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THE CURIOUS HISTORY OF ATTEMPTS TO SUPPRESS ANTISLAVERY SPEECH, PRESS, AND PETITION IN 1835-37

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I. INTRODUCTION

A central political question racked the United States in 1835-37: Would government prohibit abolitionists from criticizing the institution of slavery and from calling for its abolition? The question was perplexing. It directly pitted cherished, though poorly defined, ideas of free expression against perceived needs to protect public safety and preserve the Union.

Those who sought to silence abolitionists pursued various approaches. In the South, legislatures passed laws that could be used against abolitionist expression. In the North, legislatures considered laws to muzzle abolitionists, and in some cases Northern mobs took to the streets to silence abolitionists. Congress muzzled its own debates on abolition petitions. It also considered censoring the mails by banning abolitionist publications directed at the South. Each of these controversies raised again a basic question: was it legitimate to eliminate antislavery ideas and arguments from public debate—at least in the South and perhaps throughout the nation?

The years 1835-37 provide a defining moment for American conceptions of freedom of expression. Would some topics be eliminated from the political debate? Whether to ban abolitionist expression was a hard question as a matter of judicial precedent because there was no precedent directly on point. Many thought what precedent existed could, by analogy, justify state laws outlawing at least some antislavery speech and press.¹ But the debate did not merely focus on the musty precedents of the common law. Legislative and community notions of free expression defined the limits of government suppression. Public and legislative debates focused on constitutional provisions, on the function of free speech, on federalism, and on the teachings of history. One debate focused on federal power over the press. Most who discussed that subject implicitly rejected judicial decisions under

¹ See, e.g., T. R. SULLIVAN, LETTERS AGAINST THE IMMEDIATE ABOLITION OF SLAVERY ADDRESSED TO THE FREE BLACKS OF THE NON-SLAVE-HOLDING STATES COMPRISING A LEGAL OPINION ON THE POWER OF LEGISLATURE IN NON-SLAVE-HOLDING STATES TO PREVENT MEASURES TENDING TO IMMEDIATE AND GENERAL EMANCIPATION IN A LETTER TO THE AUTHOR FROM WILLIAM SULLIVAN, L.L.D. 42 (Boston 1835) [hereinafter SULLIVAN, LETTERS AGAINST IMMEDIATE ABOLITION] (setting forth letters originally printed in the *Boston Courier*); THE TRIAL OF REUBEN CRANDALL, M.D. CHARGED WITH PUBLISHING AND CIRCULATING SEDITIOUS AND INCENDIARY PAPERS &C. IN THE DISTRICT OF COLUMBIA, WITH THE INTENT OF EXCITING SERVILE INSURRECTION (Washington 1836) reprinted in SLAVE REBELS, ABOLITIONISTS, AND SOUTHERN COURTS: THE PAMPHLET LITERATURE 364 (Paul Finkelman ed., 1988).

the Sedition Act as wrong.²

This story of abolition and free expression is mainly about Northern and national laws that did not pass, about suppression considered and rejected. Southern states passed laws suppressing antislavery speech and press; the national administration censored the U.S. mails; and Congress set severe limits on its discussion of abolition petitions. But these measures did not spread to form a comprehensive system of suppression. The repression of antislavery petitions and debate in Congress was a victory for suppression. But suppression of discussion of antislavery petitions in Congress proved to be a Pyrrhic victory for slavery precisely because it violated a broad public consensus about the meaning of the right to petition.

At first, many in the North accepted Southern repression as legitimate. But as the controversy intensified in 1835-37, abolitionists and others reframed the issue from one limited to slavery in the South to one embracing liberty in the North. More and more Northerners began to see the slave system not as a limited (and even useful) Southern domestic institution, but as a system whose demands for security threatened the liberty of the North. Just as Northerners eventually demanded that slavery be contained within its present boundaries, they also eventually rejected its claim to even local immunity from criticism.

The story of how the North rejected suppression has some important lessons. First, the story shows that inchoate public ideas of free speech and press are of crucial importance in protecting freedom of expression. Two of the most crucial decisions about free expression in American history—the demise of the Sedition Act and the North's refusal to suppress antislavery speech—were not based on court decisions or recondite doctrine.³ Preserving the right of Northerners to criticize slavery and to call for its abolition turned, in part, on broad, simple, and widely held ideas of free speech and press.

Second, this story illustrates how divisions of power limited power. The federal system and the pre-Civil War idea that the federal government had no broad power to suppress abolitionist ideas meant that the issue of suppression was decided state by state. Southern states generally chose legislative suppression. Northern states rejected it. For the nation at large, piecemeal suppression meant that discussion of the legitimacy of slavery continued.

Although this Article is limited to a few years, these years overflow with events bearing on free speech and slavery. To understand

² See 24 CONG. DEB. 1152 (1836) (Sen. Davis); *id.* at 1721 (Sen. Webster); *id.* at 1723-24 (Sen. Buchanan). But see 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 21, 23-24 (New York 1836) [hereinafter 2 KENT'S COMMENTARIES].

³ For an example of the recondite doctrine, see *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

the defining events of 1835-37, Part II looks at the historical background of the controversies—first, at the Constitution, slavery, the Federal Bill of Rights, and the Sedition Act; and second, at some more immediate background from the 1830s. Part III focuses on three controversies of this period: the mails, the call for Northern anti-abolition laws, and the petition issue. It looks at the general case for suppression, the range of options—from reinforcing Southern censorship to establishing Northern anti-abolition laws—and the legal categories that allegedly justified anti-abolition laws. Part IV considers the abolitionists' arguments for free speech as well as those of others.

The Article concludes with a reflection on the meaning of these events. In the 1830s as today, arguments raged about race and free speech, about "libel" of large groups, about protecting citizens from emotional distress caused by denunciations of the group to which they belonged, and about exceptions to broad ideas of free speech and press.

One conclusion is obvious. Controversies over free speech and press did not begin with judicial cases during and after World War I as some students of constitutional law might assume.⁴ The story begins much earlier, and it is a story lawyers are beginning to examine. In 1835-37, the system of freedom of expression was shaped by political and social ideas and decisions about free speech held by a broad group of politicians, writers, and citizens. Their ideas operated far beyond that elite legal institution—the United States Supreme Court. For a better understanding of the system of freedom of expression, we should enlarge our focus to include political events and ideas beyond

⁴ Examples of casebooks that start with World War I cases include WILLIAM LOCKHARD ET AL., CONSTITUTIONAL LAW 645-46 (7th ed. 1991); GERALD GUNTHER, CONSTITUTIONAL LAW 1008-20 (12th ed. 1991). For a general casebook with a good brief history of free speech and the best historical presentation of the closely related issue of incorporation of the Bill of Rights, see WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 1194-1204 (9th ed. 1993). For an excellent historical presentation in a First Amendment casebook, see WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT (1991). Scholars have done much to explore the early history of free speech and press and much more remains to be done. See, e.g., DONNA L. DICKERSON, THE COURSE OF TOLERANCE: FREEDOM OF THE PRESS IN NINETEENTH-CENTURY AMERICA (1990) [hereinafter THE COURSE OF TOLERANCE]; LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS (1985); RUSSELL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860 (1972); FREDRICK S. 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) [hereinafter Rabban, *Levy on Freedom of Expression*]; David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L. J. 514 (1981); Stephen Smith, *The Origins of the Free Speech Clause*, 29 FREE SPEECH Y.B. 48 (1991); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699 (1991).

Supreme Court doctrines and decisions. From the Sedition Act to the crisis of 1835-37, free speech and press were not even primarily defined by Supreme Court decisions.

A second conclusion follows from the recognition that popular ideas of free speech and press are an important part of the system of freedom of expression. Proposed exceptions to free speech and press cannot be evaluated simply in light of how they affect Supreme Court doctrine. Recently, some have suggested expanded power to suppress racist political speech, press, and petition. These scholars have said, for example, that the group libel case of *Beauharnais v. Illinois*⁵ was correctly decided after all, and that it is appropriate criminally to punish racist political speech expressed in a *petition* to the government.⁶ Free speech doctrine, critics suggest, is really a series of very discrete decisions about disparate subjects, not conclusions from over-arching principles. According to these critics, exceptions should be evaluated on a specific or ad hoc basis, and not evaluated based on the assumption that exceptions may threaten the larger edifice of freedom of speech.⁷

A broader view of history provides a larger context for considering proposals to redefine the system of freedom of expression. The attempt to suppress Northern abolitionist speech in the 1830s did not fail because most in the North thought abolition agitation was an intrinsically valuable contribution to public dialogue that deserved heightened protection. Abolitionist agitation was widely disliked. Instead, suppression in the North failed, in part, because of a public perception that suppression threatened broader ideas of free speech and press. Northerners feared that making an exception to allow suppression of abolition expression, however desirable such an exception

⁵ *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The premises of *Beauharnais* seem to have been undercut by *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁶ See, e.g., Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 682-83 (1988). For a case suggesting that *Beauharnais* has been undercut by later cases, see *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

⁷ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2351-69 (1989). Professor Matsuda demonstrates that speech is dangerous and that words can wound. In response to these insights she would criminally punish racist speech (including, as I read it, political speech not directed at a particular individual). She would have an exception for racist and hateful speech directed by minorities at the "dominant" group or its members. *Id.* at 2361. Marxist speech would also be protected, because it is "not universally condemned" and because "many nations adhere to Marxist ideology," a justification somewhat weakened by recent events. *Id.* at 2359. Many would see Marxism as dangerous hate speech directed at "capitalists" (a category that historically has included small landowners who were in some cases "liquidated" based on economic group membership). Professor Matsuda, however, would protect Marxism as core political speech. *Id.* at 2359-60. She seems ready to eliminate Mark Twain from schools to protect African-American children. *Id.* at 2369. Her article was cited with approval by the Supreme Court of Minnesota in *In re Welfare of R.A.V.*, 464 N.W.2d. 507, 508 (Minn. 1991).

might otherwise be, would undermine the citadel protecting free expression and leave free speech vulnerable to a variety of other assaults. Ideas that supported free speech for abolitionists were broad and general ideas about the value of unfettered political, philosophical, and scientific inquiry and discussion. They were not ideas about the appropriateness of abolitionist expression.

So before creating new or justifying old exceptions to protections for free speech and press on political, scientific, or social topics, scholars might consider the effect of such exceptions on the broad popular consensus that supports a system of freedom of expression. Agreement about the virtue of the particular ideas we want protected may be far harder to marshal than agreement on broad principles protecting freedom of expression. While history does not provide unambiguous answers to current problems, it does provide a broader context and deeper experience by which to evaluate current ideas.

II. HISTORICAL BACKGROUND

A. *From the Revolution to the 1830s*

The American revolutionaries understood their cause as a battle for liberty against a government threatening to enslave them. The slavery consisted of threats to their systems of representative government, threats to the basic rights of Englishmen, and threats to other basic rights. These rights American revolutionaries later enshrined in early state constitutions and bills of rights and still later in the Federal Bill of Rights.⁸ The Declaration of Independence made broad claims for self-evident human rights:

[T]hat all men are created equal; that they are endowed, by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.⁹

Of course, reality fell short of rhetoric, most notably in the case of slavery. Slaves were unprotected by bills of rights and slaves had no voice in their government or in basic aspects of their lives.¹⁰ The tension between American professions and practice was one that abo-

⁸ See ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 21, 499, 501, 522 (1954); Michael K. Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENTARY 359 (1991).

⁹ *The Declaration of Independence*, in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 252 (Bernard Schwartz ed., 1971) [hereinafter 1 DOCUMENTARY HISTORY].

¹⁰ *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447 (1824). The Supreme Court later deprived even free blacks of the protections of the Federal Constitution. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

litionists pointed out again and again.¹¹

In the Constitution, the framers made no explicit effort to prohibit slavery anywhere; indeed, they crafted provisions that recognized its existence and offered it protection. The slave trade could not be prohibited before 1808 and that provision could not be amended.¹² Northerners were required to return fugitive slaves.¹³ The slave population swelled Southern representation in the House and electoral college since each slave counted as three-fifths of a free white person for purposes of representation.¹⁴ There was a provision applicable to slave revolts: on application of the state legislature, or the governor if the legislature could not be convened, the United States was required to protect each state against domestic violence.¹⁵

By 1835, many Americans believed that the Constitution was founded on a "compact" between slave and nonslave states. Slavery was recognized by the Constitution in the states where it existed: an implied provision of the constitutional bargain was that Northerners would not interfere with slavery in the South. In fact, in the 1830s, Northerners repeatedly said that they were legally bound to help subdue slave revolts.¹⁶

But the Constitution contained other provisions potentially threatening to slavery. It announced that its object was to "secure the Blessings of Liberty to ourselves and our Posterity."¹⁷ It recognized freedom of speech, press, religion, and petition and it provided that Congress shall make no law abridging these freedoms.¹⁸ It defined treason in a way that did not cover political speech or press.¹⁹ It protected congressional debate from criminal or civil sanctions.²⁰ It guaranteed a host of rights to those accused of crimes, though by conventional understanding these federal guarantees applied only in federal courts.²¹ It guaranteed to each state a republican form of gov-

¹¹ R. ALVAN STEWART, *WRITING AND SPEECHES OF ALVAN STEWART ON SLAVERY* (Luther Marsh ed., 1969).

¹² U.S. CONST. art. I, § 9. See WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 62-63 (1977).

¹³ U.S. CONST. art. IV, § 2, cl. 3.

¹⁴ U.S. CONST. art. I, § 2, cl. 3.

¹⁵ U.S. CONST. art. IV, § 4.

¹⁶ See *Speech by Harrison Gray Otis*, NILES' WKLY. REG., Sept. 5, 1835, at 10.

¹⁷ U.S. CONST. pmbl.

¹⁸ U.S. CONST. amend. I.

¹⁹ U.S. CONST. art. III, § 3.

²⁰ U.S. CONST. art. I, § 6, cl. 1.

²¹ U.S. CONST. amend. IV (protecting against unreasonable search and seizure); U.S. CONST. amend. V (protecting against double jeopardy, self-incrimination, and violation of due process); U.S. CONST. amend. VI (providing for a right to a speedy trial and the right to confront witnesses); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment). See also *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

ernment.²² It allowed Congress to regulate commerce among the states and to establish post offices and post roads.²³ It provided for the supremacy of federal law.²⁴ Finally, it gave Congress the power "to exercise exclusive Legislation in all cases whatsoever" over the seat of government and at places "purchased by the Consent of the Legislature of the State" for federal forts, arsenals, dockyards, and "other needful Buildings."²⁵ It provided power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."²⁶

The power over territories seemed to give Congress power to contain slavery by limiting it to the states where it existed. Indeed, in the final year of the Articles of Confederation and in the first Congress under the new Constitution, Congress banned slavery from territory then under the control of Congress and provided for certain "perpetual" guarantees of civil liberties.²⁷ But in the face of rising southern demands, the national government repeatedly compromised its policy of excluding slavery from new territories. The issue was crucial to the Southern political elite. If all new states were free states, the peculiar interests and institutions of the South might eventually lose the protection of the constitutional "compact." With the necessary majority, free states might amend or re-interpret the Constitution and insist on some form of emancipation.

The issue of new slave states reached a crisis over the proposed admission of Missouri. In 1819, James Tallmadge, Jr., a New York member of Jefferson and Madison's Republican Party, proposed requiring gradual emancipation as a condition of the admission of Missouri.²⁸ Initially, the House divided along sectional lines: Northerners voted for the amendment and Southerners voted against it.²⁹ Eventually Congress embraced the Missouri Compromise: states from Louisiana Purchase territory above the latitude of thirty-six degrees, thirty minutes would be admitted as free states, and states from below thirty-six degrees, thirty minutes could be slave states.³⁰

The aged Thomas Jefferson, from the vantage point of Monticello, saw the sectional division over slavery as a prologue to disunion. He called the controversy a "fire bell in the night." A "geographical

²² U.S. CONST. art. IV, § 4.

²³ U.S. CONST. art. I, § 8, cls. 3, 7.

²⁴ U.S. CONST. art. VI.

²⁵ U.S. CONST. art. I, § 8, cl. 17.

²⁶ U.S. CONST. art. IV, § 3, cl. 2.

²⁷ 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 86-89 (Melvin Urosky ed., 1989) [hereinafter DOCUMENTS OF AMERICAN HISTORY].

²⁸ WILLIAM W. FREEHLING, THE ROAD TO DISUNION: VOLUME I, SECESSIONISTS AT BAY, 1776-1854, at 144-48 (1990) [hereinafter FREEHLING, ROAD TO DISUNION].

²⁹ *Id.* at 149.

³⁰ *Id.* at 153.

line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper," he wrote.³¹ In the institution of slavery, Jefferson lamented, the South had "the wolf by the ears." It could neither safely hold it nor let it go. Jefferson grimly foretold the destruction of the Union and the wreck of the work of 1776.³²

In the controversy over abolitionist literature, many had similar forebodings. The solution of 1820 had been to compromise the issue of slavery in the territories and to remove slavery from the political agenda. In 1835, however, Abolitionists threatened to put the divisive issue back on the agenda. The events of the 1830s involved not only slavery but a further issue as well—the meaning of constitutional guarantees of free speech, press, petition, and religion. Did these guarantees mean that abolitionists had a right to "agitate" the issue of slavery—to try to put it on the national agenda or to place it squarely before the conscience of slaveholders?

The failure to include a bill of rights in the new Federal Constitution had been one of the arguments against its adoption. Both during and after the Constitutional Convention, some leading Federalists had argued that a guarantee for freedom of the press was unnecessary because the new government had no power over the press.³³ In the face of mounting opposition some Federalists relented and suggested a bill of rights would be added as an amendment to the new Constitution.³⁴ In the first Congress under the new Constitution, James Madison sought to fulfill that pledge. Most of Madison's proposed amendments passed Congress, were ratified by the states, and became the

³¹ Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), in THOMAS JEFFERSON, WRITINGS 1434 (Library of America ed., 1984) [hereinafter THOMAS JEFFERSON, WRITINGS]; FREEHLING, ROAD TO DISUNION, *supra* note 28, at 155.

³² *Id.* See also JOHN CHESTER MILLER, THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY 243-52 (1977).

³³ See, e.g., JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 640 (Adrienne Koch ed., 1966) (recording Sherman as saying that protection of freedom of the press was "unnecessary" and that "[t]he power of Congress does not extend to the Press"); THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (Jacob Cooke ed. 1961); 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1030-34 (Bernard Schwartz ed., 1971) [hereinafter 2 DOCUMENTARY HISTORY] (setting forth comments by Jackson in debate on the Bill of Rights in the House saying the press was in no danger because "[t]here is no power given to Congress to regulate this subject as they can commerce"); William Van Alstyne, *Congressional Power and Free Speech: Levy's Legacy Revisited*, 99 HARV. L. REV. 1089 (1986) (reviewing Leonard Levy's *Emergence of a Free Press* (1988)). For recent commentary, see Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Paul Finkelman, *A Reluctant Paternity: James Madison and the Bill of Rights*, 1990 SUP. CT. REV. 301; Paul Finkelman, *The Ten Amendments as a Declaration of Rights*, 16 S. ILL. U. L.J. 351 (1992).

³⁴ BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 119-59 (1977).

Bill of Rights. Madison apparently conceived of most of his provisions as limits only on federal power. He proposed to put most of them in Article I, section 9 with other limitations on the power of Congress.³⁵ However, he also insisted that federal limits should be set on some state powers: "no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases."³⁶

Madison described freedom of the press, trial by jury, and the right of conscience interchangeably as "rights" and as "privileges." He used the "no state shall" form specifically to limit states in reference to these rights.³⁷ While most state constitutions secured these rights, Madison favored a "double security on those points."³⁸ "State governments," Madison warned, "are as liable to attack the invaluable privileges as the General Government is."³⁹ Madison rejected a suggestion to leave the matter to the states: the limitation on state power was "the most valuable amendment in the whole list."⁴⁰ If that was the view of Madison and the House, the Senate did not concur. It rejected Madison's "most valuable" amendment.

Still, the understanding of 1789, when the Bill of Rights was framed, was different from our contemporary understanding. By the consensus of 1789, the people already had the rights referred to in the Bill of Rights. These were pre-existing rights, either natural or inherited rights of "freeborn Englishmen." The Bill of Rights recognized them but did not create them. Its provisions were "declaratory" and "prohibitory" but not creative.⁴¹

The Sedition Act of 1798 put constitutional protections of speech and press to their first major test. In this act, Congress made it a crime to subject the President, the government, or either house of the Congress to "false, scandalous and malicious" criticisms.⁴² Truth was admissible and "the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases."⁴³ The political purposes of the act were clear. It had a sunset provision so that it would expire with the term of President

³⁵ 2 DOCUMENTARY HISTORY, *supra* note 33, at 1026.

³⁶ *Id.* at 1030.

³⁷ *Id.* at 1033.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1113; *see also id.* at 1053, 1033.

⁴¹ *See* COMMISSION ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE CONSTITUTION OF THE UNITED STATES AND THE DECLARATION OF INDEPENDENCE 10 (1991) (setting forth a resolution of Congress March 4, 1789 transmitting proposed amendments to the states and describing them as "declaratory and restrictive clauses").

⁴² Ch. 74, 1 Stat. 596, § 2 (1798) [hereinafter *Sedition Act*]. For further discussion see JAMES M. SMITH, FREEDOM'S FETTERS, THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1966).

⁴³ *Sedition Act*, *supra* note 42, § 3.

John Adams. It protected the President, but not the Vice President, Thomas Jefferson, his likely rival in the election of 1800. The administration used the act to prosecute supporters of Jefferson. Juries (packed juries, Jefferson insisted)⁴⁴ convicted Jefferson's supporters of violating the act, and Federalist federal judges upheld the act against constitutional challenges.⁴⁵

The Jeffersonian-Republicans attacked the Sedition Act on textual, structural, and functional grounds. Their attack also had a strong flavor of states' rights.⁴⁶ The Constitution gave Congress no power over the press; the First Amendment reiterated this lack of power; and finally, republican government required a free press. The Virginia resolutions announced that the Sedition Act should "produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."⁴⁷ The functional argument suggested that political expression ought to be free. It built on, developed, and elaborated a principal-agent argument espoused by the 17th century Levellers, the Radical Whigs, and the revolutionary Congress's Address to the Inhabitants of Quebec.⁴⁸ The sovereignty of the people meant that rulers were the agents, and the people were the principal. Free press was a crucial means by which the principal learned about the actions of the agent and consulted for purposes of making new decisions about the agent's conduct. This argument was in considerable tension with the Jeffersonian tenet that suppression of seditious libel was up to the states.⁴⁹

By the time of the Constitution, this principal-agent popular sov-

⁴⁴ Amar, *supra* note 33, at 1188 n.254.

⁴⁵ See, e.g., *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800); *Lyon's Case*, 15 F. Cas. 1183 (C.C.D. Vt. 1798).

⁴⁶ Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109.

⁴⁷ See DOCUMENTS OF AMERICAN HISTORY, *supra* note 27, at 160 (setting forth the Virginia Resolutions of December 21, 1798).

⁴⁸ 1 DOCUMENTARY HISTORY, *supra* note 9, at 223; JOHN TRENCHARD & THOMAS GORDON, 1 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 96-103, 249-50, 253 (De Capo Press 1971) (6th ed. 1755) [hereinafter CATO'S LETTERS]; Curtis, *supra* note 8; Rabban, *Levy on Freedom of Expression*, *supra* note 4, at 823.

⁴⁹ Letter from Thomas Jefferson to Abigail Adams, in LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 367 (1966) (stating that: "[w]hile we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so"). The Jeffersonian tradition often cited in the 1830s was from Jefferson's public and broad statements in favor of freedom of opinion, not his states' rights qualifications to those statements. "If there be any among us who would wish to dissolve this Union or change its republican form," Jefferson wrote in a passage from his first inaugural often cited in the 1830s, "let them stand undisturbed as monuments to the safety with which error of opinion may be tolerated where reason is left free to combat it." THOMAS JEFFERSON, WRITINGS, *supra* note 31, at 493.

ereignty rhetoric was used by both sides in the political debate.⁵⁰ In stark contrast to the Madisonian argument, supporters of the Sedition Act cited Blackstone, an exponent of parliamentary sovereignty, for the proposition that freedom of the press was limited to protection against censorship before publication and did not prevent punishment after publication.⁵¹

Public reaction (or at least Jefferson's election) doomed the Sedition Act. After Jefferson was narrowly elected President, the act expired, and Jefferson pardoned those convicted under it. For the nation at that time and later during the controversy over abolition publications in the 1830s, the Sedition Act was a defining constitutional moment.⁵² The history of the Sedition Act shaped the debate on free speech in the 1830s at the height of Northern and Southern demands for suppression of abolitionist expression. But if the Sedition Act was the story, what was its moral? Was it that no government had power to suppress speech about public men and public measures? Or was it simply that the federal government lacked such power?

B. The 1830s

In *Barron v. Baltimore*,⁵³ in 1833, the Supreme Court ruled that guarantees of the Bill of Rights did not limit the states. Had the framers intended such a result, Chief Justice Marshall said, they would have used the "no state shall" words before the general prohibitions.⁵⁴ So it seemed the security of the rights of American citizens had a two-fold aspect. They were protected against federal action by the Federal Bill of Rights; but, to the extent they were protected against state action, it was by state constitutions and bills of rights. By the time Chief Justice Marshall wrote in 1833, the right to criticize slavery had suffered serious erosion in the South.

By the 1830s, the tide of history seemed to be running against slavery. By 1804, Northern states had either abolished slavery or adopted programs of gradual emancipation. In Haiti, black revolutionaries had abolished slavery by force. In 1813 and 1814, Argentina and Columbia abolished slavery. Chile followed in 1823, Central America in 1824, Mexico in 1829, and Bolivia in 1831. By the autumn

⁵⁰ See, e.g., THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Bantam Books ed., 1982). For background, see CATO'S LETTERS, *supra* note 48, at 96-103, 249-50, 253; Curtis, *supra* note 8, at 367-68; Rabban, *Levy on Freedom of Expression*, *supra* note 4, at 823.

⁵¹ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (University of Chicago Press 1979) (1st ed. 1769). For scholarly discussions of the Sedition Act, see generally, Anderson, *supra* note 4; LEVY, *supra* note 4; Mayton, *supra* note 4; Rabban, *supra* note 4; Smith, *supra* note 4.

