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Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment

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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 do the framers of the Fourteenth Amendment. Then, after a brief revival of interest stimulated by the writings of Howard Jay Graham and Jacobus tenBroek, in the 1970s and 1980s two influential works by Robert Cover and William Nelson once again marginalized these thinkers.

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 abolitionist lawyers and activists throughout the North. 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 these forgotten abolitionist writings, 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 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.

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> 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.[1]

Introduction: The Need to Revisit Abolitionist Constitutionalism

Section One of the Fourteenth Amendment consists of four distinct, though functionally connected, parts:

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;"
4. *The Equal Protection Clause*: "nor deny to any person within its jurisdiction the equal protection of the laws."

Why were these four provisions chosen for inclusion and what was their public meaning at the time of their enactment in 1868? Any such inquiry must begin with their origin in constitutional arguments made by abolitionists beginning at least as early as the 1830s. Yet the general neglect of abolitionist constitutionalism by constitutional scholars, noted by Howard Jay Graham six decades ago, persists to this day.

In this article, I revisit the abolitionist origins 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, James Birney, Alvan Stewart, Charles Dexter Cleveland, Lysander Spooner, William Goodell, Salmon P. Chase, Joel Tiffany, Horace Mann, Gerrit Smith, Lewis Tappan, 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[2] and Wendell Philips.[3] Instead, these abolitionists read the Constitution as either entirely antislavery or providing important constitutional barriers to its extension.

Their largely forgotten books, pamphlets, articles, resolutions, and legal briefs addressed the pressing constitutional disputes of their day: 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 were remarkably united in their conclusions. On only one issue did they disagree: whether slavery was also unconstitutional in the states that comprised the original union.[6]

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 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 II of this article.

A direct connection between abolitionist constitutionalism and the Fourteenth Amendment is not hard to find. While 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 Fourteen on Reconstruction. During the deliberations of the Committee, this specific language was proposed by Committee member and Ohio Congressman John Bingham.[8]

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 III 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.

I do not claim that these abolitionist arguments 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.[9]

Still, 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 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, they compare favorably with the reasoning of Justice Story in *Prigg* and Chief Justice Taney in *Dred Scott*. In my view, they even hold their own with much of current constitutional argumentation. Of course, this judgment will be in the eye of the beholder.

In addition to examining the origin of each component of Section One, I will also consider one additional issue. Originalists Michael Rappaport and John McGinnis have recently contended that the original public meaning of a text includes the "original methods" of interpretation held at the time of its enactment.[10] Without endorsing this approach, I include here evidence of how abolitionists thought the meaning of the Constitution was to be identified. As it turns out, they uniformly affirmed the supremacy of what Lawrence Solum has called original semantic meaning,[11] and strongly opposed any appeal to the intentions of the Framers or ratifiers to resolve problems of vagueness. Several also implicitly distinguished between constitutional interpretation and constitutional construction.

Before examining antislavery constitutionalism and its connection to the Fourteenth Amendment, however, it is worth considering briefly why this body of constitutional argument stands in need of revival. It is to this question, I now turn.

I: Rescuing Abolitionist Constitutionalism From its Critics

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,"[12] and by Jacobus tenBroek's 1951 book, *The Antislavery Origins of the Fourteenth Amendment*.[13] 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.

The most comprehensive and still worthy study was legal historian William Wiecek's 1977 book, *The Sources of Antislavery Constitutionalism in America, 1760-1848*.[14] But, although Wiecek is a law professor as well as a historian, he does not purport to evaluate how the abolitionists' arguments contributed to the public meaning of the four constituent parts of Section One.[15] 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.[16]

Why then are law professors today so unfamiliar with abolitionist constitutionalism, notwithstanding these early efforts? One reason might be 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*,[17] 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.

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," [18] Cover dismissed their legal arguments as "a forced reading of positive law instruments."[19]

Cover also took direct aim at "men like Jacobus tenBroek and Howard Graham . . . who discovered roots for their own constitutional aspirations in the visions of William Goodell, Lysander Spooner, Joel Tiffany, and Alvan Stewart." [20] 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."[21] 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.[22]

Cover's caustic repudiation of abolitionist constitutionalism, and the scholars who had called attention to it, was both cursory and dubious.[23] First, he isolated the claim that slavery was unconstitutional in the original states, which he then dismisses as "so extreme as to be trivial."[24] Yet, as we shall see, only some abolitionists made this claim, and all made serious constitutional arguments on other pressing issues of their day.

Next, Cover conveniently reduces abolitionist constitutionalism to Lysander Spooner's *Unconstitutionality of Slavery*, which Cover inaccurately describes as "the most complete of the arguments for the utopians."[25] To the contrary, as will be shown below,[26] the treatise by Joel Tiffany, which Cover fails to discuss, incorporated Spooner's analysis into a far more comprehensive argument.

Cover then contends that, because Spooner paid little attention to the four components of what became Section One and rested his argument primarily on " natural law," any connection between abolitionism and Section One is marginal.

Yet, as discussed in Part II, one of Spooner's crucial contributions concerned interpretive method, which Cover cursorily dismisses as "amputated from any social context."[27] Instead, Cover uncritically adopts, without analysis or defense, Garrison's jurisprudential claim that "the important thing is not the words of the bargain, but the bargain itself."[28] And Cover entirely overlooks Spooner's development of the concept of national citizenship.[29]

Finally, without presenting any evidence, Cover characterized these antislavery writers as "relatively unimportant."[30] This conclusion seems plausible only because his narrative severs these so-called "utopian" writers from such prominent lawyers as Horace Mann, a congressman from Massachusetts, and Salmon P. Chase, the future Chief Justice of the United States. As Eric Foner has shown, "Chase's interpretation of the Constitution . . . formed the legal basis of the political program which was created by the Liberty party and inherited in large part by the Free Soilers and Republicans."[31]

Yet, as will be seen below, when positioned chronologically, Chase's constitutionalism is virtually indistinguishable from the others. Neither does Cover acknowledge in this part of his book that all these abolitionists, save Spooner, were politically active and many were influential in the Liberty party, a precursor of the Republican party. Indeed, among this group, Lysander Spooner is unusual in his detachment from politics, an affinity he shared with the Garrisonians,[32] of whom Cover is far more respectful.[33]

Robert Cover was not the only prominent scholar who dismissed abolitionist constitutionalism.[34] In his 1988 book, *The Fourteenth Amendment*,[35] 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.[36] 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. . . ."[37] To make this case, however, Nelson ignored the full range of specific antislavery constitutional arguments,[38] and the possible connection of these legal arguments to the wording of Section One.

Even more than Cover, Nelson's marginalization of the abolitionists was jurisprudential rather than historical. He repeatedly asserted that, because general principles do not deductively decide particular cases, such principles are not law, strictly speaking. "The very essence of all law is to discriminate—to separate out the occasions on which one legal consequence rather than an opposite will obtain."[39] For Nelson, therefore, "the concept of higher law" in the antebellum period was not "a species of legal doctrine that dictated or even pointed toward certain and specific results on any of the questions to which higher law arguments were addressed."[40] Instead, such arguments were "a form of political rhetoric. . . ."[41] According to Nelson, the drafters of the Fourteenth Amendment "were acting primarily as statesman and political leaders, not as legal draftsmen," and "few of

them took seriously the task of legal draftsmanship. . . ."[42]

As a result of this view of the nature of law, Nelson unintentionally condescended towards his sources, characterizing statements about natural rights as "the old rhetoric of higher law"[43] and as "species of political rhetoric, without clear content and clear limits. . . ."[44] He claimed that those "who used the discourse of equality, natural law, natural rights, and federalism in the three decades before the Civil War generally were not concerned with intellectual coherence or precision, but with persuading those to whom their rhetoric was addressed."[45] At one point, he implied that "strictly speaking, no such thing as a natural right could exist,"[46] which is hardly an historical claim.[47]

It is worth noting that, despite their disparagement of abolitionist constitutionalism, neither Cover nor Nelson actually deny its connection with Section One. Cover simply brushes aside tenBroek and Graham's "hypothesis"[48] about the Fourteenth Amendment without attempting to refute it.[49] 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.[50] 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.

