"Chapter 11: Radical Constitutional Antislavery: The Imagined Past, the Remembered Future" in

The Source of Antislavery Constitutionalism in America

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Sir Lewis Namier could have been writing about the controversy over slavery in America when he remarked on the perverse inclination of people to "imagine the past and remember the future." **<fn1>.** When they thought and wrote about some historical problem, such as the framers' actual intentions, abolitionists (and defenders of slavery, too) imagined the past in terms of their contemporary values, if not in terms of their wishful thinking. When they tried to descry and influence the future, they "remembered" it along the synthetic lines sketched by their historical imagining. In doing so, radical abolitionists produced a flawed and disingenuous constitutional program. But though a failure in the short run, radical constitutionalism contained prescient ideas about the American libertarian heritage. Some of these ideas passed into the mainstream of postwar constitutional development, and those that were not so absorbed remained as a reminder of how far American social reality fell short of our democratic goals.

The radicals were either independents, with no previous or subsequent affiliation with any branch of organized antislavery, or belonged to a splinter of the Liberty party. A disaffected group within the party began to coalesce in the early forties, at first over nothing more tangible than dissatisfaction with the party's failure to come to grips successfully with specific issues. These potential dissidents remained in the Liberty party through the 1844 national elections because of their distaste for the choice between the proslavery Whig Tweedledum [*250] Henry Clay, and the Democratic Tweedledee, James K. Polk, that the regular parties offered them.

Increasingly, however, they balked at Liberty moderation and the emergent tendency in western Liberty leadership toward amalgamation politically and constitutionally with nonabolitionists. The radicals' restiveness erupted at the Port Byron, New York, Liberty party state convention (25 and 26 June 1845). William Goodell there delivered a formal address, which the convention refused to adopt, that condemned One Idea platforms and the prevalent assumption that the Liberty party was a temporary expedient to be abandoned as soon as one of the regular parties could be converted to antislavery. Goodell argued that the depredations of the Slave Power, abetted by the subservience of the regular parties, made it necessary for the Liberty party to become a permanent party advocating the cause of all human rights, and to take a stand on all issues that were the legitimate objects of governmental power. **<fn2>.** Where the moderates were simultaneously trying to dilute the Liberty program in order to broaden its appeal, the radicals sought to extend it to embrace an reform issues.

Though rejected in 1845, Goodell's proposal remained in circulation for two years

and became the platform of a rump faction that seceded from the Liberty party in 1847. This group, resisting the imminent sell-out to the Free Soil movement by the Liberty majority, gathered in a convention at Macedon Lock, New York (8 to 10 June 1847) in response to a convention call drafted by Goodell that repeated the premises of the 1845 address. **<fn3>.** The delegates to the Macedon convention renamed themselves the Liberty League, nominated Gerrit Smith for the presidency, and adopted a platform written by Goodell, the "Address of the Macedon Convention." **<fn4>.** The "Address" jettisoned One Idea and called for repeal of all tariffs, including those for revenue; abolition of the army and navy; an immediate end to the Mexican war; limitations on the amount of land that could be held by individuals and corporations; free public lands to actual [*251] settlers; inalienability of homesteads; abolition of the federal govemment's post office monopoly; cheap postage and abolition of franking privileges; and the exclusion of slaveholders from public offices.

After their decisive rebuff at the Buffalo Free Soil convention in August 1848, the Leaguers reorganized themselves as the "Liberty Party Abolitionists" and ran Smith as an abolitionist alternative to the Van Buren-Adams ticket. They made an insignificant showing, since only dedicated purists would throw away their vote as a gesture of protest against the shortcomings of Free Soil. The League resurfaced again in 1852 as the National Liberty party, when it ran, the shadow of a shadow, in opposition to the Free Democracy's candidate, John P. Hale.**<fn5>.**After lackluster conventions at Buffalo (1851) and Syracuse (1852 and 1855), the group rejuvenated a little, reorganized itself as the Radical Political Abolitionists, a party, and the American Abolition Society, a reform organization and successor to the A&FA-SS. These tandem groups contained an unusual assortment of veteran abolitionists: Goodell, their chief propagandist and editor of the party's organ, the *Radical Abolitionist;* Frederick Douglass, editor of the *North Star,* organ of the National Liberty party in 1852; Lewis Tappan, along with Smith the chief financier of the movement, who had reluctantly and slowly been converted to political action out of a sense of the futility of nonparty groups like the A&FA-SS; black abolitionists James McCune Smith and Jermain W. Loguen; and Amos Dresser, one of the earliest and best-known victims of antiabolitionist violence. Disheartened by the political stresses of the 1850s and by the covertly racist program of the Republicans, the radicals reorganized for one last try in 1860 as the Free Constitutionalists. Their pathetic objective- "to procure the defeat of the Republicans" which among the parties was "the most thoroughly senseless, baseless, aimless, inconsistent, and insincere"- was a measure of the frustrations of consistent and principled men.**<fn6>.**