⁵² For historical analysis of constitutional law, see generally, BRUCE ACKERMAN, WE THE PEOPLE (1991).

⁵³ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

⁵⁴ *Id.* at 248.

of 1833, news reached the United States that Britain had abolished slavery in the West Indies.⁵⁵ In the crisis of 1859-60, a Southern congressman compared the institution of slavery to sand castles and suggested slavery needed to be moved out of the Union to protect it from the inexorable tide of antislavery sentiment.⁵⁶ Similar, though less desperate, feelings of insecurity seized parts of the Southern elite in the 1830s.

The insecurity was heightened by rumors of slave uprisings, and news of real incitements, plots, and rebellions. Denmark Vesey, after allegedly reading newspaper stories of Northern congressmen urging abolition during the Missouri controversy, plotted a slave insurrection in Charleston, South Carolina in 1822.⁵⁷ In 1829, David Walker, a free Negro, sent pamphlets south urging a slave rebellion. The authorities discovered some of Walker's pamphlets in the port city of Wilmington, North Carolina, and elsewhere in the South.⁵⁸ In 1831, William Lloyd Garrison launched the *Liberator*, a paper filled with harsh denunciation of slavery and slaveholders.⁵⁹ Some Southern papers began to inform their readers of what the *Liberator* was saying. In 1831, Nat Turner led a slave revolt in Virginia, killing sixty whites before his rebellion was suppressed.⁶⁰ Governor Floyd of Virginia attributed Nat Turner's rebellion to abolitionist papers.⁶¹

The revolt produced panic in Virginia and throughout the South. Proposals to rid Virginia of slavery by gradual emancipation were debated in the Virginia legislature, reported in the press, and narrowly defeated. Opponents of slavery in Virginia had suggested that slavery was a public nuisance, that owners of slaves were like receivers of stolen goods and therefore not entitled to compensation, and that slavery violated basic rights.⁶² Opponents of the plan to rid Virginia of slavery not only defended the slave system but also suggested that dissent

⁵⁵ LEONARD L. RICHARDS, *THE LIFE AND TIMES OF CONGRESSMAN JOHN QUINCY ADAMS* 90-91 (1986) [hereinafter RICHARDS, JOHN QUINCY ADAMS].

⁵⁶ CONG. GLOBE, 36th Cong., 1st Sess. 285 (1859) (Rep. Pryor).

⁵⁷ FREEHLING, *ROAD TO DISUNION*, *supra* note 28, at 79.

⁵⁸ CLEMENT EATON, *THE FREEDOM OF THOUGHT STRUGGLE IN THE OLD SOUTH* 89-117 (1964).

⁵⁹ *Id.*

⁶⁰ *Id.* at 92.

⁶¹ W. SHERMAN SAVAGE, *THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830-1860*, at 3-4 (photo. reprint 1968) (1938).

⁶² CHARLES J. FAULKNER (OF BERKELEY), *SPEECH IN THE HOUSE OF DELEGATES OF VIRGINIA ON THE POLICY OF THE STATE WITH RESPECT TO HER SLAVE POPULATION* 9, 14 (Jan. 20, 1832) (transcript on file with the author); JOHN A. CHANDLER (OF NORFOLK COUNTY), *SPEECH IN THE HOUSE OF DELEGATES OF VIRGINIA ON THE POLICY OF THE STATE WITH RESPECT TO HER SLAVE POPULATION* 6-7 (Jan. 17, 1832) (transcript on file with the author); THOMAS J. RANDOLPH (OF ALBEMARLE), *SPEECH IN THE HOUSE OF DELEGATES OF VIRGINIA ON ABOLITION OF SLAVERY* 7 (Jan. 16, 1832) (transcript on file with the author). Generally, these items can be found in *SLAVERY SOURCE MATERIAL AND CRITICAL LITERATURE* (Lost Cause Press

on the issue was illegitimate and that press accounts of the debates could cause slave revolts.⁶³

Faced with these developments, Southern legislatures began to construct a legal Maginot Line to quarantine themselves against abolitionist ideas. In 1830, for example, North Carolina prohibited dissemination of publications that tended to produce slave revolt or dissension.⁶⁴ Since free blacks on ships were a suspected source of "incendiary" publications, North Carolina, like South Carolina and some other Southern states, provided for temporary imprisonment of free black sailors who came into Southern ports.⁶⁵ A case concerning the constitutionality of a Negro Seaman Act came before Justice Marshall on circuit, but he avoided deciding the main issue. He wrote that he was not fond of butting his head against a stone wall in sport.⁶⁶ The decision in *Barron* meant the Chief Justice could avoid butting his head against another part of the Southern stone wall.

The state of North Carolina also made it a crime to teach slaves to read.⁶⁷ If the dreaded propaganda made it past the quarantine, at least blacks could be vaccinated against infection by enforced illiteracy. Other Southern states passed similar laws. Most were in place at the time of the controversy over abolitionist literature in 1835-36.⁶⁸

Meanwhile in 1833, abolitionists began to organize societies, including a national one, and to engage in a publicity campaign aimed at ending slavery. They proclaimed their sentiments to the world: slavery was a sin and slaveholders should immediately renounce it. Still, the American Anti-Slavery Society recognized that states had control over slavery within their boundaries. The Society admitted that Congress had no power to abolish slavery in the slave states. The abolitionists believed, however, that Congress did have power to prohibit slavery in the District of Columbia and in the national territories, and they suggested Congress should exercise that power to ban slavery in those places. The Society thought Congress should also ban the inter-

1971) and in COLLECTION OF ANTISLAVERY PROPAGANDA IN OBERLIN COLLEGE LIBRARY (Lost Cause Press, microfiche reprint 1964).

⁶³ See, e.g., *The Letter of Appomattox to the People of Virginia* 18 (1832), in SLAVERY SOURCE MATERIAL AND CRITICAL LITERATURE (Lost Cause Press 1971).

⁶⁴ Act to Prevent Circulation of Seditious Publications, ch. 5, 1830 N.C. Sess. Laws 10 (codified at 1837 N.C. REV. STAT. ch. 34, § 517).

⁶⁵ Acts Passed by the General Assembly of North Carolina, ch. 30, 1831 N.C. Sess. Laws 29.

⁶⁶ CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 1789-1835, at 626 (1926). But see Justice Johnson's more active approach to the problem in *Elkison v. Delies-seline*, 8 F. Cas. 493 (C.C.D.S.C. 1823). See Paul Finkelman, *States Rights North and South in Antebellum America*, in AN UNCERTAIN TRADITION, CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH (Kermit Hall & James W. Ely, Jr. eds., 1989).

⁶⁷ Act to Prevent Circulation of Seditious Publications, ch. 5, 1830 N.C. Sess. Laws 10.

⁶⁸ See, e.g., *id.*; An Act to Suppress the Circulation of Incendiary Publications, ch. 66, 1836 Va. Acts 44, 45; see also 2 KENT'S COMMENTARIES, *supra* note 2, at 253-54; *Southern Assertions Compared with Southern Evidence*, EVENING POST (NY), Nov. 19, 1835, at 2.

state slave trade. Finally, the Society renounced the use of violence by its members or by the slaves.⁶⁹

In these respects, the practical and political aspects of the American Anti-Slavery Society's program clearly resemble the platform that the Republican Party would adopt twenty-six years later. The Republican platform of 1860 also recognized the legal right of Southern states to control their "domestic institutions," but it favored a ban on slavery in the territories.⁷⁰ Republicans also hoped that free speech would spell the end of Southern slavery.

In addition to its attack on slavery in federal territories, the American Anti-Slavery Society also advocated immediate and uncompensated emancipation and incorporation of the newly freed slaves into American society as citizens, though there was some equivocation on the last point.⁷¹ In this respect, its position was not reached by the Republican Party until after the revolutionary experience of the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.

There was less to immediate emancipation than met the eye, however. Abolitionists sought to persuade Americans and slaveholders that slavery was a sin; they argued that slaveholders should voluntarily and immediately relinquish their slaves, just as other sins should be immediately abjured. Abolitionists expected change through change in public opinion. Eventually, as Southerners were persuaded, slavery would be abolished by individual action or, perhaps, by state legislation. Abolitionist leaders were influenced by the great religious awakening of their time, and they used similar techniques to seek converts from the sin of slavery.⁷² Abolitionist denunciations were blunt and often bitter—slaveowners were wilful sinners: "[E]very American citizen, who retains a human being in involuntary bondage as his property, is, (according to scripture) a manstealer"⁷³

In 1860, with the election of a Republican president who was committed to containment of slavery and who hoped for its ultimate extinction, the South seceded. Leaders of the secessionist movement announced that they were threatened by abolition. The similarity of

⁶⁹ *Declaration of the Anti-Slavery Convention*, U.S. TELEGRAPH, Dec. 21, 1833, at 69.

⁷⁰ NATIONAL PARTY PLATFORMS 1840-1964, at 32 (Kirk Porter & Donald Johnson eds., 1956).

⁷¹ For an example of equivocation, see Letter of J.A. Thome & J.W. Alford to Theodore Weld (Feb. 9, 1836), in 1 LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKÉ, AND SARAH GRIMKÉ 257 (Gilbert H. Barnes & Dwight L. Dumond eds., 1965) [hereinafter 1 WELD-GRIMKÉ LETTERS].

⁷² GILBERT H. BARNES, THE ANTISLAVERY IMPULSE 1830-1844, at 3-28, 100-08 (1933); CHARLES S. SYDNOR, THE DEVELOPMENT OF SOUTHERN SECTIONALISM 1819-1848, at 238-42 (1962).

⁷³ *Declaration of the Antislavery Convention*, U.S. TELEGRAPH, Dec. 21, 1833, at 69.

some practical aspects of the abolitionist and Republican programs helps explain why the secessionist leaders thought this was so.

Abolitionists sent paid agents throughout the North to proselytize the new antislavery gospel; took advantage of cheap printing and the wealth of their supporters to flood the country with abolition literature; and finally, aimed their efforts not just at men, but at women and children. As a result, their opponents found them sinister and threatening.⁷⁴ The abolitionists were tireless organizers. Starting with a few societies in the early 1830s, they had increased to 1006 by 1837.⁷⁵ In 1835, they engaged in a mass mailing (sending abolition literature south), conducted a petition campaign (sending massive petitions to Congress to abolish slavery in the District of Columbia), held public meetings, and organized new antislavery societies. In response, their critics called for suppressing abolition thereby raising questions about the meaning of free speech, free press, and freedom to petition.

When the American Anti-Slavery Society announced its goal of immediate abolition, the conventional national wisdom was that slavery was an evil, one imposed by the legacy of the past, and one that was so difficult to change that little could be done. Those who opposed both slavery and the abolitionists often suggested leaving reform of the slave system to providence.⁷⁶ Moderate reformist efforts were channeled into the American Colonization Society. It proposed to colonize free blacks in Africa or in some equally distant location. But the growth of the slave population far exceeded the number of free blacks colonized, as the abolitionists demonstrated.⁷⁷ Indeed, abolitionists charged that the South used colonization as a scheme to strengthen slavery by ridding the South of its "anomalous" free black population.⁷⁸

Formation of antislavery societies in the North and calls for immediate abolition produced a harsh and violent reaction in the North as well as in the South. Indeed, anti-abolition incidents were probably more numerous in the North than in the South because the North was where the abolitionists usually were located. From 1833-37, mobs organized to prevent or disrupt abolitionist meetings in Utica, New York, in Boston, Massachusetts, and throughout the North. In Octo-

⁷⁴ See, e.g., LEONARD L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA 47-49, 55-59 (1970) [hereinafter GENTLEMEN OF PROPERTY AND STANDING].

⁷⁵ *Id.* at 158-59.

⁷⁶ CONG. GLOBE 24th Cong., 1st Sess. 93 (1836) (setting forth the remarks of Representative Bouldin urging all, North and South, to "leave this subject—too mysterious, deep, and dangerous for man's management, (or that of woman either)—to the operation of . . . the providence of God").

⁷⁷ WILLIAM JAY, MISCELLANEOUS WRITINGS ON SLAVERY 12-13, 124 (1968) [hereinafter JAY, WRITINGS ON SLAVERY].

⁷⁸ *Id.*

ber 1835, William Lloyd Garrison was captured by a mob that invaded an abolitionist meeting; the mob led him around the streets of Boston with a rope around his neck.⁷⁹ In 1834, a mob broke into the home of Lewis Tappan, a leader and financial angel of the abolitionists, and destroyed his belongings.⁸⁰ Tappan wrote that he would leave his despoiled house throughout the summer as a silent monument to the corrupting effect of slavery on the American Republic.⁸¹

The *Boston Atlas* blamed Boston violence on the provocative position taken by the abolitionists. It branded "free discussion on the subject of slavery" as "the mischief . . . in a nut shell," and hoped that new efforts by abolitionists to renew excitement on the subject of slavery would be met with "universal scorn and indignation, that they may be indicted before the Grand Jury as PUBLIC NUISANCES, and if t[h]is fail, that they may be provided at the public expense with a wholesome . . . coat of Tar and Feathers."⁸² Mobs organized to suppress abolitionist expression were typically led by community leaders, by "gentlemen of property and standing."⁸³ Anti-abolition furor reached a climax in 1835, as the presidential election approached.⁸⁴ The American Anti-Slavery Society had sent antislavery publications to the South in the mails, a new technique in its antislavery proselytizing. The South responded furiously. In July 1835, a mob in Charleston, South Carolina entered the post office, removed abolition literature and publicly burned it.⁸⁵ Southern states already had laws against publications tending to cause rebellion or resistance among slaves, and Southern leaders interpreted the abolitionist literature as a violation of their statutes. Southern governors and state legislatures demanded that the North suppress abolitionists in the North and stop their "interference" with the South's peculiar institution.⁸⁶

These events came at a sensitive time for the then dominant national Democratic Party. Andrew Jackson's Presidency was drawing to a close, and Martin Van Buren of New York was his hand-picked successor. The slavery issue threatened to disrupt the national Democratic coalition by driving a wedge between its Northern and Southern Wings. Martin Van Buren, the first Northern candidate of Jefferson's

⁷⁹ GENTLEMEN OF PROPERTY AND STANDING, *supra* note 74, at 64; NYE, *supra* note 4, at 161-62.

⁸⁰ *Mob in New York—Slavery*, U.S. TELEGRAPH, June 14, 1834, at 817.

⁸¹ Letter from Lewis Tappan to Theodore Weld (July 10, 1834), in 1 WELD-GRIMKÉ LETTERS, *supra* note 71, at 155.

⁸² *Anti Slavery Riots*, U.S. TELEGRAPH, July 24, 1834, at 853.

⁸³ See GENTLEMEN OF PROPERTY AND STANDING, *supra* note 74, at 131-54; NYE, *supra* note 4, at 194.

⁸⁴ GENTLEMEN OF PROPERTY AND STANDING, *supra* note 74, at 15.

⁸⁵ WASH. GLOBE, Aug. 6, 1835, at 3.

⁸⁶ *The Richmond Meeting—Southern Pretensions*, EVENING POST (NY), Aug. 17, 1835, at 3; WASH. GLOBE, Oct. 5, 1835, at 3; *Governor Swain*, NILES' WKLY. REG., Dec. 5, 1835, at 228.

party, particularly needed to reassure his Southern supporters.⁸⁷ The Van Buren press accused Southern pro-slavery "Nullifiers" and Northern Whigs of exacerbating the issue in order to disrupt the Democratic North-South coalition and to throw the election into the House of Representatives.⁸⁸ They also accused Southern "nullifiers" of acting in implicit concert with abolitionists to agitate the slavery issue in order to produce a united Southern party. This in turn would lead to disunion and civil war.⁸⁹ In this context the nation debated sensitive issues of the meaning and limits of free speech, free press, and the right to petition.

III. THE ISSUES OF 1835-37: THE POST, PETITIONS, AND POLITICAL LIBERTY OF SPEECH AND PRESS

A. *The Case for Suppression*

Advocates of suppression made two basic points to justify outlawing abolition societies and publications. First, abolition threatened to ignite slave rebellion in the South. Second, it threatened the survival of the Union. Closely tied to both concerns was a view of the constitutional compact that made abolitionism illegitimate.

In 1831, Governor Floyd of Virginia, then a supporter of a gradual plan to rid Virginia of slavery, attributed the Nat Turner slave revolt to abolitionist agitation reaching slaves through free Negroes and malign whites.⁹⁰ In 1831, the Governor of North Carolina accused reckless Northerners of spreading sedition among the slaves and claimed that free blacks transmitted the message.⁹¹ In 1831, a Raleigh, North Carolina grand jury indicted the publisher of the Massachusetts-based *Liberator* for circulating the newspaper in Wake County.⁹²

Of course, to incite slave rebellions abolition publications had to reach the South. In the summer of 1835, abolitionists were mailing their publications to the South in large quantities. Though they sent most to the Southern elite, by 1835 the assumption that abolitionist publications would lead to slave rebellions seemed so obvious to many Northerners and Southerners that it needed no demonstration. Chan-

⁸⁷ *Mr. Van Buren—No Abolitionist*, WASH. GLOBE, Mar. 19, 1836, at 2.

⁸⁸ *The Slave Question*, WASH. GLOBE, Aug. 1, 1835, at 2; WASH. GLOBE, FROM THE ALBANY ARGUS, Aug. 14, 1835, at 3; N.Y. POST, Feb. 10, 1835 at 3.

⁸⁹ *The Geographical Party*, WASH. GLOBE, Aug. 2, 1836, at 2.

⁹⁰ W. SHERMAN SAVAGE, *THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830-1860*, at 3-4 (1968).

⁹¹ JOURNALS OF THE SENATE AND HOUSE OF COMMONS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA 1830-31, at 161; CLEMENT EATON, *THE FREEDOM OF THOUGHT STRUGGLE IN THE OLD SOUTH* 124 (Harper & Row 1964) (1940).

⁹² 1 HENRY WILSON, *THE RISE AND FALL OF THE SLAVE POWER IN AMERICA* 186 (Negro University Press 1969) (1872) [hereinafter 1 WILSON, *SLAVE POWER*].

cellor Kent said that the "great principle of self-preservation doubtless demands, on the part of the white population dwelling in the midst of such combustible materials, unceasing vigilance and firmness."⁹³

The abolitionist postal campaign of 1835 was greeted by howls of outrage from the South and by anti-abolition protest meetings throughout the North. On the issue of slave revolts, an anti-abolition mass meeting in Portland, Maine was typical. Its resolutions insisted that abolitionist agitation would excite the passion of slaves against their masters, produce slave discontent, and produce discontent among free blacks. As a result, abolitionist agitation was preparing the way for the horrors of servile insurrection.⁹⁴ Harrison Gray Otis, former Federalist and leading citizen of Boston, warned against "immense numbers of books, pamphlets, tracts, and newspapers of the most inflammatory character."⁹⁵ Some contained pictures and all featured harsh strictures against slave owners. Otis said the message would reach the slaves: although few slaves could read, all slaves could understand the pictures.⁹⁶ Even John Quincy Adams, soon to be seen by Southerners as an antislavery congressman, saw the abolitionists as "making every possible exertion to kindle the flame of insurrection among the slaves."⁹⁷

Only rarely did the opponents of abolition explain in detail why the abolitionists of the American Anti-Slavery Society—who disavowed violence, sent their publications to leading Southerners, and never explicitly advocated slave resistance or revolt—were nonetheless threatening slave revolts. Critics insisted that, whoever their immediate audience, the publication would eventually reach slaves and free blacks. Writing to the *New York Post*, a citizen who signed his letter "Plain Truth," in a rare departure from standard denunciations, actually cited *Human Rights*, an abolition publication, for the propositions that laws sustaining the right of slavery were null and void in the sight of God, that man could not hold property in man, and that slavery was a crime. To Plain Truth the conclusion from such sentiments was obvious:

The unavoidable consequences of their sentiments is to stir up discontent, hatred, and sedition among the slaves. Interpreted into monitory language, they would read thus, Slaves! you are an injured race—plundered of your unalienable rights by wicked men, who falsely claim a property in you, and who are guilty of a deliberate plot, under the form of law, against your lives and happiness. Their treatment absolves you

⁹³ 2 KENT'S COMMENTARIES, *supra* note 2, at 254.

⁹⁴ WASH. GLOBE, Aug. 24, 1835, at 2.

⁹⁵ *Speech of Harrison Gray Otis*, NILES' WKLY. REG., Sept. 5, 1835, at 11.

⁹⁶ *Id.*

⁹⁷ See 9 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS 254 (Phila. Pa., J.B. Lippincott & Co. ed., 1877) [hereinafter ADAMS, MEMOIRS]; see also RICHARDS, JOHN QUINCY ADAMS, *supra* note 55, at 111.

from all the ties of humanity—desertion, fire, robbery and massacre are not crimes in you; therefore we “exhort you to a quiet and peaceful demeanour.” It is hard to believe the sincerity of such advice.⁹⁸

The more sophisticated critics recognized that abolitionists were not sending their publications to slaves since slaves could not read, but the critics insisted that wide circulation meant that the publications would fall into the hands of literate free negroes or of malevolent white men or women inclined to pass abolitionist ideas on to slaves.⁹⁹ Logically applied, as it never entirely was, the argument reduced the free population to reading only ideas acceptable for circulation among slaves. One notable result was that discussion of the legitimacy of slavery itself became illegitimate in the South. Virginia newspapers had published the state legislative debates on abolition. Soon much of the South treated publication of the debates as unacceptable. For example, an 1836 Virginia statute criminalized statements similar to those its legislators had expressed in the Virginia debate over slavery.¹⁰⁰

The danger of slave revolts was not the main argument for suppression. The Cassandra of the North warned of desolation if the wooden horse of antislavery agitation was allowed within the citadel of political dialogue. Abolition would become a political issue; political parties would become sectional; and when the antislavery party achieved a majority, the result would be disunion and civil war.¹⁰¹ To Harrison Gray Otis of Boston and countless others, this was a “still stronger” objection to abolition.¹⁰² “The work of destruction is more than commenced,” warned the *Boston Atlas* in 1834. “The train is laid, and a single spark may blow our Constitution into atoms, and scatter its blackened fragments to the winds. Unless measures are adopted to meet and repel the efforts of the abolitionists, this country is inevitably doomed to be theatre of a civil . . . war.”¹⁰³ But if slave revolts and civil war were the consequence of agitation for abolition, what was the remedy? If the remedy was to suppress abolition expression, what theory justified suppression?

B. Types of Suppression

Abolitionists organized associations; they held public meetings seeking new societies and converts to abolition; they printed and published a vast number of books, periodicals, and pamphlets; and they

⁹⁸ *To the Editors of the Evening Post*, EVENING POST (NY), Sept. 10, 1835, at 2.

⁹⁹ *Id.*

¹⁰⁰ See sources cited *supra* note 68; see also WILLIAM FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816-36, at 333-39 (1966).

¹⁰¹ *Speech of Harrison Gray Otis*, NILES' WKLY. REG., Sept. 5, 1835, at 21.

¹⁰² *Id.*

¹⁰³ *The Slave Question*, U.S. TELEGRAPH, June 22, 1834, at 843.

mailed some of their publications to the slaveholding states. Most of their activities were directed to converting the people of the North. But some, like their great 1835 mass mailing, were directed to reaching people in the South.

1. *Northern Approval of the Southern Quarantine.*—The danger of slave revolts implicated only activities that reached the South. As to their activities in the South, abolitionists faced broad condemnation, North as well as South. Except for the abolitionists themselves and a few others, Northerners and Southerners alike castigated their attempts to proselytize against slavery in the South. Southern leaders insisted that in the South there was no dissent on the need to suppress the inflammatory publications of the abolitionists.¹⁰⁴

As many contemporaries saw it, disseminating abolition literature in the South was simply a crime. Even before the abolitionist postal campaign of 1835, legislation was in place that could be used to suppress abolitionist expression in most Southern states. In 1830, North Carolina, like other Southern states, passed a law punishing disseminators of publications with a "tendency" to excite insurrection or resistance among slaves or free blacks.¹⁰⁵ Alabama's statute provided the death penalty for any person who distributed or published "any seditious papers . . . tending to produce conspiracy or insurrection . . . among the slaves or colored population."¹⁰⁶ In 1836, after the postal campaign, Virginia passed a statute providing for imprisonment of any antislavery society member who entered the state and advocated abolition or maintained that masters had no property in their slaves. The statute also banned circulating books with the intent of "persuading persons of colour within this commonwealth . . . to rebel or denying the master the right of property in their slaves and inculcating the duty of resistance to such right."¹⁰⁷

Many Southerners read their acts to reach the activities of the abolitionists. The Governor of Alabama and a grand jury at Tuscaloosa, Alabama interpreted the Alabama act to outlaw a statement in *The Emancipator* that "God commands, and all nature cries out, that man should not be held as property. The system of making men property, has plunged 2,250,000 of our fellow countrymen into the deepest physical and moral degradation, and they are every moment sinking

¹⁰⁴ *Southern Sentiment*, WASH. GLOBE, Sept. 26, 1835, at 2.

¹⁰⁵ Act to Prevent the Circulation of Seditious Publications, ch. 5, 1830 N.C. Sess. Laws 10 (codified at 1837 N.C. REV. STAT. ch. 34, § 17).

¹⁰⁶ ACTS PASSED AT THE THIRTEENTH ANNUAL SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF ALABAMA, BEGUN AND HELD IN THE TOWN OF TUSCALOOSA, ON THE THIRD MONDAY IN NOVEMBER, ONE THOUSAND EIGHT-HUNDRED AND THIRTY-ONE 116-17 (Tuscaloosa, Ala. 1832).

¹⁰⁷ An Act to Suppress Incendiary Publication, 1836 Va. Acts 44, 45.

deeper."¹⁰⁸ On the basis of those words, the Tuscaloosa, Alabama grand jury indicted the New York publisher of *The Emancipator*, and the Governor of Alabama requested his extradition.

