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THE 1837 KILLING OF ELIJAH LOVEJOY BY AN ANTI- ABOLITION MOB: FREE SPEECH, MOBS, REPUBLICAN GOVERNMENT, AND THE PRIVILEGES OF AMERICAN CITIZENS

Michael Kent Curtis*

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* Professor of Law, Wake Forest University School of Law. I wish to thank Tom Curtis, Paul Finkelman, Mark Graber, Stephen Heyman, Richard John, David Logan, Mark Tushnet, Eugene Volokh, and Ronald Wright for comments on an earlier draft of this Article. I also want to thank my research assistants, Kelly Patterson, Steven McCallister, and Andrew Sheffer for their help and assistance. I owe a special debt of thanks to librarian John Perkins. The mistakes and misconceptions are my own.

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I. INTRODUCTION

A. Elijah Lovejoy Dies Defending His Antislavery Press from a Mob

On November 7, 1837, Elijah P. Lovejoy, the Abolitionist editor of the *Alton Observer* and a Presbyterian minister, was killed defending his fourth printing press from an anti-abolition mob. Three of his presses had already been destroyed. A mob had smashed the third press, the most recent prior casualty, and dumped it into the Mississippi River.¹ The mob was determined that no Abolitionist paper should be permitted in Alton, Illinois. Lovejoy was determined to continue publishing. Before the arrival of the fourth press, Lovejoy and a group of supporters had appealed, as they had done previously, for protection from the city authorities. Alton Mayor John Krum requested that the Common Council of Alton authorize him to appoint special constables to maintain order.² However, the city council refused to act, except to advise Lovejoy and his friends not to reestablish a press in Alton.³

Lovejoy and his supporters put the new press in a warehouse and armed themselves. The mob stoned the warehouse, and the mob and the defenders exchanged shots. (Which side shot first was disputed by some papers at the time, although most historians say that the first shot came from the mob.)⁴ One of the defenders of the press shot and killed a mem-

1. LEONARD L. RICHARDS, *GENTLEMEN OF PROPERTY AND STANDING: ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA* 105 (1970). There are a number of historical accounts of the Lovejoy affair. See, e.g., MERTON L. DILLON, *ELIJAH P. LOVEJOY, ABOLITIONIST EDITOR* (1961); JOHN GILL, *TIDE WITHOUT TURNING: ELIJAH P. LOVEJOY AND FREEDOM OF THE PRESS* (1958); PAUL SIMON, *FREEDOM'S CHAMPION: ELIJAH LOVEJOY* (1994).

2. DILLON, *supra* note 1, at 161.

3. *Owen Lovejoy*, 2 *EMANCIPATOR* 134 (Dec. 28, 1837).

4. See DILLON, *supra* note 1, at 167 n.27; GILL, *supra* note 1, at 194-95 (asserting that the mob fired first); EDWARD MAGDOL, *OWEN LOVEJOY: ABOLITIONIST IN CONGRESS* 21 (1967). *But cf.* RICHARDS, *supra* note 1, at 109 (noting the uncertainty regarding who fired the first shot).

ber of the mob; other mob members got ladders and one climbed up to set fire to the roof of the warehouse. As Lovejoy attempted to shoot the arsonist, he was killed.⁵

Lovejoy's death was the culminating event in his struggle for free speech and press on the subject of slavery. It was also a climactic event in a larger struggle for free speech about slavery and against northern mobs determined to silence Abolitionists. The reaction to Lovejoy's death was profound. For many the event had symbolic importance that transcended Lovejoy and the issue of abolition. For these people, Lovejoy's death was an attack on free speech, free press, and republican government—not just for Abolitionists, but for all. This was so because, as these people saw it, the principle turned against Abolitionists today could be turned on other groups tomorrow. The death raised questions of the nature of free speech, of the problem of private suppression of speech, and of the nature and future of republican government.

B. A Preview of Coming Attractions

Lovejoy's death triggered an intense reaction in the North because it was not seen as an isolated event. Instead, for many in the North, Lovejoy's death was a profound metaphor. The attack on Lovejoy by an Alton mob was an attack on northern liberty by the slave system of the South.

My effort to evaluate the meaning of Lovejoy's story will begin in Part II with a quick review of the larger context of the tension between civil liberty and slavery in which his death occurred. Part II will also look in detail at two incidents of mob violence aimed at suppressing antislavery press: attacks on James G. Birney's paper in Cincinnati and Lovejoy's experience. Next, Part III will describe reactions to the attack on Birney's paper and to Lovejoy's death, and will discuss the constitutional thinking these events spawned. Many saw Lovejoy's death as a direct attack on free speech, free press, and republican government. Many concluded that free speech and press were "privileges" of American citizens under both state and federal constitutions. Many rejected the legitimacy of extralegal decisions to suppress speech and press; insisted that free speech and press protected a wide range of expression on political, scientific and religious subjects; and insisted on counter speech as the remedy for dangerous political doctrines. Finally, many insisted that Lovejoy's death should not be

5. RICHARDS, *supra* note 1, at 110.

seen as an isolated issue of abolition, but instead should be analyzed as a principle containing a much broader threat to free speech.

Part IV discusses the aftermath of Lovejoy's death and its political impact. Troubling events followed Lovejoy's death—the burning of Pennsylvania Hall, proposals to annex Texas as a slave state, the controversy over the congressional gag rule, and resolutions by John C. Calhoun that seemed designed to scotch antislavery agitation. These events seemed for many in the North to confirm the idea that Lovejoy's death implicated broad general principles. These general ideas and principles are discussed in Part V. Events, of which Lovejoy's death was a significant part, led to the emergence of claims that all Americans had a right to free speech wherever they were. These events also led to discussion of the nature of free speech and its relation to other interests, to seeing private suppression as a violation of free speech, to discussion of access to public discourse, and to discussion of the press as a defender and violator of free speech.

The remaining parts of this Introduction will discuss the free speech tradition and free speech and private violence.

This Article is an installment in a series on episodes in the history of free speech. An earlier article,⁶ discussed briefly below, focused on contro-

6. Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785 (1995) [hereinafter Curtis, *Curious History*]. Scholars have done much to explore the early history of free speech and press, and much remains to be done. See, e.g., DONNA LEE DICKERSON, *THE COURSE OF TOLERANCE: FREEDOM OF THE PRESS IN NINETEENTH-CENTURY AMERICA* (1990); CLEMENT EATON, *THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH* 89–117 (1964); LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985); RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860* (1963); W. SHERMAN SAVAGE, *THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE, 1830–1860*, at 3–4 (1968); FREDRICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476–1776* (1952); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109; Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263 (1986); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981); Stephen A. Smith, *The Origins of the Free Speech Clause*, in 29 FREE SPEECH Y.B. 48 (Raymond S. Rodgers et al. eds., 1991); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699 (1991). For an excellent study of the press' uneven role in press freedom, see JOHN LOFTON, *THE PRESS AS GUARDIAN OF THE FIRST AMENDMENT* (1980).

Much fine work has been done on the subject of slavery and free speech. See, e.g., DICKERSON, *supra*; NYE, *supra*; EATON, *supra*; SAVAGE, *supra*, at 3–4. For my own efforts, see Curtis, *Curious History*, *supra*, at 785, and Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the*

versies about free speech from 1835 to 1837. This included the unsuccessful proposals to ban abolition publications from the mails, to pass state laws suppressing antislavery expression, and to extradite northerners to the South so they could be tried for antislavery publications sent to southern states. It also discussed a more successful proposal to prohibit reading or discussion of antislavery petitions in the United States House of Representatives. From 1835 to early 1837, free speech was often described as a powerful limit on the *federal* government: the First Amendment guarantee of “no law abridging freedom of speech or of the press” meant something far closer to “no *federal* law” than it does today. However, that understanding potentially left states to protect, suppress, or regulate free speech and free press. Before Lovejoy’s death, free speech and press were often described as a matter for local laws and state constitutions. Private suppression of antislavery speech, meanwhile, was often cheered even by those reluctant to pass laws to suppress speech.

A second article in the series focused on the free speech controversy in 1859–1860 that swirled around Hinton Helper’s book, *The Impending Crisis*.⁷ By that time, many Republicans in Congress expressed the idea that free speech was a right of American citizens that no state had the right to abridge.

C. The Lovejoy Story and the Free-Speech Tradition

This Article is partly about transition. It documents broad and strong condemnation of mob violence directed at antislavery expression. It also illustrates an emerging view in the mid-1830s and particularly in 1837–1838, that free speech and press were rights or “privileges” to which all American citizens were entitled everywhere in the United States. The “privileges . . . of citizens of the United States” is a phrase that occurs in Section 1 of the Fourteenth Amendment and that has provoked legal controversy ever since. The Lovejoy story is legally and constitutionally significant for the light it sheds on an 1837–1838 understanding of “privileges” of citizens of the United States. That understanding was shaped in part by public reaction to Lovejoy’s dramatic death defending his press, an event well known to many framers and ratifiers of the Fourteenth Amendment.

First Section of the Fourteenth Amendment, 68 CHI.-KENT L. REV. 1113 (1993) [hereinafter Curtis, *Impending Crisis*]. A shorter version by the same title appears as a book chapter in *SLAVERY AND THE LAW* (Paul Finkelman ed., 1997).

7. Curtis, *Impending Crisis*, *supra* note 6, at 1113.

The Lovejoy story also involves persistent free speech issues. Should speech be suppressed because of long term dangers posed by its message? Should free speech principles be broadly defined to protect speech the elite or the majority find dangerous or evil? If a function of free speech is to allow the people to set the political agenda, is it appropriate to put political topics off limits? Should controversial and despised speakers have access to a public forum to spread their messages? How consistently has the press supported broad free speech rights and how much access does it provide for "radical" views that seem to threaten established interests?

While history may not provide answers to contemporary problems, by giving us broader experience it deepens our understanding of the rules we establish and implications of proposals for change. Finally, most believe that original intent or purpose is at least a factor to be considered in constructing the Constitution. If so, then a crucial (and elusive) intent is not merely that of the framers or ratifiers but of the people they represent. The Lovejoy story can provide some insight into background assumptions of the framers and ratifiers of the Fourteenth Amendment and of the people they represented.

Readers of law review articles may find this Article and its predecessors strange. Detailed discussions of court decisions about the meaning and nature of free speech are rarely to be seen. Instead, the present Article focuses on events in the history of free speech and on popular expressions of opinion in response to these events. These responses, in turn, reveal a view of an emerging northern consensus about the nature and meaning of free speech that confronted a very different consensus in the South.

The Lovejoy story raises questions about the nature of civil liberty. It suggests that, as James Madison had expected,⁸ constitutional guarantees of liberty function at more popular levels as well as at the level of elite institutions such as the Supreme Court of the United States, state supreme courts, Congress, and state legislatures. Popular views limit and channel both legislation and private action, each of which can either constrain or empower speech.

Some recent scholarship suggests that the courts reflect rather than initiate social change. The most extreme version of this view pictures the Court as a cork, bobbing on the waves of social forces. This extreme approach ignores the fact that courts both reflect and contribute to social

8. James Madison, Amendments to the Constitution June 8, 1789, in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1030 (Bernard Schwartz ed., 1971); see also Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301.

change, that the decisions of courts are themselves social forces as well as reflections of those forces. Still, it is important to recognize that the law is much influenced by forces larger than court decisions and that court decisions often reflect broader social decisions. If that is so, then a history of free speech that limits itself to what happens in courts (or even in courts and legislatures) is an incomplete account. Very significant constitutional developments (such as the rejection of the Sedition Act, abolition of slavery, or the protection for civil liberty in the Fourteenth Amendment) are in good part produced by popular discussion and debate which, in turn, helps shape the views of those who propose and ratify constitutional amendments, pass legislation, or write judicial opinions.

Similarly, ideas of free speech and press are part of a growing and evolving tradition that includes, but is not limited to, court decisions. So a deeper understanding of that tradition requires an expanded focus. An expanded focus is particularly important for lawyers, legislators, scholars, judges, and ordinary citizens, who are both custodians and revisers of the free speech tradition. History provides vicarious experience. "A lawyer without history or literature is a mechanic, a mere working mason," wrote Sir Walter Scott in *Guy Mannering*. Scott added that, "if he possesses some knowledge of these, he may venture to call himself an architect."⁹

D. Free Speech and Private Violence

The problem of private (that is nongovernmental) attacks on free speech raises perplexing federal constitutional problems in a system where most constitutional guarantees of liberty have been interpreted merely to limit government, but not private action. The problem of private suppression of speech, press, and association, which was so significant in the mid-1830s, surfaced again during the Reconstruction. Then Klan violence aimed at black and white Republicans helped end Republican rule in the South.¹⁰ In many ways, the suppression of Republicans in the South after the Civil War replicated suppression of opponents of slavery before the war. Ultimately, with the development of the state action doctrine, the Court seemed to find that the federal government lacked the constitutional power

9. CLARENCE DARROW, VERDICTS OUT OF COURT 17 (Arthur Weinberg & Lila Weinberg eds., 1989) (citing Sir Walter Scott, *Guy Mannering*).

10. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1989); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985); VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI, 1865-1890 (1947).

to punish many purely private attacks aimed at speech and press.¹¹ As to power under the Fourteenth Amendment (as opposed, for example, to power under the Commerce Clause), the doctrine may continue to limit federal power to this day.¹² To the extent that public officials co-operate in the violent suppression of speech, federal power can reach otherwise "private" as well as public actors.¹³

In 1837, as today, the issue of politically motivated private violence implicates the extent and nature of the duty of federal, state, and local governments to protect advocates of unpopular causes. In recent years, private violence has been aimed at a lesbian center in Mississippi¹⁴ and by Communists at the Klan, and then lethal violence by the Klan at Communist marchers in Greensboro, North Carolina. College students, unhappy with what they saw as a racist editorial policy, have seized and destroyed copies of a school newspaper.¹⁵ These actions are typically beyond the reach of Reconstruction-era civil-rights statutes, as understood by the Court, though they usually violate state laws. So the nineteenth-century problem of private suppression appears in different garb in the twentieth century.

II. THE HISTORICAL CONTEXT

A. The Constitutional Context

The American Constitution was deeply ambiguous. It sought to protect liberty—and to protect slavery. On the one hand, it recognized free-

11. Compare *United States v. Cruikshank*, 92 U.S. 542 (1875), with *The Civil Rights Cases*, 109 U.S. 3 (1883), and *United States v. Harris*, 106 U.S. 629 (1882). By contrast, federal rights conferred on the citizen could be protected—such as the right to vote in a federal election or the right to assemble to discuss national matters and to petition the federal government. *Ex parte Yarbrough*, 110 U.S. 651, 658, 666 (1884); *Cruikshank*, 92 U.S. at 552–53.

12. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624 (1995); *United Bhd. of Carpenters Local 610 v. Scott*, 463 U.S. 825 (1983); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Harris*, 106 U.S. at 629; *Cruikshank*, 92 U.S. at 542.

13. Compare, e.g., *United States v. Price*, 383 U.S. 787 (1966), *United States v. Guest*, 383 U.S. 745 (1966), and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), with *Griffin v. Breckenridge*, 403 U.S. 88 (1971), and *Scott*, 463 U.S. at 825.

14. Stephen Labaton, *Reno Orders U.S. Mediation in Lesbian Harassment Case*, N.Y. TIMES, Feb. 19, 1994, at 1.

15. See Richard Cohen, *Sheldon Hackney's Dangerous Balance*, WASH. POST, July 6, 1993, at A15; Mary Jordan, *Students Who Set Off Penn Newspaper Censorship Uproar Won't Be Punished*, WASH. POST, Sept. 15, 1993, at A12 (discussing the University of Pennsylvania incident); see also Howard Kurtz, *A Trash Course in Free Speech; College Newspapers Pitched In Protests*, WASH. POST, July 29, 1993, at C1 (discussing similar incidents on other college campuses).

dom of speech, petition, religion, and the press and explicitly prohibited Congress from abridging them. It both recognized and protected rights such as freedom of speech and of the press by denying Congress power over them. Still in 1833, the United States Supreme Court suggested that this prohibition did not reach the states.¹⁶ The Constitution defined treason narrowly so that political criticism was not treason.¹⁷ It protected speech and debate in Congress from being "questioned in any other place," guaranteeing an absolute immunity from prosecution by the executive branch or by states for things said in Congress.¹⁸ It guaranteed due process to all persons and prohibited unreasonable searches and seizures. It contained a number of guarantees for those accused of crimes—right to counsel, privilege against self-incrimination, jury trial, etc.—all of which made it more difficult to suppress speech and press.¹⁹ The Court assumed that these guarantees also limited only the federal government.²⁰ The Constitution provided that the United States would guarantee to each state a republican form of government, and that the citizens of each state should be guaranteed all privileges and immunities of citizens in the several states.²¹

At the same time, the Constitution provided for return of escaped slaves,²² seemed to guarantee federal assistance against slave revolts,²³ and counted slaves as three-fifths of a person for purposes of representation in the House—swelling the votes of the slaveholding states in the House of Representatives and in the electoral college.²⁴

The attempt to secure *both* liberty and to protect slavery ultimately failed. Proponents of slavery concluded they could not tolerate free discussion and political activity aimed at its elimination. Slavery depended on continued obedience by slaves and continued support by a white population in the South, most of whom did not own slaves. The slaveholding southern elite concluded, perhaps correctly, that the institution could not withstand incessant political criticism, particularly because slavery was

16. U.S. CONST. amend. I; see *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

17. U.S. CONST. art. III, § 3, cl. 1.

18. *Id.* art. I, § 6, cl. 1.

19. *Id.* amends. IV, V, and VI; see also *id.* art. III, § 2, cl. 3.

20. *Permolli v. New Orleans*, 44 U.S. (3 How.) 589 (1845); *Barron*, 32 U.S. at 247.

21. U.S. CONST. art. IV, § 4; *id.* art. IV, § 2, cl. 1.

22. *Id.* art. IV, § 2, cl. 3.

23. *Id.* art. IV, § 4.

24. *Id.* art. I, § 2, cl. 3 (amended 1868); *id.* art. II, § 1, cl. 2 (amended 1868); see, e.g., PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (1996); Phillip Shaw Paludan, *Hercules Unbound: Lincoln, Slavery, and the Intentions of the Framers*, in *THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE 1–22* (Donald G. Nieman ed., 1992).

vulnerable to appeals both to idealism and self-interest. Slavery seemed inconsistent with the Declaration of Independence, and many insisted it was harmful to the mass of the southern population.

Those determined to repress antislavery agitation often said that such agitation was unconstitutional. By this understanding, the three-fifths clause, the fugitive slave clause, and the rest promised southern states security for slavery in the South. This, many northerners and southerners insisted, was a key constitutional value that superseded guarantees of free speech when the two collided. The Constitution was a compact between North and South; the promise not to disturb slavery in the states was the cornerstone of the edifice; and if it were removed, the entire structure would collapse.²⁵ For many, agitation of the slavery issue (in the North or the South, in Congress or in any state legislature) was inconsistent with the constitutional compact, which had security of slavery as a key element.

This is not to say that most Americans at first saw slavery as a good. Many thought it was an evil imposed on Americans by the British, but one whose immediate removal threatened even worse consequences. By this view, the preferred way of dealing with the problem was *not* to deal with it and to wait.²⁶ The problem of slavery was so difficult and threatening that the subject was better repressed, left deep in the recesses of the American subconscious.

Ultimately, repression did not work. The American nation was expanding, adding new territories and then new states. Most Americans were seemingly willing to allow slavery to exist in the South in the expectation that time and providence would solve a problem too complex for mere mortals. But the expansion of slavery by adding new slave states and slave territories was quite another matter, and one that proved ultimately impossible to compromise. For the slaveholding elite that ruled the South, confining slavery to states where it existed would so tilt the national balance of power between slave and free states that slavery would be threatened. As the nation became overwhelmingly free, the Commerce Clause might be used against slavery, by prohibiting interstate slave trade or by attacking the institution in the states. The Constitution might be amended to outlaw

25. E.g., *From the Eastern (Me.) Republican*, WASH. GLOBE, Sept. 22, 1835, at 3; see also Curtis, *Curious History*, *supra* note 6, at 808, 842, 860-61.