The radicals rejected the disunion and the de facto political quietism of the Garrisonians because both "seek to separate the free States from the slave States, and to leave the slave States, so far as concerns [*252] the political power of the free States, at perfect liberty to continue their oppression and torture of the black man." "Dissolve the Union on this issue," they challenged the Garrisonians, "and you delude the people of the free States with the false notion that their responsibilities have ceased, though the slaves remain in bondage. Who shall stand up as deliverers, then?" They forthrightly rebutted the moral premise of the disunionist posture: "They sometimes demand of us whether we would maintain a political connection with robbers to put down robbery, and with adulterers to put down adultery? We readily answer them, yes. This is precisely the thing we are doing in

respect to all crimes. Civil government is founded on this very idea." **<fn7>.**

Radicals also rejected the allure of major-party politics because they believed that the true function of an antislavery political party was to hold aloft egalitarian principles, not to embrace halfway measures like the Wilmot Proviso. Nor were they any more satisfied with other limited objectives of moderate constitutionalism. "We are not merely warring against the extension of new slave territory," the Western Anti-Slavery Society insisted in 1851, "nor against any fugitive slave law constitutional or unconstitutional; nor for the writ of habeas corpus, or the right of trial by jury for recaptured slaves, but we are waging eternal war against the doctrine that man can ever under any possibility of circumstances, hold property in man."**<fn8>.**

Some of the ideas of radical constitutionalism had been broached early in the nineteenth century. In 1806, John Parrish had claimed that "there is no just law to support [slavery]; it is against the essence of the Constitution," whose "leading features" were determined by the Declaration of Independence. Jesse Torrey in 1817 and James Duncan in 1824 had hinted at radical constitutional arguments based on concepts of the protection of the laws and republican government. **<fn9>.** In 1837, Elizur Wright and an anonymous black abolitionist used [*253] due process arguments to condemn the federal Fugitive Slave Act of 1793. **<fn10>.** At the same time, at the annual convention of the N-EA-SS, a range of radical opinion surfaced: William Goodell claimed vaguely that slavery was "unlawful"; Nathaniel Colver, a Massachusetts clerical abolitionist, argued that the Constitution did not recognize any right of slaveholding; and the Reverend Orange Scott went all the way: "The whole system of slavery is unconstitutional, null and void, and the time is coming when the Judges of the land will pronounce it so. So far from the Constitution authorizing or permitting slavery, it was established to guard life, liberty, and property." **<fn11>.**The business committee of the Massachusetts Anti-Slavery Society in the next year fatuously urged southern slaves to petition Congress for a redress of their grievances, and, if they were unsuccessful, "then we will lend them our aid in bringing their cause before the [Supreme] court of the United States to ascertain if a man can be held in bondage agreeably to the principles contained in the Declaration of Independence of the Constitution of our country."**<fn12>.**

But these tentative expressions were not representative of the thinking of those who were to become radicals. Gerrit Smith bespoke their orthodoxy on the federal consensus when he wrote New York's Governor William Marcy early in 1836, affirming categorically that "the federal constitution, by which we are bound, . . . leaves 'the right to abolish slavery where only it could be safely left; with the respective states, wherein slavery existed.' We are glad, that this right belongs exclusively to those states; and the abolitionists do not meditate the least encroachment on it." **<fn13>.**

This orthodox position was first challenged by two unlikely figures, Samuel J. May and Nathaniel P. Rogers- unlikely because both became Garrisonians for a time after the schism, and Garrisonian t thought was the inveterate enemy of radical constitutionalism. May and Rogers published articles in the *Quarterly Anti-Slavery Magazine* [*254] in 1836 and 1837 that contained several elements of radical

theory. <fn14>. May agreed with Charles Olcott, an Ohio protoradical, that the Constitution did not establish slavery, but simply ignored it or left it alone.<fn15>. Such a position was still compatible with the federal consensus, since it left the legitimacy of slavery to be determined by the states. Even Alvan Stewart at the time maintained that the Constitution was "neutral" as to slavery or that "it leans many degrees in favor of liberty, and against slavery as a system." <fn16>. But the pattern of thinking in May's, Olcott's, and Stewart's writing represented a trajectory away from the federal consensus, a trajectory best described by Lewis Tappan in 1844: "Not long since almost every person supposed the

C[onstitution] of the U.S. guaranteed slavery. Now most men believe it merely permits it, while an increasing number are persuaded that the Constitution is altogether an anti-slavery document, and will put an end to American slavery." <fn17>. Rogers, in his article "The Constitution," and in an earlier speech to the New Hampshire Anti-Slavery Society, <fn18> went considerably further, concluding that slaveholding "is contrary to the Constitution of the United States." This conclusion might have been startling at the time (1837) had it not been for the rhetorical tone of Rogers' argument, which merely iterated conclusions with little analysis or supportive reasoning. The Rogers and May pieces went unnoticed in the national antislavery press, partly because of a more sensational event in 1837: Alvan Stewart's open repudiation of the federal consensus. On 20 September 1837, in a speech before the second annual meeting of the [*255] NYSA-SS, Stewart shocked the entire movement by arguing that the due process clause of the Fifth Amendment empowered the federal government to abolish slavery in the states. This speech marked the dramatic debut of radical antislavery constitutionalism. Stewart published his argument a month later as "A Constitutional Argument on the Subject of Slavery," <fn19> and then carried his argument to its logically necessary conclusion by moving that the AA-SS, at its fifth annual meeting (1838), delete from its constitution the clause affirming the society's adhesion to the federal consensus.

