

"Chapter Nine: Formal Assumptions of the Antislavery Forces"

in Justice Accused: Antislavery and the Judicial Process

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After 1840 a significant part of all antislavery writing was devoted to analysis of the legal system of the United States and to its bearing on problems of slavery. [<note 1>](#). There were lawyers of note among the abolitionists, and the works of William Jay, James Bimey, Charles Sumner, Salmon Chase, Robert Rantoul, or Richard Dana bear witness to the professional skill with which arguments were shaped. [<fn1>](#). However, the story of abolitionist legal theory by no means stops in the courtroom or with the speculations of established lawyers. Richard Hildreth's book *Despotism in America*, Harriet Beecher Stowe's *Key to Uncle Tom's Cabin*, Thoreau's essays "Civil Disobedience," and "Slavery in Massachusetts," Frederick Douglass' "Speech on the Meaning of the Fourth of July for the Negro," Theodore Weld's *Slavery as it Is* and *The Power of Congress over the District of Columbia*, to mention but a few, bespeak the pervasive concerns of the leaders of the antislavery movement with the legal structures of slavery. [*150]

Antislavery was never a unified movement. It is no wonder therefore to find a sharp split among different factions of the movement over an issue of such pervasive concern. In its approach to law, the antislavery movement split primarily because of differences over the sorts of formal problems that have been discussed hitherto in their relation to the legal establishment. The split was between the Garrisonians and a variety of opponents. On the one hand, the Garrisonians steadfastly preached and advocated scrupulous respect for the formalism of the legal system, and understood that formalism largely in the same terms as the leading judges and lawyers of the day. Their opponents, on the other hand, either urged disregard for the formalism of the law or advocated an unorthodox understanding of the nature of the law's formalism. These generalities must be spelled out in detail. [<fn2>](#).

The Garrisonians: Formalism Conceded

The Garrisonians, with Wendell Phillips their chief spokesman, stressed the dichotomy between natural and positive law. They accepted [*151] the orthodox position that the law as it is and the law as it ought to be present two distinct spheres. Moreover, they agreed that the function of a judge, according to constitutional principles, is the application of positive law- the law as it is. Finally, this group of theorists also accepted as right the obligation of the judge to apply only positive law and to disregard natural law when in conflict with the law as it is. This obligation of judicial obedience was, itself, derived from natural law justifications of the state-social contract in various forms.

Since William Lloyd Garrison and his followers were, above all, moralists, it is not surprising to find them among the first to appreciate the consequences of the Constitution for

moral choices. That is, they understood the moral weight of presumptive consent anendant on a largely democratic, constitutional compact. It was precisely because they appreciated the inference of moral obligation from constructive consent that they reached their radical prescriptions for action: disobedience, abstention from voting or office holding, and disunion. Their line of analysis of law was ironically similar.to that of the most troubled of our federal judiciary: McLean and Story, Wendell Phillips was the most articulate spokesman for the Garrisonian position on these issues, and it is to his work that reference will be made. [<note 2>](#). First, Phillips, like most of the judiciary, perceived the Constitution as, in critical part, a compromise over slavery, a compromise that could, in operation, lead to servitude for millions of human beings. Phillips pointed to five provisions as evidence of this view of the Constitution: The three-fifths clauses that provided that for both [*152] representation and direct taxation a slave would count as three-fifths of a person; the limitation on the power of Congress to prohibit the migration or importation" of slaves until 1808; the Fugitive Slave clause; the clause affording Congress the power to suppress insurrection; the clause insuring, upon application from a state, federal assistance in the suppression of domestic violence. Despite the fact that the word slave is circumlocuted everywhere in the Constitution, Garrison and Phillips, no less than Story, argued forcefully that the purpose of these provisions was to effectuate a bargain, the terms of which conferred legitimacy and a measure of protection for slavery. Story called the Fugitive Slave clause, "a fundamental article, without the adoption of which the Union could not have been formed." And Phillips wholeheartedly agreed, denoting the five proslavery clauses as "the articles of the 'Compromise,' so much talked of between the North and South." [<fn3>](#). Indeed, Wendell Phillips's book *The Constitution: A Pro-Slavery Compact* consisted of extracts from the then recently published *Madison Papers* and from Elliot's reports of various state ratifying conventions demonstrating that the unabashed intent of the framers was to recognize and protect slavery.