Southern leaders insisted on banning antislavery discussion. Offenses against the rule of silence might be punished by law or by private action. A South Carolina newspaper insisted that slavery "shall not be open to discussion." The moment an individual "attempts to lecture us upon [the] evils and immorality" of slavery, the paper said, "IN THE SAME MOMENT HIS TONGUE SHALL BE CUT OUT AND CAST UPON THE DUNGHILL."¹⁰⁹ A Charleston, South Carolina meeting called to protest the abolitionists' postal campaign did not defend slavery in its resolutions. This reticence, the meeting explained, came not from any inability to defend the institution, but rather from "a deep conviction of the fixed resolutions of the people of this state, to permit no discussion within her limits of RIGHTS, which she deems inherent."¹¹⁰ Southern governors and legislatures echoed the demand that antislavery discussion must cease, in the North as well as in the South.¹¹¹

Support for, or at least tolerance of, Southern laws that punished abolitionist expression in the South was, at first, quite common in the North. In August of 1835, a Philadelphia, Pennsylvania mass meeting strongly protested abolitionist activity aimed at the South: "[W]e regard the dissemination of incendiary publications throughout the slaveholding States with indignation and horror." It advocated efficient, "but legal and moderate measures" to suppress this "evil."¹¹²

The broad national consensus on the right of Southern states to suppress abolitionist expression was based on an understanding of the Constitution by which states retained substantial sovereignty. The Constitution reserved slavery to the states. It recognized and protected slavery by constitutional provisions such as the Fugitive Slave Clause and the Three-Fifths Clause. Amos Kendall, President Jackson's Postmaster General, said that as to slavery, the states were "as independent of each other as they were before the Constitution was formed."¹¹³ The slave states could "fence and protect their interest in slaves by such laws and regulations as, in their sovereign will, they may deem expedient."¹¹⁴ To insure the safety of their people, Kendall said, Southern states had exercised their reserved rights by "prohibit-

¹⁰⁸ *Legislature of New York: Requisition of the Governour of Alabama*, EVENING POST (NY), Jan. 11, 1836, at 2 (reprinting Alabama indictment and requisition of the Governor of Alabama for extradition).

¹⁰⁹ *Incendiaries*, NILES' WKLY. REG., Oct. 3, 1835, at 65.

¹¹⁰ *Important Public Meeting*, NILES' WKLY. REG., Aug. 22, 1835, at 446.

¹¹¹ See *infra* notes 282-91 and accompanying text.

¹¹² *Town Meeting in Philadelphia*, WASH. GLOBE, Aug. 29, 1835, at 2.

¹¹³ Report of the Postmaster General, CONG. GLOBE, 24th Cong., 1st Sess. App. 9 (1835).

¹¹⁴ *Id.*

ing, under heavy penalties, the printing or circulation of papers" like those the abolitionists had sent to the South.¹¹⁵ "It has never been alleged," Kendall continued, "that these laws are incompatible with the Constitution and laws of the United States." Nor could there be such a claim, because it was a subject over which the United States "cannot rightfully assume any control."¹¹⁶ The provision of Article IV, Section 2 that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States" was, Kendall insisted, of no aid to abolitionists. It simply gave them the same right to advocate abolition that citizens of the Southern state enjoyed—none.¹¹⁷

Kendall was Postmaster General in a Democratic administration determined to conciliate the South. On this point, however, his views were shared by most mainstream politicians, regardless of party or section.¹¹⁸ Accepting the premise of state sovereignty, the conclusion was inevitable. As Kendall and many others saw it, by attempting to spread abolition in the South, abolitionists were violating or circumventing valid state laws. According to most Northern opinion leaders and politicians, Southerners were perfectly within their rights in suppressing abolition in the South.

2. *Northern Action with Reference to Abolition: Efforts at Persuasion.*—As the issue moved from Southern laws suppressing abolition in the South to suppressing abolition in the North, broad support for suppression fractured. National or Northern actions or laws to suppress abolitionist activities in the North itself might be sought simply by mobilizing public disapproval of abolitionists, by physical and extralegal actions designed to suppress abolitionist agitation, or by national or Northern laws. Alternatives were not always clearly separated in the uproar and mass public meetings that followed the abolitionist postal campaign of 1835. When in the 1830s Northern opponents of abolition repeatedly expressed faith in the power of "pub-

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* The later Fourteenth Amendment referred to "privileges or immunities" that no state shall abridge. Many Republicans had interpreted Article IV, § 2 privileges and immunities to include fundamental rights and a guarantee of equality. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 216 (1986). In addition to the equality provisions of the Equal Protection Clause, the Fourteenth Amendment privileges or immunities provision could include an equality component as well as protection for fundamental rights. Akil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1231 n.174 (1992).

¹¹⁸ See, e.g., *CONG. GLOBE*, 24th Cong., 1st Sess. 1108 (1836) (Sen. Davis); *CONG. GLOBE*, 24th Cong., 1st Sess. 1728 (1836) (Sen. Henry Clay).

lic opinion,"¹¹⁹ it was sometimes unclear exactly how—violently or peacefully—that “public opinion” was to be expressed.

Many seemed to believe that abolition could be neutralized by organized public expressions of disapproval (which would presumably lead abolitionists to repent), or at least that public condemnation would so isolate them as to render them powerless. This course was the least coercive and the most consistent with libertarian ideas of free speech. Still, to the extent that abolitionists were branded as criminals and traitors, as they often were, speech denouncing them might lead to lawless conduct aimed at their suppression.

Often “public opinion” on the subject was manufactured and expressed by mass meetings that passed resolutions in most Northern cities. These in turn were reprinted virtually verbatim in much of the press.¹²⁰ The pro-Van Buren papers were particularly assiduous in publishing such items in a transparent effort to hold the South for the first Northern nominee of the Democratic Republicans. A resolution approved by a Philadelphia, Pennsylvania mass meeting viewed the actions of the abolitionists “in organizing societies, maintaining agents, and disseminating publications intended to operate upon the institutions of the South, as unwise, dangerous, and deserving emphatic reprehension and zealous opposition.”¹²¹ That meeting also expressed “indignation and horror” at the “dangerous and disgraceful” practice of disseminating “incendiary publications throughout the slaveholding states.”¹²²

In Albany, New York, the Democratic governor presided over an anti-abolitionist meeting. He was supported by an all-star cast of politicians. The meeting resolved that slavery was a subject belonging “exclusively to the people of each State”; any attempt by those from other states to interfere with it would “violate the spirit” of the constitutional compact.¹²³ The meeting denounced those who attempted to coerce other states into abolition as “disturbers of the public peace” and called on abolitionists to prove the purity of their motives by “discontinuing a course of conduct, which they cannot now but see must lead to disorders and crimes of the darkest dye.” Those who “with full knowledge of their pernicious tendency” persisted in carrying on abolitionist discussions were branded as “disloyal to the Union.”¹²⁴

¹¹⁹ See, e.g., 1 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA 422, 423 (attacking the report of the New York Joint Legislative Committee) (1835-36). But cf., *Great Meeting*, WASH. GLOBE, Sept. 28, 1835, at 2.

¹²⁰ *Anti-Abolition Meeting*, WASH. GLOBE, Oct. 3, 1835, at 3; *Great Meeting at Bath, Maine*, WASH. GLOBE, Sept. 3, 1835, at 2; *Great Meeting in the Park*, WASH. GLOBE, Sept. 1, 1835, at 2; *Public Meeting*, WASH. GLOBE, Sept. 7, 1835, at 2.

¹²¹ *Town Meeting in Philadelphia*, WASH. GLOBE, Aug. 29, 1835, at 2.

¹²² *Id.*

¹²³ *Meeting of the Citizens of Albany*, WASH. GLOBE, Sept. 10, 1835, at 2.

¹²⁴ *Id.*

Almost every sizable Northern community held anti-abolition mass meetings in the summer or fall of 1835. These meetings, like the Democratic and Whig press, typically referred to abolitionists as "fanatics," and "incendiaries."¹²⁵ Meanwhile, the major political factions of the day traded charges that the other was soft on abolitionism.¹²⁶

Typically, abolitionists were stigmatized by their critics in the leading partisan newspapers and not quoted directly.¹²⁷ To the extent that abolitionists were heard in the national political debate it was because wealthy backers and dedicated activists provided their own channels of communication through pamphlets, periodicals, and agents who traveled the North in search of converts. Ironically, Southern nationalists or "nullifiers" disseminated some abolition statements to show the danger and reality of the abolition threat. Finally, as the focus shifted from freedom for the slave to the freedom of Northerners to espouse the cause of the slave, abolitionists' pronouncements on abolition and freedom of expression got more attention from at least some segments of the Northern press.¹²⁸

3. *Northern Action Against Abolition: Coercion.*—In the early years of the antislavery crusade, Northern mobs made many efforts to disperse abolitionists by force. Still, some anti-abolition mass meetings deprecated lawless action, an apparent reference to mob actions against abolitionists.¹²⁹

In 1835, New York abolitionists announced an organizational meeting for a New York antislavery society set in Oneida, New York. Oneida County Democrats resolved that the meeting of "incendiary individuals" should not be "permitted to assemble within its corporate bounds" and demanded that all courtrooms, schools, and churches should close their doors against "these wicked and deluded men."¹³⁰ Initially, the abolitionists obtained permission from the local government to meet in a courtroom, but as a result of protests the local government withdrew permission. The abolitionists then assembled in a

¹²⁵ See *supra* note 120 and accompanying text; *Southern Sentiment*, WASH. GLOBE, Sept. 26, 1835, at 2.

¹²⁶ WASH. GLOBE, Sept. 13, 1836, at 2; *The Geographical Party*, WASH. GLOBE, Sept. 2, 1836, at 2.

¹²⁷ See, e.g., *Anti-Abolition Meeting*, WASH. GLOBE, Oct. 8, 1835, at 2; *Meeting of the Citizens of Albany*, WASH. GLOBE, Sept. 10, 1835, at 2; *More of the Incendiaries*, WASH. GLOBE, Oct. 8, 1835, at 2.

¹²⁸ See, e.g., *Protest of the American Anti-Slavery Society*, EVENING POST (NY), Jan. 28, 1836, at 2.

¹²⁹ *Great Meeting at Bath, Maine*, WASH. GLOBE, Sept. 3, 1835, at 2; *Great Meeting in the Park*, WASH. GLOBE, Sept. 1, 1835, at 2; *Philadelphia Mass Meeting*, WASH. GLOBE, Aug. 29, 1835, at 2.

¹³⁰ See GENTLEMEN OF PROPERTY AND STANDING, *supra* note 74, at 62.

local church from which a mob compelled them to withdraw. A mob invaded the office of a local paper that had supported both Van Buren and the abolitionists. The mob threw the paper's type into the street.¹³¹ Finally, the abolitionist convention was able to re-assemble at the nearby estate of Gerrit Smith, a wealthy sympathizer.

Leaders of the effort to suppress the abolitionist convention received implicit and explicit approval from other political leaders. The proceedings were reported in the *Washington Globe* (which had refused to publish the call for the abolition convention) under the chortling headline, ABOLITION MEETING ABOLISHED.¹³² The *Globe* reported that the "citizens of Utica would not suffer their town to be disgraced with a meeting meditating treason against the compromises of the Constitution."¹³³ The *Globe* reflected the views of the administration. Indeed, Southern Democratic Party leaders seem to have asked their Northern counterparts for anti-abolition action. In August 1835, Secretary of State Forsyth wrote to Vice President Van Buren, known as the little magician: "Instead of mobbing poor blacks, a little more mob discipline of the white incendiaries would be wholesome A portion of the magician's skill is required in this matter . . . the sooner you set the imps to work the better."¹³⁴ The *Utica Observer* described the suppression of abolitionists as "peaceful illegality."¹³⁵ Abolitionists did not resist physically. The leaders controlled the mob so that it achieved its objective without serious personal injury. The *Globe* noted that there had been a simultaneous disruption of an abolition meeting in Boston.¹³⁶ In 1836, in Cincinnati, Ohio a mob representing leading citizens raided James Birney's abolitionist newspaper and threw its press in the river. Destruction of abolitionist pamphlets and disruption of meetings occurred in Philadelphia and elsewhere in the North as well.¹³⁷

In early 1836, Senator Thomas Hart Benton of Missouri praised the action of the mobs in subduing abolitionists. As reported in the

¹³¹ NILES' WKLY. REG., Oct. 31, 1835, at 146.

¹³² *Abolition Meeting Abolished*, WASH. GLOBE, Oct. 27, 1835, at 3.

¹³³ *Id.*

¹³⁴ *Abolitionists*, WASH. GLOBE, Oct. 26, 1835, at 2; Letter from Secretary of State Forsyth to Vice President Martin Van Buren (Aug. 5, 1835), in WILLIAM A. BUTLER, A RETROSPECT OF FORTY YEARS 1825-1865, at 78-79 (1911). The Forsyth letter was discovered by Richard John. See RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE (forthcoming Harvard Univ. Press 1995).

¹³⁵ NILES' WKLY. REG., Oct. 31, 1835, at 148.

¹³⁶ *Abolitionists*, WASH. GLOBE, Oct. 26, 1835, at 2.

¹³⁷ See generally GENTLEMEN OF PROPERTY AND STANDING, *supra* note 74, at 69, 93-95 (setting forth how a Philadelphia mob of 1835 seized abolitionist pamphlets and threw them in the Delaware River); 1 WILSON, SLAVE POWER, *supra* note 92, at 274-98.

Congressional Globe, his fear that dissolution of the Union had begun was "quickly dispelled" by

the great body of the people in all the non-slaveholding States Their conduct was above all praise They had chased off the foreign emissaries, silenced the gabbling tongues of female dupes, and dispersed the assemblages whether fanatical, visionary, or incendiary They had acted with a noble spirit. They had exerted a vigor beyond all law. They had obeyed the enactments not of the statute-book, but of the heart; and while the spirit was in the heart, he cared nothing for laws written in a book. He would rely upon that spirit to complete the good work it had begun—to dry up these societies . . . and put an end to publications and petitions.¹³⁸

Senator Silas Wright of New York was equally celebratory of the work of "public opinion" in suppressing abolition. He recited the details of the disruption of the Utica Convention. Specifically, Wright mentioned throwing the types of the pro-abolition paper in the streets, the refusal of the grand jury to indict those who disrupted the convention, and the subsequent election of one member of the committee of twenty-five involved in the disruption to the state senate and election of another, by the legislature, as attorney general of the state. Senator Wright "mentioned these facts . . . to show that the determined feeling of resistance to the dangerous and wicked agitators in the North had already reached a point above and beyond the law."¹³⁹

Closing public and private places to abolitionists and using mobs to disperse them when they were able to gather were two parts of a systematic effort designed to eliminate abolition from public debate. Alvan Stewart, the New York antislavery lawyer, put it this way:

Anti-abolitionists at the North say they believe in free discussion, in the abstract, and will not allow it to be drawn into question; but this means, as we find it interpreted and translated in the dictionary of daily experience, that each man may discuss slavery, or any thing else, in the silent chambers of his own heart, but must not discuss it in public, as it may then provoke a syllogism of feathers, or a deduction of *tar*. An abolitionist may have the abstract right of discussion, but it must be disconnected with time, or place, if a majority of his neighbors differ with him there is no place *where* or time *when* he may discuss. This abstract discussion requires an abstract place, and abstract time . . . the solitude of the wilderness, or loneliness of the ocean . . .¹⁴⁰

While some Senators celebrated conduct above the law, a number of other citizens were less sanguine. Many public meetings called to

¹³⁸ CONG. GLOBE, 24th Cong., 1st Sess. 78 (1836).

¹³⁹ *Id.* at 121.

¹⁴⁰ Alvan Stewart, Speech before the New York Antislavery Convention held at Utica on October 21, 1835, and before the New York Antislavery State Society Held at Petersboro on October 22, 1835, in PROCEEDINGS OF THE NEW YORK ANTI-SLAVERY CONVENTION AT UTICA OCTOBER 21, AND NEW YORK ANTI-SLAVERY STATE SOCIETY HELD AT PETERSBORO, OCTOBER 22, 1835, at 4-5 (1835).

condemn abolitionists also implicitly or explicitly condemned use of lawless measures to suppress free discussion.¹⁴¹ Some editors, even some Democratic ones, criticized extralegal suppression. In August 1835, the *Utica Observer* announced that the people of the North stood ready to "oppose all [abolitionist] *illegal* acts. To silence them is impossible; however foolish and absurd may be their opinions they have a *right* to promulgate them" Attempts at forcible suppression would merely increase their support. The *Observer* advocated "letting 'the fanatics' alone. All will see the absurdity of their preaching against *slavery*, where *slavery does not exist*" ¹⁴² In July, the *New York Evening Post*, a Van Buren paper with such a strong devotion to free speech that it soon got into verbal battles with the *Globe*, attributed the increase in abolition strength to "the wholly unjustifiable species of opposition which has been arrayed against them. Fanaticism was never yet put down by persecution, and mobs and riots are not very successful enlighteners of the understanding."¹⁴³

Meanwhile, abolitionists working in the field were coming, somewhat uncertainly, to the conclusion that persecution was helping the cause. James Birney thought earlier New York riots would have a good effect by showing to the uncommitted the dangers slavery posed to republican government.¹⁴⁴ In March 1835, Theodore Weld, one of the antislavery evangelists fielded by the American Anti-Slavery Society, reported that at first threats, missiles, and personal violence met his lectures in Ohio and elsewhere in the North. Weld persisted and violence generally disappeared after later lectures; by the close of the last, he often reported, the entire house "rose up and pledged themselves to the principles of immediate abolition."¹⁴⁵

An example illustrates Weld's technique. In the fall of 1835, Weld arrived in Painesville, Ohio and encountered a "mob" that had passed anti-abolition resolutions, including one requesting him to leave the city. The mob stoned the building where he spoke. As Weld began to speak the fifth time, the leader of the opposition interrupted, accused Weld of treason and violation of the Constitution, and an-

¹⁴¹ *Great Meeting at Bath, Maine*, WASH. GLOBE, Sept. 3, 1835, at 2; *Great Meeting in the Park*, WASH. GLOBE, Sept. 1, 1835, at 2; *Philadelphia Mass Meeting*, WASH. GLOBE, Aug. 29, 1835, at 2.

¹⁴² WASH. GLOBE, Aug. 4, 1835, at 3.

¹⁴³ EVENING POST (NY), July 18, 1835, at 2.

¹⁴⁴ See Letter from James Birney to Theodore Weld (July 26, 1834), in 1 WELD-GRIMKÉ LETTERS, *supra* note 71, at 162; see also Letter from William Ellery Channing to James Birney (Nov. 1, 1836), in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 195 (Harold L. Nelson ed., 1967) [hereinafter FREEDOM OF THE PRESS] (stating that "[t]he abolitionists then not only appear in the character of champions of the colored race They are sufferers for the liberty of thought, speech, and the press").

¹⁴⁵ See Letter from Theodore Weld to E. Wright, Jr. (Mar. 2, 1835), in 1 WELD-GRIMKÉ LETTERS, *supra* note 71, at 206.

nounced no further abolition lectures would be permitted. Weld responded that he "assumed he was speaking to the FREE PEOPLE of Painesville. [Is the gentleman who intruded] your master? Ladies are you the wives of slaves?" He set a lecture for the next day. "Do you acknowledge subjection to this man who assumes to dictate?" He told the crowd to attend if they wished to vote "no" on that proposition. The next day, Weld spoke to a large crowd.¹⁴⁶

Others agreed that violence was redounding to the benefit of abolitionists. A letter to James G. Birney concluded that in its first years the abolition society had faced public apathy. "From that difficulty your enemies have relieved you by their persecutions."¹⁴⁷ From a very different perspective, Duff Greene, the editor of the *Washington Telegraph*, a pronullification paper affiliated with John C. Calhoun, refused to find consolation in anti-abolition meetings and mobs. Green distrusted mobs¹⁴⁸ and insisted that the true test of Northern intentions was not mobs or resolutions, but laws aimed at suppression of abolition in the North.¹⁴⁹

Events were to prove that mob action could not always be trusted to work its will through "peaceful illegality." In 1837, after mobs had destroyed three presses of his antislavery newspaper, editor Elijah Lovejoy was killed defending the fourth press from the mob.¹⁵⁰ In 1838, in an effort to ensure that they would have a place to meet, abolitionists in Philadelphia built Philadelphia Hall, a "temple of freedom" dedicated to free discussion and equal rights. Soon an anti-abolition mob burned it and then applied the torch to an orphanage for colored children.¹⁵¹ Discomfort with rising mob violence in 1835-36, as well as its inefficiency, led some to explore legal methods of suppression.

4. *An Uncertain Trumpet: The Calls for Legal Action Against Abolitionists.*—The postal campaign of the abolitionists produced immediate Southern demands for protection of their peculiar institution from outside interference.¹⁵² A Charleston, South Carolina mass meeting asked the nonslaveholding states "promptly [to] adopt the

¹⁴⁶ *Id.* at 236-39, 238 n.4.

¹⁴⁷ Letter from John Green to James Birney (Nov. 2, 1836), in 1 LETTERS OF JAMES GILLESPIE BIRNEY 1831-1857, at 370-71 (Dwight Dumond ed., 1966) [hereinafter BIRNEY LETTERS].

¹⁴⁸ *Mob in New York—Slavery*, U.S. TELEGRAPH, June 14, 1834, at 817.

¹⁴⁹ *Abolition—The Norwalk Gazette*, U.S. TELEGRAPH, Jan. 5, 1836, at 94; *Arbitrary Proposition—Abolitionists*, U.S. TELEGRAPH, Oct. 23, 1835, at 2; *Legislative Measures Against the Incendiary Tracts*, U.S. TELEGRAPH, Sept. 11, 1835, at 2; *The North and the South—Fanaticism—And Syren Songs*, U.S. TELEGRAPH, Aug. 14, 1835, at 2.

¹⁵⁰ NYE, *supra* note 4, at 144-49; 1 WILSON, SLAVE POWER, *supra* note 92, at 374-82.

¹⁵¹ 1 WILSON, SLAVE POWER, *supra* note 92, at 297-98.

¹⁵² NILES' WKLY. REG., Aug. 22, 1835, at 445, 446 (setting forth the reports of public meetings in Richmond, Virginia and Charleston, South Carolina).

necessary measures to punish any vile incendiaries within their limits, who, not daring to appear in person among us, where the gallows and the stake await them, discharge their missiles of mischief in the security of distance."¹⁵³ Soon, however, the South demanded suppression of abolition in the North as well.

The problem was complex. Slavery was virtually nonexistent in the North and freedom to criticize the institution there was seen by many as inherent in free speech, free press, and popular sovereignty. In the South, criticism of slavery, certainly the type abolitionists engaged in, was widely seen as unacceptable. The North and South had separate systems with different assumptions and needs. But they were part of one country. Newspapers from the North circulated in the South and so did speeches in Congress. The nation was increasingly connected by roads, canals, shipping, and the postal system. All of these were holes in the Southern quarantine through which abolition propaganda could enter. In the real world of an increasingly interconnected nation, the demand for security by slaveholding states required exporting at least some slave state laws to the North.

While the Northern anti-abolitionist meetings were unanimous in their condemnation of abolitionists, in other respects they were deeply ambivalent. When they recommended legislation (and a number did not),¹⁵⁴ the meetings typically limited their recommendations to forbidding attempts by citizens of their states to circulate abolitionist publications in the South.¹⁵⁵

General Dix, a speaker at the Albany, New York meeting cited the maxim that "nothing is to be feared from discussion, when reason is left free to combat error."¹⁵⁶ But he asked if this proposition "may not be subject to exceptions. Is it not, under the peculiar circumstances of this case, unsafe in practice, so far as it is carried on by the circulation of abolition publications in the South?"¹⁵⁷ The arguments in such publications would inevitably find their way to the slave. "He becomes discontented with his condition, is sometimes stimulated to acts of violence . . ."¹⁵⁸ General Dix suggested a dual standard of

¹⁵³ *Id.* at 446.

¹⁵⁴ *Great Meeting*, WASH. GLOBE, Sept. 28, 1835, at 2; *Great Meeting*, WASH. GLOBE, Sept. 7, 1835, at 3; *Great Meeting at Bath, Maine*, WASH. GLOBE, Sept. 3, 1835, at 2; *Great Meeting in New York*, WASH. GLOBE, Sept. 1, 1835, at 2; *New Jersey*, WASH. GLOBE, Nov. 10, 1835, at 2.

¹⁵⁵ *Anti-Abolitionist Meeting in Jefferson Hall—Portsmouth*, WASH. GLOBE, Sept. 18, 1835, at 2; *Incendiaries*, WASH. GLOBE, Oct. 7, 1835, at 1-2; *Town Meeting in Philadelphia*, WASH. GLOBE, Aug. 29, 1835, at 2.

¹⁵⁶ *Meeting of the Citizens of Albany*, WASH. GLOBE, Sept. 10, 1835, at 2.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

freedom of discussion congruent with the difference between the slave and free states:

In communities of freemen, unrestrained discussion is indispensable as a safeguard against error and abuse. But who does not see that in dealing with an unenlightened population, placed by the force of circumstances in a peculiar relation to others, the effect of discussion may be to awaken them to a knowledge of their condition without enlightening them as to the necessity which has produced it¹⁵⁹

Still General Dix continued, "I am not contending against the abstract right of discussion, nor do I concede that any restraint can be imposed on it, so long as it is guided by moderation and truth, excepting that which arises out of the sense of moral obligation and duty." But abolitionists had abandoned moderation and resorted to "abuse and insult" against the master and, as to the slave, "an incentive to . . . insurrection and bloodshed." The authors and supporters of these publications "morally at least" were accessories before the fact to the crime that "may grow out of their circulation."¹⁶⁰ Comments like those of General Dix showed deep ambivalence and militated against broad suppression of Northern antislavery expression.

The least intrusive suggestion was passing laws in the North to punish those who participated in sending publications to the South. A second alluring possibility was extraditing abolitionists who had sent publications to the South or participated in a larger plan with that object. The latter group would include virtually the entire abolitionist leadership. But at bottom, slaveholding states thought security for the South required an end to antislavery agitation in the North.

So it is not surprising that some Southerners soon called for legislation to suppress abolitionists in the North. Indeed, some suggested that abolition was more dangerous in the North than in the South.¹⁶¹ "Let it be admitted," declared a resolution of the South Carolina legislature,

that, by reason of an efficient police and judicious internal legislation, we may render abortive the designs of the fanatic and incendiary within our own limits, and that the torrent of pamphlets and tracts which the abolition presses of the north are pouring forth with an inexhaustible copiousness, is arrested the moment it reaches our frontier. Are we to wait until our enemies have built up, by the grossest misrepresentations and falsehoods, a body of public opinion against us, which it would be almost impossible to resist, without separating ourselves from the social system

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Incendiary Tracts*, WASH. TELEGRAPH, Aug. 17, 1835, at 2. For a Northern view of the danger of political success by abolitionists in the North, see *Speech of Harrison Gray Otis*, NILES' WKLY. REG., Sept. 5, 1835, at 11.

of the rest of the civilized world?¹⁶²

Some Northerners joined Southerners in the explicit call for legal action to suppress abolition in the North. Once the issue turned from denunciation and mobs to legislation, the nation faced the practical problem of how to define impermissible acts and expression on the subject of slavery and whether such laws were constitutionally permissible.

