Neither a Slave nor a King: The Antislavery Project and the Origins of the American Sectional Crisis, 1820-1848

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NEITHER A SLAVE NOR A KING: 
THE ANTISLAVERY PROJECT AND THE ORIGINS OF THE AMERICAN SECTIONAL 
CRISIS, 1820-1848

by

JOSEPH T. MURPHY

A dissertation submitted to the Graduate Faculty in History in partial fulfillment of the 
requirements for the degree of Doctor of Philosophy, The City University of New York

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Joseph T. Murphy

This manuscript has been read and accepted for the Graduate Faculty in History in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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THE CITY UNIVERSITY OF NEW YORK
ABSTRACT

Neither a Slave nor a King: The Antislavery Project and the Origins of the American Sectional Crisis, 1820-1848

Advisor: James Oakes

“Neither a Slave nor a King” intervenes in the scholarly debate over the “antislavery origins” of the sectional crisis in antebellum America – how the rise of a northern antislavery movement escalated the sectional tensions that led to southern secession and the Civil War.

There are two main strands of literature on the antislavery origins of the sectional crisis. The first, in which social and cultural historians are dominant, focuses on the rise of radical (or “immediate”) abolitionism in the 1830s, exploring its impact on North-South relations and antebellum reform generally. The other strand, written by political and legal historians, looks at the emergence of antislavery politics in the 1840s and 50s – the effort to dislodge the “Slave Power” from the federal government and ban slavery’s expansion into the western territories.

This historiographical divide is quickly disappearing, but its premises and assumptions still shape the literature, muddying the terms of the sectional debate over slavery and casting a shadow on the premises and assumptions of the antislavery movement. While there is ample evidence in the literature regarding how antislavery activists agitated the slavery question, it is still difficult to see what activists planned to do about slavery.

This dissertation fills that gap by examining the origins and evolution of the chief political project of antislavery activists in the period 1820-1848: the effort to reorient federal policy so that it favored freedom and discouraged slavery, forcing the slave states to commence gradual abolition on their own. It also recovers the forgotten premises and assumptions of the
slavery conflict between 1835 (the beginning of the abolitionists’ mass petition drives) and 1843 (the commencement of the Texas annexation controversy). The slavery controversy rarely focused on slavery’s status in the states; instead, it considered slavery’s relationship to federal power in areas of the Union outside the slave states, in places like Washington, D.C., the “free” states of the North, and U.S. coastal waters. In recovering the terms of slavery debate, the dissertation also sheds light on the premises and assumptions of the antislavery movement, broadly conceived.

Drawing on an array of congressional records, federal and state court cases, private and public correspondence, abolitionist publications, third-party convention minutes and antislavery newspapers, “Neither a Slave nor a King” uses a new analytical framework to reinterpret long-familiar events in the antebellum era. It is a political history which places the antislavery project front and center in the narrative, giving us new insight into the chronology and meaning of sectional conflict in the 1830s and 40s. The short term is given priority over the long durée, as one of the central aims of this study is to capture the interplay between antislavery activists, jurists and politicians as they contributed to the formation of the antislavery project. The Introduction lays out some key concepts in the dissertation, from the political economic premises of the antislavery project to the importance of viewing slavery as a property regime. Part I considers the origins of the antislavery project, recovering the terms of slavery conflict in the early republic – namely, the question of slavery’s relationship to central-government power (Chapter 1). It also tells the story of how radical abolitionists in the 1830s developed a constitutional program for realizing universal abolition in the United States (Chapter 2). Part II follows the abolitionists as they press their agenda in Congress, triggering a constitutional crisis over slavery and federal power, a crisis whose insights were then used to strengthen the
antislavery project. In each of the three main theaters of constitutional debate – Washington, D.C. (Chapter 3), the “free” states of the North (Chapter 4), and U.S. coastal waters and the “high seas” (Chapter 5) – the primary issue was slavery’s relationship to federal power, as was true of *Prigg v. Pennsylvania* (1842), the deeply controversial and profoundly important fugitive-slave case (Chapter 6). Part III tracks the political evolution of the antislavery project, as the abolitionists’ constitutional program became the official platform of the Liberty Party (Chapter 7) and, after the upheavals of the Texas and Mexican War controversies, the Free Soil Party (Chapters 8 and 9).

Focusing on the antislavery project’s evolution across 1820-1848 suggests that the sectional crisis began well before 1846, the year most often associated with the Civil War’s origins. It was the pushing of a *specific political program* in Congress and the courts, not just sporadic agitation, which triggered the many conflicts over slavery and federal power in the 1830s and 40s – crises which culminated in the Free Soil revolt of 1846-48. The Free Soil coalition brought the antislavery project into mainstream American politics, where it would remain until the Civil War. In addition to the “antislavery origins” of the sectional crisis and the Civil War, the history of the antislavery project up to 1848 offers new insights into early-nineteenth-century political and constitutional development, as well as general lessons regarding American reform and its relationship to politics.
Table of Contents

Introduction

Recovering the Antislavery Project  
Recovering the Constitutional Crisis over Slavery, 1835-1843  
The Free Soil Revolt as a Political Turning Point  
The Social Basis of the Antislavery Project

Part I: Origins

1 The Missouri Crisis and the Problem of Slavery in the Early Republic  
   Property and Personhood in the British Empire  
   Abolition in the Northern States  
   Slavery and the Articles of Confederation  
   Slavery and the U.S. Constitution  
   Slavery National?  
   The Missouri Crisis, 1819-1821  
   Benjamin Lundy and the Antislavery Response to Missouri

2 The Making of a National Antislavery Agenda  
   A Constitutional Crisis Emerges, 1824-1828  
   The Emergence of Radical Abolitionism, 1829-1833  
   The Abolitionists’ Constitutional Program  
   Abolitionist Strategy  
   The Meanings of “Immediate Emancipation”

Part II: Crisis and Development

3 The Entering Wedge: Slavery and Federal Power in Washington, D.C.  
   The Debate over Abolition in Washington, D.C.  
   The Proslavery Nationalism of John C. Calhoun  
   The Antislavery Response in Congress  
   Congress Adopts the Gag Rule  
   Denying a Constitutional Right to Slave Property  
   Theodore Dwight Weld and the Making of Antislavery Constitutionalism  
   Publicizing Antislavery Constitutional Arguments  
   Congressional Debate over the Abolitionists’ Program, 1837-1839

4 Our Constitution of Liberty: Slavery and Federal Power in the Free States  
   The Slavery Debate in the North: Transient Slaveowners and Fugitive Slaves  
   A Nationalist on the Frontier  
   Salmon P. Chase, Northern Lawyer

vii
Anti-Abolitionism and the Threat to Civil Order in the North
The Case of Matilda Lawrence
In re Matilda (1837)
Ohio v. Birney (1837)
Implementing the Abolitionists’ Agenda in the North

5
Following the Flag: Slavery and Federal Power on the High Seas
The Enterprise Resolutions
The Amistad Affair
Groves v. Slaughter (1841)
The Impact of Amistad and Groves on the Abolitionist Movement
The Creole Resolutions

6
“A Triumph of Freedom”: Joseph Story’s Opinion in Prigg v. Pennsylvania (1842)
The Antislavery Response to Prigg v. Pennsylvania
A Policy of “Noncooperation” Emerges
Jones v. Van Zandt (1843)

Part III: Politics

7
Absolute and Unqualified Divorce
Toward an Antislavery Politics
Schism and the End of the American Antislavery Society
The Liberty Party
A Balance-of-Power Strategy
Salmon Chase Joins the Liberty Party
Debating the Objective of Antislavery Politics
Salmon Chase Develops an Antislavery Platform
Coalition on the Basis of Denationalization
Denationalization Becomes the Official Platform of the Liberty Party

8
A Common Platform
The Furor over Texas Annexation
The Election of 1844
Antislavery Dissidents Rally around Denationalization
Resistance to Coalition
The Mexican War Spurs Antislavery Coalition-building in the North
The Wilmot Proviso
The Democratic Party Frays
Antislavery Whigs Revolt
Grounding the Proviso in Antislavery Constitutionalism
Coalition on Liberty Principles
Introduction

Recovering the Antislavery Project

In December, 1843, representatives of the Ohio Liberty Party, including Salmon P. Chase, the Cincinnati lawyer who made his name defending fugitive slaves in court, sent a letter to the leader of the Irish Repeal Movement in Dublin, Daniel O’Connell. The letter set forth the terms of the slavery controversy in the United States, where a peculiar federal system complicated efforts at abolishing slavery. It was imperative that antislavery activists in Ireland grasp the “true constitutional position of our National Government, in relation to slavery.” A slaveowning oligarchy – a “Slave Power” – was attempting to destroy the republic from within. Slaveowners, already in control of the federal government and its policies, were now trying to subvert “the true construction of the Constitution” by making slaveowning into a constitutional right. Counterrevolutionary reactionaries – a cadre of “aristocratic” slaveowners from Virginia, the Deep South, and above all South Carolina – were engineering a creeping rollback of the egalitarian principles in the Declaration of Independence and the Constitution, blasting away at the long-held premise that slavery was a “local” institution limited to the states which sanctioned it. In truth, the letter explained to O’Connell, the Constitution reserved all power over slavery to the states. It gave Congress – the federal government – no power to either abolish slavery in the states or establish slavery in areas outside the states. Congress, in other words, had no “power to make one man the property of another – to make a Slave, or make a King.” Yet these pillars of constitutionalism were rapidly being overturned in America. In Congress and the White House
and even the Supreme Court, it was now “boldly claimed that the Constitution guaranties property in men, and that slavery is a National Institution!\(^{1}\)

The message from Ohio was clear and urgent: a grave battle was underway in America, as antislavery northerners pushed back against the machinations of proslavery oligarchs. The Liberty Party had come into existence three years earlier to combat the nationalization of slavery and restore federal policy to its original goal of promoting freedom. It was the latest phase in an ongoing struggle to “localize” the right to “property in man” and put slavery once again on a path toward extinction. It was crucial that Irish republicans understand the central objective of mainstream antislavery politics in America: to separate slavery from the federal government, to divorce “property in man” from both federal power and the Constitution. In this, the antislavery project paralleled the Irish republican campaign to repeal union with Britain. “You demand the repeal of a statute which makes Ireland the political vassal of England. We demand the abrogation of laws which make millions the chattel property of thousands. You demand the repeal of the Union statute, because it was carried out by fraud and has been perpetuated by force. We demand the abrogation of our national, man-chattelizing legislation, because it is repugnant alike to the Constitution of our country, and to the code of Heaven.” The slave system “could hardly last a year” once antislavery forces gained control of the federal government, repealing slave codes and halting proslavery policies. But American activists could not do this alone, for their project was neither local nor national in scope; it was international, part of a broader campaign in defense of human dignity and republican freedom.

The project which the Ohio Liberty men described to O’Connell in 1843 – divorcing slavery from the federal government – became the chief program of mainstream antislavery

\(^{1}\)Cincinnati *Philanthropist*, Dec. 20, 1843. The phrase “no power to make one man the property of another – to make a Slave, or make a King” is not from the O’Connell letter. That particular phrase can be found in the August 20, 1844 of the *Philanthropist*, Cincinnati’s leading antislavery paper.
politics up to the Civil War. Often referred to as the “cordon of freedom,” the project was designed to withdraw federal support for slavery – long seen as the lifeblood of the slave system – and surround the South with a circle of free states and territories, forcing the slave states to abolish slavery on their own. By the 1850s, it was the official platform of the Republican Party. In 1862, in the middle of the Civil War, Republicans, presiding over their very first regular session of Congress, translated the antislavery project into law, localizing slavery in America and fulfilling the objectives set out by the Ohio Liberty Party in 1843 – even as military emancipation and the exigencies of war led to the total collapse of American slavery.²

This dissertation is about the origins and political evolution of the antislavery project that became the “cordon of freedom.” It traces the project’s development from the Missouri Crisis in 1820 to the Free Soil revolt in 1848, demonstrating how it moved from the radical fringes of northern society to the very center of national politics by midcentury, where it would remain until Lincoln’s election in 1860. It emphasizes the common bonds of the “broad” antislavery movement – from William Lloyd Garrison to Lincoln – by recovering the forgotten premises and assumptions of the antebellum slavery controversy. Insofar as it modifies our understanding of the “antislavery origins” of the Civil War, it is a significant contribution to the study of antebellum politics and the sectional crisis, slavery and antislavery, and the coming of the Civil War.³


As the “cordon” image implies, the antislavery project did not call for direct federal interference in the states. Hardly anyone in antebellum America thought it was the central government’s duty to abolish slavery in the states where it existed; most people assumed that slavery was a state institution, and those who looked forward to universal abolition believed that slavery would die on a state-by-state basis, not by federal-government intervention. Instead, the antislavery project was to reorient federal policy so that it favored freedom and discouraged...
slavery, jumpstarting the process of state-by-abolition which had begun in the North in the late eighteenth century, but which had ground to a halt in the South after 1800. Antislavery northerners – not just the radical vanguard of abolitionists, but the silent majority who opposed slavery’s “nationalization” – believed it was the central government’s moral duty to urge abolition upon the slave states, to do everything in its power short of direct intervention to promote an expansion of liberty.

The antislavery project consisted of two distinct but overlapping strategies, both of which operated within the framework of American federalism. The first strategy was for Congress to withdraw all federal support for slavery in areas under its direct control. The second was for the northern states to remove – or at the very least, minimize – their connections to slavery under the Constitution.

It is worth pausing here to remember that, by the 1830s, slavery had become a *de facto* national institution. Slaveowners enjoyed a key structural advantage in the Three-Fifths Clause of the Constitution, which, in allowing them to count their slaves for purposes of representation, gave them a numerical advantage in Congress – which in turn shaped federal laws and policies as well as the electoral college, which gave slaveowners disproportionate influence over presidential elections and, by extension, the choice of Supreme Court justices. Not surprisingly, functionaries in all three branches of the federal government, including members of both parties, openly claimed that rights to slave property were extraterritorial rights guaranteed protection by the U.S. Constitution. By the 1830s, Congress had long upheld the slave codes of Washington, D.C. and recognized those of the Florida and Louisiana Territories. Many of its members pushed policies for hastening its expansion into the Southwest and northern Mexico, while in the 1810s members of Congress advocated a repeal of the Northwest Ordinance’s ban on slavery. High-
ranking U.S. diplomats hounded British authorities for compensation when slaves emancipated themselves on the high seas and found refuge in British jurisdictions. Federal officials routinely signed contracts with slaveowners to use their slaves as hired labor on public works projects. The federal Fugitive Slave Law of 1793 gave teeth to the Fugitive Slave Clause of the U.S. Constitution, which strongly implied that federal power would be used to protect and enforce slaveowner property rights outside the slave states. The U.S. Army helped remove Indian tribes from the Old Southwest, opening the floodgates for cotton, credit, and slave markets. U.S. soldiers fighting in the Second Seminole War in Florida (1835-42) acted as de facto slavecatchers, holding captured fugitives until they were reclaimed by their Georgia masters. In the North, several free-state policies – for instance, granting comity to slaveowners (allowing them to hold their slaves within the limits of a free state for up to six months, in practice often longer) and concurrent legislations aimed at enforcing and expediting fugitive-slave recaptures under the federal Fugitive Slave Law – gave the general impression that slavery was indeed a national institution. The antislavery project was about reversing this trajectory, reorienting federal policy so that freedom was the animating principle of the U.S. government.

Withdrawing federal support for slavery meant a number of things. Above all it meant repealing slave codes in federal jurisdictions, starting with Washington, D.C., but also in federal territories like Florida and federal forts, arsenals, and post offices inside the slave states. It also meant preventing new slave states from joining the Union (Texas being the prominent example), a policy that would permanently alter the sectional balance in Congress by guaranteeing a plurality of free states in the Union. Beyond these measures, withdrawing federal support for

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slavery meant banning slave labor on public-works projects and revoking diplomatic aid for the “owners” of self-emancipated slaves on the high seas. In short, all branches of the federal government would adopt the legal presumption of freedom that defined the Northern states (at least in theory) – they would operate on the assumption that all persons outside the slave states were free, regardless of skin color.

