of the restrictions imposed on opticians that benefitted ophthalmologists and optometrists.

34 See *Lee Optical of Oklahoma v. Williamson*, 120 F. Supp. 128, 132 (1954): “A court can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable, or discriminatory.” In *Lee Optical* the court found the restrictions sufficiently inconsistent with the professed health and safety rationale offered on their behalf to warrant concluding that they were unconstitutional. Cf. *United States v. Carolene Products*, 304 U.S. 144, 152 (1938): “a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.”

35 *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.).

36 *Id.*

37 See also David N. Mayer (2009, 573–592), describing substantive due process in early American law.

plished by a ‘law,’ and to be a ‘law,’ a congressional act must not have exceeded the limits of legislative power marked by natural and customary rights” (*id.*, 644–645).

The claim is not that courts should expressly identify and protect these pre-existing natural rights, as a court would protect rights today. Rather, the claim is that, because these widely-acknowledged fundamental rights limit the just power of legislatures, the “due process of law” requires an examination of the *substance* of legislation for irrationality or arbitrariness, or because it favors one group or discriminates against another. Of course, others have disputed that judges were thought at the founding era to have authority to nullify legislation that violated natural rights (*see* Philip Hamburger, 2008). But regardless of who is correct about the Founders’ view of judicial power, as the backdrop to the Fourteenth Amendment, it will be useful to discern how abolitionists viewed the “due process of law.”

Theodore Dwight Weld’s principal argument concerned the plenary power Congress has over the District of Columbia. Article I, section 8, gives Congress the power “[t]o exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States.”³⁸ The power “to exercise exclusive legislation in all cases whatsoever,” would seem comparable to the police power of a state, which was thought to include the power to abolish, as well as establish, slavery within its borders.

After making what appears to be a powerful textual argument in favor of the power of Congress to abolish slavery, Weld then responded to the objection that the Constitution “withheld from Congress the power to abolish slavery in the District” (1838, 40). Such an argument had been made in a report of a House Select Committee upon the Subject of Slavery in the District of Columbia, which was chaired by Representative Henry L. Pinckney of South Carolina, son of the Founder, Charles Pinckney.³⁹

The Pinckney report denied that Congress had unlimited legislative authority over the District because the Constitution “could confer no power contrary to the fundamental principles of the Constitution itself,

38 U.S. Const., art. 1, § 8.

39 *See Biographical Directory of the United States Congress* (2010).

and the essential and inalienable rights of American citizens.”⁴⁰ Congress’s right to legislate within the District, though exclusive, was “evidently qualified” by the Due Process Clause. “We lay it down as a rule that no Government can do anything directly repugnant to the principles of natural justice and of the social compact. It would be totally subversive of all the purposes for which government is instituted.” Consequently, “[n]o republican could approve of any system of legislation ... by which the property of an individual, lawfully acquired, should be arbitrarily wrested from him by the high hand of power.”⁴¹ The report then relied on a lengthy quote from Justice Chase’s opinion in *Calder v. Bull*.⁴² In 1857, this same substantive due process argument would be accepted by the Supreme Court with respect to the seemingly plenary power of Congress over the territories in *Dred Scott v. Sanford* when Chief Justice Taney concluded that restricting the rights of slaveholders to take their slaves into the territories violated the Due Process Clause.⁴³

40 In his response, Weld does not deny the basic assertion that the due process of law protects the fundamental right to hold property free of arbitrary interference. Instead, he observed that “[a]ll the slaves in the District have been ‘deprived of liberty’ by legislative acts. Now these legislative acts ‘depriving’ them ‘of liberty’ were either ‘due process of law’ or they were *not*.” If they were, then using legislation to deprive the master “of the identical ‘liberty’ previously taken from the slave” would likewise be “due process of law” and constitutional. “[B]ut if the legislative acts ‘depriving’ them of ‘liberty’ were *not* ‘due process of law,’ then the slaves were deprived of liberty *unconstitutionally*, and these acts are *void*. In that case the *constitution emancipates them*” (1838, 40).

41 In other words, if a law depriving the slaves of their property in themselves was consistent with due process, then so too would be a law depriving the master of the very same property right. Conversely, if the “due process of law” protects the property of the master, as alleged by

40 H.R. Rep. No 691, 24th Cong. 1st Sess. (May 18, 1836), p. 14.

41 *Id.*

42 *Id.* at 14-15 (quoting 3 Dall., at 388).

43 *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857): “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws could hardly be dignified with the name of due process of law.”

the Pinckney report, then it also protects the very same property of the slave. To reach this latter conclusion requires an examination of the substance of the laws in question, not merely the procedures by which they were enacted.

Which view of “due process” was held by Weld? At the very beginning of his essay, Weld offered a reason to doubt whether an unjustified legislative deprivation of life, liberty, or property was due process of law. “The law-making power every where is subject to *moral* restrictions, whether limited by constitutions or not. No legislature can authorize murder, nor make honesty penal, nor virtue a crime, nor exact impossibilities.” Because this moral limit on legislative power is not a product of a constitution but precedes it, such a limitation would not result from the Fifth Amendment but is presupposed by it. “In these and many similar respects, the power of Congress is held in check by principles, existing in the nature of things, not imposed by the Constitution, but presupposed and assumed by it” (1838, 3). 42

Assuming that legislative power is inherently limited in this way, the phrase “due process of law” would not include the judicial enforcement of a statute that was outside the power of a legislature to enact. But Weld does not expressly link his discussion of “due process of law” to his earlier assertion of moral limits on the legislative power. Because he is responding to the reasoning of the Pinckney report, he could merely be making an “internal” critique of its claims by accepting its substantive conception of due process for the sake of argument. 43

The same holds true for his discussion of the claim that “due process of law” is limited to providing such judicial process as a jury trial. After making his argument concerning the substance of the “legislative act,” Weld then writes: “If the objector reply, that the import of the phrase ‘due process of law,’ is *judicial* process solely, it is granted. . . .” But to this, Weld offers his second argument that slavery violates the due process of law. “[F]or no slave in the District *has* been deprived of his liberty by ‘a judicial process,’ or, in other words, by ‘due process of law’ . . .” Therefore, “upon the objector’s own admission, every slave in the District has been deprived of liberty *unconstitutionally*, and is therefore *free by the constitution*” (1838, 40). 44

Because Weld frames his analysis of the due process of law as replies to the arguments of others, it is hard to discern exactly which conception he himself holds. But his second point does seem to assume that, if limited to 45

“judicial process solely,” such judicial process refers to such procedures as trial by jury. As will be discussed below, however, confining “due process” to a right to a jury trial does not eliminate all scrutiny of substance in an era in which juries are considered to be judges of the law as well as of the facts.

46 Notice that Pinckney’s committee was responding to the abolitionists’ textual claim that, because Congress had a plenary police power over the District of Columbia, it had the same discretionary power to abolish slavery as did the states. By interposing that this power was restricted by the Due Process Clause of the Fifth Amendment, Southern lawyers like Pinckney armed abolitionists with a new textual argument: the abolition of slavery in the District of Columbia and the territories was not only *permitted* under Congress’s plenary powers over those places, it was also *required* in those places by the Fifth Amendment because slavery deprived slaves of their “liberty” without “due process of law.” Once learned, this was an argument they would never forget. And some would also expand it to include the existing states.

47 “*Protection.*” Weld also advanced an argument that became a staple of abolitionist constitutionalism: from whomever the government demands obedience to its laws, the government owes a duty of protection. Given that obedience to laws was expected of slaves, Weld asked whether “the government of the United States [is] unable to grant *protection* where it exacts *allegiance*?” (1838, 45).⁴⁴ To this he responded that “[i]t is an axiom of the civilized world, and a maxim even with savages, that allegiance and protection are reciprocal and correlative.” Therefore, “[*p*]rotection is the CONSTITUTIONAL RIGHT of every human being under the exclusive legislation of Congress who has not forfeited it by crime” (*id.*).

48 We see in Weld the beginning of what will become a pattern: the equal protection of the laws is, first and foremost, about rendering *protection*. That Weld viewed the duty of protection as arising from the exclusive jurisdiction of Congress renders uncertain whether he thought it might also extend to the protection of slaves in the states. Likewise, because Weld’s pamphlet is limited to the issue of congressional power over slavery in the District of Columbia, he offers no opinion as to whether the Due Process Clause of the Fifth Amendment might also empower Congress to protect slaves in the original slave states or in the territories.

44 Nelson does note Weld’s argument concerning the relation of allegiance to the protection of the laws. See Nelson (1988, 26).

Still, “[i]n these remarkable due process and protection arguments,” writes Wiecek, “Weld anticipated the following thirty years of antislavery constitutionalism, and hit upon the precise mode that antislavery Republicans would choose to destroy the vestiges of slavery.” By this Wiecek can only be referring to the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Moreover, “Weld’s tract was a signpost for his contemporaries pointing to doctrines that would lead some of his fellow abolitionists to conclude in a few years that slavery was everywhere illegitimate” (1977, 190). 49

2.2. Alvan Stewart, 1837

While most abolitionist constitutionalists did not assert that the Fifth Amendment applied to the existing states, one early exception was Alvan Stewart (1790–1849). A New York attorney and founder of the New York Anti-Slavery Society, Stewart also helped organize the Liberty Party and ran as its candidate for governor of New York.⁴⁵ Sewell describes him as “an able and resourceful lawyer” (1980, 49). Stewart was an “imposing figure—tall, dark, and muscular,” who “blended immense learning with mordant humor in ways which juries and, later, antislavery assemblies found marvelously effective” (*id.*). 50

Stewart’s earliest contribution to antislavery constitutionalism was “A Constitutional Argument on the Subject of Slavery,”⁴⁶ which he presented to the New York Anti-Slavery Society in September of 1837. His argument was published in October of that year.⁴⁷ At the 1838 annual convention of the American Antislavery Society, “Stewart moved to amend the Society’s charter by striking from it a clause which admitted the constitutional right of each slave state to exclusive control over slavery within its own limits” (Sewell, 1980, 50). By 1839, he “had emerged as the leading spokesman for an antislavery party” (*id.*, 51). 51

“*Due Process of Law.*” Like the other abolitionists discussed here, Stewart relied heavily on the Due Process Clause of the Fifth Amendment. Unlike 52

45 See *Dictionary of American Biography*, s.v. “Stewart, Alvan.” Dumas Malone, ed. (1964, 9:5). Stewart’s extensive political efforts to form the Liberty Party are discussed at length in Sewell (1980, 43–70).

46 Alvan Stewart ([1837] 1965, 282–295). Although repeatedly relying on sources in tenBroek’s appendix, Nelson seems not to have discussed Stewart.

47 See tenBroek ([1951] 1965, 281–282), providing brief biography.

most others, however, Stewart contended that “Congress, by the power conferred upon it by the Constitution, possesses the entire and absolute right to abolish slavery in every state and territory in the Union” ([1837] 1965, 282). Stewart “was the first to argue, in any substantive manner, that the federal government was empowered to abolish slavery in the states” (Knowles, 2007, 315).⁴⁸ Later we shall see this argument developed by Joel Tiffany.

53 Relying upon Lord Coke, Stewart identified the phrase “due process” as equivalent to the phrase “by the law of the land” in Magna Carta. Stewart’s reliance on Coke is evidence of continuity with the substantive due process concept that Frederick Gedicks identifies at the Founding: “American colonists looked almost exclusively to Coke in formulating higher-law arguments against their perceived oppression by Britain” (2009, 611). This is potentially significant because, as Gedicks shows, the Founders read Coke (whether correctly or not) as imposing due process limitations on the power of legislatures. “On balance, the historical evidence shows that one widespread understanding of the Due Process Clause of the Fifth Amendment in 1791 included judicial recognition and enforcement of unenumerated natural and customary rights against congressional action” (*id.*, 669).

54 Some, like Philip Hamburger, contend that this was a misreading of Coke. Although Coke in his report of *Bonham’s Case* “had used words that might seem to suggest judges could hold statutes void,” Hamburger claims that, in fact, “this was not an argument for holding statutes void, but rather for equitable interpretation” (2008, 274). But the issue of concern to Gedicks is how the Founders interpreted Coke, not the correctness of their reading. As Hamburger observes, “*Bonham’s Case* was susceptible of being misunderstood, and many Americans took pleasure in a misinterpretation that allowed them to believe that judges could actually hold an act of Parliament unlawful” (*id.*) So when the abolitionists rely on Lord Coke, they are signaling continuity with the Founding generation who believed that the duty of judges included invalidating unconstitutional laws that are “against common right and reason.”⁴⁹

48 For a description of abolitionist William Jay’s objection to Stewart’s claim, see Knowles (2007, 317–318).

49 *Bonham’s Case* (C.P. 1610), Coke, Reports, 8: 118a.

Having said this, Stewart adopts a narrow definition of “due process of law” that we shall see echoed by other abolitionists. “[T]he true *and only* meaning” of “due process of law,” he wrote, was “an indictment or presentment by a grand jury, of not less than twelve men, and a judgment pronounced on the finding of the jury, by a court” ([1837] 1965, 283, emphasis added). Thus, “each man, woman, and child, claimed as slaves, before they shall be deprived of liberty, shall always have an opportunity, as ample as the benignity of the common law, to vindicate their freedom, so far as the forms of trial are concerned” and shall not be deprived of their liberty “except by the indictment of a grand jury, and trial by a petit jury, and the judgment of a court thereon, that the person is a slave, and the property of A” (*id.*, 286). Because no slave in the United States had received this judicial process, no slave was legally being held to service. Therefore, any judge of the United States was authorized to issue a writ of habeas corpus to demand proof that a person held as a slave had been deprived of his liberty only after indictment, trial, and conviction by a court. While it is possible that “the judgment of a court” (*id.*) upon a jury verdict could be contingent on a judicial assessment of the justice of slavery, Stewart says nothing to suggest this possibility.

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Still, Stewart’s reading of the “due process of law” is not inconsistent with a substantive assessment of statutes. To the extent that he and others at the time assumed that juries could assess the justice or constitutionality of the laws (or both), what is now called “jury nullification,” then the due process right of trial by jury would ensure a case-by-case assessment of the injustice or unconstitutionality of slavery. Not only was the belief that juries were the independent judges of both law and fact prevalent at the Founding,⁵⁰ abolitionist Lysander Spooner wrote an entire book defending this proposition in 1852 ([1852] 1971e, vol. 2). Spooner’s immediate motivation for the project was to bolster the argument about jury nullification he had made in his 1850 pamphlet *A Defence for Fugitive Slaves*,⁵¹ which responded to the Fugitive Slave Act of 1850. That juries may nullify slavery laws is made explicit by Benjamin Shaw. Therefore, even when limited to

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50 See generally Clay S. Conrad (1998), tracing the development of the doctrine of jury independence.

51 Spooner ([1850] 1971a, 4: 61–72), discussing the right of juries to nullify legislation. On Spooner’s motivation for writing *Trial by Jury*, see Charles Shively (1971, introduction to *Trial by Jury*, vol. 2).

trial by jury, the due process of law could well have been “substantive,” albeit with the power to nullify unconstitutional laws on a case-by-case basis residing in juries rather than in the judiciary.

57 To the objection that “person” in the Due Process Clause did not refer to slaves, Stewart responded with the wording of Article IV, section 2 referring to “No person held to service.”⁵² “The word ‘person’ here means a slave, and in other parts of the Constitution the word ‘persons’ is used for slaves” ([1837] 1965, 288). In addition to Article IV, section 2, Article I, section 2 refers to “three fifths of all other persons.” The Fifth Amendment contained no exceptions for persons who are held as slaves. “Any person,” contended Stewart, “is equivalent to every body” (*id.*) That same year, the identical textual argument about the word “person” in the Due Process Clause had also been made by attorney Nathaniel P. Rogers. “If the negro be not a person,” he wrote, “and the enslaved negro too, then slaves and negro people are not alluded to throughout the Constitution.”⁵³ Rogers concluded that slavery “is contrary to the Constitution of the United States.”⁵⁴

58 But what gave Congress the power to enforce the Fifth Amendment against the states? Although Stewart invoked the Necessary and Proper Clause, he placed more reliance on the Supremacy Clause of Article VI, which made “this Constitution . . . the supreme law of the land; and the judges in every state shall be bound thereby, *any thing in the Constitution or law of the state to the contrary notwithstanding*.”⁵⁵ From this, Stewart concluded that Congress could pass a law enforcing the Fifth Amendment against the states and freeing all slaves who had been deprived of liberty without due process of law, and that no free state was bound to uphold slavery in any form.

59 Like other abolitionists, Stewart entirely ignored the Supreme Court’s ruling in *Barron v. Baltimore*,⁵⁶ which had been decided a mere four

52 U.S. Const., art 4, § 2.

53 See N. P. Rogers (1837, 152), citing other provisions of the Constitution such as “Three fifths of all other *persons*.”

54 See Wiecek (1977, 253–254), discussing Rogers’s article, “which merely reiterated conclusions with little analysis or supportive reasoning.”

55 Stewart ([1837] 1965, 290), quoting U.S. Const. art. 6, his emphasis.

56 *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). See Graham (1968, 224): “The few who were aware of John Marshall’s holding simply assumed that whatever might be the positive law, the states were morally bound by the first eight Amendments, particularly since nearly all the state constitutions contained even stronger guarantees of these basic freedoms.”

years earlier, that the Bill of Rights applied only to the federal government and not to the states. Whether it was because he disagreed with the decision, or was unaware of it, cannot be discerned from his silence. But later, when defending the addition of the Due Process Clause as part of the Fourteenth Amendment against the objection that it was redundant of the Fifth, it was necessary for John Bingham to remind his fellow congressmen in the Thirty-Ninth Congress of the existence of the Supreme Court's decision in *Barron*.⁵⁷ Of course, *Barron* was confined to whether the Bill of Rights applied to the states of its own force, rather than what power Congress might have in enforcing its personal guarantees against the states, a power that Stewart claimed it had.

Stewart's Argument and Prigg v. Pennsylvania. Today, we would not take seriously Stewart's argument that Congress is empowered under the Necessary and Proper Clause to enforce the rights in the Bill of Rights, or to protect these rights from state or private interference. Just five years after he wrote, however, the Supreme Court adopted the very same theory of congressional power, albeit to enforce the rights of slaveholders to reclaim slaves who had fled to free states, rather than the rights of slaves to their property in themselves. 60

In *Prigg v. Pennsylvania*,⁵⁸ the Court upheld the constitutionality of the Fugitive Slave Act of 1793, which overrode judicial procedures in Northern states requiring proof that a person claimed to be a slave was indeed a runaway. In his opinion for the Court, Justice Story interpreted Article IV, section 2, in light of its purpose or object "to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude." Not only was the "full recognition of this right and title... indispensable to the security of this species of property in all the slaveholding states" but Story went so far as to claim that it "was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of 61

57 See Cong. Globe, 39th Cong., 1st Sess., (1866, 1089–1090), speech of John Bingham on February 29, 1866, reading aloud a passage from *Barron* to establish "that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution has been denied."

58 41 U.S. (16 Pet.) 537 (1842). For an extensive discussion of the case in historical context, see Earl M. Maltz (2009, 83–113).

which the Union could not have been formed.”⁵⁹ Antislavery lawyers would sharply contest Story’s historical claim as entirely unsubstantiated, and they would also challenge his use of the motives and intentions of the slaveholders to interpret the meaning of the text, rather than on its plain or public meaning.

62 Having established the fundamentality of this right of slaveholders on the basis of the original motives or intentions behind the adoption of Article IV, section 2, Story then contended that “[i]f, indeed, the Constitution guaranties the right, and if it requires the delivery upon the claim of the owner, (as cannot well be doubted,) the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it.” In support of this claim of an unenumerated power in Congress to enforce fundamental rights against the states, Story invoked what he described as the “fundamental principle applicable to all cases of this sort,” that “where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted.”⁶⁰

63 Story made explicit his reliance on the presumed intentions of slaveholders when he claimed that “[i]t is scarcely conceivable that the slaveholding states would have been satisfied with leaving to the legislation of the non-slaveholding states, a power of regulation, in the absence of that of Congress, which would or might practically amount to a power to destroy the rights of the owner.”⁶¹ To previous similar invocations of the supposed intent of slaveholding states to determine the meaning of the Constitution, Theodore Dwight Weld had objected that, “[i]f ‘suppositions’ are to take the place of the constitution—coming from both sides, they neutralize each other.” And courts of law should look askance at “guessing at the ‘suppositions’ that might have been made by parties to it. . . .” Still, if constitutional questions are “to be settled by ‘suppositions’ suppositions shall be forthcoming, and that without stint” (Weld, 1838, 26).