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.

II: Abolitionist Constitutionalism

Abolitionist constitutionalism can be traced to controversies in the 1830s over the legal treatment and constitutional status of free blacks.[51] The notorious case of Crandall v. State[52] 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.[53] Ellsworth and Goddard contended that free blacks migrating from other states were "*citizens* of their respective states,"[54] 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."[55]

They carefully traced the recognition of this citizenship on judicial decisions, state constitutions, and the Articles of Confederation, before turning

attention to Article IV, sec. 2: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[56] This provision, they maintained, barred discrimination against citizens from another state with respect to "the right of education, [which] is a *fundamental right.*"[57] Among other authorities, they quoted at length from the list of privileges or immunities identified by Justice Bushrod Washington in Corfield v. Coryell.[58] *Crandall* had nothing to do with any special benefits afforded Connecticut citizens, but concerned a statute that infringed upon the fundamental "right of education" in a private school.

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*."[59] With this affirmation of fundamental right, 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*."[60]

In both cases, Article IV was viewed as a bar to discrimination against citizens from other states with regard to their fundamental rights, not any special benefits granted or created by state law. 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. . . ."[61] As Ohioan lawyer and publisher James G. Birney wrote in 1836, disabilities imposed on free blacks were unconstitutional because (1) "they destroy or materially affect rights that the state has constitutionally, declared 'natural, inherent, and unalienable;'" (2) "they are totally inconsistent with 'enjoying and defending life and liberty, and acquiring and possessing and pursing and obtaining happiness and safety," and (3) they are "inconsistent with the Constitution of the United States, which gives 'to the citizens of each state all the privileges and immunities of citizens in the several states.'"[62]

When they turned their attention to laws touching upon slavery itself, abolitionists offered a panoply of constitutional arguments. Because my goal is to trace the origins of the 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 be deliberately ignoring their many other constitutional arguments concerning slavery. My object is not to assess whether they were ultimately correct in their claim that the Constitution was antislavery, but to examine important evidence of the original public meaning of terms that eventually constituted Section One. To appreciate fully abolitionist claims about the meaning of the Constitution, it is also necessary to discuss their endorsement of original public meaning

interpretation, and their rejection of intentionalism.

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. After reading what follows in this Part, it should come as no surprise that John Bingham and his fellow Republicans in the Thirty-Ninth Congress would take such analysis for granted.

With each of these authors, I will organize the presentation of around the four components of Section One of the Fourteenth Amendment: (1) Citizenship, (2) Privileges or Immunities, (3) Due Process, and (4) Equal Protection. Where the author provides a discussion of interpretive methodology, this will be included as well.

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 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 their constitutional claims requires explication of the legal content of their arguments—a task that cannot be accomplished via the historian's inquiry into purposes and causal influences. My aim is to give abolitionist constitutional theory its proper due as legal argumentation, and to lay the foundation for future work that will assess the contribution that abolitionist theories and arguments made to the public meaning of Section One of the Fourteenth Amendment. Consequently, in this Article, I focus on the legal content of the constitutional arguments made by particular abolitionists, rather than a historical account of why they offered them.

Theodore Dwight Weld, 1836

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 Ohio Laws*.[63] After studying for the ministry at Lane Seminary, Cincinnati, in 1834, he left school to became a full time anti- slavery activist, operating mainly in New York. In 1836, his essay, " The Power of Congress over the District of Columbia," appeared in the *New York Evening Post.*[64] In 1838, he published an expanded version as a pamphlet.[65] Jacobus tenBroek described this piece as "a restatement and synthesis of abolitionist theory as of that time."[66] 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." Weld's principal argument concerned the plenary power given Congress over the District of Columbia under Article I, section 8.

He considered the meaning of the Due Process Clause of the Fifth Amendment only in response to the objection that it "withheld from Congress the power to abolish slavery in the District."[67] Weld was directly responding to an argument made in a report of a House Select Committee upon the Subject of Slavery in the District of Columbia, which was chaired by H.L. Pinckney of South Carolina.

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, and the essential and inalienable rights of American citizens."[68] 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. "[69] 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. "[70] The report then relied on a lengthy quote from Justice Chase's opinion in Calder v. Bull.[71] In 1857, this argument will be accepted by the Supreme Court with respect to the power of Congress in *Dred Scott v. Sanford* when Chief Justice Taney concluded that restricting the rights of slave holders to take their slaves into the states that were admitted into the Union as free violated the Due Process Clause.[72]

Weld made two arguments against reading the Fifth Amendment this way. First, Weld 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*."[73] If they were, then taking by legislation from the master "of the identical 'liberty' previously taken from the slave"[74] 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*."[75]

At the very beginning of his essay, Weld offered a reason to doubt whether such a legislative deprivation of liberty 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."[76] 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."[77]

Assuming that legislative power is inherently limited in this way, then 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 make this textual argument by linking his discussion of "due process of

law" to his earlier assertion of moral limits on the legislative power.

Consequently, when considering the objection that "that import of the phrase 'due process of law,' is *judicial* process solely,"[78] Weld's response is ambiguous with respect to the scope of the judicial process. That due process refers only to judicial process "is granted, and that fact is our rejoinder; for no slave in the District *has* been deprived of his liberty by 'a judicial process,' or, in other words, by 'due process of law' . . ."[79] 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*."[80]

This passage can be read either that the slave has not been given a jury trial before being deprived of his freedom, or that the judicial process also includes an inquiry into whether Congress has exceeded the moral limits on its legislative power. In his essay, Weld leaves unclear whether he views the " judicial process" to which the "due process of law" refers as including the judicial refusal to enforce a statute that exceeds the moral restrictions on legislative powers.

"Protection." Weld also advanced an argument that became a staple of abolitionalist 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*?"[81] 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."[82] Therefore, "[*p*]*rotection is the CONSTITUTIONAL RIGHT of every human being under the exclusive legislation of Congress who has not forfeited it by crime*."[83]

We see in Weld the beginning of what will become a pattern: the 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.

James G. Birney, 1837, 1847

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. In his newspaper, the *Philanthropist*, which he edited from 1835-37, Birney published arguments concerning the constitutionality of laws sanctioning slavery as early as 1837 resembling made of his Ohio abolitionist colleague Weld.[84] It was a mob

attack on Birney's newspaper in 1836 that brought Salmon Chase into the abolitionist camp.[85] The Liberty party nominated Birney for President in April 1840 and August 1843.[86] TenBroek describes him as a "quartermaster of ideas in the movement rather than an original producer of them."[87]

"Due process of law." Like Weld, Birney responded to the Due Process Clause argument in the Pinckney report with the claim that the "Constitution contains provisions which, if literally carried out, would extinguish the entire system of slavery."[88] After discussing the Republican Guarantee Clause, and the procedural protections of the Fourth and Fifth Amendments, he turned to the Due Process Clause. "By what 'due process of law' is it, that two millions of 'persons' are deprived every year of the millions of dollars produced by their labor? By what due process of law is it that 56,000 'persons,' the annual increase in the slave population, are annually deprived of their 'liberty'?"[89] When combined with the Supremacy Clause, and carried "out to their full extent, . . . how long would it be ere slavery would be utterly prostrated?"[90] Although he did not claim that these clauses "were inserted with a specific view toward this end," they nevertheless were "a perpetual rebuke to the selfishness and injustice of the whole policy of the slaveholder" and "embody principles which are at entire enmity with the spirit and practice of slavery."[91]

"Protection." In 1847, Birney published a four-part article in *The Albany Patriot* entitled, "Can Congress, Under the Constitution Abolish Slavery in the States?"[92] By this time, Birney's answer was "yes." In his article, Birney placed great weight on the relationship of allegiance and protection that had previously been identified by Weld. He repeatedly linked the protection of the laws to allegiance: "*allegiance* and *protection* are inseparable."[93] 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."[94]