Withdrawing free-state support for slavery meant several things, but two strategies prevailed. The first was for Northern courts and legislatures to deny comity to slaveowners who brought their slaves into the North, to nullify the limited right to hold slaves as property in the free states – a policy that would emphatically reject the idea that owning slaves numbered among the “privileges and immunities” of American citizenship. The second was for Northern courts and legislatures to adopt a narrow reading of the federal Fugitive Slave Law, reducing the involvement of free-state magistrates and officers in fugitive-slave recaptures, and to pass so-called “personal liberty laws” granting suspected runaways access to habeas corpus, jury trial, and other hallmarks of common-law civil procedure. Beyond these two initiatives, the free states could repeal all laws that indirectly recognized or supported slavery, from the so-called “stay laws” – those granting slaveowners a limited right to hold slaves in the free states – to concurrent legislation regarding fugitive slaves. Last but not least, they could repeal all racially-prejudiced laws on the grounds that they reflected the Southern practice of using black skin as the basis of legal presumption.

The antislavery project tapped into a rich vein of what we can call “antislavery nationalism.” Antislavery northerners of all stripes saw the United States government as not only separate from the states, but as a “free” government which operated on a legal presumption of freedom. In other words, they believed that the central government should follow the free states
in presuming that all persons in the Union enjoyed equal protection of the law, regardless of skin color. At home, such a policy would unleash the economic energies of a free people by paving the way toward smarter, more efficient economic development. Abroad, it would secure America’s international legitimacy by freeing the country from taint of slavery, an apparent vestige of the colonial era. Viewed against the backdrop of Europe’s “civilized” nations, all of whom had abolished slavery in their own dominions, the United States had a moral duty (in the words of the Preamble to the U.S. Constitution) to “establish justice” and promote “the blessings of liberty” inside the Union. In this way, the U.S. government belonged to a “global” antislavery legal regime stretching from the post-Emancipation British Empire to Haiti, Mexico and the other “free” Latin republics.5

The antislavery project emerged from a series of constitutional crises over slavery’s relationship to central-government power. The first sketches of the project emerged in the aftermath of the Missouri Crisis of 1819-21, when Quaker abolitionist Benjamin Lundy introduced a seven-point plan for resetting federal policy and reviving the state-by-state abolition process. The fallout from the Missouri Crisis was a major factor in the creation of a second party system dedicated to the suppression of slavery discussion in national politics. The “shutdown” of the late 1820s – the systematic silencing of antislavery sentiment in the nation’s councils – was the single greatest factor in the emergence of radical abolitionism in the early 1830s. The so-called “second-wave” abolitionists condemned slavery in the rhetoric of evangelical revivalism, but more importantly, they established the country’s first-ever national antislavery movement, transposing state-level lessons onto a continental canvass. They turned Lundy’s sketch into a comprehensive constitutional program and forced it into national political debate by means of massive back-to-back petition drives.

The petition campaigns sparked a constitutional crisis over slavery which would last from roughly 1835 to 1843, when it was subsumed into the conflict over slavery’s extension into the Mexican Cession territories. The debates centered on slavery’s legitimacy in a variety of “hot-spot” jurisdictions outside the slave states, from Washington, D.C. and the northern states to U.S. coastal waters and the broader Atlantic Ocean. Altogether, they revived the question of slavery’s relationship to federal-government power. It was in the midst of this constitutional crisis that an antislavery politics first emerged in the North in the form of the Liberty Party, the country’s first-ever antislavery third party. Using the lessons from constitutional conflict, Liberty Party activists translated the abolitionists’ constitutional program into a political platform that could

compete in the rough-and-tumble world of electoral politics. Ohio’s Salmon P. Chase, the antislavery attorney who would become Lincoln’s Secretary of the Treasury as well as Supreme Court Justice of the United States, rechristened the program “denationalization,” or “divorce.” In lieu of the abolitionists’ catalogue of legislative actions, Chase set forth a clear-cut policy proposal: to denationalize slavery, to separate it completely from federal-government power. The policy was the same as before – to reorient federal policy and revive the state-by-state abolition process – but Chase’s platform exploited the lessons of the constitutional conflict (in particular those from recent Supreme Court cases), giving the antislavery project a new and more potent edge.

Along with his fellow Liberty activists, Chase was confident that, once enacted, his program would lead to universal abolition in the United States. He harbored “no doubt at all as to the Constitutional power of the General Government to effect directly & indirectly the extinction of Slavery.” Erelong, Chase wrote, invoking the early-nineteenth-century Irish poet Thomas Moore, “slavery will be driven back within her legal limits, there I trust like the veiled prophet of Khorossan to be stripped of her silver veil, to be exposed in all her monstrous deformity, and to perish amid the execrations of those whom she has so long deluded & betrayed.”

After 1846, the antislavery project served as the indispensable common ground in the flurry of coalition-building that would lead to the Free Soil Party, the country’s first truly national antislavery party. To be sure, the antislavery Democrats who came out in support of the Wilmot Proviso in 1846 and who would form the backbone of the Free Soil coalition in 1848 initially rallied around a policy of “non-extension,” opposing slavery’s expansion while

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professing fidelity to the status quo ante. But through a combination of abolitionist cajoling and slaveowner arrogance, they eventually embraced the denationalization program as the official platform of the Free Soil Party. The party’s decent showing in the election of 1848 marked a turning point in antebellum politics, the moment the antislavery project entered into the political mainstream.

Developed on the fringes of northern society, the antislavery project migrated to the center of national politics by 1848. It was remarkably consistent across the different stages of its progression. Yet the project has somehow escaped notice in the literature on abolitionism and antebellum politics. Scholars of antislavery politics mention the project only in passing, downplaying it in favor of other themes like coalition-building, electioneering and conventional politicking. For historians of the abolitionist movement, particularly those with a focus in social

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and cultural history, the project barely registers. The antislavery project that I have described here is (to borrow a phrase from a former U.S. Secretary of Defense) the great “unknown known” in coming-of-the-Civil-War literature. Historians are familiar with the contours of the project yet unclear about its origins and its exact role in the abolitionist movement and, later, in the rise of antislavery political parties. Its relegation to the shadows of American history can be ascribed to some unfortunate trends in the literature of the recent past – trends which are quickly changing, but whose premises and assumptions still shape the literature. Until quite recently, the study of the Civil War’s “antislavery origins” was hampered by a division of labor between scholars of “abolitionism” (which was often portrayed as extrapoltical, sometimes even anti-political, characterized by an uncompromising moral purity) and scholars of “antislavery politics” (the effort to bring the fight against slavery into the arena of electoral politics, a project which raised significant questions about the moral purity of the antislavery movement after 1848). Moreover, the antislavery project has fallen victim to specialization. The literature on slavery conflict in the antebellum period is balkanized into discrete studies that are either geographic in scope – i.e., works on slavery conflict in Washington, D.C., the federal territories, the “free” states of the North, and the high seas – or thematic in scope – i.e., works on the political, ideological, cultural, racial, gender, class compositions of abolitionism and antislavery politics, respectively. Our knowledge of the details is impressive, and yet we still struggle to see the larger picture, the common principles which fused the different theaters of slavery conflict. Only when we recover the terms of the slavery debate at both the state and national levels will

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8 See works cited in supra n. 3.
we be able to recover the true dimensions of the antislavery project, recapturing its many premises and assumptions.9

I offer a new interpretive framework of the slavery controversy circa 1820-1848. Many of the events and individuals discussed here will be familiar to students of the antebellum period. Yet by placing the antislavery project at the center of the narrative, I tell a very different story. Most importantly, in applying the concept of “constitutional politics” to the slavery controversy, I have tried to recover the terms of the slavery debate in America, shedding light in turn on the forgotten premises and assumptions of this country’s antislavery movement. Constitutional historians Michael Les Benedict, Gerald Leonard, Mark A. Graber, Christian G. Fritz and others have used the phrase “constitutional politics” to describe the central role of constitutional conflict in nineteenth-century national politics. Whereas today it is generally thought that constitutional matters are the special preserve of the Supreme Court, in the nineteenth century the Constitution was the subject of fierce debate in all branches of the federal government, as well as in state courts and legislatures. Nineteenth-century politicians and parties understood “their politics not as working within a constitutional order so much as working out a constitutional order,” including substantive issues like the breadth of and relationship between rights, sovereignty and the federal system. According to legal historian Larry Kramer, that process extended to the public sphere of print and petitions, where ordinary people took part in a flourishing “popular constitutionalism.” As analytical categories, “constitutional politics” and “popular constitutionalism” are enormously helpful in recovering the terms of the slavery debate in antebellum America. In capturing the interplay of constitutional arguments between national institutions and the public sphere, they also shed light on the origins and development of the

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antislavery project in national politics. That story is vital to the history of antebellum reform and the coming of the Civil War, as well as to the history of American slavery and its role in shaping our country’s institutions and values.¹⁰

**Recovering the Constitutional Crisis over Slavery, 1835-1843**

Though the first sketches of the antislavery project first appeared in 1821 with Benjamin Lundy’s “proposal” for gradual abolition, the project truly came into its own in the late 1830s and early 40s, as abolitionists and antislavery politicians developed systematic constitutional arguments to defend the antislavery project against proslavery attacks in Congress, the courts, and the press. It is often overlooked that the slavery controversies of the period 1835 (the beginning of the abolitionists’ mail campaign) to 1843 (the onset of the Texas annexation controversy) belonged to a broader constitutional crisis over slavery’s relationship to federal power. This was the issue at stake in both the Missouri Crisis of 1819-21 and later, during the territorial crisis after 1846. To understand how the antislavery project emerged in the 1820s and 30s and why it appealed to so many northerners by the 1840s, we must first recover the

constitutional conflicts that gave rise to the project in the first place, recovering the terms of slavery debate in the two decades after the Missouri Crisis.

The debates were never about federal intervention against slavery in the states, which all but a handful of abolitionists considered beyond the pale. Instead, it centered on the national government’s disposition toward slavery in areas outside of the slave states, in federal territories under Congress’s direct jurisdiction – namely, Washington, D.C., federal territories like Florida, and U.S. coastal waters – and in the “free” states of the North. Should the national government adopt the basis of legal presumption used in the northern states – presume that all persons in the Union were free, regardless of skin color – or should it adopt the South’s presumption of slavery on the basis of black skin? This was a question of how to interpret the Union and the legacy of the American Revolution, a debate over the core principles of American empire. But like all pivotal issues in the nineteenth century, the crisis was couched in the language of constitutional politics. The central issue was whether or not the Constitution guaranteed the protection of property rights in slaves – whether or not rights to “property in man” extended beyond the limits of the states, into all areas of the Union. Was it a national, even constitutional, institution?11

The debates focused on slavery’s constitutional status in three key arenas: Washington, D.C., U.S. coastal waters -- both of which were federal areas under Congress’s direct jurisdiction -- and the free states of the North, which were bound by the Constitution to recognize slavery in certain circumstances. In each of these arenas, antislavery activists engaged with proslavery leaders in a close constitutional dialogue over slavery’s extraterritorial reach in the Union – where slaveowner property rights extended and where they did not. In the process, both sides

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used constitutional arguments first introduced during the Missouri Crisis. A razor-sharp, years-long discourse ensued, giving rise to two diametrically-opposed pro- and antislavery constitutional doctrines. Despite the best efforts of party leaders, including a “gag” on antislavery petitions in Congress beginning in 1836, the slavery issue kept seeping into national politics, threatening the bonds of Union. No amount of compromising could conceal the constitutional crisis.  

Led by John C. Calhoun of South Carolina, proslavery leaders put forward a radical brand of the proslavery nationalism first broached during the Missouri Crisis. Calhoun and others insisted that property rights in slaves were no different from other forms of property, and thus, that it was the federal government’s positive duty to protect slavery in all areas of the Union – and possibly even in foreign jurisdictions. Congress in this sense was a mere proxy for state interests, the very vehicle of slavery’s expansion. According to this proslavery view, the U.S. Constitution *guaranteed* the protection of slave property in all places where slaveowners brought the American flag. Proslavery leaders were trying to make slavery not just national, but *constitutional*, in the broadest sense possible.

In response, antislavery activists argued that, indeed, the Constitution *recognized* slavery in the states, but it *did not guarantee* its protection anywhere else. Slavery, they argued, was not like other forms of property, and the language in the Constitution reflected that distinction. It referred to slaves as “persons” rather than “property.” It reserved all power over slavery to the states; Congress had no connection to it whatsoever. If this was true – if Congress had no power over slavery because slavery was a state institution – then Congress had no business upholding

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slavery in federal areas and protecting it in the North. As a subject of constitutional politics, the fight against slaveowner control of the federal government belongs squarely in the tradition of the “anti-oligarchy Constitution,” which uses constitutional arguments to rein in the rich and powerful in America.  

By the time Supreme Court Justice Joseph Story handed down his controversial opinion in the pivotal case of *Prigg v. Pennsylvania* in 1842 – the most important slavery case before *Scott v. Sanford* in 1857 – the contours of a fundamental conflict over slavery were clear to anyone who followed the debates: it was a contest over the orientation of federal government policy, a “great struggle between the advocates of oppression and the friends of freedom.” Most Americans were probably unaware of the deep constitutional crisis emerging in national politics at the time, buried as it was under the clanging excitement of democracy on the surface – elections, personalities, scandals. But abolitionists, fire-eaters, and the majority of moderate politicians and jurists all understood that the multiplying conflicts over slavery – in Congress and the Supreme Court, in state legislatures and city streets – reflected a deeper struggle over the basic contradiction in American politics: the existence of two incompatible legal regimes in one political union. That was the essence of the crisis as it stood in the early 1840s.

The uproar over slavery and the federal territories after 1846 exacerbated the earlier constitutional crisis, but it did not change the basic thrust of the debate. The administrations of presidents John Tyler and James K. Polk, looking to quell the storm by distracting the public with patriotic expansion, annexed Texas in 1845 and went to war with Mexico shortly thereafter,  

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acquiring huge tracts of new territory in the process. But instead of quieting the furor over slavery, the acquisition of new territory raised old questions about slavery’s expansion in a country dedicated to freedom and equality: the resulting “territorial crisis” – which began in 1846 with Pennsylvania Representative David Wilmot’s famous proviso against slavery expansion – dominated national politics for the next twelve years, into the election of 1860 and the secession winter of 1860-1861.

By exploiting the insights of constitutional conflict, antislavery activists strengthened their own national project, inverting the logic of slaveowners and building on the advices of antislavery judges. For one thing, the crisis affirmed the essential soundness of antislavery nationalism and its corollary, antislavery constitutionalism. Pressed by abolitionist lawyers, sympathetic antislavery judges at the state and federal levels – men like Joseph Story, John McLean and Lemuel Shaw – issued opinions which maintained the basic argument that, while the Constitution recognized slavery’s existence in the states, it did not guarantee the protection of slave property as such. Their opinions supported the claim that the national government ought to presume freedom, treating all persons in the Union as free regardless of skin color. In this way, antislavery judges worked with antislavery lawyers, endorsing their broad arguments while reining in the more excessive claims about the Constitution. The result was a solid constitutional foundation for antislavery politics, in the form of key precedents and a number of subtle hints as to how to navigate the American federal system.