A second point of basic agreement between the Garrisonians and the judiciary concerned the proper limits of the judicial function. Phillips argued that the law as it stood did not permit the judge to apply his own vision of natural law with respect to slavery. Mort important still, Phillips agreed that the law should not permit the judge to apply his own perception of natural law. For authority on the proposition that judges do not have the power, under existing law, to apply their own natural law, Phillips quotes at length Blackstone, Kent, Locke, Chitty, Mansfield, Coke, Scott, Marshall, fredell, and Baldwin. Story, himself, could not have done better. As to the wisdom of this constraint, Phillips is eloquent. He fully recognized that the natural law of South Carolina was likely to prove different from his own. Because "nature" no longer spoke with a single voice, only the judge's conscience ultimately determined the source of right. He concluded by quoting Lord Camden:

The discretion of a Judge is the law of tyrants, . . . In the best it is often times caprice- in the worst, it is every vice, folly and passion, to which human nature is liable. [<fn4>](#). [*153]

Finally, the Garrisonians would have agreed wholly with the judiciary that, by external moral criteria, it would be improper for a judge to use judicial power in a manner contrary to agreed rules, The external moral values that Phillips brings to bear are those of good faith and trust. Phillips states that the officeholder, at least in a government in which there is some

measure of participation, stands in a contractual relationship to those who confer on him his power. To accept power on certain conditions and then fail to live up to the conditions is to deceive those to whom one stands as a sort of fiduciary and to subvert the values that are supposedly served by participatory government- a measure of responsibility to the people on the part of their representatives. [<fn5>](#).

At this point it should be clear that the premises and reasoning of the radical Garrisonians compel a full measure of acquiescence in the judicial refusal to apply natural law concerning slavery. It would, indeed, be impossible for McLean or anyone else to effectuate natural law with respect to slavery while still playing by the rules that Phillips acknowledged were and ought to be in force. Moreover, Phillips also agreed that the Constitution, which by those limits had to be enforced, was in conflict with natural law on the issue of slavery. Phillips did not shrink from the conclusion: "Their only 'paramount obligation', as judges, is to do what they agreed to do when they were made judges, or quit the bench." [<fn6>](#).

Since the logic of moral discourse leads to an unacceptable result if the choice point is to be between applying natural law and the Constitution, it was necessary to relocate the point of moral choice. If choice is made at the point of participation or abstention, there are no considerations of a formal character or of role limitation that inhibit a "pure" choice on the basis of which alternative more nearly conforms to moral desiderata.

In the second edition of his book *The Constitution: A Pro-Slavery Compact*, Phillips included a letter of resignation from an obscure Massachusetts Justice of the Peace, to drive home the logic of resignation. This Justice, Francis Jackson, wrote,

The oath to support the Constitution of the United States is a solemn promise to do that which is a violation of the natural rights of man, and a sin in the sight of God. . . . I withdraw all profession [*154] of allegiance to it [the Constitution], and all my voluntary efforts to sustain it. [<fn7>](#).

The Phillips-Garrison view of judicial obligation was not a disinterested one. The struggle for dominance in the antislavery movement was in part between those, like Garrison, who refused to participate in the processes of government and those who wanted a political, even electoral, movement. The jurisprudence of Wendell Phillips served the end of justifying his own faction's position and of impugning the opposition as both morally and legally obtuse. But, of course, the very fact that Phillips found himself on the abstentionist side was in part the result of an intellectual and temperamental preference for the clean logic of a pure moral choice. Such a choice is obscured by confusing the law as it is with the law as it ought to be:

But alas, the ostrich does not get rid of her enemy by hiding her head in the sand. Slavery is not abolished, although we have persuaded ourselves that it has no right to exist. The Constitution will never be amended by persuading men that it does not need amendment. National evils are only cured by holding men's eyes open, and forcing them to gaze on the hideous reality. [<fn8>](#).

