No Person Shall Be Deprived: Antislavery Due Process in New York State Courts, 1840-1860

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Abstract

In this paper, I argue that Alvan Stewart's conceptualization of antislavery due process, which asserted that slavery was unconstitutional according to the Fifth Amendment, even in the states, was not exclusively a constitutional theory but functioned as a coherent legal strategy employed by abolitionist lawyers in formal litigation in the antebellum North, primarily in New York State. For a significant portion of the antebellum period, abolitionist constitutional theory and legal thought was defined by what historian William Wiecek has called "federal consensus": Congress had the power to abolish slavery in areas under exclusive federal jurisdiction, such as the western territories or the District of Columbia, but the federal government lacked the constitutional authority to abolish or otherwise interfere with slavery in the states.[1] Such a limited view of the constitutional power over the domestic institutions of the states was enshrined in American jurisprudence by the U.S. Supreme Court in *Barron v. Baltimore* (1833). Writing for a unanimous Court, Chief Justice John Marshall reasoned that the individual rights enumerated in the Bill of Rights were only binding upon the actions of Congress, not the states.

The Court's landmark ruling in *Barron* had profound implications for the American antislavery movement. In the years following the decision, many of the prominent abolitionist organizations of the antebellum North, including the American Anti-Slavery Society and its various state affiliates, accepted the *Barron* precedent as settled law. However, in the late 1830s, Alvan Stewart, an abolitionist lawyer from upstate New York, developed an alternative constitutional interpretation which asserted that the Fifth Amendment could be utilized to abolish slavery everywhere, even in the states. Stewart's theory, which I will refer in my paper to as "antislavery due process," foremost contended that the enumerated provisions of the Bill of Rights were not limited to the federal government, as the Court had ruled in *Barron*, but were also binding against the actions of the several states. With the Bill of Rights applied against the states, Stewart reasoned that the Fifth Amendment, which guaranteed that "no person… will be deprived of life, liberty, or property without due process of law," rendered slavery unconstitutional and illegitimate in every corner of the federal Union, since slaves had been overtly deprived of their life and liberty without due process of law.

Despite an ever expanding historiographic ecosystem concerning the constitutional thought and argumentation of the abolitionist movement, Alvan Stewart's antislavery due process has heretofore been examined exclusively as a *theory*, or the subject of published books, legal pamphlets, public speeches, and personal correspondence. In contrast, historians and legal scholars have devoted startlingly little attention to antislavery *litigation*, or the practical application of antislavery due process to formal legal proceedings in an established court of law before a judge or jury. Through a considered analysis of four slavery-related cases litigated in Northern state courts between 1840 and 1860, I demonstrate that antislavery due process was not merely a theory but was a coherent legal strategy employed by abolitionist lawyers in formal legal proceedings, usually on behalf of fugitive slaves, in the antebellum courtrooms of New York State.

[1] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977).

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The Fifth Amendment to the U.S. Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"The law will never make men free; it is men who have got to make the law free."

– Henry David Thoreau.[2]

Introduction

Section I: The Birth of Antislavery Due Process

A large crowd had gathered inside the Broadway Tabernacle Church in Lower Manhattan, but it was not a Sunday. In the central sanctuary, over 160 men representing twelve Northern states had convened for the Fifth Annual Meeting of the American Anti-Slavery Society (AA-SS).[3] On May 2, 1838, Lewis Tappan, an evangelical social reformer, called the meeting to order and Gerrit Smith, the Society's wealthy Vice-President, presided over the first session.[4] Reverend David Thurston offered an opening prayer.[5]

Many of the most prominent American abolitionists were present. William Lloyd Garrison, the fiery orator and publisher of *The Liberator*, represented Massachusetts alongside Wendell Phillips and Ellis Gray Loring.[6] The delegation from New York, the largest in attendance, included Beriah Green and Elizur Wright, who served as the Society's first national secretary from 1833 until 1839.[7] In addition to these established antislavery men, a new generation of white abolitionists were in attendance: Horace Day represented Yale, alongside Benjamin F. Hosford and Christopher S. Bell, two sons of Dartmouth College.[8] Representing

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[2] Henry David Thoreau, *Slavery in Massachusetts*. Thoreau's essay was originally delivered as a speech at an Anti-Slavery Celebration in Framingham, Massachusetts, on July 4, 1854.
[3] Nathan Silver, *Lost New York* (Boston: Houghton Mifflin, 1967), 46.
[4] American Anti-Slavery Society, *Fifth Annual Report of the American Anti-Slavery Society: With the Minutes of the Meetings of the Society for Business: And the Speeches Delivered at the Anniversary Meeting, Held on the 8th May, 1838.* (New York City: William S. Dorr, 1838), 3-4.
[5] Ibid.
[6] Ibid; for further reading on William Lloyd Garrison's abolitionist agitation in the 1830s, see Henry Mayer, *All On Fire: William Lloyd Garrison and the Abolition of Slavery* (New York: St. Martin's Press, 1998).
[7] Lawrence B. Goodheart, "Elizur Wright," American National Biography Online, February 2000, accessed January 5, 2021, https://doi-org.ezproxy.cul.columbia.edu/10.1093/anb/9780198606697.article.1500861; Gerald Sorin, *The New York Abolitionists: A Case Study of Political Radicalism*, vol. 11, Contributions in American History (Westport, CT: Greenwood Publishing, 1971), 52-54.
[8] *Fifth Annual Report of the American Anti-Slavery Society*, 3-4.

Columbia was a young man with a rather auspicious name: John Jay, the grandson of the Founding Father.[9] Born in New York City to William Jay, himself a committed abolitionist, John Jay II was twenty-one when he attended the Meeting, having graduated from Columbia just two years prior, in 1836.[10]

At the Fifth Annual Meeting, a gathering that featured the leading clergymen, publishers, lawyers, and theorists of the American abolitionist movement, the most consequential intervention for the purposes of this thesis came from Alvan Stewart. Born in Granville, a small New York town adjacent to the Vermont border, Stewart came from modest means: his father worked as a common farmer, and young Alvan worked part-time as a teacher to afford his tuition at the University of Vermont.[11] Following his graduation in 1813, Stewart practiced law for sixteen years in the town of Cherry Valley before being elected mayor at the age of 31.[12] As the Protestant revivalism of the Second Great Awakening swept through Central New York, Stewart abandoned his private legal practice and devoted himself to the causes of abolitionism and temperance, first moving to Utica, a hub of antislavery organizing, in 1826 before joining the American Anti-Slavery Society in 1834.[13] The following year, Stewart was instrumental in the formation of the New York State Anti-Slavery Society.[14]

On May 4, 1838, Stewart introduced a semantic revision to the constitution of the American Anti-Slavery Society. His motion called for the removal of a clause which recognized

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[9] *Fifth Annual Report of the American Anti-Slavery Society*, 3-4; Hereafter referred to as "John Jay II" to avoid confusion with his grandfather and namesake.
[10] Columbia University, *Officers and Graduates of Columbia University, Originally the College of the Province of New York Known as King's College, General Catalogue 1754-1900* (New York: Columbia University Press, 1900), 532; For a comprehensive analysis of Jay II's understanding of slavery and abolitionism, especially during his years as a student at Columbia, see Jared Odessky, "'Possessed of One Idea Himself': John Jay II's Challenges to Columbia on Slavery and Race," Seminar Paper, Columbia and Slavery, Spring 2015.
[11] Sorin, *The New York Abolitionists,* 47-48.
[12] Ibid, 48.
[13] Milton C. Sernett, "Alvan Stewart," American National Biography Online, February 2000, accessed January 5, 2021, https://doi-org.ezproxy.cul.columbia.edu/10.1093/anb/9780198606697.article.1500653.
[14] New York Anti-Slavery Convention, *Proceedings of the New York Anti-Slavery Convention: Held at Utica, October 21, and New York Anti-Slavery State Society: Held at Peterboro', October 22, 1835* (Utica, NY: Standard & Democrat Office, 1835), 15.

"that each State in which slavery exists has, by the Constitution of the United States, to *legislate* in regard to its abolition in said state."[15] Despite its brevity, this clause was profoundly significant, for it acknowledged that slavery was a legitimate domestic institution of the several states. This, in turn, limited the constitutional power of the federal government to interfere with or abolish it in the states. The conceptualization that Congress had limited constitutional authority to abolish slavery in the states is referred to as the "federal consensus."[16] Tethered to this federal consensus, the American Anti-Slavery Society instead focused on the eradication of slavery from areas under exclusive federal jurisdiction, such as the District of Columbia.[17]

Alvan Stewart, however, refused to concede that the Constitution had limited authority over slavery in the states. Throughout his writings and public speeches, Stewart advanced a radical reinterpretation of the Constitution, one that empowered Congress to abolish slavery everywhere, *even in the states*. One year earlier, speaking before the New York Anti-Slavery Society in Utica, Stewart introduced this unorthodox antislavery interpretation of the Constitution, which I will hereafter refer to as "antislavery due process," into the national discourse of the abolitionist movement.[18] While the vast majority of American abolitionists accepted the constitutional right of the states to manage all domestic institutions, Stewart rejected such a limited conceptualization of constitutional authority: "Congress, by the power conferred on it by the Constitution, possesses the entire and absolute right to abolish slavery in every state and territory in the Union."[19] The key, in Stewart's theory, was the Due Process Clause of the

[15] American Anti-Slavery Society, *The Constitution of the American Anti-Slavery Society: With the Declaration of the National Anti-Slavery Convention at Philadelphia, December, 1833: And the Address to the Public, Issued by the Executive Committee of the Society, in September, 1835* (New York: American Anti-Slavery Society, 1838), 3-4; *Fifth Annual Report of the American Anti-Slavery Society*, 9;
[16] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), 16; James Oakes, *The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution* (W. W. Norton & Company, 2021), 19.
[17] *The Constitution of the American Anti-Slavery Society*, 4.
[18] Wiecek, *Sources of Antislavery Constitutionalism*, 254-255.
[19] "A Constitutional Argument," *Friend of Man*, 18 Oct. 1837.

Fifth Amendment, which guaranteed that no person "shall be deprived of life, liberty, or property without due process of law."[20]

This invocation of the Fifth Amendment was, in and of itself, unusual. In 1833, just five years before Stewart's speech in Utica, the U.S. Supreme Court delivered a landmark ruling in *Barron v. Baltimore*. Writing for a unanimous Court, Chief Justice John Marshall determined that the individual protections enumerated in the Bill of Rights were only binding upon the actions of Congress.[21] With the Bill of Rights, including the Fifth Amendment, interpreted as solely applicable against *federal* interference, the Court offered the states full discretionary authority over whether to abide by these enumerated rights.[22] For much of the antebellum period, the American abolitionist movement accepted both the federal consensus and the *Barron* precedent as settled law, acknowledging that slavery was effectively untouchable in the states.[23]

Stewart's theory of antislavery due process introduced an alternative interpretation of American federalism and constitutional authority. In his interpretation, the protections guaranteed by the Bill of Rights were not exclusively binding on Congress, as the Supreme Court had determined in *Barron*, but also applied against the legislative actions of the states.[24] If the Due Process Clause was also binding on state institutions, Stewart reasoned, then slavery itself was unconstitutional as an overt deprivation of life and liberty without due process of law.[25] Thus, Stewart sought to apply the full weight of the Fifth Amendment against the states, contending that slavery was constitutionally repugnant in every corner of the Union.[26]

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[20] U.S. Const. amend. V.
[21] *Barron ex rel. Tiernan v. Mayor of Baltimore* 32 U.S. 243 (1833). Also see Akhil Amar, "The Bill of Rights and the Fourteenth Amendment," *Yale Law Journal* 101, no. 6 (1992).
[22] *Barron ex rel. Tiernan v. Mayor of Baltimore* 32 U.S. 243 (1833).
[23] *The Declaration of Sentiments and Constitution of the American Anti-Slavery Society* (New York: American Anti-Slavery Society, 1835), http://hdl.handle.net/2027/mdp.69015000003372, 5-6.
[24] Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1984), 56.
[25] "A Constitutional Argument," *Friend of Man*, 18 Oct. 1837.
[26] Ibid; Wiecek, *The Sources of Antislavery Constitutionalism*, 255.

From the historical record, Stewart was seemingly aware of just how unorthodox his interpretation would appear compared with the federal consensus and the *Barron* precedent. Indeed, his decision to first present his theory at the smaller New York Anti-Slavery Society convening was to ensure that his constitutional framework could "pass through the ordeal of consideration and discussion" before the national AA-SS meeting scheduled for the following spring.[27] As he predicted, his motion to remove language from the Society's constitution that acknowledged slavery's legality in the states – and the unorthodox constitutional interpretation that inspired his motion – was deeply controversial. Many of the more moderate political abolitionists were unwilling to consider such a radical departure from established jurisprudence: William Jay denounced Stewart's interpretation as a "vile heresy" and was joined by Wendell Phillips, Ellis Gray Loring, Elizur Wright, and Joshua Leavitt in circulating a set of constitutional objections to Stewart's argument.[28] Unsurprisingly, Stewart's motion failed to secure the two-thirds majority required for passage.[29]

Taken together, Alvan Stewart's address before the New York Anti-Slavery Society in 1837, and his controversial motion presented before American Anti-Slavery Society the following year, represent the genesis of antislavery due process. At its core, the theory rejected the established jurisprudential precedent that limited the applicability of the Bill of Rights against the actions of the states. Instead, antislavery due process contended that the entire Bill of Rights, but especially the Due Process Clause of the Fifth Amendment, was equally binding against the states as against Congress. As a result, the authority of the Fifth Amendment rendered

[27] "A Constitutional Argument," *Friend of Man*, 18 Oct. 1837.
[28] *The Emancipator*, 7 June 1838; William Jay to Elizur Wright, 13 April 1838, both referenced in Wiecek, *The Sources of Antislavery Constitutionalism*, 255.
[29] Randy Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment," *Journal of Legal Analysis* 3, no. 1 (March 2011), 191.

slavery constitutionally void as an unlawful deprivation of the life and liberty of the slave in state and territory alike.[30]

Despite an expanding historiography concerning the constitutional argumentation of the abolitionist movement, Alvan Stewart's antislavery due process has heretofore been examined exclusively as a *theory*, or the subject of published books, legal pamphlets, public speeches, and personal correspondence. Certainly, Stewart's voluminous published writings contain detailed articulations of his unorthodox interpretation of the Fifth Amendment. However, through a considered analysis of four slavery-related cases litigated between 1840 and 1860, I will demonstrate that antislavery due process was not exclusively a constitutional theory. Rather, Stewart's unusual interpretation of the Fifth Amendment functioned as a coherent legal strategy employed by abolitionist lawyers such as John Jay II, Gerrit Smith, and Stewart himself in formal litigation, usually on behalf of fugitive slaves, in the antebellum North. Put simply, antislavery due process was as much abolitionist legal *practice* as it was constitutional *theory*.