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."[95] If the laws of a government are at variance with natural rights, "*no one* is under any obligation to obey its laws"[96] and it would not be a government at all. "How then could the Constitution guaranty that which there is no obligation to obey?"[97] 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;"[98] thereby violating the injunction that "governments were instituted among men to secure their rights, not to destroy them."[99]

Alvan Stewart, 1837

While most abolitionist constitutionalists did not assert that the Fifth Amendment applied to the 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.[100] His earliest contribution to antislavery constitutionalism was "A Constitutional Argument on the Subject of Slavery,"[101] a paper presented to the New York Anti-Slavery Society in September of 1837, and published in October of that year.[102]

"Due Process of Law." Like the other abolitionists discussed here, Stewart relied heavily on the Due Process Clause of the Fifth Amendment. Unlike 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."[103] Stewart "was the first to argue, in any substantive manner, that the federal government was empowered to abolish slavery in the states."[104] Later we shall see this argument developed by Joel Tiffany.[105]

According to Wiecek, Stewart's claim "shocked the entire movement" and "marked the debut of radical antislavery constitutionalism."[106] But imposing the label of "radical" on some abolitionalist readings of the Constitution can be misleading. As we shall see, disagreement about whether the federal government had the power to abolish slavery in the original states may be the *only* important constitutional issue dividing abolitionists. If this single tenet is all that separates radical from moderate abolitionist constitutionalism, then the distinction unduly exaggerates the differences among abolitionalists and contributes to distorted impression of those dubbed "radicals" of the sort advanced by Robert Cover.[107]

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."[108]

At the same time, abolitionists generally held that Congress was empowered to abolish slavery in the District of Columbia, the territories, and in any new state admitted into the Union. This debate among abolitionists on whether the Due Process Clause applies to the states is well described by Wiecek [109] and does not directly concern the origin and public meaning of the various elements of antislavery constitutionalism that resulted in the wording of the Fourteenth Amendment, which after all was clearly written to apply to the states.

Relying upon Lord Coke, Stewart identified the phrase "due process" as equivalent to the phrase "by the law of the land" in Magna Charta. Stewart's

reliance on Coke signals a continuity with the substantive due process concept that Frederick Mark Gedicks identifies at the Founding. "American colonists looked almost exclusively to Coke in formulating higher-law arguments against their perceived oppression by Britain."[110] 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."[111]

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.'"[112] Gedicks explains how 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."[113] According to this meaning, "the Due Process Clause required that a congressional deprivation of life, liberty, or property be accomplished 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."[114]

As with Weld, Stewart's identification of the "due process of law" with judicial process does not reveal whether due process includes a judicial determination that a statute was within the power of a legislature to enact. "[T]he true and only meaning" of "due process of law," wrote Stewart, 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."[115] 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."[116] Because no slave in the United States had received this 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 whether any person held as slave had been deprived of his liberty after indictment, trial and conviction by a court.

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."[117] "The word 'person' here means a slave, and in other parts of the Constitution the word 'persons' is used for slaves."[118] 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. "[119] That same year, the identical textual argument about the word "person" in the Due Process Clause had also been made by N.P. Rogers. "If the negro be not

a person," wrote Rogers, "and the enslaved negro too, then slaves and negro people are not alluded to throughout the Constitution."[120]

But what gave Congress the power to enforce the Fifth Amendment against the states? Stewart invoked the Necessary and Proper Clause, but 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*."[121] 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 is bound to uphold slavery in any form.

Like other abolitionists, Stewart entirely ignored the Supreme Court's ruling in Barron v. Baltimore,[122] which had been decided a mere four years earlier, that the Bill of Rights applied only the federal government and not to the states. 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, John Bingham needed to remind fellow congressmen in the Thirty-Ninth Congress of the Supreme Court's decision in *Barron*.[123]

Stewart's Argument and Prigg v. Pennsylvania. Today, we would not take seriously Stewart's argument that the 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. But just five years after he wrote, the Supreme Court adopted the very same theory of congressional power, but instead to enforce the rights of slave holders to reclaim slaves who had fled to free states.

In Prigg v. Pennsylvania,[124] 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."[125] 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"[126] 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 which the Union could not have been formed."[127] Antislavery lawyers would sharply contest Story's historical claim as entirely unsubstantiated. As significant would be their methodological challenge to Story's use of the motives and intentions of the slave holders to interpret the meaning of the text, rather than on its plain or pubic meaning.

Having established the fundamentality of this right of slave holders 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."[128] In support of this novel and surprising 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."[129]

Story made explicit his reliance on the presumed intentions of slave holders 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."[130] To previous similar invocations of the supposed intent of slave holding 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."[131] And courts of law should look askance at "guessing at the 'suppositions' that might have been made by parties to it. . . ."[132] Still, if constitutional questions are "to be settled by ' suppositions' suppositions shall be forthcoming, and that without stint."[133]

Prigg would come under withering fire from abolitionist constitutionalists. Lysander Spooner contested Story's shift to original intentions from the plain or public meaning he had advocated in his treatise.[134] Spooner reproduced a lengthy quote in which Story had previously contended that "[n]othing but the text itself was adopted by the people."[135] 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. . . ."[136]

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. . . ."[137] 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."[138]

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."[139] 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."[140]

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."[141] To the contrary, the majority, "made the audacious and atrocious avowal, that for the sole purpose of making the 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.*"[142]

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."[143] 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."[144]

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. His 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. Yet, 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.[145] Ironically, as we shall see, 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.

Charles Dexter Cleveland, 1844

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.[146] At Dartmouth he was classmates with fellow abolitionist 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."[147] 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.[148]

Apart from its constitutional claims, his address is noteworthy for its detailed documentation of how the Southern slave states had politically dominated the three branches of the federal government and other vital interests of the country.[149] While Cleveland remarked upon the now well-known use of the Post Office to suppress the circulation of abolitionist materials in the South, he also noted how the 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.[150]

"Privileges and Immunities." While conceding the power of states to impose slavery, Cleveland nevertheless affirmed the rights of abolitionist and free black citizens of one state when 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"[151] 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."[152]

Cleveland did not limit the scope of "privileges and immunities" to special benefits afforded by a state to its own citizens, but instead 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.[153] While he objected to Northern blacks being unconstitutionally discriminated against on account of their skin color, he did not inquire as to whether they were being treated differently than Southern blacks. And the discrimination of which he complained was not between in-staters and out- of-staters but the denial of the fundamental rights of some Northerners on account of their color. 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.

"Due process of law." Early in his address, Cleveland condemned Congress continuing in force in the District of Columbia the slave laws of Maryland and Virginia as "a plain, open, total violation of the constitution"[154] because it violated the Due Process Clause of the Fifth Amendment. 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."[155]

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."[156] 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."[157] 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."[158]

Lysander Spooner, 1845, 1847

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. 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.[159] In 1845, Spooner produced *The Unconstitutionality of Slavery*, which historian Lewis Perry has described as "influential"[160] and "the most famous antislavery analysis of the Constitution."[161]

Perry situates Spooner outside some of the principal fault lines of abolitionism and respected by all, including those who, like Wendell Philips, disagreed with him about the Constitution.[162] Perry also describes Spooner's relationship with John Brown and his involvement in an aborted plot to free Brown from custody.[163] 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."[164] 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. . . ."[165]

Interpretive method. Contrary to Cover's claim,[166] natural law played no role in Spooner's approach to interpretation, though it does figure into his approach to constitutional construction when the text is alleged to be ambiguous. 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"[167] should not be overridden by the unexpressed intentions of those who wrote it or by subsequent decisions of the courts. [168] "It is not the intentions men actually had, but the intentions they constitutionally expressed; that make up the constitution."[169] 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."[170] 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."[171] In short, "[a]greeing to an instrument that had no meaning of its own, would only be agreeing to nothing."[172]

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[173] by which ambiguities in public meaning of statutes should be resolved. "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."[174]

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.'"[175]

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."[176] 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.