The first problem was that the federal and state constitutions contained guarantees for free speech, press, religion, and petition. While detailed discussion of the meaning of these provisions was rare, many Northerners thought that suppression of antislavery speech and press would violate these provisions. *Niles' Weekly Register* complained that many in the South "declare that it is the duty of the people of the Northern states to prohibit discussions on the 'slave question,' though it enters so largely into the construction of the government under which we live."¹⁶³ Under the heading "FREEDOM OF SPEECH AND OF THE PRESS, Guaranteed by the Constitution of the United States and of the several states" the *Weekly Register* reprinted (from the *Richmond Compiler*) federal and state guarantees for free speech and press. The *Compiler* said that the extracts from federal and state constitutions showed "that no law can constitutionally be passed for the purpose of restraining the fanatics of the North in their crusade against our rights."¹⁶⁴

As a result of guarantees of free speech in state constitutions and of the reverence with which they were treated, it is sometimes hard to figure out exactly what steps anti-abolition meetings were actually recommending. At a "great meeting" in Connecticut, anti-abolitionists pledged "to use all legal and proper means not incompatible with our rights and those great principles of liberty, freedom of speech and the press, to repress" interference in the relations in other states of master and slave.¹⁶⁵ At any rate, Southern demands for suppression in the North created a reaction. The *New York Herald* had supported the South and opposed the abolitionists. As reported in the *Weekly Register*, it criticized Southern demands that the North "pass laws infringing the liberty of the press" (as well as rewards for the kidnapping of Arthur Tappan, a leader and financial angel of the abolitionists). These were cases of fanaticism equivalent to that of the abolitionists.¹⁶⁶ The *Washington Globe* reprinted a piece from the *Louisville (Kentucky) Advertiser* that attributed demands for Northern censorship to the

¹⁶² *Resolutions of South Carolina*, in STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 24 (Herman Ames ed., 1906).

¹⁶³ NILES' WKLY. REG., Oct. 3, 1835, at 1.

¹⁶⁴ *Freedom of Speech and of the Press*, NILES' WKLY. REG., Dec. 5, 1835, at 236.

¹⁶⁵ *Great Meeting*, WASH. GLOBE, Sept. 28, 1835, at 2.

¹⁶⁶ NILES' WKLY. REG., Oct. 3, 1835, at 65.

machinations of the extreme Southern nullifier camp against Van Buren. Although the Postmaster General had approved Southern post office action embargoing abolitionist publications, and city after city in the North had passed resolutions harshly condemning the abolitionists,

yet we are told the South is not content—will not be satisfied, until the East and North, by legislative enactments shall suppress the publication of articles adverse to slavery The *Whig* and *Telegraph* concur . . . that the circulation of abolition tracts in the North is more injurious to the country than their circulation at the South Why are they making demands of the North which cannot constitutionally be complied with, and asserting, should the North prove disobedient, war and disunion will be the consequence?¹⁶⁷

Many in the North and South took a different view of abolitionist agitation. These people believed abolition could and should be suppressed. Generally, the argument followed the usual form: “we favor free speech but We are told of the freedom of speech and of the press, liberty of conscience, &c.,” wrote the *Wilmington, Delaware Watchman*, “this is all very plausible and we are the last individuals, who would in the slightest degree abridge these invaluable and sacred rights. But moral treason or the aiding and abetting of domestic insurrection is quite a different thing, and calls for the infliction of the severest punishment.”¹⁶⁸

A Virginia mass meeting in 1835 insisted that Virginians placed the highest value on free speech and press, and “none are willing to give a wider range to free discussion where discussion ought to be tolerated; but they cannot and will not discuss their right to existence with any one.”¹⁶⁹ The general controversy over abolitionist speech and press focused in the mid-1830s on three basic and very practical controversies.

C. *Three Controversies: The Post, Proposed Northern Anti-Slavery Laws, and the Petition Controversy*

1. *The Postal Campaign, and the Political, Administrative, and Legislative Response.*—In July 1835, the leaders of the American Anti-Slavery Society sent abolition publications to the South, mainly to members of the Southern elite. The abolitionist literature included illustrations, a recognition by abolitionists of the power of “visual impressions.”¹⁷⁰ As noted earlier, Southern communities erupted in protest. In Charleston, South Carolina the publications were seized and burned. A number of other Southern cities held mass protest meet-

¹⁶⁷ *Slavery—Abolition—No. 1*, WASH. GLOBE, Oct. 5, 1835, at 3.

¹⁶⁸ *The Northern Fanatics*, WASH. GLOBE, Sept. 22, 1835, at 2.

¹⁶⁹ *Committee of Vigilance*, WASH. GLOBE, Oct. 2, 1835, at 2-3.

¹⁷⁰ GENTLEMEN OF PROPERTY AND STANDING, *supra* note 74, at 54.

ings and organized vigilance committees to prevent the spread of abolition doctrines.

The postal campaign presented the administration of Andrew Jackson with a crisis. His Postmaster General "verbally" advised the Richmond Postmaster to limit delivery of abolitionist papers to actual subscribers.¹⁷¹ On August 4, 1835, he answered the request of the Charleston, South Carolina Postmaster, who had detained abolitionist publications and asked for instructions. Postmaster General Kendall concluded he had neither "legal authority to exclude newspapers from the mail, nor prohibit their carriage or delivery on account of their character or tendency."¹⁷² Still, he said, the Post Office was to serve the states. It should not produce their destruction. While Kendall had not seen the papers, he understood they were "incendiary, and insurrectionary in the highest degree." He would not order their delivery. "We owe an obligation to the laws, but a higher one to the communities in which we live"¹⁷³ In this situation it was "patriotism to disregard [the laws]."¹⁷⁴

Meanwhile, the Postmaster in New York asked the abolitionists to agree to suspend transmission of their publications until he received the views of the Postmaster General. The American Anti-Slavery Society refused to surrender any of their "rights and privileges . . . in regard to the use of the United States Mail" and the Postmaster at New York embargoed their papers aimed at the South. The New York Postmaster pointedly told the antislavery society that his actions could be challenged in the courts.¹⁷⁵ So the postal campaign was stopped in the city where it began, and the embargo was accomplished with the general approval of the Jackson administration.¹⁷⁶

On August 7, 1835, Kendall wrote the President for his advice, and on August 9, President Jackson responded. Himself a slaveholder, Jackson regretted the existence of men "willing to stir up servile war. Could they be reached they ought to be made to atone for this wicked attempt with their lives." He also regretted the spirit of mob law. Until Congress could pass a law on the subject, Jackson suggested that "those inflammatory papers be delivered to none but who will demand them as subscribers; and in every instance the Postmaster ought to take the names down, and have them exposed thro the publik journals as subscribers to this wicked plan of exciting the

¹⁷¹ Letter from Postmaster General Kendall to President Andrew Jackson (Aug. 7, 1835), in 5 THE CORRESPONDENCE OF ANDREW JACKSON, 359-60 (John S. Bassett ed., 1931) [hereinafter 5 CORRESPONDENCE OF ANDREW JACKSON].

¹⁷² *The Postmaster General and the Incendiaries*, WASH. GLOBE, Aug. 12, 1835, at 2.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Post Office Correspondence*, WASH. GLOBE, Aug. 17, 1835, at 2.

¹⁷⁶ GENTLEMEN OF PROPERTY AND STANDING, *supra* note 74, at 74.

negroes to . . . massacre."¹⁷⁷ They would then be compelled to desist or "move from the country."¹⁷⁸ Five days later, Jackson received a letter from a visitor to his plantation informing him that "the negroes and horses are in good Health."¹⁷⁹

On August 22, 1835, Postmaster General Kendall wrote a long letter, soon published in the press, specifically approving the action of the New York Postmaster. He had now seen some of the papers with their "revolting pictures and fervid appeals" and was convinced that they "tend directly" to produce "evils surpassing those usually resulting from insurrection." By a series of rhetorical questions, Kendall suggested that the legal right of the abolitionists to use the mails "in distributing their insurrectionary papers throughout the Southern states, is not so clear as they seem to imagine."¹⁸⁰ Did the abolitionists have the right to force postmasters to do acts which if done by the abolitionists themselves would brand them as felons? Was it certain that postmasters would not themselves be subject to the penalties of the law if they distributed the forbidden documents? "Can the United States furnish agents for conspirators against the states and clothe them with impunity [sic]?"¹⁸¹

Resolutions throughout the North condemned abolitionists for sending their publications to the slaveholding South.¹⁸² By September 11, 1835, the *Washington Globe*, organ of the Democratic Party and of Jackson's heir apparent, Martin Van Buren, thought the problem could be solved by applying Southern state laws to all offenders. This solution took Northern Democrats off the hook. Postmasters, the *Globe* announced, were "as amenable to State laws as other citizens for all acts committed in violation of their provisions" provided the laws did not violate the Federal Constitution. "Let the Southern States, therefore, consult their own rights and power. Let them enforce their constitutional laws against Postmasters and everyone else. We have little doubt they will be sustained even by the Supreme Court."¹⁸³ Someone calling himself "Vindex," writing in the Charleston Courier, agreed. States had a right to prohibit the introduction of seditious pamphlets into their territory. "It is a law," Vindex insisted, "which the State has a right to pass, as fully as she has a right to retain

¹⁷⁷ 5 CORRESPONDENCE OF ANDREW JACKSON, *supra* note 171, at 361.

¹⁷⁸ *Id.* Much more recently, Congress adopted a somewhat similar scheme to the one President Jackson advocated for with respect to "communist political propaganda." However, it was struck down in *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

¹⁷⁹ 5 CORRESPONDENCE OF ANDREW JACKSON, *supra* note 171, at 361.

¹⁸⁰ *Letters from Mr. Kendall, P.M.G.*, NILES' WKLY. REG., Sept. 5, 1835, at 8.

¹⁸¹ *Id.*

¹⁸² *Great Meeting in the Park*, WASH. GLOBE, Sept. 1, 1835, at 2; see also *supra* notes 151-53 and accompanying text.

¹⁸³ WASH. GLOBE, Sept. 11, 1835, at 2.

her slaves—for the one is essential to the other.”¹⁸⁴

The only possible defense for the postmaster who knowingly distributed abolitionist pamphlets would be lack of intent. But the defense would fail. Vindex said the clear and inevitable tendency of the abolition publications justified finding intent. “A man who should throw a lighted torch into your house at midnight, might as well allege that he had no intent to wrap it in flames”¹⁸⁵

Vindex noted that the penalties facing the postmaster were far more severe for circulation than for suppression. He suggested a balancing test for any conflict between the duties involved. “What are the consequences to the community on the one hand and the other? On one side they are light as gossamer, while on the other they are of the most fearful magnitude”¹⁸⁶

The abolitionists brought no legal challenge to the actions of the post office. The Southern quarantine reinforced by federal administrative action survived the postal campaign and was strengthened by it. Postmasters in the South faced a Postmaster General in favor of suppression and faced harsh state penalties for circulation. They generally took the safest course.

Much of the national press praised the Postmaster General for his stand against abolition. The Democratic press, in particular, was enthusiastic. But there were dissenters. The *Weekly Register*, a Whig-leaning weekly, found “a most fearful surveillance over the post office . . . that is approved by the federal authorities at Washington!”¹⁸⁷ The *Evening Post*, though a pro-Van Buren paper, was severely critical. It commented on Kendall’s letter to the Charleston Postmaster in which he simultaneously denied he had power to prevent the circulation of any newspaper and announced that he would not assist in the circulation of incendiary papers. “Who gives him the right to judge,” demanded the *Post*, “of what is incendiary and inflammatory?”¹⁸⁸ Though the *Post* did not explicitly say so, the action of the Post Office was much like prior restraint. The *Post* insisted that the federal government lacked power to establish orthodoxy:

Neither the General Post Office, nor the General Government itself, possess any power to prohibit the transportation by mail of abolition tracts. On the contrary it is the bounden duty of the Government to protect the abolitionists in their constitutional right of free discussion; and opposed sincerely and zealously as we are, to their doctrines and practice, we should be still more opposed to any infringement of their political or civil rights. If the Government once begins to discriminate as

¹⁸⁴ *From the Charleston Courier*, WASH. GLOBE, Sept. 24, 1835, at 2.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ NILES’ WKLY. REG., Oct. 3, 1836, at 65.

¹⁸⁸ EVENING POST (NY), Aug. 12, 1835, at 2.

to what is orthodox and what heterodox in opinion, what is safe and unsafe in its tendency, farewell, a long farewell to our freedom.¹⁸⁹

On December 1, 1835, Postmaster General Amos Kendall presented his report to Congress. He insisted that slavery was a subject over which the states retained sovereign power. Kendall also said that citizens of Northern states had no right to discuss Southern institutions in the South, "whatever claim" might be maintained to a right of free discussion of Southern slavery "within their own borders." According to Kendall, Southern statutes prohibiting publications like those the abolitionists had attempted to send to the South were an "exercise of their reserved [states'] rights." Finally, he concluded that these laws did not violate the Federal Constitution and that the Constitution could not require the circulation of papers that incited domestic violence.¹⁹⁰

President Jackson followed a few days later with his Seventh Annual Message to Congress. Jackson referred to "the painful excitement produced in the South by attempts to circulate through the mails inflammatory appeals addressed to the passions of the slaves, in prints and various sorts of publications, calculated to stimulate them to insurrection and to produce all the horrors of servile war."¹⁹¹ Jackson celebrated the "strong and impressive" demonstrations of Northern disapproval of the misguided abolitionists and their "unconstitutional and wicked" efforts.¹⁹² Still, recognizing that public opinion might not alone be sufficient to solve the problem, Jackson recommended a law to "prohibit, under severe penalties, the circulation in the Southern States, though the mail, of incendiary publications intended to instigate the slaves to insurrection."¹⁹³

The Executive Committee of the American Anti-Slavery Society published a lengthy protest against the President's message. The Society argued that Jackson's message to Congress violated basic principles of civil liberty. It measured the President's attack against abolitionists by the standards of the legal system. President Jackson had passed judgement on them though that was "a power not belonging to your office." He had given publicity to charges that they were engaged in "wicked and unconstitutional" efforts and that they harbored "the most execrable intentions."¹⁹⁴ He had condemned them without the opportunity to be heard. They had had no notice of the

¹⁸⁹ EVENING POST (NY), Aug. 8, 1835, at 2.

¹⁹⁰ CONG. GLOBE, 24th Cong., 1st Sess. app. 9 (1835).

¹⁹¹ Andrew Jackson, Seventh Annual Message to Congress, in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 175 (James Richardson ed., 1896).

¹⁹² *Id.*

¹⁹³ *Id.* at 176.

¹⁹⁴ *Protest of the American Anti-Slavery Society*, EVENING POST (NY), Jan. 28, 1836, at 2. The complaint followed a strategy Jackson had used in response to a Senate resolution condemning him.

charge or opportunity to meet their accusers face to face. He had made vague charges. "[Y]ou omit stating when, where, and by whom these wicked attempts were made; you give no specification of the inflammatory appeals, which you assert have been addressed to the passions of the slaves."¹⁹⁵ The Committee said the moral influence of the charges affected thousands of persons of good character who faced mobs and violence, but the vagueness of the charges made it impossible for them to prove their innocence.

Finally, the Executive Committee charged Jackson had made untrue charges: that they had "*attempted to circulate through the mails appeals addressed to the passions of the slaves calculated to stimulate them to insurrection, and with the intention of producing a servile war.*"¹⁹⁶ The committee noted that the charge was only circulation of publications. They had not been accused of putting their appeals into the hands of a single slave. The circulation was not "by secret agents, traversing the slave country in disguise" but by the mails. "And are the Southern slaves, sir, accustomed to receive periodicals by mails!" Not one publication had been alleged to be addressed to a slave; instead they had been sent to the Southern elite. The Executive Committee called on Jackson to lay before Congress the papers to which he referred.

This is more necessary, as the various public journals and meetings which have denounced us for entertaining insurrectionary and murderous designs, have in no instance been able to quote from our publications a single exhortation to the slaves to break their fetters, or the expression of a solitary wish for servile war."¹⁹⁷

William Jay, New York Judge, member of the Executive Committee of the American Anti-Slavery Society, and the son of John Jay, the first Chief Justice of the United States, made a similar complaint published later in 1835. After noting the catalogue of crimes attributed to the abolitionists, William Jay asked, "When—where—how were these crimes attempted? What proof is offered? Nothing, absolutely nothing, is offered but naked assertion."¹⁹⁸

As to the claim that their publications had a tendency to produce insurrection, the Executive Committee of the Anti-Slavery Society noted the wide range of ideas that the Southern elite had concluded were calculated to produce slave revolts. They cited a Southern minister of the gospel who warned against allowing slaves to hear the Declaration of Independence. Certain antislavery writings of President Jefferson would "expose to popular violence whoever should presume

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ JAY, WRITINGS ON SLAVERY, *supra* note 77, at 151.

to circulate them."¹⁹⁹ The Committee noted that many who made charges similar to those made by President Jackson against abolitionists had directed violence at them. Now Jackson had "sanctioned and disseminated" their charges.²⁰⁰ Finally, the Committee invited a congressional investigation and promised to produce all publications they had issued and all their books and accounts.²⁰¹ Congress ignored the invitation.

The Alabama indictment of R.G. Williams, the publishing agent for the *Emancipator*, provided the specific charges abolitionists had demanded. William Jay made the most of it. Alabama had selected Williams, instead of a top leader of the abolitionists. The indictment contained a statement of the offending words Williams was accused of circulating:

A grand jury in Alabama conceived the bright idea that the publication of tracts at the North against slavery might be arrested by indicting the publishers as felons, and then demanding them . . . as fugitives from southern justice. It was necessary, however, to specify in the indictment, the precise crime of which they had been guilty; a necessity which the President regarded as not applicable to his message. We may well suppose, therefore, that the grand jury would endeavor to secure the success of this, their first experiment, by selecting from the various publications alluded to by the President and Mr. Kendall, as sent to the South for the purpose of exciting insurrection, the most insurrectionary, cut-throat passages they could find. Behold the result.²⁰²

Jay quoted the offending sentences from the indictment: "God commands, and all nature cries out, that man should not be held as property. The system of making men property, has plunged 2,250,000 of our fellow countrymen into the deepest physical and moral degradation, and they are every moment sinking deeper."²⁰³ The indictment gave dramatic proof of the breadth of expression Alabama sought to suppress.

The Twenty-Fourth Congress spent much of its first few months wrangling over the reception of antislavery petitions, mainly those petitions demanding abolition in the District of Columbia. In December, the Senate agreed to refer the portion of the President's message dealing with incendiary publications to a select committee including Senator John C. Calhoun of South Carolina, Senator King of Georgia,

¹⁹⁹ *Protest of the American Anti-Slavery Society*, EVENING POST (NY), Jan. 28, 1836, at 2. For a critical view of the idea that Jefferson was truly an opponent of slavery, see Paul Finkelman, *Jefferson and Slavery: "Treason Against the Hopes of the World"*, in JEFFERSONIAN LEGACIES 181-221 (Peter S. Onuf ed., 1993).

²⁰⁰ *Protest of the American Anti-Slavery Society*, EVENING POST (NY), Jan. 28, 1836, at 2.

²⁰¹ *Id.*

²⁰² JAY, WRITINGS ON SLAVERY, *supra* note 77, at 345.

²⁰³ See *Legislature of New York. Requisition of the Governour of Alabama*, EVENING POST (NY), Jan. 11, 1836, at 2.

Senator Mangum of North Carolina, Senator Davis of Massachusetts, and Senator Linn of Missouri.²⁰⁴ Four of the five represented slave states.

Even before the Committee reported, Senators said they doubted the existence of general federal power over the press and, therefore, any broad federal power to deal with "incendiary" publications. Many saw the issue as one of federalism and assumed broad state power over speech. For them the problem was not whether legislation to suppress abolitionist publications would violate the right of Americans to free speech or free press. The problem was whether the federal government had any power at all to deal with the subject. Senator Grundy of Tennessee, a loyal supporter of the President, said "the general Government could do very little, [about abolition publications] except it should be through the regulation of the Post Office, and by aiding to give efficiency to the operation of the State laws."²⁰⁵ Senator Mangum of North Carolina expressed similar views. He thought "there was in the [federal] Government no power over [the] general circulation [of 'incendiary publications']."²⁰⁶ Senator Ewing, a Northerner, supported appointment of a special committee dominated by Southerners. If Congress lacked power to act on the subject, it would be best for the South to learn that from its own senators.²⁰⁷

On February 4, 1836, Senator Calhoun reported a bill from the Select Committee on Incendiary Publications. Section One of the bill prohibited any deputy postmaster from knowingly receiving and mailing or delivering "any pamphlet, newspaper, handbill or other printed, written, or pictorial representation touching the subject of slavery, directed to any person or post office, where, by the laws thereof, their circulation is prohibited."²⁰⁸ The broad language of the bill seemed to cover private correspondence as well as newspapers and pamphlets. The Postmaster General was to furnish deputies with the laws of the states prohibiting circulation of such items. Persons depositing items were given an opportunity to withdraw them; if not withdrawn within a month, they were to be burned.²⁰⁹

The bill had not followed President Jackson's recommendation. Jackson recommended establishing a federal standard of prohibited conduct. His proposal prohibited circulation through the mail of items calculated to cause slave revolts. Instead, the statute enforced state legislative standards.

²⁰⁴ See CONG. GLOBE, 24th Cong., 1st Sess. 36 (1835); NILES' WKLY. REG., Dec. 26, 1835, at 285.

²⁰⁵ 12 CONG. DEB. 27 (1835).

²⁰⁶ *Id.* at 29.

²⁰⁷ *Id.* at 33.

²⁰⁸ CONG. GLOBE, 24th Cong., 1st Sess. 165 (1836).

²⁰⁹ *Id.*

The bill was accompanied by a report, written by Senator Calhoun, but not fully joined by a majority of the committee. The report agreed with the President as to the character and tendency of abolition papers, but did not agree with his plan for Congress to pass a law "prohibiting, under severe penalty, the transmission of incendiary publications through the mail, intended to incite slave insurrection."²¹⁰ According to Calhoun's report, the First Amendment, animated by "the jealous spirit of liberty which characterized our ancestors . . . forever closed the door" against federal restrictions on the press. It "left that important barrier against power under the exclusive authority . . . of the States."²¹¹ The report cited Madison's report for the Virginia Legislature against the Sedition Act "which conclusively settled the principle that Congress has no right, in any form or in any manner, to interfere with the freedom of the press."²¹² This, the report suggested, was approved by the verdict of history. The federal government simply lacked the power to regulate the press.

Indeed, the report insisted that "no one now doubts" the unconstitutionality of the Sedition Act. But surely, it insisted, the Act would have been equally unconstitutional if it had inflicted punishment only for circulating seditious libel through the mail. "The object of publishing is circulation; and to prohibit circulation is, in effect, to prohibit publication. They both have a common object—the communication of sentiments and opinions to the public"²¹³

The principle behind the President's proposal, the report insisted, "would subject the freedom of the press on all subjects, political, moral, and religious" completely to the will of Congress. The Sedition Act was condemned "not because it prohibited publications against the government, but because it interfered at all with the press."²¹⁴

Calhoun objected to the President's recommendation because its logic implicitly conceded the power of the federal government to *require* as well as *prohibit* circulation. Calhoun was apparently convinced that the power to circulate antislavery publications in the South would spell the end of slavery. So recognizing the power called for by the President also recognized the congressional "power to abolish slavery, by giving it the means of breaking down all the barriers which the slaveholding states have erected for the protection of their lives and property." Once its plenary power over the post was conceded, a later Congress could overcome state laws and open the flood gates to incendiary publications, punishing all who resisted as

²¹⁰ JOHN C. CALHOUN, *SPEECHES OF JOHN C. CALHOUN* 189 (New York, Harper & Brothers 1843).

²¹¹ *Id.* at 189-90.

²¹² *Id.* at 190.

²¹³ *Id.*

²¹⁴ *Id.* at 191.

criminals.²¹⁵

Calhoun's solution to this dilemma was that Congress could only reinforce state prohibitions by punishing federal officials who violated state law.²¹⁶ The report closed by calling for unity among the propertied classes; slavery was a form of exploitation similar to capitalism and it behooved capitalists to join slave holders in defense of their advantages.²¹⁷

On March 25, 1836, Representative Hiland Hall of Vermont announced that three minority members of the House Post Office Committee had concluded that Congress lacked power to act on incendiary publications. The majority of the Committee split, some preferring to wait for Senate action and some unable to agree on the report that should be made to the House.²¹⁸ Printing of Hall's minority report was blocked in Congress, in part because of the absence of a majority report.²¹⁹ But a copy appeared in the *National Intelligencer* and exists among Hall's papers.²²⁰ In the end, no further action was taken by the House on the incendiary publications bill.

The minority report denied that Congress could constitutionally enforce state laws restricting the press. It noted that the proposed bill would require Congress to enforce what might be myriad state statutes restricting the press. "[A]lthough the Constitution of the United States prohibits *Congress* from making any law 'abridging the freedom of speech, or of the press,' yet it contains no such prohibition on the *States*."²²¹ State constitutions contained some limits on state powers over the press "but without such restrictions the [state] power would be full and complete, even to the establishment of a censorship." State constitutions could be "remodelled to answer an object which the People of any State may, for the time being, desire to accomplish."²²² As a result, one state might make it unlawful to circulate

²¹⁵ *Id.* at 192.

²¹⁶ *Id.* at 193.

²¹⁷ *Id.* at 197.

²¹⁸ CONG. GLOBE, 24th Cong., 1st Sess. 291 (1836).

²¹⁹ *Incendiary Publications*, NAT'L INTELLIGENCER, Mar. 26, 1836, at 3.

²²⁰ *Proposed Report by Mr. Hall (of Vt.), On Incendiary Publications*, NAT'L INTELLIGENCER, Apr. 8, 1836, at 2. The report also appears as REPORT OF THE MINORITY OF COMMITTEE ON POST OFFICES AND POST ROADS ON THE PRESIDENT'S MESSAGE, HILAND HALL PAPERS (Burlington, Vt., Park McCulloch House 1836). Professor Richard John of the Department of History at the University of Illinois at Chicago is the first scholar I know of to have located this report. He generously furnished a copy to me. I hope he will publish the entire report with his commentary so that it will be more accessible.