Section II: Methodology

Methodologically, my paper focuses on four slavery-related legal cases litigated between 1840 and 1860 in Northern state courts, primarily in New York State.[31] In each of the cases, abolitionist lawyers employed Alvan Stewart's theory of antislavery due process in formal legal proceedings. Taken together, these four cases demonstrate that antislavery due process was not

[30] "A Constitutional Argument," *Friend of Man*, 18 Oct. 1837.

[31] The legal cases I will discuss are *State v. Van Buren*, 20 N.J.L. 368 and *State v. Post*, 20 N.J.L. 368, collectively referred to as the "New Jersey Slave Case," *In re Kirk*, 4 N.Y. Leg. Obs. 456, (1846), *In re Belt*, 7 N.Y. Leg. Obs. 80 (1848), and the Trial of Henry W. Allen (1852). The first example was litigated before the Supreme Court of New Jersey by Alvan Stewart, a New Yorker. Despite the geographic proximity, New York and New Jersey differed significantly on the issue of slavery. When discussing the New Jersey Slave Case, I will focus on Stewart's legal strategy within the larger context of abolitionist litigation and the application of antislavery due process in formal legal proceedings, but will also acknowledge the geographic and political distinctions.

exclusively a theoretical abstraction disconnected from the material injustices of slavery. Rather, Stewart's conceptualization that the Fifth Amendment also applied against the actions of states, thereby invalidating the institution of slavery everywhere, was a coherent legal strategy developed through formal litigation in Northern courts. Such an argument does not appear in the present historiographic ecosystem of abolitionist constitutionalism and legal theory.

Section III: Literature Review

In recent years, legal scholars and American historians alike have sought to study the body of constitutional argumentation produced by the abolitionist movement. Such scholarship has focused almost exclusively on abolitionist constitutional *theory*, or the system of ideas conceptualized by abolitionist lawyers to articulate the illegitimacy of slavery, found in their published books, treatises, legal pamphlets, personal correspondence, and public speeches delivered in antislavery conventions. However, the relevant historical literature concerning American constitutional history has devoted little attention to antislavery *litigation*, or the practical application of this abolitionist theory to formal legal proceedings in an established court of law before a judge or jury. Conversely, the historiography concerning American slavery and abolition often explores particular examples of antislavery litigation, namely the freedom suits advanced on behalf of accused fugitive slaves, but seldom contextualizes such examples within any overarching framework of constitutional interpretation.

Section III A: Constitutional History – Theory Without Practice

To begin with, the historiography of American constitutionalism, even antislavery constitutionalism, seldom considers particular examples of abolitionist litigation. For example, in William Wiecek's foundational study of antislavery constitutional theory, nearly all of the analysis concerns the development of abolitionist constitutional thought *outside* of the courtroom. To be sure, Wiecek's research is exceptionally thorough, diligently navigating all available published abolitionist pamphlets, personal correspondence, and public speeches delivered at antislavery conventions. However, his analysis of Stewart's theory of antislavery due process appears somewhat incomplete. While Wiecek does describe Stewart's practical application of antislavery due process before the New Jersey Supreme Court in 1845, he does so within a larger chapter concerning abolitionist constitutional *theory*, spending the remainder of his analysis discussing published books and legal pamphlets.[32] Put differently, a critically important example of abolitionist *litigation* is situated within a chapter otherwise devoted to theoretical abstraction, a contextualization that diminishes Stewart's independent status as a litigator, as well as a theorist. Moreover, Wiecek does not consider the extent to which other abolitionist lawyers, namely John Jay II and Gerrit Smith, adopted antislavery due process into their legal practice.[33]

In *Equal Under Law: The Antislavery Origins of the Fourteenth Amendment,* Jacobus TenBroek provides arguably the most diligent analysis of Stewart's inventive interpretation of the Fifth Amendment and its authority over slavery in the states. While Stewart's constitutional argument remained too radical for most abolitionists, TenBroek credits Stewart with ushering in

[32] Wiecek, *Sources of Antislavery Constitutionalism*, 249-275.
[33] Ibid, 257.

a "revolution in federalism" within abolitionist constitutionalism, compelling other abolitionist lawyers to reconsider their previous deference to the federal consensus.[34] Specifically, men such as Gerrit Smith, William Goodell, George Mellen, Lysander Spooner, Joel Tiffany, and James G. Birney all eventually adopted Stewart's argument that Congress possessed the constitutional authority to abolish slavery in the states, albeit not all of these men were so narrowly confined to the Fifth Amendment.[35] However, TenBroek's scholarship still omits any discussion of the aforementioned abolitionists who adopted Stewart's interpretation as *litigators*. While Smith, Spooner, Tiffany, and the others certainly published influential works of abolitionist constitutional theory, a significant historiographic gap continues to exist in terms of the application of antislavery due process in formal legal proceedings.[36]

Robert Cover, in his *Justice Accused: Antislavery and the Judicial Process*, considers the New Jersey Slave Case to be the sole example of antislavery due process in abolitionist litigation. While Cover does consider instances of abolitionist litigation in other Northern states, his discussion of antislavery due process begins and ends with Stewart's argument before the New Jersey Supreme Court. Moreover, Cover conveys an open intellectual hostility towards Stewart's interpretation of the Fifth Amendment. For Cover, Stewart represented the vanguard of the "constitutional utopians," a radical and otherwise insignificant collection of abolitionist legal thinkers whose "idiosyncratic views" were largely disconnected from established jurisprudential norms and principles.[37] Concerning antislavery due process, Cover was particularly dismissive: "It is an argument founded wholly on constitutional text and requires nothing more than a suspension of reason concerning the origin, intent, and past interpretation of the [Due Process]

[34] Jacobus TenBroek, *Equal Under Law: Antislavery Origins of the Fourteenth Amendment* (Berkeley: University of California Press, 1951), 67.
[35] Ibid, 72.
[36] Ibid, 72-93.
[37] Cover, *Justice Accused*, 56.

clause."[38] As a result, Cover neglects to consider Stewart's theorization as a legitimate constitutional interpretation or coherent legal strategy.

In their respective journal articles, both Randy Barnett and Louisa Heiny adopt Wiecek's theoretical approach to abolitionist constitutionalism. Barnett, in his work, inadvertently demonstrates the critical gap in the existing historiography. Despite a stated focus on abolitionist legal *content*, Barnett's work neglects any consideration of the abolitionists as trained lawyers who actively applied their constitutional theory to their legal practice in courtrooms across the North.[39] Instead, Barnett focused his research entirely on sources produced outside of formal legal proceedings.[40] Similarly, Louisia Heiny seeks to demonstrate the extent to which abolitionist constitutional theory foreshadowed the Fourteenth Amendment and the application of the Bill of Rights against the states, a process known as "incorporation."[41] While she expertly demonstrates how Stewart's theorization of antislavery due process would have radically transformed the federal relationship between state and national authority, she, too, focuses entirely on abolitionist constitutional theory developed in pamphlets and speeches, rather than legal arguments and court decisions.[42]

Even exceedingly recent scholarship, such as James Oakes' *The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution*, marginally considers the application of antislavery due process in a court of law. To be sure, Oakes' research succeeds in positioning the debate over slaves as "persons" or "property," and the critical role of the Fifth

[38] Cover, *Justice Accused*, 157.
[39] Randy Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment," *Journal of Legal Analysis* 3, no. 1 (March 2011), 191.
[40] Ibid, 183.
[41] "Incorporation Doctrine," Legal Information Institute, Cornell Law School, accessed December 05, 2020, https://www.law.cornell.edu/wex/incorporation_doctrine); Louisa Heiny, "Radical Abolitionist Influence on Federalism and the Fourteenth Amendment." *The American Journal of Legal History* 49, no. 2 (April 2007), 184.
[42] Heiny, "Radical Abolitionist Influence," 184.

Amendment in that debate, at the epicenter of antebellum constitutional discord over slavery.[43] However, his discussion of abolitionist legal thinkers who challenged the federal consensus is noticeably brief, as Oakes casually notes the existence of "another group of radicals – William Goodell, Alvan Stewart, Lysander Spooner, and others [who] pushed in the opposite direction by arguing that the Constitution was an abolitionist document."[44] In this brief description of the few abolitionist legal thinkers who refuted the federal consensus, Oakes curiously highlights the work of William Goodell, rather than Alvan Stewart: "Goodell and his followers held that the federal government was fully empowered to abolish slavery everywhere."[45] Although Goodell's *Views of American Constitutional Law in its Bearing Upon American Slavery* was an influential piece of abolitionist constitutional theory, it was published in 1844, several years following Stewart's first articulation of antislavery due process in 1837. As this is the sole mention of Alvan Stewart in Oakes' work, *The Crooked Path to Abolition* does not contain any substantive discussion of antislavery due process as a strategy for abolitionist litigation.

Section III B: History of American Slavery – Practice Without Theory

Although the existing historiography of American slavery usually considers abolitionist litigation, namely freedom suits in Northern courts, such examples of abolitionist legal practice are seldom organized within a recurring constitutional interpretation or framework. Eric Foner's *Gateway to Freedom: The Hidden History of the Underground Railroad*, for example, provides an incisive investigation into the infrastructure of the Underground Railroad in antebellum New York City and the network of lawyers who were recruited to represent alleged fugitive slaves in

[43] Oakes, *The Crooked Path to Abolition*, 14.
[44] Ibid, 38.
[45] Ibid.

local courts, such as John Jay II.[46] Given his expertise as a historian of American slavery and freedom, however, rather than a constitutional historian, Foner's analysis of the abolitionist lawyers who represented alleged fugitive slaves tends not to engage with the constitutional substance of their legal arguments. John Jay II is a prominent figure within Foner's work, but *Gateway to Freedom* does not seek to advance any argumentative claims concerning the constitutional doctrines, interpretations, and frameworks employed by Jay in his extensive antislavery lawyering.[47]

In *The Slave's Cause: A History of Abolition*, Manisha Sinha masterfully considers the abolitionist movement as a radical social and political movement, with a particular focus on the centrality of slave resistance in shaping the ideology and tactics of abolition. Sinha elucidates the parameters of Stewart's radical reinterpretation of the Constitution, concerning both the Fifth Amendment and the constitutional authority of Congress to abolish slavery in the states, and the extent to which many moderate abolitionist lawyers decried antislavery due process as heretical.[48] However, despite being a comprehensive history of abolitionism, Sinha's text more closely follows the example of Wiecek, TenBroek, and the constitutional historians in its emphasis on abolitionist constitutional *theory* over legal practice. In her discussion of antislavery due process, Sinha refers exclusively to *A Constitutional Argument on the Subject of Slavery*, a pamphlet published by Stewart containing the text of his argument before the Supreme Court of New Jersey.[49] By neglecting to disclose that Stewart's constitutional theorization enjoyed its day in court (pun intended), Sinha's work does not substantively engage with antislavery due process as a coherent strategy employed in abolitionist litigation.

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[46] Eric Foner, *Gateway to Freedom: The Hidden History of the Underground Railroad* (New York: W.W. Norton & Company, 2016), 68.
[47] Ibid, 113.
[48] Manisha Sinha, *The Slave's Cause: A History of Abolition* (New Haven: Yale University Press, 2017), 474.
[49] Ibid; Alvan Stewart, *Writings and Speeches of Alvan Stewart, on Slavery.*, ed. Luther Rawson Marsh (New York: A.B. Burdick, 1860), http://hdl.handle.net/2027/miun.abt7773.0001.001, 272.

Although he is a legal historian, Paul Finkelman's *Slavery in the Courtroom* encapsulates the historiographic tendency to consider individual examples of antislavery legal practice without an overarching constitutional framework. The work, an annotated anthology of slavery-related cases in antebellum courts, seldom, if ever, advances a comparative analytical framework to connect disparate cases together. With that said, the work does contain substantive discussion of *People v. Allen* in 1852; very few texts in the historiography of American slavery mention this case at all. Finkelman does discern the extent to which Gerrit Smith argued that slavery was universally unconstitutional, but neglects to connect this unorthodox argument back to Stewart's antislavery due process, his litigation in New Jersey, or Jay's argument in *In re Kirk*, both of which are discussed elsewhere in the work.[50]

Sarah Gronningsater's excellent article on *Lemmon v. the People*, one of the most consequential freedom suits litigated in antebellum New York, further provides a compelling discussion of abolitionist litigation in New York City.[51] Gronningsater not only pays particular attention to the contributions of Black New Yorkers, ordinary men and women without a formal legal education, within the constitutional movement for the abolition of slavery, but also analyzes the extensive antislavery legal advocacy of John Jay II, including his representation of George Kirk and Joseph Belt.[52] While Gronningsater does focus on antislavery litigation, her work does not substantively consider the legal content or constitutional implications of Jay's litigation on behalf of fugitive slaves in New York City. More specifically, Gronningsater does not advance an argument that Jay's legal advocacy, especially his representation of Kirk and Belt, was connected with Stewart's interpretation of the Fifth Amendment.

[50] Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of American Cases* (Union, NJ: Lawbook Exchange, 1998), 106.
[51] Sarah Gronningsater, "'On Behalf of His Race and the Lemmon Slaves': Louis Napoleon, Northern Black Legal Culture, and the Politics of Sectional Crisis," *Journal of the Civil War Era* 7, no. 2 (June 2017).
[52] Ibid, 214; *In re Kirk*, 4 N.Y.Leg.Obs. 456, (1846).

It would be wrong "to admit in the Constitution the idea that there could be property in men."