26. CONG. GLOBE, 24th Cong., 1st Sess. 93 (1836) (statement of Rep. Bouldin).

slavery. A Supreme Court made up of antislavery justices might interpret the Constitution in ways that threatened slavery.²⁷

As Senator John C. Calhoun of South Carolina and other members of the southern slaveholding elite saw it, the end of slavery threatened them with extermination or with an inversion of existing power relations in which they would become slaves to their former slaves. So the issue had to be met at the frontier. By this logic, emancipation in the District of Columbia and prohibition of slavery in the territories were merely the first steps in a course of events that threatened southerners.²⁸ People like Calhoun seemed unable to believe that emancipated and empowered former slaves would not treat their masters even more harshly than their masters had treated them.

From the perspective of many northerners, the issue looked very different. Slavery was simply too great an evil to be allowed to spread to new territories and states. Many could treat slaveholders as innocent victims of history. But they could not justify contemporary decisions that would expand the evil and put northern workers and artisans in direct competition with slave labor. As demands to expand slavery became more insistent, efforts to repress discussion of it in the North became ever more futile.

B. Abolitionists and Mobs in 1830–1836

1. Background and Context

In the early 1830s, as the devotees of the compact theory saw it, an Abolitionist bull charged into this political and psychological china shop. From our distant perspective, it is at first hard to see why Abolitionists were so threatening to so many northerners as well as southerners, and why they were so hated. Abolitionists advocated some political activity. They asked the nation to abolish slavery in the District of Columbia, to prohibit slavery in the territories, to defeat the annexation of Texas, and to prohibit the

27. See, e.g., 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 52, 154, 250–68 (1953) (discussing the Commerce Clause and *Gibbons v. Ogden*).

28. Letter from John C. Calhoun to Augustin S. Clayton and Others of Athens, Ga. (Aug. 5, 1836), in 13 *THE PAPERS OF JOHN C. CALHOUN, 1835–1837*, at 263 (Clyde N. Wilson ed., 1980).

interstate slave trade. Many in the North agreed—at least with reference to slavery in the territories and the District. But while most in the North and South seemed to want the slavery issue to stay repressed, Abolitionists insisted on facing it at once. While the conventional wisdom was that slavery in the southern states should be left to providence and the future, Abolitionists pressed for immediate action, for either immediate or gradual abolition. The conventional wisdom held that the British were responsible for the institution and that no moral responsibility rested on Americans, North or South, slaveholder or nonslaveholder. But Abolitionists insisted that all Americans, especially slaveholders, were morally responsible for slavery. Abolitionists at first admitted that slavery in the states was beyond federal political action. But it was not beyond moral suasion. It was a sin, and slaveholders were sinners. They must be confronted; they must repent.²⁹

Sometimes Abolitionists described slaveholders as man stealers, kidnappers, pirates, or receivers of stolen goods.³⁰ Southerners accused of these sins responded by depicting Abolitionists as the embodiment of evil—Abolitionists were incendiaries threatening disunion, slave revolts, and race war. For Abolitionists, northerners who failed to confront the sin of slavery were also morally culpable. These northerners also often saw Abolitionists as the southerners did, as incendiaries threatening slave revolts (which the constitutional compact would compel northerners to help quell) and disunion. If slavery became a political issue, they insisted, it would divide the nation geographically and threaten civil war.³¹

Southern states had laws making it a crime to engage in speech or publication tending to cause discontent by slaves or free Negroes. Most southerners understood these laws to make Abolitionist and ultimately all antislavery literature criminal.³² Eventually, southern states suppressed not only speech by more “radical” opponents of slavery but also speech and press by pre-Civil War Republicans, who saw slavery as an evil and opposed its extension to federal territories.

29. See, e.g., *Anti-Slavery Principles*, ALTON OBSERVER, July 27, 1837, reprinted in EMANCIPATOR EXTRA, Feb. 12, 1838, at 1.

30. E.g., CONG. GLOBE, 24th Cong., 1st Sess. 119–20 (1836) (statement of Sen. Calhoun referring to antislavery petitions); *Declaration of the Anti-Slavery Convention, Assembled in Philadelphia, Dec. 4, 1833*, U.S. TELEGRAPH, Dec. 4, 1833, at 69 (“That every American citizen, who retains a human being in involuntary bondage as his property, is (according to scripture) a manstealer.” (citation omitted)).

31. *Speech of Harrison Gray Otis*, 49 NILES' WKLY. REG. 10 (1835); cf. *Mr. Austin's Speech, Delivered at Faneuil Hall, Dec. 8, 1837*, BOSTON DAILY ATLAS, Dec. 12, 1837, at 2.

32. See, e.g., Act to Prevent the Circulation of Seditious Publications, 1830 N.C. Sess. Laws ch. 5, § 1 (codified at N.C. REV. STAT. ch 34, § 17 (1837)).

To confront southerners with the sin of slavery, in the summer of 1835 Abolitionists mailed large quantities of antislavery literature (written material and graphic wood block illustrations depicting cruel mistreatment of slaves) to members of the southern elite. The South exploded. A few men seized and burned bags of abolition literature from the post office at Charleston, South Carolina. Northern postmasters embargoed and refused to mail abolition literature to the South. Meetings throughout the North condemned Abolitionists. Northern mobs, "gentlemen of property and standing" (as they were often described by all sides), became more active and dispersed abolition meetings, scattered the types of antislavery newspapers in the streets, or dumped abolition presses in the river. Northern cities and churches closed their doors to abolition meetings.³³ Major newspapers of both political parties condemned Abolitionists as miserable fanatics and incendiaries and generally refused to publish the abolition perspective.

In December 1835, President Andrew Jackson proposed a bill to ban from the mails "incendiary publications intended to instigate the slaves to insurrection."³⁴ The eagle eye of Senator John C. Calhoun of South Carolina, which could detect dangers to slavery at very great distances, saw in this proposal an expansion of federal power that could ultimately threaten slavery. (If the federal government could control the content of the mails, it might end up protecting abolition publications mailed to the South.) Calhoun proposed banning from the mail publications touching on slavery when the state to receive the item made such publication criminal.³⁵ But the Senate—some of its members concerned with civil liberties, many doubting that Congress could pass any law touching the press, many believing that southern states or northern states should handle the problem—refused to pass any bill.³⁶

After the Abolitionist postal effort, mass meetings throughout the North condemned Abolitionists.³⁷ Many elite figures saw mob action silencing Abolitionists as a narrow, tempered, and important response to a very dangerous problem. When an abolition meeting in Utica, New York was dispersed by a mob, the Democratic *Washington Globe* had greeted the event with the chortling headline, "ABOLITION MEETING ABOLISHED." The *Globe* seemed to congratulate the local citizens for "not

33. See generally RICHARDS, *supra* note 1; Curtis, *Curious History*, *supra* note 6, at 787–820.

34. Andrew Jackson, Seventh Annual Message to Congress, in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 176 (James D. Richardson ed., 1896).

35. CONG. GLOBE, 24th Cong., 1st Sess. 164–65 (1836); see also Curtis, *Curious History*, *supra* note 6, at 824–26.

36. Curtis, *Curious History*, *supra* note 6, at 823–36.

37. *Id.* at 836–46.

suffering their town to be disgraced."³⁸ Another paper described the events as "peaceful illegalities."³⁹ Mobs often engaged in surgical strikes, eliminating presses or preventing meetings, but avoiding excessive or gratuitous violence and destruction.

Senator Thomas Benton of Missouri found the action of mobs in suppressing Abolitionists by "chas[ing] off the foreign emissaries, silenc[ing] the gabbling tongues of female dupes, and dispers[ing] the assemblages, whether fanatical, visionary, or incendiary" as "above all praise."⁴⁰ Senator Silas Wright noted with satisfaction that suppression of an Abolitionist meeting in Utica, mob action against a local antislavery paper, and the subsequent refusal of the grand jury to indict were "above and beyond the law."⁴¹ Similarly, faced with the Abolitionist postal campaign, the Postmaster General indicated that he could find no legal authority for the postmasters to embargo abolition publications. Still he opined that "[w]e owe an obligation to the laws, but a higher one to the communities in which we live."⁴² In short, the peaceful illegality and higher-than-law conduct of anti-Abolitionists were greeted by many papers and officials with approbation.

Nor was the activity of mobs an isolated threat to antislavery expression. Because southerners insisted that abolition agitation (North and South) must cease, the southern elite demanded suppression in many forms, and some in the North attempted to comply. While the attempted censorship of Abolitionist mail headed South was narrowly rejected in the Senate, what Congress failed to authorize, postal authorities continued to do.⁴³ Some southern states demanded that northern legislatures pass laws making antislavery agitation a crime,⁴⁴ but no northern state complied. The demand, however, and its active consideration, contributed to a general feeling that civil liberty was under siege.⁴⁵ Abolitionists sent petitions to Congress that demanded abolition of slavery in the District of Columbia. On May 26, 1836, the House of Representatives passed the resolution known as the gag rule: "Resolved, That all petitions, memorials, resolutions and propositions relating in any way, or to any extent whatever to the

38. See *Abolition Meeting Abolished*, WASH. GLOBE, Oct. 27, 1835, at 3; *Abolitionists*, WASH. GLOBE, Oct. 26, 1835, at 2.

39. 49 NILES' WKLY. REG. 148 (1835) (citing the *Utica Observer*).

40. CONG. GLOBE, 24th Cong., 1st Sess. 78 (1836).

41. *Id.* at 121.

42. *The Postmaster General and the Incendiaries*, WASH. GLOBE, Aug. 12, 1835, at 2.

43. Curtis, *Curious History*, *supra* note 6, 817-36, 846.

44. E.g., *id.* at 815-16.

45. *Id.* at 836-46.

subject of Slavery, shall without being either printed or referred, be laid on the table, and that no further action whatever shall be had thereon." The idea of course was to suppress discussion of slavery in the House.⁴⁶ In the short run some discussion was eliminated. But massive opposition focused on the "denial" of the right to petition, and ultimately House discussions of slavery resumed and increased. Finally the gag rule was repealed in 1844.⁴⁷ Nor, ultimately, did mobs succeed in silencing Abolitionists. In another frantic attempt to secure its peculiar institution, the South would insist on expanded territory for slavery so that the power of slave states could continue, roughly at least, to balance that of the free.

Paradoxically, the more the southern elite insisted on security for slavery, the more insecure slavery became. The Abolitionist observation that slavery threatened the liberty of the North became more obvious. William Ellery Channing was a famous Unitarian minister and a moderate antislavery spokesman. In 1837, Channing highlighted the paradoxical quest for southern security (or was it really for an independent southern nation?) which was then demanding annexation of Texas as a slave state. The annexation of Texas, he warned, would

endanger the Union. It will give new violence and passion to the agitation of the question of slavery. It is well known, that a majority at the North have discouraged the discussion of this topic, on the ground, that slavery was imposed on the South by necessity, that its continuance of was not of choice, and that the states, in which it subsists, if left to themselves, would find a remedy in their own way. Let slavery be systematically proposed as the policy of these states, let it bind them together in efforts to establish political power, and a new feeling will burst forth through the whole North. It will be a concentration of moral, religious, political and patriotic feelings. The fire, now smothered, will blaze out, and of consequence, new jealousies and exasperation will be kindled at the South. Strange that the South should think of securing its "peculiar institutions" by violent means. Its violence necessarily increases the evils it would suppress—for example, by denying the right of petition to those who sought the abolition of slavery within the immediate jurisdiction of

46. *Id.* at 846–49. For a splendid comprehensive history of the petition question, see WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* (1996). An excellent shorter account appears in LEONARD L. RICHARDS, *THE LIFE AND TIMES OF CONGRESSMAN JOHN QUINCY ADAMS* (1986). For another excellent discussion, see GILBERT HOBBS BARNES, *THE ANTISLAVERY IMPULSE, 1830–1844*, at 109–45 (1933).

47. RICHARDS, *supra* note 46, at 178.

the United States, it has awakened a spirit, which will overwhelm Congress with petitions, till this right be restored. The annexation of Texas would be a measure of the same injurious character, and would stir up an open uncompromising hostility to slavery, of which we have seen no example, and would produce a reaction very dangerous to Union.⁴⁸

If the South favors expansion of slavery, Channing warned, a separate nation will be required. "It should borrow the code of the Dictator of Paraguay, and seal itself hermetically against the infectious books, opinions, and visits of foreigners."⁴⁹

Demands to expand slavery changed the political equation. Instead of an institution confined in the South, expansion of slavery threatened northern artisans, mechanics, and farmers with direct competition from slave labor in the territories. By the late 1850s, Republicans charged that there was a conspiracy to make slavery national, to spread it even to the free states. National slavery would pose a threat of direct competition between slave and free labor in all states.

Channing was particularly distressed by the suppressions of free speech by mob violence that were infecting the North. One attack on an abolition newspaper deserves special attention because it was close both in time and space to the events in Alton. That was the attack on the *Philanthropist* in Cincinnati, Ohio.

2. A Very Significant Mob: James G. Birney and the *Philanthropist*

James G. Birney (1792–1857) was the son of a wealthy slaveholding Kentuckian. In addition to owning slaves, however, Birney's father also advocated emancipation and a free state constitution for Kentucky. The younger Birney was trained as a lawyer. He settled in Alabama, where for a time he owned a plantation and slaves, and practiced law. He was instrumental in including in the Alabama constitution provisions permitting the legislature to emancipate slaves. Gradually Birney became increasingly antislavery. He became convinced that slavery was injurious not only to slaves but to whites in slave states. Over time, he migrated politically from colonization, to abolition, to a separate antislavery political party. As the South became increasingly hostile to abolition, Birney also migrated geographically, from Alabama, to Kentucky, to Ohio, and then farther North.

48. William Ellery Channing, *Dr. Channing on Texas*, 2 EMANCIPATOR 87 (Oct. 5, 1837).

49. *Id.*

At his father's death, James Birney emancipated his father's slaves, paying a co-heir about \$20,000 so he could do so. He broke with Garrisonian Abolitionists over their rejection of political activity and of the Constitution. In 1840 and 1844, he was the candidate for president of the newly formed antislavery Liberty party, polling first 6797 votes in 1840 (0.28% of the popular vote) and then 62,103 in 1844 (2.3% of the popular vote).⁵⁰ (The winners received 1,275,390 votes in 1840 and 1,339,494 votes in 1844.)⁵¹ Birney fell from a horse in 1845, suffered partial paralysis, withdrew from public activity, and died in 1857.⁵² In the mid-1830s most of Birney's long antislavery career was still before him.

Faced with mob opposition in Kentucky to his publication there of an antislavery weekly, in January of 1836 Birney moved to New Richmond, near Cincinnati, where he began to publish the *Philanthropist*.⁵³ In July of 1836, a mob destroyed the press of the *Philanthropist*, which had been relocated to Cincinnati.

Birney wrote an account of the Cincinnati event published under the name of the Executive Committee of the Ohio Anti-Slavery Society.⁵⁴ The description that follows is mainly from the pamphlet, often in its own words.⁵⁵ The pamphlet recounted, in the summer of 1835, a "REIGN OF TERROR" in the South. It said that the spirit of lawless violence was not confined to the South; northerners had encouraged it. Cincinnati's "principal daily newspapers, with, it is believed, but a single exception, sympathized with the flagellators and tormenters, and murderers of the South, and by their loud shouts cheered them on to further deeds of cruelty and blood."⁵⁶

Meanwhile, James G. Birney had been "compelled by . . . persecutions [of neighboring slaveholders]" to remove his family and antislavery newspaper from Kentucky. "Looking at the *Constitution* of Ohio, he there saw the fullest, the most honorable, and at the same time, the most solemn condemnation . . . upon slavery—and that to every one was secured the right—pronounced 'indisputable'—of speaking, writing, or printing on any

50. THE UNIVERSAL ALMANAC 91 (John W. Wright ed., 1997).

51. *Id.*

52. Walter Martin McFarlan, *Birney, James Gillespie*, in 1 DICTIONARY OF AMERICAN BIOGRAPHY 291-94 (Allen Johnson ed., 1964).

53. *Id.* at 292.

54. EXECUTIVE COMM. OF THE OHIO ANTI-SLAVERY SOC'Y, NARRATIVE OF THE LATE RIOTOUS PROCEEDINGS AGAINST THE LIBERTY OF THE PRESS, IN CINCINNATI (1836) [hereinafter NARRATIVE OF CINCINNATI RIOTS].

55. See RICHARDS, *supra* note 1, at 92-101 (providing a detailed account).

56. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 9.

subject”⁵⁷ But when the Cincinnati papers learned of the project, many substantial citizens, such as “merchants, who have commercial connexions with Southern slave-holders—and artizans, who are mostly employed in manufacturing household furniture . . . or other heavy machinery, for the South,” became active opponents and fanned the flames of popular fury. Birney determined to begin publication out of the city in the nearby town of New Richmond and to conduct the paper in “a fair, and impartial, and generous” way, both because it was right to do so and because Abolitionists were often criticized for their “fierce and uncharitable spirit.”⁵⁸

Still, civic leaders called a public meeting to protest Birney’s paper. It was presided over by the Mayor, assisted by an all-star cast of meeting vice presidents, including a minister and a former U.S. Senator and Ohio Supreme Court Justice. Those assembled passed a resolution objecting to “any paper which might be established for the purpose of discussing slavery.”⁵⁹ Still, the *Philanthropist* continued to publish. In April 1836, the Committee of the Ohio Anti-Slavery Society decided to move the paper, which now had 1700 subscribers, from New Richmond to Cincinnati.

Abolitionists saw a silver lining in the cloud of suppression. Birney wrote to Lewis Tappan, one of the New York financial angels of the anti-slavery movement: “You see, I am going to try Cin’i with my Press But let them mob it—as sure as they do, it will instantly make throughout this State *Five* Abolitionists to one that we now have.”⁶⁰

On the night of July 12, 1836, a group of men broke into the offices of the paper’s printer and destroyed parts of the press.⁶¹ However, the damages were quickly repaired and publication resumed.

The next night placards appeared in the city proclaiming:

ABOLITIONISTS BEWARE.

The Citizens of Cincinnati, embracing every class, interested in the prosperity of the City, satisfied that the business of the place is receiving a vital stab from the wicked and misguided operations of the abolitionists, are resolved to arrest their course. The destruction

57. *Id.* at 9–10.

58. *Id.* at 10 (emphasis omitted); see RICHARDS, *supra* note 1, at 93–94.

59. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 11; see RICHARDS, *supra* note 1, at 94.

60. Letter from James Gillespie Birney to Lewis Tappan (Mar. 17, 1936), in LETTERS OF JAMES GILLESPIE BIRNEY 1831–1857, at 311 (Dwight L. Dumond ed., 1966) [hereinafter LETTERS OF JAMES G. BIRNEY].

61. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 12; RICHARDS, *supra* note 1, at 95–96.

of their Press on the night of the 12th instant, may be taken as a warning.⁶²

The *Cincinnati Evening Post* lamented its unrealized hope for peace and quiet. It had hoped "that the Abolitionists would desist from publishing their paper here, and that those who had undertaken to prevent them would be satisfied." The paper went on to predict "that unless the arm of the law is strong enough to protect the Abolitionists, some act disgraceful to our city will be performed, if they attempt the reestablishment of their press."⁶³

The Executive Committee of the Ohio Anti-Slavery Society then published a public address recounting the destruction of the press, threats if it were reestablished, and threats of personal violence against individual members of the executive committee. It cited provisions of the Ohio Constitution securing free speech and free press. "A band of lawless men," the address insisted, "array themselves against the Constitution, declaring that *their* will and not that of the *People* is paramount. . . . Ought we basely to surrender a right pronounced by the highest law of the land to be 'INDISPUTABLE,' to a band of men who have entered into a treasonable combination to overthrow *all* law?"⁶⁴ No, the address concluded, "[W]e have embraced, with a full determination, by the help of God to maintain unimpaired the freedom of speech and the liberty of the press—the PALADIUM OF OUR RIGHTS."⁶⁵

The *Cincinnati Whig* published an article signed "Public Sentiment." Public Sentiment celebrated the Boston Tea Party, the lynching of Tories, and tarring and feathering. The founding fathers, Public Sentiment noted, revered and respected the laws "so long as they were productive of the public good" but did not "deem themselves slaves of the law." Public Sentiment suggested a crisis faced the nation with "the Government menaced and the union tottering upon the verge of dissolution." Other cities had suppressed abolition meetings and papers. Only *Cincinnati* had countenanced them. Commenting on this column, the *Whig* tersely announced its opposition both to Abolitionists and mobs.⁶⁶

On July 23, 1836, the *Cincinnati Gazette* announced a public meeting "to decide whether [they] will permit the publication or distribution of

62. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 14; RICHARDS, *supra* note 1, at 96.

63. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 15.