²²¹ See *Proposed Report by Mr. Hall (of Vt.), On Incendiary Publications*, NAT'L INTELLIGENCER, Apr. 8, 1836, at 2; see also REPORT OF MINORITY OF COMMITTEE OF POST OFFICES AND POST ROADS ON THE PRESIDENT'S MESSAGE, HILAND HALL PAPERS (Burlington, Vt., Park McCulloch House 1836) [hereinafter HALL REPORT].

²²² *Proposed Report by Mr. Hall (of Vt.), On Incendiary Publications*, NAT'L INTELLIGENCER, Apr. 8, 1836, at 1.

publications inciting slaves to insurrection; another might prohibit any discussion of slavery. One state might prohibit discussion of Protestant doctrine; another of Catholic. Logically applied, the principle supporting the federal suppression of matters relating to slavery that were prohibited by a state meant that the federal government would be enforcing a potentially vast series of laws abridging the freedom of the press. This, the minority insisted, the Constitution did not permit:

The meaning of the term abridge is not qualified in the Constitution by the specification of any particular degree beyond which the liberty of the press is not permitted to be diminished. Any, the slightest contraction or lessening of that liberty is forbidden. Nor does the Constitution point out any particular mode by which the freedom of the press may not be abridged. All *modes* of abridgement whatever are excluded, whether by the establishment of a censorship, the imposition of punishments, a tax on the promulgation of obnoxious opinions, or by any other means which can be devised to give a legislative preference, either in publication or circulation, to one sentiment emanating from the press, over that of another It was . . . to secure the *substance* of the freedom of the press, that the clause was made part of the Constitution.²²³

The minority agreed with Madison that the Sedition Act had been unconstitutional because the First Amendment was "a clear prohibition of all [congressional] power over the subject of the press." As a result, Congress could "express no legislative opinion of the character and tendency of its productions." Madison's doctrine, Hall's report asserted, had obtained the almost universal assent of the American people. But even the universally repudiated Sedition Act furnished no precedent for the proposed legislation. "In the legislation now in contemplation, the prohibitory clause of the Constitution is not even sought to be evaded, by allowing the truth to be given in evidence in justification of the publication. Whether true or false, the offense will be equally criminal" ²²⁴

Finally, the minority concluded with a ringing statement of the meaning of the First Amendment:

The People of the United States never intended that the Government of the Union should exercise over the press the power of discriminating between true and erroneous opinions, of determining that this sentiment was patriotic, that seditious and incendiary, and therefore wisely prohibited Congress all power over the subject.²²⁵

If Hiland Hall thought Calhoun's report did not follow its no-federal-power premise to its logical conclusion, others denied the premise. "A Virginian" writing in the *Washington Globe* attacked the Calhoun report from a different direction. The postal power included the power not to establish post offices and post roads. If Congress was

²²³ *Id.* at 6.

²²⁴ *Id.*

²²⁵ *Id.* at 8.

not required to set up the post office, then it had the lesser power of determining what the mail should contain. Nor was refusal to carry items suppression of free press. "[T]here was [a] wide . . . difference between refusing to assist in circulation, and prohibiting publication . . ."²²⁶ Calhoun had misunderstood Madison and, as a result, Calhoun's doctrine

not only denies to this Government the power of preventing any one from writing, printing, or publishing political libels, but of writing, printing and publishing exhortations to rob, ravish, burn, and murder, and not only so, but imposes upon the Government the obligation to circulate and distribute them In all parts of the report when [Madison] speaks of the absolute freedom of discussion, he refers, not to the right of injuring individuals or communities in their persons, property or character, and instigating them to the horrors of rebellion and insurrection; but to the discussion of religious, philosophical, or political subjects; inquiring into and examining the nature of truth, moral or metaphysical, the expediency or in expediency of public measures; and the conduct of public men.²²⁷

A Virginian did not pause to explain why abolitionist expression did not fit within the absolute protection accorded to political, religious, or philosophical discussion. If Calhoun were right about his theory of a total absence of congressional power over the press, then, A Virginian insisted, no power to suppress abolition publications existed anywhere.

But suppose with Mr. Calhoun, that Congress cannot interfere at all with the press; in any form or shape, or prohibit, or *refuse to circulate*, any publication, on the ground of its being intended to excite our slaves to insurrection; *because*, by the constitution of the United States, Congress can make no law "abridging the freedom of the press." I would like to inquire of him, what right the States have to pass such a law . . . ?²²⁸

"[S]tate *Legislatures*," A Virginian continued, "are under further restrictions, . . . imposed by their bill of rights and constitutions; and in such cases they can no more exercise a prohibited power, than Congress can exercise the same power." Every state bill of rights or constitution provided for the "unrestrained liberty of the press in nearly the words of the constitution of the United States." For example, Virginia provided that liberty of the press "shall forever be inviolably preserved." But the Southern states had passed laws that reached abolitionist publications. "How then can [Mr. Calhoun] argue from the want of power on the part of the General Government to pass a sedition law, to the want of power to prohibit the mail from circulating incendiary writings, without admitting that the States can pass sedition laws, or denying that they can interfere with incendiary

²²⁶ *Mr. Calhoun's Constitutional Scruples*, WASH. GLOBE, Feb. 26, 1836, at 2.

²²⁷ *Id.*

²²⁸ *Id.*

publications?"²²⁹

In response to Calhoun's bill and report, "Cincinnatus" published *Freedom's Defense*, a pamphlet attacking the Calhoun bill and defending freedom of speech and of the press. Cincinnatus struck at inconsistencies in Calhoun's argument. Having proved " 'that Congress has no right, in ANY FORM or in ANY MANNER to interfere with THE FREEDOM OF THE PRESS,' " Calhoun had claimed to discover "ONE 'FORM,' ONE 'MANNER,' " in which Congress could constitutionally interfere with the freedom of the press.²³⁰

Here it is. The Legislature of any one State may prohibit by law the introduction within her borders of any publication which she may be disposed to prohibit, and then call on Congress to enact a law prohibiting the transmission through the mail of such publication, and may also "demand" of every other State in the Union the passage of laws in concurrence, i.e. prohibiting discussion and publication; and Congress and the Legislatures of the States are "bound" to yield to the "demand" of that one State.²³¹

Cincinnatus noted that slaveholding states had already demanded that Northern states adopt laws that punish their citizens for publishing abolitionist sentiments. The extreme Southern demands would create a mechanism for broad suppression of speech and of the press. Perhaps nonslaveholding states might have the duty, Cincinnatus opined, "speedily to pass conservative laws for their own 'peace and security.' " They could then "require the aid of the General and State Governments to protect them against the introduction within these States" of proslavery propaganda. The targets could include the messages of slaveholding state governors and proslavery newspapers. Such publications threatened the peace as "has already been evinced in mobs and riots which they have tended to create."²³² After raising the idea of suppressing Southern propaganda, Cincinnatus dismissed his own suggestion. Such demands, he observed, violated both federal and state constitutional guarantees.

Cincinnatus noted Calhoun's appeal for a united front of capital against labor. "Reduced to plain English," Cincinnatus noted,

it is to say that, because, in other countries, and in former times, the men in power have "universally" abused that power, THEREFORE, they who have the power in this country have an undoubted RIGHT to abuse that power; and, lest the oppressed classes, should, by using the freedom of the press, assert their rights, those powerful men, who have already so much control over the press, ought to seize on more power that they

²²⁹ *Id.*

²³⁰ CINCINNATUS, *FREEDOM'S DEFENCE* 6 (1836).

²³¹ *Id.* at 8.

²³² *Id.* at 9.

may be more secure in holding what . . . has been unjustly obtained.²³³

Freedom of speech and of the press, Cincinnatus insisted, "is not a right reserved from Congress and vested in a State Legislature, but is reserved both from Congress and all State Legislatures, by the United States Constitution and the Constitutions of the States, to the PEOPLE." These rights "eternally" belong to the people. They never had and never would be "surrendered into the hands of their Rulers. The day they should do that, would number the days of their freedom."²³⁴ The Southern press and foreign despots should be free to pour out their "most violent and incendiary publications" so long as "we may be free to repel the attack by truth and manly argument through the press and the mail."²³⁵

In April 1836, the Senate debated Calhoun's bill. Senator Davis of Massachusetts spoke first for opponents. He objected to the transfer of the regulation of the post office from the United States to the states.²³⁶ Davis noted that the Committee's report concluded that Congress lacked power over the press and likened the President's proposal to the Sedition Act. But the Committee's bill led to the same result. "The one proposes suppression of certain papers by the agency of the postmasters, and so does the other; not only the end, therefore but the means, are the same."²³⁷ The only difference was that in the Calhoun bill the test of criminality came from state rather than federal law. "[B]ut if Congress, by its acts, so far adopts the law of a State as to make it a rule of conduct for public officers, requiring them, under penalties, to obey it, is not such a law in fact a law of Congress by adoption?" If so, why didn't restrictions on federal power over the press apply?²³⁸

Davis insisted the bill covered letters as well as printed matter. Postmasters would be required to investigate the content of the mail.²³⁹ They would confront "the great difficulty in determining what were, and what were not incendiary papers." As proof of the great difficulty in accurately identifying incendiary items, Davis cited the Alabama grand jury indictment against Williams. He read the offending words to the Senate: "God commanded, and all nature cried out, that human beings should not be held in bondage . . ." According to

²³³ *Id.* at 14.

²³⁴ *Id.* at 20.

²³⁵ *Id.* at 22.

²³⁶ 12 CONG. DEB. 1103 (1836).

²³⁷ *Id.* at 1104.

²³⁸ *Id.*

²³⁹ *Id.*

Davis, the words would never be thought criminal by residents of the North:

Whatever may be the views entertained in the States where slavery is lawful, . . . this language will be read with surprise . . . out of them. It will be esteemed a mere expression of opinion, a mere truism, by nine tenths of the people; and they will find it difficult to understand how, in a land where freedom of speech and the press are secured by the constitution, it can be in law criminal. If, sir, such declarations are to be denied the privilege of the mail, the constitution of Massachusetts would be excluded as libellous, because it declares all men are born free and equal. This statement is manifestly as much at war with slavery as that contained in the indictment.²⁴⁰

Davis presciently warned that Calhoun's bill would mean that speeches made in Congress could not pass through the mail.²⁴¹ Indeed, in the years to come just such items fell under the ban of slave-state censorship.²⁴² One state, Davis warned, could follow Alabama and make antislavery opinion criminal; another could ban certain religious sentiments as heretical; and another might ban "all political discussion, except what is agreeable to the views of its own majority. Each demands the aid of Congress to enforce its laws, because they have, under their several constitutions, a right to make such laws."²⁴³ What principle, he asked, would justify admitting one claim and denying the others?²⁴⁴

Who would decide, Davis demanded, and "in what manner," if the Declaration of Independence and the Massachusetts Constitution "touch the subject of slavery or are incendiary?" "Who is to decide whether the people shall see the debates in Congress, and know what their agents are doing and saying here?"²⁴⁵ Postmasters and their clerks would determine great rights "by an inquisitorial power as odious and offensive as that of . . . the inquisition of Spain."²⁴⁶ But Davis, unlike Cincinnatus and the abolitionists, did not make a broad claim to a national right to free speech. Instead, Davis suggested that the Southern states should deal with the problem. "Why does not South Carolina, if she has not done it, make it penal for persons who take from the post offices incendiary papers, to circulate them?"²⁴⁷

²⁴⁰ *Id.* at 1105.

²⁴¹ *Id.*

²⁴² 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 First Section of the Fourteenth Amendment*, 68 CHL.-KENT L. REV. 1113, 1153, 1162, 1162, n.208, n.281 (1993) [hereinafter Curtis, *The 1859 Crisis over Helper's Book*]. This article was published as part of the Symposium on The Law of Slavery.

²⁴³ 12 CONG. DEB. 1106 (1836).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1107.

²⁴⁷ *Id.* at 1108.

Davis insisted that the First Amendment meant that Congress "shall not diminish the freedom of the press The right is reserved and we are forbidden to touch it." Grants of power were made on the condition that "this privilege was to remain unimpaired." He took a functional view both of the post office and of the press. "The naked right to print, without the right to publish would be a humble privilege." Printing and publishing were united. Since the time of framing the Constitution, a major mode of publishing was by transmission of periodicals through the mail.²⁴⁸ The press was essential to republican government.

The press is the great organ of a free people. It is the medium through which their thoughts are communicated, through which they act upon one another, and by which they reason with, instruct, and move each other. It rouses us to vigilance, warns us of danger, rebukes the aspiring, encourages the modest, and, like the sun in the heavens, radiates its influence over the whole country. The people viewed it as vital to a republic, and gave it the mail as an auxiliary; and you might as well expect the blood to flow through the system without the heart, as to have the press exert its influence in a salutary manner through the country without the aid of the mail.²⁴⁹

Davis said that the reasons supporting the incendiary publication bill were the same as those always given for abridging the liberty of the press: because the press

sends forth incendiary, inflammable publications, disturbing the public peace, and corrupting the public mind. All censorships are established under the plausible pretense of arresting evils Great principles, fundamental in their character, are thus assailed on proof of abuses which no doubt at all times exist; and when once, though such pretenses, a breach is made, the citadel falls.²⁵⁰

For this reason, the Constitution prohibited abridging the liberty of the press "come what might."²⁵¹

Senator Daniel Webster also insisted that the bill violated the First Amendment. Freedom of the press included publishing as well as printing and circulation of papers through the mail.²⁵² Senator Webster thought the Constitution denied Congress power over the press. "Whatever laws the State Legislatures might pass on the subject, Congress was restrained from legislating in any manner whatever, with regard to the press."²⁵³ Webster particularly objected to deciding "what should be transmitted by their ordinary channel of intelligence" based on "the character of the writing or publication." Such a doc-

²⁴⁸ *Id.* at 1151-52.

²⁴⁹ *Id.* at 1152.

²⁵⁰ *Id.* at 1152-53.

²⁵¹ *Id.* at 1153.

²⁵² *Id.* at 1721.

²⁵³ *Id.* at 1722.

trine was a "direct" and shocking "abridgement of the freedom of the press."²⁵⁴

Senator Henry Clay of Kentucky believed the President's call for federal legislation had met "general disapprobation." After the "most extraordinary and dangerous power had been assumed by the head of the Post office, and . . . sustained by [the President's message]" he had given the question extensive thought. Clay concluded that Congress "could not pass any law interfering with the subject in any shape or form whatever."²⁵⁵ States could apply the necessary remedy "[t]he instant that a prohibited paper was handed out."²⁵⁶

Senator Thomas Morris of Ohio objected that the bill deprived citizens of the right to be secure in their "persons, houses, papers, and effects against unreasonable searches and seizures."²⁵⁷ It subjected the laws of Congress to the different policies of twenty-four states. In rejecting the postal bill, Morris also seemed to be reacting to Southern demands that Northern states suppress abolition.

[W]e, the free states . . . are called on to put the gag into the mouths of our citizens, to declare that they have no right to talk, to preach, or to pray, on the subject of slavery; that we must put down societies who meet for such purposes; that we shall not be permitted to send abroad our thoughts or our opinions upon the abstract question of slavery; that the very liberty of thought, of speech, and of the press shall be so embarrassed as to be in many instances denied to us . . .²⁵⁸

Morris also concluded that states "have ample . . . power to punish any person in their jurisdiction who may read or distribute any publication which their laws may prohibit." Morris, however, denied that postmasters were subject to state law: "they cannot reach the post office or the postmaster for delivery [of items prohibited by its law] as directed, because such act is under paramount authority."²⁵⁹

Opponents objected to the vagueness of the bill and also warned of the danger of postmasters, who were political functionaries using their power against their political opponents: "The papers of the party in power would find despatch [sic] as orthodox, while all others would be found filled with offensive matter . . ."²⁶⁰

Several pointed out the immense burden of sifting through the mail in search of statements about slavery that might be prohibited by the various laws of different states.²⁶¹ Senator Niles of Connecticut noted that fifty or more periodicals were issued from New York City

²⁵⁴ *Id.* at 1731.

²⁵⁵ *Id.* at 1728.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1167.

²⁵⁸ *Id.* at 1168.

²⁵⁹ *Id.* at 1171.

²⁶⁰ *Id.* at 1153 (Sen. Davis); *id.* at 1729 (Sen. Clay).

²⁶¹ *Id.* at 1158 (Sen. Niles).

alone. Many of them were issued daily and many were composed of items taken from other papers. "[E]ach paper must be carefully examined in its entire contents, to see if it contains anything touching the subject of slavery. This would be utterly impracticable."²⁶² Then if something touching slavery was found, it would be necessary to decide if it was incendiary under the law of the receiving state. "To decide what is incendiary matter would be similar to deciding what is a libel, what constitutes blasphemy or heresy. Of all cases ever tried before judicial tribunals, these are the most difficult and uncertain."²⁶³

Senators King of Georgia and James Buchanan of Pennsylvania supported the bill. Unlike Senator Calhoun, they found power to pass it under the postal power.²⁶⁴ Senator Buchanan agreed with critics of the bill that the First Amendment deprived Congress of power over the press. It meant that "Congress [had] no power . . . to pass any law to prevent or to punish any publication whatever." But it did not follow from this that Congress was required to distribute publications inciting insurrection. The freedom to print and to publish was unimpaired; but government could not be compelled to act as the agent of the publisher.²⁶⁵

Senator King of Georgia denied that a prohibition on sending "incendiary" publications to states that proscribed them violated the freedom of the press. The First Amendment was intended to be "a restriction on the national Legislature, intended to prevent any active interference with that right, as it existed in the States at the time the constitution was adopted." Freedom of the press "consisted in the right to print and publish whatever might be permitted by the laws of the State."²⁶⁶ The laws of the slave states prohibited delivery of incendiary items. So no one, including postmasters, had a right to deliver "incendiary" publications in those states. There was no "freedom" for the congressional statute to abridge. A freedom might exist to circulate such items in free states, but no attempt was made to abridge printing or circulating the items in states that acknowledged the right to do so.²⁶⁷

While other senators analyzed the problem in terms of power, Senator King analyzed it in terms of rights. Constitutional and other rights must be reconciled. State constitutions secured the right to free speech and free press, yet states punished libelers. The right to free speech was limited by the private right to reputation. Similarly, the right to free speech and press was limited by the property right to own

²⁶² *Id.*

²⁶³ *Id.* at 1157.

²⁶⁴ *Id.* at 1723.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1128.

²⁶⁷ *Id.*

slaves.²⁶⁸

Early debate on the Calhoun bill showed that passage was doubtful. Supporters of the administration,²⁶⁹ as well as Whigs, opposed it. Even Senator Benton, who had celebrated the achievements of anti-abolition mobs and who was unwilling to make the post office a "pack-horse for abolitionists," thought that investing powers of censorship in ten thousand postmasters "would lead to things they might all regret."²⁷⁰ Supporters of the measure postponed it and, subsequently, submitted a revised bill.²⁷¹ Because of constitutional scruples, even the original bill was limited to reinforcing the Southern quarantine. It did not seek to ban publications within any Northern states or even to ban interstate transportation of abolitionist literature. It did not even seek to punish abolitionists for mailing their publications to the South. It fell far short, for example, of contemporary anti-obscenity statutes. It simply prohibited postmasters from mailing publications about slavery to states that prohibited them or from delivering the publications in violation of state law.

The revised bill eliminated the prohibition on postmasters' mailing the publications from the North to the South. It simply forbade postmasters from delivering publications about slavery that offended state laws.²⁷² As a result, Senator Buchanan noted that the bill "did not affect, in the slightest degree, any of the non-slaveholding States."²⁷³ Senator Grundy noted that the revised bill did not even forbid transmission of "certain publications, no matter how incendiary." The whole effect of the bill was merely to prevent a postmaster who violated the law of the state in which he resided "from sheltering himself under the post office law."²⁷⁴ The bill did no more, Senator Calhoun noted, than what the Postmaster General had done without it, and, he acidly noted, without any objection by Northern Democrats who were deserting the Calhoun bill.²⁷⁵

The defense was unsuccessful. The incendiary publications bill was defeated by a vote of nineteen to twenty-five. The margin of defeat was provided by Northern Democrats and Southern Whigs who refused to support the bill. If either of these groups had supported it, and Martin Van Buren had, as expected, broken a tie in its favor, the bill would have passed the Senate.

The Post Office Act of 1836 made it criminal for a postmaster

²⁶⁸ *Id.*

²⁶⁹ These included Senator Niles, Senator Benton, and Senator Morris.

²⁷⁰ 12 CONG. DEB. 1155 (1836).

²⁷¹ *Id.* at 1156.

²⁷² *Id.* at 1721.

²⁷³ *Id.* at 1723.

²⁷⁴ *Id.* at 1727.

²⁷⁵ *Id.* at 1161.

unlawfully to detain the mail.²⁷⁶ But unlawful detention was the key concept. "[I]t cannot be unlawful to detain that which it is unlawful to deliver," concluded Attorney General Caleb Cushing in an 1858 opinion about delivery of the *Cincinnati Gazette*.²⁷⁷ In effect, states could make delivery of some political mail a crime.

The central tendency of the Senatorial discussion of the incendiary publications bill was clear. First, Congress lacked power to punish or restrain the press. (Some denied that postal censorship of abolition publications as provided by the bill was doing either of these things.) Second, Southern states had the constitutional power to punish those who circulated abolitionist publications in the South. (At least one Senator denied that this power could reach postmasters.)²⁷⁸ In practice, that meant that if abolition was to be eliminated from the political agenda, the legislatures of the Northern states would have to do it.

2. *The Move to Suppress Abolition in the North.*—The Southern nullifier and Southern nationalist factions argued that the crux of the abolition problem was abolitionist expression in the North. Much of the South agreed. Southern reaction to abolition was becoming more unified and more extreme. But some Southerners of more national orientation saw nullifier political machinations behind the exacerbation of the slavery issue. "The tariff had failed them—the Indian question had failed them," wrote the *Georgia Courier*. "People could think differently on those points—but if they could only get the lead with the slavery card, their end was accomplished—they knew every body must follow suit . . ." ²⁷⁹ Nullifiers, the paper complained, were reading or trying to read "these inflammatory publications" at public meetings.²⁸⁰ To the extent that many abolitionist ideas reached the South at all it was mainly through Southern extremists. They quoted abolition tracts to alert the South to the menace. They hoped to use the crisis to forge a political realignment and a Southern party.

To many Southerners, the Union would not be tolerable if abolitionists persuaded the North. Furthermore, as long as abolitionist publications were abundant in the North, there was danger that some might reach the South. Supporters of suppression compared abolitionist publications to fire, gunpowder, and explosions. Implicit in such metaphors was the idea that the South was living on a powder keg or tinder box, and one spark could be enough to trigger an explo-

²⁷⁶ Act of July 2, 1836, ch. 270, 5 Stat. 80, 87. The full title to this act was "An Act to Change the Organization of the Post Office Department, and to Provide Effectually for the Settlement of the Accounts Thereof." *Post Office Law*, WASH. GLOBE, July 13, 1836, at 3.

²⁷⁷ Yazoo City Post Office Case, 8 Op. Att'y Gen. 489, 494 (1858).

²⁷⁸ CONG. GLOBE, 24th Cong., 1st Sess. 291 (1836) (Sen. Morris, Ohio).

²⁷⁹ WASH. GLOBE, Aug. 29, 1835, at 2.

²⁸⁰ *Id.*

sion or conflagration. In his *Commentaries*, Chancellor Kent noted sympathetically that self preservation demanded "unceasing vigilance and firmness, as well as uniform kindness and humanity" from whites "dwelling in the midst of such combustible materials."²⁸¹

Even without the aid of national or Northern legislation, the Southern quarantine had substantially suppressed abolition in the South. But Southerners demanded more. Often they specifically asked for the suppression of abolitionist publications and societies in the North. For example, in 1835 the Virginia legislature "earnestly requested" other states "promptly to adopt penal enactments" or other measures to "effectively suppress all [abolitionist societies] within their limits."²⁸² The North Carolina legislature "respectfully requested [its sister states] to enact penal laws prohibiting the printing within their respective limits, all such publications as may have a tendency to make [its] slaves discontented with their present condition, or incite them to insurrection."²⁸³

The North Carolina legislature did not even specify that the publications to be prohibited be sent South. It wanted total prohibition to insure that no abolitionist documents reached Southerners or anybody else. Likewise, the Alabama legislature called on other states "to enact such penal laws, as will finally put an end to the malignant deeds of the abolitionists."²⁸⁴ That legislature also asked its sister states to "make it highly penal to print, publish, or distribute newspapers, pamphlets, or other publications, calculated or having a tendency to excite the slaves of the Southern states to insurrection and revolt."²⁸⁵ South Carolina made a similar request.²⁸⁶

²⁸¹ 2 KENT'S COMMENTARIES, *supra* note 2, at 254 (setting forth lecture xxxii).

²⁸² 2 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA WHICH COMMENCED AT HARRISBURG ON THE FIRST DAY OF DECEMBER 364 (Harrisburg, Va. 1835) (reprinting the Virginia Resolutions).

²⁸³ ACTS PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA AT THE SESSION OF 1835, at 121 (Raleigh, N.C. 1836).

²⁸⁴ ACT PASSED AT THE ANNUAL SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF ALABAMA BEGUN AND HELD IN THE TOWN OF TUSCALOOSA, ON THE THIRD MONDAY IN NOVEMBER, ONE THOUSAND EIGHT HUNDRED AND THIRTY-FIVE 175 (Tuscaloosa, Ala. 1836).

²⁸⁵ *Id.* at 364.

²⁸⁶ 2 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA 137 (1836) [hereinafter 2 PENNSYLVANIA SENATE JOURNAL] (reprinting the *Report of the Joint Committee of Federal Relations, in the Legislature of South Carolina*). For other Southern resolutions, often shorter and sometimes lacking explicit demands for Northern legislation suppressing abolition societies in the North, see e.g., ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA PASSED IN NOVEMBER AND DECEMBER 1835, at 297-300 (1836); ACTS PASSED AT THE FIRST SESSION OF THE FORTY-FOURTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY 683-87 (1836); ACTS PASSED AT THE FIRST SESSION OF THE THIRTEENTH LEGISLATURE OF THE STATE OF LOUISIANA 18-19 (1837); LAWS OF THE STATE OF MISSISSIPPI PASSED IN JANUARY & FEBRUARY 1836, at 101-03 (1836); LAWS OF THE STATE OF MISSOURI PASSED AT THE FIRST SESSION OF THE TENTH GENERAL ASSEMBLY 337-38 (1838); ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED AT THE SESSION OF 1835-36, at 395-97 (1836).