– James Madison at the Constitutional Convention, August 25, 1787.[53]

Chapter 1: Slavery and the Bill of Rights

In July 1787, several weeks into the Constitutional Convention in Philadelphia, James Madison issued a warning: the conflict that would define the formation of the Constitution would not be waged between large states and small states "but between the N. & Southn. States" over "the institution of slavery & its consequences."[54] Time would prove him right: although neither the word "slavery" nor "slave" would appear in the text of the Constitution, the institution was pivotal to the formation of early American law, jurisprudence, and republican government.[55] Throughout the proceedings of the Constitutional Convention, the contested legal status of slavery underwrote many of the more fractious debate concerning congressional representation, interstate commerce and foreign trade, the maintenance of public order, and the appropriate distinction of political authority between Congress and the states. Of these fissures, perhaps none was as consequential – to the Framers, the abolitionist movement, and this thesis – than the debate over property rights, and how the Constitution would reconcile a Southern political economy that recognized the right to hold property in human beings with an increasing number of Northern states that forbade such ownership.[56] While the Framers of the Constitution did

[53] Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 2 (New Haven: Yale University Press, 1911), 417.
[54] Ibid, 10; Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Cambridge: Harvard University Press, 2019), 58.
[55] The historiographic ecosystem concerning the institution of slavery and the U.S. Constitution is voluminous. See, for example, George W. Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* (Chicago: University of Chicago Press, 2010); Mason I. Lowance, ed. *A House Divided: The Antebellum Slavery Debates in America, 1776-1865* (Princeton, NJ: Princeton University Press, 2003); Jean Allain, ed. *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford, UK: Oxford University Press, 2012); Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton, NJ, Princeton University Press, 1998); John Kaminski, ed. *A Necessary Evil?: Slavery and the Debate Over the Constitution* (Lanham, MD, Rowman & Littlefield, 1995); Peter B. Knupfer, *The Union As It Is: Constitutional Unionism and Sectional Compromise, 1787-1861* (Chapel Hill, University of North Carolina Press, 2000); and Michael F. Conlin, *The Constitutional Origins of the American Civil War* (Cambridge, UK: Cambridge University Press, 2019).
[56] For a dedicated economic history of the irreconcilability of two regimes of property rights in the antebellum United States, see James L. Huston, "Property Rights in Slavery and the Coming of the Civil War." *The Journal of Southern History* 65, no. 2 (1999): 249–286.

negotiate a series of compromises with the slaveholding delegates on seemingly all of the aforementioned points of tension, the founding document remained ambiguous on the proposition that slavery was a legitimate form of property, that one could hold property in men. This textual obscurity on the critical question of slavery's dual legal status would have cascading consequences throughout the antebellum period and, through the development of abolitionist constitutional theory and practice, would sow the very seeds by which slavery's existence in the Union could be challenged.[57]

Section I: Property in Man and a Contested Constitution

By the end of the Convention, slaveholders had secured a litany of provisions that sanctified the institution within federal law and bolstered Southern political and economic might in the nascent republic.[58] Among these included the infamous Three-Fifths Clause (Art. I, §. 2, Clause 3), which tethered slaveholding with political influence in the House of Representatives and the Electoral College; the Slave Trade Clause (Art. I, §. 9, Clause 1), which prohibited the federal government from imposing a ban on the African Slave Trade until 1808; the Fugitive Slave Clause (Art. IV, §. 2, Clause 3), whereby masters retained the legal right to claim a runaway slave who fled into another state; and the Insurrections Clause (Art. I, §. 8, Clause 15), which granted Congress the authority to "call forth the militia" to quell domestic violence, including slave rebellions.[59] More broadly, the Constitution's numerous concessions to the

[57] Wilentz, *No Property in Man*, 22.
[58] Van Cleve, *A Slaveholders' Union*, 117.
[59] Wilentz, *No Property in Man*, 58-59. Also see Earl Maltz, "The Idea of the Proslavery Constitution." *Journal of the Early Republic* 17, no. 1 (1997): 37–59.

slaveholding South effectively constrained the egalitarian and liberationist impulses of the American Revolution.[60]

Alongside such concessions, however, the Constitution was strikingly ambiguous on the most critical detail of all: recognition of the right to hold property in persons. On the one hand, Sean Wilentz and Paul Finkelman have argued that the surviving record of the debates of the Constitutional Convention, and the text of the Constitution itself, indicate that the Framers deliberately excluded any provision that would validate the proposition that slavery was a legitimate form of property ownership. The infamous Fugitive Slave Clause, for example, did not explicitly refer to slaves but concerned any "person held to service or labour in one state."[61] Although the states retained significant authority when defining forms of property within their jurisdiction, the Constitution consistently referred to slaves as "persons" rather than property.[62] This, for Wilentz, encapsulates the "terrible paradox" at the heart of republican government in the United States: "A Constitution that strengthened and protected slavery yet refused to validate it."[63] Conversely, other provisions of the Constitution suggest that, despite the use of evasive language, slaves remained legally codified as property. In the Slave Trade Clause, Congress was explicitly denied the authority to abolish the international slave trade before 1808 but was empowered to levy a "tax or duty" on slaves as if they were any other form of imported goods.[64] While Wilentz has concluded that property in men received no explicit validation in federal law, the text of the Constitution appears inconclusive when balancing the dual legal status of slaves as simultaneously persons *and* property.[65]

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[60] James Oakes, "The Compromising Expedient: Justifying a Proslavery Constitution Bondage, Freedom and the Constitution," *Cardozo Law Review* 17, no. 6 (May 1996): 2023.
[61] U.S. Const. art. IV, §. 2, cl. 3; Paul Finkelman, "Slavery in the United States: Persons or Property?" In *The Legal Understanding of Slavery: From the Historical to the Contemporary*, 105–34. Oxford, UK: Oxford University Press, 2012, 119.
[62] Finkelman, "Slavery in the United States," 118.
[63] Wilentz, *No Property in Man*, 22.
[64] U.S. Const. art. I, §. 9, cl. 1.
[65] Wilentz, *No Property in Man*, 22: Finkelman, "Slavery in the United States," 118.

Section II: The Rise of the Fifth Amendment

With the ratification of the Bill of Rights in 1791, the constitutional obscurity concerning the right to hold property in the form of human beings would prove to be immensely consequential. While the idea of a supplementary charter to establish individual rights occasionally surfaced during the proceedings of the Constitutional Convention, the impetus for a bill of rights gained serious momentum during the debates over constitutional ratification.[66] Following the Convention, state legislatures were consumed by fierce opposition from Anti-Federalists over the lack of a bill of rights in the Constitution, and Madison quickly understood that a bill of rights would be the explicit price for the good will of Anti-Federalists during the ratification debates.[67] The resulting compromise, passed by the First Congress, was a set of twelve amendments designed to specifically enumerate individual rights that could not be abridged by the federal government, but only the last ten were ratified by the requisite three-fourths of state legislatures to become binding provisions of the Constitution.[68]

Of the first ten amendments, none was more concretely tethered to the contested legal status of slavery than the Fifth Amendment. At first glance, such a significance might not seem entirely obvious, seeing as the Amendment established a range of individual rights guaranteed to all persons during legal proceedings, such as the right to a grand jury and protections against self-incrimination.[69] However, the Amendment also contained the storied Due Process Clause: "no person… shall be deprived of life, liberty, or property without due process of law."[70]

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[66] Daniel Farber and Neil S. Siegel, *United States Constitutional Law* (St. Paul, MN: Foundation Press, 2019), 234.
[67] Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," *Yale Law Journal* 101, no. 6 (April 1992), 1202.
[68] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 8.
[69] "Fifth Amendment," Legal Information Institute, Cornell Law School, accessed January 07, 2021, https://www.law.cornell.edu/constitution/fifth_amendment; For a more comprehensive history of the juridical origins of the Fifth Amendment and the formation of the constitutional text, see Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (New York: Oxford University Press, 1968).
[70] U.S. Const. amend. V; Roger A. Fairfax and John C. Harrison, "The Fifth Amendment Due Process Clause," National Constitution Center, accessed January 13, 2021, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-v/clauses/633).

The implications introduced by the Fifth Amendment for the legal security of slavery were profound. On the one hand, if American law considered slavery to be a legitimate form of property ownership, then the Fifth Amendment would effectively prohibit Congress from pursuing any abolitionist legislation whatsoever, for federal interference with slavery would be an unconstitutional deprivation of a slaveowners' "property."[71] This constitutional interpretation was repeatedly invoked by Southern congressmen during the period of congressional turbulence surrounding the Missouri Compromise in 1820. Alexander Smyth, a Virginian, proclaimed that "the Constitution recognises the right to slave property, and it thereby appears that it was intended, by the [Federal] Convention and by the people, that that property should be secure."[72] Benjamin Hardin of Kentucky confidently asserted that the right to hold property in man was "absolute and unqualified, as much so as to any property a man can possess," a right "unequivocally recognized by the Constitution."[73] Together, the proslavery interpretation of the Fifth Amendment relied on the proposition that slaves were fundamentally a form of property, which in turn meant that any "interference with that property by the federal government or any other body in any way was a violation of the slaveholders' guarantee of due process under the Fifth Amendment."[74]

Of course, the language of the Fifth Amendment also enabled an alternative, antislavery interpretation. For abolitionist lawyers and legal theorists, the Constitution, even in its most ardently proslavery provisions, referred to slaves using a language of fundamental personhood.[75] The Due Process Clause, too, spoke not of citizenship rights but individual protections guaranteed to all *persons*. As a result, the textual ambiguity of the Constitution concerning the

[71] Finkelman, "Slavery in the United States," 120.
[72] AC, 16 Cong., I sess., House, 994, quoted in Wilentz, *No Property in Man*, 196.
[73] AC, 16 Cong., I sess., House, 1076, quoted in Wilentz, *No Property in Man*, 196.
[74] Wilentz, *No Property in Man*, 196.
[75] Finkelman, "Slavery in the United States," 117.

right to hold property in the form of human beings was incredibly significant in the way it also enabled an abolitionist interpretation of the Fifth Amendment: if slaves were considered "persons," then slaves could not be deprived of life and liberty without due process of law.[76]

Section III: John Marshall, the Bill of Rights, and the Several States

The abolitionist implications of the Fifth Amendment, however, were constrained by the constitutional doctrine of federalism. In crafting the Bill of Rights, Madison intended that the authority of first ten amendments only extend over the actions of Congress, rather than regulate the domestic institutions of the several states.[77] Such a limited authoritative scope was affirmed by the U.S. Supreme Court in *Barron v. Baltimore*, one of the landmark decisions of the antebellum period. Interestingly, the *Barron* jurisprudence concerned another portion of the Fifth Amendment known as the Takings Clause, which prohibited the confiscation of private property by the federal government "without just compensation," and whether this provision also applied against state and municipal governments.[78] Writing for a unanimous Court, Chief Justice John Marshall issued a sweeping opinion in which he concluded that the entire Bill of Rights was "intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States."[79] Should the states desire to grant their citizens similar rights, Marshall reasoned, the legislatures could simply amend their state constitutions: "Had the people of the several States...required additional safeguards to liberty

[76] Finkelman, "Slavery in the United States," 119; Wilentz, *No Property in Man*, 19.
[77] Amar, *The Bill of Rights: Creation and Reconstruction*, 5.
[78] "Takings," Legal Information Institute, Cornell Law School, accessed January 16, 2021, https://www.law.cornell.edu/wex/takings.
[79] *Barron ex rel. Tiernan v. Mayor of Baltimore* 32 U.S. 243 (1833).

from the apprehended encroachments of their particular governments, the remedy was in their own hands, and could have been applied by themselves."[80]

For much of the antebellum period, the American abolitionist movement accepted the *Barron* precedent as settled law. The prominent abolitionist organizations implicitly affirmed the limited applicability of the Bill of Rights against the states by focusing the bulk of their advocacy against slavery in areas under the exclusive jurisdiction of the federal government. According to its own constitution, the American Anti-Slavery Society will "endeavour, in a constitutional way, to influence Congress… to abolish slavery in all those areas of our common country that come under its control, especially in the District of Columbia."[81] Put differently, the Bill of Rights could be employed as a mechanism to disrupt the institution of slavery in federal areas, but most abolitionists refused to extend such constitutional authority into the states.[82]

[80] *Barron ex rel. Tiernan v. Mayor of Baltimore* 32 U.S. 243 (1833).
[81] *The Constitution of the American Anti-Slavery Society*, 4.
[82] Finkelman, "Slavery in the United States," 119; Wiecek, *Sources of Antislavery Constitutionalism*, 16.

"Will any man pretend that plantation and cartwhip discipline is due process of law? Will any pretend that being deprived of the right to learn to read, or write, as in some of our States, under the penalty of twenty-five lashes on the naked back of the teacher and the taught, is due process of law? Is this the due process of law, named in the Constitution of the United States? The pursuing of fugitives with bloodhounds, cannot be the due process of law of the Constitution?"

– Alvan Stewart before the Supreme Court of New Jersey, May 1845.[83]

Chapter 2: Alvan Stewart and the Slow Death of Slavery in New Jersey

Less than a decade removed from the initial formulation of antislavery due process, Alvan Stewart advanced his unorthodox constitutional interpretation in formal legal proceedings. Stewart served as the principal litigant in two congruent freedom suits – *State v. Post* and *State v. Van Beuren*, collectively referred to as the "New Jersey Slave Case" – pending before the Supreme Court of New Jersey.[84] Following a lengthy examination of the incompatibility of New Jersey state law with the institution of slavery, Stewart focused squarely on the provisions of the U.S. Constitution and the Bill of Rights. Just as he had outlined to the delegates of New York and American Anti-Slavery Society meetings in the late 1830s, Stewart contended that slaves in New Jersey had been reduced to the condition of enslavement without any legal process whatsoever. As a result, Stewart reasoned, any person held as a slave in the state had been deprived of his or liberty without due process of law. By deliberately obscuring the boundaries of state and federal law, as defined by the Supreme Court in *Barron*, Stewart's antislavery due

[83] Alvan Stewart, *A Legal Argument Before the Supreme Court of the State of New Jersey: At the May Term, 1845, at Trenton, for the Deliverance of Four Thousand Persons* (New York: Finch & Weed, 1845), 35.

[84] Ibid. On a technical note, I am aware that this particular case seems to fall outside the geographic scope of my thesis, which intends to analyze abolitionist litigation *in New York*. However, I elected to include the New Jersey Slave Case as an example for two reasons. First, Alvan Stewart himself was born in upstate New York and was invited to New Jersey by local abolitionists to litigate these cases precisely because Stewart the former president of the New York Anti-Slavery Society. Moreover, the New Jersey Slave Case is indubitably the clearest example of antislavery due process as a functional litigation strategy in the historical record, since the principal lawyer in the case was the same individual who formulated the theory in the first place.

process functioned as the legal argument of choice in his attempt to convince the state's highest tribunal that the institution of slavery was entirely unconstitutional across the Garden State.