This study builds on the work of historians who view the territorial crisis less as the prime mover of sectional conflict than as a symptom of the deeper crisis over slavery and the
political structure of the United States. It challenges the view that the sectional crisis of the 1840s and 50s arose chiefly out of the conflict over slavery’s extension into the federal territories. For many historians, the slavery issue only became dangerous – structural, constitutional, irreconcilable – when it became entwined with territorial expansion. Without the territorial crisis, they argue, there would have been no irreconcilable conflict leading to secession and civil war. Even among historians of the territorial crisis who recognize slavery’s fundamental role in the conflict, there is an implicit assumption that the prime mover of sectional conflict was not slavery per se but slavery’s extension into the territories.

There is a key assumption in this claim, sometimes implicit, other times explicit, which is that the slavery conflicts prior to 1846 (the year in which David Wilmot’s anti-extension proviso kicked off the territorial crisis) constituted a serious but not fundamental threat to the Union. Such conflicts reflected a ramping-up of sectional tensions during and as a result of the market revolution but were qualitatively different from the more fundamental problem of slavery in the territories, as demonstrated by the Union-shaking episodes of the Missouri Crisis of 1819-21 and the territorial crisis after 1846. This narrative holds that the emergence of radical abolitionism in the 1830s heightened sectional tension but, by itself, did little to change northern opinion in ways

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18 This critique applies mainly to the “neo-revisionist” scholarship cited in supra n. 3. For very different reasons, it also applies to Potter, Impending Crisis; Morrison, Slavery and the American West; Childers, Failure of Popular Sovereignty, esp. pp. 102-282; Steven E. Woodworth, Manifest Destinies: America’s Westward Expansion and the Road to the Civil War (New York: Alfred A. Knopf, 2010); Brenda Wineapple, Ecstatic Nation: Confidence, Crisis, and Compromise, 1848-1877 (New York: Harper, 2013). James Huston has called this “the sequence.” See Huston, “Interpreting Civil War Cauation: The Meaning of the Events Leading to the Civil War,” Reviews in American History 34 (September, 2006), pp. 324-331 and Kornblith, “Rethinking the Coming of the Civil War.”
that could produce irreconcilable sectional conflict. Whether it is the debate over abolition in Washington, D.C., the fugitive and “transient” slave controversies in the northern states, or the reaction to slave rebellions on the high seas, slavery conflict between 1835 and 1843 is usually bundled under the heading of the “gag rule crisis,” a reference to the infamous gag rules in Congress which tabled antislavery petitions between 1836 and 1844, when the gag was finally repealed. The gag rule crisis pitted the property rights of slaveowners, who wanted to table antislavery petitions in Congress, against the constitutional rights of northerners, who resented efforts to stifle the rights of petition and free speech in the name of slavery.

It is often assumed that the gag rule was the first systematic attempt to stifle slavery agitation in national politics, and that its draconian nature triggered the remarkable transformation in northern opinion around 1840, when a majority of northerners abandoned the anti-abolitionist sentiment of the 1830s and joined abolitionists in denouncing the so-called Slave Power in Congress. It is also assumed that, if there was a constitutional issue at stake in the gag rule crisis, it was the conflict between slaveowner property rights and northern constitutional rights, in particular the rights of petition and free speech. Whether or not this debate was fundamentally irreconcilable, it is often understood to be of a different order than the territorial crises of 1819-21 and 1846-60.19

To be sure, there was a constitutional crisis in 1846, but it did not start with the Wilmot Proviso, nor was it limited to the territorial question. The western territories in 1846 were simply the latest theater of conflict in a constitutional crisis that began in the mid-1830s and intensified into the 1840s, and that crisis cannot be reduced to the gag rule controversy, for while the constitutional debate over the rights of petition and free speech in Congress was very much a

19 Works on the so-called gag rule crisis include, among many others, Miller, Arguing about Slavery; Russell B. Nye, Fettered Freedom; Currie, Constitution in Congress: Descent into the Maelstrom, pp. 3-23; Richards, Slave Power. Cf. Ashworth, Slavery, Capitalism, and Politics, vol. 1 and Wiecek, Antislavery Constitutionalism.
constitutional crisis, it was a symptom of a much deeper crisis over chattel slavery’s relationship to federal government power and policy, in Congress, the Executive, the Supreme Court, in the courts and legislatures of the northern states, and in territories under the control of the U.S. government. As a category of analysis, the gag rule crisis cannot explain the variety of slavery conflict in the period 1835-43, including the fugitive-slave and high seas debates, all of which boiled down to slavery’s relationship to federal power. In this sense, the gag rule crisis belonged to a wider conflict whose premises were essentially the same as those in the territorial debates – namely, what was slavery’s relationship to the U.S. government?

That was a constitutional debate in the most fundamental sense, a product of the key paradox coming out of the Revolution: the emergence of two divergent legal regimes in a single country, a nation half slave and half free. If northern opinion shifted drastically in the early 1840s, it was not simply because northern liberties appeared to be flouted by slaveowning congressmen; it was also because northerners deeply resented the claim that slavery was a national institution, protected and expanded by the U.S. government by virtue of the U.S. Constitution.

The Free Soil Revolt as a Political Turning Point

Last but not least, this dissertation builds on the work of historians who portray the Free Soil Party – which emerged in 1848 in the fevered aftermath of Wilmot’s Proviso, with former Democrat Martin Van Buren and former Whig Charles Francis Adams running as candidates for president and vice-president, respectively – as a crucial stage in the broad antislavery movement of the North. It joins these scholars in pushing back against the portrayal of Free Soilers as aggrieved northerners who (apart from the party’s abolitionist contingent) cared nothing about
the plight of slaves, seeking only to ban slavery – and black Americans – from the “virgin soil” of territories acquired from the Mexican War. According to this view, several factors motivated the Free Soilers – political economic necessity, racism, resentment of slaveowner power – but principled opposition to slavery was not among them. For many historians is hard to imagine that the Free Soil Party stood for anything beyond keeping the territories “free” of black slave labor.

Yet if we view the territorial crisis not as the prime mover of sectional conflict but as one manifestation of a larger battle over slavery and federal power, the party appears as it did to many northerners in 1848: as the latest vehicle for advancing the antislavery project. Though it emerged from the debates over the Wilmot Proviso as a movement against slavery expansion, by the 1848 election the party moved to address the deeper constitutional question of slavery’s relationship to federal power. Instead of non-extension, the party endorsed a policy of “denationalization” or “divorce,” which called for the complete separation of slavery from the federal government – a total firewall between slavery and central-government power. This was the chief political project of abolitionists going back to the 1830s, and it took direct aim at slavery itself, not just slavery in the territories. To be sure, racism existed in the Free Soil ranks,

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and party leaders engaged in all sorts of political compromise. But insofar as it addressed a deeper constitutional crisis by endorsing the abolitionists’ constitutional program, the Free Soil Party represents a vital link to the abolitionists of the 1830s. It was a signal triumph for antislavery principles, the moment when the abolitionist project finally entered the political mainstream. If the Free Soil revolt was the beginning of a revolution in American politics, it was also the culmination of a long and trying campaign to get slavery into the national spotlight.21

By adopting denationalization as its official platform in 1848, the Free Soil Party initiated a revolution against the country’s ruling class – slaveowners – which culminated in the election of Abraham Lincoln in 1860 and slavery’s overthrow during the Civil War. The northern Free Soil revolt was no cynical and narrowly-focused bid to block slaveowners and blacks from the western territories. It focused on the political power of slaveowners as a class, attacking their chokehold on the party system and federal government policy. That was the impetus behind the famous “Slave Power” rhetoric in antislavery circles, a slogan which was less conspiratorial than class-based in nature. Crucially, revolt against the slaveowning class was not incompatible with moral opposition to slavery itself, for antislavery northerners understood that slaveowner political power derived from the “unnatural” dominion slaveowners enjoyed over their human chattel – in short, their legally-sanctioned property rights. With their endorsement of the denationalization program, the Free Soilers brought a radical antislavery policy developed on the fringes of American society into the political mainstream, where it would remain until Lincoln

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21 I agree with Sean Wilentz that the 1848 Free Soil revolt was “America’s version of the revolution of 1848 – a revolution fought not at barricades but in convention halls, village greens, and city streets across the North.” Wilentz, Rise of American Democracy, p. 622ff. See also Sewell, Ballots for Freedom, passim.

The effort to wrest control of the federal government from the slaveowning class transcended party lines, such as they were in the 1840s, precisely because it tapped a rich vein of antislavery nationalism. By 1848, antislavery northerners of all stripes saw the United States government as separate from the states, a “\textit{free}” government which operated on a legal presumption of freedom. It was thought that the central government should follow the free states in presuming that all persons in the Union enjoyed equal protection of the law regardless of skin color. At home, such a policy would unleash the economic energies of a free people, reorienting federal policy in ways that opened the floodgates to smarter, more efficient economic development. Abroad, it would secure America’s international legitimacy once and for all, as the country finally broke from slavery, long seen as a vestige of the colonial era. Viewed against the backdrop of Europe’s “civilized” nations – all of whom had abolished slavery within their own dominions – the U.S. government had a moral duty (in the words of the Preamble to the U.S. Constitution) to “establish justice” and promote “the blessings of liberty” inside the Union. In this way, the U.S. government belonged to a “global” antislavery legal regime stretching from the post-Emancipation British Empire to Haiti, Mexico and the other “\textit{free}” Latin republics.\footnote{U.S. Const., Preamble. See Oakes, \textit{Freedom National}, pp. 1-48; Drescher, \textit{Abolition}, \textit{passim}; Golove and Hulsebosch, “A Civilized Nation”; Benton, “Atlantic Law.”}

As antislavery dissidents from both major parties gravitated toward antislavery politics in the mid-1840s, denationalization was the one thing they could all agree on: a politically viable constitutional program for limiting the power of slaveowners. For antislavery Whigs, men like
Charles Sumner, Joshua Giddings, and Charles Francis Adams, the antislavery nationalism that was implicit in the denationalization program dovetailed nicely with the economic nationalism of their erstwhile party. They were convinced that proslavery policies had thwarted the creative energies of the American people, halting innovation and stifling ingenuity. Denationalization appealed to them precisely because it promised to deliver true economic nationalism grounded in the principles of self-ownership and free labor. It would release the pent-up energy of a long-stifled free labor economy. For antislavery Democrats, men like John P. Hale, Preston King, and Martin Van Buren himself, denationalization harmonized with the Jeffersonian Democratic tradition of using the Constitution to limit the power of would-be “aristocrats” in government. In its negative orientation, its emphasis on limited powers and strict construction, antislavery constitutionalism fit in seamlessly with the Democratic tradition. The Free Soil revolt of 1848 was couched in the same anti-aristocrat, anti-party language Martin Van Buren had used to construct the Democratic Party twenty years earlier: the anti-republican “aristocracy” in government versus the “the people” and the common good. The “divorce” platform and “Slave Power” rhetoric of antislavery politics echoed the language from the Bank War of the 1830s, when President Jackson and hard-money Democrats attacked the Bank of the United States as the instrument of anti-republican oligarchs – the “Money Power” – in the urban east. The Democratic wing of the Free Soil coalition may not have celebrated economic nationalism like their Whig counterparts, but they did share a vision of the Union as essentially antislavery, in which the national government not only existed apart from the states, but presumed freedom and

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actively discouraged slavery. Altogether, the rise of the Free Soil Party ushered in a new era in American politics. It was the beginning of new party system in which the antislavery nationalism of the Missouri era, fully developed after years of constitutional conflict, with forceful constitutional arguments and an attractive political program, reentered the political mainstream after nearly thirty years of institutionalized silence.

**The Social Basis of the Antislavery Project**

*Northern Capitalism as Restraint*

Most of the arguments that made up the antislavery project were developed in the late eighteenth century, but the thrust and appeal of the program after 1820 reflected the peculiar trajectory of northern, as opposed to southern-style, capitalism. The antislavery movement after 1820 reflected moral impulses that were peculiar to the kind of capitalism that was emerging in the North in the early nineteenth century. In contrast to the southern variety of American capitalism – a system which was largely dependent on the external merchant-capital credit and markets – northern capitalism was in the process of transitioning to industrial capitalism, as the growing interdependence between northeastern manufacturers and northwestern petty-commodity producers gave rise to a relatively autonomous northern home market which did not need southern cotton and the slave labor which produced it. Antislavery northerners of all stripes attributed the vitality of their economy to the principles of self-ownership and free labor, which were thought to be necessary preconditions to strong national economic growth.  

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26 My interpretation of the antislavery’s relationship to northern capitalism relies heavily on the analyses of free labor and wage labor in Foner, *Free Soil* and Ashworth, *Slavery, Capitalism, and Politics*, vol. 1, though I have added some new insights based on my own research.
If there was one idea which symbolized the antislavery nationalism of the 1830s and 40s, it was the concept of *restraint*. Like the constitutional arguments on which it was based, the denationalization program expressed in policy form the one indispensable feature of both the antislavery movement and the capitalist social organization which produced it—namely, an emphasis on restraint. Denationalization would curb slaveowner political power by “localizing” slavery in the states, restricting slave markets and the rampant commodification of human beings. It was about limiting individuals and placing restraints on a voracious market in human flesh, a market built on a legal regime of property rights. This was not restraint for its own sake. It presumed that deep and lasting economic prosperity—a national economy that released the creative dynamism of the American people and channeled it to productive ends—depended on restraints on the market, limits to property rights and commodification. Slavery, it was thought, posed the greatest obstacle to national economic prosperity. Its removal would result in a fairer and more proficient economic order in which each person owned himself and the products of his own labor.27

This emphasis on restraint—in denationalization and the antislavery movement more generally—was intrinsic to the social organization of northern capitalism as it had emerged in the years after 1815. Capitalism arose in the North much as it had in England and northwestern Europe in the early modern era—as a form of social organization in which a class of bourgeois “capitalists” gained control of the means of production (fields, farms, factories) and directed the surplus labor of wage-dependent workers into complex trading ventures linked to markets around the world. Divorced from the means of production, their surplus labor extracted by capitalists, workers came to depend on wages for their livelihood, rather than the land they owned. They

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27 On its face, this argument seems to derive exclusively from the economic nationalism of the Whig Party. But antislavery Democrats in the 1840s generally agreed that national economic prosperity required localizing slavery and limiting slaveowner power.
were compelled to work not by physical or legal coercion, but by the dictates of economic necessity – making enough money to meet the needs of modern life. Furnished with wages, and hoping to buy more than a few luxury items, “industrious” workers in northern Europe and the northern United States contributed to the development of dynamic “home markets,” urban clusters which consumed at an insatiable pace the raw materials of the surrounding hinterlands.

The rise of local, labor-intensive -- but not always industrial-scale – home markets reoriented the traditional relationship between city and countryside, as small farmers and producers geared their production toward the urban marketplace, trading their wares for cash, credit, or the products of urban labor.28

As regional home markets linked up – New York’s with Cincinnati’s, for instance – a bigger, more dynamic and voracious home market emerged on a national scale, creating a kind of capitalist core in “the North” (a combination of the Northeast and the Northwest), which

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sucked in raw materials from markets around the world – including the cotton states of the American South. A crucial feature of northern capitalism circa 1840 was that it was closely intertwined with but ultimately independent from the external markets with which it traded. As the emerging capitalist core of the Western Hemisphere, the North profited from market interactions with countless production zones, including the South, but northern capitalism did not depend on those markets for its existence. The example of cotton is instructive. Before the Civil War, northern capitalists and manufacturers were intimately bound up in the cotton trade with southern states, but with the destruction of slavery during the Civil War, they shifted their attention to cotton production in Egypt and India. Dependence was a one-way street: market-oriented production zones like the South were dependent on the capitalist core in the North, but the reverse was not true. The northern United States had a dynamic and largely self-sufficient home market, a different form of capitalism from the South.  