Sometimes, Southern legislatures acknowledged the claim that Northern state constitutional guarantees of freedom of speech and of the press made it impossible to suppress abolitionist publications. The Committee of Twenty-Six of the North Carolina legislature drafted its resolutions and prefaced them with a report. That report insisted that if state constitutional provisions protected expression of abolitionist ideas, this was no excuse for permitting abolitionists to continue. Northern states had a duty to their Southern sisters, and "they have no right to disable themselves from its performance by an organic law."²⁸⁷ Moreover, the committee concluded that the constitutional objections were based on "a total misconception of what is meant by the liberty of the press; which means not the right to publish without responsibility, but to publish without previous permission. Where every man has a right to publish what he pleases, but is responsible for the nature and tendency of his publication, the press is free. If he has a right to publish without such responsibility, the press is licentious."²⁸⁸

So the committee implicitly endorsed Blackstone's cramped definition of freedom of the press and implicitly rejected Madison's suggestion that speech about public men and measures was essential to republican government and should be protected.

At the least, Southern legislatures that referred to the issues of free speech and press insisted that abolition expression was an unprotected abuse of those "sacred and inviolable rights."²⁸⁹ The South Carolina legislature distinguished "freedom of discussion" from "the liberty to deluge a friendly . . . state with seditious and incendiary tracts."²⁹⁰ The legislature was quite willing that "[t]he whole circumstances of the case, and the *quo animo* of the offender might be left to a jury."²⁹¹

But if legislation was required, how should the exception to free speech be crafted? Southern states typically had prohibited expression tending to cause slave revolts or disaffection.²⁹² The legislation made the truth or the political nature of the attack on slavery irrelevant. Northern states conceivably could apply that bad tendency model to abolitionist publications intended to be sent South. But this standard would not work as well to suppress abolitionist expression in the North because the North, generally, had no slaves.

²⁸⁷ 2 PENNSYLVANIA SENATE JOURNAL, *supra* note 286, at 141 (reprinting the North Carolina report).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 271.

²⁹⁰ *Id.* at 136.

²⁹¹ *Id.*

²⁹² *Id.*; see *supra* note 68.

The least restrictive law would be one prohibiting citizens of a Northern state from sending "incendiary" documents to the South with the specific intent of exciting a slave rebellion. Laws crafted in that fashion, as critics noted, allowed for the suppression of publications regardless of truth.

In fact, several Northern Governors did suggest action against abolitionists. Governor Marcy of New York noted that the avowed object of abolitionists was to abolish slavery in the Southern and Southwestern states. "[T]heir means thus far have been confined to the organization of societies among us, and to publications of various kinds on the subject of slavery" ²⁹³ Southerners, he noted, regarded these as libels on their citizens and provocation to insurrection among their slaves. Since there were no slaves in New York and all regarded the institution as an evil, he asked, what could the abolitionists hope to accomplish in New York. New York had no power over Southern slavery. Congress had no power on the subject either, and the effort to change slavery by Northern or national legislation would violate the "compact" between North and South that made possible the Constitution. Abolitionist efforts at persuasion had been rejected indignantly in the South. Furthermore, Marcy warned, the location of abolitionist presses in New York founded by wealthy New York businessmen had led to threats of a Southern boycott and "injurious consequences to our commerce." ²⁹⁴

So what was the solution? Governor Marcy proposed, equivocally, that if public opinion were insufficient to solve the problem, then Northern states might provide, "by their own laws for the trial and punishment by their own judicatories, of residents within their limits, guilty of acts therein, which are calculated and intended to excite insurrection and rebellion in a sister State." ²⁹⁵

In February of 1836, Alvan Stewart of New York—an antislavery legal thinker and leader of the New York antislavery society—excoriated Governor Marcy's call for suppression of antislavery expression. He ridiculed the idea that abolition was a monster so powerful that its extermination required "loss of liberty of the press, of conscience, discussion, and of the inviolability of the mail." ²⁹⁶ Marcy had argued that because the power to suppress abolition publications was not delegated to the federal government, it was retained by the states. "There is a class of rights," Stewart responded,

of the most personal and sacred character to the citizen, which are a portion of individual sovereignty, never surrendered by the citizen . . .

²⁹³ Gov. Marcy's Message—*Abolition*, WASH. GLOBE, Jan. 11, 1836, at 3.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ ALVAN STEWART, WRITINGS AND SPEECHES OF ALVAN STEWART ON SLAVERY 59 (Luther Marsh ed., 1860).

either to the State or General Government, and the Constitutions of the State and Union have told the world, after enumerating them, that there is a class of unsundered rights.²⁹⁷

The legislatures of the states and of the Union, Stewart insisted, "are forbidden by the constitutions of the States and Union from touching those unsundered rights." This was so "no matter in what distress or exigency a State may find itself."²⁹⁸ To support his conclusion Stewart cited the New York Constitution.

Stewart also made a shrewd analysis, showing that guarantees of free expression were central to republican government. If those in power could use the criminal justice system to silence their political critics, he observed, then the people would be deprived of democratic choice. Stewart feared a replay of what the Sedition Act had attempted.

Oh, what scenes of abuse would have been played off before this world, if licensed presses, gagged discussion, and mail inquisitors had been tolerated! And we should have seen such laws passed in this State by a party who had the ascendancy, if the constitution had not forbidden it, by which one half of the community could neither speak, write, nor publish anything of their adversaries, under pain of indictments, fine and imprisonment.²⁹⁹

The citizens of New York, Stewart concluded, had the right to discuss, print, and circulate "their sentiments on any moral problem, or any question of right and wrong, of liberty and slavery."³⁰⁰

Stewart relied primarily on his state constitution as a protection against state action suppressing antislavery ideas. He suggested that some areas of discussion were simply beyond legislative power, however compelling the legislature's reasons for action. While Stewart related free speech to natural rights, as the slavery controversy intensified, Southerners began to repudiate the natural rights philosophy. While Stewart relied on the right of the individual to discuss political and moral questions, by 1859 Southerners in Congress relied instead on the community's right to suppress dangerous doctrine. By 1859-60, the rejection of individual rights arguments and invocation of the rights of the community were well developed by Southern congressmen.³⁰¹

²⁹⁷ *Id.* at 65.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 66.

³⁰⁰ *Id.* at 84.

³⁰¹ See, e.g., CONG. GLOBE, 36th Cong., 1st Sess. 1837 (1859-60) (Sen. Clingman); CONG. GLOBE, 36th Cong., 1st Sess. 1618 (1859-60) (Sen. Chestnut); CONG. GLOBE, 36th Cong., 1st Sess. 436 (1859-60) (Rep. Smith who repudiated many statements by men of the revolutionary generation as "false in philosophy and unsound in fact"); see also CONG. GLOBE, 36th Cong., 1st Sess. 1049 (1859-60) (statement of Sen. Collamer quoting Sen. Calhoun).

The *U.S. Telegraph*, a pronullification paper, was mildly pleased with Governor Marcy's message. But it complained that the proposed statute extended to a "very narrow class of cases," those involving actions "calculated and *intended* to excite insurrection."³⁰² "Under the plea of not 'intended' to excite insurrection," groused the *Telegraph*, "laws passed would be a mere dead letter."³⁰³ Furthermore, the law probably would not reach publications intended exclusively for Northern audiences. Publications not meant for the South would hardly be calculated and intended to excite slave uprisings.

The *Telegraph* and other Southern organs and spokesmen gloomily predicted that even such limited measures would not be enacted.³⁰⁴ "[O]ur just hopes," lamented Senator John C. Calhoun in April 1836, "have not been realized. The Legislatures of the South . . . have called upon the non-slaveholding States to repress the movements made within the jurisdiction of those States against their peace and security. Not a step has been taken; not a law has been passed . . ."³⁰⁵ The Kentucky Legislature came to a similar conclusion: "Enough has transpired to convince us [the legislature] that under the miserably perverted name of free discussion, these incendiaries will be permitted to scatter their fire-brands throughout the country, with no check but that which may be imposed by the feeble operation of public opinion."³⁰⁶

And so in fact it was to be. Northern legislatures responded to the Southern resolutions. The Committee of the New York Legislature assigned to consider the issue produced a remarkably equivocal report. It referred to the massive outpouring of public sentiment against the abolitionists and agreed with the Governor that it was beyond belief that such "manifestations of public sentiment" would be disregarded.³⁰⁷

But the committee also spoke respectfully of freedom of the press. It said "all errors and differences of opinion" on political rights or "measures of public policy" may safely be referred to the "tribunal" of public opinion.³⁰⁸ A free press, the committee continued, was

³⁰² U.S. TELEGRAPH, Jan. 19, 1836, at 442. The *Telegraph* insisted that nullification was the way to protect the South against the dangers posed by opponents of slavery.

³⁰³ *Governor Marcy's Message*, U.S. TELEGRAPH, Jan. 15, 1836, at 131.

³⁰⁴ U.S. TELEGRAPH, Jan. 19, 1836, at 442.

³⁰⁵ 12 CONG. DEB. 1147 (1836).

³⁰⁶ ACTS PASSED AT THE FIRST SESSION OF THE FORTY FOURTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY, at 685 (Frankfort, Ky. 1836).

³⁰⁷ See *The New York Report on Slavery*, reprinted in 2 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA 423 (1836). The reprint also contains the resolutions and reports from a number of states.

³⁰⁸ *Id.*

essential to a just and enlightened public opinion. Free speech and a free press were guaranteed by the state and Federal Constitutions:

[I]t is a most delicate and difficult task of discrimination for legislators to determine at what point this rational and constitutional liberty terminates, and venality and licentiousness begin. It is indeed more safe to tolerate the licentiousness of the press than to abridge its freedom; for a corrective of the evil will be generally found in the force of truth . . .³⁰⁹

Still, the legislature insisted that it had the power to pass criminal laws to reach those "actually employed in exciting insurrection and sedition in a sister State."³¹⁰ But the resolution concluded that the "unexampled unanimity" of public disapproval of those discussions of slavery "calculated to produce an exciting, an improper, and a pernicious influence within the limits of other States, have given to the Union stronger guarantees than law could furnish."³¹¹

Governor Everett of Massachusetts appealed to the constitutional compact that left slavery to the Southern states. "Every thing that tends to disturb the relations created by this compact is at war with its spirit; and whatever by direct and necessary operation, is calculated to excite an insurrection among the slaves, has been held . . . an offense against the peace of this Commonwealth" and a common law crime.³¹² Still, though suggesting prosecutions for one class of expression, Everett did not recommend legislation against abolitionists. "As the genius of our institutions and the character of our people are entirely repugnant to laws impairing the liberty of speech and of the press, even for the sake of repressing its abuses, the patriotism of all classes of citizens must be invoked, to abstain from a discussion" which would exasperate the master and worsen the condition of the slave.³¹³ In spite of Everett's suggestion, Massachusetts launched no prosecutions.

The Massachusetts Legislature, like all others of the North, passed no anti-abolitionist legislation. A committee did recommend some weakly worded resolutions on the subject. Elizur Wright wrote to fellow abolitionist Theodore Weld in delight. The proposed resolutions seemed to him to be conclusive proof of the "progress of things." The committee had condemned the doctrines avowed and measures pursued

by whom? By the Antislavery Societies? Not at all—but, by "such as *agitate the question.*" And what is to be done against these agitators? Why the legislature "does earnestly *recommend* to them carefully to abstain from all such discussion, etc." If the slaveholders are satisfied with

³⁰⁹ *Id.*

³¹⁰ *Id.* at 424.

³¹¹ *Id.* at 425.

³¹² EDWARD EVERETT, ADDRESS OF HIS EXCELLENCY EDWARD EVERETT TO THE TWO BRANCHES OF THE LEGISLATURE 30 (Boston, Mass., Dutton & Wentworth 1836).

³¹³ *Id.*

this, they will be satisfied with "great cry and little wool." But even this they have not yet, and perhaps may not. The resolutions, too, condemn mobs!³¹⁴

Governor Wolf of Pennsylvania had no sympathy for the abolitionists. He thought that their "crusade against slavery is the offspring of fanaticism of the most dangerous and alarming character; which if not speedily checked may kindle a fire which it may require the best blood of the country to quench." But he said that the matter must be left to public opinion.

Legislation cannot be brought to bear upon it without endangering other rights and privileges The freedom of speech and of the press, which after all is the safeguard to free discussion, and the best expositor of public opinion, must not be infringed upon or controlled by enactments intended to remedy some temporary mischief only.³¹⁵

The Governor nevertheless suggested a temperate, firm, and decided resolution of the legislature might "give tone and expression to public sentiment" and check the progress of abolition.³¹⁶

His successor, Governor Joseph Ritner, spoke unequivocally against slavery in his 1836 message. Slavery was an evil. Pennsylvania had abolished it and had always stood against its expansion. "Above all," Governor Ritner implored, "let us never yield up the right of the free discussion of any evil which may arise in the land or any part of it" ³¹⁷

In Pennsylvania, proposals for anti-abolition legislation were referred to the House Judiciary Committee chaired by Thaddeus Stevens. The Committee rejected Southern demands as a violation of the rights of free speech and a free press. It announced that "[e]very citizen of the non-slaveholding states has a right freely to think and publish his thoughts on any subject of national or state policy."³¹⁸ Without regard to residence, the Northern citizen had a right to attack the usury laws of New York or the slave laws of Mississippi as immoral and unjust. However weak, foolish, or false the arguments, "it would by tyranny to prohibit their promulgation." To accept such restrictions would reduce the Northern citizen to "a vassalage but little less degrading than that of the slaves whose condition we assert the right to discuss."³¹⁹ The report also upheld the power of Congress to

³¹⁴ Letter from Elizur Wright, Jr. to Theodore Weld (Mar. 24, 1836), in 1 WELD-GRIMKÉ LETTERS, *supra* note 71, at 281.

³¹⁵ George Wolf, *Annual Message to the Assembly—1835*, in IV PENNSYLVANIA ARCHIVES, PAPERS OF THE GOVERNORS 243 (1901).

³¹⁶ *Id.*

³¹⁷ *Id.* at 291-92 (message of Governor Ritner).

³¹⁸ *Report Relative to Abolition Societies and Incendiary Publications on March 30, 1836*, in 1835-36 JOURNAL OF THE HOUSE OF REPRESENTATIVES (PENNSYLVANIA) 250 (1836).

³¹⁹ *Id.*

ban slavery in the District of Columbia. The legislature approved neither the report nor legislation against abolitionists.

Some other Northern state legislatures and legislative committees also saw abolitionist ideas as opinion protected by free speech and press. The Vermont legislature resolved that "neither Congress nor the State Governments have any constitutional right to abridge the free expression of opinion, or the transmission of them through the medium of the public mails."³²⁰ The report of the Ohio legislature suggested that the Southern resolutions were as dangerous as abolitionist publications. "If the slave has capacity to understand [abolitionist] publications, he can equally understand the proceedings of legislatures which so publicly and repeatedly declare their pernicious tendency"³²¹ The Ohio Committee's report announced that "the states have no power to restrain the publication of private opinion on any subject whatever, and the principle, if admitted, involves much greater evils to the peace of the states, than the toleration of errors and the excitements they cause can ever produce."³²² The Ohio legislature resolved that "no law can be passed to impair the freedom of speech or the freedom of the press, except to provide remedy for the redress of private injury, or the breach of the peace resulting from abuse of either."³²³

The struggle over state legislation to suppress abolition was one crucial battle of 1835-37. In the end, no free state enacted repressive legislation, and several came to the defense of protection for political opinion. Some, like the New York legislature, suggested that public opinion would repress abolition, thereby making legislation unnecessary. That argument is hard to credit. In the Southern states, public opinion was more monolithic and repressive than in the North. There, those suspected of abolition faced a clear threat of summary punishment. Still, virtually all Southern states passed laws aimed at "incendiary" antislavery agitation.

The heritage of the Sedition Act controversy—and the defense of free speech and press it spawned—shaped popular and political attitudes on the question for a critical mass of people. For these people suppressing abolitionist opinion, hateful as that opinion was to some of them, violated principles of freedom of political expression. Significantly, those who held these views denied that abolition could be treated as a special case—an exception because the evil feared was so significant.

³²⁰ *The Ball Rolling*, WASH. GLOBE, Dec. 2, 1836, at 3.

³²¹ *Ohio Report on Slavery*, in 2 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA 417 (1836).

³²² *Id.*

³²³ *Id.* at 418.

Proposed anti-abolition legislation was basically a less libertarian version of the Sedition Act. After all, abolitionists criticized a major social and economic institution that had a huge effect on the political system. In 1835 and 1836, at least, they did not advocate crime or urge slaves to revolt. The danger of their speech came from its tendency—the tendency of criticism of the institution of slavery to produce (as abolitionist critics saw it) catastrophic results. That, of course, was how supporters of the Sedition Act saw the tendency of criticism of government officials. Of course in each case more was involved. The Sedition Act was aimed at suppressing political opposition. In the South, laws suppressing antislavery expression had similar political purposes. “The poor white men of the South will be tampered with . . .,” warned the *Telegraph*. “[T]he cry of ‘democracy’ and ‘working men’ will be raised. They will be told how much better will be their condition when the negro shall be transported to Africa.”³²⁴ But, in one respect at least, the Southern laws were worse than the Sedition Act. Unlike the Sedition Act, none of the Southern laws or proposed Northern laws made the truth of abolitionist criticisms of slavery a defense.

In the Senate, Daniel Webster suggested that the conduct punished by the Sedition Act was criminal by laws of all of the states at the time.³²⁵ For him the principle was only that the federal government lacked the power conferred on it by the now expired Sedition Act. But for many in 1835-37, when state legislation was demanded to suppress abolitionist ideas, they rejected the demand as a violation of free speech and a free press. The aspect of the Sedition Act controversy they relied on was not simply the federalism/states-rights distinctions of the Virginia and Kentucky Resolutions—distinctions revived again in the congressional debate on the Postal Act of 1836. Instead, they recalled the functional and structural argument of the Virginia Resolutions about the centrality to republican government of free speech on all issues of governmental policy. They applied these arguments to state constitutional guarantees. And they recalled Jefferson’s rhetoric that truth and counterargument were the antidote for error—a principle from which Jefferson himself sometimes deviated.³²⁶

The result was a limited, but more nearly absolute, protection for political opinion that did not fall into some other free speech exception. The lines were fuzzy and the concept was developing. Several advocates of repression mentioned an exception for conduct that caused breaches of the peace.³²⁷ In response to suggestions to prose-

³²⁴ *Abolition Movements*, U.S. TELEGRAPH, Sept. 2, 1835, at 2.

³²⁵ 12 CONG. DEB. 1732 (1836).

³²⁶ See, e.g., LEONARD W. LEVY, *THE EMERGENCE OF A FREE PRESS* 251, 307 (1985).

³²⁷ See, e.g., WASH. GLOBE, Aug. 28, 1835, at 2 (appearing under letters to the editor).

cute abolitionists for breach of the peace, the *Evening Post* suggested that such prosecutions should be aimed at those who used force to silence speakers, not at the speaker.³²⁸ (It was an early response to the idea of a heckler's veto over exercise of First Amendment rights.) In any case, the central decisions of 1835-37 were clear: the attempt to have free states pass statutes suppressing abolitionist ideas failed. Nor would Congress pass laws suppressing abolitionist publications.

In other respects, however, the advocates of suppression were more successful. Southern states had passed laws the North refused to enact. Southern laws and vigilance committees silenced abolition expression. Vocal domestic Southern opposition to slavery reached a brief high water mark in the 1830s and thereafter began to recede in much of the South. Laws and vigilance committees took slavery off the Southern political agenda. As a result, the institution could only be dislodged by violence. "If you fear discussion, if you maintain that the South cannot afford it," Professor Francis Lieber wrote to John C. Calhoun, "then you admit at the same time that the whole institution is to be kept up by violence only, and is against the spirit of the times and unameliorable, which means, in other words, that violence supports it, and violence will be its end."³²⁹ The post office had censored and continued to censor abolitionist publications aimed at the South, though some got through in plain brown wrappers.

3. *Petitions.*—At the same time the Congress and the nation debated the postal controversy and suppression of abolitionist publications in the states, they debated whether to receive petitions calling for abolition of slavery in the District of Columbia, in the territories, and the abolition of the interstate slave trade. Some congressmen from the South pointed out that petitions demanding the abolition of slavery were the very sort of incendiary documents Southern states had made criminal.³³⁰ They demanded steps to silence antislavery petitions and agitation in Congress. The demand ran counter to basic ideas of representative government and popular sovereignty. By this ideology, the "people," through their representatives, decided all basic

³²⁸ EVENING POST (NY), July 14, 1836, at 2.

³²⁹ Letter from Francis Lieber to John C. Calhoun, in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT, *supra* note 144 at 179; *see also* FREEHLING, ROAD TO DISUNION, *supra* note 28, at 301-04.

³³⁰ *See* CONG. GLOBE, 24th Cong., 1st Sess. 40, 75-77 (1836) (statements of Sen. Bouldin, Sen. Calhoun, Sen. Preston, and Sen. Benton). For discussions of the right to petition, *see, e.g.*, David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113 (1991); Eric Schnapper, "Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law, 74 IOWA L. REV. 303 (1989); Norman B. Smith, "Shall Make No Law Abridging . . ." An Analysis of the Neglected but Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153 (1986).

political questions. A political question in turn was one on which political action was sought. The people, in theory, set the agenda.

Once abolition in the District, for example, became part of the political agenda, it would be discussed in newspapers and throughout the land. The people would need to be informed about the subject, in both the South and the North, so they could express their views to their agents in Washington. So Senator Calhoun of South Carolina announced that discussion of abolition in Congress was more dangerous than abolitionist pamphlets in the South. Southerners could suppress those pamphlets. "It was agitation here that they feared, because it would compel the Southern press to discuss the question in the very presence of the slaves, who were induced to believe that there was a powerful party at the North ready to assist them."³³¹ Calhoun demanded that the petitions cease.

Calhoun's solution and that of the more extreme Southerners was to refuse to receive abolitionist petitions.³³² Senator Preston insisted that Congress recognize that antislavery petitions were, after all, abolitionist activity. Discussion of the subject must cease; Congress should take "such action . . . as would close the doors of this Hall against the agitation of this subject."³³³

One justification for suppression was that the petitions, in denouncing slavery, libeled the South and inflicted emotional injury. "They contained reflections," said Senator Calhoun, "injurious to the feelings of himself, and those with whom he was connected."³³⁴ The language was "highly reprehensible." One petition, Calhoun complained, spoke of dealing in human flesh and piracy. "Strange language! Piracy and butchery! We must not . . . permit those we represent to be thus insulted on that floor."³³⁵

The effort to silence antislavery discussion in Congress confronted three main constitutional obstacles. The First Amendment prohibited Congress from making any law abridging the right of the people to assemble and petition for redress of grievances.³³⁶ (Of course, internal congressional procedures might not be viewed as a "law" forbidden by the First Amendment.) Second, Article I, Section 6 also contained a provision designed to protect free speech by Representatives and Senators in Congress: "for any speech or Debate in either House, they shall not be questioned in any other Place."³³⁷

³³¹ CONG. GLOBE, 24th Cong., 1st Sess. 75 (1836).

³³² *Id.*

³³³ *Id.* at 76.

³³⁴ *Id.* at 83.

³³⁵ *Id.* at 120.

³³⁶ U.S. CONST. amend. I. The contention was that the gag rule violated at least the spirit of this guarantee.

³³⁷ U.S. CONST. art. I, § 6, cl. 1.

Third, the right to petition was central to representative government. Many Northern and some Southern congressmen rebelled at the idea of refusing to receive abolitionist petitions. To refuse to receive abolitionist petitions, many insisted, abridged the right of petition.³³⁸ They warned that abolitionists would turn refusal to receive petitions to their advantage. Senator Wright of New York, a Van Buren Democrat and an anti-abolitionist, put it this way:

[E]very Senator would concede that a general impression prevailed among our whole people, of every portion of the Union, that the right to petition Congress in respectful terms . . . was one of the broadest rights secured by the Constitution. Refuse it upon the broad principle, as relating to this subject, and these malignant agitators will seize upon the act to draw to themselves and their cause public sympathy.³³⁹

The battle over abolitionist petitions in Congress involved the basic issues that surrounded the national debate on freedom of speech for abolitionists—the right to engage in antislavery political speech. Congressman John Quincy Adams emerged as the leader of opposition to congressional efforts to stifle antislavery petitions. He insisted that “the true course [was] to let error be tolerated, [and] to grant freedom of speech, and freedom of the press, and apply reason to put it down.”³⁴⁰ Adams hoped “that the sacred right of petition would remain unimpaired.”³⁴¹ In the end, the House voted to take abolition off the political agenda. It agreed by a vote of 117 to 68 to the following resolution on the subject:

[W]hereas it is extremely important and desirable that the agitation of this subject should be finally arrested, for the purpose of restoring tranquility to the public mind, your committee respectfully recommend the adoption of the following . . . resolution, viz:

Resolved, That all petitions, memorials, resolutions, propositions, or papers, relating in any way, or to any extent whatever, to the subject of slavery, or the abolition of slavery, shall, without being either printed or referred, be laid upon the table, and that no further action whatever shall be had thereon.³⁴²

This resolution (in various forms) became the rule of the House for the next seven stormy years. To many Congressmen, as Adams put it, the resolution was “a direct violation of the constitution of the United States . . . and the rights of my constituents.”³⁴³ As predicted by many, both in and out of Congress, the gag rule became a cause celebre, and the abolitionists made the most of it. Adams conducted

³³⁸ CONG. GLOBE, 24th Cong., 1st Sess. 75 (1836).

³³⁹ *Id.* at 121.

³⁴⁰ *Id.* at 137.

³⁴¹ *Id.*

³⁴² *Abolition Report*, reprinted in 12 CONG. DEB. 4052-53 (1836).

³⁴³ *Id.* at 4053.

brilliant guerilla warfare against it until it was finally abandoned in 1844.