Section I: "Perfect Apathy" Towards Black Freedom

To borrow a phrase coined by an esteemed scholar at Columbia, the institution of slavery had several enduring afterlives in New Jersey.[85] After several decades of consistent anti-slavery agitation by the state's Quakers, the New Jersey legislature passed the 1804 Gradual Abolition Act, becoming the last Northern state to begin the process of gradual emancipation.[86] Although a significant step in the struggle against slavery, the statute included several mechanisms that ensured abolition would be a cumbersome process. According to the Act, any child born to a slave after July 4, 1804 would be considered legally free, "but shall remain the servant of the owner of his or her mother" until the child turned 25 (if male) or 21 (if female).[87] This provision "opened a fluid boundary between slavery and freedom" that was regularly exploited by New Jersey slaveholders with little resistance from elected legislators or state courts.[88] Meanwhile, any slave born prior to 1804 would remain in bondage unless liberated via private manumission.[89]

Even with the Gradual Abolition Act, slavery was deeply entrenched in the economic, political, and social infrastructure of New Jersey. In the intervening decades between 1804 and

[85] Saidiya Hartman, *Lose Your Mother: A Journey Along the Atlantic Slave Trade Route Terror* (New York: Farrar, Straus and Giroux, 2007), 6.
[86] James J. Gigantino, *The Ragged Road to Abolition: Slavery and Freedom in New Jersey, 1775-1865* (Philadelphia: University of Pennsylvania Press, 2014), 92-93; Daniel R. Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845." *Law and History Review* 4, no. 2 (1986): 339.
[87] "An Act for the Gradual Abolition of Slavery ... Passed at Trenton Feb. 15, 1804. Burlington, S. C. Ustick, Printer [1804].," online text, Library of Congress, Washington, D.C. 20540 USA, accessed February 2, 2021, https://www.loc.gov/item/rbpe.0990100b/.
[88] James J. Gigantino, "'The Whole North Is Not Abolitionized': Slavery's Slow Death in New Jersey, 1830–1860," *Journal of the Early Republic* 34, no. 3 (2014): 411-412.
[89] Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845," 339.

the mid-1840s, slaveholders in New Jersey understood that the unhurried nature of abolition had effectively created a new form of bondage, rendering African American children born after 1804 not free but "slaves for a term."[90] Black children born after July 4 were regularly entrapped in restrictive apprenticeships that resembled racial slavery in all but name.[91] Across New Jersey, local "newspapers still advertised slaves for sale, slaves still farmed their masters' land, and 'Negro' still meant the same thing as 'slave' to white New Jerseyans."[92] These apprenticeships, decried by the New Jersey Anti-Slavery Society as a "system growing out of Slavery," combined with the nearly 700 Black persons still legally enslaved, formed the remaining vestiges of slavery in New Jersey through the middle of the nineteenth century.[93]

For abolitionists, the New Jersey Constitutional Convention of 1844 presented an opportunity for the final and comprehensive eradication of slavery. Such optimism was misplaced, however, for the new state constitution did not expedite the process of abolition. More specifically, the text of the constitution did not once refer to slavery or the emerging infrastructure of racial apprenticeships, nor did the delegates to the constitutional convention guarantee equal access to political and civil rights.[94] On May 29, 1844, a motion to open the new constitution with the phrase "all men are born equal and free" was voted down in favor of "all men are by nature free and independent."[95] Moreover, the Constitution of 1844 explicitly codified suffrage rights on the basis of race, restricting the right to vote to "every white male citizen of the United States, of the age of twenty-one years."[96] The *New Jersey Freeman*, the

[90] Gigantino, *The Ragged Road to Abolition*, 96.
[91] Ibid.
[92] Ibid, 95.
[93] Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845," 344.
[94] Gigantino, *The Ragged Road to Abolition*, 230.
[95] John Bebout, ed., *Proceedings of the New Jersey State Constitutional Convention of 1844.* (Trenton: Works Progress Administration for the State of New Jersey, 1942), http://hdl.handle.net/2027/uc1.b4506453, 140; New Jersey Const. of 1844, Art. I, Cl. I.
[96] New Jersey Const. of 1844, Art. II, Cl. I; Gigantino, "'The Whole North Is Not Abolitionized,'" 431.

state's leading abolitionist periodical, wrote that the proceedings encapsulated the state's "perfect apathy" towards black freedom.[97]

Section II: A New York Lawyer in a New Jersey Courtroom

With the new state constitution silent on slavery and hostile to Black civil rights, New Jersey abolitionists turned to the courts for relief. In the winter and early spring of 1845, the state's leading abolitionist organizations committed to challenge the institution of slavery before the Supreme Court of New Jersey, hoping to eradicate slavery once and for all.[98] Successful abolitionist litigation, however, would require "able men... to argue the cause of liberty."[99] For this task, the New Jersey Anti-Slavery Society looked across the Hudson River and enlisted Alvan Stewart as the principal litigator for abolition.[100]

Although the understood intention of the litigation was the wholesale abolition of slavery across New Jersey, the case revolved around the enslavement of two specific persons. Tellingly, the two plaintiffs represented both of the respective forms of bondage that existed in New Jersey in the wake of the Gradual Abolition Act. One plaintiff was an older man named William, who, at sixty years of age, was still held as a "slave for life" by John Post of Passaic County.[101] The other was Mary Tebout, a nineteen-year-old girl who was to be held "as property" by Edward Van Beuren of Bergen County until she turned twenty-one.[102] On May 20, 1845, Stewart filed two writs of *habeas corpus* before the New Jersey Supreme Court and proceedings began the

[97] *New Jersey Freeman*, July 1844, quoted in Gigantino, *The Ragged Road to Abolition*, 230.
[98] Gigantino, *The Ragged Road to Abolition*, 231; Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845," 344.
[99] *New Jersey Freeman*, 30 April, 1845, quoted in Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845," 344.
[100] Gigantino, *The Ragged Road to Abolition*, 231.
[101] Stewart, *A Legal Argument Before the Supreme Court of the State of New Jersey: At the May Term, 1845, at Trenton, for the Deliverance of Four Thousand Persons*, 5; "Slavery Question in New Jersey," *Louisville Morning Courier and American Democrat*, 26 May 1845.
[102] Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845," 344.

following day.[103] Even with two specific plaintiffs, Stewart reminded the Court that his argument had far wider implications, as he estimated that there were several thousand Black Americans whose "liberties were involved in the argument and decision."[104]

Rather than lead with antislavery due process, Stewart began his argument with a thorough exegesis of the New Jersey Constitution, ratified the previous year. In his analysis, the institution of slavery, both in its perpetual and terminal forms, was incongruent with state law.[105] To substantiate his argument, Stewart paid particular attention to the first section of the new state constitution, namely the bold declaration of inalienable liberty that opens the document: "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."[106] By expressly precluding the enjoyment of life, liberty, property, safety, and happiness to the several thousand enslaved persons in New Jersey, Stewart contended that the new constitution had effectively abolished the institution from any area under the jurisdiction of the state.[107] Notably, Stewart extended his argument to cover the term-limited form of bondage endured by Mary Tebout, arguing that "semi-slavery" was equally repugnant to the new state constitution.[108] The continuation of slavery in New Jersey would deform the state constitution into a "vapid and senseless abstraction" and allow human liberty to "be withered by the power of slavery."[109]

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[103] Stewart, *A Legal Argument Before the Supreme Court of the State of New Jersey: At the May Term, 1845, at Trenton, for the Deliverance of Four Thousand Persons*, 5; "Slavery Question in New Jersey," *Baltimore Sun*, 20 May 1845.
[104] Stewart, *A Legal Argument Before the Supreme Court of the State of New Jersey: At the May Term, 1845, at Trenton, for the Deliverance of Four Thousand Persons*, 6; "Slavery and Abolition in New Jersey," *Democratic Free Press*, 27 May 1845.
[105] "Slavery Question in New Jersey," *Louisville Morning Courier and American Democrat*, 26 May 1845; "Slavery Question in New Jersey," *Baltimore Sun*, 20 May 1845.
[106] New Jersey Const. of 1844, Art. I, Cl. I.
[107] Stewart, *A Legal Argument Before the Supreme Court of the State of New Jersey: At the May Term, 1845, at Trenton, for the Deliverance of Four Thousand Persons*, 5, 24.
[108] Ibid, 24.
[109] Ibid.

Section III: "Behold the Shameful Injustice of the Law of Slavery"[110]

Moreover, a considerable portion of Stewart's argument in the New Jersey Slave Case transgressed the accepted boundaries of American federalism and constitutional jurisdiction. In its coverage of the proceedings in Trenton, the *New York Daily Tribune* discerned the unorthodoxy of Stewart's constitutional framework, noting that his arguments reflected his "powerful though not well disciplined intellect" as he put forward a legal claim that was "not compact and rigorously logical."[111] Indeed, Stewart's unconventional theory of antislavery due process, which held that the Fifth Amendment both applied against the states and rendered slavery unconstitutional, had arrived in the courtroom.

In adopting antislavery due process as his legal strategy of choice, Stewart challenged key provisions of the federal consensus and the *Barron* precedent. In his constitutional interpretation, any human being, even those currently enslaved, were considered "persons" in the eyes of the Constitution and its Bill of Rights: "The word person, in the Constitution of the United States, means a human being possessed of natural rights of life, liberty, and the pursuit of happiness."[112] As "persons," slaves were protected under the procedural guarantees of the Fifth Amendment, and thereby could not be deprived of their liberty without a formal legal procedure adjudicated by a judge and court. Of course, Stewart recognized that no person currently held in bondage fulfilled his criteria for lawful enslavement. As a result, slavery was a wholesale deprivation of the right to due process, leading Stewart to conclude that "there was not a slave in New Jersey, or in any slave State, who had been deprived of his liberty according to law."[113]

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[110] Stewart, *A Legal Argument Before the Supreme Court of the State of New Jersey: At the May Term, 1845, at Trenton, for the Deliverance of Four Thousand Persons*, 18.
[111] "Slavery in New-Jersey," *New York Daily Tribune*, 14 July 1845.
[112] Stewart, *A Legal Argument Before the Supreme Court of the State of New Jersey: At the May Term, 1845, at Trenton, for the Deliverance of Four Thousand Persons*, 35.
[113] Ibid.

For the logic of such an argument to be sustained by the Court, Stewart needed to demonstrate that the Bill of Rights applied against the states. Stewart acknowledged that the Supreme Court's ruling in *Barron* presented a challenging precedent to overcome, since American jurists, lawyers, and judges had long been taught that "slavery is a state-institution and is beyond the reach of any powers of Congress, for its extermination."[114] Stewart, however, refused to concede to the law of slavery and further argued that the Bill of Rights was, in fact, binding against the states. He observed that American constitutional jurisprudence readily acknowledged that Congress possessed the legal authority to create or authorize slavery in a state or territory, as was the case when Kentucky (1792), Tennessee (1796), and Alabama (1819) entered the Union.[115] If Congress possessed the power to sanction slavery in a state, then surely Congress also maintained the authority to restrain or abolish the institution anywhere in the Union.[116] After all, Stewart reasoned, the "Constitution of the United States is an Anti-slavery document, in its general spirit and tendencies."[117]

Moreover, Stewart extended the provisions of the Bill of Rights into the states through the authority of the Guarantee Clause, which authorized Congress to "guarantee to every State in this Union a Republican Form of Government."[118] In Stewart's conceptualization, the right to due process, and the protection against any unlawful deprivation of one's life and liberty, was deeply intertwined with the constitutional guarantee of republican government: the Constitution 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

[114] Stewart, *A Legal Argument Before the Supreme Court of the State of New Jersey: At the May Term, 1845, at Trenton, for the Deliverance of Four Thousand Persons*, 36.
[115] Ibid. "The Congress of the United States under slaveholding dictation created slavery, therefore, in Kentucky, Tennessee and Alabama, a portion of our territory at the adoption of the Constitution."
[116] Ibid.
[117] Ibid.
[118] U.S. Const. art. IV, §. 4.

happiness."[119] For Stewart, the constitutional authority of the federal government to enforce and protect the right to life, liberty, and due process for *all* persons did not pause at the border of a state but extended across the federal Union.[120] Thus, the authority of the Fifth Amendment extended into the states and could be invoked to liberate any person unlawfully deprived of life and liberty, including millions of enslaved persons held in perpetual bondage. As a result, Stewart entreated the New Jersey Supreme Court to rule on the side of human freedom: "I demand that these persons be delivered up to enjoy their liberty, on the ground of the declaration in the Constitution of the United States declaring that 'no person shall be deprived of life, liberty, or property, without due process of law.' There is not a slave or servant, so held, of the four thousand of both sorts in New Jersey, but what are entitled to their liberty by the Constitution of the United States."[121]

Section IV: The Law of Slavery Sustained

The Court, however, ruled against antislavery due process. In a 3-1 decision, with Chief Justice Joseph Coerten Hornblower alone in dissent, the New Jersey Supreme Court ruled that slavery and Black apprenticeship could continue in New Jersey.[122] The majority opinion reasoned that the lawful relationship between master and slave had existed in New Jersey at the time the new state constitution was adopted and that said constitution "has not destroyed that relation or abolished slavery."[123] Although New Jersey abolitionists resolved to appeal the ruling,

[119] Stewart, *A Legal Argument Before the Supreme Court of the State of New Jersey: At the May Term, 1845, at Trenton, for the Deliverance of Four Thousand Persons*, 39.
[120] Ibid, 38.
[121] Ibid, 42.
[122] "The New-Jersey Slave Case," *New York Daily Tribune,* 21 July 1845; Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845," 356.
[123] "The New Jersey Slave Case," *Democratic Free Press,* 24 July 1845.

the law of slavery was again sustained by the Court of Errors and Appeals, which, by a 7-1 vote, affirmed the decision of the Supreme Court in February 1848 without issuing any written opinions.[124]

Given the successive defeats in New Jersey, one could conclude that antislavery due process was an inadequate litigatory strategy in the struggle against slavery. After all, not even Alvan Stewart, the progenitor of this unorthodox interpretation, could convince the New Jersey Supreme Court that the Fifth Amendment applied against the states and thereby rendered slavery universally unconstitutional. In perhaps its clearest and most explicit articulation, antislavery due process had failed to liberate any of New Jersey's slaves from bondage.

However, considerable historical insight can still be derived from Stewart's legal argument in the New Jersey Slave Case. In the immediate sense, the litigation in New Jersey complicates the prevailing historiographic understanding of Stewart's legal writings and the body of constitutional theorization developed by the antebellum abolitionist movement. While antislavery due process was certainly the subject of Stewart's published books, pamphlets, speeches, and correspondence, it has now been demonstrated that he further applied and developed his constitutional theory in the crucible of the adversarial legal system. Moreover, Stewart may have been the first lawyer to deploy antislavery due process in a court of law but he would not be the last. As the remaining chapters will demonstrate, both John Jay II and Gerrit Smith would take up Stewart's mantle and apply his unorthodox interpretation of the Fifth Amendment in their own abolitionist legal practice. Despite Stewart's initial setback in New Jersey, the forthcoming litigation would establish antislavery due process as a viable constitutional mechanism in the legal struggle against slavery.

[124] *State v. Post*, 21 N.J.L. (1 Zabriskie) 699 (N.J. Ct. Err. & App. 1848); Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845," 365.

"I was deprived of my liberty without any process of law; the seizure of me in the public street was done in a riotous manner, in breach of the peace, with illegal violence."

– Joseph Belt before the Supreme Court of New York County, December 26, 1848.[125]

Chapter 3: John Jay II and the Fugitive Slave Cases

Across the Hudson River, John Jay II twice utilized the argumentative framework of antislavery due process on behalf of fugitive slaves held in New York City. As legal counsel for both George Kirk in 1846 and Joseph Belt two years later, Jay forcefully argued that both men had been unlawfully deprived of their inherent right to life and liberty.[126] In challenging the arrest of George Kirk by a Southern ship captain, and in filing a writ of *habeas corpus* to free Joseph Belt from his illegal detention in Brooklyn, Jay invoked key elements of Stewart's formulation of antislavery due process. Throughout his arguments, Jay, like Stewart, maintained that the institution of slavery was constitutionally impermissible wherever and whenever one was held in bondage without the formal adjudication by a judge or jury. Although Jay's articulation of antislavery due process was not as explicitly tethered to the Fifth Amendment as Stewart's argument in the New Jersey Slave Case, the substance of his claims in defense of Kirk and Belt affirm the critical conceptualization that slavery inherently functioned as an unlawful deprivation of the slave's liberty without legal process. In a New York City courtroom, Jay asserted that the law of slavery cannot be enforced anywhere in the federal Union, for such enforcement would deprive the alleged fugitive of the right to due process.