The type of capitalism described above was characterized by a commitment to restraint, both individually and collectively. The Northern capitalist, the very archetype of rational thinking and long-term calculation, was required to check his own impulses to buy or sell in the short run. The wage-earning working family internalized the values and rhythms of the home

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market, learning to curb their desires and exercise prudence. Cities, towns, and villages in the North were policed by magistrates and officers versed in the common-law tradition of the “well-regulated society,” by which rights and duties were meticulously balanced in the spirit of natural law. The various reform movements during the “Second Great Awakening” – temperance, prostitution, and above all antislavery – reflected a wish to set limits on the market mentality that was thought to be corroding traditional values in America.30

The boldest manifestation of northern restraint was the enshrinement of the right to self-ownership in the legal regimes of the northern states. Self-ownership was the lynchpin of liberal republican ideology as it developed in the northern states during the long eighteenth century from 1689 to 1815. The people of the northern states emerged from the American Revolution with a definition of natural rights that, in the case of slavery, emphasized personal liberty over private property. Into the early nineteenth century, the people of a fast-liberalizing northern society first rejected slavery (property in human beings) and then other forms of “unfreedom,” from apprenticeship and indentured servitude, inaugurating the transition to what would ultimately become a “free labor” society. This was the social and intellectual foundation for the process of state abolition during the “first emancipation,” as well as for the ban on slavery

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written into the Northwest Ordinance by the Continental Congress in 1787. The process of shifting and eliminating legal statuses unfolded at the state and local levels under the purview of the common-law regulatory tradition, with its commitment to a “natural” calibration of duties and rights.31

It was no accident that rights to self-ownership and the abolition of slavery in the North manifested itself in jurisdictional terms, in a process of state by state abolition which culminated in the creation of something called “the North.” The eradication of slavery and the expansion of the right to self-ownership had always advanced along jurisdictional lines, as a question of where humans could be held as property and where they could not. In this sense, the rise of “free” states in the North belonged to a long historical process going back centuries.

Slavery had existed in many societies throughout recorded history. But in the late medieval and early modern eras, in a small corner of northwestern Europe, Holland, France, England, and the northern German states endorsed what historians refer to alternately as the “municipal theory” or “freedom principle”: the idea that slavery was against natural law and could only be established by municipal (written, man-made, statutory) law. In places where no such law existed, there could be no slavery, no ownership of one person by another. Based on Roman and natural law as well as Christian doctrine, the freedom principle rejected property rights in human beings in favor of contract-based labor relations which presumed self-ownership.

While labor statuses in early-modern northwestern Europe fell far short of absolute freedom, they clearly rejected the idea of a perpetual property right in the body of the laborer. A master could own the labor power of an indentured servant or an apprentice, and could use all means of physical and legal coercion to ensure that the contracted labor was extracted; but he could not reduce the laborer to an alienable form of property, a tradeable commodity in the labor market. That was going too far. The freedom principle embodied the emphasis on restraint in the natural law tradition: one individual’s right to own property had to be balanced against the rights of others to at least own themselves. It was the duty of government to maintain equilibrium of rights, to set limits on the permeation of individual property rights. It is striking that the freedom principle emerged at a time and place when feudalism was dying out and where the seeds of later European capitalism – the peculiar social organization described above – were being sown.\(^{32}\)

\textit{A Perceived Lack of Restraint in Southern Capitalism}

In contrast to northern society, the South was said to have epitomized a lack of restraint in the modern world economy. Greedy, lascivious slaveowners were denounced by critics as the embodiments of a system with no limits, a market which penetrated into the very bodies of the labor force. To be sure, planters exhibited market values when they adopted “modern” principles

\(^{32}\) On the municipal theory, see Robin Blackburn, \textit{The Overthrow of Colonial Slavery, 1776-1848} (New York: Verso, 1988), pp. 36-58; \textit{idem., The American Crucible: Slavery, Emancipation and Human Rights} (New York: Verso, 2011); Drescher, \textit{Abolition}, pp. 22-25. See also Steinfeld, \textit{Invention of Free Labor, passim}. Robin Blackburn and Seymour Drescher remind us that the freedom principle emerged from specific class struggles in early modern northwestern Europe, not from the reveries of pensive Enlightenment-era philosophers. Far from an abstract credo, the freedom principle in Europe reflected the hard-won victories of peasants in their efforts to roll back serfdom and defeat attempts by feudal rulers to reintroduce chattel slavery. In a pure power struggle, the moral imperatives of the collective beat back the rapacity of the few. The freedom principle was inextricably related to the rise of “free labor” legal institutions and social practices in the early-modern period. As Robert Steinfeld has shown, the shift toward contractual labor in Western Europe created a spectrum of “free” servant statuses which, however unfree to modern sensibilities, excluded the possibility that masters could own the bodies of their laborers. Late-medieval towns and municipalities granted masters jurisdiction over their laborers as well as “temporary proprietary right to the servant’s labor during servitude,” but in each case the masters’ dominion extended no further than the labor of the servant. By the sixteenth century, a chain of bourgeois city-states dedicated to the freedom principle gave rise to the myth that cities were the realm of “free air.” As nation-states emerged, absolute rulers recognized the freedom principle’s utility as a means of limiting rivals’ power and placating peasant masses.
of rational production, and southern policing and regulation far outstripped that in the North. But these were not the same as placing restraints on the market. Quite the contrary, they were designed to intensify production, to accelerate the intrusion of market impulses into the bodies of slave laborers. The Old South was a society in which profligacy and desire flourished, where the self-destructive impulses unleashed by capitalism ran roughshod over the mores of the past. Debt-ridden planters invested most of their capital in slaves, spending so little on schools and infrastructure that, when the South emerged from the rubble of the Civil War, it was an impoverished backwater, a ruin of antebellum opulence. The renowned social grace of the planter class cloaked the perversities of the slave market under a veneer of mannered politesse. Even among the non-slaveholding lower and middle classes, economic mobility was perceived in terms of slave ownership. To own a slave was to become an independent southern gentleman.33

All of this could be traced to a different strand of liberal republicanism which emerged in the South after the American Revolution. The laws and mores of the Deep South (and the later trans-Appalachian Southwest) reflected the rootedness of racial slavery in those states, where the entwined concepts of liberty and property were thought to be (by the majority, at least) exclusively white – utterly incompatible with black skin. In the early nineteenth century, southern society became liberalized in ways quite different from the North, as courts and

legislatures articulated a radical notion of absolute private property rights that were ostensibly immune to state interference. The slaveowner’s “natural” or “original” right to private property trumped the liberty of his slaves, and it was the responsibility of government to protect that right against all interference.\textsuperscript{34}

This emphasis on absolute private property – like the absence of restraint which produced it – reflected the peculiar form that capitalism took in the Old South. Unlike the North, southern capitalism was dependent on global markets – in particular, the home market in England and the credit markets of the North. The South had no home market built around wage-spending workers: it had isolated trade depots like New Orleans, which shipped cotton and other goods to the capitalist core; but it had nothing like the dynamic economy emerging in the North, where urban clusters extracted raw materials from their respective hinterlands. This was because the South, while capitalist (in the sense of being fully immersed in and dependent on the global economy), did not have the same social organization as the North. Slaves were divorced from the means of production and alienated from the products of their labor, but whereas northern laborers were compelled to work by economic necessity, slaves were forced to work by legal and physical compulsion – violence authorized through the legal device of a property right. Because slaves had no wages to spend -- they were uncompensated laborers, cogs in an endless process of raw-material production -- they could not contribute to the rise of a southern home market. Slaveowners thought and acted like capitalists – they ratcheted up production through terror, violence, and wheedling – but the social organization of the South never underwent the kind of transition experienced in the North. In this sense, the South remained “colonial” until well after the American Revolution. The process of production and the rhythms of slave labor were

fundamentally dependent on the demands of the capitalist core, the home markets of the northern United States and northern Europe. The greater the demand for cotton, the harder slaveowners worked their slaves.\textsuperscript{35}

\textit{The Northern Antislavery Critique: “Property in Man”}

Antislavery activists criticized slaveowners and southern capitalism through the prism of capitalist social organization in the North, which they perceived as the “natural” order for American society. The economic critique of slavery went back at least to Adam Smith, the moral philosopher and economist who put slavery’s backwardness and inefficiency down to moral dissoluteness and maldistribution of rights. For Smith’s acolytes in the antebellum North, slavery was the ultimate symbol of a society buckling under the weight of “unnatural” and destructive commercial impulses – impulses fostered by the policies of vested interests in government. Slavery violated natural law and upset the equilibrium of rights and duties that they considered essential to political security and economic prosperity. Slave labor was inefficient and backward, a hindrance to national economic growth. The South was the opposite of a well-regulated society: slaveowners had too much power, both public and private, and their policies at the state and federal levels allowed market logic to infiltrate the most intimate of human relations. In short, the slaveowning class enjoyed an excess of power; it lacked discipline and restraint, the very virtues which were thought to undergird northern society. But limits on freedom were the “warp and woof of society,” according to Theodore Dwight Weld, a leading abolitionist and the architect of antislavery constitutionalism. The antislavery argument was therefore a negative argument, an appeal to set limits on slaveowner power and rein in markets

and commodification. It derived from the common-law legal culture in the North, where expanding freedom for one group meant diminishing freedom for others – in this case, expanding slaves’ personal liberty by withdrawing slaveowner property rights.  

Antislavery activists often pointed to the barbarity and inefficiency of slave labor. But the core of the antislavery critique was not the treatment of slaves by their masters. Instead, it was the property right which gave slaveowners absolute dominion over their slaves. The antislavery movement was above all a crusade to delegitimize property rights in human beings, to excise “property in man” from the panoply of rights in American law. Nothing symbolized the inordinateness of slaveowner power and the penetration of markets, the clear negation of self-ownership in southern legal regimes, like the legal fiction of “property in man.” It was the property right which opened the way for commodification of human beings, the process by which families were broken down into anonymous individuals, bought and sold along the circuitry of far-flung markets. “The principal feature of American Slavery, that which makes it what it is – the foundation of the whole system – the nucleus around which crystallize its untold evils – the trunk of this many branching upas tree – is the assumption of a right of property in the slave,” wrote one abolitionist in the 1830s.  

36 The critique of slavery I am describing here is somewhat different from the “free labor” critique described in Foner’s Free Soil. Whereas the latter emphasized the inefficiency and barbarity of slave labor as such, the critique I am describing emphasized the property aspect of slavery, deploiring the maldistribution of political power that appeared to derive from slaveowners’ property rights in slaves. In criticizing slaveowner property rights and demanding that Congress and state legislatures adjust the property relations between slaves and their masters, the property critique belonged to the common-law regulatory tradition explored in in Novak, People’s Welfare. In reality, the “free labor” and “property” critiques were one and the same, but it is worth pointing out the differences here. See John Blanton, “This Species of Property: Slavery and the Properties of Subjecthood in Anglo-American Law and Politics, 1619-1783,” (Ph.D. Dissertation, CUNY Graduate Center, 2016). Quote from Weld, “The Bible against Slavery: an Inquiry into the Patriarchal and Mosaic Systems on the Subject of Human Rights” (New York, N.Y.: American Anti-Slavery Society, 1838), p. 7.  

37 Philanthropist, July 1, 1836. Oakes, “‘No Such Right’: The Origins of Lincoln’s Rejection of the Right of Property in Slaves,” in Joseph R. Fornieri and Sara Vaughn Gabbard, eds., Lincoln’s America: 1809-1865 (Carbondale: Southern Illinois University Press, 2008). “Second-wave” radical abolitionists understood “property in man” to be the core evil of slavery. Yet they differed from their predecessors in paying much closer attention to slaveowners’ physical abuse of slaves. Countless slave narratives, compilations, and novels depicted the lurid and
Theodore Dwight Weld was at pains to distinguish the evil of “property in man” from other forms of servile labor. “A great variety of conditions, relations, and tenures, indispensable to the social state are confounded with slavery,” Weld wrote, “and thus slaveholding becomes quite harmless, if not virtuous.” Slavery, however, was not privation of suffrage, ineligibility to office, or taxation without representation. It was not privation of one’s oath in law or trial by jury, nor was it lack of religious freedom, cruelty and oppression, or apprenticeship. It was not filial subordination and parental claims, bondage for crime, restraints upon freedom, or compulsory service. These, according to Weld, were mere restraints upon freedom – the very glue of civil society. Slavery, by contrast, was “REDUCTING MEN TO ARTICLES OF PROPERTY – making free agents, chattels – converting persons, into things.” The “intrinsic element, the principle of slavery” was “MAN, sunk to a thing!... MEN, bartered, leased, mortgaged, bequeathed, invoiced, shipped in cargoes, stored as goods, taken on executions, and knocked off at public outcry!” Slavery was

*the reduction of persons to things; not robbing a man of privileges, but of himself; not loading with burdens, but making him a beast of burden; not restraining liberty, but subverting it; not curtailing rights, but abolishing them; not inflicting personal cruelty, but annihilating personality; not exacting involuntary labor, but sinking him into an implement of labor; not abridging human comforts, but abrogating human nature; not depriving an animal of immunities, but despoiling a rational being of attributes – uncreating a MAN, to make room for a thing! Slavery was nothing if not the eternal distinction between a person and a thing, trampled under foot.*

Weld was right. Slavery’s defining feature was the property element. To be sure, American slavery was a labor regime, and Southern law recognized that slaves were persons

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the horrible in slavery, abuse that was purportedly intrinsic to the slave system (it was). Lacking all corporeal freedom, slaves were subjected to all kinds of unimaginable cruelties, from rape and limb-cuttings to whippings and – worst of all – family separation.  

without rights. But labor is what slaves did; property is what they were, at least under the laws of the slave states. Whatever else slavery may have been in the antebellum South – a paternalist labor system, brutal exploitation, a semi-feudal “way of life” – it was above all a property regime, a regime in which human chattel were exposed to the market-driven whims of their masters.\textsuperscript{39}

Slaves were fully imbricated in the modern property law which assisted capitalism’s rise in northern Europe and Britain’s North American colonies. Initially treated as real estate (tied to the land), slaves by the late eighteenth century were considered chattels personal: moveable, alienable property entangled in contracts, gifts, wills, bequests, dowries, testaments, tort actions and debt reclamation. Attaching common-law property rights to slaves gave slaveowners a range of advantages which were not available to the owners of production in the North. For one thing, owning the entire labor force gave slaveowners unrivaled mobility; they could move west at a moments’ notice, snatching up prime real estate in the most fertile lands, well before free laborers and their families arrived. Like other forms of property in the nineteenth century, slaves were valued less as fixed holdings than as “property in action” – the dynamic basis for all future ventures by the slaveowner.\textsuperscript{40}


Furthermore, “property in man” translated into immense political power for slaveowners at the local, state and federal levels of government. Property ownership was the foundation for power in the British American colonies and later states. As holders of the most valuable form of property in the United States prior to the Civil War, southern slaveowners were by far the most powerful class in the country.41

When slaveowners defended slavery, they almost always did so by invoking their rights to private property – “vested rights” which were impervious to government interference. This, together with the deep respect for property rights in the Anglo-American tradition, made it extraordinarily difficult to attack slavery, for in liberal republican ideology and the common law tradition, to undermine one’s property was to undermine one’s liberty. Respect for private property was strong even among the most ardent of antislavery activists. Any attempt to regulate slaveowner property rights would have to confront powerful ideological currents as well as vested interests in government.42

argued that entrepreneurial nineteenth-century Americans were “concerned with protecting private property chiefly for what it could do” and that “vested rights [in the nineteenth century] had less to do with protecting holdings than it had to do with protecting ventures.” James William Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (Madison: University of Wisconsin Press, 1956), pp. 23-29. Quote from p. 24. Gavin Wright maintained that “[j]itting slavery into the system of Anglo-American common law was the central thrust of jurisprudence regarding slavery in both colonial and antebellum eras.” By the mid-eighteenth century, “slaves constituted legal property, a form of wealth and a basis of credit and exchange.” Into the nineteenth century, the “clear legal trend… was toward full alienability of slave property in the market.” Vested rights allowed slaveowners “to employ the slave in a location and at an activity of the owner’s choosing,” usually in places where no free laborer would work. Wright, Slavery and Economic Development, pp. 6, 20-21.