64 *Prigg* would come under withering fire from abolitionist constitutionalists. Lysander Spooner contested Story’s shift to original intentions from

59 41 U.S. at 611.

60 *Id.* at 615.

61 *Id.* at 624. But as was later noted by Benjamin Shaw, at the Founding, there were slaves held in every state.

the plain or public meaning approach he had advocated in his treatise. In his *Defence for Fugitive Slaves*, Spooner reproduced a lengthy quote in which Story had previously contended that “[n]othing but the text itself was adopted by the people.” Story denied that “the sense of the constitution [is] to be ascertained, not by its own text, but by the ‘probable meaning,’ to be gathered by conjectures from scattered documents, from private papers, from the table-talk of some statesman, or the jealous exaggerations of others. . . .”⁶²

Previously in his treatise, Story had objected that “that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text, but the words are to be bent and broken by the ‘probable meaning’ of persons, whom they never knew, and whose opinions, and means of information, may be no better than their own. . . .” From this, Story concluded that “[t]he people adopted the constitution, according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men.”⁶³

Yet in *Prigg*, Spooner charged, Story changed his approach, at least for the case at hand. Many of the Constitution’s provisions “were matters of compromise of opposing interests and opinions,” and “no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses.” Story then advocated examining “the nature and objects of the particular powers, duties, and rights, *with all the lights and aids of contemporary history*; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.”⁶⁴

Spooner excoriated Story for abandoning his previous commitment to the reasonable public meaning of the text in an effort to give the Constitution a proslavery interpretation. Spooner noted that Story “made no pretence that the *language itself* of the constitution afforded any justification for a claim to a fugitive slave.” To the contrary, the majority, “made the audacious and atrocious avowal, that for the sole purpose of making the

62 Spooner (1971a, 4: 55), quoting Story’s *Commentary on the Constitution* 1: 387–392.

63 *Id.* (same).

64 41 U.S. (16 Pet.) at 610.

clause apply to slaves, they would disregard,—as they acknowledged themselves obliged to disregard,—all the primary, established, and imperative rules of legal interpretation, *and be governed solely by the history of men's intentions, outside of the constitution*" (1971a, 52).

68 As Wisconsin abolitionist attorney and future state supreme court justice Byron Paine later put it: "He is one Story when seeking as a judge to sustain a usurped power, but an entirely different Story, when writing as an independent author, with no purposes but those of truth to subserve." Paine contended that, as judged by its text, the purpose of Article IV, section 2, was to deny the powers of free states to emancipate fugitive slaves, which would otherwise have been the case in the absence of this provision. "The design was to prevent the State from throwing over the slave the broad and impenetrable shield of its law, to protect him from the power of his master" (Paine 1854, 10–11).

69 Paine's principal move, however, was to contest Story's claim that the powers of Congress included an unenumerated power to enforce Article IV, Section 2. Because slavery was thought to be solely a creature of positive law, the Fugitive Slave Clause was needed to negate any claim that an escaped slave was emancipated when he reached the soil of a free state. As Massachusetts Congressman Horace Mann had explained in 1850, "the law of slavery is a *local* law. . . . The Constitution proceeds upon this doctrine when it provides for the recapture of fugitive slaves. . . . An escaped slave could not be recovered before the adoption of the constitution" ([1850] 1853c, 195–196). Paine contended that Article IV did not go beyond establishing this to create a power in Congress to enforce the return of fugitive slaves, which remained a matter of comity between the states. Paine's point-by-point dissection of Story's reasoning is too extensive to adequately summarize here, and extends beyond the subject of this article, which is the roots of Section One in abolitionist constitutionalism.

70 Despite Paine's eventual success in getting the Wisconsin Supreme Court to find the Fugitive Slave Act of 1850 unconstitutional, Chief Justice Taney, writing for the Supreme Court, summarily rejected his arguments and upheld the constitutionality of the Act.⁶⁵ Ironically, as we shall see,

65 See *Ableman v. Booth*, 62 U.S. (21 How.) 506, 513 (1858), "we have the pamphlet arguments filed and referred to by Booth." Although Nelson discussed *Ableman*, he failed to present Paine's constitutional arguments that prevailed in the Wisconsin Supreme Court (1988, 34–35).

some abolitionists such as Joel Tiffany—and later some Republicans in the Thirty-Ninth Congress—relied on *Prigg* to justify the power of Congress to protect the rights of free blacks and unionists in the South under the Privileges and Immunities Clause of Article IV.

According to Wiecek, Stewart’s claim that slavery was unconstitutional in the existing states and could be banned by Congress “shocked the entire movement” and “marked the debut of radical antislavery constitutionalism” (1977, 255). But imposing the label of “radical” on some abolitionist readings of the Constitution can be misleading. As we shall see, there was general agreement that slavery was “unconstitutional” insofar as it violated the Fifth Amendment’s Due Process Clause, which bound Congress in its governance of the District of Columbia and the territories, and because slavery denied to slaves the protection of the law. The only principal disagreement among these abolitionist constitutionalists concerned the status of slavery in the original states. 71

Most of those who treated the subject of the constitutionality of slavery at length freely conceded that Congress had no power to abolish slavery where it pre-existed the adoption of the Constitution. As was stated by the American Anti-Slavery Society, “We fully and unanimously recognize sovereignty in each state to legislate exclusively on the subject of slavery which is tolerated within its limits; we consider that Congress, under the present national compact, has no right to interfere with any of the slaved states in relation to this momentous subject” (tenBroek [1951] 1965, 281). Stewart’s motion at the 1838 convention to strike this clause from its charter, though receiving a vote of 47 to 37, failed to reach the required two-thirds required for amendment (Sewell, 1980, 50). 72

This debate among abolitionists on whether the Due Process Clause applied to the existing states is well described by Wiecek (1977, 249–275) and does not directly concern the origin and public meaning of the various elements of antislavery constitutionalism that resulted in the wording of Section One. After all, the Due Process Clause in the Fourteenth Amendment was clearly written to apply to all states. 73

To be clear, all the abolitionists surveyed here who addressed these issues believed that (1) Congress had the power to abolish slavery in the District of Columbia and the territories (and should do so immediately), (2) the Fifth Amendment posed no barrier to emancipation, (3) the Fugitive Slave Acts were unconstitutional, (4) free blacks were citizens of the United States and (5) were entitled to its protection when traveling in slave states 74

without reference to how free blacks were treated by Southern states. Finally, (6) all rejected the claim by the Garrisonians, still accepted by many today, that the original Constitution was “pro-slavery.”

- 75 Although they disagreed on whether to condemn *Prigg* or to employ the power that the Court said Congress possessed to enforce the guarantees of the Constitution, the principal issue dividing them was whether slavery could be prohibited by Congress or the courts in the Southern states, with most denying that slavery was “unconstitutional” in this sense. This disagreement had nothing to do with their stance on slavery and everything to do with the general scope of federal power over states under the original Constitution. However significant this difference of opinion, if this is all that separated “moderate” from “radical” abolitionists, rendering the latter group “constitutional utopians,”⁶⁶ then these labels unduly exaggerate the differences among them and artificially divide them into two groups.

2.3. Charles Dexter Cleveland, 1844

- 76 Charles Dexter Cleveland (1802–1869) was born in Salem, Massachusetts, and graduated from Dartmouth College in 1827. Three years later, he became a professor of Greek and Latin at Dickinson College before moving to New York University, and eventually founding a school for young ladies in Philadelphia. He served as United States Consul at Cardiff, Wales in 1861.⁶⁷ At Dartmouth he was a classmate of Salmon P. Chase. Two years before Cleveland’s death, while nursing his health in London, he reprinted his own 1844 address to the Liberty Party of Pennsylvania together with Chase’s 1845 “Cincinnati Address” to the Southern and Western convention of the Liberty party” (Chase & Cleveland, 1867). In his notes to the 1867 volume, Cleveland recounts how a pamphlet version of his Pennsylvania address initially went through three printings of twenty thousand copies each (1867a, 11).

- 77 Apart from its constitutional claims, his address is noteworthy for its detailed documentation of how the Southern slave states had politically

66 See Cover (1975, 154–158), labeling abolitionists who viewed slavery as unconstitutional in the original states as “constitutional utopians.”

67 For a brief biographical sketch of Charles Dexter Cleveland, see *Charles Dexter Cleveland*, http://chronicles.dickinson.edu/encyclo/c/ed_clevelandCD.html. Cleveland appears not to have been discussed by tenBroek, Graham, Wiecek, or Nelson.

dominated the three branches of the federal government and other vital interests of the country (1867a, 23–43). While Cleveland remarked upon the now well-known use of the U.S. Post Office to suppress the circulation of abolitionist materials in the South, he also noted how its high postage rates, as compared with England, provided a substantial subsidy from the profitable Northern postal routes to the money losing routes in the South. Together, these suggest a hitherto unremarked motivation for why abolitionist Lysander Spooner founded his own private postal service in 1844, as well as why federal authorities so swiftly shut it down by prosecuting his carriers so as to avoid the constitutional challenge Spooner had prepared.⁶⁸

“*Privileges and Immunities.*” While conceding the power of states to impose slavery, Cleveland nevertheless affirmed the rights of abolitionists and free black citizens of a free state while within a slave state. For example, he specifically objected to “the imprisonment of free citizens of Massachusetts by the authorities of Savanna, Charleston, and New Orleans” as violating the Privileges and Immunities Clause of Article IV. “We would, in the words of the Constitution, have ‘the citizens of each state have all the privileges and immunities of citizens of the several states;’ and not, for the color of their skin, be subjected to every indignity and abuse, and wrong, and even imprisonment” (1867a, 47 n*, 47). 78

Cleveland conceived of the Privileges and Immunities Clause as protecting the fundamental rights of citizens of free states from being violated when in a slave state.⁶⁹ When objecting to Northern blacks being unconstitutionally discriminated against on account of their skin color, he did not complain about differential treatment between in-staters and out-of-staters. Instead, he protested the denial of the fundamental rights of some Northerners on account of their color. Nor is there any hint that 79

68 See Spooner (1971f, vol. 1). All this occurred just a year before Spooner published *The Unconstitutionality of Slavery*.

69 Robert Natelson has claimed that the original meaning of the Privileges and Immunities Clause of Article IV was limited to barring discrimination against citizens of other states with respect to special benefits accorded the citizen of a state. See Natelson (2009, 1187), “if a state bestowed a benefit (other than mere recognition of a natural right) on its citizens as an incident of citizenship, then that state was required to extend the same benefit to American citizens visiting from other states.” Regardless of whether Natelson is correct about the original meaning of Article IV—a claim of which I am skeptical—the abolitionists surveyed here who discuss Article IV do not limit privileges and immunities of citizenship to special benefits, but include discrimination with respect to fundamental rights.

Cleveland thought the constitutionality of imprisoning free Northern blacks depended on how Southern states treated their own free blacks. For Cleveland, then, the Privileges and Immunities Clause appears to prohibit state restrictions on the fundamental rights of the citizens of one state, whether white or black, when traveling within another.

80 “*Due process of law.*” Early in his address, Cleveland condemned Congress for continuing in force in the District of Columbia the slave laws of Maryland and Virginia as “a plain, open, total violation of the constitution” because such laws violated the Due Process Clause of the Fifth Amendment (1867a, 17). When he quoted the Clause, he italicized the word “liberty” and connected it with the same term in the Preamble. Later, he made the same Due Process Clause objection to Congress extending slavery to the territory of Florida under its power to “make all needful rules and regulations respecting the territory ... belonging to the United States.”⁷⁰ This signals the parallel treatment of the power of Congress over the District of Columbia and the territories.

81 Cleveland reaffirmed the constitutionality of laws sanctioning slavery in the original Southern states. “We know, and we here repeat for the thousandth time, to meet, for the thousandth time, the calumnies of our enemies, that while we may present to you every consideration of duty, we have no right, as well as no power, to alter your State laws.” Still, he insisted, “slavery is the mere creature of local and statute laws, and cannot exist out of the region where such law has force.” While respecting the rights of states, Cleveland affirmed that “when reproached with slavery, we would be able to say to the world, with an open front and a clear conscience, our General Government has nothing to do with it, either to promote, to sustain, to defend, to sanction, or to approve” (1867a, 45, 48–49).

2.4. William Goodell, 1844

82 William Goodell (1792–1878) was frequently mentioned in the same breath as Lysander Spooner. Both men were leading exponents of the “radical” view that Congress had the power to abolish slavery in Southern states, and both men expounded on the appropriate method of interpreting and construing the Constitution. “A kindly, peace-loving man with wide experience in reform journalism, Goodell enjoyed the respect of all abolitionists” (Sewell, 1980, 20). He went from editing the *Emancipator*

70 U.S. Const. art. 4, § 3.

to working for the New York State Anti-Slavery Society, editing its paper *Friend of Man* in Utica, New York, to eventually starting his own paper. He helped found the antislavery Liberty Party in 1840 but, in 1847, left to found the Liberty League based on a broader platform of opposition to slavery, tariffs, land monopoly, liquor trafficking, war, and secret societies (*id.*, 117–120).⁷¹ Although he touched upon the constitutionality of slavery in his 1852 book, *Slavery and Anti-Slavery*,⁷² he more systematically addressed the issue in his influential 1844 book, *Views of American Constitutional Law*.⁷³

Interpretive method. As would Spooner, Goodell rejected an original framers intent reading of the Constitution in favor of its original plain or public meaning. The claim that the Constitution represented “compromises” and “guaranties” in support of slavery, he contended, “is seldom made out, from the provisions of that instrument itself . . . without lugging in, what is claimed to be the ‘implied understanding’ of the supposed parties to the ‘compact’—an understanding, without which it is assumed, the assent of the slave States to the Constitution, could not have been gained.” Goodell observed that, “in the absence of the appropriate *words and phrases*” to express any such compromise or guaranties, “resort is instantly had to *supposed intentions and ‘understandings’* to eke out the construction!” (1844, 19, 20). 83

Goodell lambasted proponents of original intent for selectively abandoning “*any recognized principle of interpretation* by which all *other* questions, the meaning of this national document, in particular, or of any other similar instrument, is supposed to be obtained.” He distinguished between two approaches to interpretation—“strict construction” and the “spirit of the Constitution,” which he analogized to two separate courts. An advocate may choose one of these approaches or the other, but, “having made its own selection, it must content itself to remain in the *same Court*, till the verdict is rendered” (1844, 20, 21). 84

71 See also *Dictionary of American Biography*, s.v. “Goodell, William.” Dumas Malone, ed. (1964, 4:384).

72 See William Goodell (1852, 88–89), discussing “due process of law”; *id.* at 563–582, discussing different views of the constitutionality of slavery.

73 Goodell (1844). A second revised edition was published in 1845, but it is very little different from the first.

85 Goodell defined “strict construction” as insisting that “the *words* of the instrument, the *literal words*, according to their commonly received and authorized *import*, and *nothing but* the words shall be allowed to tell us the meaning of the Constitution.” In a colorful passage, he explained how such an approach “rules the Historian and the News Journalist out of the witness-box, and installs the Grammarian and the Lexicographer in their stead” (1844, 21–22). To this strict construction approach he contrasted the higher court of the “spirit of the constitution” in which the “prevailing spirit, the general scope, the leading design, the paramount object, the obvious purpose of the instrument, constitute the *first*, the *chief* point of attention” (*id.*, 81–82).

86 Goodell likened the “spirit of the constitution” to an appellate court, though he might also have invoked the distinction between law and equity. “If the claim can be sustained, on the principle of ‘strict construction’ alone, let it have the benefit of the verdict. But if it finds itself defeated on *that* ground *then* let it appeal to the ‘spirit of the Constitution’ and see whether it can get the judgment reversed.” But, “let it not pack its jury from both Courts, at the same trial” (1844, 81–82). Goodell then organized his presentation around the two modes of legal reasoning.

87 Goodell’s distinction between “strict construction” and “spirit of the Constitution” tracks the modern distinction between constitutional *interpretation* of the semantic meaning of the words in context and constitutional *construction* by which vagueness is resolved and the words are applied to particular situations.⁷⁴ Interpretation, like what Goodell calls strict construction, “has nothing to do with the task of reconciling inconsistencies and contradictions in a written document. It can only expound its several parts by the help of its grammar, its lexicon, and the current use of the terms and phrases, according to the accredited literature within its reach.” Once this is done, “its functions are fulfilled. It is neither a legislative, nor yet an executive power. It is simply judicial, and its judgment is guided exclusively by *one rule*, namely the *dead letter of the words*” (Goodell, 1844, 78).

74 See Lawrence B. Solum (2008). See also Barnett (2005, 89–120, explaining the difference between interpretation and construction; Jack Balkin (2011) (same). The modern theorist who first emphasized the distinction between “interpretation” and “construction” was Keith Whittington. See Keith Whittington (1999, 7).

In contrast, constitutional construction, like what Goodell calls the “spirit of the Constitution,” arises “in case of discrepancies, and contradictions, to which all written instruments of fallible men are subject.” For Goodell, “the very notion of ‘*construction*’ supposes that something *needs to be* explained and determined, that had seemed anomalous, obscure, or doubtful” (1844, 82). Further, this need arises in the course of applying text to concrete cases. “To construe the Constitution,” he wrote, “is to fix, definitely, upon its true meaning, or some particular portion or feature of it, and decide what application or bearing it has, upon some practical problem, particularly under consideration, at the time. . . .” (*id.*, 114). In sum, Goodell’s discussion of “strict construction” versus the “spirit of the constitution” precisely describes the distinct activities that are now being labeled “interpretation” and “construction” by modern constitutional theorists.

88

“*Due process of law.*” Goodell maintained that, because it was added later as an amendment, the Due Process Clause supercedes anything to the contrary in the original Constitution. Whether or not the original Constitution sanctioned slavery, “it was confessedly thought important to define the conditions of liberty, and say in what manner a ‘person’ living under our government, could be ‘deprived’ of so inestimable a blessing” (1844, 60).

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In his analysis of strict construction of “due process,” Goodell employed definitions from Noah Webster’s dictionary and Alvan Stewart’s analysis of “due process of law” (discussed above) to ascertain the following semantic meaning of the text:

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“no individual *human being*, consisting of body and soul; no man, woman, or child,” in these United States, or under the sheltering wing of its Constitution, shall be deprived of liberty, (of the power of acting as one thinks fit, without restraint or control, except from the laws of nature,) without due process of law, without indictment by a grand jury, trial and conviction by a petit jury, and corresponding judgment of a Court (1844, 61, quoting Noah Webster).

From this, like Stewart, Goodell concluded that “[e]very ‘individual human being, with a body and a soul; man, woman, or child,’ within the United States, deprived of liberty *without* indictment, jury trial, and judgment of Court, is therefore UNCONSTITUTIONALLY deprived of liberty. A ‘*strict construction*’ of the Constitution can result in no other decision than this.” This “one inhibition of the Constitution, by the bye, is enough to settle the unconstitutionality of the act of Congress of

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1793, and of the late decision of the United States Court in the case of *Prigg v. Pennsylvania*” (1844, 61, 88 n*).

92 Whatever compromises might have been contained in the original constitution are qualified by the Fifth Amendment. In the 1845 edition, he added this passage: “If the condition of the slave is described by the phrase ‘*persons held to service or labor*,’ then the conditions of the slave is described in the words, ‘*No person shall be deprived of liberty, without due process of law.*’” Accordingly, “the construction of the original instrument, relied upon to establish slavery, abolishes it, when applied in the amendment” (1845, 62–63).

93 Goodell rejected any plea in the Court of “strict construction” that “such could not have been the *intentions* of those who drafted this clause. The question here is *not* what *they intended*, but what they the *People have done*, by adopting that clause” (1845, 63). When he proceeded to inquire whether the “spirit of the Constitution” included any compromise with or guarantee of slavery, Goodell listed the Due Process Clause among myriad other express guaranties of personal liberty, including the Ninth Amendment,⁷⁵ to show that it did not.

2.5. Lysander Spooner, 1845, 1847

94 Born in rural Athol, Massachusetts, Lysander Spooner (1808–1887) was a man of many hats: lawyer, radical abolitionist, land speculator, entrepreneur, legal theorist, and eventually individualist anarchist.⁷⁶ He left home in 1833 for nearby Worcester where he studied for the bar in the law offices of John Davis and Charles Allen, two prominent lawyers and politicians.⁷⁷ In 1845, Spooner produced the first edition of *The Unconstitutionality of Slavery*, which historian Lewis Perry has described as

75 See Goodell, 1845, 93, referring to “the recognition of rights in the People, not particularly enumerated in the Constitution (Amendments, Article 9).”