The gag rule repressed abolitionist petitions, but it also attempted to silence congressional discussion. It gagged congressmen as well as abolitionists, underlining the abolitionists' warning that the suppression of their rights implicated the rights of others as well. The gag rule suppressed discussion based on content—slavery. But it seems to have been applied neutrally to proslavery and antislavery petitions and resolutions. Suppression was not based on point of view.³⁴⁴ Of course, removing an issue from the agenda benefits the status quo. Southern states' suppression of abolitionist speech and press, in contrast, was based on point of view. Southern nullifiers and nationalists remained free to agitate the slavery issue.

Still, congressional action against petitions was limited to restricting congressional discussion of them. The constitutional guarantee of the right to petition discouraged any direct federal attempt to punish petitioners for abolitionist ideas expressed in their petitions. A Virginia state prosecution occurred in 1839 for circulating an abolitionist petition to Congress.³⁴⁵ The Virginia court construed its anti-abolition statute narrowly and did not reach the petition issue.

The demands to suppress abolitionist expression had all assumed that abolitionist speech and press were not the sort of thing the federal or state constitutions meant to protect. If abolitionist expression was not protected speech or press, what was it? It fell, supporters of suppression insisted, into one or more unprotected categories of expression.

D. Possible Categories Justifying Suppression

1. *Treason*.—Sometimes, abolitionist expression was denounced as treason. The framers of the Federal Constitution were familiar with political abuses of the English law of treason.³⁴⁶ The *Federalist Papers* defended the severely limited definition of treason (waging war against the United States and giving aid and comfort to their enemies) as a crucial guarantee of civil liberty.³⁴⁷ The Treason Clause was an important guarantee protecting political speech and press.³⁴⁸ Abolitionists pointed to the federal guarantee to refute the claim that their

³⁴⁴ See CONG. GLOBE, 24th Cong., 1st Sess. 187 (1836).

³⁴⁵ *Bacon v. Commonwealth*, 48 Va. (7 Gratt.) 602, 602-03 (1850).

³⁴⁶ THE FEDERALIST NO. 84, at 435 (Alexander Hamilton) (Bantam Books ed., 1982) (citing the treason clause as a guarantee of liberty); see also William Mayton, *Seditious Libel and the Lost Guarantee of A Freedom of Expression*, 84 COLUM. L. REV. 91, 116-18 (1984).

³⁴⁷ THE FEDERALIST NO. 84, at 435 (Alexander Hamilton) (Bantam Books ed., 1982).

³⁴⁸ *Id.*; U.S. CONST. art. III, § 3.

actions constituted treason.³⁴⁹ State constitutions were typically equally restrictive.³⁵⁰

In the conflict over anti-abolition petitions, some congressmen suggested that Adams' actions, in presenting petitions allegedly from slaves or advocating disunion, were treason or indictable as violations of the law of the District of Columbia. Because of the Treason Clause and the speech and debate clause, these were isolated suggestions that other Southern congressmen refused to join.³⁵¹

2. *Seditious Libel*.—Seditious libel or sedition was a more promising theory to exclude abolition from protections of free speech and press. By 1835, a broad consensus emerged that the federal government lacked power to pass sedition laws or even laws directly restraining the press.³⁵² However, most Senators thought state sedition laws were another matter.

After the Sedition Act, commentators, courts, and legislatures struggled to reconcile the English and American models for free speech and press. Limitations on public debate and prosecutions for criticism of public officials were recognized in English law. In England, Parliament was sovereign. In contrast, in the American system people were sovereign. As a result, James Madison insisted that popular sovereignty required popular freedom of debate on political issues.³⁵³ Similarly, John Thompson, a New York lawyer, argued that just as Parliamentary sovereignty required freedom of debate in Parliament which could not be controlled by the King, so in America popular sovereignty required a similar immunity for the sovereign American electorate.³⁵⁴

³⁴⁹ See A FULL STATEMENT OF THE REASONS WHICH WERE IN PART OFFERED TO THE COMMITTEE OF THE LEGISLATURE OF MASSACHUSETTS ON THE FOURTH AND EIGHTH OF MARCH SHOWING WHY THERE SHOULD BE NO PENAL LAWS ENACTED, AND NO CONDEMNATORY RESOLUTIONS PASSED BY THE LEGISLATURE RESPECTING ABOLITIONISTS AND ANTI-SLAVERY SOCIETIES, 11 (Boston, Mass. 1836) [hereinafter A FULL STATEMENT]. The treason clause provision was also cited by Congressman John Quincy Adams in defending himself against similar charges. See JOHN QUINCY ADAMS, LETTERS FROM JOHN QUINCY ADAMS TO HIS CONSTITUENTS OF THE TWELFTH CONGRESSIONAL DISTRICT IN MASSACHUSETTS 24 (Boston, Mass., Issac Knapp 1837). For examples in which abolitionists were accused of treason, see JAY, WRITINGS ON SLAVERY, *supra* note 77, at 141, 148.

³⁵⁰ 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW, 312, § 357 (1856).

³⁵¹ RICHARDS, JOHN QUINCY ADAMS, *supra* note 55, at 128, 142; *House Report on the Censure of Mr. Adams*, in 13 CONG. DEB. 1638 (1837).

³⁵² See, e.g., 12 CONG. DEB. 1728 (1836) (Sen. Clay of Kentucky); 12 CONG. DEB. 1721-22 (1836) (Sen. Webster, Massachusetts); see also JOHN C. CALHOUN, SPEECHES OF JOHN C. CALHOUN 190 (Harper & Brothers ed., 1843).

³⁵³ James Madison, *Report of the Committee to Whom Were Referred the Communications of Various States, Relative to the Resolutions of the Last General Assembly of this State Concerning the Alien and Sedition Laws*, in VI THE WRITINGS OF JAMES MADISON 395-98 (Gaillard Hunt ed., 1906).

³⁵⁴ THE COURSE OF TOLERANCE, *supra* note 4, at 6-7.

Though state judicial law evolved in the direction of broader liberty in the years after the Sedition Act, some states lagged behind the Sedition Act itself and refused to recognize falsity as an element of the crime of libel or truth as a defense. Legislatures tended to respond by broadening the protections for free speech and press.³⁵⁵ James Kent in his *Commentaries* insisted the English common-law doctrine—that truth was not admissible—prevailed except where changed by statute or constitutional provision.³⁵⁶ Kent believed the trend to make truth alone a sufficient justification was pernicious. It should only justify the alleged libel where the publication was for good motives and justifiable ends. This was the New York doctrine.³⁵⁷

By 1835, little if any judicial authority holding that state sedition laws violated state free press guarantees. Still, the defense of truth or truth for good motives and justifiable ends began to limit the rigor of the common law.³⁵⁸ In his *Commentaries on Criminal Law*, Joel Bishop cited a definition of libel that included alienating men's minds "from the established constitution of the state"³⁵⁹ and further suggested that any publication "which tends to excite any crime whatever, may be treated as a libel."³⁶⁰ Still, Bishop insisted that publications apparently coming within these broad definitions would not be libels "if a suppression of it would be a restraint upon that open discussion of proper subjects which is essential to the liberty of the people."³⁶¹ Bishop deduced "this doctrine . . . from the cases generally, and the reasons of the law" rather than from "any express decision."³⁶²

In 1835, at the height of the controversy over abolitionist agitation, William Sullivan, L.L.D., insisted that Massachusetts could and should ban abolitionism. Rights, he insisted, were limited by the rights of others. Abolitionist meetings and publications tended to "destroy the peace, commerce, amity, and friendly intercourse" of Massachusetts' citizens with citizens of the South. Abolitionists had perverted the constitutional "privilege of public meetings" into a public evil that the legislature could forbid by criminal statutes. The state legislature could declare meetings "to promote immediate and general emancipation [held] in non-slave-holding States" to be "unlawful, dis-

³⁵⁵ *Id.* at 22-34. For a discussion of nineteenth century libel law in New York, see Donald Roper, *James Kent and the Emergence of New York's Libel Law* 17, AM. J. LEGAL HIST. 223 (1973). Ultimately, Roper concludes that Kent's role as a protector of free speech has been exaggerated.

³⁵⁶ 2 KENT'S COMMENTARIES, *supra* note 2, at 21 (lecture xxiv).

³⁵⁷ *Id.* at 23.

³⁵⁸ See generally LEONARD LEVY, THE EMERGENCE OF A FREE PRESS 338-49 (1985).

³⁵⁹ 2 JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW 516, § 784 (Boston, Mass., Little, Brown & Co. 1858) [hereinafter 2 BISHOP, COMMENTARIES].

³⁶⁰ *Id.* at 517, § 789.

³⁶¹ *Id.* at 518, § 791.

³⁶² *Id.*; see also *id.* at 518 n.2.

orderly, seditious, and against the peace . . . of this Commonwealth; and punish those who appear at such meetings."³⁶³

Sullivan "hoped and expected" Massachusetts to "enact laws declaring the printing, publishing, and circulating papers and pamphlets on slavery; and also the holding of meetings to discuss slavery and Abolition, *to be public, and indictable offenses*."³⁶⁴ Failure to suppress abolition, he accurately if prematurely warned, would lead to integrated schools, "colored men" admitted to all the occupations of life, colored army commanders, colored jurymen and colored legislators.³⁶⁵

The *Evening Post* carried a debate between two correspondents, "Plain Truth" and "Veto," on legal justification for suppression of abolition. For Plain Truth, libel was not protected expression. A publication that had the "direct tendency . . . to excite *rebellion against the laws* is libelous."³⁶⁶ Abolitionist expression had the plain and natural tendency to excite slave insurrections. Therefore, "these firebrands of sedition—these fanatical disturbers of the publick peace" should be surrendered to "the indignant justice of their country."³⁶⁷ Nor would the defense of truth be sufficient to provide constitutional protection. Plain Truth insisted that truth was only a defense when published for good motives and justifiable ends.³⁶⁸ Writing in the same paper, Veto criticized Plain Truth's analysis.

Veto had no sympathy for abolitionists, who he believed were guilty of "virtual though unintentional urging of insurrection and massacre."³⁶⁹ Still, Veto opposed the demand that Northern states suppress abolitionist publications and protested "in the name of freedom and free discussion." He wrote, "I deny totally that the Northern Legislatures have the power to prevent the publication of any document whatever."³⁷⁰ So far, Veto's remarks may simply indicate a condemnation of prior restraint. He cited the New York Constitution:

Every citizen may freely speak, write and publish, his sentiments *on all subjects* being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or the press. What can our legislature, were it ever so well disposed, do in the teeth of this provision?³⁷¹

Veto insisted that Northerners had abolished slavery because they were determined not to permit the "odious" institution to "en-

³⁶³ SULLIVAN, LETTERS AGAINST IMMEDIATE ABOLITION, *supra* note 1, at 42.

³⁶⁴ *Id.* at 43.

³⁶⁵ *Id.* at 44.

³⁶⁶ *The Law of Libel and the Abolitionists*, EVENING POST (NY), Aug. 31, 1835, at 2.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *The Richmond Meeting—Southern Pretensions*, EVENING POST (NY), Aug. 17, 1835, at 2.

³⁷⁰ *Id.*

³⁷¹ *Id.*

danger the right of free discussion."³⁷² Remarkably, Southern demands contained "the distinct admission" that slavery "will not bear discussion. They say expressly that they cannot permit any examination of it."³⁷³ The North, Veto announced, would not co-operate in the "Southern plan of abridging private right. We have nothing here that will not bear the broad light of truth."³⁷⁴

In September 1835, Veto responded directly to Plain Truth's plan to ban abolition as libel. He insisted that a person accused of criminal libel could defend himself by establishing the truth of the assertions, a good motive in publishing them, and a justifiable end in view at the time of publication.³⁷⁵ He cited Chancellor Kent for the proposition that the state constitution guaranteed the accused the right to present facts to the jury to establish good motives and justifiable ends.³⁷⁶

Veto envisioned a very interesting political trial. If Mr. Tappan or the editor of the *Emancipator* were indicted for a libel tending to stir up slave revolt by saying that "slavery is a cruel institution, that it originated in robbery, that it leads to oppression on the part of the master, and misery on the party of the slave . . . &c. &c." then "Mr. Tappan or the Editor would have a right to produce evidence to prove the truth of the facts so alleged by him and that no judge would dare shut it out." He could then proceed to prove a good motive—a humane desire to "free the Africans from bondage." He could show that his action was justified by showing that slavery

is a serious evil to those states in which it exists . . . [U]nder our present Constitution no law can be passed which shall make the course to be pursued on an indictment for libel any different from what I have now described it to be, and . . . the 'tendency' of the writing has nothing to do with the matter . . .³⁷⁷

Finally, Veto quoted the argument of Justice Smith Thompson in *People v. Croswell*.³⁷⁸ If English law were the standard, then "all those enlightened and manly discussions which prepared and matured the great events of our Revolution, or which, in a more recent period pointed out the recklessness and folly of the confederation and roused the nation to throw it aside and to erect a better government on its ruins" would be suppressible. These were libels on the existing estab-

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *The Law of Libel and the Abolitionists*, EVENING POST (NY), Sept. 14, 1835, at 2.

³⁷⁶ *Id.*

³⁷⁷ *Id.* Veto did admit that the tendency of the writing could be evidence of intent.

³⁷⁸ *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804). Although a divided court in *Croswell* did not establish the more libertarian standard of truth published for good motives and justifiable ends, that standard together with a broad role for the jury, was established in An Act Concerning Libels, Laws of the State of New York (Albany, 1805), reprinted in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT, *supra* note 144, at 40-42.

lishments, because they tended to defame them. "THEY WERE, HOWEVER, LIBELS FOUNDED IN TRUTH AND DICTATED BY WORTHY MOTIVES."³⁷⁹

Veto's conception of free speech was more protective of political expression than the conception he criticized. But, ultimately, it left freedom of speech to the protection of juries and limited political speech to "truth" spoken for justifiable ends. Its most libertarian feature was that it rejected the idea that bad tendencies justify punishment. Other Northern writers suggested that protection for abolitionist speech was broader. Under state constitutions, they insisted, no law could be passed to punish political opinion.³⁸⁰

In 1836, Reuben Crandall was tried for circulating incendiary (abolitionist) papers in the District of Columbia. The indictment cited the tract's argument that emancipation was in the best interest of the slaveholders. This was so because "[t]he slave will become conscious, sooner or later of his strength . . . His torch will be at the threshold, and his knife at the throat of the planter."³⁸¹ The prosecution was based not on a statute, but on the common law of sedition. Indeed, Francis Scott Key, the prosecutor, insisted that "[t]he repeal of the sedition law left the common law, by which these offenses always were punishable, in full force."³⁸² Although Crandall possessed a number of copies of an abolitionist tract, and allowed one critic of abolitionism to take a copy away and read it, proof that he had been circulating the tracts in Washington to propagate abolitionist ideas was thin. The jury acquitted.

3. *Group Libel*.—Southern representatives argued that abolitionist petitions and pamphlets were like ordinary libel of an individual except that an entire class was libeled—slaveholders. Senator Calhoun complained of references made to slaveholders as dealers in human flesh and pirates.³⁸³ Libel of individuals was unprotected expression, so libel of the group of slaveholders justified refusing to receive petitions for abolition.³⁸⁴ By implication, the argument also justified Northern action to suppress abolition as criminal libel. Rep-

³⁷⁹ *The Law of Libel and the Abolitionists*, EVENING POST (NY), Sept. 14, 1835, at 2.

³⁸⁰ See, e.g., CINCINNATUS, *supra* note 230, at 17-20.

³⁸¹ THE TRIAL OF REUBEN CRANDALL, M.D., CHARGED WITH PUBLISHING AND CIRCULATING SEDITIOUS AND INCENDIARY PAPERS, ETC. IN THE DISTRICT OF COLUMBIA, WITH THE INTENT OF EXCITING SERVILE INSURRECTION (1836), *reprinted in* SLAVE REBELS, ABOLITIONISTS, AND THE SOUTHERN COURTS 8 (Paul Finkelman ed., 1988).

³⁸² *Id.* at 46.

³⁸³ See, e.g., CONG. GLOBE, 24th Cong., 1st Sess. 83, 120 (1836).

³⁸⁴ *Id.* at 83, 119-22 (statement of Sen. Calhoun).

representative Hammond clearly thought libel of Southerners (or slaveholders) as a group should be treated like individual libel:

Did freedom of speech or freedom of the press allow of licentiousness? If a man in New York were to say of his neighbor what those papers say of the Southern people, would he not be indicted as a slanderer? And if he wrote the slanders would he not be indicted as a libeler? Then are not the people of the South entitled to the same protection?³⁸⁵

In spite of this creative theory, there seem to have been no Northern group libel prosecutions for criticizing slaveholders. Bishop suggested that petitions, like court proceedings, received very broad protection against libel actions.³⁸⁶ Today, at common law, libel is typically not applicable to members of very large groups.³⁸⁷

4. *Prosecution Under the Common Law.*—In his message to the Massachusetts Legislature, Governor Edward Everett invoked the constitutional “compact” that recognized slavery and conceded to the Southern states

important rights and privileges connected with it. Every thing that tends to disturb the relations created by this compact is at war with its spirit; and whatever, by direct and necessary operation, is calculated to excite an insurrection among the slaves, has been held . . . an offense against the peace of this Commonwealth, which may be prosecuted as a misdemeanor at common law.³⁸⁸

In spite of Southern requests to suppress abolitionist expression in Massachusetts and his suggestion of common-law prosecutions for publications with a direct tendency to lead to slave revolts, Everett was unwilling to endorse general statutes for the suppression of abolitionist publications. This was because “the genius of our institutions and the character of our people are entirely repugnant to laws impairing the liberty of speech and of the press, even for the sake of repressing its abuses.”³⁸⁹ Everett called on patriotic citizens to abstain from discussion.³⁹⁰ If a direct tendency to cause slave revolts required transmission to the South, Everett’s theory was limited to publications sent South. Some critics, however, assumed that Everett’s theory justified the suppression of abolitionist publications aimed only at Northerners.³⁹¹

³⁸⁵ *Id.* at 158.

³⁸⁶ 2 BISHOP, COMMENTARIES, *supra* note 359, at 519.

³⁸⁷ *Beauharnais v. Illinois*, 343 U.S. 250, 271-72 (1952) (Black, J., dissenting). *But see id.* at 258 & n.7 (wherein the Court refers to “authority, however dubious” that group libel utterances were crimes at common law).

³⁸⁸ MASS. HOUSE DOC. NO. 6, *Address of His Excellency Edward Everett to the Two Branches of the Legislature, on the Organization of the Government, for the Political Year Commencing January 6, 1836*, at 29-30 (Boston, Mass. 1836).

³⁸⁹ *Id.* at 30.

³⁹⁰ *Id.*

³⁹¹ *History of Calhoun's Sedition Law*, EVENING POST (NY), June 18, 1836, at 2.

There seem to have been no Northern prosecutions based on the common-law breach of the peace theory or any other common-law theory. As noted above, Reuben Crandall was prosecuted in the District of Columbia for the common-law crime of sedition. The *Washington Globe* did report that "grand jurors of Oneida county . . . presented the abolition publications as incendiary and call on the people to 'destroy all such publications, wherever and whenever they can be found.'" ³⁹² The *Globe* expressed its approval, and the *Globe* and the grand jury did not seem to limit their strictures to papers sent South. The *Globe* embraced the bad tendency test: papers "tending to excite insurrection and to break up the peace and harmony of States, are certainly as indictable as libels leading to breaches of the peace between individuals." ³⁹³

The theories discussed above all turned on the issue of whether abolitionist expression was constitutionally protected. The issue of extradition was somewhat different. It focused on one mechanism of suppression.

5. *Extradition—Prosecution of Northerners Under Southern Laws.*—Yet another legal theory to suppress abolitionists for publications reaching the South was to punish Northern disseminators under Southern laws in Southern courts. This "bright idea," ³⁹⁴ as abolitionist legal theorist William Jay ironically called it, had obvious advantages. Virtually the entire abolitionist leadership could be prosecuted. The prosecutions would take place in a venue where juries would be most sympathetic to slavery and most hostile to abolitionists. The claim was not entirely implausible. Southerners argued by analogy that a culprit who fired a mortar across state lines from a Northern to a Southern state should be extradited. Why should the rule be different for abolitionists launching their incendiary verbal missiles from the North to the South? ³⁹⁵

Southerners advanced two theories to justify extradition, one that might be called "constructive flight" and one based on comity. In international law, one nation could, and sometimes did, extradite its citizens who offended the law of another. Southerners insisted that comity was even more appropriate between sister states. The Federal Constitution provided for delivery of persons "charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State." ³⁹⁶ In this case, some Southerners insisted

³⁹² *A Grand Jury Preseniment*, WASH. GLOBE, Sept. 29, 1835, at 2.

³⁹³ *Id.*

³⁹⁴ JAY, WRITINGS ON SLAVERY, *supra* note 77, at 345.

³⁹⁵ CONG. GLOBE, 24th Cong., 1st Sess. 123-24 (1836).

³⁹⁶ U.S. CONST. art. IV, § 2, cl. 2.

on a liberal construction of the Constitution to prevent abolitionists from escaping justice.

Northerners disagreed. "Novus Anglus," writing for the *New Haven Herald*, insisted that abolitionists had never been in the South and therefore had not fled from it as the Constitution contemplated. As to comity, extradition was "conceded only in extreme cases, where the offenses charged are of the deepest dye, & equally criminal by the laws of every State."³⁹⁷ A slight offense in one state might be punishable by death in another. Some states would grant a fair trial, but in others the trial would be a mockery. South Carolina, Novus Anglus noted, nullified the tariff and made attempted enforcement a crime. If the state had attempted to enforce the law of treason, would the Northern editor who urged enforcement and sent his paper to Charleston be extradited?³⁹⁸

Novus Anglus believed extradition would undermine the freedom of the press in the North. Connecticut made truth a defense to libel, but "in some of our sister states, proof of the truth of the libel would be no justification at all."³⁹⁹ In fact, Southern laws typically were written in terms of the bad tendency of the expression or directly forbade certain types of expression. Truth, apparently, was irrelevant. Extradition would provide a power over the press "which would prove absolutely fatal to the liberties of the country. A publication innocent in Connecticut, because true, might subject the writer to be whipped in one state, branded in another, imprisoned in a third, and finally perhaps, to be hung under the . . . laws or usages of a fourth." Such a power would destroy freedom.⁴⁰⁰

The extradition theories were tested, at least in the political arena. Governor John Gayle of Alabama demanded the extradition of Robert Williams for publication of the *Emancipator*, a "seditious" paper which had said "'God commands, and all nature cries out, that man should not be held as property . . .'"⁴⁰¹ Governor Gayle insisted that the constitutional provision for delivery of fugitives should be liberally construed because "it is in favour of the rights of the states, and because, without such construction, they will be deprived of the power of self protection."⁴⁰² The word "flee" he insisted was synonymous with the word "evade."⁴⁰³ Even independent states under the doctrine of comity should surrender serious offenders

³⁹⁷ *Fugitives from Justice*, EVENING POST (NY), Oct. 14, 1835, at 2.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Legislature of New York: Requisition of the Governour of Alabama*, EVENING POST (NY), Jan. 11, 1836, at 2.

⁴⁰² *Id.*

⁴⁰³ *Id.*

against the laws of other states. The problem with comity, as Gayle recognized, was that it left "too much in the power of the applied to, to judge of the nature of the crime."⁴⁰⁴

Governor William Marcy of New York refused to extradite Williams. Williams had not fled from Alabama, Marcy noted, since he had never been there. Finally, Governor Marcy lectured Governor Gayle on the dangers of loose construction. "If your construction be correct, [the fugitive from justice] clause has conferred the power on each state to pass laws that have an extra-territorial operation, and to prescribe rules to which the citizens of all the other states must conform"⁴⁰⁵ This, Marcy insisted, was a serious diminution of state rights. As Southerners saw it, abolitionists were being sought for acts which had an effect outside of the state where they resided.

Demands for the suppression of abolitionist publications, petitions, and associations produced, in turn, both Northern resistance and defense of freedom of speech, press, and petition. In 1835, 1836, and 1837, major controversies erupted over abolitionists' use of the post office, over petitions, over Northern legislation to suppress abolition, and, as we have seen, over extradition. While the controversies were distinct, they involved common elements—the limits of free speech, press, and petition rights; the effort to remove the issue of slavery from the political agenda; and broadly speaking, the issue of extraterritoriality. Would aspects of the slave code be enforced in the North or would the liberties taken by Northerners imperil slavery? Southern demands for laws to suppress Abolitionist speech and press in the North changed public opinion in the North—a "great reaction" *Niles' Weekly Register* called it—even among those who had been disposed to put down the abolitionists.⁴⁰⁶ The *Weekly Register* now saw the free speech and press issue as producing sectional divisions: "The *Missouri question* is revived in another shape, and in a highly excited manner."⁴⁰⁷ Before demands to suppress abolition by Northern censorship laws, papers like the *Weekly Register*, the *Evening Post*, and the *Washington Globe* had largely presented the abolitionists through the words of their opponents. They portrayed abolitionists as "incendiaries" and "miserable fanatics." On the free speech issue at least, the *Weekly Register* and the *Post* now occasionally directly quoted what the abolitionists had to say: slavery was a threat to the liberty of the North. The *Weekly Register* republished an antislavery poem:

Is't not enough that this is borne?

And, asks our haughty neighbor more?

Must fetters which his slaves have worn

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ NILES' WKLY. REG., Oct. 3, 1835, at 65.

⁴⁰⁷ *Id.*

Clank round the Yankee farmer's door?
Must *he* be told, beside his plough,
What he must speak, and *when* and *how*?⁴⁰⁸

"The time is coming," the *Evening Post* announced in November 1835, "when the freemen of the Northern states must decide whether their legislation shall be that of their own will or dictated to them by the slaveholding sections of the Union."⁴⁰⁹

Many Northerners rebelled at the idea of protecting slavery from all criticism. The Governor of Georgia had suggested that if abolitionists "*only have to encounter the weapon of reason and argument, have we not reason to fear, that their untiring efforts may succeed in misleading the majority.*"⁴¹⁰ In response, the *Evening Post* insisted it was unwilling to protect a system unable to survive reason and argument.⁴¹¹ Writing about the censorship at the Charleston Post Office, the *Post* wrote that the government must not be permitted to enforce political orthodoxy or to allow mobs to do so.⁴¹²

One significant effect of the effort to silence abolition was that it produced a defense of freedom of expression. By 1859, a broad defense of free expression on the subject of slavery was a central part of the ideology of the Republican Party. In the eyes of many, free expression became a right of American citizens. But from 1835 to 1837, the idea of a national right to free speech that limited state abridgements was in its infancy.