41 Robert Langford, Public Life and the Propertied Englishmen, 1689-1798 (New York: Oxford University Press, 1991). According to Langford, the post-1688 settlement ushered in a “property” paradigm which was to dominate Hanoverian political culture in the eighteenth century. Langford argues that property ownership became the predominant – in his words, “hegemonic” – social and political value of Anglo-American culture. Whether that claim is true or not, it is worthwhile to view the property-centered language of West Indian and British North American slaveowners in the light of Langford’s political-cultural argument.

The Municipal Theory

The heart of the antislavery effort to delegitimize property rights in human beings was an argument based on the municipal theory of slavery: namely, that “property in man” was an “artificial” or “local” right, not a “natural” or “universal” right founded in the “ancient” common law. That was the general premise of antislavery agitation since the seventeenth century, and it was the key premise in Lord Mansfield’s famous Somerset ruling in 1772, the single most important legal decision regarding slavery in the Anglo-American context. The basic thrust of Mansfield’s ruling – that slavery was repugnant to natural law and based solely on the positive laws of the colonies – was something of a starting premise for American antislavery. Again and again, activists argued that rights to property in slaves had no foundation in the common law, which “guarantees to all human beings within its jurisdiction and under its protection, the free use of their natural rights, in the highest perfection.” “Property in man” was different from all other forms of property; it was “nominal property, not real property,” recognized and enforced only by the laws of the slave states. According to one abolitionist, it was an indisputable fact, grounded in nature itself, that “a man cannot have a RIGHT OF PROPERTY in the bones and sinews and soul of his brother man.” Slavery was the definitive instance of corrupt social

43 On the Somerset case, see Ch. 1, n. 8.
convention overriding nature; it was a “crime” against nature and the common law, the most grievous form of theft imaginable.47

Most Americans in the early republic, even slavery’s most fervent defenders, assumed that the municipal theory applied to their unique federal system, that slavery was a strictly state institution. But the orientation of federal policy during and after the Missouri Crisis of 1819-21 convinced many northerners that slavery was becoming a national institution. The antislavery movement, with denationalization at its core, sought to reverse that trend, reasserting the municipal theory’s role in American federalism. Denationalization would “localize” slavery in the South by applying a strict reading of the municipal theory to federal law. It would set federal government policy in line with the freedom principle, putting limits on the power of slaveowners

47 Olcott, Two Lectures, p. 47ff. Olcott reminded readers of the “common law maxim, that ‘the receiver is as bad as the thief;’ which proves that at common law, slave-holding is as criminal as slave-trading and kidnapping... By the Common Law, all slavery is a mere usurpation of right; as is instantly felt whenever the rights of our white people are outraged. By that Law, no property in any thing stolen vests in the thief, or his heirs, as against the rightful owner. Neither does its produce or increase ever thus vest. The rightful owner or his heirs, can upon due proof recover them at any time. -- So if the thief sells the stolen property, neither the buyer or his heirs acquires my title to it, as against the lawful owner. By that Law too, every man is under God his own owner; and whoever steals, kidnaps, purchases or enslaves him, can acquire no title to him or his services, or to his posterity, as slaves. it is also a common law maxim, that 'the receiver is as bad as the thief;' which proves that at common law, slave-holding is as criminal as slave-trading and kidnapping. By the Common Law all the natural rights are inalienable; because the considerations of their sales and other alienations must fail; no slave having a right to hold those pretended considerations... These rules show, that all slave titles are mere wicked usurpations, committed in defiance of the Common Law. All slave laws, customs, authority and titles are ETERNAL WRONGS; and all slave traders and slave holders are among the greatest of criminals, by the Law of God and all just laws of men.” ibid., p. 32.

Here, American abolitionists followed contemporary reformers in Britain. In his pamphlet, The West India Question, Captain Charles Stuart argued that West Indian slaves were not really property. Slavery was the creature not of law but custom, a “sandy, yet terrible foundation” for property rights and related compensatory claims. There were no grounds for “property in man” and compensation in the common law, equity, or Divine Law, nor in political rights, British law, or principles of commerce. “Property in man” was not a universal right but the “legalized power of abusing and wrongdoing [slaves] with impunity.” This was the legal fiction of “property in man.” Stuart warned slaveowners: “The capital which is sunk in your negroes, is sunk.” Stuart, The West India Question (New Haven: H. Howe & Co., 1833), pp. 37, 42. West Indian Question became a staple of anti-slavery literature in the United States, re-published and distributed by the American Anti-Slavery Society as a blueprint for American abolitionists. See also Charles Stuart to Weld, March 26, 1831; to Weld [June, 1831]; to Weld, April 30, 1832; Weld to Elizur Wright, Jr., January 10, 1833, in Weld-Grimke Letters, pp. 43-44, 48-49, 74, 100.

William Lloyd Garrison quoted Lord Brougham’s denial of property in man in a published letter to the Boston Evening Transcript: “Tell me not of rights – talk not of the property of the planter in his slaves. I deny the right – I acknowledge not the property. The principles, the feelings of our common nature, rise in rebellion against it. Be the appeal made to the understanding or to the heart, the sentence is the same that rejects it. While man despise fraud, and loathe rapine, and abhor blood, they shall reject with indignation the wild and guilty fantasy, that man can hold property in man!” “Garrison to the Editor of the Boston Evening Transcript,” in Louis Ruchames, ed., The Letters of William Lloyd Garrison, vol. 1, (Cambridge: Belknap Press of Harvard University Press), p. 113.
and the penetration of slave markets. But it was never a laissez-faire policy. In limiting slaveowner power and repealing slaveowner laws, denationalization would lay the groundwork for a more balanced national economy grounded in a just distribution of rights and duties, a new order in which freedom was national, slavery local, peculiar and condemned.
PART I

Origins
Chapter 1

The Missouri Crisis and the Problem of Slavery in the Early Republic

If anyone epitomized the spirit and expectations of early national antislavery, it was Benjamin Lundy, the Quaker abolitionist who for years worked tirelessly to celebrate and promote state-by-state abolition in the Union. As a Quaker and a member of the Revolutionary generation, Lundy belonged to an antislavery tradition going back centuries to the very beginnings of slavery in English North America. Like many of his generation, Lundy’s idea of the Union was inseparable from his antislavery; to rejoice in the “blessings of liberty” secured by the Constitution was to believe in the central government’s duty to expand liberty throughout the Union, most importantly by aiding the states in the process of gradual abolition. A saddle maker by trade, Lundy traveled widely in his early years, from his native New Jersey to western Virginia, Ohio, Tennessee and Kentucky. It was in Wheeling, Virginia that he first encountered slavery, an occasion which set him on a path toward activism. Throwing his energies into antislavery journalism, Lundy grew convinced that, for antislavery agitation to be effective, it had to fuse public-opinion formation with political action. From the start, Lundy insisted on the need for a concrete plan, a strategy for limiting slavery’s growth and attacking the institution itself. “There is no kind of use in canvassing the subject by the fireside,” he wrote. The “huge fabric of oppression must go down, and I am not so anxious to listen to the question whether it shall be razed? as I am to learn how it shall be done.”¹

Yet, by 1820, Lundy’s assumptions about how universal abolition would unfold in the United States – a state-by-state process aided by a central government committed to phasing out slavery –

slavery – were in shambles, obliterated by the stark realities of the Missouri Compromise. By the terms of the Compromise, Missouri was admitted into the Union as a slave state, and the “line” separating slavery and freedom in North America was extended into the American West. As the sixth slave state to enter the Union since the ratification of the Constitution in 1788, Missouri symbolized slavery’s resurgence and the general abandonment of state-by-state abolition in the South. Congress’s decision to allow slavery into the territories south of latitude 36°30’ exemplified its proslavery bent in the years after 1815, and it naturalized what for Lundy should have been a temporary division between free and slave states. Not only were states electing to keep slavery alive in their limits, Congress abetted their apathy by aiding slavery’s expansion. Compared to Britain, Mexico and the new republics in South America, all of whom had either abolished slavery or taken steps toward that goal, the United States seemed to be moving in the wrong direction. “Monarchists are outstripping us in ground,” Lundy lamented in 1821. Here in the United States, an anti-republican “aristocracy” was attempting to roll back the egalitarian principles in the Declaration of Independence.²

The Missouri Compromise was a major defeat for antislavery Northerners like Lundy. They had assumed that the process of state-by-state abolition which had begun in the North would continue into the South until slavery no longer existed. That assumption unraveled well before Congress adopted the Missouri Compromise. The fierce debates that racked Congress between 1819 and 1821 were ostensibly about Congress’ power to ban slavery from the federal territories. But at its core the debate was about the central government’s disposition towards slavery – whether federal policy should operate on a presumption of freedom or slavery. That

² Genius of Universal Emancipation, June 19, 1823.
debate was couched in the language of constitutional politics, as a question of whether or not the Constitution guaranteed the protection of slave property as such.

Proslavery leaders argued that the Constitution treated slaves as property, and thus that Congress had a positive duty to protect slavery in the territories. Precisely because the Constitution guaranteed the protection of slave property, Congress could ban slavery from the territories. One proslavery southerner insisted that the “Constitution recognises the right to slave property, and it thereby appears that it was intended, by the Convention and by the people, that that property should be secure.”

In response, antislavery congressmen argued that it was the federal government’s longstanding policy to discourage slavery and promote freedom in areas under its direct jurisdiction. There was no constitutional guarantee for property rights in slaves, which derived from state law, not “from the Federal Constitution.” The Constitution – and thus the central government – treated slaves as persons, meaning that the national government operated on a legal presumption of freedom: all persons were presumed to be free regardless of skin color. The issues at stake in the Missouri Crisis were hardly new in 1820. As we shall see, the question of slavery’s relationship to the central government was as old as the republic itself.

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4 ibid., p. 952.
5 Until recently, the Missouri Crisis was often thought to be the first great debate over slavery in national politics, an ominous prelude to the much larger convulsions of the territorial crises after 1846. Yet a new generation of historians led by Matthew Mason and Craig Hammond has recovered the central role of slavery contestation in American politics from the founding into the third quarter of the nineteenth century, in almost every sphere of political debate, from westward expansion to party development and political economy. Slavery conflict, the new political historians argue, did not begin with the Missouri Crisis, which was as much a culmination of early-national conflicts as it was a prelude to the antebellum crisis. This chapter falls squarely in that strand of the historiography. I agree wholeheartedly with those who see the roots of the slavery controversy not in western expansion per se, but in fundamental contradictions arising out of the American Revolution, contradictions which were invested into the structure of the U.S. Constitution. My discussion in this chapter offers a new and more specific interpretive angle on slavery conflicts in the politics of the early republic. Drawing on the existing literature, I attempt to recover the unifying thread in the various slavery controversies before the Missouri Crisis: the problem of slavery’s relationship to post-1788 central-government power. Whether the issue was transient or fugitive slaves in the North, slave-trading along U.S. coastal waters, or slavery’s legal status in the Louisiana Territory and Washington, D.C., the same basic problem seemed to emerge from the slavery conflicts of the pre-1820 era: the problem of central-government policy towards slavery. A rudimentary antislavery nationalism appeared in this era and would later crystallize after the Missouri Crisis, later serving as the intellectual foundation for the radical abolitionist movement.
Property and Personhood in the British Empire

The American republic inherited the slavery question from the British Empire. Since the early seventeenth century, when England established New World colonies and engaged in the African slave trade, Britons around the Atlantic had debated the relationship of African slaves to government power, be it in Virginia, Massachusetts, or England itself. By the middle of the eighteenth century, there were two discernible poles in the debates, one proslavery, the other antislavery. Antislavery Britons, including prominent judges on the Court of King’s Bench in London, argued that slaves could never be reduced to mere chattel, that slavery was a servile status in which the essential humanity of the slave was assumed. Like all other persons in the empire, they argued, slaves were subjects of Crown and Parliament, meaning they had basic access to the definitive rights and procedures of subjecthood. In contrast, proslavery Britons from London to Kingston and Jamestown claimed that slaves were human chattel with no access to the famous “rights of Englishmen.” The property right in slaves was private and absolute, giving the slaveowner full dominion over the slave. It was a “vested” right, meaning that it was exempt from government interference. 

of the 1830s. State-level and constitutional arguments against slavery in this era would remain staples of the antislavery movement until the Civil War. Matthew Mason, Slavery and Politics in the Early American Republic; John Craig Hammond, Slavery, Freedom, and Expansion in the Early American West (Charlottesville: University of Virginia Press, 2007); Rothman, Slave Country; Waldstreicher, Slavery’s Constitution; Van Cleve, Slaveholders’ Union; Mason and Hammond, eds., Contesting Slavery; Newman, Transformation of American Abolitionism; Polgar, “Standard Bearers of Liberty and Equality” and “To Raise Them to an Equal Participation.” In stressing the continuity between pre- and post-1830 antislavery, especially the transposition of state-level antislavery arguments to the national sphere, my discussion here is closely aligned with Sarah Gronningsater, “Delivering Freedom.”

By the 1760s, slavery’s relationship to the central government in London was a source of tension in the empire. The issue appeared as a jurisdictional question about where slaves could be treated as property and where they could not. Contrary to the claims in modern scholarship, property rights in human beings did not derive from colonial statutes, which merely regulated slave behavior and dictated the terms by which slave property was managed. The Jamestown planters who in 1619 purchased the first slaves in North America assumed that the Africans were property, precisely because they had emerged from an existing Atlantic slave trade based on property rights in human beings. In 1729, it became the empire’s official policy to treat slaves as chattel property, not persons, meaning that the property right in slaves was now extraterritorial. Up to 1772, slaveowners could hold their slaves as property in London as well as Virginia. Slaveowners encountered no legal diversity as they carried their slaves from Jamaica to Massachusetts to England.7

Yet resistance to this regime never subsided. On both sides of the Atlantic, antislavery forces pushed against the government’s policy of treating slaves as property everywhere in the empire. Several North American colonies sought to close their participation in the slave trade, but were rebuffed by Parliament. Massachusetts and other colonies in North America continued to treat slavery as a personal status akin to servanthood, giving slaves access to basic common-law rights. Meanwhile, Quakers like Granville Sharp in England and Anthony Benezet in Pennsylvania worked tirelessly to inject legal diversity in the empire by applying the municipal theory to certain jurisdictions. The chief monument to their efforts was the famous Somerset

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case of 1772, which effectively ended the government’s policy of legal uniformity. The
Somerset case consumed London and the King’s Bench as the imperial crisis escalated in British
North America, where colonists were challenging the constitutional premises of Parliament’s

The Chief Justice of the King’s Bench, William Murray, Lord Mansfield, ruled that
Charles Stuart, a Virginian slaveowner who brought his slave James Somerset to England, could
not compel Somerset to leave the island and return to the colonies. Slavery, Mansfield argued in
dicta, was repugnant to natural law and could only be established by positive (man-made,
statutory, written) law. Because England had no slave codes, and because colonial slave codes
did not extend to the metropole (they were considered repugnant to English common law, which
was thought to be consonant with natural law), the property relation of master and slave had no
force in England; slaves, in this sense, were “free” the moment they stepped onto English soil.