76 The intellectual origin and exact timing of Spooner’s anarchism is unknown, but it may well have been a product of the pervasive anarchistic tendencies of “nonresistance” abolitionists. See generally Lewis Perry (1973). Indeed, the subtitle of Perry’s study is “Anarchy and the Government of God in Antislavery Thought.” Spooner’s anarchism would have been mainstream among these abolitionists. Spooner’s earliest explicitly anarchistic publication was his *No Treason, The Constitution of No Authority*, the first version of which appeared in 1867. See Spooner (1971d, vol. 1). But his correspondence reflects these views in the 1840s. See Perry (1973, 198–202), discussing Spooner’s early “latent anarchism.”

77 See Shively (1971a, 1:15–62), for a biography. While Spooner is treated respectfully by tenBroek and Wiecek, he is neglected by Nelson. See e.g., tenBroek ([1951] 1965, 108–113); and Wiecek (1977, 257–258).

“influential” and “the most famous antislavery analysis of the Constitution” (1973, 195, 165).⁷⁸

Perry situates Spooner outside some of the principal fault lines of abolitionism, but respected for his legal acumen by all abolitionists regardless of their camp, including those who, like Wendell Phillips, disagreed with him about the Constitution. “He was a maverick abolitionist who belonged to none of the familiar factions in the movement” (Perry, 1973, 194). Unlike the Garrisonians, he was a deist rather than a Christian (Spooner, 1971b, vol. 1; 1971c, vol. 1) and believed slavery to be unconstitutional; but unlike the political abolitionists, he privately disclaimed any interest in politics, including the Liberty Party.⁷⁹ Perry also describes Spooner’s relationship with John Brown and his involvement in an aborted plot to free Brown from custody (1973, 204–208).

According to Perry, Spooner was “the leading authority for the view that slavery was illegal under the Constitution, and he was greatly respected by other abolitionists” (1973, 194).⁸⁰ After Spooner, more abolitionists came to claim that slavery was illegal even in the original slave states. Eventually, even Garrison conceded that a man could be for the Constitution and yet not be pro-slavery, “if he interpreted it as an anti-slavery instrument. . . .” ([1855] 1973, 193).

Interpretive method. Because Spooner’s discussion of interpretive methodology was so extensive and influential on other abolitionists, it merits a separate discussion. Spooner’s approach is easily misunderstood unless one distinguishes between the activities of constitutional interpretation and constitutional construction. As was discussed above, the activity of constitutional interpretation attempts to discern the semantic meaning of the words on the page. Constitutional construction refers to putting

78 For an extensive analysis of Spooner’s antislavery constitutional thought, see Knowles (2010).

79 See Perry (1973, 165–66, 194–204, 208, 282–85). See also Sewell (1980, 286), noting Spooner’s rooting against the success of the Republicans in 1856 for fear “the free soilers” would go no further toward the complete abolition of slavery.

80 Cf. tenBroek ([1951] 1965, 108), “The principal spokesmen and most articulate exponents of the theory of paramount national citizenship . . . were Lysander Spooner and Joel Tiffany, especially the latter.”; Wiecek (1977, 258), “In reality, the views of Goodell and Stewart probably had a greater impact, but Spooner’s lengthy, heavily annotated, well-organized study rivalled [sic] them in its influence.”

the semantic meaning into effect by, for example, developing doctrines that can be applied to particular cases.

98 The terminology is not important. While some people use “interpretation” to cover both activities, others use the terms “interpretation” and “construction” interchangeably. As we saw, William Goodell used the term “strict construction” to refer to what I am calling interpretation and “spirit of the constitution” to refer to what I am calling construction. Regardless of the labels, however, unless these two activities are kept distinct, confusion is very likely to result.

99 For example, Robert Cover claimed that “Spooner makes use of phrases like ‘due process’ and ‘privileges and immunities’ as pegs on which to hang his theory. But the substance of his argument is natural law” (1975, 156).⁸¹ But natural law played no role in Spooner’s approach to *interpretation* per se, though it does figure importantly into his approach to constitutional *construction* when interpretation reveals the text to be ambiguous.

100 Spooner’s principal argument was that the text of the Constitution should be given its public meaning at the time of its enactment, and the “original meaning of the constitution itself” should not be overridden by the unexpressed intentions of those who wrote it or by subsequent decisions of the courts (1971g, 4:218).⁸² “It is not the intentions men actually had, but the intentions they constitutionally expressed; that make up the constitution.” Indeed, “if the intentions could be assumed independently of the words, the words would be of no use, and the laws of course would not be written” (*id.*, 117–118 n*, 220).

101 Spooner maintained that the words of the Constitution had a public meaning at the time of its enactment that is independent of the intentions of anyone who may have assented to it. “[T]he constitution, of itself, independently of the actual intentions of the people, expresses some certain fixed, definite, and legal intentions; else the people themselves would express no intentions by agreeing to it. The instrument would, in fact, contain nothing that the people could agree to.” In short, “[a]greeing to an

81 Unlike other abolitionists, however, Spooner does *not* rely on the Due Process Clause and tenBroek says as much. See tenBroek ([1951] 1965, 110 n.13), “Spooner made no mention of the due process clause.” Instead, Spooner offered a theory of public meaning interpretation that eluded Cover, and a theory of national citizenship that Cover ignored.

82 The original meaning is “the meaning which the courts were *bound* to put upon it from the beginning; not the meaning they actually have put upon it. We wish to determine whether the meaning which they have hitherto put upon it be correct” (1971g, 4:218).

instrument that had no meaning of its own, would only be agreeing to nothing” (1971g, 4:222).

Spooner supplemented this interpretive claim about original public meaning with a principle of construction he took from the 1805 Supreme Court case of *United States v. Fisher*⁸³ in which John Marshall articulated a ‘plain statement’ rule of construction for resolving ambiguities in the public meaning of statutes. “Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from,” wrote Chief Justice Marshall, “the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.”⁸⁴

As elaborated by Spooner, under this rule of construction, when the original public meaning is ambiguous—that is, when there is more than one reasonable meaning—“the court will never, through inference, nor implication, attribute an unjust intention to a law; nor seek for such an intention in any evidence exterior to the words of the law. They will attribute such an intention to the law, only when such intention is written out in actual terms; and in terms, too, of ‘irresistible clearness’” (1971g, 4:190).

Spooner offered his own version of this rule of construction: “1st, that no intention, in violation of natural justice and natural right ... can be ascribed to the constitution, unless that intention be expressed in terms that are legally competent to express such an intention;” and “2d, that no terms, except those that are plenary, express, explicit, distinct, unequivocal, and to which no other meaning can be given, are legally competent to authorize or sanction anything contrary to natural right” (1971g, 4:58–59). He then devoted the bulk of his efforts to establishing that the original public meaning of the clauses allegedly referring to slavery was either innocent, or ambiguous and properly construed as innocent.

To modern readers, Spooner’s approach can appear strained and hyper-textualist, but this is because the provisions in the Constitution concerning slavery are highly exceptional. To see why, we must distinguish between the linguistic problems of vagueness and ambiguity. “Ambiguity, properly defined, is an entirely distinct concept from that of vagueness. A word that may or may not be applicable to marginal objects is vague.” In contrast, “a

83 *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805).

84 *Id.* at 390.

word may also have two entirely different connotations so that it may be applied to an object and be at the same time both clearly appropriate and inappropriate, as the word 'light' may be when applied to dark feathers. Such a word is ambiguous" (Farnsworth, 1967, 953). In sum, language is ambiguous when it has more than one sense; it is vague when its meaning admits of borderline cases that cannot definitively be ruled in or out of its meaning.

106 Resolving ambiguity by choosing among different senses of a term is normally a matter of interpretation involving the semantic meaning of the words on the page and can usually be resolved by evidence of context. For example, the word "arms" in the Second Amendment refers to weapons, not the limbs to which our hands are attached. With vague terms, however, the semantic meaning of the text is not enough to resolve all issues of its application to particular objects. So some supplemental method of decision making must be adopted that goes beyond the meaning of the words on the page. Constitutional construction is typically required when the semantic meaning is too underdeterminate to be applied directly to facts and circumstances (Barnett, 2005, 89–120).

107 Normally, framers of constitutions choose language the public meaning of which best reflects their intentions. While vagueness is often intentional, with problems of application via construction left to future decision makers, ambiguity is typically accidental. The drafters failed to see that a word or phrase could be interpreted in more than one way. With respect to slavery, however, the authors of the text deliberately avoided using the one word that best reflected their intention—"slavery"—and chose to employ euphemisms instead.

108 A "euphemism" has been defined as a "figure of speech which consists in the substitution of a word or expression of comparatively favourable implication or less unpleasant associations, instead of the harsher or more offensive one that would more precisely designate what is intended."⁸⁵ If the favorable expression being substituted has no previous semantic connection to the offensive words, then the very usage of the euphemism renders this favorable expression potentially ambiguous. By its very nature a euphemism is always ambiguous, so the question is how such ambiguity of meaning is to be resolved.

85 *Oxford English Dictionary* 2d ed., s.v. "euphemism."

Spooner's argument exploited the fact that, while most ambiguity is inadvertent, the drafters of the Constitution deliberately introduced an ambiguity into the text to avoid any express reference to slavery. But unlike normal examples of ambiguity, with euphemisms there is a normal and obvious innocent meaning. The only way to identify the offensive meaning of a euphemism is to appeal to "parol evidence"⁸⁶ extrinsic to the writing itself. However, such appeal to extrinsic evidence to impose an unjust meaning on what would ordinarily be innocent language was barred by the rule of construction formulated by Chief Justice Marshall in *United States v. Fisher*. In essence, Spooner denied recourse to extrinsic evidence to establish the existence of the ambiguity caused by the framers' use of euphemisms. 109

This is not the place to assess whether Spooner's semantic meaning argument about slavery ultimately worked, which I discuss elsewhere.⁸⁷ I myself have vacillated on this question over the years. The purpose of this excursion into the realm of interpretive theory is merely to defend Spooner's approach from the skeptical reaction of modern readers who routinely collapse the activities of interpretation and construction, while eliding the distinct problems of ambiguity and vagueness. Spooner's thesis that slavery was unconstitutional, while counter-intuitive even in his day, achieved notoriety precisely because he implicitly grasped these distinctions and brilliantly made the most of them. 110

Spooner formulated his methodological apparatus in response to the arguments of Wendell Phillips, who based his claim that slavery was constitutional on historical evidence of the pro-slavery intentions of the framers. Phillips produced a pamphlet relying on the recent release of Madison's notes on the Philadelphia convention to establish that, notwithstanding their refusal to use the term, various passages of the Constitution were intended by its framers to refer to slavery (1844). It was Spooner's compelling methodological rejoinder to the reliance by Phillips and other Garrisonians on evidence of original framers' intent that made Spooner's work so influential among 111

86 See Farnsworth (1967, 959), explaining how, under the older parol evidence rule, the decision to admit evidence extrinsic to the writing has two steps: "first, one decides whether the language is ambiguous; second, if it is ambiguous, then one admits parol evidence only for the purpose of clearing up that ambiguity." Like the traditional parol evidence rule, Spooner claimed that, because these euphemistic terms were not ambiguous on their face, their innocent meaning must prevail and cannot be impeached by extrinsic evidence.

87 See Barnett, (2009, 633, 642–650), analyzing the problem of deliberate ambiguity and Spooner's approach to resolving it.

abolitionists. Frederick Douglass, for example, was persuaded by Spooner's argument to abandon the Garrisonian reading of the Constitution.⁸⁸

112 Spooner's argument reverberated throughout the abolitionist movement. Given the normal lack of citations, Spooner's direct and indirect influence can be discerned when later writers invoked John Marshall's rule of construction in *U.S. v. Fisher*. Even the supremely confident Harvard-trained Phillips, who perhaps not coincidentally had been a student of Joseph Story, was "[g]oaded by charges that he was afraid to tackle the most famous antislavery analysis of the Constitution—Lysander Spooner's *The Unconstitutionality of Slavery*" (Perry, 1973, 165). In response, in 1847 Phillips self-published a ninety-page reply, to which Spooner responded that same year with a "part second" of *The Unconstitutionality of Slavery* that doubled its length.⁸⁹

113 In a speech to the House in 1847, Congressman (and future Confederate general) Thomas Clingman of North Carolina displayed a close familiarity with Spooner's book, "which seemed to be spreading itself like a 'green bay tree,'" reflecting its popularity among abolitionists. "This book being something new, had a wonderful run, and the abolitionists collected around Mr. Spooner and applauded him, until he began to think that he had at length carried off the 'gates of Gaza.'" Clingman chided Spooner for an interpretive methodology that might be used to prove that a woman could become the President of the United States. He then praised the objections of Wendell Phillips, "an abolitionist of the old Garrison, or disunion school,"⁹⁰ to undercut Spooner's argument.

114 Despite Clingman's hope that Spooner's theories would be forgotten, however, Spooner continued to be cited in Congress. In 1854, Senator Albert Brown, Democrat from Mississippi, characterized Spooner's book as "ingeniously written" and conceded that, "[i]f his premises were admitted, I should say at once that it would be a herculean task to overturn his argument."⁹¹ One

88 See Frederick Douglass (1851), attributing his change of opinion to "[a] careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell."

89 See Phillips (1847). Robert Cover, in his cursory dismissal of Spooner, seemed not to be aware of Spooner's reply to Phillips, as he cites only the 1845 edition of Spooner's book, rather than the expanded version published in 1847. See Cover (1975, 156 n *).

90 *Congressional Globe*, 30th Congress, 1st Sess., (1847, Appendix: 45), Speech of Thomas Clingman on Dec. 22, 1847.

91 *Congressional Globe*, 34th Congress, 3rd Sess. (1854, Appendix: 14), Speech of Albert Brown, Dec. 2, 1854.

supposes that the “premises” to which Brown referred was Spooner’s interpretive methodology, coupled with his rule of construction.

The “enlarged edition” published in 1860 includes praise for earlier editions, including a letter written by William H. Seward to Gerrit Smith on November 9, 1855, when Seward was the Whig U.S. senator from New York and Smith an independent member of the House. Seward wrote, “I thank you for sending me a copy of Mr. Spooner’s Treatise. I had bought a copy of the first edition. It is a very able work, and I wish it might be universally studied.” Quotations of praise are also included from such abolitionists as Gerrit Smith (“admirable, invincible, and matchless argument”); Wendell Phillips (“unrivalled [sic] ingenuity, laborious research, and close logic”); Elizur Wright (“One of the most magnificent constitutional arguments ever produced”); William Lloyd Garrison (“the production of a mind equally honest and acute”); Joshua Leavitt (“unanswerable”); Nathaniel Rogers (“splendid”); and Samuel Sewall (“masterly”) (Spooner, 1971g, 4:i-ii).⁹²

“*Citizens of the United States government.*” Unlike other abolitionist writers, Spooner placed no reliance on the Due Process Clause.⁹³ But his public meaning argument provided an element missing in previous abolitionist invocations of the Privileges and Immunities Clause of Article IV to protect free Northern blacks while they were in the South. This provision only protects “*citizens* of each state.” Could the free blacks in the North be considered “*citizens*” for purposes of this clause? Before Spooner, abolitionists had “loosely interchanged ‘citizens of the United States’ with persons having inalienable natural rights, on the one hand, and with persons having the rights guaranteed by the constitutional amendments, on the other” (tenBroek, [1951] 1965, 107). After Spooner, they had a theory of national citizenship.

Spooner began his analysis of citizenship with the words “the people” in the Preamble, “We, the people of the United States . . . do ordain and establish this constitution.”⁹⁴ What was the meaning of “the people”? If it did

92 The quotations included in the volume are longer, and the publisher notes that neither Phillips nor Garrison endorse Spooner’s conclusions.

93 See note 81 above. For an explanation of why Spooner did not assert the Due Process Clause, see Knowles (2010, 316), discussing Spooner’s view that “the Fifth Amendment provided individuals with due process protections from governmental action, but did not protect slaves from (private) slaveholders.”

94 U.S. Const. Preamble.

not “intend all the people then permanently inhabiting the United States,” the Constitution provides no answer as to any subset of the people to which it is referring. “It does not declare that ‘we, the *white* people,’ or ‘we, the *free* people’” (1971g, 90).⁹⁵ Given that the Constitution “gives no information as to what portion of the people were to be citizens under it,” Spooner denied it is proper to “go outside the constitution for evidence to prove who were to be citizens under it.” As with written contracts, one “cannot go out of a written instrument for evidence to prove the parties to it, nor to explain its meaning, except the language of the instrument be ambiguous. In this case there is no ambiguity” (*id.*). Contract lawyers will recognize this as the older traditional version of the parol evidence rule.

118 The fact that blacks may not have been allowed to vote did not undermine their claim to citizenship, “for women and children did not vote on its adoption; yet they are made citizens by it, and are entitled as citizens to its protection; and the State governments cannot enslave them.” The very fact that only some who are acknowledged as citizens actually took part in ratification shows that they “acted in behalf of, and, *in theory* represented the authority of the whole people.” In sum, the invocation of “we the people” in the Preamble “is equivalent to a declaration that those who actually participated in its adoption, acted in behalf of all others, as well as for themselves” (Spooner, 1971g, 91–92).

119 Spooner reiterated that “[a]ny private intentions or understandings, on the part of any portion of the people, as to who should be citizens, cannot be admitted to prove that such portion only were intended by the constitution, to be citizens; for the intentions of the other portion would be equally admissible to exclude the exclusives.” Nor is there any exception in any other part of the document. “If the constitution had intended that any portion of ‘the people of the United States’ should be excepted from its benefits, disfranchised, outlawed, enslaved; it would of course have designated these exceptions with such particularity as to make it sure that none but the true persons intended would be liable to be subjected to such wrongs” (1971g, 91–92).

120 That Spooner was contending for a national citizenship was made clear by his denial that “state governments have the right of determining who

95 Frederick Douglass would make much of this fact in his speeches contending that slavery was unconstitutional.

may, and who may not be citizens of the United States government.” If such power existed, “then it follows that the state governments may at pleasure destroy the government of the United States, by enacting that none of their respective inhabitants shall be citizens of the United States” (1971g, 92).

Spoooner then invoked individual popular sovereignty to reject the states rights doctrine “that the general government is merely a confederacy or league of the several States, *as States*; not a government established by the people, *as individuals*” (1971g, 92).⁹⁶ This doctrine, said Spoooner, was rejected by the Supreme Court in *McCulloch v. Maryland*⁹⁷ and in *Martin vs. Hunter’s Lessee*.⁹⁸ And “what is of more consequence, it is denied also by the preamble to the constitution itself, which declares that it is ‘the people’ (and not the State governments) that ordain and establish it.” True, the Constitution was ratified by conventions in each state, but this was because “none but the people of the respective States could recall any portion of the authority they had delegated to their State governments, so as to grant it to the United States government” (1971g, 92–93).

Finally, Spoooner contended it was widely accepted that, when a state abolishes slavery, the slaves would immediately and without further legislation be citizens of the United States. Yet, “if they would become citizens then, they are equally citizens now—else it would follow that the State governments had an arbitrary power of making citizens of the United States.” Or, “what is equally absurd—it would follow that disabilities, arbitrarily imposed by the State governments, upon native inhabitants of the country, were, of themselves, sufficient to deprive such inhabitants of the

96 I discuss how the concept of individual, as distinct from collective, popular sovereignty was asserted in the 1793 case of *Chisholm v. Georgia* by Justice James Wilson and Chief Justice John Jay in Barnett (2007); Barnett (2008, 954–960).

97 17 U.S. 316 (1819). Spoooner quoted the following language from *McCulloch*: “The government (of the U.S.) proceeds directly from the people; is ‘ordained and established’ in the name of the people.” And: “The government of the Union is emphatically and truly, a government of the people; and in form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit” (1971g, 92 n*).

98 14 U.S. 304 (1816). Spoooner quoted the following language from *Hunter’s Lessee*: “The constitution of the United States was ordained and established, not by the United States in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States’” (1971g, 92 n*).

citizenship, which would otherwise have been conferred upon them by the constitution of the United States.” If states had the power “arbitrarily, to keep in abeyance, or arbitrarily to withhold from any of the inhabitants of the country, any of the benefits or rights which the national constitution intended to confer upon them,” then this would make “the State constitutions . . . paramount to the national one” (1971g, 94).