[125] *In re Belt*, 7 N.Y.Leg.Obs. 80 (1848), 96.
[126] *In re Kirk*, 4 N.Y.Leg.Obs. 456, (1846), hereafter referenced by the minutes of the proceedings published by the New York Legal Observer; *In re Belt*, 7 N.Y.Leg.Obs. 80 (1848).

Section I: A Peculiar Form of Cargo

On October 13, 1846, a sailing ship named *Mobile* departed Savannah and began its journey to New York Harbor.[127] The vessel, under the command of Theodore Buckley, carried a significant amount of cotton, grown and cultivated by enslaved Southern labor.[128] Two days into the voyage, however, the crew discovered a different type of cargo: George Kirk, a twenty-two-year-old fugitive slave, had secretly concealed himself on the lower deck of the *Mobile*, hidden beneath an excess sail.[129] As the ship round the coast of North Carolina, Kirk, who had boarded the *Mobile* to escape slavery, was arrested and detained onboard, shackles returned to his wrists.[130] Once the ship arrived in Lower Manhattan, Buckley intended to swiftly return Kirk to Charles Chapman, his lawful owner, in Bryan County, in eastern Georgia.[131]

Except Kirk was not returned to slavery. As the *Mobile* docked in New York, Kirk's cries for help drew the attention of several Black dockworkers unloading the contents of the vessel.[132] Upon discovering a fugitive slave detained on the ship, the dockworkers alerted Louis Napoleon, a free Black New Yorker, who in turn ran to the offices of the American Anti-Slavery Society to meet Sydney Howard Gay, the publisher of the *National Anti-Slavery Standard*.[133] Together, Napoleon and Gay secured a writ of *habeas corpus* and brought Kirk's case before Judge John W. Edmonds in the New York Supreme Court, arguing that Kirk should be released from

[127] George Kirk and John Jay, *Supplement to the New-York Legal Observer, Containing the Report of the Case in the Matter of George Kirk, a Fugitive Slave, Heard before the Hon. J.W. Edmonds, Circuit Judge : Also the Argument of John Jay of Counsel for the Slave* (New York: Legal Observer Office, 1847), https://link.gale.com/apps/doc/CY0102105091/SABN?u=columbiau&sid=zotero&xid=621c8351, 456.
[128] Gronningsater, "'On Behalf of His Race and the Lemmon Slaves,'" 214.
[129] Kirk and Jay, *Supplement to the New-York Legal Observer*, 456; "An Interesting and Important Fugitive Slave Case," *The Liberator*, 6 Nov. 1846; Foner, *Gateway to Freedom*, 112.
[130] Kirk and Jay, *Supplement to the New-York Legal Observer*, 456; "City Items," *The New York Daily Tribune*, 23 Oct. 1846.
[131] Foner, *Gateway to Freedom*, 112.
[132] Ibid; Gronningsater, "'On Behalf of His Race and the Lemmon Slaves,'" 214.
[133] *National Anti-Slavery Standard*, 5 Nov. 1846; Gronningsater, "'On Behalf of His Race and the Lemmon Slaves,'" 214. The contributions of Louis Napoleon and other Black New Yorkers to the legal and constitutional movement for the abolition of slavery is more comprehensively explored in the work of Sarah Gronningsater.

Captain Buckley's custody.[134] John Jay II, who had not yet turned thirty but had already emerged as the most formidable antislavery attorney in New York, was retained as Kirk's lawyer on October 28, 1846.[135] Notably, Jay accepted the case free of charge.[136]

In his response to the filed writ of *habeas corpus*, Captain Buckley testified that his detention of George Kirk was entirely consistent with Georgia state law and the constitutional requirements of the Fugitive Slave Clause.[137] Since Kirk was a slave under Georgia state law, Buckley articulated that he was compelled to facilitate his return to slavery, citing a statute that specifically required ship captains to return fugitive slaves who escaped by hiding aboard their vessels.[138] In addition to a narrow argument over state law, Buckley also put forward a much broader articulation concerning the Constitution's supposed guarantee of the right to hold property in men. Under the federal compact, Buckley asserted, Georgia functioned as "an independent and sovereign State" and thereby retained the exclusive authority to "govern and regulate all matters of internal social polity in said State," including the institution of slavery.[139] Acting in its own sovereign authority, Georgia law had defined slaves not as persons but as property. According to Buckley, therefore, the citizens of Georgia "held, possessed and enjoyed" the rights to their legally-defined property under the protection of the U.S. Constitution.[140] In the face of any legislative or judicial attempt to deprive citizens of Georgia of their lawful property in men, Buckley remained resolute that the "property of the good people of said State should be protected and preserved to the said citizens under the laws of the land."[141] Thus, Buckley

[134] Unlike most other states, New York counterintuitively refers to its trial-level courts as "Supreme Courts." Thus, the Supreme Court of New York County refers to the trial-level court with original jurisdiction in Manhattan. In New York, the highest appellate court is referred to as the Court of Appeals; Third Constitution of the State of New York, 1846, Section IV, § 4. Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of American Cases* (Union, NJ: Lawbook Exchange, 1998), 76; Foner, *Gateway to Freedom*, 112.
[135] "Letter of Attorney," 28 Oct. 1846, John Jay II Papers (Series II, Box 8, Folder 6), Rare Book and Manuscript Library, Columbia University.
[136] Foner, *Gateway to Freedom*, 113.
[137] Finkelman, *Slavery in the Courtroom*, 76.
[138] Ibid; Kirk and Jay, *Supplement to the New-York Legal Observer*, 457.
[139] Kirk and Jay, *Supplement to the New-York Legal Observer*, 456.
[140] Ibid, 457.
[141] Ibid; Foner, *Gateway to Freedom*, 113.

presented his actions as entirely justified, since the Fugitive Slave Clause compelled Kirk's return to Bryan County.[142]

In his arguments, Jay meticulously dissected each of Buckley's statements and advanced a form of antislavery due process as his guiding legal strategy. First, Jay resolutely denied that Georgia law had any binding effect outside of the state's jurisdiction.[143] Thus, Buckley could not reasonably cite Georgia law to justify his detention of Kirk within the boundaries of the State of New York, since New York law "knows no slave and no slavery."[144] Moreover, Jay employed a highly textualist analysis to challenge Buckley's assertion that the Fugitive Slave Clause compelled him to return Kirk to slavery. Jay noted that the Constitution required fugitive slaves "be delivered up on the claim of the party to whom such service or lay be due," which Congress further clarified to mean only the owner, his agent, or his attorney were legally authorized to seize the alleged fugitive.[145] Buckley, however, was neither Kirk's lawful owner nor an agent or attorney acting on behalf of Charles Chapman, which rendered his claim to custody over George Kirk unsanctioned by even the most draconian provisions of the Constitution.[146]

Even without explicitly invoking the Fifth Amendment, Jay's legal strategy in the *Kirk* litigation represents a form of antislavery due process. In his original address before the New York Anti-Slavery, Alvan Stewart articulated that the condition of enslavement, even in the states, violated the provisions of the Due Process Clause by depriving an entire class of persons their life and liberty without legal process. In Stewart's conceptualization, the authority of the Fifth Amendment extended to cover "the whole ground of our humanity… every body [sic],

[142] Finkelman, *Slavery in the Courtroom*, 76.
[143] Kirk and Jay, *Supplement to the New-York Legal Observer*, 458.
[144] Ibid.
[145] Ibid; U.S. Const. art. IV, §. 2, cl. 3.
[146] Kirk and Jay, *Supplement to the New-York Legal Observer*, 458.

without exception."[147] As a result, Stewart reasoned, no person living in the United States could be lawfully deprived of their liberty and become slaves except through an extensive formal legal procedure that included an "indictment of a grand jury, and trial by a petit jury, and the judgement of a court." In such proceedings, the constitutional provisions of the Due Process Clause would further require that any alleged slave have access to counsel, including a court-appointed lawyer should the person not possess the means to hire a private attorney, with the supposed master responsible for proving that the accused person was, in fact, a slave.

Stewart readily recognized that no person currently held in bondage fulfilled this criteria. Since the legal machinery of Southern slavery functioned without any system of indictment and conviction, and certainly without any procedural rights accorded to the supposed slave, Stewart asserted that the entire system of American slavery was *prima facie* unconstitutional: "Without this commission, this constitutional authority, growing out of an indictment, trial, and judgement against the slave, the right of the master in exercising dominion over the slave, is unconstitutional."[148] In individual cases arising between an alleged slave or fugitive and his/her master, Stewart believed that the appropriate avenue to secure the due process rights – and the freedom – of the slave was for a judge to issue a writ of *habeas corpus*: "If the master could not produce a record of conviction by which the particular slave had been deprived of his liberty by indictment, trial and judgement at a court, the judge would be obliged under the oath which he must have taken to obey the Constitution of this country, to discharge the slave and given him his full liberty."[149] Put differently, Stewart's theory of antislavery due process recognized the structural illegality of American slavery, in all its forms and in all corners of the country,

[147] "A Constitutional Argument," *Friend of Man*, 18 Oct. 1837.
[148] Ibid.
[149] Ibid.

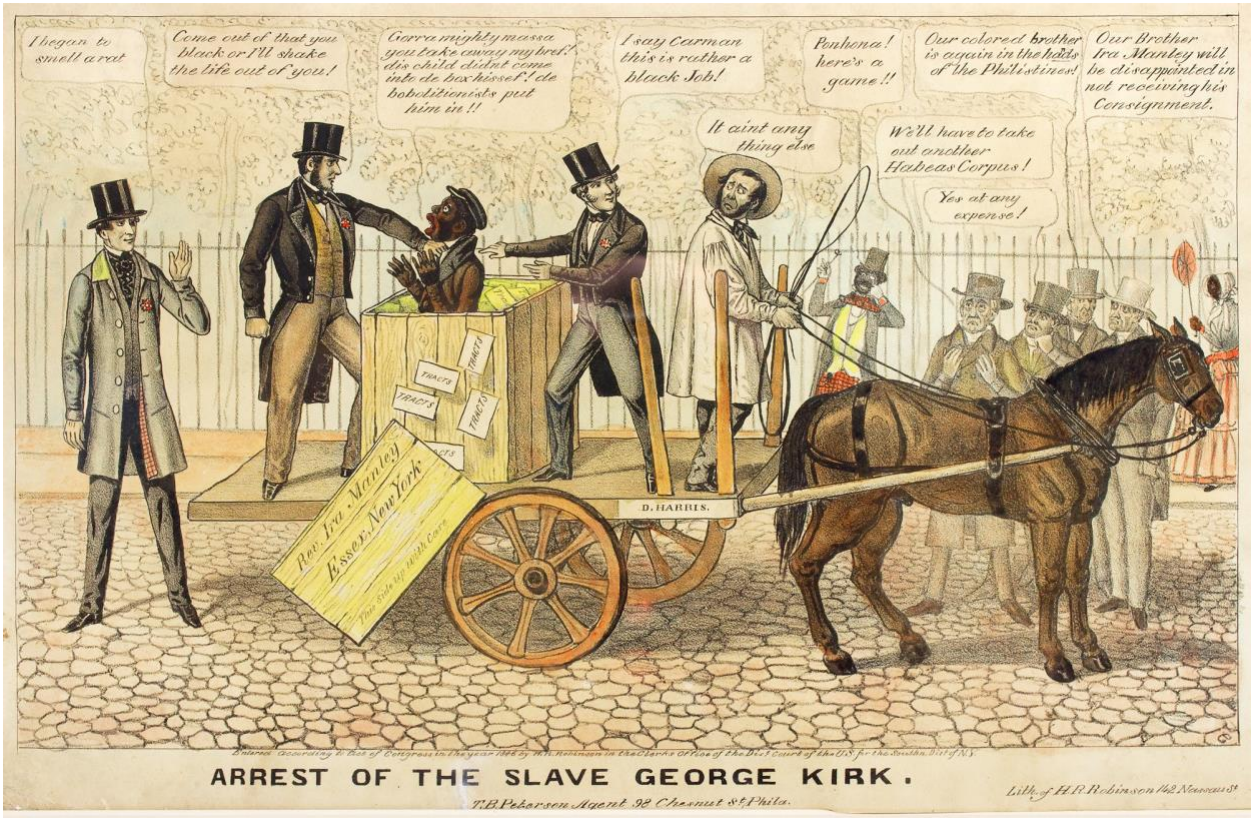
pursuant to the Fifth Amendment. According to this theory, a presiding judge retained the authority to issue a writ of *habeas corpus* and free any supposed slave from their unlawful detention as a deprivation of the inalienable right to liberty.

Mirroring much of Stewart's juridical logic, Jay condemned Buckley's arrest of George Kirk as an unlawful deprivation of the latter's right to due process. According to Jay, Captain Buckley could not cite a Georgia statute as a legal justification since his arrest of Kirk occurred outside the legal jurisdiction of the state of Georgia.[150] Moreover, Buckley could not substantiate his claim by relying on federal law: since he was neither Kirk's lawful owner, nor an agent or attorney hired by Charles Chapman, Buckley could not present any substantive constitutional claim to custody over Kirk under the Fugitive Slave Clause.[151] Thus, Jay reasoned, Buckley was guilty of an illegal trespass, since his unlawful arrest and detention had nakedly deprived Kirk of his due process rights, a clear "derogation of the natural right of the negro."[152] In filing a writ of *habeas corpus* on Kirk's behalf, Jay relied on the theoretical framework of antislavery due process to articulate that Buckley's claim to custody should be immediately dismissed.