Both Garrisonian and orthodox political-action abolitionists denounced Stewart's innovation. An incensed William Jay demanded that he be drummed out of the AA-SS for "this vile heresy." <fn20>. Birney condemned Stewart's argument at the 1837 NYSA-SS meeting, <fn21>and he was joined by Jay, Loring, Wendell Phillips, Wright, and Leavitt at the AA-SS meeting in 1838, who presented a wide array of substantive and tactical objections to the due process arguments. <fn22>. In spite of this denunciation, Stewart thought he had won an "immense victory" at the AA-SS. <fn23>. In reality, he had not, at least not in the short run. Though he secured a majority for his repeal motion at the AA-SS meeting, it fell short of the two-thirds necessary to amend the Society's constitution, and the AA-SS affirmance of the federal consensus remained intact. From their different perspectives, William Jay, Gamaliel Bafley, and Wendell Phillips then issued long written rejoinders to Stewart's argument, insisting that Stewart had given the due process clause an unwarranted extrapolation. <fn24>. [*256]

In the same year (1838) that Stewart's effort to amend the AA-SS constitution failed, Weld brought out his *Power of Congress over the District of Columbia*, which, though limited to a moderate objective (abolition in the District) contained arguments of much wider applicability that were better grounded in history and legal precedent than Stewart's

argument. Henry B. Stanton at the next annual meeting of the AA-SS reversed Weld's procedure, seeking a radical end, total and immediate abolition, by a moderate mode, amendment of the federal Constitution: as "a dernier resort we will alter the Constitution and bring slavery in the States within the range of federal legislation, and then annihilate it at a blow." **<fn25>.**

In 1841, George W. F. Mellen published *An Argument on the Unconstitutionality of Slavery,* the first book-length exposition of the radical argument. **<fn26>.** Despite its chronological priority, Mellen's work was not particularly significant, and was seldom cited by other radicals, partly because Mellen was an embarrassment to more cotiventional abolitionists. He was flamboyantly eccentric, if not mad. Mellen was a namesake of George Washington, and at times thought he *was* Washington. Accordingly, he appeared at antislavery conventions dressed in the military uniform of the Revolution. **<fn27>.** Impressed by the fact that his grandfather, a Revolutionary-era congressman, had emancipated his slaves, Mellen reinvestigated the federal and state constitutional and ratifying conventions to prove that slavery was established in the southern states in contravention of the federal Constitution. His book was an unsuccessful attempt to neutralize the impact of the Madison Papers.

The banner years for radical constitutionalism were 1844 and 1845; within a few months of each other there appeared three comprehensive arguments denying the legitimacy of slavery in the states. First was Alvan Stewart's "New Jersey argument" wherein he put his 1837 theory to practical application in a freedom suit. New Jersey in 1804 and 1820 had enacted *post-nati* emancipation statutes, by [*257] which all persons born slaves before 4 July 1804 would remain slaves for life, and all children born of such slaves after that date were free but were held as apprentices by their "owners," males till age twentyfive, females till twenty-one. In two companion cases, *State v. Van Buren* and *State v. Post (1845),* **<fn28>** Stewart and Jersey abolitionists sought writs of habeas corpus for a pre-1804 slave and a child of such a slave apprenticed to her master. They contended that the new state constitution of 1844 abolished slavery because it contained an "all-men-are-by-nature-free-and-independent" clause patterned after Article I of the 1776 Virginia Declaration of Rights and Article I of the 1780 Massachusetts Constitution .**<fn29>.** For the first time, radical constitutionalism had been brought into a courtroom. **<fn30>.**

Next came the publication of William Goodell's compendium, *Views of American Constitutional Law.* **<fn31>.** Though disjointed in its organization, Goodell's volume was a synopsis of the radical argument. He elaborated on it in subsequent pamphlet, book, and newspaper writings, but his 1844 *Views* embodied the principal ideas of the radical constitutionalists, especially since Goodell remained at the center of their activities through 1860.

The third of the comprehensive radical arguments of 1844-1845 was the Massachusetts lawyer Lysander Spooner's *Unconstitutionality of Slavery.* **<fn32>.** Even in a movement that attracted individualists and eccentrics, Spooner stood out. **<fn33>.** His earliest publications dealt with free thought and postal reform, but he soon moved on to antislavery, [*258] and his long treatise was accepted as a text of radical

constitutionalism. In reality, the views of Goodell and Stewart probably had a greater impact, but Spooner's lengthy, heavily annotated, well-organized study rivalled them in its influence. Spooner disseminated his tract widely among legislators in hopes that it would convert them to radical premises, but he had no success. **<fn34>.**

Spooner supplemented his *Unconstitutionality of Slavery* with an anonymous article in the 1848 *Massachusetts Quarterly Review*, "Has Slavery in the United States a Legal Basis?" **<fn35>.** and two years later produced a legalistic attack on the fugitive slave laws. **<fn36>.**Relentlessly pursuing his ideas to their extreme logical conclusions, he next turned to the role of the common-law jury as a guarantor of individual liberty against the oppression of majorities and of the state, and argued that juries must be judges of both fact and law. **<fn37>.** He defended John Brown after the Harpers Ferry raid, and after the war became a leading exponent of antistatist thought, second only to Josiah Warren in his influence on American anarchism.