Spooner's argument exploited the fact that the Framers of the Constitution used euphemisms to refer to slavery. Using euphemisms does not so much exploit a preexisting ambiguity as deliberately create ambiguity by conveying potentially objectionable intentions using words whose ordinary public meaning is innocent. Spooner's claim was that we are not bound by a meaning they failed to express, when such a meaning is manifestly unjust.[177]

Spooner's methodological argumentation responded to intentionalist arguments for the constitutionality of slavery as made, for example, by abolitionist Wendell Phillips, which were stimulated by the release in 1840 of Madison's notes on the Philadelphia convention.[178] It was Spooner's compelling advocacy of original public meaning over original intent that made his work so influential among abolitionists. Frederick Douglass, for example, was persuaded by Spooner's argument to abandon the Garrisonian position on the Constitution.[179]

Spooner's argument reverberated throughout the abolitionist movement, his direct and indirect influence traceable by the invocation by others of John Marshall's rule of construction in United States v. Fisher. Even the supremely

confident Harvard-trained Wendell 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*."[180] In response, in 1847 Philips self-published a ninety page reply,[181] to which Spooner responded that same year with a "part second" of *The Unconstitutionality of Slavery* that doubled its length.[182]

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,'"[183] as well as 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.'"[184] Clingman chided Spooner for proving everything except that, by Spooner's approach to interpretation, "a woman cannot be President of the United States."[185] He then praised the objections of Wendell Phillips, "an abolitionist of the old Garrison, or disunion school,"[186] to undercut Spooner's argument.

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."[187] One supposes that the "premises" to which Brown referred was public meaning originalism, as opposed to intentionalism.

Unlike other abolitionist writers, Spooner placed no reliance on the Due Process Clause.[188] Yet, his public meaning argument provided a link that was missing in previous abolitionist invocations of the Privileges and Immunities Clause of Article IV to protect Northern free 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."[189] After Spooner, they had a theory of national citizenship.

"Citizens of the United States government." 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."[190] What was the public meaning of "the people"? If it did 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'."[191] 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."[192]

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."[193] 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."[194] 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."[195]

Spooner reiterated his denial 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."[196] 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."[197]

That Spooner was contending for a national citizenship was made clear by his denial that "state governments have the right of determining who may, and who may not be citizens of the United States government."[198] 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."[199]

Spooner 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*."[200] This doctrine, said Spooner, was rejected by the Supreme Court in *McCulloch v. Maryland*[201] and in *Martin vs. Hunter's Lessee*.[202] 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."[203] True, the Constitution was ratified by conventions in each states, 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."[204]

Finally, Spooner contended that, were states to abolish slavery, no one doubts that 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."[205] 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 citizenship, which would otherwise have been conferred upon them by the constitution of the United States."[206] 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."[207]

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."[208] Spooner's argument about national citizenship had immediate and obvious implications, which he noted almost in passing.

Privileges and Immunities. "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."[209] 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."[210] Again, this appears to be an invocation of nondiscrimination with respect to fundamental rights of blacks moving from one state to another, not special benefits accorded to citizens of a state.

That privileges and immunities were not special benefits but fundamental rights is reflected in Spooner's analysis of the infamous "three fifths of all other persons" language of Article I, Section 2, which "purports only to prescribe the manner in which the population shall be counted, in making up the basis of representation and taxation; and to prescribe that representation and taxation shall be apportioned among the several States, according to the basis so made up."[211] Instead, it "has 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. . . ."[212] Such persons are "of course, are equal parties to it with others, and have equal rights in it, and in all the privileges and immunities it secures."[213]

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 does 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."[214] 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"[215] and resident aliens. 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."[216]

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*."[217] 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."[218]

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 national citizenship would be rejected by the Supreme Court in *Dred Scot*, but only after Chief Justice Taney adopted an intentionalist approach to interpretation. When that case was decided, abolitionists influenced by Spooner were well-positioned to critique the Court, and Republicans in Congress would eventually reverse *Dred Scot* and adopt Spooner's position on national citizenship by constitutional amendment.

William Goodell, 1845

Lysander Spooner was frequently mentioned in the same breath as William Goodell (1792-1878). Both men were leading exponents of the "radical" view that Congress had power to abolish slavery in the original states, and both men expounded on the appropriate method of interpreting and construing the Constitution. Goodell was a journalist who was an editor of the Emancipator before working for the New York State Anti-Slavery Society, editing its paper the Friend of Man in Utica, NY and 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.[219] Although he touched upon the constitutionality of slavery in his 1852 book, *Slavery and Anti-Slavery*,[220] he only systematically addressed the issue in his influential 1845 book, *Views of American Constitutional Law*.[221]

Interpretive method. Like Spooner, Goodell rejected an intentionalist reading of the Constitution in favor of its original 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."[222] 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!"[223]

Goodell lambasted proponents of intentionalism 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."[224] 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."[225]

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."[226] Goodell then organized his presentation around the two modes of legal reasoning.

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."[227] 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."[228] 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."[229]

Without using this terminology, Goodell implicitly distinguished between constitutional *interpretation* of the semantic meaning of the words in context on the one hand, and constitutional *construction* by which vagueness is resolved and the words are applied to particular situations. Strict construction—what I am calling interpretation—he says, "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."[230] 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 if the words*."[231]

In contrast, the need for what I am calling construction arises "in case of discrepancies, and contradictions, to which all written instruments of fallible men are subject."[232] For Goodell, "the very notion of '*construction*' supposes that

something *needs to be* explained and determined, that had seemed anomalous, obscure, or doubtful."[233] 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. . . ."[234] This is a remarkably lucid account of the distinction between constitutional interpretation and construction.

"Due process of law." Like Spooner, the bulk of Goodell's analysis concerns the powers of Congress over slavery, but unlike Spooner, Goodell discusses the Due Process Clause of the Fifth Amendment. 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."[235]

In his analysis of strict construction, Goodell employed definitions from Noah Webster's dictionary and Alvan Stewart's analysis of "due process of law" (discussed above[236]) to ascertain the following semantic meaning of the text:

> "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.[237]

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."[238] This "one inhibition of the Constitution, by the bye, is enough to settle the unconstitutionality of the act of Congress of 1793, and of the late decision of he United States Court in the case of Prigg v. Pennsylvania."[239] For Goodell, due process of law is a matter of judicial process, but one that constrains the operation of statutes that deprive persons of their liberty.

Whatever compromises might have been contained in the original constitution are qualified by the Fifth Amendment. "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*.'"[240] Accordingly, "the construction of the original instrument, relied upon to *establish* slavery, *abolishes* it, when applied in the amendment."[241] Goodell rejects 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."[242] When Goodell then moves to inquire whether the " spirit of the Constitution" included any compromise with or guarantee of slavery, he then lists the Due Process Clause among myriad other express guaranties of personal liberty, including the Ninth Amendment,[243] to show that it did not.

Salmon Portland Chase, 1845, 1846

Charles Cleveland's classmate at Dartmouth eclipsed him in fame. Salmon P. 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., where he studied 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 United States Senator and, as a Republican, was elected governor of Ohio in 1855 and 1857, before returning to the Senate in 1861. When Lincoln appointed him secretary of the treasury, Chase resigned his Senate seat after serving all of two days. Due to differences with Lincoln, Chase resigned as Treasury Secretary in July of 1864. 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, he presided over Johnson's impeachment trial in the Senate in 1868.[244]

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 reported that no less than one hundred thousand copies of Chase's speech were printed and circulated in pamphlet form.[245] 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,"[246] but favored instead "its removal from each State by State authority."[247] 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" pursuant to the "true sense and spirit" of the " Constitution rightly construed and administered."[248]

In 1846, Chase appeared before the Supreme Court to argue the case of Jones v. Vanzandt.[249] The next year, Chase's argument was published as a pamphlet.[250] 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 was 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 anti-slavery was the intended policy of the founders of the nation, and was fully compatible with the Constitution."[251] 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."[252]

Interpretive method. In his Supreme Court argument, Chase rejected original intent as a "dangerous ground on which to build a construction of the constitution, in disregard of the plain import of its terms."[253] Against the claim that "it could not have been the intention of its framers to entrust" the execution of the fugitive slave provision to state authorities, Chase hypothesized a proposal to include in the Constitution a clause using the same wording as the Fugitive Slave Act. "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?"[254] 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. . . ."[255] As authority for this claim, Chase quoted the words of the Tenth Amendment.