64. *Id.* at 18.

65. *Id.*

66. *See id.* at 19–20; RICHARDS, *supra* note 1, at 97.

Abolition papers in this city.”⁶⁷ The *Whig* proclaimed its loathing of Abolitionists and its belief in the pernicious tendencies of mobs. Still it suggested “there may be *ex necessitate rei* exception[s] to every general rule.”⁶⁸

On July 23, 1836, a public meeting issued various resolutions.

And, whereas, although we deprecate the existence of slavery, . . . yet we hold it to be one for which the present generation is not responsible; and . . . we regard the conduct of the abolitionists as justly calculated to excite unfriendly disposition on [the part of the southern states], and thus to effect injuriously our own business and prosperity.

The meeting called for the “absolute discontinuance of the publication of the said abolition paper” as the only way to “prevent a resort to violence.”⁶⁹ A final resolution promised to follow in the footsteps of the patriots at the Boston Tea Party who acted “*without* the sanction of law.” The Abolitionist newspaper, the meeting sorrowfully noted, was “shielded from legal enactment according to the usual practice of our laws so as to leave us but one channel though which we can rid our fair land of its withering influence.”⁷⁰

On July 26, the *Whig* asked with evident exasperation:

Will Birney and his Abolition associates still persist in the publication of their villainously misnamed *Philanthropist*, in despite of the public voice so *significantly* expressed at the immense meeting on Saturday? If they do they are to all “intents and purposes” *mobocrats* If a mob, however, be excited by their pugnacity and violence, let them not after this have the effrontery to say that they were not the offenders⁷¹

Birney and his associates could not expect to destroy the trade of Cincinnati and the Union and be counted as “peaceable citizens.”⁷² Meanwhile the *Cincinnati Republican* warned the Abolitionists that “[t]here are points beyond which public sentiment, even in a free government, may not be

67. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 21; see RICHARDS, *supra* note 1, at 97.

68. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 22.

69. *Id.* at 24; see RICHARDS, *supra* note 1, at 97.

70. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 25; RICHARDS, *supra* note 1, at 98.

71. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 28.

72. *Id.*

trifled with impunity." The clear implication was that the Abolitionists had reached that point.⁷³

A conference between the representatives of the Ohio Anti-Slavery Society—the publishers of the *Philanthropist*—and a committee appointed by the anti-abolition meeting was held, but the Abolitionists refused to desist from publishing their paper.⁷⁴ At the meeting, the Abolitionists proposed holding a public meeting to discuss all sides of the slavery issue, but, according to Birney, members of the anti-abolition committee responded that "the people would hear no public discussion on slavery." The anti-abolition committee made clear that it opposed any abolition paper. The issue was not the manner in which the ideas were discussed. "[I]t was the *discussion of slavery here*, that was thought to be injuring the business of the city."⁷⁵ In refusing to suspend publication, the Ohio Anti-Slavery Society argued that the *Philanthropist* was the only journal in the area discussing the slavery question and that public question must be discussed.⁷⁶ "We decline complying," the Executive Committee of the Ohio Anti-Slavery Society responded, "because the demand is virtually the demand of slaveholders, who, having broken down all the safe-guards of liberty in their own States, in order that slavery may be perpetuated, are now . . . making the demand of us to follow their example."⁷⁷ The anti-abolition committee adjourned, advising citizens against violence.⁷⁸

The *Cincinnati Whig* wrote, "Lay on M'Duff," and published the name and address of Achilles Pugh, the *Philanthropist's* printer. The anti-abolition group held another meeting which resolved that the press should be destroyed in a peaceable, orderly, and quiet manner; and a mob then destroyed the press and Pugh's printing office, and searched unsuccessfully for Pugh and Birney. The Mayor met the crowd and urged them to disperse, saying that for the mob to continue might endanger the innocent. "We have done enough for one night," he declared.⁷⁹ Later, some mob members made an "attack . . . [upon] the residence of some blacks." Riots continued for several nights.

A group of Cincinnati citizens calling themselves "the friends of Order, of Law, and the Constitution, having no connection with the Anti-

73. *Id.* at 29.

74. RICHARDS, *supra* note 1, at 98.

75. NARRATIVE OF THE CINCINNATI RIOTS, *supra* note 54, at 35.

76. *Id.* at 36.

77. *Id.* at 37.

78. *Id.*

79. *Id.* at 40; RICHARDS, *supra* note 1, at 99.

Slavery Society," called for a meeting to protest the mob violence. Leonard Richards says the group included prominent lawyers and merchants but, by and large, it included those with more lowly jobs (hatters, saddlers, bricklayers, and booksellers), compared to members of the anti-abolition committee or the mob.⁸⁰ Among the signers of the call for the meeting were S.P. Chase, later antislavery governor of Ohio, U.S. Senator, Lincoln cabinet member, and Chief Justice of the U.S. Supreme Court. The friends of Order, of Law, and the Constitution prepared a statement and a series of resolutions for consideration. One insisted on a right that was the bulwark of all others, "the right of every citizen to write, speak, and print, upon every subject, as he may think proper, being responsible to the laws and the laws ONLY, for the abuse of that liberty." If the right was abused a judicial remedy was available. If necessary the legislature could consider new laws.⁸¹

When the friends of Order, of Law, and the Constitution assembled, they found their meeting place already occupied by a large group of those who had held previous anti-abolition meetings. The friends of Order, of Law, and the Constitution sat by helplessly as the anti-Abolitionists resolved that the "establishment of the Abolition Press in this city has been the cause of all our recent difficulties."⁸² The Abolitionists persisted, however, and in 1837 an abolition press continued to publish in Cincinnati.

Infuriated public opposition would lead many to rethink, to doubt, and to retreat. Many Abolitionists, however, saw themselves as part of an historical tradition, and that view gave them strength and courage. Christ, after all, had been persecuted and killed, but He ultimately triumphed. Puritan martyrs had been burned in England, but their fame had been preserved in Foxe's *Book of Martyrs*, and the cause of Protestantism had triumphed. Later some activists in the English revolution of the 1640s, like Algernon Sidney, had remained true to republicanism after the Restoration and had been executed for their republican faith. But they were heroes to American revolutionaries. Like Birney, many Abolitionists and non-Abolitionists believed that persecution would aid the cause.

In 1834, the American Anti-Slavery Society had fielded a number of abolition missionaries. Led by the brilliant public speaker Theodore Weld,

80. RICHARDS, *supra* note 1, at 100.

81. NARRATIVE OF CINCINNATI RIOTS, *supra* note 54, at 42.

82. *Id.* at 44; see RICHARDS, *supra* note 1, at 100.

their missionaries converted northerners to Abolitionists with considerable success. They traveled through Ohio and other northern states, spreading the antislavery gospel. In September 1836, two Cincinnati papers had recommended that the antislavery activists be lynched.⁸³

One of the missionaries wrote Weld from the field. He had been asked to leave abolition for a more purely religious revival activity. He decided against leaving abolition:

My convictions have been greatly strengthened by the news we have just received from Cincinnati. You have probably heard that mob law is triumphant there—the press torn down and thrown into the river—the abolitionists hunted by bloodthirsty men—mayor and chief men at their head. My brethren are in bonds, not only the blacks, but the abolitionists. . . . I have helped to raise the storm. Shall I now avoid its fury by going into a less dangerous field? God forbid.⁸⁴

Instead, mob violence led Abolitionists to redouble their efforts. They published pamphlets to warn Americans how the persecution of Abolitionists endangered everyone's liberty. They increased their proselytizing. They sent more petitions to Congress to abolish slavery in the District of Columbia.

The basic Abolitionist belief was that slavery was a threat to American liberty. In August 1835 after some experience with mobs in Kentucky, Birney wrote to Gerrit Smith, a wealthy New York leader for the abolition cause:

The contest is becoming—has become,—one, not alone of freedom for the *black*, but of freedom for the *white*. It has now become absolutely necessary, that Slavery should cease in order that freedom may be preserved to any portion of our land. The antagonist principles of liberty and slavery have been roused into action and one or the other must be victorious. There will be no cessation of the strife, until Slavery shall be exterminated, or liberty destroyed.⁸⁵

83. RICHARDS, *supra* note 1, at 93.

84. Letter from William T. Allan et al. to Weld (Aug. 9, 1836), in 1 LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKÉ WELD, AND SARAH GRIMKÉ 1822–1844, at 324 (Gilbert H. Barnes & Dwight L. Dumond eds., 1965) [*hereinafter* WELD GRIMKÉ LETTERS].

85. Letter from James Gillespie Birney to Gerrit Smith (Aug. 13, 1835), in LETTERS OF JAMES G. BIRNEY, *supra* note 60, at 243.

3. The Alton Tragedy

Except for their dramatic and tragic end, events in Alton, Illinois in 1837 are remarkably similar to events in Cincinnati, Ohio in 1836. Both Lovejoy and Birney had faced mob violence in a slave state because of the nature of their newspapers, and both migrated to a free state to continue their antislavery press. Both Birney's Cincinnati and Lovejoy's Alton were just across a river from the slave states of Kentucky and Missouri the editors had fled. Both cities had strong commercial links to slave states, and a common basis for opposition was fear that antislavery activity would produce an economic boycott and undermine the prosperity of the cities.

Elijah P. Lovejoy, named for an Old Testament prophet, was born in Albion, Maine in 1802. Lovejoy's father was a clergyman, and after graduating from college and teaching school for a time, Elijah followed in his father's footsteps. He was licensed to preach by the Philadelphia Presbytery in 1833 and went to Saint Louis, in the slave state of Missouri, to edit the *Saint Louis Observer*.⁸⁶

Lovejoy's writings reflected his strong, and not always tolerant, opinions. He insisted that he did not "wish to touch any of the rights belonging to any class of citizens, Catholic or Protestant, Jew or Mahometan. But . . . Popery and Freedom . . . are incompatible . . ." He warned his countrymen "to be on their guard against . . . the hordes of ignorant, uneducated, vicious foreigners who are now flocking to our shores, and who, under the guidance of Jesuit Priests, are calculated, fitted and intended to *subvert our liberties*."⁸⁷

Lovejoy became increasingly antislavery. He supported gradual emancipation in Missouri. While generally in agreement with the ends the Abolitionists espoused, he warned against exciting "prejudices and bitterness."⁸⁸ As time went on, Lovejoy became more apocalyptic. In April 1835 he warned, "The groans, and sighs, and tears, and blood of the poor slave have gone up as a memorial before the throne of Heaven [T]hey

86. Gilbert H. Barnes, *Lovejoy, Elijah Parish*, in VI DICTIONARY OF AMERICAN BIOGRAPHY 434-35 (Dumas Malone ed., 1961).

87. E. P. Lovejoy, *ST. LOUIS OBSERVER*, Aug. 27, 1835, reprinted in MEMOIR OF THE REV. ELIJAH P. LOVEJOY 113-14 (Joseph C. Lovejoy & Owen Lovejoy eds., 1838) [hereinafter LOVEJOY MEMOIR].

88. E. P. Lovejoy, *Slavery*, *ST. LOUIS OBSERVER*, June 1834, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 120.

will descend in awful curses upon this land, unless averted by the speedy repentance of us all."⁸⁹ However, Lovejoy continued to oppose the Abolitionists' demand for "immediate and unconditional emancipation."⁹⁰

Lovejoy's warnings of God's thunderbolt aimed at "authors of such cruel oppression" were soon followed by discussion of the upcoming state constitutional convention. Missouri faced a "crisis that calls for the exercise of all the candor, enlarged patriotism, and sound judgment of all our citizens. We have it in our power to bequeath to posterity a benefit, for which all future generations shall bless us . . ." His candor included direct warnings of the dangers of slave revolts and the need to avoid bloodshed by gradual emancipation.⁹¹

Lovejoy had done other things that shocked supporters of slavery. He had shipped some Bibles to Jefferson City and (apparently unknowingly) used a full-fledged abolition paper, the *Emancipator*, as packing paper. He had preached against slavery during a revival, joining it with the sins of drinking and gambling. And, at a time when most of the nation's press suppressed any direct publication of Abolitionist principles and documents, Lovejoy printed the platform of the American Anti-Slavery Society and expressed his agreement with most of the Society's positions.⁹² A public meeting, led by influential citizens of St. Louis, condemned Abolitionists.⁹³ The meeting

Resolved, That the right of free discussion and freedom of speech exists under the constitution, but that being a conventional reservation made by the people in their sovereign capacity, does not imply a moral right, on the part of the Abolitionists, to freely discuss the question of Slavery, either orally or through the medium of the press, [sic] It is the agitation of a question too nearly allied to the vital interests of the slave-holding states to admit of public disputation; and so far from the fact, that the movements of the Abolitionists are constitutional, they are in the greatest degree seditious, and cal-

89. DILLON, *supra* note 1, at 54 (citing the *St. Louis Observer*, Apr. 16, 1835); E. P. Lovejoy, *Slavery*, ST. LOUIS OBSERVER, Apr. 16, 1835, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 123.

90. Lovejoy, *supra* note 89, at 123.

91. DILLON, *supra* note 1, at 54-55; Elijah P. Lovejoy, *Letter from the Editor*, ST. LOUIS OBSERVER, May 21, 1835, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 131.

92. DILLON, *supra* note 1, at 58, 60, 62.

93. *Id.* at 66-67.

culated to incite insurrection and anarchy, and, ultimately, a dis-
severment of our prosperous Union.⁹⁴

The resolutions further warned that the "infatuated Abolitionists" advanced the "doctrine of *amalgamation*," which would "reduce the high intellectual standard of the American mind to a level with the Hottentot."⁹⁵ Finally, the resolution announced that "Slavery as it now exists . . . [is] sanctioned by the sacred Scriptures."⁹⁶

Lovejoy printed the resolutions and responded to them in the November 5 issue of his paper. He insisted that he had not knowingly sent the *Emancipator* with the Bibles he shipped, but "I claim the *right* to send ten thousand of them if I choose, to as many of my fellow-citizens. Whether I will *exercise* that right or not, is for me, and not the *mob*, to decide."⁹⁷

He insisted the moral right to discuss slavery was not a matter for human legislation or resolutions. The true issue was the civil, the political right to discuss slavery and that was answered by the Missouri Constitution: "That the free communication of thoughts and opinions is one of the invaluable rights of man, and every person may freely speak, write, and print ON ANY SUBJECT, being responsible for the abuse of that liberty."⁹⁸ If he abused his freedom of speech, he was amenable to the laws.

But it is said that the right to hold slaves is a constitutional one, and therefore not to be called in question. I admit the premise, but deny the conclusion. . . . The Constitution declares that this shall be a perpetual republic, but has not any citizen the right to discuss, under that Constitution, the comparative merits of despotism and liberty? . . . Robert Dale Owen came to this city . . . openly proclaiming the doctrine that the institution of marriage was a curse to any community It was . . . an abominable doctrine, and one which, if acted out, would speedily reduce society to the level of barbarism . . . yet who thought of denying Mr. Owen . . . the perfect right of avowing such doctrines, or who thought of mobbing [him] . . . ?

94. Archibald Gamble et al., *To the Rev. E. P. Lovejoy, Editor of the Observer*, ST. LOUIS OBSERVER, Oct. 5, 1835, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 138-39.

95. *Id.* at 139.

96. *Id.* at 140.

97. Elijah P. Lovejoy, *To My Fellow Citizens*, ST. LOUIS OBSERVER, Nov. 5, 1835, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 141.

98. *Id.* at 143.

See the danger, and the natural and inevitable result to which the first step here will lead. To-day a public meeting declares that you shall not discuss the subject of Slavery The truth is, my fellow-citizens, if you give ground a single inch, there is no stopping place.⁹⁹

Lovejoy emphatically denied that the Bible sanctioned slavery.

What is the system of Slavery . . . ? It is a system of buying and selling immortal beings for the sake of gain; a system which forbids to man and woman the rights of husband and wife, . . . a system which tolerates . . . tearing husband and wife, parent and child asunder, chaining their victims together, and then driving them with a whip¹⁰⁰

Lovejoy further suggested the real cause of opposition to the *Observer* was "its opposition to Popery."¹⁰¹ "I do, therefore," Lovejoy insisted "as an American citizen, and Christian patriot, and in the name of Liberty, and Law, and RELIGION, solemnly PROTEST against all these attempts . . . to frown down the liberty of the press, and forbid the free expression of opinion."¹⁰²

Lovejoy's defense of freedom of the press brought him expressions of support. But intense opposition continued, and he decided to move the press from St. Louis, in the slave state of Missouri, to Alton, in the free state of Illinois.

In the same issue of the *Observer* in which he announced his intention to move the paper to Illinois, Lovejoy editorialized on a "SAVAGE BARBARIETY." A free black man named McIntosh had attempted to rescue a fellow sailor who was in custody of law enforcement officers. When he was arrested in turn and was told he could expect to spend five years in prison, the black man stabbed one of his captors to death. He was apprehended and jailed, but seized by a mob that tied him to a tree and burned him to death.¹⁰³

It is not yet five years since the first mob . . . was organized in St. Louis. They commenced operations, by tearing down the brothels of

99. *Id.* at 143-44.

100. *Id.* at 147 (internal quotation marks omitted).

101. *Id.* at 149.

102. *Id.* at 153.

103. See, e.g., RICHARDS, *supra* note 1, at 101.

the city The next achievement was to tear down a gambling-house The next and last we need not again repeat.

. . . [I]t is difficult to withdraw our thoughts and feelings from the great provocation to violence [But w]e *must* stand by the constitution and laws, or ALL IS GONE.¹⁰⁴

More outrages followed. The local judge, Luke Lawless, charged the grand jury that if the death of the "murderer . . . was the act . . . of the multitude . . . of congregated thousands, seized upon and impelled by that mysterious, metaphysical, and almost electric frenzy . . . then, I say act not at all in the matter . . . it is beyond the reach of human law. . . ."¹⁰⁵ The judge blamed the killing by the black man on the Abolitionists, and he identified Lovejoy as one.¹⁰⁶ Lovejoy in turn criticized the judge as a foreigner: "[F]oreigners educated in the old world, never can come to have a proper understanding of American constitutional law."¹⁰⁷ He detected in the judge's charge "the cloven foot of Jesuitism." "What is Jesuitism but another name for the doctrine that principles ought to change according to circumstances? And this is the very identical doctrine of the Charge."¹⁰⁸ Finally, he answered the judge's suggestion that the office of the *Observer* was in danger because of what it had written about the "M'Intosh tragedy":

To establish our institutions of civil and religious liberty, to obtain freedom of opinion and of the press, guaranteed by constitutional law, cost thousands, yea, tens of thousands of valuable lives. . . . We covet not the loss of property nor the honours of martyrdom; but better . . . that editor, printer, and publishers, should be chained to the same tree as M'Intosh, and share his fate, than that the doctrines promulgated by Judge Lawless from the bench, should become prevalent For they are subversive of all law, and at once open the door for the perpetration, by a congregated mob, calling themselves

104. Elijah P. Lovejoy, *Awful Murder and Savage Barbarity*, ST. LOUIS OBSERVER, May 5, 1835, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 172-73.

105. Elijah P. Lovejoy, *The Charge of Judge Lawless*, ST. LOUIS OBSERVER, July 21, 1836, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 175.

106. DILLON, *supra* note 1, at 83-85.

107. Lovejoy, *supra* note 105.

108. *Id.* at 176.

the people, of every species of violence, and that too with perfect impunity.¹⁰⁹

Though Lovejoy had announced his intention of moving to Alton, a St. Louis mob smashed the office of the *Observer*, but somehow failed to demolish the press. So the press survived, though not for long.¹¹⁰

Opposition dogged Lovejoy. Upon the press' arrival in Alton, some men took it from the dock and threw it in the river.¹¹¹ The press was replaced and Lovejoy continued to speak frankly against slavery and ever more favorably of abolition. On May 25, 1837, he wrote that the love of money was blunting the nation's moral sense. "The love of money is an earth-born, grovelling propensity, and it debases . . . all whom it influences . . ." ¹¹² Slavery was one example: even Christian ministers, "reverend divines" taught that the Bible justified slavery. Future generations would find it difficult to believe. "Men were either too busy in making money . . . or too desirous to get a share of that earned by the forced labour of the poor slave, to hear his groans. His tears, mingled with his blood drawn by the whip of the merciless taskmaster, fell unheeded . . ." ¹¹³

On July 6, 1837, Lovejoy more formally aligned himself with Abolitionists and advocated formation of an Illinois antislavery society.¹¹⁴ Opposition mounted. On July 8, 1836, a handbill called for a meeting of "friends of the *Observer* dissatisfied with its course." The meeting expressed its "disapprobation of the course pursued by the Rev. E. P. Lovejoy, Editor of the *Alton Observer*, in publishing and promulgating the doctrines of Abolitionism . . ." ¹¹⁵ It found Lovejoy guilty of abolition doctrines of "a most inflammatory character."¹¹⁶ Because Illinois was a free state, the

109. *Id.* at 177.