Mansfield’s Somerset ruling was revolutionary in that it reversed half a century of British
policy on slavery and endorsed the premises of antislavery Britons. The ruling simultaneously
applied the municipal theory to England and limited property rights in human beings to the
colonies that sanctioned slavery. Mansfield seems to have assumed that when a slave entered a
free jurisdiction, his legal status changed from a property to a servant status, from chattel to a
legal person. From that point forward, the slave’s master owned the labor of his servant, not his
body; he was now a slaveholder in the strictest sense of the term. In other words, Mansfield
endorsed the antislavery argument that courts in free jurisdictions should presume freedom, treating slaves as subjects by placing them on the same level as their masters. In this way, Mansfield introduced legal diversity into the British Empire, erecting an imaginary “line” between the “free” metropole (England) and the “slave” colonies. Mansfield affirmed the legal diversity regarding slavery in the British Empire (outside the American colonies).9

Abolition in the Northern States

Beginning in 1777, several former colonies in the northern half of the United States either abolished slavery outright or began the process of gradual abolition. Although there was resistance to abolition on the grounds that it would undermine private property and saddle the states with impoverished black communities, slavery was easier to abolish in the northern states because it had never been as central to their economies as in the southern colonies, particularly South Carolina and Georgia, where great wealth had been amassed on the basis of slave-based staple production. The breakaway republic of Vermont was the first to abolish slavery, banning it in the state constitution of 1777. Tellingly, the ban referred to slavery as a personal status, avoiding any mention of property rights in human beings. Massachusetts and New Hampshire abolished slavery through their respective judiciaries. Antislavery lawyers in Massachusetts argued on Somerset grounds that “property in man” had never existed in Massachusetts, and that it was finally expunged by the 1780 Declaration of Rights, which had incorporated the principles

set forth in the Declaration of Independence. Much the same process unfolded in New Hampshire.10

Pennsylvania, Connecticut, Rhode Island, and later, New York and New Jersey, all adopted abolition legislation that gradually phased out the institution. (Pennsylvania’s 1780 abolition statute was the first of its kind anywhere in the world). To be sure, there was nothing gradual about the annulment of “property in man.” The property right in slaves was abolished immediately, and children of slave mothers would thereafter be free, breaking the cycle of perpetual slavery inherent in the property right. From that point forward, slaveowners could own slaves’ labor but not their bodies. In other words, slavery was transformed from a property status to a servant status, in line with the premises of the Somerset decision. What was gradual was the process by which slaves and their children continued to work for their masters as indentured servants. Adults would work as servants for the rest of their lives; children born after the passage of the statute would serve their masters until they came of age. Though hardly “free” in a modern sense, the key point is that post-emancipation slaves were no longer chattel property; they lived in communities where “property in man” was expunged from the books.11


In this way, abolition proceeded on a state-by-state basis. The speed and efficiency of abolition depended on the balance of power in each state. In states where slavery was marginal and slaveowners had little political clout – states like New Hampshire and Vermont – slavery was stamped out quickly. But in states like New York and New Jersey, where slavery was relatively prominent and slaveowners were entrenched in the legislatures, it was more difficult for antislavery forces to strike down “property in man.” Slaveowners resisted abolition on the grounds that slaves were private property. To be sure, there was a clear economic aspect to this claim, but the key part of the argument was political: as the basis of political liberty, property rights were inviolable and therefore off-limits to government interference. But even in New York and New Jersey, slaveowners were a minority, and their resorts to vested-rights doctrines were always quashed by the dominant regulatory tradition of the “well-regulated society,” in which rights were viewed as relational rather than abstract and absolute. Eighteenth-century courts and legislatures had long invoked the public rights and the common good to confiscate and abridge private property, and this situation was no different. Slaveowners made a lot of noise, but because the majorities in their states favored abolition, they could do nothing to halt the abolition process.12

Those who believed that universal abolition was within reach assumed that it would unfold on a state-by-state basis. For this reason, among others, there was no national antislavery movement in the Revolutionary era. Instead, there was a collection of state abolition societies like the New York Manumission Society and the Pennsylvania Abolition Society. Headed by elite figures like Benjamin Rush, John Jay, Alexander Hamilton, state abolition societies worked

with black community leaders to integrate freedmen into northern life, not least by educating white populations about the fundamental equality of blacks and by teaching current and former slaves the core values of republican citizenship. State societies also provided legal aid to blacks caught up in the slave system, from those who were wrongly held as servants to those who were accused of being runaways. Though it is difficult to draw the exact connections, it seems likely that antislavery advocates in the northern states were influenced by Lord Mansfield’s *Somerset* ruling. Most of them justified abolition using the natural-rights language of the Revolution, and while Mansfield’s ruling said nothing about natural rights (it referred to the older tradition of natural law), it was seen by many as favoring natural rights to liberty over private property. The form that gradual abolition took in these states – turning a property status into a servant status, transferring masters’ property rights from bodies to labor – reflected the *Somerset* ruling and the antislavery reasoning it championed.13

Many Americans expected the process of state-by-state abolition to continue southward. Yet while there were proposals for gradual abolition and a wave of manumissions in Delaware, Maryland, and Virginia, abolition did not take root in the South as it did in the North. This was hardly surprising given slavery’s fundamental role in the socioeconomic and political fabric of the southern states by the eighteenth century. By the mid-1780s it was clear that the legal uniformity of the colonial had given way to a serious conflicts-of-law situation -- namely, two different property regimes existing side-by-side in a single country. Just as the *Somerset* ruling erected a “line” separating metropolitan England from its “slave zone” colonies, northern abolition established a line in North American between the “free” North and “slave” South -- the

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famous Mason-Dixon line on the Maryland-Pennsylvania border. The new situation created two fundamentally incompatible legal regimes with different bases of legal presumption. In “the South,” humans – at least those with African ancestry – could be property, and courts there presumed slavery on the basis of black skin. In the North, where people could not be property, courts there generally presumed freedom regardless of skin color. By injecting legal diversity into what had been a uniform question between the colonies, the northern states forced the issue of whether the new national government would treat slaves as property or persons.14

The system of government established under the Articles of Confederation was remarkably decentralized, with numerous “confederal limitations” on the central government. This reflected the general antipathy to central government after the Revolution, but it also testified to slaveowner influence in the making of American federalism. By the terms of what historians call the “federal consensus,” it was generally agreed that the new government would have no power to touch slavery in the states. In the post-*Somerset* context, everyone – slaveowners and antislavery leaders alike – assumed that slavery would be a state institution. This situation was advantageous to slaveowners, who turned Lord Mansfield’s reasoning on its head in order to safeguard slavery in the states. Alarmed by growing attacks on slavery grounded in natural law and natural rights rhetoric – including Mansfield’s dicta in *Somerset* – slaveowners latched onto Mansfield’s positive-law reasoning, using it to bolster and protect slavery in states that had no intention of abolishing it. Mansfield’s positive-law logic cut both ways: while it specified that slavery could only exist in places that sanctioned it with positive law, it also reinforced the argument that no outside power could interfere with slavery inside

those jurisdictions. In fact, Mansfield’s ruling made it clear that slavery was a legitimate institution under the law of nations (defined as a compilation of positive laws). Slaveowners in the 1780s used this logic to ensure a weak central government in the new United States.\textsuperscript{15}

From the beginning, there was confusion about whether the new government would treat slaves as persons or property. For instance, did the Articles’ “privileges and immunities” clause, which guaranteed an equality of rights throughout the Union regardless of state, mean that the property right in slaves was extraterritorial in the Union? Similar questions arose when it came to taxation. Debates over taxation in the Continental Congress in 1783 produced the infamous “three-fifths” ratio that would later end up in the Constitution. Still, despite the uncertainty regarding the national government’s disposition toward slavery, it was widely understood that the central government would have no power to touch slavery in the states. If anything, most Americans continued to assume that slavery was a state institution which little connection whatsoever to the central government.\textsuperscript{16}

Evidence that slavery would be treated as a state institution could be seen in the northern states’ policy of granting comity to slaveowners traveling with their slaves in the North as transients, sojourners, or temporary residents. With divergent legal regimes in the North and South, visiting slaveowners posed difficult questions about the legal status of slaves in the northern states. For guidance, free-state judges and legislators turned to the branch of the law of nations known as “comity” or “conflicts of law” doctrine, which dealt with clashing legal regimes. Their task was to decide whether and to what extent their states should recognize the


right of the slaveowner to his slave – in short, to square the property right of the slaveowner with the presumption of freedom in their states.17

Beginning in the 1780s, the free-state legislatures settled on a policy of granting comity to slaveowners. Yet they made it clear that the right to “property in man” did not extend into their jurisdictions. Slaveowners who became residents of a northern state could not hold their slaves as property. Transient or sojourning slaveowners could, however, apply for a license to hold slaves for up to six or nine months, depending on the state. In the name of national comity, these so-called “stay laws” limited the effect of the municipal theory to some extent, allowing slaveowners to hold their slaves in the North for a period of time. Yet the stay laws’ very existence testified to the slavery’s uniqueness in the American federal system; one did not need a permit to bring a horse or chair into a free state. To be sure, the northern states could have denied comity altogether but chose not to, ignoring to an extent the logic of the municipal theory. But the stay laws conspicuously qualified rights to “property in man,” setting them apart from other rights made extraterritorial by the Privileges and Immunities Clause.18

Antislavery Americans in the Revolutionary era assumed that the national government would assist state-by-state abolition by discouraging slavery on the continental level. The Continental Congress verified that assumption when it passed the Northwest Ordinance in 1787,

18 ibid. Though it remains the best work on slavery and comity in the United States, Finkelman’s book reflects an overly pessimistic view of the North’s comity policy in the early republic. Whereas Finkelman apparently saw the stay laws as a rejection of Somerset principles and, by implication, a nationalization of slavery by way of an extraterritorial right to slave property, I see them as a qualification of the local right to property in human beings, a recognition of the master’s ownership of the labor power, not the body, of his slave-servant. Where Finkelman sees a glass half full, I see a glass half empty. The same critique applies to the treatment of comity in Cover, Justice Accused: Antislavery and the Judicial Process (New Haven: Yale University Press, 1975). On extraterritorial rights and the U.S. Constitution, see Daniel Joseph Hulsebosch, Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830 (Chapel Hill: University of North Carolina Press, 2005).
extending the “line” between slavery and freedom to the Mississippi River. Introduced by Thomas Jefferson in 1783 as a total ban on slavery in the American territories, the ordinance was revived in 1787 by New Englanders Nathan Dane and Rufus King. Among other things, it banned slavery from the territories north of the Ohio River (present-day Ohio, Indiana, Illinois, Wisconsin and Michigan). It established a presumption of freedom in the Northwest Territory and all future states carved from it; all persons there would presumably own themselves and their labor and have access to basic civil protections. For many, the ordinance epitomized a national policy of discouraging slavery and facilitating the process of state-by-state abolition.19

The Northwest Ordinance of 1787 was the last piece of legislation passed by the Continental Congress. Almost simultaneously, delegates from the states were in Philadelphia laying the foundations for a new national government that departed radically from the decentralized structure of the Articles of Confederation. The new central government contemplated by the constitutional convention in 1787 was far stronger than that established by the Articles, but its precise relationship to slavery remained unclear. No one questioned the federal consensus which had emerged under the Articles: the delegates appear to have assumed that slavery would continue to be a state institution which the new Congress would have no power to restrict. The power to establish, regulate, or abolish slavery would reside with the state governments, who would determine the property regimes of their states. This was an implicit premise in the slavery-related debates at the convention, and it reflected the delegates’ likely

familiarity with the *Somerset* decision and its impact on state policies over the previous fifteen years.

The new Constitution recognized slavery’s existence in the states and protected it in important ways. Three clauses stand out. The first is the so-called Three-Fifths Clause, which incorporated slaves into the formula for representation in the new Congress. The plan adopted by the convention would base representation in the House of Representatives on a state’s population while giving two representatives to each state in the Senate. In the latter body, representation reflected population, whereas in the former it reflected property. Because slaves were both persons and property, they became entangled in the debate over representation.

Should slaves be considered as part of a state’s proportion of representation in Congress? If so, should they be counted as property or as persons, or some combination of the two? Slaveowning delegates wanted slaves to count as property only, to give them increased representation in the Senate, but northern delegates refused, arguing that northerners would have no reciprocal representation in that body. Eager to defuse tension and reach a compromise, the delegates turned to the so-called federal ratio, which had developed out of earlier debates over taxation under the Articles of Confederation. According to the federal ratio, slaves would count

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as three-fifths of a “whole” represented person, precisely because they were persons held as property. If slaves had been treated as persons only, they would have given either total representation or none at all; but precisely because they were persons and property, they were given qualified recognition via the nefarious three-fifths ratio. By recognizing the dual character of slaves, the Three-Fifths Clause cast legitimacy on the property regimes of the slave states.

The second slavery-related clause was the Fugitive Slave Clause, which came up late in the convention and passed without much debate. Slaveowning delegates from the Deep South states of South Carolina and Georgia came to Philadelphia with grave concerns about the jurisdictional diversity created by northern abolition. They were not alone, for New York and New Jersey were still slave states in 1787 and it is likely that their delegates had the protection of slave property on their minds as well. The problem was stark: What would happen if a slave absconded to a “free” state and, like James Somerset in England, won her freedom by means of habeas corpus and a sympathetic judge? Would slaveowners’ property rights extend into the free states? The Fugitive Slave Clause answered these concerns by effectively suspending the municipal theory in the case of runaway slaves. It held that the condition of slavery – property rights in human beings – attached to runaway slaves in the North, and it barred the northern states from enacting legislation interfering with that right of recaption. The clause made the slaveowners’ “right of recaption” extraterritorial in the Union – (though it is not clear that a right of recaption was considered the same thing as a right of property as such) -- and it suggested that such a right would supersede the purported rights of the runaway. Though located in the section

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of the Constitution dealing with relations between the states (rather than with the functions of the central government), the Fugitive Slave Clause strongly suggested that, in the case of runaway slaves, slaveowner property rights would be enforced with central government power.\textsuperscript{22}

Finally, there was the Slave Trade Clause, which guaranteed that Congress would not interfere with the African slave trade for another twenty years. While this protected the Atlantic trade for a time, it also meant that Congress \textit{would have} power to abolish the trade by 1808 – and, by extension, that it would have full power over slavery on the high seas.\textsuperscript{23}

These were the great slavery-related compromises in the Constitution, “security arrangements” enshrined in positive law, as one recent historian has argued. They reflect the political influence of Deep South delegates at the convention, who represented the wealthiest states in the new Union.\textsuperscript{24} Constitutional debates in subsequent decades would focus primarily on these three clauses.

Before moving on, it is worthwhile to pause and consider the question of slavery’s relationship to the central government. For while the clauses above recognized slavery’s existence and extended it crucial protections, there is a certain silence and dissimulation in the language of these clauses, an air of discomfiture which suggests that, not only were slaves different from other forms of property, the central government should also act upon them differently. This was likely done deliberately as a way to avoid sectional tensions during the convention and the subsequent ratification process. It is nearly impossible to discern the

\begin{itemize}
\item \textsuperscript{22} On the Fugitive Slave Clause, see Wieck, \textit{Antislavery Constitutionalism}, pp. 78-80; Fehrenbacher, \textit{Dred Scott}, pp. 24-25; \textit{idem}, \textit{Slaveholding Republic}, p. 44; Finkelman, \textit{Founders}, p. 31; Waldstreicher, \textit{Slavery’s Constitution}, p. 98; Van Cleve, \textit{Slaveholders’ Union}, pp. 167-172.
\item \textsuperscript{24} Some historians have argued that several other clauses touched upon slavery indirectly, including the clause for suppressing domestic violence in the states, but future conflicts over slavery would mainly on these three. See Wieck, \textit{Antislavery Constitutionalism}, pp. 62-83; Finkelman, \textit{Founders}, pp. 3-7.
\end{itemize}
framers’ intentions from the text alone, but at the very least, the language in the Constitution allowed future generations of antislavery activists to argue that, while the Constitution recognized slavery’s existence in the states, it did not sanction or guarantee slavery as such. It significant that, in the final document, the words “persons” and “persons held to service” were used instead of “slaves,” “slavery,” or “slave property.” For instance, the Three-Fifths Clause, which, as we have already noted, counted slaves as both property and persons, nevertheless refers to them as “other persons,” a designation which suggests a stylistic distinction between slaves as property in the states and slaves as persons in the frame of the national government. Likewise, the phrase used in the Fugitive Slave Clause – “persons held to service” – was evasive enough to allow later abolitionists to argue that the clause involved a right of recaption to servants’ labor power, not a property right to slaves as such. During the debates over the Slave Trade Clause, James Madison claimed that it would be wrong to admit the principle of property in man into the Constitution – at least according to the notes his estate published in 1840, which Madison might have edited in light of subsequent slavery controversies.