Although Cover does his best to separate Chase from "the higher law theorists,"[256] 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."[257] How this differs from Lysander Spooner's approach to constitutional construction is not explained.

"Immunities of citizens." In his Cincinnati address, Chase maintained that the extra representation apportioned to slave states for three fifths of its 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."[258] 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."[259] 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,"[260] as violating the Privileges and Immunities Clause of Article

IV.

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."[261] 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."[262]

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."[263] With the second, it "establishes certain articles of compact or agreement between the states."[264] 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."[265]

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."[266] 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."[267]

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. . . ."[268] 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. . . ."[269] 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."[270] In other words, if *Prigg* was correctly decided, a proposition that Chase rejected, then the other abolitionists were correct in their claim that Congress *did* have the power to abolish slavery in the original states under the Due Process Clause.

From this, we can infer that, for Chase, the rights to which the Privileges and Immunities Clause referred were not limited to discrimination with respect to

the dispensation of state benefits but included fundamental rights under the Constitution of the United States, including the rights in the Fifth Amendment.

"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."[271] 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."[272]

Despite the Court's decision in *Prigg*, in his Supreme Court argument, 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 process of law, it must be admitted that the act which authorizes seizures without process, is repugnant to a constitution which expressly forbids it."[273] 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."[274] 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."[275]

Chase's Due Process Clause challenge rested on the "summary manner" [276] 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 seized the animal and took "him before his own hired magistrate, and prove his claim by affidavits."[277] 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."[278] Chase then asked, " How long would society hold together, if this principle were carried into general application?"

Salmon P. Chase's arguments concerning slavery were indistinguishable from the others discussed here, save for the disagreement among abolitionists on the constitutionality of slavery within the original 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 the Republican party, his election as governor and United States 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.

Joel Tiffany, 1849

A Treatise on the Unconstitutionality of Slavery[279] 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.[280] Born in Connecticut, Tiffany was yet another of the Ohio abolitionists when he wrote his treatise. Later, he left Ohio 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 work. His explicit rebuttals to Wendell Phillips' reply to Lysander Spooner show his familiarity with Spooner's writings.[281]

Interpretive method. In his rejection of intentionalism, 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"[282]: (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;"[283] (2) "the preamble, with a view of ascertaining the true reason and spirit of the law;"[284] (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';"[285] (4) "the subject matter, but this must be ascertained from the act itself;"[286] (5) "the effects and consequences, to see if they harmonise with the apparent design of the legislator;"[287] 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."[288] He then observed "that none of these rules launch us out into the wide ocean of conflicting, 'collateral history, or national circumstances' in search of light."[289]

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 immagination [sic], or an ambitious, or designing administration may not graft upon it."[290] 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."[291]

For this reason, "written constitutions were adopted to hold them in check. But these have not always been successful."[292] 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 go beyond the plain, palpable meaning of the grants in construing written constitutions."[293] 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."[294] 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."[295]

Tiffany denied the superior authority of contemporary over later interpreters. "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. . . ."[296] 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."[297] 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."[298]

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."[299] 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."[300] 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 overuled [sic] by the same, or other courts, and are never considered conclusive."[301]

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. "[302] Even the Supreme Court can err on what the law is. "If, on examination, it is found that courts, from error, prejudice, or misapprehension have mistaken or mistated 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."[303] 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 aud erroneous positions."[304] 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."[305]

"Citizens of the National Government." Tiffany adopted in its entirety, Spooner's argument on behalf of blacks being citizens of the United States. To the question, "how do men become citizens of the United States?," Tiffany answered, 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. "[306]

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," he wrote "but expressly, and emphatically by all, who, in the common acceptation of the term, might be denominated, the people of the United States."[307] 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."[308]

All "citizens of the National Government by birth or naturalization . . . are entitled to the benefits of all these guaranties for personal security and liberty." [309] Tiffany then provided the most extensive and detained description of the enumerated and unenumerated "privileges and immunities" of citizens of the United States of any abolitionist writer.

"Privileges and Immunities of citizenship." Tiffany's discussion of the Privileges and Immunities Clause of Article IV is a departure from all previous abolitionists surveyed here. Up until now, abolitionists confined their application of the clause solely to state deprivations of the fundamental rights of citizens, such as black sailors or white abolitionists, who came from another state. Tiffany instead reads 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."[310]

With this reading, Tiffany becomes 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."[311] 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."[312] 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."[313]

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."[314] 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."[315] Later, he contends 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 they are not correct?) the Federal Government have ample power to enforce those guarantees in every State in the Union.[316]

This is a significant departure from previous invocations of the Privileges and Immunities Clause. Unlike previous writers, Tiffany essentially reads 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.[317]

So too could federal courts nullify state laws that violated fundamental rights. Tiffany maintained that 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. . . ."[318] 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."[319] 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."[320] 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*."[321] 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."[322]

Given his interpretation of Article IV, Section 2, it is unsurprising that Tiffany then provides the most extensive answer to the question "What are the privileges, and immunities of citizenship, of the United States?"[323] Tiffany's answer extended far beyond any special benefits granted by state governments. "[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."[324] Among these guaranties are "*the positive provisions*"[325] 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.[326]

"[T]he right of suffrage," he had noted earlier "is not a necessary incident to citizenship."[327]

But Tiffany did not limit the privileges and immunities of citizenship to the express or "positive guarantees of the constitution.,[328] Significantly, he treats implied privileges separately from implied immunities. Tiffany derives three additional unenumerated "'*privileges*' . . . guaranteed by the Federal Constitution" [329] 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 cites 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."[330] 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"[331] 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 law provided by the written Constitution.

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,'"[332] a privilege that is also expressly affirmed by the Fifth Amendment. 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."[333] 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."[334]

In addition to these privileges, Tiffany implies the existence of certain unenumerated *immunities*. 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.[335] 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."[336]

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."[337] The right to personal security, liberty and property is also implied by 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.'"[338] 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."[339] Tiffany concluded "that these guaranties, in the Federal Constitution, were made for the express and only pupose, [sic] of securing to every citizen full and perfect *immunity* in the enjoyment of his natural and inalienable rights."[340]

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."[341] 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;"[342] 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."[343] Later he 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."[344] Tiffany then details 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,"[345]—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*."[346]

That Tiffany thought that the due process of law included judicial scrutiny of the 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.[347] *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.[348] As Justice Bronson explained, "[u]nder our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people."[349]

In a passage quoted by Tiffany,[350] 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."[351] 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."[352] 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.'"[353] 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[354] "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.[355]

"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."[356] 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."[357] 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."[358] 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."[359]

This right of individuals to the protection of government stemmed directly

from the individual nature of sovereignty.[360] "[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."[361] 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."[362] 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. . ."[363] And the obligations are reciprocal: "[T]he 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."[364]

Later, in a discussion of the clause guarantying to every state a republican form of government, Tiffany explicitly connects 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."[365] 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."[366] 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." From Tiffany, it is clear that the individual concept of sovereignty affirmed by Justice James Wilson and Chief Justice Jay in Chisholm v. Georgia[367] not only survived, but has important implications.

Horace Mann, 1849, 1851

After graduating from Brown University in 1819, Horace Mann (1796-1859) studied law and was admitted to the Massachusetts bar in 1823. From 1827-1837, 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 Mann served until 1853 when he became president of Antioch College.[368] Mann became famous as an educator committed to the establishment of public schools, which explains why so many public schools around the United States are named for him.[369]

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. In these speeches, he said little about interpretive method, though in one speech he invokes 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 that "have become maxims, or axioms, of legal interpretation. . . ."[370]

"The people." In response to the claim that the Constitution did not protect slaves, 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."[371] 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."[372] Sounding much like Lysander Spooner, his fellow Massachusetts' lawyer, Mann affirmed 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.'"[373]

"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."[374] 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."[375] On this ground, like all other abolitionists Mann protests the "unconstitutional imprisonment"[376] 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."[377] Once again, privileges and immunities are not limited to the dispensation of special benefits by states, but pertain to the fundamental rights of Americans.