The Macedon Convention and the formation of the Liberty League in 1847 further stimulated radical constitutionalist efforts. The Liberty League's presidential nominee, Gerrit Smith, restated radical constitutionalism as a political platform in a public challenge to the leader of the moderates, Salmon P. Chase. **<fn38>.** Of more intellectual substance [*259] was a series of articles in the *Albany Patriot* in 1847 contributed by James G. Birney. **<fn39>.** Birney was by then disillusioned with his former associates. Suspicious of the sort of expediential politics that was irresistible to the Liberty moderates, he worked out for himself anew the premises of radical constitutionalism. Finally, in 1849 Joel Tiffany, reporter of the New York Supreme Court and a lawyer raised in that extraordinary nursery of abolitionist and Radical Republican theorists, Lorain County, Ohio, rounded out the work of the radical systematizers with his *Treatise on the Unconstitutionality of Amerian Slavery*. **<fn40>.**

Where the jurisprudential base of Garrisonian thought had been positivism, the foundation of radical constitutionalism was its opposite: an emphasis on the legally binding force of natural law. Quoting Blackstone, who had naturalized this semitheological concept into English law, radicals claimed that "this law of nature, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding all over the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this. And such of them as are valid, derive all their force, and all their authority mediately or immediately, from this original ." **<fn41>.** In a more secular form, natural law inhered in "natural justice," "men's natural rights..... natural principles of right," "human conscience," or "principles existing in the nature of things. **<fn42>.**

Radicals converted the moral "ought" directly to the legal "must" [*260] because natural law, whether embodied in secular or religious form, was of anterior and superior obligation to manmade law. As such, it was both the source of individual human rights and a limitation on the powers of government. Governments existed to secure individual liberty; no government could deprive men of liberty, security, and property (a Blackstonian triad), nor permit other men to do so. Hence any governmental act infringing human liberty was ipso facto void, of no obligation, and incapable of being legitimated. **<fn43>** rejected

Garrisonian positivism as a standard of legitimacy because it grounded law in force, whereas to the radicals conventional law had to be measured against a superior gauge of morality and justice. **<fn44>** Reversing Phillips' criticism of their natural law position, Spooner and Goodell insisted that it was conventional law that was unstable, dependent as it was on the changing whims of whoever happened to be in power. According to a common law maxim, *jura naturae sunt immutabilia*, it was the laws of nature that were stable, unchanging, universal, and certain. **<fn45>.**

The radicals' natural-law emphasis was not an alien graft on American constitutionalism. **<fn46>.** Justice Samuel Chase had acclimated it in his *Calder v. Bull* opinion (1798), **<fn47>** and Chief Justice Marshall reiterated it in *Fletcher v. Peck* (1810), where he voided a state statute both because it conflicted with a specific clause of the federal Constitution and because it was contrary to "general principles which are common to our free institutions." **<fn48>** Story echoed Marshall implicitly [*261] in *Terreft v. Taylor* (1815) and explicitly in *Wilkinson v. Leland* (1829), **<fn49>** though Marshall had abandoned the natural-law branch of his argument in *Dartmouth College v. Woodward (1819)* **<fn50>.** Natural-law principles were vigorously applied by state court judges in the next generation and were reabsorbed into U.S. Supreme Court thinking by Taney's *Dred Scott* opinion in 1857, whence they passed on, via the due process clause, into modem constitutional discourse in the late nineteenth century. In the 1840s, radicals, like contemporary conservative judges on the state benches, were attuned to the judicial formulation of natural-law doctrine, and cited *Calder v. Bull* to support limitations on the power of all governments to interfere with individual liberty.

Natural law was not the only source of higher law. The common law also embodied its principles, and constituted another limitation on the power of states to authorize enslavement. "The common law is the grand element in the United States Constitution," Weld argued; "all its fundamental provisions are instinct with its spirit." "Its principles annihilate slavery wherever they touch it. It is a universal unconditional abolition act." **<fn51>.** Radicals recurred to Mansfield's *Somerset* opinion, which they considered to be the definitive exposition of the common law as it pertained to slavery. They maintained that *Somerset* had held slavery to be incompatible with the common law, and had sanctioned legal mechanisms-habeas corpus and, in the United States, jury trial and homine replegiando-by which individuals could secure judicial protection of their liberty. **<fn52>.** The impact of *Somerset* was not spent in the metropolis; it extended to the colonies as well. If the common law was the basis for the colonial constitutions and legal order, and if slavery was void [*262] under the common law of the metropolis, then it followed that it was just as invalid in the colonies. Here radicals recurred to Sharp and one of his favorite common-law maxims, *debile fundamentum, fallit opus*. **<fn53>.** To Sharp, this maxim had meant that slavery's illegitimate origins in force had destroyed the structure of laws that supposedly supported it. To his American disciples, however, the *fundamentum* was the legitimacy of slavery in the colonies under the common law, and the *opus* was the legal structure of black codes that maintained slavery.