The utmost caution is needed in any analysis of slavery and the Constitution. Nothing is certain, precisely because the record is thin and the language is so ambiguous. Still, the designation of slaves as persons rather than property needs emphasizing. A generous analysis might conclude that such language reflects the moral wriggling of framers ashamed of slavery and yet compelled to register its political economic significance in the machinery of government. A still more generous reading would argue that the majority of framers, including Gouvernor Morris, the author of the final product, sought to distinguish slavery from the national government as much as possible. It is entirely possible that, for men like Morris and even Madison, whose brave “new science of politics” overlapped with an older view of constitutions
as grounded in natural law, membership in Europe’s community of “civilized nations” depended on making the United States into a “free” country – a place where the freedom principle predominated, even with the existence of slavery in the states – in line with the metropolitan states of Europe. That kind of respectability would only come if slavery – which many likely saw a vestige of the colonial era – was portrayed as “local,” distinct from the new national government. In this sense, the omission of the words “slave” or “slave property” suggests more than shame and expediency; it also points to a possible distinction in the new federal system, however cosmetic, between “state” slavery and “national” freedom. In other words, while the Constitution recognized slavery and threw a measure of legitimacy upon it, it may not have sanctioned slavery in a positive sense, as a national institution. In some ways, the presence of structural safeguards for slavery in the Constitution highlight slavery’s unique status in the Constitution, that slaves were not like other forms of property – that such safeguards were exceptions to a general rule of freedom.

In the final analysis, the point which needs emphasizing is that the Constitution’s ambiguity laid the foundations for a policy of national silence and obfuscation, and yet, simultaneously, set the groundwork for both pro- and antislavery interpretations in the future. In one sense, the founding document reflected the political economic realities of the immediate postcolonial context: it acknowledges slavery as a powerful interest in the states, a property regime backed by the full force of the new central government. At the same time, the Constitution holds out the possibility of a future in which slavery no longer exists in the United States, as if, on the national level at least, the whole terrible ordeal had never taken place. As one recent historian has pointed out, the ratification debates of 1787-88 were arguably the first constitutional crisis over slavery, as pro-ratification forces beat back anti-adoption hostility in the

25 The notion of two temporal perspectives on the Constitution is from Fehrenbacher, Dred Scott, p. 27.
states: opposition in the slave states pointed to the document’s lack of sufficient protections for slavery, while northern antislavery opponents complained about precisely the opposite – that the Constitution included too many concessions to slaveowners and slavery. In the end, the deliberate obfuscation of the Federalists won the day, but the fundamental question of slavery’s relationship to the new central government was left unresolved.26

Slavery controversy erupted in the very first session of Congress in 1790. Quaker petitioners, joined Benjamin Franklin, petitioned the Congress to go to the “full extent” of its power to abolish slavery and the slave trade in the United States – to “devise means for removing this inconsistency from the character of the American people; that you will promote mercy and justice towards this distressed race, and that you will step to the very verge of the power vested in you for discouraging every species of traffic in the persons of our fellow-men.” Strictly speaking, because the term “full extent” did not mean direct abolition in the states, the Quakers’ request did not violate the federal consensus. Still, slaveowners in Congress responded with a swift and fierce rebuke, insisting that it was improper for Congress to even consider the slavery question. The House report on the petitions argued that Congress had “no authority to interfere in the internal regulations of the particular States” and could not end the slave trade until 1808. It was up to the “Legislatures of the several States,” not Congress, to satisfy the “objects” in the petitions, including “the happiness of slaves.”27

26 Waldstreicher, Slavery’s Constitution, pp. 107-151.
Though vague, the Quaker petition of 1790 was the first explicit demand upon the central government to take action against slavery, and in that sense it was the first expression of antislavery nationalism in American politics. But ironically, the Quaker petitions effectively strengthened slavery where it already existed. Faced with an antislavery critique, slaveowners in Congress doubled down on the positive-law logic of the *Somerset* case, claiming that slavery was legitimate in the states and immune to central-government interference. As was true in the *Somerset* case, the Quaker critique of slavery in 1790 – a critique grounded in the language of natural law and natural rights – actually fortified the bulwarks protecting slavery at the local level. In this way, the petition debate of 1790 reiterated the centrality of the federal consensus under the new regime. This did not mean that the new regime was proslavery. Antislavery Americans accepted the federal consensus on the grounds that slavery was a state institution. In their view, the federal consensus was a double-edged sword: Congress could not touch slavery in the states, but it *could* take action against slavery in areas outside the states. In this vein, the House report on the petitions – the same one that prohibited federal action in the states – affirmed Congress’s power over slavery “in all cases to which the authority of Congress extends.” In other words, property rights in slaves were *not* guaranteed protection outside the slave states.28

The constitutional regime after 1788 recognized “property in man” as a state institution, but a few clauses in the Constitution suggested that slavery was in some ways extraterritorial in the Union. The Privileges and Immunities and Full Faith and Credit clauses – both of which

derived from comity – implied that the free states should recognize slavery to an extent, that slaveowners should at least have the right to transport such property across state lines. As we have seen, the Fugitive Slave Clause was intended to mute the *Somerset* principle in the Union, to give slaveowners an extraterritorial right to at least the labor of the slave. Neither of these clauses made the property right in slaves extraterritorial, but they did create a situation in which slavery reached well beyond the limits of the slave states. This was reinforced in 1793, when Congress enacted a federal Fugitive Slave Law to enforce the Fugitive Slave Clause – to expedite the recapture of fugitive slaves. The law established the legal procedure by which slaveowners and their agents recaptured slaves: they would have to bring the alleged runaway before a northern magistrate, who would then issue a writ of recapture. It also established penalties for any person found aiding or concealing suspected fugitives. The language in the law suggested that slaveowner property rights should take precedence over the slave’s right to liberty; for instance, courts would only hear testimony from claimants, never from defendants. The law passed in Congress with little debate, evidence that the Fugitive Slave Clause was understood to be the exception to the rule of freedom. Yet the general spirit of the law – the fact that it extended the legal presumption of slavery into northern courts and backed slaveowner property rights with federal power – undercut the idea that slavery was a state institution.29

Southern slavery not only survived the egalitarian impulses of the Revolution, it emerged stronger and more profitable than ever. The turn of the nineteenth century witnessed the rise of a new breed of American slavery that was deeply entwined in the credit markets of Britain and the

North, a “capitalist” slave system that was far more complex and demanding than the slave systems of the seventeenth and eighteenth centuries. Faced with growing demand for cotton in England, where the textile industry was spearheading the industrial revolution, American slaveowners scrambled to increase cotton production. There were two general ways to do this: secure new land and intensify slaves’ labor output. The invention of the cotton gin in 1793 by Yale graduate Eli Whitney helped meet demand by expediting cotton production, but slaveowners also began to develop more exacting standards of labor output, using violence, threats and rewards to increase productivity. Slaveowners from Virginia and North Carolina poured into the trans-Appalachian west, laying the foundation for two new slave states, Kentucky and Tennessee. Some even pushed for a repeal of the slavery ban in the Northwest Ordinance, hoping to expand slavery into areas north of the Ohio River (they were defeated by antislavery Ohioans). Further south, Georgian and South Carolinian slaveowners encroached on Creek, Cherokee and Chickasaw lands and pressed their state legislatures and Congress to push the tribes further west. All of this was abetted by the U.S. government. Congress organized the Mississippi Territory in 1798, and U.S. Indian agents facilitated the removal of Indians from wide swaths of territory, often by means of fraudulent treaties. Far from discouraging slavery, Congress was actually prolonging it in the Southwest.30

Different premises about the relationship between slavery and federal power emerged in the South in these years. Slaveowners increasingly saw the Union as the guarantor of slave property in the borderlands of the southwestern frontier, where proximity to the French and Spanish empires – and several hostile Indian tribes – stoked fears of slave rebellion and

unchecked marronage. This view sprang from the practical implications of the Northwest Ordinance, whose ban on slavery applied only to areas north of the Ohio River – which implied that slavery could expand into the areas south of the river. Unlike settlers in the Northwest, whose views on slavery and federal power were shaped by the ban on slavery in the Northwest Ordinance, slaveowners in the Southwest grew accustomed to the idea of letting those on the frontier – mainly themselves – determine the social organization of the territories. In this sense, Congress was thought to be a mere proxy for slaveowner interests, not a paternal legislature with broad powers for managing property relations in the territories.  

The first signs of tension appeared in 1798, as Congress considered a bill for organizing the Mississippi Territory. Several northern congressmen called upon Congress to ban slavery from the proposed territory. Massachusetts Federalists George Thatcher argued that slavery was repugnant to the “rights of man” and “in direct hostility to the principles of our government.” Though many southerners may have agreed, they did not share the underlying premise of Thatcher’s attack: that Congress had the power and moral authority to halt slavery’s expansion into the West. For them, the issue of slavery’s extension was a matter for the people of the states, not the federal government, whose only responsibility was to protect and advance the interests of the states, including slavery.  

Slaveowners had outsized influence on federal policy as a result of the three-fifths rule, which gave them a distinct numerical advantage in Congress. With a majority interest in the Electoral College, slaveowners swayed presidential elections, and because the president picked Supreme Court judges, they also shaped the political orientation of the Supreme Court. It was precisely this numerical advantage which allowed Thomas Jefferson to defeat John Adams in the

31 Bonner, Mastering America, pp. 5-14; Childers, Failure of Popular Sovereignty, pp. 10-25.
presidential contest of 1800, a victory which solidified southern control of federal policymaking and ushered in a functionally proslavery federal government. Jefferson’s election coincided with a major slave revolt in Virginia led by Gabriel Prosser, an event which did more than anything to halt the progress of state-by-state abolition in the South. In 1801, Congress reenacted the Virginia and Maryland slave codes in Washington, D.C., the new national capital. Two years later, Jefferson’s administration orchestrated the famous Louisiana Purchase, doubling the size of the United States. Slavery had already existed in the Louisiana Territory, and as American slaveowners streamed into what would become Arkansas and Missouri, the idea of the Union as a vehicle for advancing and protecting slavery on the frontier gained strength among southern leaders. Once again, there was antislavery opposition – a vocal minority of northern congressmen sought to ban importation of slaves into the Louisiana Territory (Federalist Samuel White of Delaware denounced the “disgraceful traffic in human flesh” and insisted that the treaty by which France ceded the territory to the United States offered no protection for “the power, I will not say right, of holding slaves”) – but most congressmen insisted that the treaty obliged the U.S. government to recognize “property in man.”

Congress acquired the Louisiana Territory in 1803 and admitted Louisiana as a slave state in 1812. In this and other ways, slaveowners and their allies in Congress geared federal policy toward proslavery ends, strengthening the ties between slavery and the central government.

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33 White quoted in Rothman, Slave Country, p. 28.
Yet in other areas, federal policy worked toward antislavery ends. In 1807, Congress banned American participation in the Atlantic slave trade, fulfilling the promise of the Slave Trade Clause at the earliest moment possible. The U.S. prohibition paralleled developments in Britain, where, in that same year, Parliament banned participation in the slave trade. Sir William Grant, Mansfield’s successor as Chief Justice of the Court of King’s Bench, enforced Parliament’s ban in the *Amedie* case (1810) by grounding the policy in *Somerset* principles. His successor, Sir William Scott, Lord Stowell, argued much the same thing in two important cases, *The Fortuna* (1811) and the *Donna Marianna* (1812). On the high seas, as in the Northwest Territory, U.S. policy reflected a legal presumption of freedom. In other words, the national government would promote freedom at the same time it would actively discourage slavery. Notwithstanding what was happening in the Southwest, this was what many Americans saw as the basic premise of federal policy in the first decade of the nineteenth century.35

That changed after 1815, when federal policy veered in a definite proslavery direction. Napoleon’s defeat at Waterloo and the end of hostilities in Europe led to a revival of transatlantic trade centered on Britain’s thriving textile industry and, to a lesser extent, the textile industry emerging in New England. With demand for American cotton stronger than ever, federal policymakers made it a priority to secure new lands for cotton production. The U.S. Army was instrumental in removing Indian tribes from the Lower Mississippi Valley during and after the War of 1812, opening up huge tracts of land with rich alluvial soil – the famous “Black Belt,” as it came to be known. Slaveowners and land speculators flooded the territory with slaves and credit, creating a cotton boom which, among other things, produced a massive interstate slave

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trade between the older slave states and the “Deep South.” Between 1810 and 1820, when three new slave states joined the Union, close to 125,000 slaves were moved from states like Virginia and Maryland to the newer states of Mississippi (1818) and Arkansas (1819). The trade, which took place both overland and along U.S. coastal waters, trebled in size by 1830. By 1818, the new breed of capitalist slavery had truly come into its own, with much help from the federal government.36

The end of the Napoleonic Wars also invigorated the positive-law defense of slavery in the states. Slaveowners grew increasingly confident that, not only was slavery a legitimate form of property, the internal slave trade was a valid form of commerce. Here they were inspired by the reasoning in the 1816 King’s Bench case Le Louis, in which Lord Stowell recognized the right of foreign countries to engage in the African slave trade. The return to peace meant that the laws of war had been superseded by the law of nations, Stowell wrote. The law of nations recognized the right of slaveholding nations to participate in the slave trade. To be sure, slavery was against natural law, but that alone did not justify seizing foreign slaving vessels. Despite Parliament’s own ban on slave-trading, Britain had to respect the right of other countries – France, Spain, Portugal – to partake in the African slave trade. In a stark passage that reflected the general shift towards legal positivism in the early nineteenth century, Stowell argued that, when judging slavery and the slave trade, that the law of nations used a “legal standard of morality” rather than natural law. This reasoning went well beyond the immediate context of the

case; it implied that, under the law of nations, slave-trading between countries that sanctioned slavery was entirely legitimate and immune to interference.  

This was precisely the logic which American slaveholders used to defend the interstate slave trade in the United States. The 1807 slave-trade ban had severed American slavery from the wars in Africa which supplied the African slave trade. The American trade was entirely different; it was domestic and therefore legitimate, a respectable trade in human commodities. It was also encased in the same hard shell of positive law as slavery in the states; the same law of nations that prevented British warships from seizing Spanish or Portuguese slaving vessels applied to American warships in U.S. coastal waters. In other words, the federal consensus applied to the slave trade as well as slavery in the states. Congress had no power to interfere with slaving vessels from Maryland to Louisiana.  

Indeed, slavery’s renascence after 1815 was so powerful that it began to spill over into areas long considered free. Northern stay laws were routinely ignored by slaveowners, who exploited a general policy of non-enforcement in the North in the early nineteenth century. In the Indiana and Illinois territories, the territorial governor William Henry Harrison (the future presidential candidate) aided slaveowner efforts to repeal the ban on slavery in the Northwest Ordinance. When the Illinois Territory applied for statehood in 1818, proslavery settlers tried to insert the right to property in slaves into the Constitution, making it into a slave state. All of these attempts were defeated at the hands of antislavery settlers, who reinforced the ordinance’s slavery ban and strengthened the Northwest’s cultural identification with the “free” North.