IV. THE DEFENSE OF FREE SPEECH.

A. *The Abolitionist Defense of Freedom*

At the height of the crisis of 1835, James G. Birney, a Kentucky abolitionist editor who moved to Ohio, wrote to Gerrit Smith. Birney referred to "the exorbitant [sic] *claims* of the South on the liberties of the free states—demanding that every thing that has heretofore been deemed precious to them should be surrendered, in order that the Slaveholder might be perfectly at ease in his iniquity."⁴¹³ Birney suggested an irrepressible conflict between principles of liberty and slavery, an idea that would later become a commonplace of the Republican Party. He and many other Americans reframed the debate over slavery into a debate over the liberty of American citizens.

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

⁴⁰⁸ *Id.*

⁴⁰⁹ *EVENING POST* (NY), Nov. 13, 1835, at 2.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *EVENING POST* (NY), Aug. 8, 1835, at 2.

⁴¹³ Letter from James G. Birney to Gerrit Smith (Sept. 13, 1835), in *BIRNEY LETTERS*, *supra* note 147, at 243.

necessary, that Slavery should cease in order that freedom may be preserved to any portion of our land. The antagonistic 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.⁴¹⁴

The attacks on free expression for abolitionists shaped Birney's thinking and would shape that of a host of others.

The call for a New York antislavery society convention warned that "the privileges of the free are now doomed as a sacrifice on the altar of perpetual slavery. . . . [W]e shall speedily be all free or all slaves together."⁴¹⁵ The platform of the Convention resolved that "free enquiry and discussion is the corner stone of liberty; and the safeguard of truth, and is dreaded only by tyrants and the wicked: and that it is the RIGHT of American citizens to discuss the subject of slavery as well any other subject; and to express their opinions freely, and fully; privately, and openly."⁴¹⁶ It denounced "any attempt to control or deter this freedom" as "an assumption of illegal power, and an infringement on *rights* given us, by God, and guaranteed to us by the Constitution of the United States, and of the individual states."⁴¹⁷ Free discussion was a right abolitionists would never relinquish. "This high constitutional privilege we shall assert, and exercise in all places, and at all times"⁴¹⁸ "[P]rinciples, opinions, institutions and usages, which cannot bear thorough examination and inquiry," they announced, "are unworthy of Americans, and ought to be abandoned."⁴¹⁹

While others analyzed the rights of free speech and press in light of positive law, abolitionists insisted that the rights were God given rights which state and Federal Constitutions secured but did not create. "No," said Gerrit Smith, "the constitution of my nation and state create none of my rights. They do, at the most, but recognize what is not theirs to give."⁴²⁰ The harried abolitionist convention in Utica in 1835 resolved that "the right of free discussion" was "given to us by our God."⁴²¹

Still, they appealed to constitutional guarantees, and from 1835 through 1837 they typically appealed to both federal and state guarantees. Federal guarantees prevented federal censorship, they sug-

⁴¹⁴ *Id.*

⁴¹⁵ PROCEEDINGS OF A CONVENTION OF DELEGATES, ASSEMBLED FROM VARIOUS PARTS OF THE STATE OF NEW YORK, AT UTICA, IN THE COUNTY OF ONEIDA, ON 21, OCTOBER 1835 [hereinafter PROCEEDINGS OF NEW YORK CONVENTION OF DELEGATES].

⁴¹⁶ *Id.* at 12.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 13.

⁴¹⁹ *Id.* at 16.

⁴²⁰ *Id.* at 19.

⁴²¹ *Id.* at 16.

gested, and state guarantees prevented state suppression. Indeed, abolitionists suggested that their critics appealed not to the Constitution but to their understanding of the North/South bargain or compact the critics said underlay it. Explicit constitutional guarantees, the Anti-Slavery Society complained, were thus "set at naught by men, whom your favour has invested with a brief authority." These men measured liberty of conscience, of speech, and of the press not by the constitution but by "the COMPACT by which the South engages on certain conditions to give its trade and votes to Northern men All rights not allowed by this compact, we now hold at sufferance" ⁴²²

While abolitionists appealed to the Federal Constitution and to those of the Northern and Southern states, ⁴²³ in the years 1835-37 they rarely unequivocally suggested that Southern censorship violated the Federal Constitution. The paradigm of 1835-37 was that of the semi-sovereign state. In the end, the position tolerating Southern suppression was unstable: it left the rights of opponents of slavery in the South to be decided by Southern courts from which no appeal existed.

Still, abolitionists insisted that states—with their own constitutional guarantees—lacked power to suppress abolitionist expression. In the long run, a party dedicated to the ultimate extinction of slavery could not accept a decision to ban its discussion in the South. To accept such limitations left opponents of slavery preaching antislavery where slavery did not exist. So it is hardly surprising that abolitionists, and later Republicans, embraced the idea that federal guarantees for free speech, free press, and freedom of religion were needed to protect Americans throughout the nation and that Southern suppression of antislavery speech violated or should violate federal constitutional principles.

Once slavery became a political issue, indeed the central political issue, the tension between ideas of republican government and slavery became apparent and unbearable. The Constitution contained guarantees drawn from the experience of the struggle for liberty in England. These guarantees were designed to protect representative government. Congress could not abridge free speech, free press, and freedom of religion. Political speech could not be treason. The people had a right to petition, and members of Congress were protected from punishment for things said in congressional debates. All of these provisions carried threats for the institution of slavery.

The Constitution also guaranteed each state a republican form of government. But in the South, one of the major political factions of the day could not advocate its ideas, and peaceful change of the insti-

⁴²² *To The People of the United States or To Such Americans as Value Their Rights, and Dare to Maintain Them*, EVENING POST (NY), Aug. 2, 1836, at 2.

⁴²³ A FULL STATEMENT, *supra* note 349, at 10.

tution of slavery could not be discussed. To abolitionists and later to Republicans, this was not republican government. It was, as Republicans in 1859 saw it, despotism.

In contrast to those in Congress who insisted that states retained the power to suppress abolition though the federal government did not, representatives of the Massachusetts Anti-Slavery Society, like many nonabolitionists, suggested that both governments were equally restricted from suppressing political opinion. "The power of restricting freedom of speech and of the press was withheld from the Legislature of MASSACHUSETTS, *for the same reason* that it was withheld from the GENERAL GOVERNMENT, and to *the same extent*."⁴²⁴

Abolitionists appearing before a committee of the Massachusetts legislature insisted that in violation of constitutional provisions the "slaveholding States . . . have bound the lips and pen of the *free white citizens*."⁴²⁵ These Southern statutes and similar proposals to limit abolitionist speech in the North were justified with the claim that "the Legislature is invested with authority to suppress whatever discussion or publication shall be deemed subversive of the public safety or peace."⁴²⁶ In short, speech that had bad tendencies could be suppressed. Such an assumption of power by the legislature, the Anti-Slavery Society insisted, "would nullify the provisions of the Constitution, and place that discretionary power in legislators, which it was the manifest intent of the Constitution to withhold from them." The object of the constitutional restriction was that "the legislature shall be intrusted with no such discretionary power; shall take into consideration no such supposed contingencies."⁴²⁷

In their rejection of the bad tendency test, Massachusetts abolitionists cited the Virginia Statute of Religious Freedom. They suggested its principles were equally applicable to speech and press.

To suffer the civil magistrate to intrude his power into the FIELD OF OPINION, and restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because, he, being of course the judge of that tendency, will make his opinions the rule of judgement, and approve or condemn the sentiments of others, only as they shall square with, or differ from his own. It is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break forth into OVERT ACTS against peace and order; and finally, truth is great, and will prevail, if left to herself; she is the proper and sufficient antagonist

⁴²⁴ *Id.* at 17.

⁴²⁵ *Id.* at 10.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

of error⁴²⁸

Finally, abolitionists noted the extent of the violation of their rights. They could not travel in half the states of the Union without imperiling their lives. If the sentiments of Pickney or Jefferson on the subject of slavery were found among their papers "our Southern brethren deem us worthy of public stripes." Though they paid like other citizens for the support of the United States Postal Service, "[w]e may use it only at the discretion of our Dictators."⁴²⁹ The representatives of the Massachusetts Anti-Slavery Society asked their legislature "to maintain and assert the doctrines of freedom."⁴³⁰ As we have seen, a significant number of influential nonabolitionists insisted on freedom for political opinion and that truth was the appropriate antidote for error. Like Madison's report on the Sedition Act, they insisted that constitutional guarantees of free speech were designed to change the common law.⁴³¹

Women joined the abolitionist crusade and some began to give abolitionist speeches to "promiscuous" (sexually integrated) audiences. That in turn provoked a hostile reaction from some ministers and some abolitionists. Criticism ranged from the idea that women were violating the natural order by engaging in politics to the argument that, as a matter of prudence, issues of the rights of women should be avoided. The Grimké sisters insisted on meeting the issue directly. They analogized the attack on the right of women to speak to the attack on free speech rights for abolitionists, and they insisted that the denial of free speech rights to women would furnish a precedent for more sweeping invasions of freedom of speech.⁴³² The issue eventually split the abolitionist movement.

B. The Political Defense of Free Speech and Press After 1835-37

In the years that followed the events of 1835-37, opponents of slavery gradually began to embrace an even broader conception of freedom of conscience, speech, and press. The effort to keep the issue

⁴²⁸ *Id.* at 10-11. See also Letter from William Ellery Channing to James G. Birney (Nov. 1, 1836), reprinted in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT, *supra* note 144, at 199 stating that:

Almost all men see ruinous tendencies in whatever opposes their particular interests or views. 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 connections and consequences of human affairs, that nothing can be done in which some dangerous tendency may not be detected.

⁴²⁹ A FULL STATEMENT, *supra* note 349, at 34.

⁴³⁰ *Id.* at 36.

⁴³¹ AN ACCOUNT OF THE INTERVIEWS WHICH TOOK PLACE ON THE FOURTH AND EIGHTH OF MARCH BETWEEN A COMMITTEE OF THE MASSACHUSETTS ANTI-SLAVERY SOCIETY AND THE COMMITTEE OF THE LEGISLATURE 15-16 (Boston, Mass. 1836).

⁴³² 1 WELD-GRIMKÉ LETTERS, *supra* note 71, at 426-30, 433; Amar, *supra* note 117, at 1279-84.

of slavery off the political agenda failed, in part because one faction of Southerners demanded increasing protections or reassurances for the institution. Therefore, Senator John C. Calhoun introduced resolutions on the subject that were debated in early 1838. One of these, the third resolution, resolved that the Government was under a duty to resist "all attempts by one portion of the Union to use it as an instrument to attack the domestic institutions of another."⁴³³ Another

[r]esolved, [t]hat domestic slavery, as it exists in the Southern and Western States of this Union, composes an important part of their domestic institutions, inherited from their ancestors, and existing at the adoption of the constitution, by which it is recognized as constituting an important element in the apportionment of powers among the States, and that no change of opinion or feeling on the part of the other States of the Union in relation to it, can justify them or their citizens in open and systematic attacks thereon.⁴³⁴

Senator Smith of Indiana suggested an amendment: nothing in the resolutions

shall be . . . understood as expressing an opinion of the Senate adverse to the 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 . . . shall never be abridged. That error of opinion may be tolerated while reason is left free to combat it . . ."⁴³⁵

Smith's resolution was amended by substituting a statement that the Calhoun resolution was not intended to allow Congress to interfere with freedom of speech or of the press "as secured by the constitution to the citizens of the several States, within their States respectively."⁴³⁶ The substitute passed over the objection of fourteen senators, including Smith. Still, Smith made a strong plea for freedom of opinion, as he understood it.

[C]ombat error of opinion by reason, not by gag laws, not by mobs, not by inquisitions, not by establishing censorships over the press, not by abridging the freedom of speech, but by reason, holding the parties responsible for the abuse of all these privileges, or rather rights, to the party aggrieved; and then the question, what are and what are not errors of opinion, must be left to the final arbiters—the people, where they must be left in every country where liberty dwells.⁴³⁷

Southern attacks on antislavery expression generated a more vigorous defense of free speech. Smith insisted that the resolutions indi-

⁴³³ See ABRIDGMENT OF THE DEBATES OF CONGRESS, 25th Cong., 2d Sess. 578 (1838).

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 582.

⁴³⁶ *Id.* at 583.

⁴³⁷ *Id.* at 585.

cated that free speech about slavery in the North was "intermeddling" with the domestic institutions of the South. He said Calhoun's resolutions embraced the principles of the Sedition Act and should be defeated.⁴³⁸ In 1859, Jefferson Davis introduced Senate resolutions similar to those Calhoun had proposed. By this time, a Republican amendment supporting free speech and press on all state and national issues received the united support of Republicans in the Senate.⁴³⁹

In 1838, S.B. Treadwell, an obscure nonlawyer abolitionist, devoted a book to slavery and its relation to American liberty. The centerpiece of the book was a defense of freedom of expression, a concept he distinguished from the "loose . . . idea of a licentious . . . liberty."

The most obscure, or the most unpopular individual in the 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.⁴⁴⁰

Treadwell suggested the right to free speech was a national right protected by the Federal Constitution. Southerners were able to express pro-slavery sentiments in the North and should be protected in that right, for they were "American citizens, still under the . . . American constitution."⁴⁴¹

Free speech was essential to representative government. Free speech must be protected and Treadwell defined it broadly. It was "the business of any, and of each and of all the citizens, under a free government of their own, most freely to discuss and intimately to understand all subjects, moral, political, or scientific, which have, or may have an influence upon the interests of the subjects of such government!!"⁴⁴²

By 1838, one group of abolitionists concluded that the Constitution was an antislavery document and that slavery violated the guarantees of the Federal Bill of Rights. These writers now insisted these guarantees limited state governments as well as the federal government.⁴⁴³ It was a dramatic break from the semisovereign state para-

⁴³⁸ *Id.* at 585-86.

⁴³⁹ Curtis, *The 1859 Crisis over Helper's Book*, *supra* note 242, at 1157-58.

⁴⁴⁰ S.B. TREADWELL, *AMERICAN LIBERTIES AND AMERICAN SLAVERY MORALLY AND POLITICALLY ILLUSTRATED* at xxxii, xxxvii (1969) (Rochester, N.Y. 1838) [hereinafter *AMERICAN LIBERTIES AND AMERICAN SLAVERY*].

⁴⁴¹ *Id.* at 57.

⁴⁴² *Id.* at 60.

⁴⁴³ See, e.g., G.W.F. MELLEN, *AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY* 43, 63, 357, 417, 428 (Boston, Mass. 1841); JOEL TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY* 56-57, 84-89, 93-94, 97, 99 (1849).

digm, a paradigm embraced by most, including most abolitionists, in 1835-36. The view that the Constitution outlawed Southern slavery remained the view of a small minority. By the time of the Civil War, however, influential Republicans embraced the idea that liberties in the Federal Bill of Rights limited state as well as federal denial of *citizens'* rights. Still, until emancipation, most Republicans recognized the legality of slavery in the states.⁴⁴⁴

The recognition of state control over the question of slavery was made more palatable because so many Republicans now believed that American citizens, shielded by the "sacred" guarantees of the Federal Bill of Rights, were entitled to criticize slavery in the South. With the election of a Republican President, they looked forward to access to the mail for Republican ideas and the growth of a local Southern Republican Party. And, they believed that truth would vanquish error, and freedom of speech would destroy slavery. It was a view of the power of free speech against slavery that they shared with John C. Calhoun.⁴⁴⁵

V. CONCLUSIONS AND REFLECTIONS

The Abolitionists and later the Republicans were protected in the right to speak and write against slavery at least in part because of the revered—if somewhat undefined—place freedom of speech and press occupied in the hearts and minds of many Americans. By this tradition, speech and press on political questions, broadly understood, were not to be suppressed. Public opinion was ahead of the law, and it ultimately favored protection for antislavery speech that some Northern state courts might have found suppressible under state law. Broad support for the values of free speech, with strong help from partisan divisions and a federal system, defeated national and Northern state suppression of antislavery speech and press.

The congressional consensus that the federal government lacked power over speech and press insured that no broad federal law would suppress abolition. As to federal action, the congressional consensus on the lack of federal power gave substantially more protection for speech and press than the Court has ever provided,⁴⁴⁶ and far more protection than was provided by decisions following World War I and the Red Scare of the 1950s.⁴⁴⁷ Had Congressmen believed they had

⁴⁴⁴ MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 42 (1986).

⁴⁴⁵ Curtis, *The Crisis over Helper's Book*, *supra* note 242, at 1150.

⁴⁴⁶ See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951). The most protective standard announced by the Court was in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Brandenburg* requires both conduct directed to producing or inciting illegal conduct and clear and present danger.

⁴⁴⁷ See *Debs v. United States*, 249 U.S. 211 (1919); *Dennis v. United States*, 341 U.S. 494 (1951).

power to suppress speech and press where, for example, such action was justified by the gravity of the evil to be prevented discounted by its improbability,⁴⁴⁸ they might have passed an anti-abolition law. Slave revolts, disunion, and civil war were grave evils indeed. Many saw them as the probable effect of agitation of the slavery issue. Had the Supreme Court of the time used the weak version of the "clear and present danger test," it might well have upheld suppression.

State constitutional law provided less protection for abolitionist expression than our contemporary understanding of the guarantees of the First and Fourteenth Amendments,⁴⁴⁹ still no state statutes were passed. Opponents of suppression included many who opposed the abolitionists. They saw the suppression of abolition as the precedent for further encroachments on political liberty and insisted on meeting the menace at the frontier. Defeat of anti-abolition laws in the North came from a broad view of free speech together with the idea that limited incursions (even those directed against doctrines that many believed threatened the Union and the peace and had a tendency to cause slave revolts) would open the way for further denials.

Today it is fashionable to deny such global understandings of threats to free speech. Some scholars reject arguments that suppression of obnoxious ideas provides a precedent for even more dangerous incursions. One such scholar, Professor Mari J. Matsuda, has suggested a standard permitting suppression of hateful speech directed by "dominant" whites at blacks, but not by blacks at "dominant" whites, and for the protection of political speech by Marxists, but not Fascists.⁴⁵⁰ She insists slippery slope arguments are fallacious. Still, law does move by analogy and doctrines tend to expand in the

⁴⁴⁸ *Dennis*, 341 U.S. at 510-11.

⁴⁴⁹ State constitutional guarantees evolved over time and the original meaning of the guarantees has not been fully explicated. State courts are paying increasing attention to the subject. See, e.g., *Price v. State*, 622 N.E.2d 954 (Ind. 1993); *State v. Linares*, 630 A.2d 1340, 1353-54 (Conn. App. Ct. 1993) (Schaller, J., concurring); *Ex parte Tucci*, 859 S.W.2d 1, 9-17 (Tex. 1993). For a chronological collection of state guarantees, see *id.* at 42 (appendix to concurring opinion of Phillips, C.J.). For one analysis of early state constitutions see Robert C. Palmer, *Liberties as Constitutional Provisions 1776-1791*, in WILLIAM E. NELSON & ROBERT C. PALMER, *CONSTITUTIONS AND RIGHTS IN THE EARLY REPUBLIC* 55-148 (1987).

⁴⁵⁰ See Matsuda, *supra* note 7, at 2351-69 (discussing Professor Matsuda's theory of First Amendment jurisprudence). Professor Matsuda advocates that persons of "dominant" groups who engage in racist speech directed at minorities should be subject to criminal penalties. Professor Matsuda maintains, however, that the First Amendment would still protect core political speech. Professor Matsuda's article was cited with approval by the Supreme Court of Minnesota in *In re Welfare of R.A.V.*, 486 N.W.2d 507, 508 (Minn. 1991). The approach taken by the Minnesota court was rejected by the Supreme Court in *R.A.V. v. St. Paul*, 112 S.Ct. 2538 (1992). Both *R.A.V.* and *American Bookseller Assn., Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) reject ideologically selective exceptions to the First Amendment. For a thoughtful discussion of free speech in the academic context, see William Van Alstyne, *The University in the Manner of Tiananmen Square*, 21 HASTINGS CONST. L.Q. 1 (1993).

direction suggested by their logic. Would the pro-free speech anti-abolitionists of 1835-36 have opposed suppression of abolition speech if they believed that suppression could be confined to a unique category and would not spread to other cases? Most in the North were hostile to abolitionists, but they believed that laws aimed at suppressing ideas undermined liberty for all.

At bottom, the issue involved delegating discretion to government officials or juries. Were opponents of abolition willing to concede the power to suppress abolition, and to implicitly recognize governmental discretion to suppress speech that officials find "evil" or fraught with bad tendencies? Many opponents of abolition agreed that it was a wicked doctrine, but were unwilling to trust government with the discretionary power that the suppression of abolition implied.

Today, in contrast, we see renewed calls for prohibition of group libel, for much broadened protection from the real pain caused by (for example) racist words, and a resurrected "bad tendency test"—though limited in theory only to certain bad tendencies. These devices were also touted in the 1830s, though in that case as weapons for the defense of slavery. (In addition to libel and bad tendency, one justification Senator Calhoun gave for rejecting abolitionist petitions was protection of his own "feeling" and the feelings of those he represented.)⁴⁵¹ The history of the 1830s raises a central question: can doctrines like group libel and the bad tendencies test be modified and revived without at the same time providing a handy tool for the suppression of dissent? Might such doctrines have been used against progressive political movements such as the crusade against slavery, the crusade for women's rights (whose founding declaration might have been viewed as group libel of men), or the Civil Rights Movement of the 1960s? Will those in power confine the operation of the rules as suggested by critics of broad free speech rights? History does not provide easy answers to contemporary problems, but it can expand our experience and deepen our understanding of the issues. Even if racist or fascist political speech retains its protections, the state still should prohibit focused and (for example) racially motivated malicious conduct that places another in fear.⁴⁵²

Abolitionists supported free speech for ideas with horrible tendencies—ideas justifying human slavery. It was their faith that ideas of liberty would defeat slavery so long as persuasion and argument were the only weapons allowed in the contest. It was a view, ironi-

⁴⁵¹ CONG. GLOBE, 24th Cong., 1st Sess. 120 (1836).

⁴⁵² *State v. Talley*, 858 P.2d 217 (Wash. 1993). Before attempting to draft or enforce rules or statutes on the subject, the drafter would do well to study the case of the student at the University of Pennsylvania disciplined for calling noisy students outside his dorm window (students who were also African American) "water buffaloes." *Speech Impediment*, ROLLING STONE, Aug. 5, 1993, at 45.

cally, shared by some of the Southern elite. Given the human tendency to reject unorthodox ideas and to screen out those that do not confirm pre-existing notions, the vision of truth easily conquering error is too optimistic. But without tight controls on censorship of ideas, truth may be deprived even of a fighting chance.

In spite of their faith that truth would vanquish error, the abolitionists did not sit back and wait for the invisible hand to select the best from the marketplace of ideas. They passionately and tirelessly argued for the rights of free blacks and slaves and repeatedly confronted bigotry with the weapons of free discussion. Abolitionists saw calls for censorship as a confession of weakness. From the vantage point of the waning years of the twentieth century, many people find their faith naive, and some look to government to suppress even political racist and sexist speech. Perhaps a broader historical perspective may lead us to reconsider the question in light of the experience of the abolitionists.

There is a second irony in the events of 1835-37. If the abolitionists are to be believed, attempts to suppress them led to radically unintended consequences. The attempt at suppression focused attention on abolitionists and gave them a forum to spread their ideas. While abolition itself eventually waned, it did so, in part, because it was absorbed into a mass political movement. That movement advocated the containment of slavery and eventually achieved its abolition.

But there are ironies here too. For slavery only ended after the bloodiest war in American history, a result many in the 1830s predicted from the symbiotic relation between the Southern nationalists and nullifiers, on one side, and the abolitionists on the other.

In July of 1836, Charles Finney wrote to his protégé Theodore Weld to express his reservations about the course of abolition. Finney believed "our present course [is] going fast into civil war" and he feared "a wave of blood over the land."⁴⁵³ The mode of "abolitionizing the country" needed to be greatly modified. Finney said the leading abolitionists were good men, but few were wise. Some were reckless and some were denunciatory. Finney's solution was to focus the public mind on salvation and to "make abolition an appendage."⁴⁵⁴

In the debates of 1864-66 on slavery and individual rights, Republicans recalled the events of 1835-37. These events epitomized for them the danger of state sovereignty unbounded by national guarantees of individual rights. One congressman recalled Garrison being led around the streets of Boston with a rope around his neck and the

⁴⁵³ Letter from Charles G. Finney to Theodore Weld, 1 WELD GRIMKÉ LETTERS, *supra* note 71, at 318.

⁴⁵⁴ *Id.* at 319.

attempt to expel John Quincy Adams from Congress; others recalled the practice of destroying antislavery presses and Southern laws banning freedom of speech and of the press against slavery.⁴⁵⁵ In the debates of 1835-37, opponents of limiting free speech and free press for abolitionists referred to these guarantees alternately as rights or privileges.⁴⁵⁶ They emphasized the strength of the word "abridge" in the First Amendment.⁴⁵⁷ By 1859, and even more strongly in 1864-66, leading Republicans were asserting that these privileges were, or should be, protected by the Federal Constitution and Bill of Rights against state interference. In 1866, Congress provided that "[n]o state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."⁴⁵⁸

Although the Supreme Court soon liquidated the Privileges or Immunities Clause,⁴⁵⁹ it eventually resurrected protection against state denial for most of the liberties in the Bill of Rights under the Due Process Clause.⁴⁶⁰ During the second Reconstruction of the 1960s, the spiritual descendants of the abolitionists were protected by the Federal Constitution against state efforts to suppress them—efforts Southern states used with such success before the Civil War.

⁴⁵⁵ See, e.g., CONG. GLOBE 38th Cong., 1st Sess. 2979 (1864) (statement of Rep. Farnsworth); *id.* at 1202 (statement of Rep. Wilson); CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865) (statement of Rep. Kasson).

⁴⁵⁶ See *supra* notes 314, 415, 437 and accompanying text.

⁴⁵⁷ See *supra* note 221 and accompanying text.

⁴⁵⁸ U.S. CONST. amend. XIV, § 1.

⁴⁵⁹ Slaughter-House Cases, 83 U.S. 36 (1872).

⁴⁶⁰ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).