Another variant of the common law argument derived from the provisions found in the charters of all the colonies stating that the power of the colonial legislatures did not

extend to enacting laws repugnant to the law of England. Seizing on these repugnancy clauses, the radicals claimed that the colonial-era black codes could not have created slavery in America because slavery was repugnant to the common law. Moreover, the colonies constitutions had embedded in them guarantees of English liberty (jury trial, habeas corpus) that Americans claimed as their constitutional birthright, and slavery was blighted by these too. **<fn54>.**

To radicals, only some absolutely explicit statute, such as the hypothetical suggested by Justice John McLean, "And be it enacted that slavery shall exist," could have been the positive law that Mansfield had said was necessary to the establishment of slavery. **<fn55>.** But no such law had ever been enacted; at most, the colonial black codes had merely recognized the existence of slavery in society, somewhat in the way that laws taxing alcoholic beverages recognized the use of liquor. Hence even a constricted and conservative reading of *Somerset* delegitimated slavery, and rendered it "sheer usurpation and abuse, from beginning to end; a nuisance, demanding judicial (not to say legislative) removal. Every slave held in America is unlawfully held, and in defiance of American Constitutional Law. **<fn56>.** [*263]

When radicals turned from abstract theory to the Constitution itself, they immediately confronted an inconvenient obstacle: the Madison Papers, which seemed to be incontrovertible proof of the proslavery intentions of the framers. To get around this, radicals turned to common-law maxims for rules of construction that might provide a way through the less clear places in the Constitution. Spooner was the leading exponent of this method, and he devoted whole chapters of his *Unconstitutionality of Slavery* to exegetical ground rules.

Spooner and others suggested these rules of interpretation: construe the document by "the prevailing spirit, the general scope, the leading design, the paramount object, the obvious purpose" of the instrument; resolve ambiguities in favor of liberty and justice; do not construe words so as to give effect to fraud or injustice; look to "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." This last rule was particularly important because the words "slave' and "slavery" do not appear in the document. **<fn57>.**

Thus armed, the radicals were ready to tackle the difficult question of the framers' intentions. They insisted above all that these intentions be gleaned from the words of the document themselves, taken in their literal meaning. "Extraneous" historical evidence (i.e. the Madison Papers) they dismissed as "worthless" or at least as insufficient to overthrow the literal meaning of the text. **<fn58>.** This, however, was not enough to neutralize the impact of the Madison Papers, and some radicals fell back on a conspiracy theory to explain how the proslavery intent of the framers could have been so imperfectly realized by the ambiguous language they used. They "chose rather to trust to their craft and influence to corrupt the government . . . after the constitution should have been adopted, rather than ask the necessary authority [to establish slavery] directly from the people." The Constitution [*264] Goodell maintained, had an intrinsically "honest character" that the framers perverted after

ratifications. **<fn59>.**

But this conspiracy explanation did not satisfy radicals either. Most of the framers, after all, were on record as having mild antislavery sentiments, so the radicals tried to reconcile these with the words of the Constitution. This was the focus of Mellen's work, the first radical treatise to appear. The benign reinterpretation of the framers' intent began with their known desire to establish liberty for themselves and their posterity. According to the radicals, they viewed slavery as an anomaly, an obsolete retrograde system inconsistent with the empire of liberty they had established. The framers expected slavery to pass away shortly, hastened toward its end by moral pressure and state political action. They chose their circumlocutions carefully to avoid any inference that the Constitution secured slavery, and even inserted into the Constitution numerous provisions that might in time insure its demise. **<fn60>.**

Having thus partially exculpated the framers, the radicals could then get on with construing their handiwork. They began with the Declaration of Independence and comparable Bill of Rights provisions in the state constitutions. Was it literally a self-evident truth that all men are bom free and equal? Or were there implicit exceptions for black people, women, aliens, and others? Americans would be forced anew to determine what their republic was to be; they would have to rediscover themselves.

Before 1840, Americans viewed the Declaration as being rhetorical or hortatory, rather than as a substantive and operative component of the constitution. Radicals, on the other hand, insisted that it was *the* constitution until 1782, when the Articles of Confederation were ratified, or at least that its principles were "the basis of the Constitution." **<fn61>.** So elemental was the Declaration that compared to it the Constitution was but "the mere outward form, the minutely [*265] detailed provisions . . . the instrument, of which those principles [of the Declaration] are the living spirit and substance. To accept [the Constitution] as a substitute for the [Declaration] . . . would be to accept of the shell, and throw the kernel away, -to idolize the instrument and spurn the blessings it was intended to procure for US." **<fn62>.** The Declaration overrode all inferior laws, including statutory enactments, court decisions, and inconsistent provisions in the federal and state constitutions. It was of its own force an act of abolition. **<fn63>.** As both a source of principles and as substantive constitutional law, the Declaration supplemented natural law as a limitation on the power of government and a guarantor of individual liberty. **<fn64>.**

Radicals then scrutinized the Constitution for documentary proof that slavery was illegitimate. By 1864, their search was so successful that William Goodell's annotated text of the Constitution, *Our National Charters*, listed almost half its clauses as actually or potentially antislavery. **<fn65>.** They relied primarily, though, on three sources: the due process clause of the Fifth Amendment, the privileges and immunities clause, and the guarantee clause.