123 From this, Spooner concluded “that the State governments have no power to withhold the rights of citizenship from any who are otherwise competent to become citizens.” In words that presage the first sentence of the Fourteenth Amendment, Spooner maintains that “all the native born inhabitants of the country are at least competent to become citizens of the United States, (if they are not already such,)” and, therefore, “State governments have no power, by slave laws or any other, to withhold the rights of citizenship from them” (1971g, 94).

124 *Privileges and Immunities.* Spooner’s argument about national citizenship had immediate and obvious implications for the application of the Privileges and Immunities Clause in Article IV, which he noted almost in passing. “If slavery be unconstitutional, all the colored persons in the United States are citizens of the United States, and consequently citizens of the respective States.” Therefore “when they go from one State into another, they are ‘entitled to all the privileges and immunities of citizens’ in the latter State. And all statutes forbidding them to testify against white persons, or requiring them to give bail for good behavior, or not to become chargeable as paupers, are unconstitutional” (1971g, 293 n*). Again, this appears to be an invocation of nondiscrimination with respect to fundamental rights of blacks moving from one state to another that is not dependent on how free Southern blacks may have been treated by their own state.

125 That privileges and immunities referred to the fundamental rights of American citizens is reflected in Spooner’s analysis of the infamous “three fifths of all other persons” language of Article I, section 2. Spooner claimed that this provision, which “purports only to prescribe the manner in which the population shall be counted, in making up the basis of representation and taxation,” has instead “been transmuted, by unnecessary interpretation, into a provision denying *all civil rights under the constitution* to a part of the very ‘people’ who are declared by the constitution itself to have ‘ordained and established’ the instrument. . . .” (1971g, 265–266, emphasis added). Such persons “of course, are equal parties to it with others, and have equal rights in it, and in all the privileges and immunities it secures” (*id.*, 266).

The equal right to the “protection of the laws.” As was noted above, Spooner contended that the fact that blacks may not have been allowed to vote did not undermine their claim to citizenship, “for women and children did not vote on its adoption; yet they are made citizens by it, and are entitled as citizens to its protection; and the State governments cannot enslave them” (1971g, 90-91). As part of his contention that “the three fifths of all other persons” did not refer to slaves, Spooner distinguished between “the native and naturalized citizen—that is, the *full* citizens” and resident aliens (*id.*, 247). The “free persons” to which that clause refers were the citizens of the United States who were “free and equal members of the state, entitled, *of right*, to the protection of the laws” (*id.*, 168).

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Notice that the usage here is not “equal protection of the laws” but “equal” citizens who are “entitled, *of right*” to “the protection of the laws.” Spooner viewed all citizens as equally entitled to the protection of the laws. Citizens are “full members of the State,” and can “claim the *full* liberty, enjoyment and protection of the laws, *as a matter of right, as being parties to the compact.*” In contrast, resident aliens can “claim hardly anything *as a right* (perhaps nothing, unless it were the privilege of the writ of *habeas corpus*,) and were only allowed, *as a matter of favor and discretion*, such protection and privileges as the general and State governments should see fit to accord to them” (1971g, 247).

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For Spooner, then, the original public meaning of “the people” led to the concept of full and equal national citizenship, which entitled each citizen to the protection of the law and informed the applicability of the Privileges and Immunities Clause of Article IV. Spooner’s theory of the birthright citizenship of free blacks (and even slaves) would be rejected by the Supreme Court in *Dred Scott*, but only after Chief Justice Taney qualified the seemingly unambiguous language of the Constitution and Declaration of Independence by his historical claims about original intent.⁹⁹ When that case was decided, abolitionists influenced by Spooner were well-positioned to critique the Court, and Republicans in Congress would eventually reverse

128

99 See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857): persons who descended from African slaves, whether they had become free or not, “are not included, and were *not intended* to be included, under the word ‘citizens’ in the Constitution.” [emphasis added]; *id.* at 410: The general words “all men are created equal” in the Declaration of Independence “would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were *not intended* to be included. . . .” [emphasis added]. Remember, Taney was claiming that not only African slaves were intended to be excluded from citizenship, but so too were any free blacks who descended from African slaves.

Dred Scot and adopt Spooner's position on national citizenship in Section One of the Fourteenth Amendment.

2.6. Salmon P. Chase, 1845, 1846

- 129 Charles Cleveland's classmate at Dartmouth eclipsed him in fame. Salmon Portland Chase (1808–1873) was born in New Hampshire. Chase was nine when his father died, and he was placed under the care of an uncle who was the Protestant Episcopal bishop of Ohio. After graduating from Dartmouth in 1826, he moved to Washington, D.C., to study law under the guidance of Attorney General William Wirt. Being admitted to the bar in 1829, Chase returned to Ohio in 1830, where he practiced law in Cincinnati and entered into antislavery activities. Chase helped form the Liberty Party, and became one of its leaders. In 1849, as a member of the Free Soil Party, he served as a U.S. senator. He was elected the first Republican governor of Ohio in 1855, and again in 1857, before returning to the Senate, this time as a Republican, in 1861. When Lincoln appointed him secretary of the Treasury, Chase vacated his Senate seat after serving all of two days. (He was replaced by John Sherman.) Due to differences with Lincoln, Chase resigned as Treasury secretary in July of 1864.
- 130 However, when Chief Justice Taney died in October of the same year, Lincoln nominated Chase as his replacement. It was Chase who administered the presidential oath to Andrew Johnson following Lincoln's assassination in 1865 and, as chief justice, it was Chase who presided over Johnson's impeachment trial in the Senate in 1868.¹⁰⁰ "Three weeks before he died in May 1873, the frail and ailing" Chase joined three of his brethren in dissent in the *Slaughter-House Cases*.¹⁰¹
- 131 Because of his insistence that slavery was constitutional in the original slave states, Chase today has a reputation as a moderate in sharp distinction from the "radicals."¹⁰² But Sewell makes clear that "this dispute was

100 Chase's "political abolitionist" activity is extensively discussed in Sewell (1980). The development of his views of slavery and the Constitution is described in Foner ([1970] 1995, 73–102.) See also *Dictionary of American Biography*, s.v. "Chase, Salmon P." Dumas Malone, ed. (1964, 2:27).

101 Robert J. Kaczorowski (1993). Kaczorowski wonders how the result may have differed had Chase "retained some of his earlier vigor" to persuade Justice Strong, who had previously ruled that "the Reconstruction amendments affirmatively secured the fundamental rights of citizens," to join him to constitute a majority. *Id.* at 191.

102 See, e.g., Tsesis (2008, 78), identifying Chase and others as "deferential to the existing order in slave states."

one among friends, since both sides equally desired the overthrow of slavery everywhere. . . .” (1980, 90). The “great mass of Free Soilers were as much committed to uprooting slavery everywhere as were the most dedicated Garrisonians” (*id.*, 189). And, while Chase “insisted on the distinction between moral and political action” (*id.*), he viewed the political as a means to the moral. “What we want, in my judgment, is not resistance to encroachment, but direct aggression,” he wrote in 1846. “Abolish slavery in the District, on the seas, in all places of exclusive national jurisdiction—employ no slaves on public works—give clear preference to antislavery men in public appointments . . . and all w[ould] be well” (*id.*, 133).

In 1845, Chase addressed the Southern and Western Convention of the newly-formed Liberty Party on the question of the constitutionality of slavery. Charles Cleveland (1867b, 72) reported that no less than one hundred thousand copies of Chase’s speech were printed and circulated in pamphlet form. Chase declined to adopt the view expressed by other abolitionists “that no slaveholding, in any State of the Union, is compatible with a true and just construction of the Constitution,” but favored instead “its removal from each State by State authority” ([1845] 1867, 101, 121). On the other hand, like every abolitionist surveyed here, he “would have it removed at once from all places under the exclusive jurisdiction of the National Government”—meaning the District of Columbia and the territories—pursuant to the “true sense and spirit” of the “Constitution rightly construed and administered” (*id.*, 121).

In 1846, Chase litigated the case of *Jones v. Vanzandt*¹⁰³ before the Supreme Court, and his argument was published the following year as a pamphlet (1847, 89). John Vanzandt was an elderly Ohio farmer who came across some fugitive slaves from Kentucky and gave them a ride in his wagon. He drove them for about fourteen miles before being confronted by agents of the owner. All but one of the slaves were recaptured. Later, the owner, Wharton Jones, brought suit against Vanzandt for damages arising from the loss of the one slave and the costs of recapturing the other. He also sued Vanzandt to recover the five hundred dollar penalty specified in the Fugitive Slave Act of 1793.

In these and other strenuous efforts, “Chase developed an interpretation of American history which convinced thousands of northerners that

¹⁰³ *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847).

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anti-slavery was the intended policy of the founders of the nation, and was fully compatible with the Constitution” (Foner, [1970] 1995, 73). According to Foner, “because of Chase’s efforts,” the anti-slavery interpretation of the Constitution, “eventually came to form the constitutional basis of the Republican party program” (*id.*, 75).

135 *Interpretive method.* In his Supreme Court argument, Chase rejected the claim that “it could not have been the intention of the framers to entrust the execution” of the Fugitive Slave Clause “to state authorities.” This was a “dangerous ground on which to build a construction of the constitution, in disregard of the plain import of its terms” (1847, 105). In this way, Chase countered an argument based on “the intention of the framers” with the “plain import” of the text.

136 In addition, he employed a standard abolitionist technique of meeting claims about the supposed intentions of the framers with an opposite supposition. Suppose it has been proposed to give Congress the power “to appoint officers, and provide by law, for the arresting and delivering up of persons escaping, and to provide, also, for the punishment of all interference with the right herein secured, by harboring, or otherwise.” Chase asked, “Can any man believe that such a clause would have received the assent of the Convention? or, that, a constitution with such a clause in it, could have obtained ratification in the States?” Given that the preexisting state constitutions had “guarantied the absolute, inherent and inalienable rights of all the inhabitants or citizens,” it could hardly be supposed that “any state, especially any nonslaveholding state, would have agreed to a constitution which would withdraw, from any of these rights, the ample shield of the fundamental law, and leave them exposed to the almost unlimited discretion of Congress. . . .” (1847, 105–106). As authority for this claim, Chase quoted the words of the Tenth Amendment.

137 Although Cover does his best to separate Chase from “the higher law theorists,” he attributes to Chase the view that natural rights “should at least govern the construction of positive laws. If there is a conceivable construction that would harmonize positive and natural law, it should be seized upon by the court” (1975, 173, 172). How exactly this differs from Lysander Spooner’s approach to constitutional construction is not explained. In contrast, Nelson attributes “higher law” thinking to Chase, but finds him to be “confused” when he “spoke about ‘such a thing as natural rights, derived . . . from the constitution of human nature

and the code of Heaven, ... proclaimed by our fathers in the Declaration of Independence to be self-evident, and reiterated in our state constitutions.”¹⁰⁴

“*Immunities of citizens.*” In his 1845 Cincinnati address, Chase maintained that the extra representation apportioned to slave states for three fifths of their slaves has resulted in an aristocracy by which persons representing fewer actual voters than representatives from the North and “bound together by a common tie, would generally act in concert, and always with special regard to the interests of masters whose representatives in fact they were” (1867, 97). Among a lengthy litany of adverse consequences, this concerted interest “waged an unrelenting war with the most sacred rights of the free, stifling the freedom of speeches [sic] and of debate” and “denying *in the Slave states* those immunities to the citizens of the free, which the Constitution guarantees” (*id.*, 98, emphasis added). Chase appears here to be adopting the same view as Cleveland: that within their borders slave states were denying to citizens of free states their fundamental rights in violation of the Privileges and Immunities Clause of Article IV. Like other abolitionists, he condemned “the imprisonment of free citizens of Massachusetts by the authorities of Savannah, Charleston, and New Orleans” (*id.*, 47 n*), as violating the Privileges and Immunities Clause of Article IV without any inquiry into how free blacks were treated in those localities.

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In his Supreme Court argument, Chase advanced the theory that provisions of the Constitution were a product of two distinguishable purposes. The first and foremost was “to create a national government, and confer upon it certain powers.” A “secondary purpose was to adjust and settle certain matters of right and duty between the states, and between the citizens of different states, by permanent stipulations, having the force and effect of treaty obligations” (1847, 98–99).¹⁰⁵

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104 Nelson (1988, 36), quoting Chase’s argument in *The Case of the Colored Woman Matilda* as it appeared in tenBroek. But the confusion lies in Nelson’s own categories of (1) “duties imposed on government by higher law,” (2) “rights granted to people by God,” and (3) “rights which people derived from the meaning of republicanism.” *Id.* To someone in the American natural rights tradition, Chase’s statement makes complete sense.

105 Chase relied for authority on the Massachusetts case of *Commonwealth v. Aves*, 18 Pick. 193, 200 (1836): “Now the constitution of the United States partakes both of the nature of a treaty and of a form of government,” though the distinction is formulated by Chief Justice Lemuel Shaw with much less clarity.

- 140 These two purposes resulted in two types of clauses in the Constitution. With the first type, the “constitution establishes a government, declares its principles, defines its sphere, prescribes its duties, and confers its powers.” With the second, it “establishes certain articles of compact or agreement between the states.” Clauses in the second category, however, “confer no powers on the government: and the powers of government cannot be exerted, except in virtue of express provisions, to enforce the matters of compact” (1847, 99).
- 141 Chase offered this theory to explain why Congress lacked power to enforce the portion of Article IV, section 2, which governed fugitive slaves. “It is, in the strictest sense, a clause of compact; and the natural, if not necessary, inference from its terms, seems to be that its execution, like that of other compacts, is to be left to the parties to it” (1847, 100). Such reasoning applied with equal force to three other “similar clauses” in this section, including the Privileges and Immunities Clause. Whereas the Full Faith and Credit Clause of this section expressly empowers Congress to regulate such matters, the other three provisions lack any grant of power to Congress. In contrast with “the proof and effect of records, which could not affect the personal liberty of the citizens,” Chase contended that the Constitutional Convention “would scrupulously abstain from giving any such power in regard to the subjects of the other clauses,” because the exercise of such a power by Congress “would necessarily interfere with the great first right and duty of State Governments to protect the rightful claims, to personal liberty and security, of all persons within their several jurisdictions” (*id.*, 101).
- 142 Chase then noted the radical implications of the “original” doctrine in *Prigg* by which “in all cases, where the constitution secures rights to states or individuals, Congress has power to legislate for the protection and enforcement of those rights. . . .” According to Chase, “the powers of Congress have not hitherto been supposed to be so extensive. — If they are, they certainly warrant the legislation in question, and much more.” If Congress has power to “nullify any state legislation which the constitution forbids,” then it “may, and should, under the clause which secures to the citizens of each state the immunities of citizens in all the states, enforce, in South Carolina and Louisiana, the rights of the negro citizens of Massachusetts. . . .” Likewise, Congress “should, under the clause which forbids the privation of liberty, without due process of law, provide for the abolition of slavery, throughout the United States” (1847, 103–104).

To be clear, because Chase was contesting the correctness of *Prigg*, he did not admit any of these implications of that decision. Instead, he was using these consequences to undercut *Prigg* as a precedent to be followed. But it is worth remembering that this *reductio ad absurdum* implies the converse: if Justice Story's implied powers theory in *Prigg* was correct, then so too might be those abolitionists like Joel Tiffany who relied on *Prigg* to claim that Congress *did* have the power to abolish slavery in the Southern states under the Due Process Clause. 143

Chase's argument shows how those abolitionists who objected to the power of Congress to enforce the Fugitive Slave Clause of Article IV were then led to deny that Congress had power to enforce the Privileges and Immunities Clause of Article IV. And this, in turn, at least partially accounts for why the Republicans in the Thirty-Ninth Congress would include the Privileges or Immunities Clause in Section One of the Fourteenth Amendment, which was then expressly made congressionally enforceable by Section Five. 144

"*Due process of law.*" Chase reiterated the standard abolitionist positions that "slaveholding is contrary to natural right and justice" and therefore "can subsist nowhere without the sanction and aid of positive law." From the fact that the Constitution, "expressly prohibits Congress from depriving any person of liberty without due process of law," Chase derived an antislavery program of (1) "repealing all legislation, and discontinuing all action, in favor of slavery, at home and abroad;" (2) "prohibiting the practice of slaveholding in all places of exclusive national jurisdiction, in the District of Columbia, in American vessels upon the seas, in forts, arsenals, navy yards;" (3) "forbidding the employment of slaves upon any public work;" (4) "adopting resolutions in Congress, declaring that slaveholding, in all States created out of national territories, is unconstitutional, and recommending to the others the immediate adoption of measures for its extinction within their respective limits;" and (5) electing and appointing to public office only those who "openly avow our principles, and will honestly carry out our measures." Chase maintained that the "constitutionality of this line of action cannot be successfully impeached" (1867, 101, 100). 145

Notwithstanding the Court's decision in *Prigg*, in his Supreme Court brief, Chase contended that the Fugitive Slave Act of 1793 unconstitutionally violated the Due Process Clause of the Fifth Amendment. "Now, unless it can be shewn that no process of law at all, is the same thing as due 146

process of law, it must be admitted that the act which authorizes seizures without process, is repugnant to a constitution which expressly forbids it.” Slaves were entitled to the protection of the Clause, he argued, because they were persons. “It is vain to say that the fugitive is not a person: for the claim to him can be maintained only on the ground that he is a person.” To show that fugitive slaves were considered persons under the Clause, Chase noted that, while the Virginia ratification convention had proposed a clause reading, “no free man shall be deprived of life, liberty, or property, but by the law of the land,” Congress changed its scope to “no person” (1847, 89).

147 Chase’s Due Process Clause challenge rested on the “summary manner” by which slaves were to be recaptured under the Act. Suppose an owner of a horse should find the animal in the possession of his neighbor and, “instead of resorting to due process of law, and the old fashioned replevin,” simply seize the animal and take “him before his own hired magistrate, and prove his claim by affidavits.” Or if he claims a failure to provide services, “instead of suing him for breach of contract, let him drag his reluctant neighbor before his magistrate, establish his claim, and then remove him to his task” (1847, 96). Chase then asked, “How long would society hold together, if this principle were carried into general application?”

148 Salmon P. Chase’s arguments concerning slavery were indistinguishable from the others discussed here, save for the disagreement among these abolitionists on the constitutionality of slavery within the Southern states. His constitutional arguments were every bit as serious as any made today on a contentious topic. His arguments as a lawyer in the Supreme Court, his political activism in helping found and develop the platforms of the Liberty, Free Soil, and Republican parties, his election as governor and U.S. senator, and his eventual appointment by President Lincoln as chief justice of the United States, supports the conclusion that these arguments were far from marginal. They infused the ideology of the party that dominated the Thirty-Ninth Congress, the leaders of which chose the wording of the Fourteenth Amendment.

149 As was previously noted, in one of his final acts as chief justice, Chase dissented from the Supreme Court’s gutting of the Privileges or Immunities Clause of Section One in the *Slaughter-House Cases*. That same day, the Supreme Court announced its decision in *Bradwell v. Illinois*,¹⁰⁶ a law-

106 *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

suit in which Myra Bradwell contested the denial to her of a license to practice law because she was female. Writing for the majority, consistent with his approach in *Slaughter-House*, Justice Miller denied that the right to pursue a lawful occupation as a lawyer was among the privileges or immunities of citizens of the United States. Justice Bradley, in an opinion joined by his fellow *Slaughter-House* dissenters Justices Swayne and Field, concurred with the majority on the grounds that this discrimination against women was justified and therefore within the police power of the state.¹⁰⁷ Chief Justice Salmon P. Chase, alone and near death, “dissented from the judgment of the Court and from all the opinions.”¹⁰⁸

2.7. Benjamin Shaw, circa 1846

The Reverend Benjamin Shaw (1789–1876) was a Methodist preacher from Vermont who lectured throughout New England on the evils of slavery, as well as its unconstitutionality. In 1840, Shaw hiked from Vermont on foot for some ninety miles through snow and mud to attend the Albany convention that established the Liberty Party (Sewell, 1980, 70). He served as vice president of the convention (Wright, 1882, 259). In a letter written in 1843, he wrote to his brother, “I preach, & lecture against slavery, & make out to get enough to live on ... I try to love God with all my heart, & my neighbors as myself, whether black or white; in short, I am an abolitionist” (Shaw 1843). Shaw asked his brother whether he was “a true republican, i.e. in favor of immediate liberty & equal rights to all men; & whether you vote with the Liberty party, & take an antislavery paper.” And he explained that “the North by 47 majority in Congress, has the constitutional power to free about 30,000 slaves, in the district & territories & stop the slave trade from State to State, & thus make it worthless in 17 states & more.” If this happened, “then we have free States enough to alter the constitution, so as to free every slave in the nation. So the chief reason the slaves are not free is because the North have not voted right” (*id.*).