The Court's decision recognized the Fifth Amendment implications of the *Kirk* litigation. Critically, Judge Edmonds' decision relied extensively on the constitutional requirements of the Due Process Clause and seemingly endorsed antislavery due process as a mode of constitutional interpretation. While the Fugitive Slave Clause established some legal mechanisms to facilitate the return of escaped slaves, Edmonds reasoned that the authority of the Clause could or did not surpass the procedural protections accorded to George Kirk under the Fifth Amendment: "As I read and understand [the Fugitive Slave Clause], it clearly contemplates that the right to reclaim

[150] Kirk and Jay, *Supplement to the New-York Legal Observer*, 458.
[151] Ibid.
[152] Ibid.

a fugitive slave shall not be exercised except by due process of law, and never *vi et armis*."[153] Speaking more generally, Edmonds articulated that the interpretation of any constitutional provision, even the most proslavery clauses, must be counterbalanced with the guiding "principles of our institutions," chief among them the prohibition "that any one shall be deprived of life, liberty or property, except by due course of law."[154] Thus, Buckley's detention of Kirk could not be sustained by the Court without violating Kirk's right to legal process. Judge Edmonds ordered Kirk to be released from Buckley's unlawful detention, delivering antislavery due process a sweeping legal victory in a freedom suit.[155]



"C" [Clay]. *Arrest of the Slave George Kirk.* New York: Lith. of H.R. Robinson, 142 Nassau St.; T.B. Peterson Agent 98 Chesnut St. Phila., 1846. Lithograph; contemporary hand-coloring. Approx. 11 x 16 inches (neatline image approx. 9¾ x 15½ inches). Lithograph signed "C" on stone. Archival mat, mylar sheet.[156]

[153] Kirk and Jay, *Supplement to the New-York Legal Observer*, 459. In legal procedure, the Latin phrase *vi et armis*, meaning, "by force or arms," refers to a forceful trespass against a person or his/her property.
[154] Ibid.
[155] Ibid, 462; Foner, *Gateway to Freedom*, 114.
[156] See also Frank Weitenkampf, *Political Caricature in the United States in Separately Published Cartoons* (Berkeley: University of California Press, 1953), 86. In what appears to be an explicit allusion to the legal strategy of John Jay II, one of the white observers on the right-hand side of the image exclaims that "we'll have to take out another *Habeas Corpus*!"

Section II: A Kidnapping on Duane Street

On December 20, 1848, Joseph Belt was kidnapped. As he walked through Lower Manhattan in the company of another man named Thomas Peck, a carriage stopped nearby and two white men jumped out and wrestled Belt and Peck into the coach.[157] As the carriage pulled away, Belt and Peck, now handcuffed, were initially accused by their kidnappers of theft. As they drove on, one of the kidnappers looked at Peck and exclaimed "that ain't the man," at which point Peck was shoved onto the street, leaving Belt alone inside.[158]

By the early afternoon, Belt had been forcibly transported to Gravesend, on the southern edge of Brooklyn, where he was detained for two days.[159] As the transcript of the court proceedings would later indicate, Belt's seizure had been orchestrated by John Lee, a wealthy slaveowner of Frederick County, Maryland, who would claim that Belt was a fugitive slave who had escaped lawful bondage in Maryland. To recapture the fugitive, Lee had dispatched two men, later identified as Charles Bird and Sydney Clayton, to Manhattan to find Belt before loading him onto a ship bound for the Chesapeake.[160]

Like George Kirk two years earlier, however, Joseph Belt was never returned to his alleged enslavement. By the weekend, John Jay II had filed a writ of *habeas corpus* in the New York Supreme Court, again presided over by Judge Edmonds. While John Lee, the supposed owner, testified that he was merely asserting his constitutional right to reclaim a fugitive slave who had escaped from his service, Jay challenged Belt's arrest as an unlawful deprivation of Belt's right to his own liberty.[161] By employing a nearly identical litigatory strategy as he had

[157] "The Slave Case," *National Anti-Slavery Standard* 28 Dec. 1848; Foner, *Gateway to Freedom*, 114-115.
[158] "The Slave Case," *National Anti-Slavery Standard* 28 Dec. 1848.
[159] Foner, *Gateway to Freedom*, 115.
[160] Ibid; *In re Belt*, 7 N.Y.Leg.Obs. 80 (1848), 96; "The Slave Case," *National Anti-Slavery Standard* 28 Dec. 1848.
[161] *In re Belt*, 7 N.Y.Leg.Obs. 80 (1848), 93.

two years earlier on behalf of George Kirk, arguments that borrowed extensively from Stewart's legal writings on the interplay between slavery, *habeas corpus*, and the Fifth Amendment, Jay again utilized a practical application of antislavery due process in a formal legal proceeding.

To challenge Jay's writ of *habeas corpus*, John Lee emphasized his constitutional right to reclaim a fugitive slave. In his testimony, Lee identified the detained Belt as a fugitive slave who had escaped his lawful bondage in Maryland. In Lee's account, Belt had traveled with him to Baltimore in November 1847 before fleeing the state without the knowledge or consent of his master, proceeding first to Lynn, Massachusetts, before arriving in New York.[162] A month later, Lee hired two men to arrest Belt and secure his return to Maryland.[163] Such actions, Lee reasoned, were legally permissible according to the Fugitive Slave Clause: "That, if a slave, the master had a right, under the Constitution of the United States, to arrest him in this State [New York], either himself, or by the persons whom he employed, without warrant, and take him home with him."[164] Seeing no reasonable or constitutional basis to rule against what appeared to be an unambiguous application of the Fugitive Slave Clause, Lee demanded that Judge Edmonds restore Belt to his lawful custody "without any further molestation or interruption."[165]

In response to Lee's claims, Jay advanced a convincing articulation of antislavery due process. To begin with, Jay argued that Lee had failed to substantively demonstrate, in accordance with the usual rules of evidence, that Joseph Belt was legally held to service or labor under his custody in the first place. Even if Belt *was* held as a slave by Lee, Jay reasoned, it had not been sufficiently demonstrated that Belt was ever *legally* held as a slave, for Belt "could have been kidnapped from a free State and reduced to slavery unjustly."[166] With the legality of Lee's

[162] *In re Belt*, 7 N.Y.Leg.Obs. 80 (1848), 94; "The Slave Case," *National Anti-Slavery Standard* 28 Dec. 1848.
[163] *In re Belt*, 7 N.Y.Leg.Obs. 80 (1848), 95.
[164] Ibid, 98.
[165] Ibid, 95.
[166] Ibid, 99; *National Anti-Slavery Standard*, 4 Jan. 1849.

supposed custody over Belt called into question, Jay asserted that the nature of the case, with its obvious implications for the life and liberty of the detained Belt, required that "every intendment… be made in favor of freedom."[167] Moreover, Jay argued that Lee failed to secure the return of Belt in a manner consistent with any legal process. Rather than present Belt before a local magistrate or secure a certificate for his removal, Lee hired two men to kidnap him. Seeing as the Constitution, and especially the Bill of Rights, was designed to ensure that the "individual rights of every free citizen are preserved," Jay concluded that the detention of Belt was a deprivation of the latter's right to life and liberty without due process of law: "Here there was illegal violence towards a free citizen, Peck, in the arrest of Belt; and an infringement of the public peace; and the arrest of Belt was, therefore, illegal, *ab initio*, and any subsequent detention under it void."[168]

Thus far, Jay's arguments closely mirrored not only Stewart's writing but the litigatory strategy developed in the *Kirk* litigation two years prior. And yet, the most telling distinction between the two cases was the extent to which antislavery due process was endorsed as a litigatory strategy by Joseph Belt himself. In a remarkable maneuver, Jay opted not to make an opening statement when he first appeared in Court, instead allowing Joseph Belt to testify on his own behalf. Belt's testimony, a seamless combination of personal narrative and constitutional argument, is the most explicit demonstration that antislavery due process was Jay's (and Belt's) legal argument of choice in the case. After testifying to his status as a free citizen of the United States, not legally held to service or labor to any master or owner, Belt plainly stated that he had been "deprived of my liberty without any process of law; the seizure of me in the public street

[167] *In re Belt*, 7 N.Y.Leg.Obs. 80 (1848), 99.
[168] Ibid, 100.

was done in a riotous manner, in breach of the peace, with illegal violence."[169] To conclude his remarks, Belt made his second allusion to the language of the Due Process Clause: "At no period since my arrest has any process of law for my arrest or detention been exhibited to me or alleged to have been issued."[170] Critically, antislavery due process proved successful: for the second time in as many years, Judge Edmonds ruled in favor of the alleged fugitive slave, requiring that Belt be immediately discharged from custody.[171] John Lee returned to Maryland and Belt escaped New York City via the Underground Railroad.[172]

Section III: Due Process Beyond the Courtroom

Outside of the courtroom, Jay's litigation in *In re Belt*, namely his successful application of antislavery due process as a coherent legal argument, led to appreciable shifts in the public conceptualization of the relationship between slavery and constitutional law. Shortly after Judge Edmonds' decision to discharge Belt, the *New York Tribune* reported that Lee, who had returned to Frederick County empty-handed, had joined forces with a larger "association of Maryland slaveholders... for the purposes of mutual protection in the matter of their absconding chattels, and that he was acting in this case by their advice and co-operation."[173] In addition to providing Lee with financial support for his legal efforts in the *Belt* litigation, this collection of wealthy Maryland slaveowners functioned as an incubator for proslavery constitutional theorization and argumentation. In a letter to Frederick Douglass, James W.C. Pennington, an influential African American minister who had been born into slavery, expressed concern regarding the legal

[169] *In re Belt*, 7 N.Y.Leg.Obs. 80 (1848), 97.
[170] Ibid, 98.
[171] Ibid, 107.
[172] Foner, *Gateway to Freedom*, 115.
[173] *National Anti-Slavery Standard*, 4 Jan. 1849.

advocacy advanced by Lee and his associates: "I am told that John Lee represents an association of slaveholders, who have resolved to join their purses together, for the purpose of testing the strength of the Constitution and laws of Congress on the recovery of fugitives."[174] The formation of this association of proslavery constitutionalists following the *Belt* litigation demonstrates the significance of antislavery due process as a formal legal strategy. In the wake of Jay's successful defense of George Kirk and Joseph Belt in the span of two years, slaveholders recognized that their human property would be vulnerable to abolitionist constitutional argumentation, especially claims based on the procedural safeguards enshrined in the Fifth Amendment.

Moreover, the African American community in New York City seemingly approved antislavery due process as a viable constitutional mechanism to secure the abolition of slavery. On Christmas evening, 1848, an undetermined but significant number of Black New Yorkers gathered in Terrence Hall on Church Street, led by abolitionist Jeremiah Powers.[175] At the meeting, which was intended to be a demonstration against Belt's unlawful arrest, the congregants unanimously adopted a series of resolutions that reaffirmed the right of all African Americans to the protections of due process.[176] The final resolution, reprinted in full in several Northern periodicals, was nothing short of an open endorsement of antislavery due process:

> "5. That no coloured persons should permit themselves to be arrested on charge of criminal offence, except upon process of law. The first step in all legal process is complaint to some magistrate, and the issuing of a warrant by that magistrate; and no officer or other person has the right to arrest any other person without such due process. You have a right to challenge any man to show, and read his warrant, and if he will not do so you may resist. The Constitution of the United States says, Art. 5 of the amendment, '*No person shall be deprived of life, liberty, or property, without due process of law'*."[177]

[174] *The North Star*, 12 Jan. 1849.
[175] "City Items," *New York Daily Tribune*, 26 Dec. 1848; "The Slave Case," *National Anti-Slavery Standard* 28 Dec. 1848; "Slave Case in New York and the Colored Meeting," *Pennsylvania Freeman,* 4 Jan. 1849.
[176] "City Items," *New York Daily Tribune,* 26 Dec. 1848.
[177] Ibid; "The Slave Case," *National Anti-Slavery Standard* 28 Dec. 1848; "Slave Case in New York and the Colored Meeting," *Pennsylvania Freeman,* 4 Jan. 1849.

Thus, after the initial setback in New Jersey, Jay's litigation worked to establish antislavery due process as a viable constitutional argument in the legal struggle against slavery. In the span of two years, Alvan Stewart's constitutional interpretation not only secured the release of two fugitive slaves from their bondage, in turn cultivating the resounding approval of Black New Yorkers, but had catalyzed increased anxiety among wealthy slaveholders about the constitutional security of their cherished property in men. Far from operating exclusively as a constitutional theory, antislavery due process was the driving force behind two successful iterations of abolitionist legal practice, a coherent legal strategy with cascading effects on American public opinion far beyond the courtroom.

"For instance, the Constitution provides… that 'no person shall be deprived of life, liberty, or property, without due process of law;' and that 'the United States shall guarantee to every State in this Union a republican form of government.' Now, who can doubt, that this language does, on the face of it, and by every rational and just construction of it, give power to abolish every part of American slavery?"

– Gerrit Smith to Salmon P. Chase, November 1, 1847.[178]

Chapter 4: Antislavery Due Process and the "Jerry Rescue"

Finally, Gerrit Smith utilized the framework of antislavery due process in his prosecution of Henry Allen, Deputy U.S. Marshal, on the charge of kidnapping. In October 1851, Allen had seized William "Jerry" Henry, an African American resident of Syracuse's First Ward on the suspicion that Henry was a fugitive slave. Although Henry eventually escaped from Syracuse with the assistance of local abolitionists, Smith nevertheless brought criminal charges against Allen, alleging that the U.S. Marshal had unlawfully detained Henry.[179] In his legal argument, Smith foremost articulated that the Fugitive Slave Act of 1850, the federal statute that Allen claimed had justified his actions, was unconstitutional. As the proceedings developed, Smith then transitioned into a much broader claim, alleging that the very institution of slavery, wherever it existed in the federal Union, was a violation of the Constitution. Remarkably, however, the transcript of the legal proceedings does not contain the *content* of Smith's argument in this section, stating simply that "Mr. Smith spent a couple of hours in arguing the Unconstitutionality of slavery," frequently referencing the work of Lysander Spooner and his own published writings.[180] Despite the gap in the historical record, Smith's noted deference to

[178] Gerrit Smith, *Letter of Gerrit Smith to S.P. Chase on the Unconstitutionality of Every Part of American Slavery* (Albany, NY: S.W. Green, 1847), 4.
[179] *Trial of Henry W. Allen, U. S. Deputy Marshal, for Kidnapping, with Arguments of Counsel & Charge of Justice Marvin, on the Constitutionality of the Fugitive Slave Law, in the Supreme Court of New York* (Syracuse: Power Press of the Daily Journal Office, 1852).
[180] Ibid, 35.

Lysander Spooner and his contemporaneous constitutional theorization bolster the claim that antislavery due process formed the basis of his arguments concerning the unconstitutionality of slavery in *People v. Allen*.