110. DILLON, *supra* note 1, at 88.

111. *Id.*; RICHARDS, *supra* note 1, at 101.

112. *The Bubble Burst*, ALTON OBSERVER, May 25, 1837, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 189.

113. *Id.* at 190.

114. *Illinois State Anti-Slavery Society*, ALTON OBSERVER, July 6, 1837, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 214; RICHARDS, *supra* note 1, at 102.

115. *Illinois State Anti-Slavery Society*, *supra* note 114, at 217; RICHARDS, *supra* note 1, at 102-03.

116. *Illinois State Anti-Slavery Society*, *supra* note 114, at 218.

meeting insisted, agitating the slavery issue in Illinois could do no good and could do "much injury and damage" to Alton by antagonizing slave states.¹¹⁷ "[A]s we deprecate all violence of mobs," the meeting announced, "we now call on him, by our committee, and politely request a discontinuance of the publication of his incendiary doctrines"¹¹⁸

Lovejoy did not desist. On July 20, 1837, he published an article explaining antislavery doctrines. His discussion is crucial to understanding the controversy. For this reason, I will set out Lovejoy's description of abolition principles at length:

FIRST PRINCIPLES.

1. Abolitionists hold that "all men are born free and equal, endowed by their Creator with certain inalienable rights, among which are life, LIBERTY, and the pursuit of happiness." They do not believe that these rights are abrogated, or at all modified by the color of the skin, but that they extend alike to every individual of the human family.

2. As the above-mentioned rights are in their nature inalienable, it is not possible that one man can convert another into a piece of property, thus at once annihilating all his personal rights, without the most flagrant injustice and usurpation. But American slavery does this—it declares a slave to be a "THING," a "CHATTEL," an article of personal "PROPERTY," a piece of "MERCHANDISE," and now actually holds TWO AND A HALF MILLIONS of our fellowmen in this precise condition.

3. Abolitionists, therefore, hold American Slavery to be a *wrong*, a legalized system of inconceivable injustice, and a sin. That it is a sin against God, whose prerogative as the rightful owner of all human beings is usurped, and against the slave himself, who is deprived of the power to dispose of his services as conscience may dictate, or his Maker requires. And as whatever is morally wrong can never be politically right, and as the Bible teaches, and as abolitionists believe, that "righteousness exalteth a nation, while sin is a reproach to any people," they also hold that slavery is a political evil of unspeakable magnitude, and one which, if not removed, will speedily work the downfall of our free institutions, both civil and religious.

117. *Id.*

118. *Id.* at 219.

4. As the Bible inculcates upon man but one duty in respect to sin, and that is, immediate repentance, abolitionists believe that all who hold slaves, or who approve the practice in others, should *immediately* cease to do so.

5. Lastly. Abolitionists believe, that as all men are *born* free, so all who are now held as slaves in this country were BORN FREE, and that they are slaves now is the sin, not of those who introduced the race into this country, but of those, and those alone, who now hold them, and have held them in slavery from their birth. Let it be admitted, for argument's sake, that A. or B. has justly forfeited his title to freedom, and that he is now the rightful slave of C., bought with his money, how does this give C. a claim to the posterity of A. down to the latest generation? And does not the guilt of enslaving the successive generations of A.'s posterity belong to their respective masters whoever they be? No where are the true principles of freedom and personal rights better understood than at the South, though their practice corresponds so wretchedly with their theory. Abolitionists adopt, as their own, the following sentiments expressed by Mr. Calhoun in a speech on the tariff question, delivered in the Senate of the United States, in 1833: "He who *earns* the money—*who digs it out of the earth* with the sweat of his brow, has a *just-title* to it against the Universe. No one has a right to touch it, *without his consent*, except his government, and *it only* to the extent of its legitimate wants: to take more is *robbery*." Now, this is precisely what slaveholders do, and abolitionists do but echo back their own language when they pronounce it "*robbery*."

EMANCIPATION—WHAT IS MEANT BY IT?

Simply, that the slaves shall cease to be held as *property*, and shall, henceforth be held and treated as human beings. Simply, that we should take our feet from off their necks. Perhaps we cannot express ourselves better than to quote the language of another southerner. In reply to the question, what is meant by emancipation, the answer is—

"1. It is to reject with indignation the wild and guilty phantasy, that man can hold *property* in man. 2. To pay the laborer his hire, for he is worthy of it. 3. No longer to deny him the right to marriage, but to let every man have his own wife, as saith the apostle. 4. To let parents have their own children, for they are the gift of the Lord *to them*, and no one else has any right to them. 5. No longer to

withhold the advantages of education and the privilege of reading the Bible. 6. To put the slave under the protection of law, instead of throwing him beyond its salutary influence.”

Now, who is there that is opposed to slavery at all, and believes it to be wrong and a sin, but will agree to all this?

HOW AND BY WHOM IS EMANCIPATION TO BE EFFECTED?

To this question the answer is by the *masters themselves*, and by no others. No others can effect it, nor is it desirable that they should, even if they could. Emancipation, to be of any value to the slave, must be the free, voluntary act of the master, performed from a conviction of its propriety. This avowal may sound very strange to those who have been in the habit of taking the principles of the abolitionists from the misrepresentations of their opponents. Yet this is, and always has been, the cardinal principle of abolitionists. If it be asked, then, why they intermeddle in a matter where they can confessedly do nothing themselves in achieving the desired result, their reply is, that this is the very reason why they do and ought to intermeddle. It is because they cannot emancipate the slaves, that they call upon those who can to do it. Could they themselves do it, there would be no need of discussion—instead of discussing they would act, and with their present views the work would soon be accomplished.¹¹⁹

In Alton, the local meeting of dissatisfied “friends” of Lovejoy’s *Observer* appointed a committee of five citizens who wrote Lovejoy to inform him of the meeting’s action and to request a conference. Lovejoy thanked the writers for the courteous terms of the letter and expressed his respect toward them as individuals. But, he said he could not “admit that the liberty of the press and freedom of speech, were rightfully subject to other supervision and control, than those of the land.”¹²⁰

As opposition mounted, Lovejoy was stalked by opponents,¹²¹ some hoping to tar and feather him; a mob invaded his home; and a mob wrecked his newspaper office. Subsequent public meetings followed. At one public meeting, the Rev. Edward Beecher proposed a series of resolutions. Edward Beecher was the son of Lyman Beecher and brother to Harriet Beecher Stowe, who would write *Uncle Tom’s Cabin*. Beecher’s

119. *Anti-Slavery Principles*, ALTON OBSERVER, July 27, 1837, reprinted in EMANCIPATOR EXTRA, Feb. 12, 1838, at 1.

120. Letter from Elijah P. Lovejoy to B. K. Hart et al. (July 26, 1837), reprinted in LOVEJOY MEMOIR, *supra* note 87, at 228.

121. RICHARDS, *supra* note 1, at 104–05.

resolutions declared that the free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely write, speak, and print on any subject, being responsible for the abuse of that liberty. "[T]he question of abuse must be decided solely by a regular civil court, and in accordance with the law; and not by an irresponsible and unorganized portion of the community . . ."122 Truth would triumph in free discussion. These principles, Beecher insisted, should be maintained independent of persons or sentiments and especially so in the case of unpopular sentiments. "[T]hese principles," Beecher's resolutions continued, "demand the protection of the Editor and of the press of the 'Alton Observer,' on grounds of principle solely, and altogether disconnected with approbation of his sentiments."¹²³

The resolutions were opposed by Mr. Usher Linder, attorney general of the state, and referred to a committee pending a further meeting. Linder proposed his own resolution, which carried. It opposed any infraction of the peace in the interim between adjournment and reassembling. At the next meeting the committee report attempted to conciliate all sides and called for peace. It was sure citizens would "discountenance every act of violence . . . and cherish a sacred regard for the great principles contained in our Bill of Rights."¹²⁴ But general principles did not decide this concrete case:

[W]hile there appears to be no disposition to prevent the liberty of free discussion . . . as a general thing; it is deemed a matter indispensable to the peace and harmony of this community that the labours and influence of the . . . Editor of the "Observer" be no longer identified with any newspaper establishment in this city.¹²⁵

Lovejoy spoke to the resolutions:

I, Mr. Chairman, have not desired, or asked any *compromise*. I have asked for nothing but to be protected in my rights as a citizen—rights which God has given me, and which are guaranteed to me by the constitution of my country. . . . What, sir, I ask, has been my offence? . . . If I have committed any crime, you can easily convict me. You have public sentiment in your favour. . . . But if I have been guilty of no violation of law, why am I hunted up and

122. LOVEJOY MEMOIR, *supra* note 87, at 269 (quoting Resolutions from the City of Alton Public Meeting (Nov. 2, 1837)).

123. *Id.* at 270.

124. *Id.* at 274.

125. *Id.*

down continually like a partridge upon the mountains? Why am I threatened with the *tar-barrel*? Why am I waylaid every day, and from night to night, and my life in jeopardy every hour?

. . . I plant myself, sir, down on my unquestionable *rights*, and the question to be decided is, whether I shall be protected in the exercise, and enjoyment of those rights¹²⁶

Most of the anti-Lovejoy resolutions passed. A few days later Lovejoy was killed defending his fourth press from a mob, shot as he attempted to shoot an arsonist climbing to set fire to the roof of the building housing the press and its defenders.

III. REACTION TO THE ATTACK ON FREE SPEECH

A. Defense of Free Speech by William Ellery Channing

Even before Lovejoy's death, more people began to defend free speech and press and to attack mobs. One early defender of free speech was William Ellery Channing, the great Unitarian Minister. In 1835, Channing wrote his book *Slavery*, a moderate antislavery manifesto. Channing's views epitomized a non-Abolitionist, antislavery, pro-free speech perspective.

While Channing was antislavery, he was no Abolitionist. He found Abolitionist criticism often too harsh and uncharitable. He opposed their mode of agitating the slavery question, but he favored discussion. "There was never such an obligation to discuss slavery as at this moment," Channing wrote, "when recent events have done much to unsettle and obscure men's minds in regard to it."

This result is to be ascribed in part to the injudicious vehemence of those who have taken into their hands the care of the slave Let no man touch the great interests of humanity, who does not strive to sanctify himself for the work by cleansing his heart of all wrath and uncharitableness, who cannot hope that he is in a measure baptized unto the spirit of universal love. Even sympathy with the injured

126. *Id.* at 279-80 (quoting the Remarks of Elijah P. Lovejoy Before the City of Alton Public Meeting (Nov. 3, 1837)) (internal quotation marks omitted).

and oppressed may do harm, by being partial, exclusive, and bitterly indignant.¹²⁷

Still, Channing defended the rights of Abolitionists to engage in free speech about slavery and rejected mob rule. His was one of a number of early protests against denials of free speech. Channing and others pointed out that mob rule was inconsistent with republican, or representative, government. The theory of the American nation was that the people were sovereign and that their will, expressed through representative institutions, should control. This will was filtered and checked in many ways. But at least in theory, these limits were imposed by the people themselves in their federal and state constitutions. A corollary to the idea of popular sovereignty was that the people had the right to set the agenda and that citizens had the right to raise issues for general consideration.

Mobs violated republican government in two ways. Because mobs circumvented established institutions for determining popular will, the rule imposed by the mob was not the legitimate voice of the people. Second, because mobs kept matters off the agenda, they prevented the people from considering issues and alternatives in the first place.

Channing made the first point quite clearly.

Mobs call themselves, and are called, the People, when in truth they assail immediately the sovereignty of the People, . . . [T]he People is Sovereign. But by the People we mean not an individual here and there, not a knot of twenty or a hundred or a thousand individuals in this or that spot, but the Community formed into a body politic, and expressing and executing its will through regularly appointed organs. There is but one expression of the will or sovereignty of the people, and this is Law.¹²⁸

Lovejoy had made the same point when he implied that a mob calling itself "the people" did not make itself the people. He referred to "a congregated mob, calling themselves the people," who therefore could perform "every species of violence, and that too with perfect impunity."¹²⁹

127. William E. Channing, *Slavery*, in *SLAVERY AND EMANCIPATION* 4 (Negro Univ. Press 3d ed. 1968) (1835).

128. *Id.* at 163.

129. Lovejoy, *supra* note 105, at 177.

By itself the argument that the law was the only form by which the will of the people could be legitimately executed left open the possibility of silencing Abolitionists through law rather than mobs. At times Channing suggested that, if changes were required, the matter should be put before the legislature or a state constitutional convention. But in the end, he implied that silencing Abolitionists was not consistent with representative government because it precluded popular choice.

Of all powers, the last to be intrusted to the multitude of men, is that of determining what questions shall be discussed. The greatest truths are often the most unpopular and exasperating; and were they to be denied discussion, till the many should be ready to accept them, they would never establish themselves in the general mind. The progress of society depends on nothing more, than on the exposure of time-sanctioned abuses, which cannot be touched without offending multitudes, than on the promulgation of principles, which are in advance of public sentiment and practice, and which are consequently at war with the habits, prejudices, and immediate interests of large classes of the community. Of consequence, the multitude, if once allowed to dictate or proscribe subjects of discussion, would strike society with spiritual blindness, and death. The world is to be carried forward by truth, which at first offends, which wins its way by degrees, which the many hate and would rejoice to crush.¹³⁰

Suppression by law of Abolitionist ideas was also not consistent with Channing's views of individual rights.

Channing believed that directly inciting slaves to rebel could and should be made criminal. But southern defenders of slavery and their northern allies insisted on suppression that went far beyond that. They justified suppressing speech that did not directly counsel slave revolts. Suppression was justified, they insisted, because antislavery speech, simply by virtue of its denunciation of slavery, had a natural tendency to produce revolts and disunion. Channing and others squarely rejected the bad tendency rationale.

Of all pretenses for resorting to lawless force, the most dangerous is the *tendency* of measures or opinions. Almost all men see ruinous tendencies in whatever opposes their particular interests or views.

130. Letter of Dr. W. E. Channing to James G. Birney, Boston, November 1st, 1836, *PHILANTHROPIST*, Dec. 9, 1836, at 2, reprinted in 2 WILLIAM ELLERY CHANNING, *THE WORKS OF WILLIAM E. CHANNING* 156, 161 (1980).

All the political parties, which have convulsed our country, have seen tendencies to national destruction in the principles of their opponents. So infinite are the connexions [sic] and consequences of human affairs, that nothing can be done in which some dangerous tendency may not be detected. . . . There is a tendency in laying bare of deep-rooted abuses to throw a community into a storm. . . . Exclude all enterprises which *may* have evil results, and human life will stagnate. . . . The truth is, that any exposition of Slavery, no matter from whom it may come, may chance to favor revolt. It may chance to fall into the hands of a fanatic A casual, innocent remark in conversation, may put wild projects into the unbalanced or disordered mind of some bearer. Must we then live in perpetual silence?¹³¹

As northern critics noted, the bad tendency rationale might require banning publication of the Declaration of Independence.¹³²

By the time Lovejoy was killed, the gag rule, the attempt to ban anti-slavery publications from the mail headed south, the unsuccessful attempts to convince northern legislatures to pass laws silencing Abolitionists (or at least punishing them for pamphlets and newspapers sent to the South), and mobbing of Abolitionists had all combined to give thoughtful Americans concern for the future of civil liberty.

B. Reaction to Lovejoy's Death

Lovejoy's death crystallized the fear that slavery would destroy free speech and civil liberty in the North as well as the South. It produced an immense public reaction, a reaction the Abolitionists did all they could to cultivate. Earlier, in 1835, the *Washington Globe*, an organ of the national Democratic party, had noted with satisfaction, "[Abolitionists] have been hissed from the pulpit in Maine—their conventicles have been broken in upon and dispersed in New York—and recently in Ohio, one of their leaders was pelted with rotten eggs, and his incendiary attempt thus marked with the infamy it merited."¹³³ But in late 1837, the reaction was quite

131. *Id.* at 163–64. For another rejection of the bad tendency rationale, consider, for example, CINCINNATUS, FREEDOM'S DEFENCE: OR A CANDID EXAMINATION OF MR. CALHOUN'S REPORT ON THE FREEDOM OF THE PRESS 22 (1836).

132. In the South, Congressman John Quincy Adams said, "the doctrine of the Declaration of Independence . . . is there held as incendiary doctrine, and deserves lynching." 2 EMANCIPATOR 47 (July 19, 1838).

133. *The Southern Agitators*, WASH. GLOBE, May 18, 1835, at 2.

different. After Lovejoy's death and the firestorm of criticism it evoked, fewer in the North supported suppression of abolition.

As the *Louisville Journal* of December 6, 1837 put it, "[t]he death of Lovejoy has evidently created an excitement at the North, of tremendous depth and strength."¹³⁴ The *Emancipator*, the New York paper of the American Anti-Slavery Society, reported that to its direct knowledge more than two hundred newspapers had "fully and decidedly" condemned the "Alton outrage."¹³⁵ "The incidents which preceded and accompanied, and followed the catastrophe of Mr. Lovejoy's death," former President John Quincy Adams insisted, "point it out as an epocha in the annals of human liberty. They have given a shock as of an earthquake throughout this continent"¹³⁶

Condemnation by press and pulpit was intensified because the attack had been made on an editor and a minister. Many in the press noted that their own interests and rights were at stake. "The press, we are rejoiced to say," commented the *Easton Pennsylvania Whig*, "utters one common sentiment of abhorrence at this bloody transaction Every man, and especially every journalist, must feel called upon to see to it that the outrage upon every thing we hold dear is redressed."¹³⁷ "We have been connected with the press too long," commented the *Boston Times*, "not to know its value"¹³⁸ "We are astonished," wrote the *Providence Courier* "that even one journal can be found, so unmindful of its own rights" as not to fully condemn the attack on Lovejoy.¹³⁹

Not all read Lovejoy's death in this way, however. The *Cincinnati Whig*, *The National Intelligencer* (a leading Whig paper), and the *Washington Globe* (a leading Democratic paper) all suggested that Lovejoy's obstinate course had contributed to the tragedy. For example, the *Whig* wrote:

There has been another very serious riot at Alton, Illinois, caused by the indomitable abolitionism of the Rev. E. P. Lovejoy; who seems to have utterly disregarded the sentiments and feeling of a large

134. *The Impression That is Making in the Slave States*, 2 EMANCIPATOR 131 (Dec. 21, 1837) (quoting the *Louisville Journal*, Dec. 6, 1837).

135. *Testimonies of a Free Press*, EMANCIPATOR EXTRA, Feb. 12, 1838, at 2.

136. John Quincy Adams, *Introduction to LOVEJOY MEMOIR*, *supra* note 87, at 12.

137. *Sentiments of the Press*, 2 EMANCIPATOR 130 (Dec. 21, 1837) (quoting the *Easton Pennsylvania Whig*).

138. *Id.* (quoting the *Boston Times*).

139. *Id.* (quoting the *Providence Courier*).

majority of the people of that place and who, apparently, has taken no little pains to bring about the awful catastrophe, of which we are now to speak.¹⁴⁰

A sermon by Rev. Hubbard Winslow of Boston explained,

Mobs are an evil incidental to all but despotic governments; and it is the part of every good citizen to guard against exciting them In all republican governments where the power resides with the people, if you either do or publish any thing, right or wrong, so far in advance of, or aside from their views, as to strongly excite their indignation, a mob is the natural consequence¹⁴¹

But these reactions were not typical.

In the mid-1830s, citizens frequently called public meetings and passed resolutions in an attempt both to shape and express public sentiment. In 1835, after the abolition postal effort, a large number of local meetings had condemned Abolitionist agitation. But after Lovejoy's death, many meetings condemned the attack on the freedom of the press. The *Emancipator* collected and reprinted resolutions from throughout the nation.¹⁴²

C. Some Common Ideas Expressed After Lovejoy's Death: Free Speech as a National and State Right, Liberty, or Privilege

The very general reaction in the North was to condemn the murder and to see it as part of an attack on the *rights, liberties, or privileges* (words commentators often used) of *American citizens* and of liberties protected by *state and federal constitutions*.