"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."[378] After asking "what does this word 'person' mean?",[379] 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."[380]

Yet slavery denies to blacks in the District of Columbia the due process of

Law. "Process of law," says Mann, "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.[381] Later, in his 1851 speech, he also condemns 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.[382] Once again, due process of law concerns a statutory failure to afford the individual a proper judicial process. The possibility that such process also includes a judicial evaluation of whether a statute is a binding "law" is not rejected, but neither is it mentioned.

Gerrit Smith, 1850

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. 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. 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.[383] His account of the elements that came to comprise Section One of the Fourteenth Amendment can be considered the conventional wisdom among abolitionists.

Although Smith wrote much in the form of letters and speeches, here I will focus on his 1854 speech to the House concerning the bill for organizing the territories of Nebraska and Kansas, which he opposed because it denied suffrage to blacks and immigrants and suggested 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."[384]

Interpretive method. Smith began his discussion of the constitutionality of slavery by considering the claim that the slave holders 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,"[385] explaining how slave holders at the Founding, under the influence of the Declaration of Independence, were uniformly in favor of abolition, and considered slavery a dying institution. Only with the invention of the cotton gin did slavery become so profitable that slave holders 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 concedes 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."[386] 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."[387]

At the same time, Smith rejected any reliance on the intentions of those who consented to the Constitution, whether they be 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."[388] 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."[389] 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.

Midway through his speech he disclaims 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."[390] 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."[391] Smith's 1854 speech in Congress is still more evidence that these abolitionist constitutional arguments were far from obscure. Earlier we noted how North Carolina Representative Howard Clingman expressed his familiarity with Spooner's work in a speech to the House in 1847. In passing, Smith makes note of Clingman's knowledge of the antislavery position. "Such good abolition doctrine from such surprising sources was very grateful to me."[392]

"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."[393] 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."[394] 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."[395] To this he responds that because this provision in the Constitution "is an organic and fundamental law, it is not subject to any other law, but is paramount every other law"; and he denies that "the laws, so called, by which persons are held in slavery, " can be considered "due process of law."[396]

Like Tiffany, Smith quotes from Justice Greene Bronson's 1843 due process opinion in Taylor v. Porter & Ford.[397] As was discussed above, *Taylor* is one of the many antebellum state cases adopting a "substantive" conception of due process, which requires a judicial determination that a statute depriving someone of life, liberty or property be within the constitutional power of the legislature to enact.[398] Smith's reliance upon Justice Bronson's opinion to contend that state laws authorizing slavery violate due process is, therefore, significant. According to Smith, via *Taylor*, the judicial proceedings contemplated by the Due Process Clause include the ability to challenge a law for unconstitutionally.

And as a further indication he was adopting a substantive approach to due process, Smith concluded his discussion of Due Process by quoting 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."[399] Likewise, Smith 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."[400]

As Gedicks explained, for Coke and the American Founders, "judges could void government acts contrary to the fundamental common law,"[401] which he identified with natural law.[402] If Gedicks is correct that "Coke's reading of substance into due process was adopted by the American colonies,"[403] then Tiffany and Smith's invocations of both Coke and *Taylor* is significant. The use of these authorities indicates that this higher-law reading of the due process of law survived into the 1850s and, as we shall see in Part II, provides a link between the Founders' substantive understanding of "due process of law" and the public meaning of Section One.

Smith sided with those abolitionists who denied that the Fifth Amendment was limited to the federal government and not also applicable to the states. Just as Article I defines, and thereby restricts, the powers of Congress, as well as restricting the powers of states, so also does the Fifth Amendment, whose scope is nowhere expressly limited to federal power. True, the 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 are 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. "[404]

Smith also contended that, given "a reasonable doubt, that 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."[405] 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. Frankly, before reading Smith, I had not heard this explanation for the omitting Madison's proposed protections of rights against states in the Bill of Rights.

"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."[406] Governments "are instituted, not to destroy, but to secure these rights."[407] 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."[408] And to illustrate how some natural rights "are ever to be held sacred from the invasion and control of the human legislature,"[409] Smith offered this example: "For instance, what we shall eat and wear is a subject foreign to human legislation."[410]

Far from reading the Declaration as consistent with slavery, Smith noted how advocates of slavery had repudiated it. "They ridicule it, and call it 'a fanfaronade 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."[411] 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."[412]

Lewis Tappan, 1850

Lewis Tappan (1788-1863) was born in Northampton, Massachusetts and, with his brother, Arthur, became a successful businessmen in New York City. In 1833, together with Theodore Dwight Weld, Tappan helped form the American Anti-Slavery Society. 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. In 1850, Tappan published a pamphlet urging the repeal of the newly enacted Fugitive Slave Act, and challenging its constitutionality.[413] Notwithstanding *Prigg*, Tappan contended that the Fugitive Slave Act of 1793 violated the Due Process Clause of the Fifth Amendment.[414] And he also condemned the imprisonment by South Carolina of "colored seaman, citizens of Massachusetts"[415] in violation of the Privileges and Immunities Clause of Article IV.

Byron Paine, 1854

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.[416] Paine had brought a writ of habeas corpus to release him from custody. Born and raised in Ohio, Payne had moved to Wisconsin with his family when he was 20.[417] 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 of 1850. After prevailing in Wisconsin courts,[418] the case was eventually reversed by the United States Supreme Court in an opinion by Chief Justice Taney.[419]

Paine's argument, which was published as a pamphlet by the *Free Democrat*,[420] deserves to be read in its entirety to appreciate its eloquence and 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. He died of pneumonia in 1871 when only 43 years old.

Interpretive method. We saw above how Paine castigated Justice Story's opinion in *Prigg* for abandoning the interpretive methodology advanced in his treatise in favor of intentionalism.[421] 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."[422] 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."[423]

In challenging the correctness of *Prigg*, Paine distinguished between precedents, the overturning of which would unsettle property rights, and 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."[424] 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."[425]

Privileges and Immunities. Like Chase, 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 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."[426] Paine did not specify whether the clause is violated by state action, or by the unwillingness of states to protect speakers from mob violence. Nevertheless, he assumed that the freedom of speech or thought is a privilege or immunity of a citizen and is unconstitutionally restricted, notwithstanding that the ban on abolitionist speech was enforced within Southern states against everyone alike in a nondiscriminatory fashion.

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,"[427] regardless of whether these states are 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 benefit granted either by state governments or by the Constitution.

"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."[428] 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."[429] Indeed, even "without the express guarantee of the constitution, it would be implied as a fundamental condition of all civil governments."[430]

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.[431] Then later in his argument, Paine refers back to this previous discussion: "As 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."

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. 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-scourging of the earth."[432]

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.*"[433] 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*."[434] 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."[435] 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![436]

National citizenship. When a "citizen of Wisconsin sojourns to Louisiana," "he has a constitutional right to do so."[437] He is "a citizen of the United States."[438]

"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?"[439] 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."[440] 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."[441] Once again, we see that the scope of the Privileges and Immunities Clause is not limited to barring 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 rights possessed by citizens of the United States, which though they may be included in, are not created by, the Bill of Rights.

"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."[442] Whatever proslavery clauses the Constitution may have contained, an amendment "like the codicil to a will, over-rides, dis-places, and abrogates whatever in the original instrument might have been inconsistent with it."[443]

Frederick Douglass, 1857

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 spell-binding 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."[444] As previously noted, however, two years later, "[a] careful study of the writings of Lysander Spooner, of Gerrit Smith, and of William Goodell"[445] persuaded Douglass to change his mind.[446]

Interpretive Method. In a 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."[447] 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."[448] 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."[449]

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 We the People to which the Preamble refers. "'We the

People,'—note 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." [450] And, like Spooner, Douglass wrote at length about how the allegedly pro-slavery clauses of the Constitution should be afforded their innocent public meanings.