Alvan Stewart was the chief architect of antislavery due process. His interpretation transformed the clause in two ways. First, he insisted that it was a limitation on state, as well as federal power; and second, he gave it a substantive, rather than procedural,

reading. Stewart began with the orthodox procedural interpretation of the clause in Joseph Story's *Commentaries on the Constitution,* which held the clause to be

> but an enlargement of the language of Magna Charta (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land.) Lord Coke says that these latter words, "per legem terrae" (by the law of the land), mean by due process of law, that is, without *[sic]* due presentment or indictment, and being brought in [*266] to answer thereto, by due process of the common law. So that this clause, in effect, affirms the right of trial according to process and proceedings of common law. **<fn66>.**

But in his 1837 "Constitutional Argument," and in the New Jersey argument of 1844, **<fn67>** Stewart blurred the distinction, so familiar to American lawyers, between procedural and substantive due process. In Stewart's hands, the distinction became meaningless (as, indeed, it intrinsically is) because procedure shaded off imperceptibly into substance. If a person had a procedural right not to be enslaved unless he was held to be a slave under the traditional forms of common-law criminal proceedings, that right could itself be enforceable as a substantive one. Stewart therefore concluded that no person anywhere in the United States was constitutionally enslaved because none had been declared to be a slave in common-law proceedings, and all had a substantive right to liberty.

In its time, Stewart's due process argument was fatally defective in three ways. First, he accounted for the presence of the due process clause in the Constitution by a benevolent conspiracy theory: the framers supposedly felt obliged to counterbalance their concessions to slavery by insisting that the victims of those concessions be only those who were held to be slaves by due process of law. When Stewart first made his due process arguments in 1837, he labored under the handicap of not having access to Madison's notes, which were not published for another three years, so this argument was not at first as preposterous as it later appeared. Second, he made the incredible error of assuming that the due process clause was drawn up at the Philadelphia convention of 1787! Nowhere in his later arguments did he repudiate this. This may have been a lapse attributable to zeal, but it did his reputation as a lawyer no credit. Third, Stewart ignored the doctrine enunciated by the United States Supreme Court in *Barron v. Baltimore* (1833), which held the first eight amendments to the federal Constitution inapplicable as restraints on the states. **<fn68>.** Stewart was swimming upstream against the current of a nearly unanimous understanding that the Fifth Amendment did not bind the states.[*267]

Yet Stewart's due process argument may not have been quite the folly that the foregoing suggests. For one thing, he may have been understandably unaware of the existence of the *Barron* precedent. At that time, it was not unusual or discreditable for attorneys to lack the means for familiarity with the holdings of distant courts that the modem lawyer enjoys thanks to twentieth-century innovations in legal communications like advance sheets, loose-leaf and pocket supplements, and the Shepards service. If Stewart was ignorant of *Barron,* he was in good company. The Illinois Supreme Court in 1846 considered the due process clause of the Fifth Amendment to be binding on the states. **<fn69>.** In the same year as the *Barron* decision, Henry Baldwin, one of the justices of the United States Supreme

Court that handed down that unanimous decision, sitting on circuit, felt himself bound by another provision of the Bill of Rights (the First Amendment religion clauses) in interpreting state law. **<fn70>.**

Alternatively, Stewart and other radicals who used the due process clause may have been aware of *Barron* and may have chosen to repudiate it as bad law. Gerrit Smith did so explicitly in 1850, claiming that the Court was wrong and that only the First, Ninth, and Tenth Amendments were exclusively restrictions on federal power. **<fn71>.** The other amendments (Two through Eight), he argued, were restraints on both the states and the federal government. Sniith's argument had two plausible bases: the language of the amendments (only One and Ten are by their phrasing related to federal authority), and the history of the period of their adoption. His historical understanding may have been better than the Supreme Court's; the framers of the Amendments did seem at times to be thinking of inherent limitations on all governmental power or of universal safeguards for individual liberty. Amendments Two through Ten are written in the passive voice, leaving open the syntactical possibility that they were universally applicable. **<fn72>.**

The second basis of radical constitutionalism was a conglomeration [*268] of concepts: protection of law, equality of status, and the privileges and immunities of citizenship. Its doctrinal source was the privilege and immunities clause. The second Missouri crisis, *Corfield v. Coryell,* and the Prudence Crandall controversy provided radicals with an ample fund of ideas on which to draw in their effort to secure for both free and enslaved blacks the rights that whites enjoyed. But none of these aboriginal civil rights controversies had established a definitive meaning for the privileges and immunities clause, and the field beckoned invitingly to radicals.