The *Baltimore Lutheran Observer*, like many papers, both described free press as a constitutional privilege and suggested that if Lovejoy had offended against the law (and those that considered the question typically insisted that he had not), then a legal remedy was the only appropriate one. But southern slaveholders would find cold comfort in the suggestion. Not a single northern legislature had acceded to the southern demand that Abolitionist expression be made a crime.

140. *Some Particulars of the Abolition Riot and Deaths at Alton, From the Cincinnati Whig Nov. 14, DAILY ALBANY ARGUS, Nov. 22, 1837, at 2.*

141. *Lynch Law, 2 EMANCIPATOR 141 (Jan. 11, 1838).*

142. *See EMANCIPATOR EXTRA, Feb. 12, 1838, at 1-4.*

As the *Lutheran Observer* put it:

Whatever may have been the faults of Mr. Lovejoy, he should if guilty of a violation of the laws of the state, have been called to an account in a legal or constitutional form. Freedom of opinion and of the press is an inalienable privilege secured to us by our political *magna charta* as well as by the original inherent right of our nature, and it is impossible that the citizens of this free and enlightened republic should consent to surrender this inestimable privilege in the present age of liberal views. . . . We have . . . but little feeling in common with abolitionists, but we tell all anti-abolitionists that they are far from serving their cause by such acts of bloody ferocity; they are doing more by such deeds of violence and murder to aid the cause they wish to subvert than ten presses in Alton could effect.¹⁴³

The press accounts and resolutions quite commonly described freedom of speech, press, and opinion as rights or privileges of American citizens and as rights established or guaranteed by the national constitution as well as by state constitutions. These statements are significant in evaluating common understanding of words later used in Section 1 of the Fourteenth Amendment, which would be proposed twenty-nine years after Lovejoy's death, in 1866. The Fourteenth Amendment, which capped more than thirty years of antislavery efforts, provided that no state "shall abridge the privileges or immunities of citizens of the United States."¹⁴⁴

Could Americans have understood that American citizens—not just citizens of Illinois or a state that chose to secure the right—had a national right of free speech? A second question is whether the right could equally well be described by the word "privilege." The question is complex because today we think of a right or privilege as something the courts will enforce. Many in the eighteenth and nineteenth centuries distinguished the right from the question of whether the law provided security for it.

In 1836, the *New York Evening Post* had said that "[t]o entertain and express freely any opinion respecting our political institutions, is the privilege of all who live under a democratick government."¹⁴⁵ An 1836 meeting in Willoughby, Ohio in favor of free discussion of slavery proclaimed the "unquestionable right of all persons in this republic, to discuss every

143. *Testimonies of the Spirit of Liberty*, 2 EMANCIPATOR 129, 129–30 (Dec. 21, 1837) (quoting the *Baltimore Lutheran Observer*).

144. U.S. CONST. amend. XIV, § 1.

145. N.Y. EVENING POST, July 14, 1836, at 2.

subject pertaining to its welfare." The "constitution of the United States," the meeting insisted, "protects us in so doing."¹⁴⁶ "Is a citizen of the United States . . . to be murdered for defending the rights guaranteed to him by the Constitution of his country?" asked the *Louisville Herald*.¹⁴⁷ Those who killed Lovejoy, the *New York Daily News* said, were "violators of the rights and privileges of American citizens."¹⁴⁸ It was disgraceful, the *New Hampshire Courier* wrote, that local authorities had failed to protect Lovejoy, who was "battling to protect the freedom of speech, and of the press and of all the sacred rights secured to the citizens by the Constitution of these U.S."¹⁴⁹ Lovejoy, said the *Brooklyn Gazette*, "was exercising a natural right, a right guaranteed to him by the Constitution of his country. He fell a martyr to the freedom of speech and of the press."¹⁵⁰ A public meeting in Weymouth, Massachusetts resolved that "the freedom of speech and of the press, acknowledged and guaranteed by the Constitution of these United States, cannot be abridged and taken away without the utter annihilation of our most essential rights and liberties."¹⁵¹

Lawyers were prominent in many of the public meetings held to protest Lovejoy's death. The meetings typically disclaimed any connection with Abolitionists. A meeting of young men in New York resolved that "the liberty of the press, of speech, and the right of petition, are among the greatest blessings and proudest prerogatives of a free people, that their exercise is guaranteed to every citizen by the Federal Constitution."¹⁵² Assailing these rights was "an encroachment upon the rights of citizens, and a direct and fatal attack" on that "sacred instrument which unites us as one people."¹⁵³

Often the words "rights," "liberties," and "privileges" were used interchangeably. The *Newark Daily Advertiser* described "the right of free discussion" as an "inalienable privilege of a freeman."¹⁵⁴ "Liberty of speech," insisted the *Berkshire Courier*, "must not be surrendered. It was one of the privileges left us by our fathers."¹⁵⁵ Free speech was "a 'home-bred right,'

146. From the *Cleveland Whig*, PHILANTHROPIST, Mar. 11, 1836, at 4.

147. *The Voice of the Public Press*, 2 EMANCIPATOR 120 (Nov. 30, 1837) (quoting the *Louisville Herald*).

148. *Id.* (quoting the *New York Daily News*).

149. *Testimonies of a Free Press*, *supra* note 135, at 2 (quoting the *New Hampshire Courier*).

150. EMANCIPATOR EXTRA, Feb. 12, 1838, at 3 (quoting the *Brooklyn Gazette* (Conn.)).

151. *Supremacy of Laws—Meeting in Weymouth*, BOSTON DAILY ADVOCATE, Dec. 19, 1837, at 2.

152. *Meeting of Young Men in New York*, 2 EMANCIPATOR 154 (Feb. 1, 1838).

153. *Id.*

154. *The Voice of the Public Press*, *supra* note 147 (quoting the *Newark Daily Advertiser*).

155. *Testimonies of a Free Press*, *supra* note 135, at 3 (quoting the *Berkshire Courier*).

a ‘fireside privilege,’” according to a Concord, New Hampshire public meeting.¹⁵⁶ A public meeting in Susquehanna County, Pennsylvania resolved that “freedom of the press is a right too sacred to be in the least invaded—a privilege too dear to be shackled or impaired by public enactments or lawless violence.”¹⁵⁷

Often the press noted that the Illinois constitution explicitly protected freedom of the press and often state constitutions (sometimes alone, often in conjunction with the federal Constitution) were mentioned as protecting the rights of speech and press.¹⁵⁸ A public meeting in Belfast, Maine, for example, said Lovejoy had “fallen a martyr in defence of rights which are guaranteed to every freeman by the constitution of the general and state governments.”¹⁵⁹

D. Lovejoy’s Death and Free Speech: The Scope and Function of Free Speech

Papers often coupled a suggestion that if Lovejoy had offended the laws he could be legally punished with a clear implication that what Lovejoy had said was or should be protected speech. For example, the *Nashua, New Hampshire Courier*, a paper friendly to the Democratic Van Buren administration, said:

We are far from being abolitionists—we disapprove of their spirit, and believe them extravagant. We are still farther from being an advocate for slavery It matters not whether Lovejoy acted prudently or imprudently—morally right or wrong. He was in the exercise of a right guarantied by the laws, and under their protection. . . . If this freedom degenerates into licentiousness, correct the evil—if the laws are deficient, amend them. But while we retain the name of *freemen*, we will speak and publish our opinions boldly—we will have a government of laws, and not the despotism of a mob.

It was a noble remark of the father of democracy—Thomas Jefferson—that “error of opinion may be safely tolerated, where reason is left free to combat it.” The odious “*sedition law*,” which

156. *The Impartial Verdict of Free Citizens, Concord, N.H.*, 2 EMANCIPATOR 168 (Feb. 22, 1838).

157. *The Impartial Verdict of Free Citizens, Susquehanna, Pa. County*, 2 EMANCIPATOR 168 (Feb. 22, 1838).

158. *Appeal to Alton*, 2 EMANCIPATOR 161 (Feb. 15, 1838).

159. *The Impartial Verdict of Free Citizens, Belfast, Maine*, 2 EMANCIPATOR 169 (Feb. 22, 1838).

gagged the press by pretending to check its abuses, was at war with this freedom, and it was repealed.—The people will suffer no violation of this principle. If the rights of *one man* in one particular are disregarded and trampled down, no man—no principle is safe. . . . Lovejoy is now a *martyr*, not to abolition solely, but to a high and important principle—the freedom of opinion, of speech, and of the press.¹⁶⁰

One might insist that each legal suppression of speech is a particular event to be judged in isolation and on its own merits. By this approach, if the potential harms from Abolitionist expression, such as slave revolts, disunion, or civil war, far outweighed its benefits, then abolitionism should be suppressed. By this view, suppression of Abolitionist ideas need not threaten suppression of other expressions of opinion. The same logic could also apply in evaluating private acts of suppression. The idea that suppression tends to spread to more and more subjects could be rejected as based on the fallacy of the slippery slope.

In 1837, however, many opinion leaders implicitly rejected that view. Public reaction to Lovejoy's death was great because many refused to view it as an isolated event or one that merely involved Abolitionists.

That contemporaries refused to view the attempt to suppress Lovejoy's paper in isolation was crucial to the breadth and strength of the reaction against suppression. Because the issue was not just abolitionism or free speech for Abolitionists, but was free speech and the rule of law for all, a great many came to the aid of what previously had been a despised few. Perception that events at Alton implicated general principles led to books, pamphlets, editorials, and resolutions. The importance of broad principle was that it enlisted many in the cause of a few.

As Edward Beecher wrote in his introduction to the *Narrative of Riots at Alton: In Connection with the Death of Rev. Elijah P. Lovejoy*, the events at Alton "are invested with unusual interest in consequence of their connection with principles of universal application."¹⁶¹ "It is a case," wrote the *New York Evangelist*, "which brings out in full life the rights and privileges of an American all in jeopardy. They are universal rights. Every editor, every minister, every man in all the land, is personally interested in it."¹⁶²

160. *Mobocracy and the Press*, 2 EMANCIPATOR 133 (Dec. 28, 1837) (quoting the *Nashua, N.H. Courier*).

161. EDWARD BEECHER, NARRATIVE OF RIOTS AT ALTON: IN CONNECTION WITH THE DEATH OF REV. ELIJAH P. LOVEJOY 5 (1838).

162. *The Alton Murder*, 2 EMANCIPATOR 120 (Nov. 30, 1837) (quoting the *New York Evangelist*).

The *Greenfield Gazette* insisted on meeting the issue at the frontier. In this case, Abolitionist speech was on the frontier of free speech and press:

No matter on what subject the press is *first* prohibited to speak. Be the subject slavery, or politics, or religion, when the first prohibition is obeyed there is no security against further encroachments. Safety requires vigilance and resistance on discovery of the *earliest, slightest* danger. A small breach in the dykes of Holland, if left unrepaired, will shortly result in flooding that whole country with the waters of the ocean. If the American press is to be maintained free and unshackled, the first encroachments upon its liberty must be met and resisted. The danger must be proclaimed from every watchtower, and echoed through every valley. The voice of an indignant public must thunder rebuke into the ears of the first invaders. If we disregard warning, because our enemy is a feeble infant, we shall soon meet a *giant* in the field clad in a Philistine's armor.¹⁶³

Many writers said that the danger was greater because a mob had suppressed the freedom of the press. "If an abolition editor is murdered with impunity to-day," warned the *Philadelphia Commercial Herald*, "an Anti-Masonic or a Masonic editor may be murdered to-morrow—a Jackson or Van Buren or a Whig editor the next."¹⁶⁴ The editor of the *Peoria (Ill.) Register*—one of a very few Illinois papers to condemn the killing—made a similar point:

It is folly to connect abolitionism with this tragedy. All our readers know that we have expressed ourself as decidedly against the doctrines and practices of the abolitionists as any press in the state. We are at this moment a slave owner But a man in a free state, in the absence of any law to the contrary, may write and publish against slavery until his mind and fortune are exhausted, without any hinderance from us. Establish the principle that the mob is the law, and we shall have as many different enactments, and as many modes of executing them, as there are varieties of opinion in the majority. In one town, where the abolitionists are stronger, we shall have the pro-slavery men murdered off, to avenge the blood of the Alton martyr; in another, where the infidels are strongest, we shall have the churches demolished, and a periodical *auto da fe*; in another,

163. *Testimonies of a Free Press*, *supra* note 135, at 3 (quoting the *Greenfield Gazette*).

164. MURDER!, 2 EMANCIPATOR 120 (Nov. 30, 1837) (quoting the *Philadelphia Commercial Herald*).

where the temperance star is in the ascendant, the licensed coffee houses will be torn down, and the distillers burnt in their own fires; in another, where puritanism prevails, the theatres will be razed and the actors assassinated.¹⁶⁵

Critics of the Lovejoy killing linked free speech to democratic government and to the sovereignty of the people. One aspect of free government was the right to try to persuade the people that accepted ideas or institutions should be changed. "[T]he Institutions of any country should be made the subject of free discussion by its citizens," a meeting in Washington County, New York insisted, "so that any errors, which from ignorance or other cause, may have been incorporated in the system may be examined and exploded."¹⁶⁶ Freedom of speech and of the press were "essential elements in our free government," as a public meeting in Lawrence, Pennsylvania put it.¹⁶⁷ "[I]f ever," said a public meeting in Belfast, Maine, "the time shall come when the supremacy of the laws cannot be maintained, and when the civil power cannot vindicate and protect every man in the undisturbed enjoyment of freedom of thought, of speech, and of the press, our great experiment in self government by the people will have failed."¹⁶⁸ One of the most detailed discussions of free speech as essential to democracy appeared in the *Boston Daily Advocate*, a Democratic paper whose editor hastened to point out that he was no Abolitionist. "We are the advocates of the freedom of discussion," the editor of the *Advocate* wrote, "in its broadest sense. Were we otherwise, we could not consider ourselves democrats."

Democracy is a principle which recognises *mind* as superior to matter, and moral and mental power over that of wealth or physical force. . . . Democracy is also a principle of reform; consequently, it must examine, compare, and analyze, and how can it do this without freedom of inquiry and discussion. . . .

To argue that there are subjects, which ought not to be discussed, in consequence of their unpopularity with a majority of the people, is in reality to argue that the people are not capable of self-government;

165. *The Voice of a Slaveholder to the Citizens of Alton*, 2 EMANCIPATOR 127 (Dec. 14, 1837) (quoting the *Peoria (Ill.) Register*). The Illinois press was far less critical than papers in states farther north.

166. *The Impartial Verdict of Free Citizens, Washington County, N.Y.*, 2 EMANCIPATOR 168 (Feb. 22, 1838).

167. *The Impartial Verdict of Free Citizens, Lawrence, Pa.*, *supra* note 159, at 168.

168. *Impartial Verdict of Free Citizens, Belfast, Maine*, *supra* note 159, at 168.

and the power of deciding what shall and shall not be discussed, ought to be invested in a censorship¹⁶⁹

While freedom of discussion might not produce truth, "it is reasonable," the editor said, "to suppose that a nearer approach to it will be made" than under a system of suppression.¹⁷⁰

The individual must decide what should be discussed, subject to the public will as "expressed in the constitution and the laws."¹⁷¹ The "right to discuss a subject of exciting character, is no less recognized by the constitution of this State, than one of a different nature." Indeed, the fact that it was exciting showed that it was one of public interest which should be discussed.¹⁷²

Second, as the *Boston Daily Advocate* and others insisted, the sovereignty of the people could only be expressed by laws. As a public meeting at Faneuil Hall in Boston put it:

[I]n a free country, the laws enacted according to the prescriptions of the Constitution are the voice of the people—are the only forms by which the sovereignty of the people is exercised and expressed and that, of consequence, a mob, or its combination of citizens for the purpose of suspending by force the administration of the laws, or of taking away the rights which those laws guaranteed, is treason against the people, a contempt of their sovereignty, and deserves to be visited with exemplary punishment.¹⁷³

In this country, a number of resolutions insisted, popularly enacted laws were "our only sovereign and their appointed tribunals the only proper courts to administer them."¹⁷⁴

Free speech and press were essential to representative government, and they were in danger. Threats, even to the "fanatical" Abolitionists, were to be regarded as threats to the liberty of all. But what, exactly, was the nature of freedom of speech and of the press? Generally, the press and the

169. *Freedom of Discussion*, BOSTON DAILY ADVOCATE, Jan. 3, 1838, at 2.

170. *Id.* A line has been dropped in the copy of the paper I have examined, however, I think this is the intended meaning.

171. *Id.*

172. *Id.*

173. *Meeting at Faneuil Hall*, EMANCIPATOR EXTRA, Feb. 12, 1838, at 1 (quoting the *Boston Daily Advertiser*).

174. *The Impartial Verdict of Free Citizens, Public Meeting at Rochester*, 2 EMANCIPATOR 168 (Feb. 22, 1838) (quoting the *Rochester N.Y. Democrat*).

public meetings did not answer this question in detail and some, by simply insisting on the rule of law, avoided it altogether. Perhaps because the actions in Lovejoy's case were the actions of a mob, many did not discuss at any length what limits could be imposed on free speech by law. Even if "in some degree," said the *Boston Christian Watchman*, Lovejoy "violated the just liberties of the press, and of the freedom of speech," that was not the issue. If there were any abuse, that was a question for a civil tribunal.¹⁷⁵ Still, there was some discussion of the nature of free speech.

Many insisted the right was not created by the national or state constitutions. These documents merely recognized and declared a natural right.¹⁷⁶ A public meeting in Concord, New Hampshire, resolved that liberty of the press "has its origin above and anterior to human codes and governments, and is neither to be alienated nor abridged by them,—and that all attempts to do this, either by the enactments of law, or the outrages of a mob, are violations of a higher law written by the finger of God in the heart of man."¹⁷⁷ A meeting in Prospect, Maine resolved that "liberty of speech is an inalienable right, derived from no human authority."¹⁷⁸ Free speech, a candidate for office responded to an Abolitionist query, "is a natural right, confirmed and guaranteed by our constitution."¹⁷⁹ "Mr. Lovejoy was exercising a natural right," explained the *Brooklyn Gazette*, "a right guaranteed to him by the Constitution of his country."¹⁸⁰ A Marlboro public meeting resolved "[t]hat as freedom of discussion is a *natural right* as well as a constitutional privilege, we will defend it for ourselves and support others in its exercise, whether they may hold opinions in conformity with our own or otherwise."¹⁸¹ A meeting in Lynn, Massachusetts resolved:

175. *The Alton Riot*, 2 EMANCIPATOR 129 (Dec. 21, 1837) (quoting the *Boston Christian Watchman*).

176. The Massachusetts legislature and its Governor, Edward Everett, assailed the congressional gag rule as a violation of the right to petition. "[I]t tends essentially to impair those fundamental principles of natural justice and natural law, which are antecedent to any written constitutions of government," the legislature asserted. Letter from Edward Everett, Governor of Mass., to Winthrop Atwill (Oct. 28, 1838), reprinted in 2 EMANCIPATOR 115 (Nov. 23, 1837).

177. *The Impartial Verdict of Free Citizens, Concord, N.H.*, *supra* note 156.

178. *The Impartial Verdict of Free Citizens, Prospect, Maine*, 2 EMANCIPATOR 168 (Feb. 22, 1838).

179. Letter from Marcus Morton, Judge (Sept. 28, 1837), reprinted in 2 EMANCIPATOR 115 (Nov. 23, 1837) [hereinafter Judge Morton's Letter].

180. EMANCIPATOR EXTRA, Feb. 12, 1838, at 3 (quoting the *Brooklyn Gazette (Conn.)*).

181. *The Impartial Verdict of Free Citizens, Public Meetings in Worcester County*, 2 EMANCIPATOR 168 (Feb. 22, 1838) (referring to the Marlboro meeting on Dec. 19).