Section I: A Busy Day in Syracuse

Given the number of visitors in Syracuse, October 1, 1851 was a peculiar day for a kidnapping. In Hanover Square, the Onondaga County Agricultural Society was holding a County Fair. Just a few blocks south, the Liberty Party held a gathering for a small group of committed political abolitionists.[181] Although the Liberty Party's electoral significance began to subside by the late 1840s, some party members, such as Gerrit Smith, remained faithful to the Party into the 1850s.[182] Elsewhere in Syracuse, in the First Ward, William "Jerry" Henry, a fugitive slave of mixed race, was at work in the cooperage owned by Frederic Morrell.[183] Around noon, while Jerry was seated in the empty shop, three U.S. Marshals, led by Henry Allen, seized him from behind and threw him to the ground.[184] Confused, Jerry was informed that a warrant had been issued for his arrest on suspicion of theft.[185] He was escorted to the office of the U.S. Commissioner Joseph Sabine to answer for the charges presented against him.[186]

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[181] Jayme A. Sokolow, "The Jerry McHenry Rescue and the Growth of Northern Antislavery Sentiment during the 1850s," *Journal of American Studies* 16, no. 3 (December 1982), 433; W. Freeman Galpin, "The Jerry Rescue," *New York History* 26, no. 1 (January 1945), 24.
[182] Gerrit Smith. *Speech of Gerrit Smith, made in the National Liberty Party Convention at Buffalo, September 17th, 1851, when the following Resolutions were under discussion*. The Gilder Lehrman Institute of American History. GLC04717.33. Available through: Adam Matthew, Marlborough, American History, 1493-1945. http://www.americanhistory.amdigital.co.uk/Documents/Details/GLC04717.33 [Accessed December 16, 2020].
[183] Galpin, "The Jerry Rescue," 23; Borden, H. D, and R Griffin. City of Syracuse. [Syracuse, N.Y.: Sage, Sons, & Co, 1868] Map. https://www.loc.gov/item/2007627501/.
[184] Jermain W. Loguen, *The Rev. J.W. Loguen, as A Slave and as A Freeman*, (Syracuse, NY: Office of the Daily Journal, 1859), 401.
[185] Sokolow, "The Jerry McHenry Rescue," 432.
[186] Ibid; "Syracuse and the Underground Railroad," Special Collections Research Center, Syracuse University Library, September 30, 2005, accessed December 16, 2020, https://library.syr.edu/extsites/undergroundrr/maps.php.

Except Jerry was not arrested for suspicion of theft. In Sabine's office, a handcuffed Jerry was informed that the charges filed against him were actually based on the provisions of the Fugitive Slave Act of 1850.[187] Passed by Congress one year earlier, the Act was one in a series of bills designed to placate the interests of Southern slaveholding states and Northern Free-Soilers who opposed the expansion of slavery into the federal territories.[188] In its various provisions, the Act dramatically expanded federal authority over local law enforcement procedures in the states. It created a new category of federal official, a U.S. Commissioner, who was authorized to adjudicate the competing claims concerning an accused fugitive slave and decide whether to issue a certificate of removal.[189] Certificates of removal were financially incentivized, for a Commissioner would collect twice as high a fee if he issued a certificate of removal.[190] To prevent illegitimate "molestation" of the slaveowner's constitutional and procedural right to reclaim his or her fugitive slave, certificates of removal could not be challenged in state or local courts, nor could the accused fugitive testify at the hearing.[191] Due process rights were denied to the fugitive, who was prevented from filing a writ of *habeas corpus*, while the alleged owner was authorized to "pursue and reclaim such fugitive person," either by securing a warrant from a judge "or by seizing and arresting such fugitive, *where the same can be done without process*" (italics mine).[192] On the morning of October 1, Jerry was not a suspected thief, but had been detained by Federal Marshals as a fugitive slave from Missouri.

[187] Sokolow, "The Jerry McHenry Rescue," 432; *The Liberator*, 10 Oct. 1851.
[188] Foner, *Gateway to* Freedom, 121.
[189] Ibid, 124. Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* (Chapel Hill: University of North Carolina Press, 1970), 24.
[190] Foner, *Gateway to Freedom*, 124.
[191] Ibid.
[192] "The Fugitive Slave Act of 1850," Avalon Project: Documents in Law, History and Diplomacy. United States. Lillian Goldman Law Library, Yale Law School, accessed March 28, 2021, https://avalon.law.yale.edu/19th_century/fugitive.asp; Campbell, *The Slave Catchers*, 24.

Under the law, Jerry was one such fugitive slave. He had been born into slavery sometime around 1812 in Buncombe County, in western North Carolina.[193] Two years prior to his birth, his mother, known as Celia or Ceil, was sold to William Henry for $450. By 1818, Henry, his wife, his stepson John McReynolds, and several slaves, including Jerry, had settled in Marion County, Missouri.[194] It was in Marion County that Jerry received a rudimentary education, as he was credited with being able to read and developed skills in carpentry, farming, and mechanical work.[195] On July 3, 1845, William Henry sold Jerry to a man named Miller, who in turn sold Jerry back to John McReynolds, Henry's stepson, on July 8, 1851.[196] By that time, however, Jerry had long escaped from bondage, eventually settling in upstate New York.[197] For several years, Jerry had lived and worked in Syracuse under the name William Henry, his first owner.[198]

In addition to Jerry and the Federal Marshals, only a few other men were present in the office of the U.S. Commissioner that afternoon. Among them was James Lear, a resident of Marion County, who had agreed to serve as the agent for John McReynolds, Jerry's present owner, and submit the claim on McReynolds' behalf.[199] Alongside Lear stood Samuel Smith, the sheriff of Marion County.[200] Outside, the city of Syracuse was aflame with news of Jerry's arrest. The Liberty Party convention immediately adjourned for the day, with several abolitionists, including Gerrit Smith, hurrying to the Commissioner's Office.[201] The story of Jerry's arrest "spread like wildfire," with throngs of local residents gathering in Clinton Square, adjacent to

[193] *Syracuse Herald*, 1 Sept. 1899, reprinted in Earl Evelyn Sperry and Franklin Henry Chase, *The Jerry Rescue, October 1, 1851* (Syracuse, NY: Onondaga Historical Association, 1924), 43; Galpin, "The Jerry Rescue," 22; Sokolow, "The Jerry McHenry Rescue," 433. Sperry and Chase state that Jerry was born around 1812, Galpin argues that it was either 1811 or 1812, whereas Sokolow asserts the birth year was 1815.
[194] *Syracuse Herald*, 1 Sept. 1899, reprinted in Sperry and Chase, *The Jerry Rescue*, 43.
[195] Ibid; Sokolow, "The Jerry McHenry Rescue," 433; Galpin, "The Jerry Rescue," 22.
[196] *The Albany State Register*, 24 Feb. 1853, reprinted in *National Anti-Slavery Standard* 13, no. 40.
[197] Ibid.
[198] *The Liberator*, 28 Oct. 1853; Galpin, "The Jerry Rescue," 23.
[199] *National Anti-Slavery Standard*, 9 Oct. 1851.
[200] *The Albany State Register*, 24 Feb. 1853.
[201] Sperry and Chase, *The Jerry Rescue*, 22.

Sabine's office.[202] The bells of the city's churches rang out together, a cacophonous symbol of an "impending public calamity."[203] For several hours, the proceedings inside were repeatedly disturbed by the escalating clamor of the crowd, which threw stones and exhibited "other unmistakable signs that they were decidedly hostile to the Fugitive Slave Law."[204]

Section II: Gerrit Smith and the Prosecution of Henry Allen

Ultimately, Jerry was not to be returned to a life of slavery in Missouri. On October 2, before Commissioner Sabine could adjudicate the competing claims, several members of the Liberty Party convention orchestrated a remarkable operation to free Jerry from his detention. The circumstances of Jerry's escape and eventual journey to Canada, colloquially referred to as the "Jerry Rescue," are already the subject of an extensive historiography and are tangential to this thesis.[205] What *is* relevant is the prosecution of Henry W. Allen, the U.S. Deputy Marshal who detained Jerry, for kidnapping in the summer of 1852.[206] The prosecution, led by none other than Gerrit Smith, foremost articulated how Allen had violated a New York State statute signed into law by Governor William Seward in May 1840 designed to guarantee a jury trial for all alleged fugitive slaves.[207] Although Allen entered a plea justifying his seizure of Jerry under the auspices of the Fugitive Slave Act, a Grand Jury in Onondaga County determined that there was

[202] Sperry and Chase, *The Jerry Rescue*, 22; *National Anti-Slavery Standard*, 9 Oct. 1851.
[203] *National Anti-Slavery Standard*, 9 Oct. 1851.
[204] Sperry and Chase, *The Jerry Rescue*, 22.
[205] For further reading on the Jerry Rescue, see Angela F. Murphy, *The Jerry Rescue: the Fugitive Slave Law, Northern Rights, and the American Sectional Crisis* (New York: Oxford University Press, 2016); Earl Evelyn Sperry and Franklin Henry Chase, *The Jerry Rescue, October 1, 1851* (Syracuse, NY: Onondaga Historical Association, 1924); Jayme A. Sokolow, "The Jerry McHenry Rescue and the Growth of Northern Antislavery Sentiment during the 1850s," *Journal of American Studies* 16, no. 3 (December 1982); W. Freeman Galpin, "The Jerry Rescue," *New York History* 26, no. 1 (January 1945).
[206] *Trial of Henry W. Allen, U. S. Deputy Marshal, for Kidnapping, with Arguments of Counsel & Charge of Justice Marvin, on the Constitutionality of the Fugitive Slave Law, in the Supreme Court of New York*. (Syracuse: Daily Journal Office, 1852), 3.
[207] "An Act to Extend the Right of Trial by Jury." Act of May 6, 1840; Paul Finkelman, "The Protection of Black Rights in Seward's New York," *Civil War History* 34, no. 3 (September 1998), 212.

sufficient evidence to bring the case to trial.[208] The trial began on June 21, 1852 in the New York Supreme Court, seated in Syracuse.

When the case came to trial, the courtroom of Justice Marvin was brimming with spectators from across Onondaga County and remained crowded for all seven hours of Gerrit Smith's prosecuting arguments.[209] Crandal, charged with recording the proceedings of the trial, remarked that the prosecution of Allen was the first case "of the kind that has been brought since the Constitution of the United States was adopted. It, therefore, possesses, on that account, an importance which could not otherwise attach to it."[210] In its coverage of the trial, the *New York Daily Times* noted that a "noticeable feature in the composition of the auditory was the presence of a large number of ladies."[211] The women of Syracuse were evidently as keen as the men to witness the application of antislavery due process in a court of law.

Although his opening remarks were described as "tremendous," an "able and masterly effort," Smith did not begin the prosecution of Henry Allen with antislavery due process.[212] For roughly the first four hours of his remarks, Smith directed his constitutional analysis against the infamous Fugitive Slave Act of 1850. For the prosecution, the entire case hinged on whether the Act met constitutional muster, for if the law was constitutionally valid, and Allen "rightly interpreted its scope and claims," then the charges could not continue to be pursued against him.[213] In Smith's interpretation, the Fugitive Slave Act could only be interpreted as constitutionally repugnant, violating no fewer than seventeen different provisions of the Constitution, ranging from its denial of the right to a trial by jury, to its suspension of the writ of

[208] *Trial of Henry W. Allen*, 5.
[209] *New York Daily Times*, 26 June 1852; *Baltimore Sun*, 28 June 1852.
[210] *Trial of Henry W. Allen*, 5.
[211] *New York Daily Times*, 26 June 1852.
[212] Ibid; *Baltimore Sun*, 28 June 1852.
[213] *Trial of Henry W. Allen*, 9.

habeas corpus, to its legislative overreach into the realm of the independent judiciary.[214] Over the course of seven hours, he rhetorically probed the jury about whether a law designed to "treat a human being as property" could ever be legally valid.[215]

For the remainder of his arguments concerning the draconian Fugitive Slave Act, Smith remained fixated on the premise that all persons, even those accused to be fugitive slaves, were entitled to certain procedural protections during legal cases: "How does this trial of a [fugitive] for his liberty by mere *exparte* testimony agree with the great Constitutional protection: 'No man shall be deprived of his life, liberty, or property, without due process of law?'"[216] In his condemnation of the Fugitive Slave Act, Smith seemingly applied the theory of antislavery due process in a court of law: the Constitution refers to "persons," never to slaves, and the Fifth Amendment guarantees that no *person* shall be deprived of their liberty without due process of law.[217] Thus, for Smith, a critical component of the unconstitutionality of the Fugitive Slave Act was its deprivation of the Fifth Amendment rights to accused fugitive slaves.

Section III: A Gap in the Historical Record

Having articulated the range of constitutional offenses committed by the Fugitive Slave Act in and of itself, Smith embarked to demonstrate that slavery itself was unconstitutional: "I have now, therefore, come to that stage in my argument, in which I shall undertake to show that the Federal Constitution sanctions no slavery, permits no slavery, knows no slavery."[218] The sweeping significance of this particular claim, especially in relation to the previous fifteen points

[214] *Trial of Henry W. Allen*, 11, 19, 28; *New York Daily Times*, 26 June 1852.
[215] *Trial of Henry W. Allen*, 9.
[216] Ibid, 20, quoting U.S. Const. amend. V.
[217] Ibid, 36.
[218] Ibid, 35.

of his argument, was immediately apparent: "If I succeed in showing [that slavery is altogether unconstitutional], it, of course, follows that, whether my previous arguments are, or are not, sound, the fugitive servant act of 1850 is Unconstitutional and void."[219]

And then W.L Crandal, the man responsible for recording the proceedings in the case, stopped transcribing. In the place of a diligent recounting of Smith's arguments in this section, contemporary readers are left only without the following general description:

> Mr. Smith spent a couple of hours in arguing the Unconstitutionality of slavery. He frequently quoted from his own published writings, and from those of Lysander Spooner. Whoever will be at the pains to read the little pamphlet entitled "Gerrit Smith's Constitutional Argument," and the large and incomparably more valuable pamphlet entitled "The Unconstitutionality of Slavery, by Lysander Spooner," will conceive a sufficiently just idea of the course and character of Mr. Smith's argument under this head.[220]

At first glance, this may seem like a historical dead end. And yet, Crandal provided contemporary historians with a narrow clue to discern what Smith likely argued concerning the unconstitutionality of American slavery: Smith "frequently quoted from his own published writings, and from those of Lysander Spooner."[221] Therein lies the opening. Through a close analysis of the surrounding historical record, namely Spooner's *The Unconstitutionality of Slavery* and Smith's voluminous writing on the contested interplay between slavery and American law, one can discern that Smith, like Alvan Stewart before him, employed antislavery due process as the coherent legal strategy underwriting his prosecution of Henry Allen.

[219] *Trial of Henry W. Allen*, 35.
[220] Ibid.
[221] Ibid.

Section IV: The Inspiration of Lysander Spooner

To begin with, the formal published writings of Lysander Spooner contain subtle assertions about the unconstitutionality of slavery akin to Alvan Stewart's theorization of antislavery due process. Born in central Massachusetts in 1808, Spooner, like Stewart, was considered a leading exponent of radical constitutional abolitionism, which held that Congress possessed the constitutional authority to abolish slavery everywhere in the Union, even in the slaveholding states.[222] In his *The Unconstitutionality of Slavery*, Spooner navigated the twin pillars of antislavery due process as the theory has been defined for the purposes of this paper: slavery is an unlawful deprivation of the liberty of the slave in violation of the Fifth Amendment and the protections of the Bill of Rights apply in the several states, thereby rendering slavery universally illegitimate.

On the first point, Spooner argued that the condition of enslavement operated without any formal foundation in the law: "The master does not hold his slave in custody by virtue of any formal or legal writ or process, either authorized by law, or issued by the government."[223] Within Spooner's interpretation, it is neither state nor federal law that holds a slave in his or her condition but the brute force and compulsion of the owner: "The slave is held simply as property, by individual force, *without legal process*" (italics mine).[224] Without sanction by formal legal procedure or statute, Spooner articulated that slavery only existed by virtue of the owner's personal compulsion, thereby positioning the entire institution of slavery as an unlawful deprivation of the slave's liberty without due process of law.