Constitutional Utopians

While the legal theories of the Garrison-Phillips wing of abolitionism have attracted little attention except insofar as they confirmed the diagnosis of acute antiinstitutionalism, their opponents in this internal antislavery debate have been seized upon by one dissenting wing of American constitutional law scholarship as prophets of the Fourteenth Amendment and as evidence of that Amendment's thrust toward racial equality. Reacting to the apologists for *Plesvy v. Ferguson*, these dissenting scholars- men like Jacobus tenbroek and Howard Graham-discovered roots for their own constitutional aspirations in the visions of William Goodell, Lysander Spooner, Joel Tiffany and Alvan Stewart. [fn9](#). Just as these scholars in the 1940's and early 1950's appealed to what the Constitution could become, to the highest of the principles that went into it, so their "discovered" progenitors had appealed [*155] beyond case law and history to a grand vision of society that they found *in potentia* in many of the phrases of the Constitution.

The argument of tenbroek and of Graham is that the, Fourteenth Amendment and its language- "due process," "equal protection," and "priviledges and immunities"- cannot be understood except in the context of three decades of abolitionist legal theory aspiring to an antislavery vision of the Constitution and using precisely, these phrases in their theories. The "due process" language of the Fifth Amendment and the "privileges and immunities" language of Article IV were viewed by these abolitionists as potential sources of an antislavery constitution. Their reincorporation into the Fourteenth Amendment might therefore be best understood as an embodiment of the Abolitionist understanding of the words.

Whatever the merit of this Fourteenth Amendment argument, the ulterior motives of the tenBroek-Graham hypothesis distort somewhat the image of the antislavery constitutional utopians. For this handful of relatively unimportant antislavery thinkers had some meaning for their legal madness, And the meaning related more to theories of obligation than to the substance of the law.

By "constitutional utopians," I am not referring to the many lawyers and writers who appealed to a not yet accepted antislavery version of some constitutional issue. The utopians were reacting against such theorists. When Theodore Dwight Weld wrote that Congress had authority and a moral duty to end slavery in the District of Columbia, he appealed to a notion of congressional authority (if not of congressional morality) that was well within the accepted limits of the day. [fn10](#). When William Jay castigated the federal government's complicity in the crime of slavery, he did so by contrasting actual federal involvement in slavery with the constitutionally required minimal involvement. He also contrasted the gratuitous complicity with slavery with a vision of what the national government, might pemissibly do against slavery. Most of Jay's positions on congressional or executive power were well within the mainstream of legal thought of the day. Those few issues on which Jay advanced an unorthodox position were either unimportant or, not related to the fundamental problems of distribution of power. On the critical issue of the states' rights to determine their own domestic institutions, Jay and his followers were orthodox in their understanding of the Constitution. [fn11](#). To [*156] accept William Jay's understanding of the Constitution was to confront the dilemma of conscience posed by Garrison and Phillips. How can one swear fidelity

and undertake, by some affirmative act, the obligation of obeisance to a bargain condemning one's fellow men to servitude? True, Jay emphasized how the Constitution holds out the promise of dealing limited blows to slavery, through national legislative action against the trade and against slavery in all islands of national legislative competence. But the slave in Alabama was constitutionally forsaken. [<fn12>](#).

William Goodell, Alvan Stewart, Gerritt Smith, Joel Tiffany and, most notable, Lysander Spooner, replied that the Constitution outlaws slavery, even in Alabama. [<fn13>](#). The position that slavery, itself, was unconstitutional was so extreme as to appear trivial. TenBroek and Graham "rediscovered" these theorists because they used certain phrases that presaged the Fourteenth Amendment. Yet their real significance in the antislavery movement was the answer they provided to the formal problems. They searched, not for a legal theory, but for a way out of the Garrisonian argument with regard to "obligation." The purpose of the argument was not to prove slavery unconstitutional (whatever that means in a confessedly utopian context) but to prove that antislavery men may become judges and may use their power to free slaves.