[T]he right of freedom of speech and of the press is not derived from human Governments, but proceeds from the Creator

. . . [T]he Constitution of the U. States recognizes this primal right as pre-existing and inherent in the people, and not as derived from any of its provisions, and declares that Congress shall pass no law to abridge it, and that the constitutions of almost all the free States, in like manner, and with like emphasis recognize the same right—that these constitutional provisions were intended to place—and do place the freedom of speech and of the press beyond the power of a majority¹⁸²

There were a great many statements of the same nature.¹⁸³

The *Philadelphia Public Ledger and Daily Transcript* (“the *Ledger*”) put it this way:

The right of opinion is one of those great natural rights which God gave to man, which man cannot justly invade, which is proclaimed in the Declaration of Independence, was asserted by our revolutionary fathers, is guaranteed by the Federal Constitution and the Constitution of every State. To secure this right, is one great end of all free institutions, is one great object of our whole system of constitutions, laws, legislatures, judiciaries, and executives.¹⁸⁴

“Upon this right, and under the supposed protection of constitutions and laws,” Lovejoy had spoken against slavery for which he was murdered. “Is this freedom of opinion?” the *Ledger* demanded, and it answered: “Yes! Such freedom as the Roman Emperors accorded to the primitive christians, in offering them up to wild beasts”¹⁸⁵ The *Ledger* seems ambiguous on free speech in slave states. It admitted the constitutional right of slaveholding states “to regulate their domestic relations. But we insist on the right of the other States to maintain the great natural and constitutional right of opinion. If the opinions of the abolitionists be wrong, reason can refute them”¹⁸⁶

Many also discussed the content of the right to free speech and free press. Free speech and press were not without limits; people could be pun-

182. *From the Lynn Record, Great and Solemn Meeting*, BOSTON DAILY ADVOCATE, Nov. 24, 1837, at 2.

183. E.g., Adams, *supra* note 136, at 8; Lynch Law, *supra* note 141; Judge Morton’s Letter, *supra* note 179.

184. *Horrible Outrage Against Constitution and Laws*, PHILA. PUB. LEDGER & DAILY TRANSCRIPT, Nov. 20, 1837, at 4.

185. *Id.*

186. *Id.*

ished for their abuse—a formula that came directly from state constitutions. To the extent that abuse was defined, it was sometimes connected to libel of a private person and sometimes to treason, and occasionally to other subjects.¹⁸⁷ Many noted that Lovejoy's actions had not violated any law. Just as many insisted on principles that suggested that what he said could not be lawfully restrained.

Freedom of speech and the press, many suggested, included the "right to discuss, freely and openly, by speech, by the pen, by the press, all political questions, and to examine and animadvert upon all political institutions."¹⁸⁸ The right was "so clear and certain, so interwoven with our other liberties, so necessary in fact, to their existence," *The New York Evening Post* insisted, "that without it we must fall at once into despotism or anarchy."¹⁸⁹ Many quoted Jefferson and insisted that "[e]rror of opinion may safely be tolerated, while truth is left free to combat it."¹⁹⁰ A number insisted on a right of free "discussion of all subjects, whether of a religious, moral or political nature."¹⁹¹ This right, a public meeting in Concord, New Hampshire resolved, "'is the ancient and undoubted, prerogative of the people' of this Republic . . . a right which 'has ever been enjoyed in every house, cottage and cabin in this nation.'"¹⁹²

Proponents of free speech and a free press insisted that the majority was required to respect the rights of the minority. "If Mr. Lovejoy could rightfully be called on to desist from publishing his paper because a majority of the people of Alton willed it—then," wrote the *Utica, N.Y. Magazine and Advocate*, "may the political papers in New York city, of the minority, be stopped by the majority—yes, and *our press* he driven from Utica from the state of New York—from the UNITED STATES—tomorrow!"¹⁹³ Others concurred. "Let one editor be shot for attempting to print a newspaper for a minority," wrote the *Elmira, N.Y. Republican*, "and none are safe, for

187. See *The Law of Libel and the Abolitionists*, N.Y. EVENING POST, Aug. 31, 1835, at 2; *The Northern Fanatics*, WASH. GLOBE, Sept. 22, 1833, at 2 (quoting the *Wilmington Watchman*); Letter from S.G. Goodrich to Elias Richards (Oct. 30, 1837), reprinted in 2 EMANCIPATOR 115 (Nov. 23, 1837).

188. *Sentiments of the Public Press*, 2 EMANCIPATOR 117 (Nov. 23, 1837) (quoting *The New York Evening Post*).

189. *Id.*

190. *Mob in Alton, Ill.*, 2 EMANCIPATOR 128 (Dec. 14, 1837) (quoting the *Utica, N.Y. Magazine and Advocate*, in turn quoting Thomas Jefferson, First Inaugural Address, reprinted in THOMAS JEFFERSON, WRITINGS 493 (Viking Press 1984)).

191. *The Impartial Verdict of Free Citizens, Concord, N.H.*, supra note 156; see also *Freedom of Discussion*, BOSTON DAILY ADVOCATE, Jan. 3, 1838, at 2.

192. *The Impartial Verdict of Free Citizens, Concord, N.H.*, supra note 156.

193. *Mob in Alton, Ill.*, supra note 190.

majorities are very fluctuating; and what is unpopular to-day may be popular to-morrow."¹⁹⁴ A number insisted that constitutional provisions guaranteeing freedom of the press were designed to protect the rights of the minority, not to secure the right to echo majority opinion.¹⁹⁵

Discussion of the right of the minority moved seamlessly back to whether the issue raised by Lovejoy's death was simply a narrow one involving Abolitionists, or whether a much more general principle was at stake. There were, as one writer pointed out, potentially a lot of vulnerable minorities.

The question is not one of abolition or not—of negro freedom or slavery—of the right or wrong of emancipation—it assumes broader ground. . . . Shall the *freedom of the press* be maintained undiminished, or shall it be abridged and destroyed whenever it opposes the opinions of the majority, or an infuriated mob demands it? Shall men be forbidden 'to argue and to utter freely' whatever their consciences may dictate because their sentiments are unpopular? . . . Shall the little band of Van Buren's friends in [Massachusetts], who have opposed, year after year, strenuously and unceasingly, the expressed and reiterated will of the vast majority of its citizens be proscribed, their presses destroyed, and be told to go into New Hampshire with their heretic notions . . . ? Shall the Quakers be again put under the ban, and their tongues bored through with hot irons and their bodies hung up in our public squares and at the corners of our streets? Shall the Unitarian and the Christian and a hundred other sects be no longer tolerated, but their presses be all swept away by the mob? Shall sects and parties begin to count numbers and combine for the suppression of those who differ from them? This question is common ground on which all the lovers of freedom of the mind may unite, and banded as one man cast off in indignation from the press and the tongue the shackles which are gathering upon them. Every man who has an intellect and a conscience is concerned. Not only the abolitionist, but the man of science should gird himself up for resistance. Let him remember the fate of Galileo. The philosopher, the poet, the man of

194. *The Alton Riot*, 2 EMANCIPATOR 133 (Dec. 28, 1837) (quoting the *Elmira*, N.Y. *Republican*); see *The Contrast*, BOSTON DAILY ADVOCATE, Dec. 2, 1837, at 2.

195. See, e.g., Letter of Reverend Thomas Brainerd to the Editor of the *Emancipator* (Dec. 12, 1837), reprinted in 2 EMANCIPATOR 152 (Jan. 25, 1838).

letters, every independent thinker, has a high and solemn duty to perform.¹⁹⁶

E. Protection, Equal Protection, and Free Speech

Mobs had already destroyed three of Lovejoy's presses and finally a mob killed him as he attempted to repel its attack on his fourth press. A mob had destroyed Birney's press. Mobs had attacked other Abolitionists. These events raised the basic issue of protection and equal protection of the laws. In most cases, local authorities had done little or nothing to protect the victims.

Lovejoy raised the issue plainly in his speech to a public meeting shortly before his death:

I have asked for nothing but to be protected in my rights as a citizen—rights which God has given me, and which are guaranteed to me by the constitution of my country. . . . I plant myself, sir, down on my unquestionable rights, and the question to be decided is, whether I shall be protected in the exercise, and enjoyment of those rights¹⁹⁷

Mr. Chairman, I do not admit that it is the business of this assembly to decide whether I shall or shall not publish a newspaper in this city. . . . I have the right to do it. I know that I have the right freely to speak and publish my sentiments, subject only to the laws of the land for the abuse of that right. This right was given me by my Maker; and is solemnly guaranteed to me by the constitution of these United States and of this state. What I wish to know of you is whether you will protect me in the exercise of this right; or whether, as heretofore, I am to be subject to personal indignity and outrage.¹⁹⁸

By refusing to endorse resolutions supporting Lovejoy's right to publish and by resolving that he should not do so, the meeting gave an implicit answer to Lovejoy's question.

196. *Sound the Alarm*, 2 EMANCIPATOR 133 (Dec. 28, 1837) (quoting the *Herald of Freedom*).

197. LOVEJOY MEMOIR, *supra* note 87, at 279–80 (quoting the Remarks of Elijah P. Lovejoy Before the City of Alton Public Meeting (Nov. 3, 1837)).

198. Elijah P. Lovejoy, *Europe*, ST. LOUIS OBSERVER, Mar. 27, 1834, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 86.

In reacting to Lovejoy's death, many noted the connection between rights and protection of the law. To obtain protection for rights was, after all, the rationale of the social contract. As Edward Beecher put it in his account of events at Alton, "protection is a debt due from community to every citizen; and that he has a undoubted right to claim it; and that it is more grossly absurd and unjust for a community to talk of compromising it."¹⁹⁹ Free speech required protection to be a meaningful right. As a public meeting in Cleveland, Ohio noted:

That it is the fundamental idea of the freedom of speech and of the press, that the citizen shall be protected from violence in uttering sentiments opposed to those which prevail around him, and that to put him in peril for uttering what the majority disapprove, is to assail the very foundation of this freedom and destroys its life.²⁰⁰

That one could forfeit the right to protection for views that offended the community would mean, the Lovejoy brothers noted in their memoir to their fallen brother, that

Galileo deserved to be condemned and punished as he was, for . . . teaching that the earth is a sphere, turning on its axis, and revolving round the sun. William Tindall deserved to be strangled and burned for offering such an insult to public sentiment, as to prepare and publish a translation of the New Testament in English²⁰¹

States and cities had acted against free speech simply by not acting, by failing to provide protection.

IV. AFTERMATH

A. Reactions

The death of Lovejoy at Alton was a significant event that increased support for a broad and general view of free speech in the North and dramatically strengthened the view that mobs and the institution of slavery threatened liberty and representative government. In his autobiography,

199. BEECHER, *supra* note 161, at 83.

200. *The Impartial Verdict of Free Citizens, Cleveland, Ohio*, 2 EMANCIPATOR 168 (Feb. 22, 1838).

201. Reverend Silas McKeen, Sermon at Oldtown, Maine on the Occasion of the Death of Elijah P. Lovejoy (Dec. 31, 1837), reprinted in LOVEJOY MEMOIR, *supra* note 87, at 300.

Horace Greeley, then a Whig, but later editor of the *New York Tribune* and a Republican, cited the death of Lovejoy as conclusively showing how slavery affected the liberty of the North. "It was thenceforth plain to my apprehension, that Slavery and true Freedom could not coexist on the same soil."²⁰² Before Lovejoy's death, John Quincy Adams, formerly the nation's president and in 1837 a member of the House of Representatives, had begun his long and brilliant guerilla warfare against the gag rule that attempted to silence discussion of slavery in the House. In his diary, Adams described the Lovejoy death as "[t]he most atrocious case of rioting which ever disgraced this country." Lovejoy, he concluded, "has fallen a martyr to the cause of human freedom."²⁰³ In January 1838, in Illinois, young Abraham Lincoln gave a speech against mobs that were mobilized against gamblers and others, but Lincoln did not directly mention Lovejoy or abolition.²⁰⁴ In Concord, Massachusetts, Ralph Waldo Emerson wrote about Lovejoy's death in his journal. "The brave Lovejoy has given his breast to the bullet . . . and has died when it was better not to live. . . . I sternly rejoice that one was bound to die for humanity and the rights of free speech and opinion."²⁰⁵ Lovejoy's death propelled others into active abolitionism. Wendell Phillips career as an active abolition agitator really began with his stirring speech condemning the defense of the mob by Massachusetts Attorney General William Austin.²⁰⁶ Before Lovejoy was killed, Edward Beecher had defended free speech for Lovejoy and other Abolitionists. The killing propelled him into full fledged abolitionism. As his wife wrote, "The Alton murder has brought us all over to the [abolition] faith."²⁰⁷ In 1885, Isaac Newton Arnold, an Illinois congressman and contemporary of Abraham Lincoln, wrote a biography of Lincoln. Arnold said Lincoln's election was a culmination of opposition to a constellation of events connected with slavery including "the violence . . . by which free-

202. HORACE GREELEY, *RECOLLECTIONS OF A BUSY LIFE* 287 (1868).

203. *THE DIARY OF JOHN QUINCY ADAMS 1794-1845*, at 489 (Allan Nevins ed., 1928).

204. See Abraham Lincoln, *Address to the Young Men's Lyceum of Springfield, Illinois: The Perpetuation of our Political Institutions*, in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858*, at 28-36 (Don E. Fehrenbacher ed., 1989); see also BENJAMIN P. THOMAS, *ABRAHAM LINCOLN: A BIOGRAPHY* 72 (First Modern Library ed. 1968) (1952).

205. RALPH WALDO EMERSON, *THE HEART OF EMERSON'S JOURNALS* 119 (Bliss Perry ed., 1926). See generally Len Gougeon, *Abolition, The Emersons, and 1837*, 54 *NEW ENG. Q.* 345 (1981).

206. RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 139 (1949).

207. Letter from Isabella Beecher to the Beecher Family (Jan. 22, 1838), in JOAN D. HEDRICK, *HARRIET BEECHER STOWE, A LIFE* 109 (1994).

dom of speech and liberty of the press had been suppressed in portions of the slave states."²⁰⁸ Arnold identified Lovejoy's death as a key political event that had unleashed a crusade against oppression by Lovejoy's brother Owen and other Abolitionists, a crusade consummated by "a President elected on the distinct ground of opposition to the extension of slavery."²⁰⁹

A remarkable change had occurred in public opinion. A few years before, almost all political leaders had shunned the Abolitionists and discussion of slavery. Now, at least with reference to issues of free speech, press, and petition, John Quincy Adams and a few others were directly and openly co-operating with them. The effect was like the effect on the Anti-Vietnam War movement when J. William Fulbright, Chair of the Senate Foreign Relations Committee, began to criticize the war. In 1842, Theodore Weld, the Abolitionist activist, decided to go to Washington to work with Adams and antislavery congressmen. These men, he noted, in a point equally true in 1837 and 1838, could do more for the antislavery cause "by a single speech . . . than our best lecturers [could] do in a year."²¹⁰ The speeches would be published in national newspapers and "scattered all over the south as well as the North."²¹¹ As the *Emancipator* noted in 1838, just three years before, a citizen of Washington had been indicted (though acquitted) on a charge of possession of abolition literature with an intent to distribute it. Now (in 1838) Senator Slate's "speech, which is as full of Anti-Slavery doctrine as possible, has been printed in a pamphlet form at Washington city, and a thousand copies sent out through the Post office, many of them into the southern States."²¹² The *National Intelligencer* had reprinted speeches attacking slavery by John Quincy Adams. There had been "a great change."²¹³ *The New York Evening Post* announced that the Alton incident had produced a good effect: "It gave an impulse to the public feeling favorable to liberty of discussion,—an impulse which will end in making infamous all attempts to tyrannize over the free and honest expression of thought . . ."²¹⁴

But criticism of slavery continued to be controversial. Many substantial, wealthy, and conservative citizens continued to condemn abolition

208. ISAAC N. ARNOLD, *THE LIFE OF ABRAHAM LINCOLN* 169 (1885).

209. *Id.* at 170.

210. Letter from Theodore Dwight Weld to Lewis Tappan (Dec. 14, 1841), in 2 WELD GRIMKÉ LETTERS, *supra* note 84, at 881.

211. *Id.*

212. *Id.* (quoting the *National Intelligencer*).

213. *Anti-Slavery Publication Office, at Washington*, 3 *EMANCIPATOR* 55 (Aug. 2, 1838).

214. *A Memoir of the Reverend Elijah P. Lovejoy*, N.Y. *EVENING POST*, Mar. 27, 1838, at 2.

and discussion of slavery. Channing himself had been critical of the Abolitionist mode of agitating the slavery issue, of their sometimes harsh rhetoric, and of their tactic of sending antislavery publications to the South. Channing expressed sympathy for both slaves and slaveholders and saw the solution of the slavery problem as one of gradual moral education. Once the evil of slaveholding was better understood, it would begin to die out. When Channing criticized slavery in more moderate language and defended free speech on the subject (even for the hated Abolitionists), he, in turn, found himself shunned by many of the wealthy and conservative citizens of Boston.²¹⁵

Though wounded by the reaction, Channing should not have been surprised. As he explained in 1836, unjustified opposition to abolition could be found in all classes:

Such are to be found in what is called the highest class of society, that is, *among the rich and fashionable*; and the cause is obvious. *The rich and fashionable belong to the same caste with the slaveholder*; and men are apt to sympathize with their own caste more readily than with those beneath them."²¹⁶

Among the wealthy and conservative classes were those "who, from no benevolent interest in society, but simply because they have drawn high prizes in the lottery of life, are unwilling that the most enormous abuses should be touched, lest the established order of things, so propitious to themselves, should be disturbed."²¹⁷

Both historians and contemporaries have noted that anti-abolition mobs contained gentlemen of property and standing. Indeed, both in Cincinnati and in Alton, public meetings that demanded the suppression of abolition papers pointed to the danger to prosperity of the cities. Demands to suppress Birney's and Lovejoy's papers were prompted in part by fear of economic retaliation by the South, as well as concern for the Union and fear of slave revolts. Southerners had quite explicitly warned northerners of the possibility of economic retaliation if abolitionism were not suppressed. "The present state of feeling in the South," warned a New York paper, "as indicated in the resolutions referred to, plainly shows that all commercial intercourse with the South will be embarrassed, unless efficient measures are adopted by the northern States for gagging and pinioning our abolition

215. See Gougeon, *supra* note 205, at 358-59 (quoting DANIEL WALKER HOWE, *THE UNITARIAN CONSCIENCE* (Wesleyan Univ. Press 1988) (1970)).

216. WILLIAM ELLERY CHANNING, *TRIBUTE OF WILLIAM ELLERY CHANNING TO THE AMERICAN ABOLITIONISTS, FOR THEIR VINDICATION OF FREEDOM OF SPEECH* 9 (1861).

217. *Id.* at 11.

leaders."²¹⁸ A St. Louis newspaper directly warned the citizens of Alton that southerners would refuse to have business dealings with those who tolerated Abolitionists.²¹⁹

Economic ties with the South existed throughout the nation and affected people of all social classes. In 1837, there was a conflict between trade, prosperity, and human rights—and many chose trade. But as those who would silence Abolitionists saw it, they also chose Union and peace. “Thus is the love of money and power constantly trenching upon personal rights,” lamented the *Fall River, Mass. Patriot* after Lovejoy’s death, “and if not resisted, will trample them in the dust.”²²⁰

B. Boston and the Quest for a Public Forum

After Lovejoy’s death, William Ellery Channing, the Unitarian Minister, requested the use of city-owned Faneuil Hall in Boston for a protest meeting. The meeting was intended to support free speech and to protest mobs. Use of the hall had often been granted for political and other meetings. But the Boston mayor and aldermen turned down the request after receiving objections from a number of prominent citizens who said they feared a breach of the peace.

The mayor and aldermen gave three reasons for denying the request. First, many from outside the city would construe resolutions passed by the meeting as reflecting the sentiments of Boston citizens, and the city officials did not expect that to be the case. Second, “[t]he Board think it generally inexpedient to grant the use of the Hall to any party who have taken a side upon a highly exciting and warmly contested question.”²²¹ Finally, “[a] Remonstrance has also been received against granting the prayer of the petition, signed by many persons” in whom the board members had great confidence.²²²

The editors of the *Salem Gazette* said they had intended to comment on the “flimsy, wretched, and most unsatisfactory reasoning put forth by

218. *From the New York Sunday Morning News, Southern Sentiment*, WASH. GLOBE, Sept. 26, 1835, at 2.

219. *See The Alton Meeting*, MO. REPUBLICAN, July 17, 1837, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 229–30; *Abolition*, MO. REPUBLICAN, Aug. 17, 1837, reprinted in LOVEJOY MEMOIR, *supra* note 87, at 230; *see also* DILLON, *supra* note 1, at 112.

220. *Sentiments of the Press*, 2 EMANCIPATOR 130 (Dec. 21, 1837) (quoting the *Fall River, Mass. Patriot*).

221. *Faneuil Hall Refused*, 2 EMANCIPATOR 124 (Dec. 7, 1837) (quoting the *Salem Gazette*, in turn quoting Order of Boston Mayor and Aldermen, Nov. 29, 1837).