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107 *Id.* at 142: “in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.”

108 *Id.* at 152.

151 Sometime in the 1840s, Shaw published a twelve-page pamphlet called *Illegality of Slavery*.¹⁰⁹ It is a brief and lucid compendium of antislavery constitutional thought as it had developed to this point. Given Shaw's role in the formation of the Liberty Party, it is important that he expressly relied on and recommended the writings of William Goodell and Lysander Spooner. He called Goodell's pamphlet "a good common sense view of the subject," while describing Spooner's as "a legal, logical view of the same, and adapted to professional men" ([1846?], 12).

152 As with previous writers, most of Shaw's arguments against slavery are beyond the scope of my focus on the elements that became Section One. Likely due to the influence of Goodell and Spooner, Shaw adopted a more radical stance concerning the constitutionality of slavery than he had held in 1843. For example, like Spooner he "boldly" asserted that "there is no *legal*, or lawful slavery in America, in any proper sense of the word; and that there *never was* any such slavery here, and never *can* be; at least until our government is overthrown." Like Spooner, he then asserted that slaves would be entitled to seek a writ of habeas corpus ([1846?], 1).¹¹⁰ In addition he also invoked the Republican Guarantee Clause of Article V, section 4, and several others to show the unconstitutionality of slavery, presumably in the slave states. But I turn now to the portion of his arguments that are pertinent to this study.

153 *Interpretive method.* Shaw denied that the founders intended to enshrine slavery in the Constitution, or that there was any bargain between free and slave states. "As all the States had slaves, there could be no compromise between free and slave States, as some have foolishly asserted." To the contrary, the "majority intended to have a free constitution for a free people, and they got it, and yet, we let slaveholders administer it, as they understand it, or rather, as they construe it." But, echoing Spooner, Shaw insisted that, "whatever the intentions of our fathers were, their unwritten intentions are not binding upon us." And Shaw also adopted the rule of construction advanced by Spooner: "It is a principle in law, that if an instrument contradicts itself, or is dark or doubtful, or will admit of two

109 See Shaw ([1846?]). Various Internet sites give the year of publication as 1846. The Gale Cengage Learning site, which reproduces the original pamphlet from the Oberlin College Library, lists the year of publication as unknown. Given that it cites Spooner's *The Unconstitutionality of Slavery*, Shaw's pamphlet could not have appeared before 1845, so 1846 is a plausible publication date.

110 See, e.g., Spooner ([1848] 2010, 32).

interpretations, that interpretation most favorable to liberty and justice, is the true one” ([1846?], 4, 5).

“*The privileges and immunities of the citizens in the several States.*” Shaw defined a “citizen” as “either an inhabitant of a place, or a freeman of a city.” He accused South Carolina of violating the Privileges and Immunities Clause by imprisoning “free colored citizens of Boston” when they arrive as seamen. But he does not limit his claim to free blacks. “Let an abolitionist, (though he be a white citizen,) go into South Carolina, and senator Preston will hang him.” He then condemned Maryland for imprisoning free blacks from other states and, if they cannot pay the fine, selling them into slavery ([1846?], 9). In none of these examples did he inquire whether local citizens were treated differently than those from out of state. Indeed, laws suppressing abolitionist speech applied equally to all.

154

“*Due process of law.*” Like Spooner, Shaw denied that the phrase “persons held to service” in Article IV, section 2, referred to slaves rather than indentured servants. But, unlike Spooner, he notes that, supposing “it refers to slaves, they are recognized only as persons, and not as property.” Therefore, under the Due Process Clause of the Fifth Amendment, they are to be given up only when proof of the claim that they are slaves is provided to a judge or jury. “For instance, a slaveholder claims me, I challenge the claim, and what then?” After quoting the Due Process Clause, he concluded that “all the slaves are unconstitutionally held in chains, because the masters did not get their liberty away by judge or jury; and therefore, the supreme court can set them free with a dash of the pen.” But even if there was initial due process of law, the masters “must have another process of law, with the *escaped* slave.” And here the role of substantive jury nullification in the due process of law is made manifest: “Now where will you find a decent jury in a free State, that would decide that the reputed slave *owes* service to the reputed master. . . . And if the jury do not deliver him up to the master, no man can. Talk about a slave *owing service!* The master owes him.” The same goes for judges. “Judge Williams of Vermont says, ‘of a case of the kind should come before me, I would dismiss it at once; for I know that *no* man can bring evidence enough to prove to me, that another man is his property’” ([1846?], 11).

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In an Appendix to another undated pamphlet, *Political Sin and Political Righteousness*, Shaw adopted Spooner’s position that slavery was established as a matter of practice and not positive law. “[S]lavery was begun

156

by individuals, and the enactments were made to regulate it. But if it was *illegally* begun, how could it be *legally* continued?” Then, after quoting the Due Process Clause, he asked: “Now when and where did slaveholders ever sue the colored persons, and get away their liberty by due process of law; — by judge and jury?” (Shaw, n.d., 12).

2.8. James G. Birney, 1847

157 James Gillespie Birney (1792–1857) was a Kentucky born, Princeton educated lawyer. Originally a slave owner and Democrat, adverse reaction to his abolitionist activities in Kentucky necessitated his relocating to Cincinnati (Sewell, 1980, 72). In his newspaper, the *Philanthropist*, which he edited from 1835 to 1837, Birney published arguments concerning the constitutionality of laws sanctioning slavery as early as 1837 resembling those of his Ohio abolitionist colleague Weld.¹¹¹ It was a mob attack on Birney’s newspaper in 1836 that brought Salmon Chase into the abolitionist camp (Foner [1970] 1995, 74). “Birney ... chose a rising young Cincinnati attorney, Salmon P. Chase, to represent the plaintiffs” in a civil action against those who destroyed his newspaper’s press (Wiecek, 1977, 91). “Chase and Birney, both competent lawyers, together worked out the arguments used in this litigation, and were successful” (*id.*). In the fall of 1837, he moved to New York City to become executive secretary of the American Anti-Slavery Society (Sewell, 1980, 72).

158 TenBroek describes Birney as a “quartermaster of ideas in the movement rather than an original producer of them” ([1951] 1965, 296), but Sewell describes him as “the most resourceful and effective spokesman for anti-slavery politics,” as well as “[c]ourageous and firm in his abolitionism, deeply religious, and skilled in the arts of propaganda. ...” (1980, 38, 72). The Liberty Party nominated him for President in 1840 and 1843 (*id.*, 72–79, 124).¹¹²

159 “*Protection.*” In 1847, Birney published a four-part article in *The Albany Patriot* entitled, “Can Congress, Under the Constitution Abolish Slavery in the States?” ([1847] 1965). In contrast with his stance in 1837, ten years later Birney’s answer was “yes.” In his article, Birney placed great weight on the relationship of allegiance and protection that had previously been

111 See e.g. Nelson (1988, 231–232) (discussing an article by Birney from January 13, 1837 emphasizing the Due Process and Supremacy clauses).

112 Birney’s activities in Ohio are extensively discussed in Graham (1968,167–174, 215–235).

identified by Weld. He repeatedly linked the protection of the laws to allegiance: “*allegiance* and *protection* are inseparable.” Slaves are required to obey the laws and may be punished for disobedience. “We try him because we demand of him allegiance. . . . For this *allegiance* we owe him, what we refuse to pay, *protection*—‘entire security.’ Without this protection—this security—we have no right to try him for the violation of the laws of the country which deprives him of both” (*id.*, 317, 318–319).

Birney connected this duty of obedience to natural rights. “[N]o people, and no government instituted by them, can properly take from any individual his rights—his *natural rights*. To do so is usurpation—a wrong—a perversion of the object of government.” If the laws of a government are at variance with natural rights, “*no one* is under any obligation to obey its laws” and it would not be a government at all. “How then could the Constitution guaranty that which there is no obligation to obey?” ([1847] 1965, 310, 311). Relying on the Declaration of Independence, Birney maintained that slavery violates the “right to liberty that can never be alienated;” by debarring the slave “from pursuing his happiness as he wished to do, without interfering in an improper manner, with the happiness of others;” thereby violating the injunction that “governments were instituted among men to secure their rights, not to destroy them” (*id.*, 318).

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2.9. Joel Tiffany, 1849

A Treatise on the Unconstitutionality of Slavery authored by attorney Joel Tiffany (1811–1893) and published in 1849 represents the culmination of the line of abolitionist constitutional thought that provided the intellectual basis for each of the components of Section One of the Fourteenth Amendment.¹¹³ Born in Connecticut, Tiffany “was raised in that extraordinary nursery of abolitionist and Radical Republican theorists, Lorain County Ohio” (Wiecek, 1977, 259). He wrote his treatise in Ohio before leaving for New York where he became a reporter of its highest court. Each of the elements identified above are smoothly and succinctly presented in Tiffany’s 144-page booklet. His explicit rebuttals to Wendell

161

113 See Wiecek (1977, 258–259), situating Tiffany among other antislavery constitutionalists, such as Gerrit Smith, Salmon Chase and James Birney. Tiffany goes unmentioned by Nelson and Cover, but is emphasized by Michael Kent Curtis (1986, 42–44, 81).

Phillips's reply to Lysander Spooner show his familiarity with Spooner's writings (1849, 28, 34).¹¹⁴

162 *Interpretive method.* In his rejection of arguments based on framers' intent, Tiffany expanded upon the original public meaning methodology advanced by Lysander Spooner. After examining the "rules of construction" of written statutes advanced by Blackstone and favored by Story, he summarized what interpreters "have a right to look at"¹¹⁵: (1) "the general common established meaning of the words used, in a dictionary, or other works where the true signification of the words may be found;" (2) "the preamble, with a view of ascertaining the true reason and spirit of the law;" (3) "other laws passed by the same legislator, on the same or a similar subject, about the same time, to ascertain the meaning of a certain, peculiar expressions used as 'Benefit of Clergy, Simony &c';" (4) "the subject matter, but this must be ascertained from the act itself;" (5) "the effects and consequences, to see if they harmonise with the apparent design of the legislator;" and (6) "the reason and spirit of the law to see if the case at bar is one which was in the contemplation of the legislature" (1849, 48).

163 "[N]one of these rules," he observed, "launch us out into the wide ocean of conflicting, 'collateral history, or national circumstances' in search of light." To the extent that legislative history is allowed when interpreting a statute, Tiffany denied it was appropriate when interpreting a constitution. "It is all important that such an instrument should be strictly construed. For if a loose construction be allowed, there will be no limit to the implied powers which a fertile imagination [sic], or an ambitious, or designing administration may not graft upon it." If such construction is allowed, "[p]owers never intended to be granted by the people, will be assumed. In all governmental bodies, there is always a strong tendency to usurp power" (1849, 48, 49).

164 For this reason, "written constitutions were adopted to hold them in check. But these have not always been successful." Written constitutions fail because the "doctrines of latitudinarian construction readily form a ladder by which all constitutional bulwarks are scaled; and history has demonstrated that there is no safety in allowing courts, or legislatures to

114 Unlike many of the others discussed here, Tiffany does not seem to have been involved in political action, but I have not deeply investigated this matter. He may well have been.

115 Tiffany later expanded on his discussion of interpretive methodology in Tiffany (1867, 65–75).

go beyond the plain, palpable meaning of the grants in construing written constitutions.” This is all the more important “if the power sought to be grafted on by implication is one in conflict with natural right and justice, and opposed to the general object and professed designs of the instrument.” For Tiffany, the prime example of latitudinarian construction was *Prigg* in which the Supreme Court “assume[d] the authority to go in any, and all directions for light, and aid when they please; and then shut themselves up in the prison of the letter when they please” (1849, 49, 50).

Tiffany denied the superior authority of framers over later interpreters when it came to interpreting their textual handiwork. “Those who framed that instrument, did not understand the legal effect of the words used any better, than they are understood at the present time. . . .” To the contrary, “there is more danger of a misconstruction of that instrument by those who were contemporary with its formation, than there is by those who have lived since.” This is because a judge who was privy to discussions of “the propriety or impropriety of particular grants of power” would “often be liable to give their supposed familiar understandings of that instrument, rather than the legal meaning of the instrument itself . . . [and] follow his own particular understanding without closely adhering to the letter and spirit of the particular clause” (1849, 52).

For this reason, “[p]recedent is not necessarily law. It may be received as evidence of what the law is, or is supposed to be, but is liable to be overruled and rebutted” (1849, 52). Although in this passage, the “precedents” to which Tiffany is referring are the early practices and interpretations in the wake of the Constitution’s adoption, he extends the same reasoning to the decisions of the Supreme Court. Referring to *Prigg*, Tiffany maintained that “even if the Supreme Court have made such a decision, it by no means follows that such is the law. Decisions of Courts are not, necessarily law.” Tiffany explained that precedents “at most, are but evidence of what the law has been held to be, on certain points; but they are liable to be overruled [sic] by the same, or other courts, and are never considered conclusive” (*id.*, 71).

Tiffany noted “the truth” that no court treats precedent as “law, absolutely” binding, “but merely as authoritative evidence of what the law has been held to be.” Even the Supreme Court can err on what the law is. “If, on examination, it is found that courts, from error, prejudice, or

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misapprehension have mistaken or mistated [sic] the law, in giving any of their decisions, no one questions their authority to disregard such precedent, which would not be the case if precedent was, necessarily law." For this reason, courts "always claim, and exercise the authority, to regard, or disregard precedent, as to them appear right and proper; and nothing is more common, than for courts, to overturn, and disregard even long established precedents, where it appears to them, those precedents have been established upon false and erroneous positions." The judicial willingness to disregard previous judicial decisions amounts to a virtual declaration "that those precedents were never law, although they had been received as such" (1849, 71).

168 "*Citizens of the National Government.*" Tiffany adopted in its entirety Spooner's argument on behalf of blacks being citizens of the United States. His treatise marks the reception of Spooner's position into the mainstream of abolitionist constitutionalism. Tiffany posed the question, "how do men become citizens of the United States?" His answer was, first, "all persons who had a legal residence in the country at the time of the Revolution, and at the adoption of the Federal Constitution, and who were not, by that instrument excepted, became citizens of the United States;" second, "[a]ll persons, born within the jurisdiction of the United States, since the adoption of the Federal Constitution, became citizens by birth; and third, "[f]oreigners, by birth, coming into the United States to reside, by complying with the provisions of certain naturalization laws, passed by congress, become citizens by naturalization" (1849, 88).

169 The Preamble affirmed that the Constitution was "ordained and established" by the people, "not by the States, not by the white people, or black people, not by the rich people, or poor people; not by the voting or non-voting people; not by one class, as opposed to any other class in the United States," words that echoed Spooner, "but expressly, and emphatically by all, who, in the common acceptance of the term, might be denominated, the people of the United States." It is these people who became citizens of the United States. "There were no citizens, or aliens, to it, before its adoption, but all became citizens by its adoption" (1849, 89).

170 "*Privileges and Immunities of citizenship.*" With this conception of national citizenship in hand, Tiffany contended that all "citizens of the National Government by birth or naturalization . . . are entitled to the benefits of all these guaranties for personal security and liberty" (1849, 57). He then provided the most extensive and detailed description of the

enumerated and unenumerated “privileges and immunities” of citizens of the United States of any abolitionist writer.

Tiffany’s discussion of the Privileges and Immunities Clause of Article IV, however, is a departure from all previous abolitionists surveyed here. Whereas the rest offered a conventional reading of Article IV as protecting the fundamental rights of free citizens of one state when traveling into another, Tiffany read Article IV to protect the rights of any citizen of the United States from state laws infringing his fundamental rights, even the laws of his own state. “The states can pass no laws that shall deprive a person of the right of citizenship. Nor can they pass any law that shall in any manner conflict with that right” (1849, 96). 171

With this reading, Tiffany became the first of these abolitionists to invoke the Privileges and Immunities Clause against slavery itself. “If making a man a slave, withholds from him citizenship, or is inconsistent with his privileges and immunities as a citizen, then it is unlawful to make a man a slave, in the United States” (1849, 97).¹¹⁶ By the same token, “if the slave is a citizen (and that he is we have no doubt) then is he entitled to all the privileges and immunities of citizenship, which are guaranteed in the Federal Constitution for personal security, personal liberty, and private property.” And these rights are then enforceable, as “the whole Nation, individually and collectively, stand pledged to protect and defend him in the enjoyment of those rights” (*id.*, 97). 172

With regard to *Prigg v. Pennsylvania*, Tiffany took the opposite tack from Chase, who maintained that *Prigg* was wrongly decided. Responding to the objection that the federal government has no power to enforce these guaranties, Tiffany included a string of quotes from *Prigg* beginning with this one: “if the constitution guaranty a right, the natural inference certainly is, that the National Government is clothed with appropriate authority to enforce it” (1849, 99–100). From this, he concluded that “all the rights and immunities guaranteed by the Constitution to the citizen of the United States, can be secured by the Federal Government, and for this end they have a right to pass all the laws necessary for the enforcement of those guarantys” (*id.*, 100; *see also* 138–141). Later, he contended that “taking the rules adopted by the Supreme Court of the United States, for construing that instrument to be correct, (and who can show that 173

116 *See also id.* at 129: “the privileges and immunities guaranteed to citizens and persons in that instrument are absolutely inconsistent with slavery.”

they are not correct?) the Federal Government have ample power to enforce those guarantees in every State in the Union” (*id.*, 139).

174 Unlike previous writers, therefore, Tiffany essentially read Article IV, section 2 as if it had been worded in the manner of Section One: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” And, by accepting *Prigg*, Tiffany anticipated the power of congressional enforcement later enumerated in Section Five.¹¹⁷ In this sense, Tiffany’s *Treatise* subtly transformed the more conventional constitutionalism of his predecessors into the theory that eventually became the text of the Fourteenth Amendment some twenty years hence.

175 Tiffany maintained that, while state legislatures might merit some deference, federal courts could nullify state *statutes* that violated fundamental rights: “It is peculiarly the province of the state governments” to “see that those rights are observed between citizen and citizen in the same state” and “they will be presumed to have performed that duty. . . .” But this presumption on behalf of state governments may be rebutted in the exceptional “cases where, *by positive enactments*” the states “have authorized a violation of these rights.” In short, “whenever a state shall *by its legislation*, attempt to deprive a citizen of the United States of those rights and privileges which are guaranteed to him by the Federal Constitution, as such citizen, such legislation of the state is void.” In such a case, “it is the duty of the federal judiciary to take cognizance of such violations, whenever any of the citizens of the United States are thus injured *by state legislation*.” A judicial remedy for violations of privileges or immunities “is not obnoxious to the charge of consolidation on the one hand, nor of state rights and nullification on the other” (1867, 57–58, emphases added).

176 Given his interpretation of Article IV, Section 2, it is unsurprising that Tiffany then provided the most extensive answer to the question, “What are the privileges, and immunities of citizenship, of the United States?” Tiffany’s answer extended far beyond any discrimination with regard to the rights or benefits of existing state laws. “[T]o be a citizen of the United States, is to be entitled to the benefit of all the guarantys of the Federal Constitution for personal security, personal liberty, and private property”

117 See U.S. Const. amend. 14, § 5: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

(1867, 58). Among these guaranties are “*the positive provisions*” (*id.*, 100) of the original Constitution and the Bill of Rights, including

the right of petition,—the right to keep and bear arms, the right to be secure from all unwarrantable seizures and searches,—the right to demand, and have a presentment or indictment found by a grand jury before he shall be held to answer to any criminal charge,—the right to be informed beforehand of the nature and cause of accusation against him, the right to a public and speedy trial by an impartial jury of his peers,—the right to confront those who testify against him,—the right to have compulsory process to bring in his witnesses,—the right to demand and have counsel for his defence,—the right to be exempt from excessive bail, or fines, &c., from cruel and unusual punishments, or from being twice jeopardized for the same offence; and the right to the privileges of the great writ of Liberty, the Habeas Corpus [*id.*, 99].