Because he mentions the precursors of Section One only in passing, [451] the significance of Douglass's writings for the meaning of Section One lies in his highly visible affirmation of original public meaning interpretive methodology, and his rejection of intentionalism. Douglass represents both an impassioned proponent of abolitionist constitutionalism, and someone whose powerful mind had been moved by the arguments made on its behalf.

III. Three Speeches by John Bingham: 1856, 1857 & 1859

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). On April 21, 1866, committee member Thaddeus Stevens proposed 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."[452] The fifth section of Stevens' proposal 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. Later the same day, Bingham proposed that the following language be added as a new section five of the proposed amendment (pushing the enforcement power to a sixth section):

> 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.[453]

His motion carried, and for the next four days, Bingham's language coexisted with Stevens' nondiscrimination provision in the same proposal, strongly suggesting what appears obvious from their wording: these provisions had distinct public meanings.[454]

On April 25, the motion was made and carried to strike Bingham's language, 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' proposal. Bingham's motion failed.[455] Then on April 28, Bingham moved to replace the nondiscrimination language of Section One with his previously stricken language, and his motion carried.[456] On that day, the committee approved and sent to Congress the amendment with Bingham's

Section One; the Citizenship Clause was later added in the Senate.

As Richard Aynes has shown, 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.[457] With this background it is thoroughly unsurprising that Bingham would have been entirely familiar with the abolitionist constitutional arguments described in Part II and that each of the three elements of his proposal can be traced to abolitionist constitutionalism.

In this Part, I trace the influence of those abolitionist arguments on the Fourteenth Amendment by examining 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.[458] In the second, delivered on January 13, 1857,[459] 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. . . ."[460] 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.[461]

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 view was 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. 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!"[462] 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 s 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."[463]

Again, this is not to claim that Bingham thought that the federal government could abolish slavery in the original states. However, 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.

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."[464] This statement stands in contrast with the intentionalist approach of Justice Taney in *Dred Scott*, an opinion already published well before Bingham delivered his speech.

"Citizens of the United States." Like abolitionists dating back to Weld, Bingham derives a national citizenship from an allegiance to the national government, though he does not contend 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. . . ."[465] 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."[466] Bingham identifies 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."[467] Bingham would rectify this ambiguity when wording the Privileges or Immunities Clause of the Fourteenth Amendment.

"Privileges and Immunities of Citizens of the United States." Like other abolitionists other than Tiffany, Bingham employs Article IV, section 2 when discussing the treatment of free blacks, not slaves, and he views the clause as barring the deprivation of the fundamental rights of all citizens of the United States. In his 1859 speech, Bingham objected to the constitutionality of a provision of the Oregon state constitution that: "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. . . ."[468] 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."[469]

Lest the wording of this statement suggest that the right to acquire and own property is somehow distinct from the privileges and immunities of 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. . . .[470] 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 abolitionists surveyed in Part II, Bingham viewed the substance of the Privileges and Immunities of citizens to be fundamental rights, not special state conferred benefits. 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."[471] 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."[472]

Bingham contrasted the natural rights protected by the Clause with political rights, which "are conventional, not natural; limited, not universal."[473] While a political right, such as the right to vote, can be restricted to a subset of the citizenry, the natural rights of 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."[474] 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."[475] 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

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."[476]

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. . ."[477] 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?" [478] Because Bingham was here objecting to a detailed statute equally restricting a variety of liberties of whites and blacks alike, his speech provides an even clearer endorsement of a substantive interpretation of the Due Process Clause than do abolitionist objections to slavery.

In 1857, Bingham clearly accepts 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 impliedly 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."[479] 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 judgement of his peers, or the law of the land. . . ." [480] When the Ordinance was superceded 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;" . . ."[481]

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, are by this constitution guarantied by the broad and comprehensive word 'person,' as contradistinguished from the limited term citizen. . . ."[482] 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."[483] 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." [484]

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."[485] 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."[486] 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."[487] Indeed, a territory could not be admitted as a state if its constitution "denied to any man *protection* of life, liberty, or property" [488] because it would be violative of the Fifth Amendment.

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."[489] In his 1859 speech, he again affirmed that "all persons are equally entitled to the enjoyment of the rights of life, liberty and property. . . ." [490] Although the citizens of the United States, are "not equal in respect of political rights," they "are equal in respect of natural rights."[491]

From the Due Process Clause, Bingham infers"the absolute equality of all, and *the equal protection of each*, are principles of our Constitution, which ought to be observed and enforced. . . ."[492] 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."[493] 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."[494] 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. . . ."[495]

Conclusion

The contribution of abolitionist constitutionalism to the original public meaning of Section One was long obscured by a revisionist history that marginalized abolitionism, the "radical" Republicans, and their effort to establish democracy over Southern terrorism during Reconstruction.[496] As a result, more Americans know about "carpetbaggers" than they do the framers of the Fourteenth Amendment. Although this cloud began to lift with the work of tenBroek, Graham, Foner, and Wiecek, knowledge of abolitionist constitutionalism among constitutional scholars is scant, perhaps due to the influence of Cover and Nelson. My principle aim is to expose constitutional scholars 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 freedman and unionists in the South. And Bingham was far from the only moving force behind Section One. Others included Thaddeus Stevens and Jacob Howard.[497]

This study is intended to supplement, not supplant, the other 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.[498]

Caveats aside, this survey provides important evidence of the original public meaning of Section One. All the components of Section One were employed by a wide variety 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 is no doubt that the Citizenship Clause of Section One—as well as the citizenship portion of the Civil Rights Act of 1866 which defined citizens as "all persons born in the United States and not subject to any foreign power"[499]—incorporated the abolitionist conception of birthright national citizenship as first elaborated by Lysander Spooner.

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 rights of citizens coming from other states. Joel Tiffany extended this to protect the privileges and immunities 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 two respects, therefore, Tiffany's reading of Article IVcame closest to the actual wording of Sections One and Five of the Fourteenth Amendment.

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 with state conferred benefits. They consistently invoked the clause when objecting to the imprisonment by Southern states of Northern black sailors, as well as state limits on the freedom of anyone to advocate abolition in the South; and it mattered not that laws restricting the speech of citizens from other states were equally enforced within a state.

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 "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?[500] Or does that phrase define the class of persons whose 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. Abolitionist constitutionalism makes clear that, while, the core of the Due Process of Law protected by the Fifth Amendment refers to judicial process, a properly enacted statute could violate the Due Process Clause. John Bingham contended that, to be valid, a law "should only extend to such rightful subjects of legislation as was consistent with the Constitution."[501] Otherwise it was merely "pretended legislation."[502] And "natural or inherent rights, which belong to all men *irrespective of all conventional regulations*, are by this constitution guarantied by the broad and comprehensive word 'person,'" in the Fifth Amendment "as contradistinguished from the limited term citizen. . . ."[503] Hence, the "due process of law" appears to require that any restrictions on the fundamental rights of "life, liberty, and property" be imposed by a valid *law*.

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. . . ."[504]

The more one reads these forgotten abolitionist writings, 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 Fourteenth Amendments were enacted to reverse the Court's rulings. To appreciate fully the public meaning of

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[1]Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment* (pt. 1), 1950 Wisc. L. Rev. 479, 483.

[2]*See, e.g.*, William Lloyd Garrison, *The Constitution: A "Covenant With Death and an Agreement with Hell,"* 12 Liberator 71 (1842).

[3]*See, e.g.* Wendell Philips, The Constitution: A Pro-Slavery Compact: Selections from the Madison Papers, &c. (1844).

[4]41 U.S. (16 Petl.) 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, *Antislavery Constitutionalism*, in 1 Encyclopedia of the Supreme Court of the United States 78 (David S. Tanenhaus, ed. 2008):

> 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. Theirs 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, whether or not they thought its continued existence was constitutional, or that the federal government lacked power to abolish slavery there. Consequently, I will use the terms antislavery and abolitionist constitutionalism interchangeably.

[7]*See* GArrett Epps, Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America 231-36 (2006)(describing the addition of the Citizenship Clause in the Senate).

[8]*See infra* notes ___-___ and accompanying text.