222. *Id.*

the authorities of our sister city," but instead it printed Dr. Channing's letter of protest.²²³ The purpose of the meeting, Channing explained in his well-publicized letter, was to allow citizens of Boston to

express their utter uncompromising reprobation of the violence which has been offered to the freedom of speech and the press. . . . To intimate that such resolutions would not express the public opinion of Boston, and would even create a mob, is to pronounce the severest libel on this city. It is to assert, that peaceful citizens cannot meet here in safety to strengthen and pledge themselves against violence, and in defence of the dearest and most sacred rights.²²⁴

Channing urged the citizens of Boston to "demand the public meeting which has been refused, with a voice which cannot be denied."²²⁵ Channing thought that the fact that most in Boston disagreed with Lovejoy's views and that people of all political persuasions would join in the condemnation would make their statements in favor of free speech and the rule of law much more impressive. "A citizen has been *murdered* in defense of the right of free discussion," Channing concluded. "I do not ask whether he was a Christian or unbeliever—whether he was abolitionist or colonizationist."²²⁶ Editorials and resolutions from a public meeting poured in protesting the denial.²²⁷

A meeting at the courthouse to protest denial of Faneuil Hall insisted that the hall belonged to all citizens and was "consecrated to liberty and free discussion" and its use had been wrongfully denied.²²⁸ The *Boston Daily Advocate* insisted that "Faneuil Hall is common property for the purposes of free meetings of the citizens, as much as the streets are common property for citizens to walk in."²²⁹ The common council had established a dangerous precedent: "[N]ine men will undertake to decide whether the opinions of the applicants for the Hall, are such as in their opinion, ought

223. See *id.* (quoting Letter from William E. Channing to the Citizens of Boston (Nov. 27, 1837)).

224. *Id.*

225. *Id.*

226. *Id.*

227. See *Opinion of the Press*, BOSTON DAILY ADVOCATE, Dec. 4, 1837, at 2; *Public Opinion in Defence of the Liberty of the Press*, BOSTON DAILY ADVOCATE, Dec. 4, 1837, at 2. Several papers were unsympathetic to granting the hall. See *Faneuil Hall Granted*, BOSTON DAILY ADVOCATE, Dec. 7, 1837, at 2.

228. *Meeting at Faneuil Hall*, EMANCIPATOR EXTRA, Feb. 12, 1838, at 1 (quoting the *Boston Daily Advertiser*).

229. *The Denial of Faneuil Hall*, BOSTON DAILY ADVOCATE, Dec. 4, 1837, at 2.

to be promulgated; and if not, they will refuse the application.”²³⁰ Facing a barrage of criticism, the aldermen relented and allowed a daytime meeting limited to the subject of mobs and free speech.

At the meeting, a number of resolutions were proposed: It was “the fundamental idea of the freedom of speech and the press that the citizen shall be protected from violence in uttering opinions opposed to those which prevail around him.” If the liberty were confined to uttering “what none would deny, then absolute governments might insist of it as loudly as republics.”²³¹ The resolutions further provided that the laws enacted “according to the prescriptions of the Constitution” were the voice of the people and were “the only forms through which the sovereignty of the people is exercised.”²³² Dr. Channing and others spoke for the resolutions.

James Austin, attorney general of the state, spoke on the other side. Austin insisted that the resolutions “republish truths never contradicted and never denied . . . and which, if they are not supposed to have some particular application, it is idle and useless to republish to the world.” The real reason for publication, he said, was that the resolutions were intended to apply to the Lovejoy case. But Austin denied the general principles were appropriately applicable to that case. After all,

[i]n the State of Missouri the Reverend Mr. Lovejoy established an abolition newspaper; the effect and tendency of which, in the judgment of the white people of that State, was to excite insurrection and murder, and by what is termed a *moral suasion*, to produce a terrible war of bloodshed and destruction.²³³

Lovejoy, Austin continued, was like a man who insisted on breaking open cages containing wild beasts and setting them free to prey on the populace. “The people of Missouri had as much reason to be afraid of their slaves,” Austin insisted, “as we should have of the wild beasts of the menagerie.” So they had driven Lovejoy out. Then Lovejoy had moved on to Illinois, just across the river from a slave state. Now the issue became one for citizens of Alton. “Here was an abolition paper,” Austin continued, “in their judgment, violating the principles of religion, morality and order—exciting a servile war, under the guise of freedom, and preaching murder, in the

230. *Id.*

231. *Meeting at Faneuil Hall, supra* note 228.

232. *Id.*

233. *Mr. Austin's Speech, Delivered at Faneuil Hall, Dec. 8, 1837, BOSTON DAILY ATLAS, Dec. 12, 1837, at 2.*

name of Christianity. The people of Alton considered this an extreme case, and they put the paper down."²³⁴

Austin said the citizens of Alton had behaved like the patriots who threw the tea into Boston Harbor. "Satisfy a people that their lives are in danger," Austin exclaimed, "by the instrumentality of the press, injudiciously and intemperately operating on the minds of slaves; give them reason to fear the breaking out of a servile war," and, much as Austin said he deplored a mob, a mob was inevitable.²³⁵ Wendell Phillips rebuked Austin in a forceful speech.²³⁶

Phillips denied that the Boston Tea Party justified Lovejoy's death. The Boston patriots had attacked an illegal tax imposed without their consent. The mob in Alton met to rob a citizen of his just rights under laws "we ourselves have enacted."²³⁷ The state of Missouri had no more right to demand Lovejoy's silence in Illinois than the Czar had "to control the deliberations of Faneuil Hall."²³⁸ Phillips said the claim by a Boston clergyman that in a republican government, "no citizen has a right to publish opinions disagreeable to the community," and those who do invite a mob, made republican institutions worthless. At least under the despotism of the sultan, "one knows what he may publish and what he may not," whereas with a mob "we know not what we may do or say, till some fellow citizen has tried it, and paid for the lesson with his life."²³⁹

According to the *Emancipator*, the *Boston Times*, "an impartial paper," reported that the Boston pro-free speech and anti-mob resolutions passed by a large majority, a view shared by the *Boston Daily Advocate*.²⁴⁰ The *New York Evening Post* reported that the meeting was one of the largest ever held and that Abolitionists had not taken an active part in the meeting.²⁴¹ The Faneuil Hall vindication of the liberty of the press received a

234. *Id.*

235. *Id.* For the argument that the analogy of Alton to the Boston Tea Party was false because the tax on tea was a law made without the consent of the colonists while the laws violated in destroying Lovejoy's presses had been consented to by the voters, see *The Destruction of the Tea*, BOSTON DAILY ADVOCATE, Dec. 12, 1837 at 2.

236. See WENDELL PHILLIPS, *The Murder of Lovejoy*, in SPEECHES, LECTURES, AND LETTERS 1-10 (James Redpath ed., 1864). The *Boston Daily Advocate* published the speech on Dec. 12, 1837. *Speeches in Faneuil Hall*, BOSTON DAILY ADVOCATE, Dec. 12, 1837, at 2.

237. *Speeches in Faneuil Hall, Remarks of Wendell Phillips, Esq.*, BOSTON DAILY ADVOCATE, Dec. 12, 1837, at 2.

238. *Id.*

239. *Id.*

240. *Faneuil Hall Has Spoken for Liberty*, 2 EMANCIPATOR 129 (Dec. 14, 1837). To the same effect, see *Great Meeting in Faneuil Hall*, BOSTON DAILY ADVOCATE, Dec. 9, 1837, at 2.

241. See *Great Meeting at Boston*, N.Y. EVENING POST, Dec. 11, 1837, at 2 (citing the *Boston Daily Advocate*).

somewhat sour reception from several of the major Boston papers. The *Richmond Whig and Public Advertiser* quoted an account from the *Boston Atlas*:

The result was entirely satisfactory. Nothing was suffered to go down which bore the slightest taint of abolitionism. The resolutions offered on the occasion were mere plagiarisms from the bill of rights in relation to the freedom of speech, the liberty of the press, and the supremacy of the laws. Not a Fourth of July oration can be produced which does not embody all they venture to assert. Their solemn reiteration of undisputed truisms was deservedly ridiculed. In fact so superfluous and supererogatory were they regarded, that when the question was put upon the final passage, a majority of the meeting could not be found to hold up their hands. The question being put in the negative, there seemed to be an equal division of those who had taken the trouble to vote.²⁴²

The *Boston Daily Evening Transcript* said that Abolitionists were in a minority in the meeting, but because the resolutions were "cunningly worded" and could not be opposed by lovers of liberty, they passed. However, the *Transcript* insisted, the speech of Attorney General Austin reflected the true spirit of the meeting and the citizens of Boston.²⁴³

C. Pennsylvania Hall

In May 1838, Pennsylvania Abolitionists and activists opened Pennsylvania Hall, an impressive structure dedicated to freedom of discussion, especially of slavery. Managers of the hall received letters of congratulations from former president and current House member from Massachusetts, John Quincy Adams, from Senator Thomas Morris of Ohio, and from Thaddeus Stevens (Pennsylvania state legislator and a future leader of the Republican party in the Congresses that proposed the Thirteenth Amendment, abolishing slavery, and the Fourteenth Amendment).

John Quincy Adams wrote his "respected friends" that he had learned with pleasure that the Pennsylvania Hall Association had erected "a large building in your city, wherein liberty and equality of civil rights can be freely discussed and the evils of slavery fearlessly portrayed."²⁴⁴ This was

242. *Meeting in Boston*, RICHMOND WHIG & PUB. ADVERTISER, Dec. 15, 1837, at 1.

243. *The Meeting at Faneuil Hall*, BOSTON DAILY EVENING TRANSCRIPT, Dec. 8, 1837, at 2.

244. Letter from John Quincy Adams to Samuel Webb and William H. Scott, reprinted in 3 EMANCIPATOR 15 (May 24, 1838).

particularly significant because “[t]he right of discussion upon slavery, and an indefinite extent of topics connected with it, is banished from one half the States of this Union. It is *suspended* in both houses of Congress.”²⁴⁵

For Senator Thomas Morris of Ohio, a hall devoted to free discussion prompted “a train of solemn reflections.” Surely the hall was not required because in Philadelphia “*free* discussion on all questions connected with the religion, morality, the welfare of the country, or the rights of man, cannot be had with safety to the citizen, and the peace and quiet of the community.”²⁴⁶ But if Philadelphia was safe “from all attempts to put down the right of free discussion, the liberty of speech and the press, your fellow-citizens have seen and felt that all parts of our beloved country are not thus highly favored.”²⁴⁷

It is gratifying indeed, that while the enemy of human rights and constitutional liberty is, in our country, making rapid advances to power, endeavoring so far as in him lies, not only to silence discussion, but even to muzzle the press itself, knowing that his principles cannot stand the test of examination; Philadelphia has the honor to erect a barrier which he cannot pass, and a battery which he cannot silence, but which will effectually destroy his whole power, by the consecration of a spot where all his pretensions may be fully and fairly discussed.²⁴⁸

Within days of its opening, a mob burned the hall, outraged by the idea of abolition or, some insisted, by white men and black women and white women and black men promenading outside the hall arm in arm. By another account, no such promenades had occurred, and by a third, the promenaders had been hired by those determined to provoke a riot.²⁴⁹ Once again, most of the press seems to have fully condemned the outrage. But the *Richmond Whig and Public Advertiser*, while mildly condemning the arson, found the guilt of the mob greatly mitigated by provocation.

[I]f ever there was a case in which a community should be excused for using violence to arrest the violation, or to enforce the obser-

245. *Id.*

246. Letter from Senator Thomas Morris on the Occasion of the Opening of the Pennsylvania Hall, reprinted in 3 *EMANCIPATOR* 21 (June 7, 1838).

247. *Id.*

248. *Id.*

249. See, e.g., *The Philadelphia Arson*, 3 *EMANCIPATOR* 18 (May 31, 1838) (quoting the *Commercial Advertiser*) (suggesting that promenading incited the riot); *For the Evening Post*, N.Y. *EVENING POST*, May 30, 1838, at 2 (reporting that no promenading took place); *Causes*, 3 *EMANCIPATOR* 29 (June 21, 1838) (quoting the *Montrose, Pa. Spectator*) (reporting that blacks and whites were hired to promenade and incite a riot).

vance, of the canons of decency and well ordered society, that case is made out for the citizens of Philadelphia in their late proceedings. . . . From the time of its dedication until it was consumed, [Pennsylvania Hall] was the head-quarters for agrarians, infidels and abolitionists, from all regions, who congregated there daily and nightly to preach and practise their abominations—Negro fellows escorted white “ladies” through the streets—white “ladies” felt honoured in sitting on the same bench with black fellows—in marked contempt for decency and public opinion. Such practices, outraging the moral sense of the community, and if continued, tending inevitably to throw society into confusion, and to engender immorality and vice, it could not be expected, that any people, having respect for themselves or affection for their children, would permit to endure.²⁵⁰

Governor Joseph Ritner of Pennsylvania promptly issued a proclamation expressing deep regret and offering a reward for apprehension of the arsonists. “The torch of the incendiary,” Governor Ritner lamented, “has been applied by unmasked violators of law, in the darkness of night in the heart of a crowded city, and for the avowed purpose of preventing the exercise of the constitutional and invaluable right of ‘the free communication of thoughts and opinions.’”²⁵¹ It was the duty of the magistrate “to protect all in the exercise of their constitutional rights.”²⁵²

With the death of Lovejoy and the destruction of Pennsylvania Hall, the future of free discussion of Abolitionist ideas must have seemed bleak. But some took a long view. The editor of the *Massachusetts Spy* wrote:

[W]e are not yet prepared to believe that the spirit which has thus manifested itself in the cities, is the prevailing one of the country. On the contrary, we have found it shrinking under the withering rebuke, which it has received from the less contaminated portions of the community, whenever it has been manifested in such outrageous acts.²⁵³

In Boston, a few inoffensive women had been mobbed for speaking against slavery. “[T]he rebuke following that act has produced such a change, that large meetings of all classes of citizens are now allowed to meet and discuss the same question in the most public manner possible” In Utica, a

250. RICHMOND WHIG & PUB. ADVERTISER, May 22, 1838, at 2.

251. A Proclamation, 3 EMANCIPATOR 19 (May 31, 1838).

252. *Id.*

253. Another Outrage, 3 EMANCIPATOR 29 (June 21, 1838) (quoting the *Massachusetts Spy*).

convention had been broken up by leaders riding roughshod over constitutional rights. Now advocates of suppression were "in a meagre and contemptible minority." So it would be in Philadelphia.²⁵⁴

V. REFLECTIONS

Pivotal moments seldom seem so pivotal at the time they occur as they do in hindsight. Change is never total. While much remained the same after Lovejoy's death, much had also changed. One thing that remained the same was federal postal policy excluding Abolitionist pamphlets from mail directed to southern states. Another was the gag rule.

What follows is an attempt to identify emerging themes as they were popularly expressed, particularly in reaction to threats to the right to petition and threats to free speech and free press that culminated in Lovejoy's death. Not all in the North shared these broad ideas, but they appeared much more generally in the popular press and in public meetings after Lovejoy's death than they had before.

Lovejoy's killing accelerated and increased the expression of broad ideas of free speech and press as the rights of Americans. Elite institutions, like the United States Supreme Court, had articulated a different view: Rights in the Bill of Rights were simply limits on the federal government. U.S. Senators, for example, had suggested that federal guarantees of free speech and press did not limit the states. But in response to perceived threats to liberty, popular and broad ideas of free speech and press were rising to the surface from newspapers and public meetings, and these were often more libertarian and national than those held by the governing elite. Most of the papers and meetings were not Abolitionist.

A. Free Speech as a Right of American Citizens

In the early 1830s, discussions of the right (or liberty or privilege) of free speech and press typically tied it to rights under state law and state constitutions. Mention of the federal Constitution, except as a limit on federal action, was less frequent. In 1837, free speech and free press were frequently referred to as rights or privileges of American citizens—not just of a citizen of a state that might or might not protect the right—and as a federal as well as a state constitutional right. The change had startling implications, although these were rarely discussed by the general press or

254. *Id.*

meetings in 1837. The emerging northern consensus implied that the suppression of antislavery speech and press in the South was illegitimate, an implication that became explicit in later years.

By 1837, many people talked about the declaratory nature of constitutional provisions protecting speech, press, petition, and assembly. (A declaratory provision recognizes or declares a pre-existing natural or legal right but does not purport to create it.) One result was that free speech and press could be seen as constitutional rights or privileges of American citizens even if the First Amendment had not created these rights. The First Amendment explicitly secured them only against congressional abridgement, and it did so by a denial of federal power.

A second consequence for those who accepted the declaratory nature of the First Amendment was that state legislatures could not rightfully pass laws abridging the free speech rights or privileges of American citizens. In 1838, Senator John C. Calhoun of South Carolina had proposed a series of resolutions dealing with slavery. One resolved that,

in delegating a portion of their powers to be exercised by the Federal Government, the States retained severally the exclusive and sole right over their own domestic institutions and police, . . . and that any intermeddling of any one or more States, or a combination of their citizens with the domestic institutions and police of the others, on any ground, political, moral, or religious, or under any pretext whatever, with the view to their alteration or subversion, is not warranted by the Constitution²⁵⁵

Another Calhoun resolution provided that slavery composed an important part of the domestic institutions of the slave states and that no change in public opinion in other states can justify them or their citizens in open and systematic attacks on slavery.²⁵⁶ Though resolutions much like these passed, they were attacked by a small group of senators. Senator Morris of Ohio

conceived the resolutions of the Senator from South Carolina liable to the strongest objections, and as warring against the dearest rights and privileges of freemen When war was made on the freedom of speech, of the press, and the right of petition, these inalienable

255. CONG. GLOBE, 25th Cong., 2d Sess. app. at 22 (1838).

256. See *Twenty-Fifth Congress, Second Session, Tuesday, January 10*, N.Y. EVENING POST, Jan. 11, 1838, at 2.

rights must and would be defended; they were Heaven's best gift to man.²⁵⁷

As to remarks suggesting that Abolitionists could be punished by state laws, Senator Morris "regarded this and other similar doctrines . . . as subversive of all freedom and of the institutions of the country [A]ll classes of men had an imprescriptible right, above all government, to the freedom of speech and the right of petition."²⁵⁸ Citizens had an indisputable right "to speak, write, print, and publish," on the laws and institutions of other States.²⁵⁹ Morris proposed a set of counter-resolutions. They show that Calhoun's states' rights rhetoric could easily be turned against Calhoun's resolutions and that Morris and others saw the Calhoun resolutions as a threat to states' rights, not just individual rights. The Morris resolutions insisted that Calhoun's violated the rights of states and individuals. Morris invoked, though without citing them, the Ninth as well as the Tenth Amendment. The people of the states had reserved to the states and the people powers not delegated to the federal government. Among these were "full liberty of speech and the press to discuss the domestic institutions of any of the States, whether political, moral, or religious." The Morris resolution insisted that

it would be the exercise of unauthorized power, on the part of this Government, or of any of the States, to attempt to restrain the same, and that any endeavor to do so would be insulting to the People and the States so interfered with; for each State alone has the power to punish individuals for the abuse of this liberty within their own jurisdiction; and whenever one State shall attempt to make criminal acts, done by citizens in another State, which are lawful in the State where done, the necessary consequence would be to weaken the bonds of our Union.²⁶⁰

Morris' resolution also insisted that

this Government is bound so to exercise its powers as not to interfere with the reserved right of the States over their own domestic institutions; and it is the duty of this Government to refrain from any attempt, however remote, to operate on the liberty of speech

257. CONG. GLOBE, 25th Cong., 2d Sess. 73 (1838).

258. *Id.* app. at 24.

259. *Id.* app. at 25.

260. *Twenty Fifth Congress, Second Session, DAILY NAT'L INTELLIGENCER*, Jan. 1, 1838, at 1.

and the press, as secured to the citizens of each State by the Constitution and laws thereof.²⁶¹

Finally, Morris borrowed more language from Calhoun's resolutions, once again turning them on their heads. "[N]o change of feeling on the part of any of the States can justify them or their citizens in open and systematic attacks on the right of petition, the freedom of speech, or the liberty of the press, with a view to silence either on any subject whatever"²⁶²

As a correspondent for the *Boston Daily Advocate* saw it, leading southerners had decided "that their domestic institutions cannot be protected" without surrender by the free states of "their dearest domestic institutions, freedom of speech and the press, and the right of petition."²⁶³ If northern and southern institutions clashed, "which neither will surrender and which cannot subsist together," the writer wondered, where would it all end?²⁶⁴ With all the emerging references to rights of American citizens, the rights of states and their citizens remained a key concern for parties on all sides of the dispute.