Earlier, however, he had noted that “the right of suffrage is not a necessary incident to citizenship” (*id.*, 95). 177

But Tiffany did not limit the privileges and immunities of citizenship to the express or “positive guarantees of the constitution” (1867, 118). Significantly, he treated implied privileges separately from implied immunities. Tiffany derived three additional unenumerated “*privileges*’ . . . guaranteed by the Federal Constitution” from “the nature and object” of the writ of habeas corpus. First, is the judicial review of the justification for any restriction of personal liberty. Tiffany cited Blackstone for the proposition that the writ asserts “that the personal liberty of the subject is a natural and inherent right, which cannot be surrendered, or forfeited, unless by the commission of some crime, and which ought not to be abridged in any case, without the *special* permission of the law.” This imposes upon anyone who restrains the liberty of another “an absolute necessity of expressing upon every commitment, the *reason* for which it is made, that the Court, upon Habeas Corpus, may examine into its validity” (*id.*, 103, 104). In essence, every person whose liberty is restrained has a privilege of a judicial inquiry into the justification or lawfulness of this restraint, which in the United States, unlike England, would include whether it comports with the written Constitution. 178

Second, again quoting Blackstone, the writ “asserts ‘that the liberty of the subject cannot be restrained but upon *legal process* awarded in due course of law, by an officer of the government, authorized to issue such process,’” a privilege that is also expressly affirmed by the Fifth Amendment. 179

And third, the writ “asserts that the Government shall by its officers, take due precaution, and inquire cautiously into the facts, before any process shall be awarded to deprive the subject of his liberty.” These, he concluded, are “the ‘*privileges*’ of this writ, which are secured to all the people of the United States; which no authority can abrogate, except under the circumstances therein named; and all state laws and constitutions which interrupt, limit, delay or postpone any portion of these privileges, are necessarily inoperative and void” (1867, 104).

180 In addition to these privileges, Tiffany found certain unenumerated *immunities* were “implied” by those that were enumerated. Implied by the enumerated right to keep and bear arms—which Tiffany characterized as one of the “*immunities* of a citizen of the United States”—is the natural right of self-defense (1867, 117, emphasis added). The right to arms is “*subordinate*’ in reference to the great, absolute rights of man; and is accorded to every subject for the purpose of *protecting and defending himself*, if need be, in the enjoyment of his absolute rights to life, liberty and property” (*id.*).

181 The implied right of self-defense, in turn, “also implies that the citizen has a right to himself that is to his own personal security, liberty, property, &c.,—all of which is herein and hereby guaranteed.” The right to personal security, liberty, and property is also implied by the Fourth Amendment’s express injunction that “‘the right of the people to be secure in their persons,’ &c., ‘shall not be violated;’ ‘and no warrants shall be issued but upon probable cause, supported by oath, or affirmation, and particularly describing the person to be seized.’” Nor are these “guaranties of the people of the United States,” limited to citizens; they “are even held applicable to those who are not citizens.” Tiffany concluded “that these guaranties, in the Federal Constitution, were made for the express and only pu[r]pose, of securing to every citizen full and perfect *immunity* in the enjoyment of his natural and inalienable rights” (1867, 118–119).

182 According to Tiffany’s usage, then, the distinction between privileges and immunities corresponds to the modern distinction between positive rights and negative liberties. A “privilege” is some procedure or positive action that the government has a duty to perform. In contrast, an “immunity” is a natural right or liberty that the government is bound to respect. “Privileges” and “immunities” are limited neither to special benefits nor to expressly enumerated rights. Of course, there remains a distinction between the substance of privileges and immunities, and who is empowered to protect them against whom.

“*Due process of law.*” Like the other abolitionists before him, Tiffany complained that the part of the Fugitive Slave Act of 1793 that “authorizes the owner, or his agent, to seize and hurry away without process the supposed fugitive is flatly in conflict with the 5th article of the amendments of the Constitution.” We have already considered three aspects of “due process of law” that Tiffany considered “privileges” of citizenship, which are also entailed by the writ of habeas corpus. First was a judicial inquiry into the validity of any restriction on liberty; second was the need for “legal process, awarded in the due course of law, by an officer of the government, authorized to issue such process” (1867, 79); and third was the duty upon government and its officers to “take due precaution, and inquire cautiously into the facts, before any process shall be awarded to deprive the subject of his liberty” (*id.*, 104). 183

Later Tiffany elaborated that the *process* of law concerns the reliable and accurate application of statutes and other laws to particular persons. “The fact that we have a law upon our statute books punishing murder, theft, burglary &c., is no warrant for arresting a man supposed to be guilty of any of those crimes, without legal process: that is, the law itself is no process authorizing an arrest, and detention.” Tiffany then detailed all the requirements of what “is technically called the ‘process’ which the Government puts into the hands of its officer, authorizing him to do the particular thing, which the law requires to be done,”—for example, having probable cause for a warrant supported by an oath and that such warrant “particularly describe the person, to be seized, *as to leave no room for mistake*” (*id.*, 122, emphasis added). 184

That Tiffany thought the due process of law included judicial scrutiny of the substantive justification for a statute is evidenced by his reliance upon an 1843 opinion by Justice Greene Bronson of the Supreme Court of New York in the case of *Taylor v. Porter & Ford*.¹¹⁸ *Taylor* is known to be among the many state cases adopting a “substantive” conception of due process requiring a judicial determination that a statute depriving someone of life, liberty or property be within the constitutional power of the legislature to enact.¹¹⁹ As Justice Bronson explained, “[u]nder our form of government the legislature is not supreme. It is only one of the organs 185

118 4 Hill 140 (N.Y. Sup. Ct. 1843).

119 See Gedicks (2009, 658), citing *Taylor*.

of that absolute sovereignty which resides in the whole body of the people.”¹²⁰

186 In a passage quoted by Tiffany (1849, 41), Justice Bronson continued: “Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void.” According to Bronson, “the same measure of protection against *legislative encroachment* is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others.” If “*the legislature* can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison, or put him to death. But none of these things can be done by *mere legislation*. There must be ‘due process of law.’”¹²¹

187 Tiffany’s invocation of the due process case of *Taylor* is especially revealing given that it immediately follows his praise for Justice Chase’s refusal in *Calder v. Bull*¹²² “to submit to the omnipotence of State Legislation, or that it was absolute or without controll, [sic] although its authority should not be expressly restrained by the constitution” (1849, 41).

188 “*Equal protection.*” The right of all persons to the protection of the law runs throughout the entire treatise and is founded on natural rights. “The *object* of the National Government was to protect the rights of each individual citizen against oppression at home and abroad. Against the encroachments of foreign nations, and domestic states: against lawless violence, exercised under the forms of governmental authority.” In sum, “[p]rotection, in the enjoyment of their natural, and *inalienable* rights, was the great paramount object of the institution of the National Government.” To be “a citizen of the United States . . . is to be *invested* with a *title to life, liberty*, and the *pursuit of happiness*, and to be *protected* in the *enjoyment thereof*, by the guaranty of twenty millions of people” (1849, 55, 56). Echoing Weld and Birney, Tiffany maintained that the “term *citizen*, under our constitution . . . carries with it the duty of obedience, and support, and the right of protection on the part of the citizen” (*id.*, 84).

120 4 Hill at 144.

121 4 Hill at 144.

122 3 U.S. (3 Dall.) 386 (1798).

This right of individuals to the protection of government stemmed directly from the individual nature of sovereignty. “[T]he nature and policy of the National Government, that it looked to the protection of *individuals*, because there were none but *individuals* to protect. There was no such thing as a government independent of the people. Nor was there any such thing as government interests, independent of individual interests” (1849, 86–87). For Tiffany, then, “the people” refers to a body of individuals. And the government itself “belonged to no class of citizens; it was the property of all, and designed for the *equal protection* of all, individually and collectively” (*id.*, 87, emphasis added). Every individual citizen “has a right to demand, and have full and ample protection in the enjoyment of his personal security, personal liberty, and private property; protection against the oppression of individuals, communities, and nations...” Because the obligations are reciprocal, “the Nation stands pledged to him, as he to them, to defend him in the enjoyment of these rights. His civil obligations to defend his country are based upon his country’s obligation to defend him” (*id.*, 87).

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Later, in a discussion of the clause guarantying to every state a republican form of government, Tiffany explicitly connected individual sovereignty to the right of protection, including protection from abuses by a state. “[A]ll the citizens of the United States stand pledged to each *citizen*, that the State government under which he lives shall be to *him* Republican.” The relation that each citizen “shall sustain to that government shall be that of one of the *free, independent sovereigns* by whose consent the government was established, and for whose protection it shall be maintained.” Therefore, “if there be a single citizen who is, or has been robbed of full and ample protection in the enjoyment of his natural and inherent rights, by the authority, or permission of the State in which he lives,” Tiffany concluded, “this solemn guaranty has been violated, and the plighted faith of the nation demands that his wrongs shall be redressed, if need be, by the overthrow of that government that thus oppresses him” (1849, 114). From Tiffany, it is clear that the individual concept of popular sovereignty affirmed by Justice James Wilson and Chief Justice Jay in *Chisholm v. Georgia*¹²³ not only survived, but has important implications.

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123 2 U.S. (2 Dall.) 418 (1793). See Barnett (2007), describing the individualist conception of popular sovereignty expressed by Wilson and Jay; Barnett (2008, 954–960) (same).

2.10. Horace Mann, 1849, 1851

191 Born in Franklin, Massachusetts, Horace Mann (1796–1859) graduated from Brown University in 1819, studied law at the Litchfield School of Law, and was admitted to the Massachusetts bar in 1823.¹²⁴ From 1827 to 1837 he served as a member of the Massachusetts legislature, followed by 11 years as secretary of the Massachusetts Board of Education. When former President and Congressman John Quincy Adams died in 1848, the Whigs chose Mann as his replacement in the House, where he served until 1853 when he became president of Antioch College. Mann became famous as an educator committed to “universal, free, public education for precollege young people” (Lowance, ed., 2003, 451), which explains why so many public schools around the United States are named for him.¹²⁵

192 Upon his election to Congress, Mann immediately entered into the heated congressional battles over the abolition of slavery in the District of Columbia, the extension of slavery into the territories, and the Fugitive Slave Act of 1850. In his speeches and correspondence, both public and private, Mann’s arguments echoed those of the other abolitionists discussed here, such as Salmon Chase, who did not contest the constitutionality of slavery in the original slave states. Yet he did not shrink from the term “abolitionist.” “If we were abolitionists, then we are abolitionists of human bondage; while those who oppose us are abolitionists of human liberty” ([1850] 1853c, 184).

193 *Interpretive method.* In his speeches, Mann said little about interpretive method, though in one speech to the House concerning the scope of congressional power over the territories, he observed that “every body knows that there is no principle more dear to the common law than that all treaties, statutes, and customs shall be construed in favor of life and in favor of liberty” ([1850] 1853c, 200). A year later, he observed that: “The main and primary object of the constitution was to protect natural rights; but the object of the Fugitive Slave clause was to protect a legal right in conflict with natural right.” He then invoked the principles that “provisions against life and liberty should be strictly construed, while those in favor of liberty should be liberally construed,” which he said are principles

124 See Lowance, ed. (2003, 450-451); *Dictionary of American Biography*, s.v. “Mann, Horace.” Dumas Malone, ed. (1964, 6:240).

125 A list of 72 schools named after Horace Mann in 23 states can be found on the website of the Horace Mann League of the USA: <http://www.hmleague.org/mannschoools.htm>.

that “have become maxims, or axioms, of legal interpretation. . . .” ([1851] 1853d, 457).

According to Mann, “the same legal maxims, in regard to all subjects touching life and liberty, bind Congress in legislating under the constitution, as bind the judicial tribunals in administering the law” ([1851] 1853d, 457). According to these maxims of interpretation, judicial tribunals are bound by a law that, strictly construed, conflicts with natural rights because they are against liberty. But this was also implied by Lysander Spooner’s reading of the clear statement maxim of construction he took from *U.S. v. Fisher*.

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“*The people.*” Responding to the claim that slaves were not protected by the Constitution, Mann contended that “the constitution of the United States creates no slaves, and can create none. Nor has it power to establish the condition of slavery anywhere.” Although “the existence of this slavery was recognized, and certain rights and duties in relation to it were respectively acknowledged and assumed,” he wrote, “the government of the United States has no more power to turn a freeman in a free state into a slave than it has to turn a slave in a slave state into a freeman.” Sounding much like Lysander Spooner, his fellow Massachusetts lawyer, Mann concluded that “[n]o reason can be assigned why a slave is not as much under the protection of a constitution made for the ‘people’ as under the protection of law made for the ‘people’” ([1851] 1853d, 415, 416, 424).

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“*Privileges and Immunities of citizens.*” In analyzing the constitutionality of the Fugitive Slave Act of 1850, Mann rejected the argument later accepted by Chief Justice Taney in *Dred Scott* that free blacks are not citizens under the Constitution. First, he affirmed that “every man found within the limits of a free state is *prima facie* FREE.” Consequently, every man “in any one of the free states of this Union, has a right to stand on this legal presumption, and to claim all the privileges and immunities that grow out of it *until* his presumed freedom is wrested from him by legal proof” ([1851] 1853d, 416).

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Like other abolitionists, Mann protested the “unconstitutional imprisonment” by the Southern states of free black sailors from the North, citing “that part of the constitution which says that ‘the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states’” (*id.*, 469). Once again, privileges and immunities are not limited to nondiscrimination under local law, about which Mann does not inquire, but pertain to the fundamental rights of Americans.

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198 “*Due Process of Law.*” In 1849, Mann delivered an impassioned speech in Congress protesting the existence of slavery in the District of Columbia, and devoted a portion of his speech to its unconstitutionality. Like other abolitionists starting with Theodore Dwight Weld, Mann contended that slavery in the District violated the Due Process Clause of the Fifth Amendment, where “the constitution uses the word ‘person’—the most comprehensive word it could find.” After asking “what does this word ‘person’ mean?” he examined every clause in the Constitution that uses the word. From this he concluded that person “embraces all, from the slave to the President of the United States” ([1849] 1853b, 170, 172).

199 Yet slavery denies to blacks in the District of Columbia the due process of law. “Process of law,” he said, “means legal proceedings and a jury trial. It is a phrase that does not pertain to the legislature, but to the courts.” It means “the institution of a suit in civil matters; the finding of an indictment, or an information in criminal ones; the issuance of subpoenas for witnesses in both.” Slavery is unconstitutional in the District, therefore, because a slave “is deprived of his liberty and property, in pursuance of the laws of Congress, without *any* legal process whatever, and therefore in flagrant contradiction of the” Fifth Amendment ([1849] 1853b, 173). Later, in his 1851 speech, he also condemned the Fugitive Slave Act of 1850 for violating the Due Process Clause of the Fifth Amendment for depriving an accused runaway slave of liberty without a jury trial or indictment ([1851] 1853d, 403–404). Here, the due process of law concerned a statutory failure to afford the individual a proper judicial process. Assuming juries are judges of law as well as fact, this conception of due process can extend to the justice or constitutionality of the statute being enforced, but this possibility is not mentioned by Mann.

2.11. Lewis Tappan, 1850

200 Lewis Tappan (1788–1863) was born in Northampton, Massachusetts and, with his younger brother, Arthur, became a successful businessman in New York City. Upon selling their business, the Tappan brothers became philanthropists providing financial support to abolitionist causes, including Oberlin College in Ohio, which provided education for both white and black students in fully-integrated classrooms.¹²⁶ It was there that they

126 See *Dictionary of American Biography*, s.v. “Tappan, Lewis.” Dumas Malone, ed. (1964, 9:303).

influenced Theodore Dwight Weld toward abolitionist activism. In 1833, working with William Lloyd Garrison, the Tappans, along with Weld, helped form the American Anti-Slavery Society. “Lewis Tappan proved an astute publisher for the organization” (Lowance, ed., 2003, 91, 421). Initially opposed to a third party movement, by 1843 Tappan became a zealous member of the Liberty Party. By 1852, again after some hesitation, he was actively involved in the Free Soil party (Sewell, 1980, 110, 241).

In 1850, Tappan published a pamphlet urging the repeal of the newly enacted Fugitive Slave Act, and challenging its constitutionality. It adds little to our understanding of abolitionist constitutionalism, besides affirming the widespread acceptance of its basic tenets among politically active abolitionists. Notwithstanding *Prigg*, Tappan contended that the Fugitive Slave Act of 1793 violated the Due Process Clause of the Fifth Amendment. And he also condemned the imprisonment by South Carolina of “colored seaman, citizens of Massachusetts” in violation of the Privileges and Immunities Clause of Article IV (1850, 28, 30).

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2.12. Gerrit Smith, 1854

Gerrit Smith (1797–1874) was a central figure among abolitionists. Part activist, part philanthropist, part theorist, Smith knew and corresponded with all the players and financially supported many of them. His wealth derived from his father’s land holdings in central and western New York (Lowance, ed., 2003, 420). In 1840 he took a leading part in the organization of the Liberty Party, and in 1848 and 1852 he was nominated for the presidency by the remnant that had not been absorbed by the Free Soil Party.¹²⁷ In 1853 he was elected to the House of Representatives as an independent from New York and served from 1854 to 1855, resigning his seat after one term due to disillusionment (*id.*, 421).

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In the late 1850s, Smith “supported John Brown’s militia activities in Kansas and was involved in planning Brown’s raid on the federal arsenal at Harpers Ferry, Virginia” in 1859 (Lowance, ed., 2003, 421).¹²⁸ After Brown’s execution, Smith came under investigation for his involvement. Smith’s association with Brown stemmed from his earlier political

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127 Smith’s political activism is extensively discussed in Sewell (1980). See also *Dictionary of American Biography*, s.v. “Smith, Gerrit.” Dumas Malone, ed. (1964, 9:270.)

128 The story is told at length in Chester G. Hearn (1996).

involvement with the crisis in Kansas. At one point, he engaged Lysander Spooner to represent him in a libel action against the New York *Herald*. Spooner, who had himself been involved in a plot to kidnap the governor of Virginia to ransom him for Brown, advised him against the suit (Hearn, 1996, 74–75).

204 Smith wrote much in the form of letters and speeches. For example, in 1847, he wrote to Salmon Chase imploring him to drop his opposition to a proposed plank of the Liberty Party platform holding slavery to be unconstitutional in the slave states. In his letter, Smith disclaimed any reliance on framers' intent to qualify the text of the Constitution. After examining each of the allegedly pro-slavery provisions of the Constitution, he concluded: “[I]s it not high time for the Liberty party to have done with running after the pro-slavery speculations on the intentions of the Constitution? Is it not high time to leave to the pro slavery parties the hunting up of slavery in the intentions of that instrument?” His answer: “Let that miserable work be theirs. But let the Liberty party take the Constitution as it is, and look into its fair free face, instead of mousing about behind its back among the heaps of pro-slavery speculations, which pro-slavery commentators have piled up there” (1847).

205 Here, however, I will focus on his 1854 speech to the House opposing the bill for organizing the territories of Nebraska and Kansas. His opposition was based on the denial of suffrage to blacks and immigrants and the implication that Congress had no power to interfere with the governance of the territories. During his oration, Smith maintained “that the Constitution not only authorizes no slavery, but permits no slavery; not only creates no slavery in any part of the land, but abolishes slavery in every part of the land” (1854, 520).

206 *Interpretive method.* Smith began his discussion of the constitutionality of slavery by considering the claim that the slaveholders among the Founders would never have consented to a constitution that failed to protect slavery. In a lengthy passage, he contrasted “the slaveholders of that day with the slaveholders of this,” explaining how slaveholders at the Founding, under the influence of the Declaration of Independence, were uniformly in favor of abolition, and considered slavery a dying institution (1854, 521). Only with the invention of the cotton gin did slavery become so profitable that slaveholders in the South came to embrace the institution as just and constitutional; so important did the cotton trade become to the economic interests of the Union that many in the North went along.

Indeed, Smith conceded that “had the making of the Constitution been delayed no more than a dozen years, it would, (could it then have been made at all,) have been pro-slavery” (1854, 521).¹²⁹ In sum, Smith accused his contemporaries of historical anachronism by misinterpreting “the desires and designs of our fathers, in regard to the Constitution,” by looking “through the medium of the pro-slavery spirit and interests of our own day, instead of the medium of the anti-slavery spirit and interests of their day” (*id.*, 521).¹³⁰

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At the same time, Smith echoed Goodell, Spooner, and Tiffany by rejecting any reliance on the intentions of those who consented to the Constitution, whether they were for or against slavery, to prove its meaning. The meaning of the Constitution is to be gathered “from the words of the Constitution, and not from the words of its framers—for it is the text of the Constitution, and not the talk of the Convention, that the people adopted. It was the Constitution itself, and not any of the interpretations of it, nor any of the talks or writings about it, that the people adopted.” Therefore, the question of the constitutionality of slavery “is to be decided by the naked letter of the instrument, and by that only. If the letter is certainly for slavery, then the Constitution is for slavery—otherwise not” (1854, 522). Following the lead of Lysander Spooner, with whom he had a tumultuous association, Smith then quoted the rule of construction from *U.S. v. Fisher* requiring a clear statement by lawmakers before their words will be given an unjust meaning.