"A Constitution springs from our weakness and need of protection," Stewart argued in the New Jersey case, "and is a covenant of the whole people with each person, and of each person with the whole people, for the protection and defence of our natural rights, of life, liberty, and the pursuit of happiness." He bundled together the objects of government as set forth in the Preamble to the United States Constitution, the natural rights theory, and the concept of protection by law. **<fn73>.** Radicals agreed that "allegiance and protection are inseparable" and that since slaves owed allegiance to the government that compelled their obedience, "protection is the constitutional right of every human being." **<fn74>.** In claiming protection for all men, the radicals were attuned to jurisprudential values that dominated their time. The nineteenth-century American legal order placed a high premium on the creative capacity of the individual and protected him in his exercise of it. **<fn75>.** Illinois abolitionists bespoke the spirit of the age when they declared that "the great end of all systems of legislation" is "to aid each individual member of society to gain the great end of his being, in accordance with the laws of his nature, and to maintain and defend those rights which are essential to enable him to do so. **<fn76>.** This could only be done if the law provided equal opportunity to all men to realize their creative capacities. The concept of equal protection aimed at securing blacks' "civil rights" in the nineteenth-century sense of that phrase: the right to [*269] own property, marry, move about, not be commanded by a master, etc. Eventually, though, radicals recognized that their egalitarian logic compelled them to accord full political rights- the vote- as well, and they did not flinch from this

position, despite the violent opposition they knew it would arouse. Goodell's Port Byron address of 1845 frankly stated that the right to vote was protected under the privileges and immunities clause, and Smith, as Liberty League candidate of 1848, saw the ballot as a right equivalent with rights of social equality "in the school, or the house of worship, or elsewhere." **<fn77>.**

When radicals atempted to tie down their vague concepts of equality and protection to a specific clause, the privileges and immunities clause seemed the most likely candidate, and Joel Tiffany became its prime exegete. In order to make this work, however, Tiffany and others first had to demonstrate that slaves were citizens in the terms of the clause, and then to demonstrate that equal protection was one of the rights of citizenship. They did this by construing the word "citizen" as it was used the second time in the clause as having the implicit qualification "of the United States," so that slaves enjoyed a national citizenship by reason of their American nativity." **<fn78>.**

This was a strained argument, even for the radicals, and it exposed a weakness inherent in the clause. The clause cut both ways, and could work against the abolitionist position as well as for it. For example, a free New York black seaman imprisoned in Charleston under the Negro Seamen's Acts had no right to complain under the clause, because he was treated just as South Carolina would treat any of its own free black "citizens" suspected of inciting disaffection among slaves and other blacks. These considerations suggested that the tangled, obscure, and difficult question of citizenship would be a weak reed for abolitionists to lean on, and encouraged them to rely instead on the third of their major arguments against slavery in the states, the guarantee clause.

Article IV, section 4, of the Constitution contains the enigmatic provision: "The United States shall guarantee to every State in this [*270] Union a Republican Form of Government." Again sensing possibilities in textual ambiguity, radicals read into the vague phrases of the clause a command that the federal government abolish slavery in the states. **<fn79>.** They devoted most of their attention to defining "a republican form of government." Such a government, they argued, was one dedicated to the ideals of the Declaration of Independence, "that authenticated definition of a republican form of Govemment." **<fn80>.** In a republican government, all men must be secure in the enjoyment of their rights to life, liberty, property. "The very pith and essence of a republican government . . . [is] the protection and security of those rights."**<fn81>.** The guarantee clause incorporated the whole scope of natural rights, the ideals of the Declaration, and the objectives of the Preamble.

Radicals referred to Madison's classical definition of a republic in *Federalist* Number 39:

> a government which derives all its powers directly or indirectly from the great body of the people...It is essential to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it. **<fn82>.**

From this statement they inferred that a government bad to be majoritarian, in the sense that the whole people constituted the basis of society, not a "favored class" of slaveholders who held a large minority in bondage. The principle of popular self-government inherent in the majoritarian idea was violated by enslavement. **<fn83>.** Radicals also drew on an even older tradition that lay behind the origins of the guarantee clause in 1786-1787: an observation in [*271] Montesquieu's *Spirit of the Laws* that in a republican federation, all constituent members must be republican, lest an aristocratic or monarchic member overthrow the free institutions of the others. This seemed to foretell exactly the policies of the governments of the southem states. It further implied a power in the central authority to control the social institutions and internal policies of the states to check antirepublican tendencies. **<fn84>.** The verb "guarantee" was a plenary grant of power, and the phrase "the United States" was a clear designation of who should exercise it.