According to Morris, the Calhoun resolution was simply an attempt to silence speech without passing a law. "Let the same thing be done by law," Morris thundered, "and then see whether the people had become so base as to permit these privileges to be taken from them."²⁶⁵

Senator Oliver Smith of Indiana moved an amendment to the Calhoun resolutions:

Provided, That nothing contained in these resolutions shall be construed or understood as expressing an opinion of this Senate adverse to these fundamental principles of this Government, "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That the freedom of speech and of the press, and the right of the people peaceably to assemble to petition the Government for redress of grievances, shall never be abridged. That error of opinion may be tolerated while reason is left free to combat it. That the Union must be preserved." But, on the contrary, all

261. *Id.*

262. *Id.*

263. *Washington, Friday, Jan. 5th.*, BOSTON DAILY ADVOCATE, Jan. 10, 1838, at 2.

264. *Id.*

265. CONG. GLOBE, 25th Cong., 2d Sess. app. at 26 (1838).

those constitutional, fundamental, and political truths, are expressly recognised by this Senate.²⁶⁶

Others also saw the Calhoun resolutions as an attack on free speech. The *Boston Daily Atlas* suggested that Calhoun was assisting Abolitionists in making slavery a national issue and that his motive was the establishment of a separate southern confederacy. For many years, the South had been predominant in the nation. Now that that predominance was threatened by the growing population and power of the North, some southern leaders were unwilling to continue in the nation:

It may be supposed by some, that Mr [sic] Calhoun renders these services to the abolitionists unconsciously and unintentionally. Not at all. He knows perfectly well what he is about. His object is *agitation*; he wishes to create an agitation at the North, in order that he may employ it as a means of creating agitation at the South. With this design he makes those violent assaults upon the right of petition, the liberty of speech and the press, and even the privilege of thinking, contained in his famous resolutions. Instead of acting like oil upon the waters, he knows, and he exults, that those resolutions must and will operate like fuel to the fire.²⁶⁷

While Smith, Morris, and a handful of others were not successful in recasting Calhoun's resolutions in 1838, by 1860 a united Republican party in the Senate voted (unsuccessfully) to amend a resolution offered by Jefferson Davis and much like the one Calhoun had proposed. The Republican amendment provided that

free discussion of the morality and expedience of slavery should never be interfered with by the laws of any State, or of the United States; and the freedom of speech and of the press, on this and every other subject of domestic and national policy, should be maintained inviolate in all the States.²⁶⁸

The trail followed by Republicans in 1859–1860 had been blazed by a few rugged pioneers in 1837 and 1838.

Many Abolitionists, like others, increasingly shifted from heavy emphasis on rights under state constitutions, to an at least equal emphasis

266. *Id.* app. at 23.

267. *Mr. Calhoun's Policy*, BOSTON DAILY ATLAS, Feb. 1, 1838, at 2.

268. CONG. GLOBE, 36th Cong., 1st Sess. 2321 (1860).

on rights under the federal Constitution. In 1838, S. B. Treadwell, an anti-slavery editor who became an activist in the Liberty and Free-Soil parties, wrote the book, *American Liberties and American Slavery: Morally and Politically Illustrated*.²⁶⁹ Treadwell insisted that free speech and free press were national constitutional rights. Because of the federal constitutional guarantees, Treadwell insisted that communities had no right, "by mob law, or by any other law (which of course must be unconstitutional and an abridgement of the inalienable rights of man), to forcibly suppress the discussion and the constitutional promulgation" of opinions which most in the community despised.²⁷⁰ As Treadwell stated it:

The most obscure, or the most unpopular individual in community, stands most in need of the lawful and constitutional protection of all his rights. History and biography have most abundantly shown us, that many new systems and new theories, which obscure and unpopular persons have introduced, and for which they have been persecuted, imprisoned, and often put to death, have subsequently proved to be of immense value to the whole world of mankind.²⁷¹

Treadwell criticized "advocates for free inquiry and investigation [who] make a kind of mental reservation in this matter, and really mean those subjects only which may happen to coincide with their own peculiar notions, interests, or convenience."²⁷² Southerners could come North and criticize northern institutions (and even advocate slavery, as many opponents of slavery pointed out) and none attempted "to abridge their liberty of speech, or suppress their freedom of opinion, for they are American citizens, still under the gratefully waving banner of the American constitution."²⁷³ Treadwell rejected the claim that "the States are so many independent nations, and that they may enact laws abridging the constitutional liberties of American citizens."²⁷⁴

B. The Nature of the Right to Free Speech

Northerners increasingly saw free speech as a right of all Americans not to have speech restrained except according to regularly enacted laws

269. SEYMOUR B. TREADWELL, *AMERICAN LIBERTIES AND AMERICAN SLAVERY: MORALLY AND POLITICALLY ILLUSTRATED* (Negro Univ. Press 1969) (1838).

270. *Id.* at xxxv.

271. *Id.* at xxxvii.

272. *Id.* at xlii-xliii.

273. *Id.* at 57.

274. *Id.* at 177-78.

that comported with constitutional limitations. Some things were paradigmatic examples of free speech: the right to espouse opinions on all political, moral, religious, and scientific subjects and the right to criticize laws and institutions of one's own or another state. Free speech, many suggested, though not unlimited, was a principle of general application that must be available even to evil views. Jefferson's statement that error of opinion could be tolerated where truth was left free to combat it was reiterated again and again.

One might, and many do, take a very different approach, reserving free speech only for good ideas while suppressing bad ones. Abolitionist speech might be defended because it was on behalf of the oppressed. Supporters of free speech for Abolitionists did not take this approach. At this point, most did not find Abolitionist ideas good or agree with them. Nor was there any general consensus at the time in favor of freeing the oppressed slaves.

Finally, one might insist that simply expressing opinion on political and social institutions like slavery was impermissible if it interfered with the rights of others, such as the right of slaveholders to peaceful enjoyment of the institution. One might insist on balancing the two rights or on balancing the right to criticize slavery against the great dangers it threatened—disunion, slave revolts, civil war. Many who expressed support for free speech as the result of the Lovejoy incident, however, viewed free speech and free press as a limited protected area not to be invaded by legislative or private power, though the reasons for doing so seemed to many quite compelling. Supporters of free speech for Abolitionists sometimes cited direct incitement to violence and libel of a private person as examples of unprotected speech, but several rejected a bad tendency test. Channing insisted that possible effects on susceptible people could not be the test. The other view was expressed by critics of the resolutions that connected the Lovejoy issue to free speech. These people said that speech (like antislavery speech) that threatened such grave injuries was not within the freedom of speech.²⁷⁵

275. The resolution in favor of suppressing Birney's press said protections for speech and press were, "controlled by the same rules which govern other rights, viz: to be used in such a manner as not to injure the acknowledged rights of others." *Public Meeting*, PHILANTHROPIST, Jan. 29, 1836, at 2. In contrast to most public statements of non-Abolitionists, Birney took a different view. "[A]ny previous restraint amounts to a censorship destructive of the right, whilst punishment for its abuse, is its life and the means of perpetuating its vigor and usefulness." *The Cincinnati Preamble and Resolutions, Number II*, PHILANTHROPIST, Feb. 26, 1836, at 2. Birney saw the public meeting demanding cessation of his paper as a prior restraint and he did not elaborate fully on the distinction between protected speech and abuse. True statements on matters of

Channing and others noted that dominant groups frequently find prevailing evils benign, and criticisms of them evil. To permit governments or mobs to ban wicked ideas threatened progressive change. Many progressive ideas were at first rejected as wicked and only later accepted and cherished. The idea that slavery should be promptly abolished (or even limited to its then existing confines) is one example. Because radical ideas (such as the abolition of slavery or even its limitation to the slave states) threaten the economic interests of dominant groups, if those groups controlled the government and had the power to control the agenda, then such ideas could never be raised. (Something much like that had happened in the South.)

Opponents of slavery, in particular, were confident that ideas of freedom would vanquish those of slavery in a fair fight. Lovejoy and Birney offered space in their papers to supporters of slavery. Birney regularly printed proslavery and anti-abolition declarations.²⁷⁶

A copy of a letter to John C. Calhoun in the Elizur Wright papers gives a dramatic example of this faith. Attempts to suppress antislavery speech would fail, Wright insisted, because Americans did not trust ideas that had to be protected from argument. Wright proceeded to make a remarkable proposal. An antislavery magazine he edited would

be enlarged to the size of our large Reviews, and will be freely opened to the ablest of our opponents to the extent of 100 pages of each number. That there may be no occasion for the complaint of unfair play, the replies, when we see fit to make any, will be limited to the same space [and] type as the respective articles that have called them forth. Here then we offer to those who deprecate the effect of our agitation, access to the same readers—the power of sending the antidote along with the poison. It will be the fault of their courage or their arguments if they do not make our Magazine a pro-slavery instead of an Anti-slavery engine. Most cheerfully shall we welcome an article from your pen, either with or without your name. Should you prefer to write anonymously, you may depend upon the incog[nito status] being . . . observed so far as we are con-

public concern, he insisted, were protected. He suggested that free speech was limited by the rights of others but denied slaveholders had any right to hold slaves. *Id.*

276. See, e.g., *Extract from Governor M'Duffie's Message*, PHILANTHROPIST, Jan. 1, 1836, at 1.

cerned. Or, should any cause prevent your writing at all, we will admit any champion of your selecting on the same terms . . .²⁷⁷

C. Free Speech as a Political Issue

Today, as lawyers, law teachers, and law students we generally think of free-speech issues as matters decided by courts. The Lovejoy experience shows that free speech is a much broader political tradition and that crucial free-speech decisions are made by citizens, by the press, by legislators, and by public officials who are not judges. In 1837, the idea of free speech as a principle that covered a very broad range of opinions and ideas was an important part of that tradition. Again and again, resolutions and statements in the press insisted that Lovejoy was every person, and that violation of his rights (yes, even of the rights of despised Abolitionists) threatened the rights of all. Because of adherence to this tradition and because they saw free speech and press as protecting an area from invasion by government or mobs, people who disliked abolition could and did defend free speech for Abolitionists. Rejection of the tradition and an insistence on a very particular weighing of the advantages and disadvantages of tolerating Abolitionist (or other speech seen as obnoxious) would have been much more likely to produce legal or extra legal suppression. If suppression of Abolitionist speech were not seen as a threat to other speech, in 1837 and 1838 opponents of suppression would be limited to the small group of supporters of abolition. This suggests that in evaluating ideas about free speech the broad public and political nature of the tradition should be given careful attention. Ideas that undermine the tradition that free speech must protect evil as well as good ideas have costs as well as benefits. There is, of course, a legacy of repression as well as a tradition broadly protecting free speech.

D. Private Suppression as a Violation of the Right to Free Speech

In 1835, some politicians who were unwilling to make antislavery speech and publication unlawful in the North, nonetheless celebrated the

277. 13 THE PAPERS OF JOHN C. CALHOUN, 1835-1837, *supra* note 28, at 625-26 (editorial marks omitted). The editor comments that if Calhoun got the letter, he did not respond.

actions of mobs in breaking up Abolitionist meetings and presses. Many treated acts of private suppression either as benign or only mildly problematic. By 1837, many more opinion leaders recognized that free speech and press had a positive (freedom to speak) as well as negative (freedom of governmental suppression) aspect. When governments were unable or unwilling to protect free speech from private violence, the "right" or "privilege" or "immunity" became meaningless. So, by 1837, the attacks like those on Lovejoy were regularly described as violations of the right to free speech and free press and as violations of state and federal constitutional rights.

By this view, rights to free speech and free press were more than simply a shield against state or federal laws abridging these freedoms. The rights implied a positive duty of government to protect their exercise. Typically, in 1837, when mobs suppressed speech, press, or assembly, criticism for failure to protect was directed to the local government. The role of the federal government (if any) in suppressing private violence aimed at speech was almost never discussed. One correspondent of the *Emancipator* did suggest in detail how local authorities should deal with threats of private violence aimed at speech:

As to the city authorities, when there are indications of a mob, the course of duty is plain. The magistracy is solemnly bound to protect abolitionists in their constitutional and legal rights. Instead of asking them to waive their rights, shut up their halls, postpone their meetings, or yield an iota to the requisitions of the populace, they should at once declare their purpose to protect and defend them in the full exercise of their rights as citizens. To this end the whole power of the police should be brought immediately into action. The party threatened or assailed should be promptly assured of protection, and the whole community should be made to understand that the law will be enforced.

....
S.A.²⁷⁸

How to reconcile a federal system with protection against private attacks on federally guaranteed rights to free speech was a problem for another day. As a practical matter, a federal government that was attempting to suppress discussions of antislavery petitions was not likely to be active in protecting antislavery activists from mobs.

278. S.A., *Mobs*, 3 EMANCIPATOR 15 (May 24, 1838).

E. Access to Public Discourse

A central tenet held by many Americans who came to the defense of Abolitionist expression was that truth would vanquish error. Of course, the idea that truth will vanquish error in free debate (optimistic as it is) assumes a free debate in which participants have access to listeners. To a remarkable extent, Abolitionists had been denied access to most of the mainstream press. Both municipal and private buildings were closed to their meetings; newspapers attacked them but, before 1837, most never or rarely directly reported what Abolitionists had to say. On the other hand, in public meetings held to decide whether they should be silenced, Lovejoy and Birney both had had an opportunity to speak.²⁷⁹ The meeting in Ohio had listened in full to the Declaration of Sentiments of the Anti-Slavery Society.

On February 1, 1838, the *Emancipator* noted that “[o]ne good effect of the Alton massacre, has been to obtain an insertion of Mr. Lovejoy’s elaborate Declaration of Sentiments in a considerable number of newspapers which have never before published so full and convincing a statement of the principles of Abolitionists.”²⁸⁰ Because in those days the nation had a great many newspapers, perhaps conscious or unconscious manufacturing of an official view by a ruling elite was difficult. Still, there were serious impediments to a truly free discussion in the press. Though advertisers did not yet wield great power over most newspapers, there was still the problem of the patrons and even the readers. As William Ellery Channing noted: “The newspaper press is fettered among us by its dependence on subscribers, among whom there are not a few intolerant enough to withdraw their patronage, if an editor give publicity to articles which contradict their cherished opinions, or shock their party prejudices, or seem to clash with their interests.”

“In such a state of things,” Channing regretfully observed, “few newspapers can be expected to afford to an unpopular individual or party, however philanthropic or irreproachable, an opportunity of being heard by the public. Editors engage in their vocation like other men, for a support” As a result, “the newspaper press fails of one of its chief duties,

279. See LOVEJOY MEMOIR, *supra* note 87, at 279–80 (quoting the Remarks of Elijah P. Lovejoy Before the City of Alton Public Meeting (Nov. 3, 1837)); RICHARDS, *supra* note 1, at 94.

280. *Lovejoy’s Sentiments*, 2 EMANCIPATOR 155 (Feb. 1, 1838).

which is to stem corrupt opinion, to stay the excesses of popular passions."²⁸¹

Abolitionists dealt with the problem as best they could. They created their own newspapers. They developed a cadre of speakers who fanned out throughout the North and spoke against slavery. They held meetings. By Lovejoy's death in 1837, the Abolitionist claim that slavery threatened the liberty of the North received increasingly wide acceptance.

F. The Press and Free Speech and Press

Much of the press had strongly and unequivocally condemned the killing of Lovejoy. Up to that point, however, and with notable exceptions, the press, pulpit, and public officials had been, at best, less than robust in defense of free speech for Abolitionists. "We are sorry to say, too," wrote the *Portland Daily Courier*,

that the people of Alton are not alone accountable for this cruel act. The blame must fall also in some degree, upon other parts of the country where scenes of a similar character have been played, and, if not absolutely approved, have been passed over almost in silence. True, they have not elsewhere attained so eminent a degree. Let our readers reflect, and they will remember more than one even[t] in our own New England, and in our own city, too, which were only less disgraceful because not so fatal in their results. They will have occasion to remember some scenes even among us, where peaceful and respectable men have been interrupted in the exercise of their legal and constitutional rights by the assaults of a rabble, and put in danger of personal injury, for no other reason than that they dared to express their own settled opinions.²⁸²

In a resolution, the Executive Committee of the American Anti-Slavery Society complained "that a fearful responsibility rests upon editors, who have misrepresented the doctrines and measures of abolitionists, and excited misguided individuals to interrupt their meetings, and menace their persons, property, and lives."²⁸³ Though some noted the contribution of the press to the climate of suppression, few, if any, suggested legal sanctions. Perhaps the faith that error could be checked by more discussion was

281. Note, in CHANNING, *supra* note 130, at 177-78.

282. *The Alton Murder*, 2 EMANCIPATOR 124 (Dec. 7, 1837) (quoting the *Portland Daily Courier*).

283. *Additional Resolutions*, 2 EMANCIPATOR 125 (Dec. 7, 1837) (listing resolutions passed by the Executive Committee of the American Anti-Slavery Society on Dec. 4, 1837).

one contributing factor. As a practical matter, a dominant group (as the opponents of Abolitionists were at the time) was quite unlikely to prosecute itself.

VI. CONCLUSION

The death of Elijah Lovejoy defending his press from a mob was a critical moment both in the crusade against slavery and in the closely related battle for free speech and free press. It helped to advance the idea that free speech and press were invaluable privileges of American citizens. It helped to shape a tradition that a broad spectrum of speech and press was entitled to protection and a recognition that violation of the rights to free speech and press could come from individual action as well as government action.

By 1860, invocation of a broad and national right to free speech and press had become common for Republicans. The Lovejoy incident was part of the collective memory of the Republican party, a party that would abolish slavery and then, in the Fourteenth Amendment, write the primary basis for national protection for civil liberties—including speech and press—from state denial.

In 1860, Congress was in an uproar over Republican endorsement of a book by Hinton Helper that called on nonslaveholding southerners to unite for political action against slavery. (Southern congressmen and senators saw the book as a call for slave revolts, and, indeed, it had a few purple passages about what could be done if the slaveholding elite attempted to suppress democratic action against slavery.) In the ensuing debate, Owen Lovejoy, brother of Elijah, now a Republican congressman from Illinois, insisted on “the right of discussing this question of slavery anywhere, on any square foot of American soil . . . to which the privileges and immunities of the Constitution extend.” “[T]hat Constitution,” Lovejoy insisted, “guaranties to me free speech.”²⁸⁴ Representative Elbert Martin of Virginia told Lovejoy, “And if you come among us we will . . . hang you . . .” Congressman Lovejoy replied: “I have no doubt of it.”²⁸⁵

There were other echoes of the Lovejoy incident in the same Congress, complaints about newspapers committed to the flames and presses thrown in the river.²⁸⁶ In 1864–65, when the Congress debated the abolition of slavery, the idea that free speech and free press were liberties of

284. CONG. GLOBE, 36th Cong., 1st Sess. app. at 205 (1860).

285. *Id.* app. at 207.

286. *Id.* at 1872 (statement of Rep. Henry Waldron).

American citizens that had been threatened and suppressed by slavery was commonplace. "Slavery," said Representative John A. Kasson of Iowa, "denies the constitutional rights of our citizens in the South, suppresses freedom of speech and of the press, throws types into the rivers when they do not print its will, and violates more clauses of the Constitution than were violated even by the rebels when they commenced this war."²⁸⁷ In his litany of evils spawned by slavery, Congressman John Farnsworth recounted "the murder of Lovejoy at Alton."²⁸⁸

In 1864, before the adoption of the Fourteenth Amendment, Congressman James Wilson, Chair of the Judiciary Committee in the Thirty-ninth Congress, reflected a change in constitutional understanding that came in part from the reaction to Lovejoy's death. "Freedom of religious opinion, freedom of speech and of press, and the right of assemblage for the purpose of petition," Wilson said, "belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no state may interfere without breach of the bond that holds the Union together."²⁸⁹ Slavery had practically destroyed these rights. It had:

[P]ersecuted religionists, denied the privilege of free discussion, prevented free elections, [and] trampled upon all the constitutional guarantees belonging to the citizen Throughout all the dominions of slavery republican government, constitutional liberty, the blessings of our free institutions were mere fables. An aristocracy enjoyed unlimited power, while the people were pressed to the earth and denied the inestimable privileges which by right they should have enjoyed . . . by the Constitution.²⁹⁰

287. CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865).

288. CONG. GLOBE, 38th Cong., 1st Sess. 2979 (1864).

289. *Id.* at 1202.

290. *Id.*