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Midway through his speech, Smith disclaimed his ability to give but an outline of the argument against slavery and commended to his audience “the arguments of William Goodell and Lysander Spooner on this subject.” He observed that it “must be very difficult for an intelligent person to rise from the candid reading of Mr. Spooner’s book, entitled ‘The Unconstitutionality of Slavery,’ without being convinced, by its unsurpassed logic, that American slavery finds no protection in the Constitution” (1854, 525). Smith’s 1854 speech in Congress is still more evidence that these abolitionist constitutional arguments were far from obscure. Earlier we noted

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129 As he explains: “I make this admission, because I remember, that, during those dozen years, Whitney’s cotton gin, (but for which invention American slavery would, long ago, have disappeared,) came into operation, and fastened slavery upon our country” (1854, 521).

130 Without discussing Smith, Cover reaches much the same conclusion that “not a little of” the claim that the Fugitive Slave Clause was “a basic part of the constitutional bargain” was “a reading of the problems of the present backward into history” (1975, 192).

how North Carolina Representative Howard Clingman expressed his familiarity with Spooner's work in a speech to the House in 1847. In passing, Smith acknowledged Clingman's grasp of the antislavery position. "Such good abolition doctrine from such surprising sources was very grateful to me" (*id.*, 520).

210 "Due process of law." Smith contended that the "Constitution extends its shield over every person in the United States; and every person in the United States has rights specified in the Constitution, that are entirely incompatible with his subjection to slavery." After quoting the Due Process Clause of the Fifth Amendment, Smith exclaimed: "Let this provision have free course, and it puts an end to American slavery." Smith then considers the claim "that, inasmuch as the slave is held by law, (which, in point of fact, he is not,) and, therefore, 'by due process of law,' nothing can be gained for him from this provision." To this he responded that, because this provision in the Constitution "is an organic and fundamental law, it is not subject to any other law, but is paramount to every other law"; and he denied that "the laws, so called, by which persons are held in slavery," can be considered "due process of law" (1854, 522, 524). Like Tiffany, Smith quoted from Lord Coke and Justice Greene Bronson's 1843 due process opinion in *Taylor v. Porter & Ford*, but the particular quotes he used from these sources do not evince a clear endorsement of substantive due process.¹³¹

211 Smith's Kansas and Nebraska speech was delivered just two years before Representative John Bingham took to the floor of the House to object to the constitutionality of a pro-slavery Kansas statute on the ground that it violated the Due Process Clause of the Fifth Amendment. Unlike Bingham, however, Smith sided with those abolitionists who claimed that the Fifth Amendment was applicable to the states. Just as Article I defines, and thereby restricts, the powers of Congress, as well as restricting the powers of states, Smith contended, so also does the Fifth Amendment, whose scope is nowhere expressly limited to federal power. True, the

131 Smith quoted Lord Coke's definition of "due process of law" as "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by suit original of the common law" (1854, 524). He quoted the following passage from *Taylor*: "The meaning of the [due process of law] then seems to be, that no member of the State shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him, upon trial had, according to the course of the common law." *Id.* The question raised, but not answered, is Smith's conception of "the common law."

First Amendment begins “Congress shall make no law,” but Smith observed that this was originally the third proposed amendment, so it in no way controls all the scope of all the others. Given that the text of the other amendments is not limited to the federal government, “[i]t is enough, that they are in their terms, nature, and meaning, as suitably, limitations on the government of a State, as on the National Government” (1854, 524).

Sounding much like Mann, Smith also maintained that, given “a reasonable doubt, the fifth amendment refers exclusively to the Federal Government, it should be construed, as referring to State Governments also; for human liberty is entitled to the benefit of every reasonable doubt; and this is a case in which human liberty is most emphatically concerned” (1854, 524). Smith concluded by offering his account of the adoption of the amendments, noting that although Madison originally proposed separate provisions to be inserted in the text in different sections to limit federal and state power, when they were added at the end, the scope of the amendments was not expressly restricted to the federal government alone.

It has long been accepted that the Bill of Rights did not originally apply to the states, in part, because Madison had originally proposed separate restrictions on state power that were to be inserted into Article I, Section 10, which concerns limitations on the states. That these express restrictions on states were not adopted entailed that those that were applied only the federal government. Smith claimed, however, that when the proposed amendments were changed from being insertions into the original text to an appended list of amendments, their general wording qualified both federal and state power unless they were expressly limited to restricting Congress.

“*Protection*” and “*equal right*.” What little time Smith devoted to the protection of the laws arose in the context of his discussion of the Declaration of Independence and the natural rights to which it referred. “Law is for the protection—not for the destruction—of rights,” he said. As the Declaration of Independence says, “to secure these rights, Governments are instituted among men.” Governments “are instituted, not to destroy, but to secure these rights.” The rights to life, liberty, and the pursuit of happiness are declared by the Declaration to be inalienable. “These are not conventional rights, which, in its wisdom, Government may give, or take away, at pleasure. But these are natural, inherent, essential rights, which Government has nothing to do with, but to protect.” And

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to illustrate how some natural rights “are ever to be held sacred from the invasion and control of the human legislature,” Smith offered this example: “For instance, what we shall eat and wear is a subject foreign to human legislation” (1854, 525, 526).

- 215 Far from the Declaration being consistent with slavery, Smith noted how advocates of slavery had repudiated it. “They ridicule it, and call it ‘a fan-faronade of nonsense.’ It will be ridiculed in proportion as American slavery increases. It will be respected in proportion as American slavery declines. Even members of Congress charge it with saying that men are born with equal strength, equal beauty, and equal brains.” Smith then explained the idea of equality that derives from natural rights. “I understand the Declaration of Independence to say that men are born with an equal right to use what is respectively theirs” (1854, 525).

2.13. Byron Paine, 1854

- 216 Smith’s speech to the House was delivered on April 6, 1854. On May 29th, attorney Byron Paine (1827–1871) began what was to be a two-day oral argument on behalf of Sherman Booth, the editor of the Milwaukee *Free Democrat*. In March, Booth had led a raid that freed Joshua Glover, a runaway slave from Missouri, from custody and was charged with violating the Fugitive Slave Act of 1850.¹³² Paine had brought a writ of habeas corpus to release him from custody.
- 217 Born and raised in Ohio, Payne had moved to Wisconsin with his family when he was 20.¹³³ Paine’s father, brother, and uncle were all prominent lawyers, and Paine passed the bar in 1854, the very year he mounted his defense of Booth by challenging the constitutionality of the Fugitive Slave Act. After prevailing in Wisconsin courts,¹³⁴ the case was eventually reversed by the United States Supreme Court in an opinion by Chief Justice Taney.¹³⁵
- 218 Paine’s argument, which was published as a pamphlet (1854) by the *Free Democrat*, deserves to be read in its entirety to appreciate its eloquence and

132 The factual and legal background of the dispute is extensively discussed in Maltz (2009, 196–209, 278–286).

133 For a concise biography of Paine, see Joseph A. Ranney (2002).

134 See *In re Booth*, 3 Wis. 1 (1854) (decision by Justice Smith); 3 Wis. 54 (1854) (decision by full court).

135 *Ableman v. Booth*, 62 U.S. 506 (1859).

sophistication. His impressive performance at the age of 27 brought him to prominence. He became a Milwaukee County judge two years later and, in 1859, at the age of 32, he was elected to the Wisconsin Supreme Court. In 1864 he resigned from the bench to serve in the Union Army, after which he returned to Milwaukee to practice law. In 1866 Paine sued on behalf of Ezekiel Gillespie, a leader of Milwaukee's black community, for equal suffrage and prevailed in the Wisconsin Supreme Court. In 1867, Paine was reappointed to his old seat on the Court, and from 1868 until 1871, Paine was a professor of law in the University of Wisconsin, from which he received the degree of LL.D. in 1869. His brilliant legal career was cut short when he succumbed to pneumonia in 1871 at the age of 43.

Interpretive method. We saw above how Paine castigated Justice Story's opinion in *Prigg* for allegedly abandoning the interpretive methodology advanced in his treatise in favor of framers' intention. Citing Spooner, and then quoting at length from Story's treatise, Paine adopted an original public meaning approach. "[T]he intention of an instrument is to be gathered from its words." The decisions construing Article IV to give Congress a power to enact a Fugitive Slave Act, "assume an ambiguity in this clause when there is none, that they may abandon the words without just cause, to seek for the intention in a historical investigation, and then infer an independent power in congress to execute it, from a mere argument of convenience" (1854, 8, 9). 219

In challenging the correctness of *Prigg*, Paine distinguished precedents that would unsettle property rights from precedents that restrict liberty. Although it is said that "it is more important that the law be settled, than in how it is settled," Paine contended that "in matters relating to personal liberty alone, this doctrine cannot apply with equal force. The only consequence of departing from a bad precedent there, would be that better justice would be done afterwards, than had been done before." Moreover, when considering the weight attached to judicial decisions, Paine cautioned that "judges are, after all but men. That although as a matter of theory, they are sometimes supposed to be above the reach of prejudice or passion, yet in practice ... they are influenced by the same prejudices and passions as other men" (1854, 22). 220

Privileges and Immunities. Like Chase, whose 1847 Supreme Court brief Paine might well have studied, Paine considered the Fugitive Slave Clause of Article IV to be an article of compact among the states, which created no enforcement power in Congress. Likewise for the Privileges 221

and Immunities Clause of Article IV. Yet he nevertheless contended that the latter has been “systematically and outrageously violated by the South, for many years” when any person who goes there “whose sentiments are known to be opposed to slavery” is “driven out by violence” (1854, 18). Paine did not specify whether the clause is violated by state action, private action, or by the unwillingness of states to protect speakers from mob violence. Nevertheless, he assumed the freedom of speech or thought to be a privilege or immunity of a citizen that was being unconstitutionally restricted—notwithstanding the fact that bans on abolitionist speech were enforced within Southern states in a nondiscriminatory fashion against locals as well as those from out-of-state.

222 Paine joined other abolitionists in condemning as unconstitutional, under Article IV, statutes enacted by South Carolina and Louisiana imprisoning black “citizens of Massachusetts whenever they enter those States” (1854, 18). Again, this objection was not made dependent on whether these states were treating all blacks equally. In sum, according to Paine, the Privileges and Immunities Clause protected certain fundamental rights of citizens of one state against infringement when in another state, not merely a right to equal treatment within a state. And among the privileges and immunities protected by Article IV was the freedom of speech—a natural right, not a special privilege created either by state governments or by the Constitution.

223 “*Due process of law.*” In criticizing the process afforded accused slaves by the Fugitive Slave Act, Paine applied the “technical meaning” of the due process of law we have previously seen: “regular judicial proceedings, according to the course of the common law, or by regular suit, commenced and prosecuted according to the forms of law.” Paine grounded this right in natural law: “The passing of judgment upon any person without his ‘day in court,’ without due process or its equivalent, is contrary to the law of nature, and of the civilized world.” Indeed, even “without the express guarantee of the constitution, it would be implied as a fundamental condition of all civil governments” (1854, 30).

224 For Paine, the core of due process is a judicial proceeding, but one that includes protection of fundamental rights as embodied in the common law. Paine read a passage from Kent’s Commentaries, which links the due process of law to Lord Coke’s reading of “the law of the land” provision of the Magna Carta (1854, 19). Then later in his argument, Paine referred back to this previous discussion: “I have already referred the

court to the construction of the words ‘due process of law,’ which are held to include all the essential rights secured by the common law, among which the trial by jury is one” (*id.*, 20).

2.14. Proceedings of the Radical Abolitionist Convention, 1855

In April of 1855, a convention of “Radical Political Abolitionists” was called by Lewis Tappan, W. E. Whiting, William Goodell, James Mocune Smith, Gerrit Smith, George Whipple, S. S. Jocelyn, and Frederick Douglass, to be held in Syracuse in June. Its proceedings concerning the unconstitutionality of slavery were published as a pamphlet in New York (Proceedings of the Convention of Radical Political Abolitionists [hereafter Proceedings], 1855). Given the involvement of Goodell and Smith, it is not surprising that it included much of the same constitutional analysis we have seen developed to this point. And, it is worth noting, the convention also expressly condemned the “prejudice against color” that “drives the colored man from the workshop, the counting-room, and the polls, making him a hissing and a by-word, a miserable outcast, the off-scouring of the earth” (*id.*, 55).

Interpretive method. The convention deemed it “right and proper to construe the Constitution as it *reads*, and not as the slaveholders pretend that it *means*.” Even if it could be proved that “our fathers mentally intended to protect slavery, while their words, in the Constitution, required its suppression, we should still hold ourselves at liberty and under obligations to use the Constitution according to its *righteous language*, and against their *unrighteous intentions*.” Even if “men use language for dishonest purposes,” it is the duty of honest men “to whom their written instruments are committed, to defeat such dishonest purposes and intentions if they can by interpreting the language according to its natural and just meaning” (Proceedings, 1855, 6). The convention formally resolved:

That we have a right to demand that the Constitution be expounded by the same rules of legal interpretation that, by common consent, control the exposition of all similar instruments and all human laws, the same rules that *do* control the exposition of the Constitution itself when the interests of slavery do not forbid it! (*id.*, 53).

National citizenship. When a “citizen of Wisconsin sojourns to Louisiana,” “he has a constitutional right to do so.” He is “a citizen of the United States” (Proceedings, 1855, 30).

228 “*Privileges and Immunities of citizens in the several states.*” After quoting Article IV, they asked, “[b]ut what are the privileges and immunities to which this citizen is entitled?” The only example provided is the one personal right enumerated in the Bill of Rights that was omitted by Joel Tiffany: the free exercise of religion. “May he freely exercise his religion? Not if his religion enjoins deeds of mercy to those who most need them.” Yet, “[f]or no other offense, this peaceful Christian citizen,” referring to Pardon Davis, “on the eve of returning home to Wisconsin, is intercepted, seized, condemned, and sentenced to imprisonment for twenty years, among felons” (Proceedings, 1855, 30). Once again, we see that the scope of the Privileges and Immunities Clause was not limited to discriminatory treatment within a state—for the laws prohibiting assisting fugitive slaves applied to Davis were applied equally to everyone in South Carolina. And their understanding of “privileges and immunities” was not limited to special privileges granted by the state, or by the Constitution, but extended to certain natural rights possessed by citizens of the United States, which though they may be included in, are not created by, the Bill of Rights.

229 “*Due process of law.*” Citing Gerrit Smith’s speech to the House, the convention reiterated his analysis of the Due Process Clause, including his reliance on Lord Coke and Justice Bronson. After quoting from the Fifth Amendment, it stated: “No one will pretend that any slave in the United States ever lost his *liberty* by this process, or that ‘due process of law’ could ever reduce any man to *slavery*, though it may deprive him of liberty by imprisonment for crime.” Whatever proslavery clauses the Constitution may have contained, the Fifth Amendment “like the codicil to a will, overrides, dis-places, and abrogates whatever in the original instrument might have been inconsistent with it” (Proceedings, 1855, 15–16).

2.15. Frederick Douglass, 1857

230 Of all the abolitionists discussed here, Frederick Douglass is surely the most familiar to a modern audience. His fame is well deserved. He was a runaway slave who became a spellbinding orator and prolific writer at the risk of his freedom and his life. Originally a Garrisonian, he accepted the Wendell Phillips position that the Constitution sanctioned slavery. Indeed, in 1849, Douglass published a rebuttal to an address by Gerrit Smith in which Smith had advocated the unconstitutionality of slavery. In a compelling defense of the constraints of a written constitution, Douglass implored Smith: “Do not, for the sake of honesty and truth, solemnly swear to protect and defend an

instrument which it is your firm and settled purpose to disregard and violate in any one particular” (1849). As previously noted, however, two years later, “[a] careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell” persuaded Douglass to change his mind (1851).¹³⁶

Interpretive Method. In an 1857 speech protesting the *Dred Scott* decision, Douglass affirmed the original public meaning of the document: “The Supreme Court . . . has told us that the intention of legal instruments must prevail; and that this must be collected from its words.” He then paraphrased the rule of construction from *U.S. v. Fisher* that Spooner had introduced into the abolitionist arsenal. “It has told us that language must be construed strictly in favor of liberty and justice. It has told us where rights are infringed, where fundamental principles are overthrown, where the general system of the law is departed from, the Legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.” These rules, he said, “are as old as law. They rise out of the very elements of law. It is to protect human rights, and promote human welfare. Law is in its nature opposed to wrong, and must everywhere be presumed to be in favor of the right. The pound of flesh, but not one drop of blood, is a sound rule of legal interpretation” ([1857] 1999, 344, 353). 231

In his speech responding to *Dred Scott*, Douglass employed an original public meaning approach to counter Chief Justice Taney’s denial that blacks could ever be considered part of the “We the People” to which the Preamble refers. In much the same words as those of Spooner, Douglass declared: “‘We the People,’—not we, the white people—not we, the citizens, or the legal voters—not we, the horses and cattle but we the people—the men and women, the human inhabitants of the United States, do ordain and establish this Constitution, &c.” ([1857] 1999, 354). And, like Spooner, Douglass wrote at length about how the allegedly pro-slavery clauses of the Constitution should be afforded their innocent public meanings. 232

Because he mentions the precursors of Section One only in passing,¹³⁷ the significance of Douglass’s writings for the meaning of Section One 233

136 For an excellent discussion of Douglass’s constitutionalism, see Peter C. Myers (2008, 83-109).

137 See, e.g., ([1857] 1999, 354):

I ask then, any man to read the Constitution, and tell me where if he can, in what particular that instrument affords the slightest sanction of slavery? Where will he find a guarantee for slavery? Will he find in the declaration that no person shall be deprived of life, liberty, or property, without due process of law?

lies in his highly visible affirmation of original public meaning interpretive methodology. Douglass represents both an impassioned proponent of abolitionist constitutionalism, and someone whose powerful mind had been moved by the arguments made on its behalf—arguments that had been developing and deepening for some twenty years since 1837 when Theodore Dwight Weld first published his essay in the *New York Evening Post* claiming that slavery in the District of Columbia was unconstitutional.

3. THREE SPEECHES BY JOHN BINGHAM: 1856, 1857, AND 1859

234 We now come to the use of the precepts of abolitionist constitutionalism by John Bingham, who, as a member of the Joint Committee of Fifteen on Reconstruction in the Thirty-Ninth Congress, moved the language that became Section One (without the citizenship clause). As Richard Aynes has shown (1988), abolitionist and antislavery ideology was pervasive in Bingham's immediate and extended family, the Pennsylvania and Ohio communities in which he was raised, his schooling at Franklin College in Ohio, his church, his professional associations, and his political activities.

235 With this background it is thoroughly unsurprising that each of the three elements of Bingham's proposal can be traced to abolitionist constitutionalism. But the connection between Bingham and abolitionist constitutionalism is also strongly reinforced by a theme that emerges from the previous discussion: With the exception of Spooner, Tiffany, and Paine, the figures discussed above who developed abolitionist constitutionalism were, at the very same time, deeply engaged in political activism. In particular, each played central roles in developing the Liberty Party, which begat the Free Soil Party, which begat the Republican Party. As Eric Foner has observed, Salmon P. Chase "lived to see his political approach to the slavery issue spread from a handful of abolitionists to become the rallying-cry of a victorious political party" ([1970] 1995, 102). Whatever else he was, John Bingham was an Ohio Republican.

236 In this Part, I examine three of Bingham's speeches to the House over a three-year period in the 1850s in which he employs what will now be recognized as mainstream abolitionist constitutional arguments. The first, delivered on March 6, 1856, concerned the contested congressional election in Kansas. In the second, delivered on January 13, 1857, Bingham

responded to the last State of the Union message by lame duck President Franklin Pierce, a Democrat from New Hampshire. In his message, Pierce defended the repeal of the “unconstitutional” and “injurious” Missouri Compromise, and sharply condemned what he called “assaults upon the Constitution” by opponents of slavery, accusing them of “violence and unconstitutional action,” and “endeavor[ing] to prepare the people of the United States for civil war by doing everything in their power to deprive the Constitution and the laws of moral authority. . . .”¹³⁸ Bingham’s third, and by far the most comprehensive speech, delivered on February 11, 1859, concerned the admission of Oregon into the Union and the constitutionality of various provisions in its proposed state constitution.