Radicals found power to abolish slavery in the states in lesser clauses, too. The common defence and general welfare clause was violated by an institution that depressed the welfare of all classes and endangered the United States in time of war. **<fn85>.** A nonabolitionist, John Quincy Adams, had argued that Congress' war power might be used to liberate slaves, and radicals improved on this idea by suggesting both war- and peacetime modes for incorporating blacks into the army and militias or for liberating slaves in a theater of military operations. **<fn86>.**Radicals saw the commerce clause as a means of expanding federal power over the states, presciently anticipating one of the most expansive sources of federal power in the twentieth century. **<fn87>.** They argued that Congress' power over interstate commerce was plenary, and read the 1808 clause as confirming commerce power over the slave trade by a negative pregnant, i.e., that the withdrawal of one limited segment of congressional power for twenty years implies an otherwise unlimited power over the whole subject. **<fn88>.**

The supremacy clause of Article VI was important to the radicals' argument, since they read it as establishing the superiority of federal power over the states. **<fn89>.** Rebutting Calhoun's 1837 resolutions, radicals saw the federal Constitution with all its antislavery potential as the "supreme act of the sovereign people . . . paramount to the constitutions, laws, or usages of any single state." **<fn90>.** Finally, several provisions of the Bill of Rights, including the jury trial, search and seizure, cruel and unusual punishment, and the taking of property without compensation clauses, and all the First Amendment liberties, were violated by slavery. **<fn91>.**

Having investigated the antislavery provisions of the Constitution, radicals then took up the four clauses alleged to be guarantees of slavery. They were of two minds about these clauses. Some admitted that the clauses did in fact refer to slaves, but argued that they need not be honored, or could easily and legitimately be evaded by the free states. These clauses were also examples of the framers' strained effort to keep slavery out of the Constitution. Radicals again emphasized that the words "slave" and "slavery" did not appear in the document. Some of them agreed with John Quincy Adams that circumlocutions are the fig leaves under which these parts of the body politic are decently concealed," and therefore saw the proslavery clauses as something to be gotten around. **<fn92>.** Others maintained that each of the clauses might be applied to something other than

slavery. Mellen, reviewing the federal number clause, thought that "it would seem as if some one had worded this phrase in such a manner that it would not require an alteration of the Constitution for the purpose of having representatives chosen, or taxes collected, provided the system of slavery should be done away, and were careful [*273] to have it worded as to exclude the idea, as much as possible, that they had anything to do with it. **<fn93>.** In this interpretation, the federal number clause was actually a disincentive to the maintenance of slavery, a "penalty," or a "premium in favor of human liberty." **<fn94>.** Other radicals argued that the negative correlative of the "free Persons" mentioned in the clause was not slaves, but rather aliens and Indians not taxed. By this argument, slavery disappeared entirely from the clause.**<fn95>.**

Radicals also gave the 1808 clause differing interpretations. Mellen conceded that it did apply to slaves, but others argued that even if it did, it was an antislavery authorization to Congress, giving it power to abolish both the international and interstate trade. **<fn96>.** Whatever sanction for slavery might be read into the clause applied only to the original states and lapsed with the abolition of the trade in 1808. **<fn97>.** Alternatively they argued that the clause referred only to federal authority over the in-migration of free persons like indentured servants, who could in a sense be said to be "imported." **<fn98>.**

Radicals maintained that the fugitive slave clause did not apply to slaves for two reasons. First, under *Somerset,* once a slave left the jurisdiction under which he was held, his slave status fell away. **<fn99>.** Second, a slave was not "held to service" and his labor was not "due" his master under the laws of the southern states. The black codes disbarred slaves from entering into a contractual relationship, and since the quoted phrases implied a contract, the clause applied only to [*274] indentured servants and apprentices or other forms of labor that are based on a contractual relation. **<fn100>.** As to the pair of clauses that arguably pertained to slave uprisings, the insurrections and domestic violence clauses, radicals argued that putting down an uprising for liberty would be wrongful; that a slave uprising is not an "insurrection"; and that slaveholding itself is the "domestic violence" against which the federal government must protect the states. **<fn101>.**

This was obviously the weakest part of the radicals' argument, justifying William Jay's harsh judgment that radical constitutionalism was a mere "verbal quibble." **<fn102>.** However necessary it may have seemed to radicals to construe slavery out of the Constitution, they appeared only obtuse or dishonest for the effort, and weakened their posture vis-a-vis moderates and Garrisonians.

In the short run, radical constitutionalism was a failure. Northern opposition to slavery became channeled into the Free Soil and Repubhcan effort and the radicals, both in their constitutionalism and their politics, were left stranded in a backwater where they became increasingly unrealistic and sectarian. But their long-term impact was more substantial. They were the antebellum era's leading exponents of a theory of natural law limitations on governmental power. Alvan Stewart outlined the premises of this "modern" natural-law approach in 1836:

> There is a class of rights of the most personal and sacred character to the

> citizen, which are a portion of individual sovereignty, never surrendered by the citizen. . . . The legislatures of the States and Union are forbidden by the constitutions of the States and Union from touching those unsurrendered rights; no matter in what distress or exigency a State may find itself, the legislature can never touch those unsurrendered rights as objects of legislation. **<fn103>.**

However imperfectly realized, this view has become prevalent today. Modem libertarian constitutional thought, using the Fourteenth [*275] Amendment's due process and equal protection clauses as vehicles, has transmuted natural-law concepts into working guarantors of individual freedom. Ideas of substantive due process, equal protection of the laws, paramount national citizenship, and the privileges and immunities of that citizenship were all first suggested by the radicals. T'hey did not contribute directly to the triumph of their ideas; that was, ironically, the work of the Republicans whom they came so heartily to despise. But it was the radicals who first opened up the possibilities realized by their foes.