[222] Lewis Perry, *Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought* (Ithaca: Cornell University Press, 1973), 194; Barnett, "Whence Comes Section One?," 194.
[223] Lysander Spooner, *The Unconstitutionality of Slavery* (Boston: Bela Marsh, 1845), 122.
[224] Ibid.

Moreover, Spooner's writing established the second prong of Stewart's antislavery due process theory: the universal illegality of American slavery. Although many political abolitionists over the course of the antebellum period accepted the legitimacy of slavery in the states, Spooner, like Stewart, acknowledged no such legitimacy at the state level. On the contrary, Spooner's position was resolute: "The Constitution of the United States, not only does not recognize or sanction slavery, as a legal institution, but that, on the contrary, it presumes all men to be free; that it positively denies the right of property in man; and that it, of itself, makes it impossible for slavery to have a legal existence in any of the United States."[225]

Several portions of this argument are important when considering the application of antislavery due process in formal legal proceedings. First, Spooner asserted that the Framers deliberately excluded any clause or provision that would validate the proposition that slavery was a legitimate form of property ownership, seeing as each of the supposed proslavery clauses in the Constitution refer to slaves not as property but as "persons." While Spooner did not mention the Fifth Amendment directly, his argument that slaves are considered "persons" within the context of the Constitution intersects with the Due Process Clause, which asserts that all persons, and *ipso facto* slaves, cannot be deprived of their liberty without due process of law. Spooner then explicitly rejected the premise that slavery was safe in the states; by virtue of the fact that slaves are persons, they are protected within the purview of the Fifth Amendment, which in turn "makes it impossible for slavery to have any existence in *any of the United States*" (italics mine).[226] While perhaps less explicit than Stewart's original argument, the implications of Spooner's theorization were no less consequential: slaves, given their inalienable personhood,

[225] Lysander Spooner, *The Unconstitutionality of Slavery* (Boston: Bela Marsh, 1845), 67-68.
[226] Ibid.

are protected by the range of Constitutional protections applicable to all persons, and this protection destroys the legality of slavery in every part of the Union.

Section V: Gerrit Smith's Note to Self

In addition to Spooner's work, Crandal's transcription mentions that Gerrit Smith quoted substantially from his own published writings. While Smith's "Constitutional Argument," published in 1844, is mentioned by name, it is challenging to discern how Smith may have used the pamphlet in his prosecution of Henry Allen. While unquestionably persuasive, the "Constitutional Argument" functions more as an attempt to negate and disprove claims made by proslavery constitutional theorists. Rather than speak to the unconstitutionality of slavery in and of itself, Smith takes a negative approach, navigating the various clauses that proslavery advocates cite as support for their position in order to demonstrate that these provisions are "not susceptible of the pro-slavery meaning."[227] On the *positive* unconstitutionality of slavery, this pamphlet offers little argumentative substance.

However, Smith's other contemporaneous writings provide a comprehensive argument for the fundamental unconstitutionality of American slavery. In a published letter to Salmon P. Chase, a future U.S. Congressman, Senator, Treasury Secretary, *and* Chief Justice of the U.S. Supreme Court, Smith first described an evolution of his constitutional interpretation, especially on the nature of the federal relationship between Congress and the states. Having formerly endorsed the premise that the federal government was not empowered to abolish slavery in the states, a position held "in common with most abolitionists," Smith later arrived at the conclusion

[227] Gerrit Smith, *Gerrit Smith's Constitutional Argument* (Utica, NY: Jackson and Chaplin, 1844), 13.

that the Constitution enabled Congress to abolish "every part of American slavery."[228] To substantiate this claim, Smith reminded Chase of the Fifth Amendment: "The Constitution provides… that no person shall be deprived of life, liberty, or property without due process of law."[229] Following this quotation, Smith offered an incisive rhetorical question to his abolitionist colleague: "Now, who can doubt, that this language does, on the face of it, and by every rational and just construction of it, give power to abolish every part of American slavery."[230]

Three years later, Smith further demonstrated his belief in antislavery due process. In a speech delivered before the New York State Assembly in March 1850, Smith again asserted that the Constitution provided no legal sanction for slavery, that the institution is entirely "incapable of legalization."[231] As in his letter to Chase, the language of the Due Process Clause provided the textual basis for slavery's illegality.[232] Interestingly, Smith took direct aim at the jurisprudential precedent established by the U.S. Supreme Court in *Barron v. Baltimore*. Although Marshall's majority opinion determined that the first ten amendments were "said to be negations of federal power only – not of the power of the States," Smith argued that there was little evidence to suggest that the Bill of Rights was designed to apply solely to Congress: "No such distinction appears in the language of the provisions. The language makes the provisions apply, as well as to control the action of State Governments, as of the Federal Government."[233] In fact, Smith extended his claim in the opposite direction of the *Barron* precedent, alleging that there is "abundant historical evidence" to suggest that the Fifth Amendment, and the entirety of the Bill

[228] Smith, *Letter of Gerrit Smith to S.P. Chase*, 3.
[229] Ibid, 4.
[230] Ibid.
[231] Gerrit Smith, *Substance of the Speech Made by Gerrit Smith in the Capitol of the State of New York, March 11th and 12th, 1850* (Albany: J.T. Hazen, 1850), 4.
[232] Ibid, 22.
[233] Ibid.

of Rights, was purposely designed to restrict state governments as well as to restrict Congress.[234] In both instances, Smith expertly asserted the central claims of antislavery due process.

Thus, we return to Gerrit Smith's prosecution of Henry W. Allen on the charge of kidnapping. While the gap in the transcribed proceedings precludes historians from making any ironclad conclusions about the prosecutorial strategy in the case, Smith's noted deference to the work of Lysander Spooner, and his extensive quotation of his own published writings, provide the most logical reconstruction of his arguments concerning the unconstitutionality of slavery. From the sources described above, it is clear that, by 1852, Smith had adopted antislavery due process as the framework for his own constitutional interpretation, expertly utilizing Stewart's arguments concerning the Fifth Amendment and the illegality of slavery in the states. Thus, the surrounding historical record, namely Smith's own contemporaneous correspondence on the interplay between constitutional law, federalism, and slavery, demonstrates that antislavery due process more than likely formed the substance of Smith's legal strategy.

[234] Smith, *Substance of the Speech Made*, 22.

"In each and every one of these clauses special care is taken to designate slaves as *persons*, and thus necessarily to exclude the idea that they are *property*. Their service, their labor, is due to – is owned – others; but they do not, therefore – because they cannot – surrender any of the rights which always, from the necessity of the case, belong inalienably to persons everywhere."

– "Slaves as Property, The Question Really at Issue," *The New York Times*, April 9th, 1860.[235]

Conclusion: The Constitutional End of Slavery

On January 1st, 1863, Abraham Lincoln published the final version of the Emancipation Proclamation, initiating the long overdue process for the abolition of American slavery. While its transformative significance cannot be understated – instantly changing the legal status of 3.1 million enslaved persons in the largest single act of emancipation in world history – the Proclamation nevertheless had considerable geopolitical and constitutional limitations.[236] Grounded in Lincoln's constitutional authority as commander-in-chief during a time of war, the Proclamation applied solely to enslaved persons held in states then engaged in rebellion against the United States.[237] This limited scope meant that the Proclamation had no bearing on the five slaveholding Border States that did not secede from the Union (Delaware, Maryland, Kentucky, and Missouri, and, after 1863, West Virginia), nor did it extend into certain areas in Virginia and Louisiana, which were under direct military administration by the Union army.[238] The state of Tennessee was entirely exempted from the Proclamation as a political favor to Andrew Johnson, who served as the state's military governor before becoming Lincoln's vice-president.[239]

[235] "Slaves as Property – The Question Really at Issue," *New York Times*, 9 April 1860.
[236] Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York: W. W. Norton & Company, 2019), 26.
[237] "Emancipation Proclamation; January 1, 1863," Avalon Project: Documents in Law, History and Diplomacy. United States. Lillian Goldman Law Library, Yale Law School, accessed February 8, 2021, https://avalon.law.yale.edu/19th_century/emancipa.asp).
[238] Foner, *The Second Founding*, 26.
[239] Ibid.

Given the range of slaveholding areas exempted from the Emancipation Proclamation, Republicans in Congress increasingly understood that a constitutional amendment would be necessary to secure the abolition of slavery everywhere in the Union. To open the Thirty-Eighth Congress in December 1863, Representative James Mitchell Ashley of Ohio introduced a constitutional amendment to abolish slavery and guarantee "perpetual freedom."[240] Shortly thereafter, James F. Wilson of Iowa put forward a similar abolition proposal that included a clause enabling Congressional enforcement through appropriate legislation.[241] In the Senate, John Henderson of Missouri, a staunch Democrat and former slave owner, proposed a joint resolution for a constitutional abolition amendment in early January 1864, mainly as a vehicle to end the political divisiveness that slavery had unleashed onto the nation.[242] Hence, as early as 1863, Republicans in both chambers, and even some war-weary Democrats, were already seeking to make the provisions of Lincoln's earlier proclamation constitutionally permanent.

The final wording of the Thirteenth Amendment, developed by Senator Lyman Trumbull, the chairman of the Senate Judiciary Committee, resolved many of the constitutional ambiguities introduced by the Emancipation Proclamation.[243] Passed by Congress in January 1865 and ratified by the requisite number of states by the end of the year, the Amendment established that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their

[240] Foner, *The Second Founding*, 30; Michael Vorenberg, *Final Freedom: The Civil War, The Abolition of Slavery, and the Thirteenth Amendment* (New York: Cambridge University Press, 2004), 49.
[241] *CG*, 38th Cong., 1st Sess. (December 14, 1863), 21. Wilson's proposal consisted of the following language: "Sec. 1. Slavery, being incompatible with a free government, is forever prohibited in the United States' and involuntary servitude shall be permitted only as a punishment for crime. Sec. 2. Congress shall have power to enforce the foregoing section of this article by appropriate legislation.
[242] Vorenberg, *Final Freedom*, 52.
[243] Foner, *The Second Founding*, 31-32.

jurisdiction."[244] In the very act of abolition, the Thirteenth Amendment introduced the word "slavery" into the Constitution for the first time.[245]

Three decades before the passage of the Thirteenth Amendment, Alvan Stewart already understood the utility of the Constitution in the crusade against the institution of slavery. When compared with the various other mechanisms adopted by the antebellum abolitionist movement to bring about the swift eradication of slavery, ranging from William Lloyd Garrison's moral and religious persuasion to the Liberty Party's embrace of electoral politics, Stewart's early endorsement of antislavery constitutionalism appears almost prophetic. Moreover, the substance of his constitutional interpretation is even more significant given how deeply his theory diverged from the accepted jurisprudence and legal thought of the early nineteenth century. Indeed, by contending that the Bill of Rights, namely the Fifth Amendment, did not apply solely against Congress but was equally binding against the several states, antislavery due process transgressed seemingly all of the conceptual boundaries of American federalism established by the Supreme Court in *Barron v. Baltimore*. And, with the authority of the Fifth Amendment extended into the states, Stewart contended that the Amendment rendered slavery unconstitutional everywhere in the federal Union, a position that was anathema according to the "federal consensus," which accepted the legal legitimacy of slavery as a domestic institution of the states.[246]

Upon reflection, one could readily conclude that, despite the obvious unorthodoxy of his constitutional interpretation, Stewart was largely unsuccessful in bringing about the abolition of slavery through legal or constitutional means. After all, for both Stewart and Gerrit Smith, antislavery due process was rejected as a legitimate legal argument in a Northern courtroom: the

[244] U.S. Const. amend. XIII.
[245] Foner, *The Second Founding*, 32.
[246] Wiecek, *Sources of Antislavery Constitutionalism*, 254-255.

New Jersey Supreme Court sustained the law of slavery, including Black apprenticeship, and a jury in Syracuse voted to acquit Henry Allen on the charge of kidnapping after Judge Marvin recommended acquittal. While substantial distinctions exist between the respective cases examined in this thesis in terms of the facts of each case and legal questions raised therein, not to mention the geopolitical differences between the three jurisdictions where the cases were filed and adjudicated, antislavery due process still came up short in a court of law more often than it secured a favorable ruling.

Even in defeat, however, the attempt to use such a transgressive constitutional interpretation in a formal legal proceeding is nevertheless historically (and historiographically) significant. Despite the growing body of historical scholarship concerning the constitutional argumentation produced by the abolitionist movement, scholars have focused almost entirely on the development of abolitionist constitutional thought *outside* of the courtroom. While antislavery due process was certainly the subject of Stewart's published books, legal pamphlets, public speeches at organizing conventions, and personal correspondence to other abolitionists, it also formed the substantive framework for his litigation, a legal strategy he and others applied, developed, and tested through the crucible of the adversarial legal system. In the antebellum North, Alvan Stewart's antislavery interpretation of the Fifth Amendment was as much abolitionist legal *practice* as it was constitutional *theory*.

Moreover, in arguably its greatest historical contribution, antislavery due process facilitated the emancipation of two fugitive slaves from bondage. Through John Jay's expert utilization of the Fifth Amendment in his litigation in New York City, both George Kirk and Joseph Belt were released from their unlawful detention and custody. Following the favorable rulings issued by Judge Edmonds in the respective cases, both Kirk and Belt escaped New York

City via the Underground Railroad.[247] Even indirectly, Stewart's articulation of antislavery due process, his radical constitutional interpretation that asserted the universal unconstitutionality of slavery according to the Fifth Amendment, offered Jay the ideal constitutional instrument to secure the freedom for two men – two human beings – from the brutality of their enslavement, enabling them both to live out the remainder of their lives in full enjoyment of their inalienable freedom and agency.

Ultimately, it would take several decades of sectional division, and a bloody Civil War, for the nation to finally rid itself of the sin of slavery. And, of course, neither antislavery due process, nor the Fifth Amendment more broadly, would serve as the constitutional mechanism by which slavery would come to be abolished across the United States. As a result, many historians who have attempted to chart the meandering road toward abolition, the most fundamental arc in American history, have glanced over Alvan Stewart as an insignificant radical whose constitutional interpretation was far too heretical to be effective against the prevailing jurisprudential precedents of the antebellum period. For George Kirk and Joseph Belt, however, it was Alvan Stewart's theory of antislavery due process – his interpretive creativity, his willingness to openly transgress even the most deeply established norms concerning constitutional interpretation and federal jurisprudence, and, above all, his fervent, lifelong commitment to the cause of abolitionism – that made all the difference.

[247] Gronningsater, "'On Behalf of His Race and the Lemmon Slaves,'" 215; Foner, *Gateway to Freedom,* 115.

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