In these speeches, Bingham discussed the concept of United States citizenship, the Privileges and Immunities Clause of Article IV, the Due Process Clause of the Fifth Amendment, and the equal protection of natural rights. On each of these topics, his views are indistinguishable from those abolitionists whose only concession to the constitutionality of slavery was that the federal government lacked power to suppress it in the original thirteen states where it was still practiced. 237

Consider this passage of his 1857 speech: “[B]y the Constitution of our common country, MEN are not PROPERTY, and cannot be made property, and have the right to defend their personal liberty even to the infliction of death!” (1857, 139). Or this from 1859: “Inasmuch as black men helped to make the Constitution, as well as to achieve the independence of the country by the terrible trial by battle, it is not surprising that the Constitution of the United States does not exclude them from the body politic, and the privileges and immunities of citizens of the United States” (1859, 984). 238

138 Franklin Pierce’s Fourth Annual Message, The American Presidency Project [online]. For a scathing report of this portion of his message, see *New York Times* (December 3, 1856): “If President Pierce believes what he . . . asserts, his retirement should be to an idiot or insane asylum. He lacks the common sense needed for the discharge of the common-place duties of private life.” In his message, Pierce called upon “either the legislative assembly of the Territory [of Kansas] or Congress” to “see that no act shall remain on its statute book violative of the provisions of the Constitution or subversive of the great objects for which that was ordained and established,” as well as to “take all other necessary steps to assure to its inhabitants the enjoyment, without obstruction or abridgment, of all the constitutional *rights, privileges, and immunities of citizens of the United States*, as contemplated by the organic law of the Territory.” *Id.* (emphasis added). To this, the *Times* responded: “This is good advice. If it is sincere,” but “[o]ne of the rights guaranteed to the people of Kansas was immunity from murder.” *Id.*

- 239 Again, this is not to claim that Bingham thought that the federal government could abolish slavery in the Southern states. Still, in these speeches Bingham argued forcefully that Congress had the power to suppress slavery in all the territories, and in any state formed therefrom, as well as to ban any commerce in slaves among the several states.
- 240 *Interpretive method.* Bingham says little about interpretive methodology, but he clearly utilizes the original public meaning approach defended by other abolitionists. In answering the question of who are “citizens of the United States,” Bingham says in his 1859 speech that they include “all free persons born and domiciled within the United States—not all free white persons, but all free persons. You will search in vain, in the Constitution of the United States, for that word white; it is not there” (1859, 984). This statement stands in contrast with the original intent approach of Justice Taney in *Dred Scott*, an opinion already published well before Bingham delivered his speech.
- 241 “*Citizens of the United States.*” Like abolitionists dating back to Weld, Bingham derived a national citizenship for free blacks from their allegiance to the national government (though he does not claim that slaves are citizens). When considering the plight of free blacks in his 1859 speech, he asks: “Who are citizens of the United States? Sir, they are those, and those only, who owe allegiance to the Government of the United States. . . .” In sum, “[a]ll free persons born and domiciled within the jurisdiction of the United States, are citizens of the United States from birth; all aliens become citizens of the United States only by act of naturalization, under the laws of the United States” (1859, 983). Bingham identified a potential ambiguity in the text of Article IV: “There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is ‘the privileges and immunities of citizens of the United States in the several States’ that it guaranties” (*id.*, 984, emphasis added). Bingham would rectify this ambiguity when wording the Privileges or Immunities Clause of the Fourteenth Amendment.
- 242 “*Privileges and Immunities of Citizens of the United States.*” Like other abolitionists, with the exception of Joel Tiffany, Bingham employed Article IV, section 2, when discussing the treatment of free blacks, not slaves. And he viewed the clause as barring the deprivation of the fundamental rights of all citizens of the United States.
- 243 In his 1859 speech, Bingham objected to the constitutionality of a provision of the Oregon state constitution that read: “No free negro or

mulatto, not residing in this State at the time of the adoption of this constitution, shall ever come, reside or be, within this State, or hold any real estate, or make any contract, or maintain any suit therein. . . .” Bingham contended that this violated the Privileges and Immunities Clause of Article IV in at least two respects: First, by prohibiting a citizen of the United States from entering the state, and second by prohibiting any citizen of the United States from owning property or entering into contracts. “I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the ‘privileges and immunities’ of a citizen of the United States” (1859, 984).

Lest the wording of this statement suggest that the right to acquire and own property is somehow distinct from the privileges and immunities of U.S. citizens, any ambiguity is dispelled in another passage of the same speech in which he referred to “all the privileges and immunities of citizens of the United States, *amongst which are* the rights of life and liberty and property, and their due protection in the enjoyment thereof by law. . . .” (1859, 984, *emphasis added*). In this passage, Bingham also expressly distinguished between “the rights of life, liberty and property” themselves and “their due protection in the enjoyment thereof by law.” Both these substantive rights and their protection are among the privileges or immunities of citizens of the United States.

Like the abolitionists surveyed in Part 2, Bingham viewed the substance of the Privileges and Immunities of citizens to be fundamental rights, rather than rights under state laws. In his 1859 speech he identified the set of rights that are protected: “Not to the rights and immunities of the several States; *not to those constitutional rights and immunities which result exclusively from State authority or State legislation*; but to ‘all privileges and immunities’ of citizens of the United States in the several States” (1859, 984, *emphasis added*). Although the Oregon Constitution was clearly discriminatory, Bingham’s objection was to the state denying the fundamental rights of any “law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein” (*id.*).

Bingham contrasted the natural rights protected by the Privileges and Immunities Clause with political rights, which “are conventional, not natural; limited, not universal.” While a political right, such as the right to vote, can be restricted to a subset of the citizenry, the natural rights of

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the individual may not be restricted even by a majority of the public. “I cannot, and will not, consent that the majority of any republican State may, in any way, rightfully restrict the humblest citizen of the United States in the free exercise of any one of his natural rights,” which are “those rights common to all men, and to protect which, not to confer, all good governments are instituted.” Indeed, “the failure to maintain [natural rights] inviolate furnishes, at all times, a sufficient cause for the abrogation of such government; and, I may add, imposes a necessity for such abrogation, and the reconstruction of the political fabric on a juster basis, and with surer safeguards” (1859, 984). As we shall see below, Bingham’s conception of equal protection was founded, not on the equality of personal characteristics, but on this equality of natural rights.

247 *Due Process of Law.* In his 1856 speech, Bingham objected to the constitutionality of a Kansas “enactment” making it a crime (1) to carry away the slave with the intent to effect the slave’s freedom; (2) to persuade a slave to run away; (3) “to aid a slave in escaping from the service of his master, or to *aid* or *harbor* any slave who has escaped from his master”; (4) “to print, or circulate, or publish, or aid in printing, circulating or publishing within said Territory, any book, paper, pamphlet, magazine, handbill or circular, containing any sentiment *calculated to induce* slaves to escape from the service of their masters”; or (5) “for any free person, by speaking or writing, to assert that persons have not the right to hold slaves in said Territories, or to circulate there any book containing any denial of the right of any person to hold slaves in said Territory” (1856, 124).

248 Bingham characterized this enactment by the territorial legislature as “pretended legislation of Kansas” because it “violates the Constitution in this—that it abridges the freedom of speech and of the press, and deprives persons of liberty without due process of law . . .” He then asked: “Which shall stand—the Constitution which guarantees to each man personal liberty, and to collective man empire, or these atrocious statutes which inaugurate the worst despotism the world ever saw?” (1856, 124). Because Bingham was here objecting to the substance of a detailed *statute* equally restricting a variety of liberties of whites and blacks alike, his speech provides a clear endorsement of a substantive interpretation of the Due Process Clause.

249 In 1857, Bingham expressly advanced the abolitionist position that slavery violated the Due Process Clause. Although the original states reserved to themselves the power to preserve slavery, and the Constitution impli-

edly restricted the power of Congress to reach slavery within the existing states, the later enactment of the Fifth Amendment constrained the power of all future states to establish slavery. New states were “subject ... to the spirit of the Constitution, not only as originally framed and adopted, but also as it might be thereafter amended.” The Northwest Ordinance ordained that slavery “should be *forever* prohibited within said *new States*; that *no man* should be *therein* deprived of his liberty or property, but by the judgment of his peers, or the law of the land. ...” When the Ordinance was superseded by the Constitution, the Fifth and Sixth Amendments “contain *substantially*, and almost *literally*, the provisions of the articles of the ordinance, and like them, declare that ‘*no person* shall be deprived of life, liberty, or property, without due process of law;’ ...” (1857, 137).

In a crucial passage of his 1859 speech, Bingham identified the rights protected by the Fifth Amendment as “natural or inherent rights, which belong to all men irrespective of all conventional regulations.” These rights “are by this constitution guaranteed by the broad and comprehensive word ‘person,’ as contradistinguished from the limited term citizen. ...” He then quoted both the Due Process Clause and the Takings Clause “in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race,” a guarantee which “applies to all citizens within the United States.” Later, he summarized the Due Process and Takings Clauses as affirming that “all persons are equally entitled to the enjoyment of their rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent and without just compensation” (1859, 983, 985).

The “*equal protection*” of natural rights. Scattered throughout his three speeches, Bingham referred to the “primal” duty of government as the protection of equality in the enjoyment of natural rights. In 1856, he alluded in passing to “the laws under which alone” a “free and intelligent people” are “secure in the protection of their persons and property” (1856, 122). In his 1857 speech, Bingham greatly expanded upon the theme of the equal protection of natural rights. “The Constitution is based upon the EQUALITY of the human race,” and that every state “formed under the Constitution, and pursuant to its spirit, must rest on this great principle of EQUALITY.” What he called the “primal object” of a state “must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights.” Indeed, a territory could not be admitted as a state if its

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constitution “denied to any man *protection* of life, liberty, or property” because it would be violative of the Fifth Amendment (1857, 139, 138).

252 In his discussion of equality, Bingham distinguished “[m]ere *political* or *conventional* rights” that “are subject to the control of the majority” from “the rights of human nature” that “belong to each member of the State, and cannot be forfeited but by crime” (1857, 139–140). In his 1859 speech, he again affirmed that “all persons are equally entitled to the enjoyment of the rights of life, liberty and property. . . .” Although the citizens of the United States are “not equal in respect of political rights,” they “are equal in respect of natural rights” (1859, 985).

253 From the Due Process Clause, Bingham inferred “the absolute equality of all, and *the equal protection of each*, are principles of our Constitution, which ought to be observed and enforced. . . .” (1859, 985, emphasis added). By referring to “no person,” the Fifth Amendment “makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality.” Moreover, it “protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.” And with respect to their natural rights, the Constitution is also gender blind. Although states were free to withhold the political right to vote “from the best portion of the citizens of the United States—from all the free intelligent women of the land,” with respect to natural rights, the Constitution was not marred “in its spirit of equality, by the interpolation into it of any word of caste, such as white, or black, male or female. . . .” (*id.*).

4. CONCLUSION

254 The contribution of abolitionist constitutionalism to the original public meaning of Section One has long been obscured by a revisionist history that marginalized the “radical” abolitionists and their effort to abolish slavery and the “radical” Republicans and their efforts to establish democracy during Reconstruction over the violent resistance of Southern terrorists.¹³⁹ As a result, far more Americans have heard of “carpetbaggers” than

139 The intellectual history of revisionist interpretations of the Antebellum, Civil War, and Reconstruction periods is beyond the scope of this article. A brief summary of the scholarly consensus against which Foner was writing in 1970 is provided in Foner ([1970] 1995, 1–10).

they have the framers of the Fourteenth Amendment. Although this cloud began to lift with the work of tenBroek, Graham, Foner, Wiecek, and Curtis, knowledge of abolitionist constitutionalism among most constitutional scholars remains scant. My principal aim in this article has been to expose constitutional scholars to this important and sophisticated body of constitutional thought.

Of course, abolitionist constitutionalism is not the whole story of the public meaning of Section One. Between John Bingham's 1859 speech and the drafting of the Fourteenth Amendment in 1866 much of significance occurred, including a Civil War. The Thirteenth Amendment was adopted in 1865. The Republican president from the North was murdered that same year. Black Codes arose to subordinate the freedmen. So too did widespread violence against both free blacks and white Republicans in the South. Lincoln's successor, a racist Democrat from Tennessee, maneuvered to undercut most of the efforts by Republicans in Congress to protect the freedmen and Unionists in the South. And Bingham was far from the only moving force behind Section One. Others included Thaddeus Stevens and Jacob Howard.¹⁴⁰ This study is intended to supplement, not supplant, the much-scrutinized evidence of public meaning provided by the debates over the adoption of the Thirteenth and Fourteenth Amendment—along with the debates in Congress over the Civil Rights Act of 1866 and other civil rights laws.¹⁴¹

Caveats aside, this survey provides important evidence of the original public meaning of Section One. All the components of Section One were employed by abolitionist lawyers and activists throughout the North. To advance their case against slavery, they needed to appeal to the public meaning of the terms already in the Constitution, and their arguments would only persuade to the extent they were accurately describing this meaning. Moreover, their widely-circulated invocations of national citizenship, privileges and immunities, the due process of law, and equal protection made their own contribution to the public meaning in 1866 of the language that became Section One.

National citizenship. There can be little doubt that the Citizenship Clause of Section One—as well as the citizenship portion of the Civil Rights Act of

140 For a recent and riveting retelling of the adoption of the Fourteenth Amendment, see Epps (2006).

141 This literature is large and growing larger. My own contribution is Barnett (2005, 60–71, 191–223).

1866 which defined citizens as “all persons born in the United States and not subject to any foreign power”¹⁴²—incorporated the abolitionist conception of birthright national citizenship as elaborated by Lysander Spooner.

258 *Privileges and Immunities of Citizens.* With one exception, the abolitionists surveyed here, and John Bingham, confined their reading of Article IV, section 2 to the infringements of the fundamental rights of citizens coming from other states. Joel Tiffany extended this to protect the privileges and immunities of citizens of the United States from infringement by their own state governments, and he was the only abolitionist surveyed here to accept the Supreme Court’s decision in *Prigg* that recognized a federal power to enforce fundamental guarantees against states. In these two respects, therefore, Tiffany’s reading of Article IV came closest to the actual wording of Sections One and Five of the Fourteenth Amendment.

259 But all abolitionists, and John Bingham, equated the privileges and immunities of citizens of the United States with their fundamental rights, including their natural rights, rather than the privileges or benefits conferred by state law. And they did not mention *discrimination* against out-of-staters. Instead they simply condemned the violations of the fundamental rights of persons from outside the state, regardless of how in-staters were treated. For example, they consistently invoked the clause when objecting to the imprisonment by Southern states of Northern black sailors without inquiring into the treatment of local free blacks. They also complained about state limits on the freedom of anyone to advocate abolition in the South without once mentioning whether these laws were equally enforced within a state.

260 There is a potential ambiguity in the text of the Privileges or Immunities Clause of the Fourteenth Amendment. Does “of citizens of the United States” qualify the *set of rights*—or “privileges or immunities”—such that they are limited to those rights that are peculiarly “national” in their source, as was claimed by Justice Miller in the *Slaughter-House Cases*?¹⁴³ Or does that phrase define the *class of persons* whose fundamental

142 14 Stat. 27 (1866).

143 See, e.g., *The Slaughter-House Cases*, 83 U.S. 36, 73 (1873), asserting that Section One “speaks only of privileges and immunities of citizens of the United States, and does not speak of *those of citizens of the several States*” and rejecting the claim that “the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same” (emphasis added).

“privileges or immunities” are protected, so that the Clause protects *all* the fundamental rights of those persons? Abolitionist sources, and the speeches of John Bingham, clearly support the second of these views.

Due process of law. The abolitionist constitutionalists surveyed here took a relatively conventional and constrained approach to the due process of law. They exclusively limited this concept to judicial process, with an emphasis on the right to a jury and to judgments according to the common law. But their complaints make clear that a properly enacted statute, such as the Fugitive Slave Acts, could violate the Due Process Clause by denying to individuals the full judicial process of law to which they were entitled.

While it was not as commonly asserted, for some at least, the judicial process could include a judicial assessment of whether legislation was within the power or competence of a legislature to enact. For example, John Bingham contended that, to be valid, a law “should only extend to such rightful subjects of legislation as was consistent with the Constitution.” Otherwise it was merely “pretended legislation” (1856, 124). And “natural or inherent rights, which belong to all men *irrespective of all conventional regulations*, are by this constitution guaranteed by the broad and comprehensive word ‘person,’” in the Fifth Amendment “as contradistinguished from the limited term citizen. . . .” (1859, 983, emphasis added).

Equal Protection. The equal protection of the laws did not appear in the text of the Constitution upon which the abolitionists were relying. Nevertheless, the idea that there exists a fundamental duty of government to extend its protection to all from whom obedience is expected, and a corresponding right to that protection, was repeatedly asserted. This duty of protection included protecting the equal natural rights to life, liberty, and property of every person, an equality of rights that was inconsistent with the recognition of any “caste, such as white, or black, male or female. . . .” (Bingham, 1859, 985).

* * *

I close by remembering yet one more forgotten figure whose quotation began this article: Benjamin Flowers Shaw (1831–1909) was born in Waverly, New York, in 1831. His maternal grandfather, Major Zephon Flowers, was a soldier in the Revolutionary War (Prince, ed., 1900, 3:59). At the age of 20, Shaw became owner and editor of the *Dixon Telegraph and Herald* printed in Dixon, Illinois the year it was founded in 1851. That publication is now a part of Shaw Communications, owner of many Midwestern

newspapers.¹⁴⁴ In February 1856, Shaw and eleven other newspaper editors, along with Abraham Lincoln, met in Decatur to form the Republican Party in Illinois. They called the Bloomington convention, which nominated the first Republican state ticket in Illinois on May 29, 1856. Shaw remained the editor of the *Dixon Telegraph* for nearly fifty years.

266 On May 29, 1900, the McLean County Historical Society met to commemorate the Bloomington convention. As one of the speakers, Shaw chose for his topic “Owen Lovejoy, Constitutional Abolitionists and the Republican Party.” He remembered how “the fight for liberty in this land was begun by the Radical Abolitionists long before the final battle.” These abolitionists “took it for granted that the political leaders of the Calhoun class were right in claiming that the constitution recognized slavery, and so they proclaimed that the much revered document was ‘an agreement with hell and a covenant with the devil.’” In this camp, he placed such men as William Lloyd Garrison, Wendell Phillips, Theodore Parker, and (inaccurately) Gerrit Smith. These abolitionists “were followed, however, by a class known as Constitutional Abolitionists; equally bold and brave, but more practical” (B. F. Shaw, 1900, 59, 62).

267 Constitutional abolitionists, Shaw said, responded to the “struggle between hatred of slavery, and love for the constitution” with a sustained constitutional critique of the claim that the Constitution was pro-slavery. These men, “even the rank and file, were forced to become accomplished students of the fundamental law of the land.” They “contended that under the constitution slaves could not be legally held in territory not organized into states. Constitutional Abolitionists, Republicans, if you please, believed that slavery was not recognized by the constitution, save indirectly.” They “bravely waged the war, against the further expansion of slavery; at the polls, and on the floor of congress, enduring insults such as had been heaped upon the most radical; threatened with assassination, a learned senator [Charles Sumner of Massachusetts] beaten into insensibility on the floor of the Senate.” (B. F. Shaw, 1900, 62–64). And they formed the Liberty, Free Soil, and Republican parties that led directly to the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments.

268 The more one reads the forgotten writings of these abolitionists, along with those who contended that slavery was also unconstitutional in the

144 The chronology of Shaw Communications is described by the company on its website. See <http://www.shawnewspapers.com/company.php?p=h>.

original states, the better their constitutional arguments look when compared with the opinions of the antebellum Supreme Court. But even if the Taney Court (and the Garrisonian abolitionists) was right and these constitutional abolitionists were wrong about the original meaning of the Constitution, congressional Republicans drafted the Thirteenth and Fourteenth Amendments to reverse the Court's rulings. To appreciate fully the public meaning of these Amendments, therefore, we need to know whence they came.

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