Lysander Spooner's opus, *The Unconstitutionality of Slavery*, is the most complete of the arguments for the utopians. Spooner makes use of phrases like "due process" and "privileges and immunities" as pegs on which to hang his theory. But the substance of his argument is natural law. That substance was largely ignored by tenBroek. [<fn14>](#). Spooner begins by forcefully asserting that no law in conflict with natural law is valid and that judges have no obligation to enforce such naturally invalid law. This natural law operates quite apart from incorporation by any human constituent process. [<note 3>](#). In form, Spooner moves on to assume arguendo the validity of positive law in conflict with natural law and to derive the unconstitutionality of such [*157] laws by reference to the United States Constitution and related sources alone; but, in substance, the argument remains infused by the natural law point, for he relies heavily on an interpretative mechanism that rejects any construction save one in harmony with natural law. [<note 4>](#).

There is ingenuity in Spooner's work, but it is the haphazard ingenuity of rule and phrase manipulation ignoring the "method" of the judge in any real sense. He rejects any argument based on the appeal to history and the purposes of the framers; he rejects all arguments based on the uninterrupted course of applications. [<fn15>](#). Spooner's constitution is amputated from any societal context. Garrison condemned it most succinctly: "The important thing is not the words of the bargain, but the bargain itself." [<fn16>](#).

Alvan Stewart used Spooner's arguments and a host of others in his challenge to the remnants of slavery in New Jersey. [<fn17>](#). But this New York maverick had his own unique legal theory that declared slavery to be a violation of the due process clause of the Fifth Amendment. He argued that no slavery was constitutional unless, it had come about by due process- presentment by a grand jury of twenty-three and unanimous conviction by a petit jury of twelve. His reading of the constitutional bargain was that the North had agreed to the clauses that seemed to recognize slavery in return for the South's promise that any slavery be due-process slavery. Stewart's argument is remarkable because it does not depend on a single reference to natural law or to a principle affording preference to interpretations that favor natural law. 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 clause.<fn18>.

The preoccupation of the utopians with a consistent theory of the Constitution outlawing slavery was only one prong of the attack on the judge's dilemma of conscience. Lysander Spooner was willing to treat the problem *arsuendo* as one of a judge who had sworn to uphold an unjust constitution, even though he believed the Constitution to be properly interpreted as a just, antislavery instrument. [*158] Spooner acknowledged that the dominant position seemed to be that such a judge should resign. But he thought the proper analogy was one of a man given a weapon on condition that he kill an innocent and helpless victim. In such a situation, Spooner argued, it is proper to make the promise, keep the weapon and use it, in violation of the condition, to defend rather than attack the victim. To give up the sword, to resign the judicial office, is "only a specimen of the honor that is said to prevail among thieves." <fn19>. Spooner also argued that acceptance of the total invalidity of an oath of office to violate natural law would have a salutary effect on judges:

Judges and other public officers habitually appeal to the pretended obligation of their oaths, when about to perform some act of iniquity, for which they can find no other apology, and for which they feel obliged to offer some apology. <fn20>.

Spoooner is acute in recognizing the appeal to the oath as an apology, but his prescription, though cutting against the notion of judicial fidelity to positive law, does not refute in any way the Phillips prescription of resignation. The only responsive point on the issue of whether a judge ought to resign is the intimation that it is a waste to refuse to use accessible power for a good purpose, whatever the basis of, or conditions upon, its acquisition.

On the level of theory, then, the issue had been joined by 1845. The solution to the moral-formal dilemma was resignation, according to one school. According to the other, it was the judicial enforcement of natural law, preferably through a forced reading of positive law instruments, but if need be, as an act of naked power. Neither of these solutions promised widespread acceptance by the men who sat on the bench. That practical obstacle had to be confronted by the attorneys who confronted these judges and sought relief from them.