[9]For another study of the antebellum constitutional origins of the Privileges or Immunities Clause, see Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: " Privileges and Immunities" as an Antebellum Term of Art* (August 18, 2009). Loyola-LA Legal Studies Paper No. 2009-29. Available at SSRN: http://ssrn.com/abstract=1457360.

[10]*See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751 (2009).

[11]*See* Lawrence B. Solum, *Semantic Originalism* (November 22, 2008). Illinois Public Law Research Paper No. 07-24. Available at SSRN: http://ssrn.com/abstract=1120244

[12]Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment* (pts 1 & 2), 1950 Wisc. L. Rev. 479, 610, combined and reprinted in Howard Jay Graham: Everyman's Constitution 157-241 (1968). Reviewing this book, 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, precisely as the Supreme Court initially interpreted it before veering away in favor of business interests for the next half century." William Van Alstyne, *A Constitution for Every Man* (review), 79 Yale L. J. 158, 160 (1969).

[13]Jacobus tenBroek, The Antislavery Origins of the Fourteenth Amendment (1951) (reprinted with an expanded appendix in 1965 as *Equal Under Law*). Citations to tenBroek are to the 1965 edition, which adds a new introduction and a very useful appendix of some original sources.

[14]*See* William Wiecek, The Sources of Antislavery Constitutionalism in America, 1760-1848 (1977).

[15]The same can be said of the brief but excellent discussions of antislavery constitutionalism in Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 73-102 (1970)(republished 1995); and Lewis Perry, Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought 188-208 (1973).

[16]*See* Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 42-56 (1986). Although I could be wrong, I do not believe that this aspect of Curtis'

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.

[17]Robert Cover, Justice Accused: Antislavery and the Judicial Process (1975).

[18]*See id*. at 154-58.

[19]*Id.* at 158.

[20]*Id*. at 154. 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 distinction." *Id*. at 295 n. 9.

[21]*Id*. at 154.

[22]*Id*. at 155.

[23]For an early critique, *see* Curtis, *supra* note __, at 212-15.

[24]*See* Cover, *supra* note __, at 156.

[25]*Id*. Cover's claim can only be considered accurate if "constitutional utopianism" is reserved for abolitionists who largely confined their arguments to natural law, which would exclude by fiat most of the writers discussed in Part I and thereby reduce Cover's descriptive claim to triviality.

[26]*See infra* notes ___-___ and accompanying text.

[27]*Id*. at 157.

[28]*Id.*

[29]For another legal historian who dismisses without analysis Spooner's constitutional arguments along with those of other abolitionists, *see* Paul Finkelman, Slavery and the Founders: Race and Liberty in the Age of Jefferson 201 n. 33 (2nd ed. 2001) ("Spooner's argument seems more polemical than serious."). *See also* Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, Supreme Court Review 2008, at 354 (referring to Spooner as among "a few constitutional outliers" who thought slavery to be unconstitutional in the original states).

[30]Cover, *supra* note ___, at 155.

[31]Foner, *supra* note __, at 87. Foner devoted an entire chapter to the pivitol role of Chase's antislavery constitutionalism in the Liberty party. S*ee id*. 73-102.

[32]*See* Perry, *supra* note ___, at 200-202 (describing Spooner's detachment from the Liberty party activities of others who made constitutional arguments, such as Salmon P. Chase, Gerrit Smith, Lewis Tappan, William Goodell, and Frederick Douglass).

[33]*See* Cover, *supra* note __, at 150-54.

[34]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.' " Graham, *supra* note __, at 241. Critics characterized them as "the pair who 'resurrected the Abolitionists,' 'revived old fallacies,' 'disturbed judicial and constitutional peace.' Disturbed an 1877 'settlement.'" *id.*

[35]*See* William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine (1988).

[36]*Id*. at 5 ("The study attempts to move historical scholarship on the Fourteenth Amendment beyond this present impasse.").

[37]*Id*. at 13.

[38]*Id.* at 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.").

[39]*Id.* at 138.

[40]*Id*. at 23.

[41]*Id.*

[42]*Id*. at 145.

[43]*Id.* at 62.

[44]*Id.*

[45]*Id.* at 36.

[46]*Id.* at 181.

[47]Another jurisprudential assumption also affect Nelson's assessment of the Fourteenth Amendment: his adoption of a 1980s version of originalism that sought the "purposes and intentions of the Fourteenth Amendment's framers" (*id.* at 3) rather than the public meaning of the text at the time of its enactment. From the existence of conflicting intentions he concluded that Section One is hopelessly "uncertain and ambiguous." (*id.* at 143). Historical statements can, of course, be used to establish the intentions of particular persons. But the very same statements can also be used to identify the public meaning conveyed by words and phrases. These are not at all the same inquiries.

[50]*See supra* notes ___-___ and accompanying text.

[51]*See* Graham, *supra* note __, at 157-85.

[52]Crandall v. State, 10 Conn. 339 (1834).

[53]Report of the Arguments of Counsel in the Case of Prudence Crandall, Plff. In Error, vs. State of Connecticut, Before the Supreme Court of Errors, at Their Session at Brooklyn, July Term, 1834 (hereinafter Report of Arguments).

[54]*Id.* at 5.

[55]*Id.* at 6.

[56]*Id.* at 8 (quoting U.S. Const, Art. IV, sec. 2).

[57]*Id.* at 12.

[58]*Id.*

[59]*Report on the Laws of Ohio*, in Proceedings of the Ohio Anti-Slavery Convention Held at Putnam 37 (1835).

[60]*Id.* at 39.

[61]Report of Arguments, *supra* note __, at 8 (emphasis added).

[62]James G. Birney, *The Philanthropist*, December 9, 1836, as it appears in Graham, *supra* note __, at 231-32. Just a year later, Birney would be making a due process clause argument against slavery itself. *See infra* notes __-__ and accompanying text.

[63]For a brief biographical sketch of Theodore Dwight Weld, describing him as "one of the most influential figures of his generation," *see* Graham, *supra* note __, at 165-73. For a study that situates Weld in the antislavery constitutionalism of the 1830s, *see* Helen J. Knowles, *The Constitution and Slavery: A Special Relationship*, 28 Slavery and Abolition 309 (2007).

[64]*See* tenBroek, *supra* note __, at 243.

[65]Theodore Dwight Weld, The Power of Congress Over the District of Columbia (1838).

[66]tenBroek, at 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, *supra* note __, at 18, and 25-26. So too does Cover. *See* Cover, *supra* note __, at 155.

[67]Weld, *supra* note __, at 40.

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

[69]*Id.*

[70]*Id.*

[71]*Id.* at 14-15 (quoting 3 Dall., at 388).

[72]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.").

[73]Weld, *supra* note __, at 40.

[74]*Id.*

[75]*Id.*

[76]*Id.* at 3.

[77]*Id.*

[78]*Id.* at 40.

[79]*Id.*

[80]*Id.*

[81]*Id.* at 45. Nelson does note Weld's argument concerning the relation of allegiance to the protection of the laws. *See* Nelson, *supra* note __, at 26.

[82]*Id.*

[83]*Id.*

[84]*See e.g. id.* at 231-32 (discussing an article by Birney from January 13, 1837 emphasizing the Due Process and Supremacy clauses).

[85]Foner, *supra* note __, at 74.

[86] Birney's activities in Ohio are extensively discussed in Graham, *supra* note __, at 167-74, 215-35..

[87]tenBroek, *supra* note __, at 296.

[88]James G. Birney, *The Philanthropist*, January 13, 1837, p. 2 as it appears in Graham, *supra* note __, at 231.

[89]*Id.* at 232.

[90]*Id.*

[91]*Id.*

[92]James G. Birney, *Can Congress, Under the Constitution Abolish Slavery in the States?* , The Albany Patriot, May 12, 19, 20 & 22, 1847), reprinted in tenBroek, *supra*, at 296.

[93]*Id.* at 317.

[94]*Id.* at 318-19.

[95]*Id.* at 310.

[96]*Id.*

[97]*Id.* at 311.

[98]*Id.* at 318.

[99]*Id.*