38 *ibid.*, pp. 175-177.  
By 1819, the idea that the states would abolish slavery one by one with help from the national government seemed increasingly remote. Slavery was stronger than ever, and the national government seemed to be promoting rather than discouraging its expansion. State-by-state abolition seemed to have stalled at the Maryland border, killed off by the fear instilled by Gabriel Prosser’s slave rebellion in Virginia in 1800. The state antislavery societies of the Revolutionary era were now coopted by the American Colonization Society, which explicitly rejected the old policy of integrating former slaves into republican society, and southern manumissions dwindled to a trickle as leaders endorsed the self-serving theory of “diffusion” – preparing slaves for freedom by dispersing them across the American continent, undercutting their ability to rise up against whites in unison.40

Meanwhile, a series of key legal decisions in the South revealed the extent to which abolition had fallen out of favor in the South. In cases like *Harry v. Decker & Hopkins* in Mississippi (1818), *Rankin v. Lydia* in Kentucky (1820), and *Lunsford v. Coquillon* in Louisiana (1824), southern judges freed slaves who brought freedom suits claiming their masters had held them in a free state longer than the stay laws permitted. Judges in these cases recognized the application of *Somerset* principles to the American federal system. The judge in *Rankin v. Lydia* described slavery as “a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law.”41 These rulings reinforced the idea that slavery depended on the positive law of the states – that the property right in slaves was not national. They suggested that, if slavery was at all extraterritorial in the Union, it was because northern states chose to grant a limited form of comity to slaveowners, not because the right to “property in man” was among the privileges and immunities of American citizenship.

41 *Rankin v. Lydia* 9 Ky. 467.
Yet they also gave the sense that the southern states had no intention of abolishing slavery, that they had become inured to the idea of a nation half slave and half free. Far from undermining slavery, the rulings further naturalized the Union as it was, giving slavery an air of permanence in southern life.42

Two important legal decisions in 1819 reflected the uncertainty in the early republic over slavery’s extraterritorial reach and its relationship to the national government. Both decisions concerned legal presumption – whether courts should presume freedom or slavery in cases involving alleged slaves. The first case took place at the state level, in the Pennsylvania Supreme Court. The key issue in Wright v. Deacon (1819) was enforcement of the 1793 Fugitive Slave Law. Slaveowners complained that efforts to establish the legal status of suspected runaways in Pennsylvania violated the 1793 law, which privileged slaveowner property rights over slaves’ freedom. Lawyers arguing against the Fugitive Slave Law insisted that slaves who entered Pennsylvania were no longer property but servants whose labor whose masters retained ownership of their labor, not their bodies. The language in the Fugitive Slave Clause (“persons held to service”), they argued, corresponded with this jurisdictional distinction. Pennsylvania Chief Justice William Tilghman sided with the slaveowners. Testing the legal status of the alleged slave did violate the Fugitive Slave Law, he argued, precisely because it undermined the property right in slaves. The Fugitive Slave Law was therefore constitutional. More importantly, the law bound northern courts to presume slavery in the case of runaway slaves. In other words, by virtue of a federal law, the South’s presumption of slavery extended into the free states, where abolition had established a general presumption of freedom.43

43 Wright v. Deacon 5 Serg. & Rawle 62. See Morris, Free Men All, pp. 42-44.
Around the same time, Supreme Court Justice Joseph Story argued in *La Jeune Eugenie* (1819) that the United States government should adopt a legal presumption of freedom on the high seas. The previous year, an American warship had seized the French vessel *La Jeune Eugenie* on suspicion of slave trading. Story, on circuit in Boston, concluded that the ship had been engaged in the slave trade and that the U.S. government was justified in emancipating its cargo. Story pointed to the 1807 legislation banning U.S. participation in the slave trade. But this was a foreign vessel, and according to Lord Stowell’s reasoning in the *Le Louis* case, the U.S. had no right under the law of nations to interfere with “legitimate” slave-trading. Story ignored that argument, insisting instead, that, because the law of nations rested on natural law, it did not recognize the Atlantic slave trade. The 1807 slave-trade ban was a mere positive-law expression of a deeper natural-law principle. Here was a definitive statement of antislavery nationalism: the United States presumed freedom in line with the dictates of natural law. This position was out of sync with the direction of legal culture in the post-1815, which was moving rapidly towards legal positivism, but it never disappeared in American law and politics, and it would show up a few months later in the debates over Missouri’s admission to the Union.

**The Missouri Crisis, 1819-1821**

It was in this context that Missouri, then a part of the Louisiana Territory, applied for admission to the Union as a slave state in 1819. Missouri was to be the Union’s fourth slave

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state in less than a decade, a telling indication of proslavery policy and the failure of state-by-state abolition in the South. A large bloc of northerners in the House of Representatives were outraged at the prospect of yet another slave state tilting the balance of power in Congress even more in favor of slaveowners – a prospect which would cement the proslavery orientation of federal policy, fatally undermining the project of state-by-state abolition. They dug in their heels, insisting that Missouri meet certain conditions before being admitted into the Union. The amendment attached to the Missouri bill by New York’s James Tallmadge – the famous Tallmadge amendment – demanded that Missourians ban future slave importations and initiate gradual abolition on the New York state model. That so many of the “restrictionists” were New Yorkers – in addition to Tallmadge, the opposition counted John Taylor and Rufus King as its most vocal leaders – makes ample sense, as New York was the largest state in the Union to successfully phase out slavery. These were politicians who were convinced of the practicality as well as the wisdom of gradual, state-by-state abolition. They also believed that it was the duty of the federal government to promote freedom and discourage slavery, and here they pointed to the Northwest Ordinance, describing it as the basis of national policy regarding slavery, a crucial precedent which gave Congress power to ban slavery from the territories.45

The Tallmadge amendment passed in the House in February, 1819 but was promptly rejected in the Senate. When Congress reconvened later that year, the furor generated by newspaper coverage of the initial debates set the stage for a two-year battle over slavery in the federal territories. Northern restrictionists argued that Congress had sole jurisdiction over the

territories and could ban slavery there using by invoking several clauses in the Constitution, including the New States Clause, the Rules and Regulations Clause, the Guarantee Clause, Republican Government Clause, and the Slave Trade Clause, which gave Congress the power to regulate slave importations after 1808. In turn, pro-expansion slaveowners argued that Congress had no power to regulate slavery in the territories. In their view, the federal territories were the common property of the states; rights to slave property were therefore as legitimate there as they were in the slave states.  

For both sides, the immediate issue was Congress’ power over the territories. But under the surface lay a more fundamental question about Congress’s relationship to slavery in areas outside the slave states – in this case, the federal territories. All sides agreed that slavery was a state (or “local”) institution which Congress had no power to abolish in the states. But what was the relationship between that institution and federal power? Did the Constitution guarantee the protection of slave property throughout the Union, including the federal territories? Was the right to slave property an extraterritorial right, as legitimate in federal territories as it was inside the slave states? Was it the duty of the federal government to aid slavery’s expansion into the west and protect slave property once it arrived there?  

Proslavery expansionists answered these questions in the affirmative. Together with their northern allies, a united bloc of southern congressmen argued that, while slavery was a state institution, it enjoyed federal protection in areas outside the slave states. According to Representative Alexander Smyth of Virginia, “the obligation of State laws, which hold men to service or labor, is acknowledged by the Constitution, and by the laws of the United States.” By itself, this statement was not controversial; the Constitution did recognize slavery in the form of “persons held to service.” But Smyth went much further than that. The Constitution, he said,  

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46 ibid.
recognizes “the right to slave property” and indicates “that that property should be secure... The right to own slaves being acknowledged and secured by the Constitution, can you proscribe what the Constitution guaranties? Can you touch a right reserved to the States or the people? You cannot.”

Here, Smyth and other expansionists developed the foundations of what would become proslavery constitutionalism. In rejecting each constitutional rationale put forward by the restrictionists, the expansionists betrayed a fundamentally different vision of the relationship between state and federal power. In their view, the federal government was a mere agent of the states, a disinterested vehicle for advancing the interests of the state legislatures. Sovereignty resided in the states, not “the American people,” and supremacy lay with the states, not the federal government. In other words, the post-1788 constitutional regime was not much different from the Articles of Confederation. Applied to Missouri, the proslavery argument was as follows: because slavery was a state institution – only states could decide what could be property – and because the territories were the common property of the states, Congress could not take unilateral action against slavery in the Louisiana Territory.

Northern restrictionists were equal parts shocked and indignant, but the proslavery counterattack gave them an opportunity to elaborate on their antislavery nationalism. They insisted that slavery had nothing to do with the national government, that it was a local institution which was a state, not a federal, concern. Unlike Smyth, the restrictionists embraced a nationalist understanding of American federalism. In their view, Congress was a distinct legislative entity from the states, a “national” government on par with Britain’s Parliament. The federal government shared power with the states, but whenever federal and state law clashed,

federal law was supreme. Like Joseph Story in *La Jeune Eugenie*, restrictionists assumed that
the national government presumed freedom. The same presumption of freedom which applied to
the high seas applied to the federal territories. Congress had sole jurisdiction over federal
territories and could, for the sake of morality and justice, take legislative action against the
interests of some states – in this case by regulating slavery in the Louisiana Territory.⁴⁹

These principles were elucidated by John Taylor of New York. According to Taylor, the
national government operated on the “doctrine that ‘all men are born equally free... In this
manner Congress has respected the rights of man, and has endeavored, in pursuance of the
principles of the United States Government, to limit the extension of slavery as much as
possible... The strength of this nation chiefly consists in its moral power.”⁵⁰ In other words,
Congress was a distinct “national” government which stood apart from the “local” slave codes of
the southern states. In all areas outside the South, especially in the federal territories, Congress
had a moral duty to promote freedom and extend the principles of the Declaration of
Independence. For Taylor, there was no general right to property in human beings in the
Constitution. The founding document recognized slavery’s existence in the states but did not
sanction the right to property in man. Taylor conceded that there were protections for slavery in
the Constitution. The Fugitive Slave Clause, he said, guaranteed that slaveowners would have an
extraterritorial right of recaption in the case of runaway slaves. But that was not the same thing

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⁴⁹ In the way I am using it here, the “nationalism” in “antislavery nationalism” had less to do with political culture
than with envisioning the state -- the central government -- as an indispensable agent in facilitating gradual universal
Securing a Nation* (Lawrence: University of Kansas Press, 2006); Wilentz, *Rise of American Democracy*, pp. 141-
Newmeyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University
University of Kansas Press, 1996); Newmeyer, *Supreme Court Justice Joseph Story*; McClellan, *Joseph Story and
the American Constitution*. For a different meaning of nationalism as the expression of national political culture, see
David Waldstreicher, *In the Midst of Perpetual Fetes: the Making of American Nationalism, 1776-1820* (Chapel


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as a general right to slave property outside the slave states. The clause recognized the slaveowner’s right of recaption to the labor power of a slave, but did not sanction a property right in a slave’s body. Its wording – “persons held to service” – suggested that the thing “owned” was the labor power of the runaway, not the slave’s body, since the term “persons” encompassed a variety of servant statuses, not just slavery. By treating slaves as legal persons (instead of property), such language suggested that slavery ought to be treated as a servant status in all areas of the Union outside the slave states. For Taylor, the right of recaption was the extent of the compromise over slavery in the Constitution. Northerners like himself were simply asking that southerners refrain from demanding “new and unreasonable burdens, which were never contemplated when the compromise was made.” In this way, Taylor and the restrictionists read the slavery-related clauses of the Constitution in light of the Declaration of Independence and the Northwest Ordinance of 1787.\(^{51}\)

As the crisis unfolded, observers came to realize that the slavery question posed a vital threat to the delicate architecture of the 1788 constitutional settlement. Thomas Jefferson likened the Missouri Crisis to a “firebell in the night,” an episode which shook the Union to its foundations. But while everyone agreed that the Union was in peril, not everyone agreed as to what “Union” meant. There were at least three visions of the Union at stake in the Missouri Crisis. The first was the radical proslavery vision of Union espoused by the expansionists – a Union in which the national government promoted slavery’s expansion by protecting in all areas to which the Union flag extended. The second vision of the Union was the antislavery version promulgated by Tallmadge and the restrictionists, in which a national government distinct from the states promoted freedom and discouraged slavery – a moral Union grounded in antislavery nationalism. This was a normative vision of the Union as it ought to be. The third definition of

\(^{51}\) *ibid.*, pp. 952, 960-961.
Union put forward in the Missouri Crisis was that of Henry Clay and the compromisers, which envisioned the Union as a kind of positivist Leviathan in which sectional parity and the rights and safety of white property owners trumped the natural liberty of black slaves. This view celebrated the Union as it was in 1820, a country half-slave and half-free bound together through national pride and prudent political compromise.52

In the end, the third vision of the Union won the day, serving as the intellectual backdrop for the famous Missouri Compromise. Moderate congressmen broke the impasse by smothering the constitutional debate and promising sectional parity in Congress. Kentucky’s Henry Clay introduced a compromise bill that would later be called the “Missouri Compromise.” The first part of the compromise addressed the immediate question of Missouri’s admission to the Union. By the terms of Clay’s bill, Missouri would enter the Union as a slave state, while Maine would enter as a free state. The second part of Clay’s bill would extend the “line” between slavery and freedom, this time, across the Louisiana Territory at latitude 36°30’ (Missouri’s southern border). Slavery would be banned from the areas north of that line. By the middle of 1820, Clay’s bill secured enough votes to pass in both houses of Congress, defeating the restrictionists while avoiding the constitutional problem of slavery and federal power.

Whereas Southern congressmen voted as a unified bloc, northern congressmen were divided between an antislavery majority and a minority committed to protecting slavery. The proslavery minority in the North – “doughfaces,” as they came to be known – gave the Missouri expansionists the votes they needed to beat back restriction.53

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52 Peter B. Knupfer, The Union as It Is: Constitutional Unionism and Sectional Compromise, 1787-1861 (Chapel Hill: University of North Carolina Press, 1991). On competing rhetorical uses of the phrase “the Union” in antebellum politics and political culture, see Varon, Disunion! Contrast my interpretation with the monolithic Union in Gallagher, Union War and Ross, “Lincoln and the Ethics of Emancipation.” Jefferson quoted in Forbes, Missouri Compromise, p. 103.
53 Forbes, Missouri Compromise; Van Atta, Wolf by the Ears.
The Missouri Compromise was hardly a victory for proslavery interests. From the perspective of proslavery expansionists, the compromise was disappointing in that it failed to guarantee federal protection for slave property in the territories. Yet Congress’s endorsement of the compromise officially sanctioned what had been an ad hoc assumption in the South since 1787 – that slavery would be allowed to expand into federal territories south of the Ohio River. For antislavery restrictionists, the Compromise was a signal defeat. The division of the Louisiana Territory into “slave” and “free” sections set back any hopes of abolishing slavery on a gradual, state-by-state basis, and it flatly contradicted the idea that national policy would discourage slavery – the lesson of the Northwest Ordinance. Several new slave states were now likely to enter the Union in the future, and while parity in Congress between free and slave states would ostensibly stave off another crisis, slavery seemed poised to expand indefinitely, putting the lie to the long-held northern assumption that it was slowly dying out.

Soon after the bill’s passage, another controversy emerged in Congress over the Missouri constitution ban on black residents, a debate which continued into 1821. But the slavery question was now out the picture; the Union – or, more precisely, the compromisers’ vision of Union – was saved. The constitutional politics of slavery, so evident in the Missouri Crisis, had been banished from national political discourse, supplanted by a politics of compromise embodied by Henry Clay and the moderate middle. In addition to “solving” the immediate crisis of Missouri’s admission, the Missouri Compromise forged the pattern that sectional politics would take for the next forty years. Slavery – namely, the question of slavery’s relationship to the national government – would henceforth be shut out of national political debate, smothered by compromise and the positivist constitutional culture championed by the compromisers.54

Yet instead of suppressing dissent, the Missouri Compromise prompted a surge of antislavery protest in the North, where a majority of the population viewed the compromise as an ignominious defeat. Antislavery activists compared their government’s policy to the antislavery policies adopted by other countries in the Western Hemisphere. The aftermath of the Missouri Crisis coincided with news of Simon Bolivar’s revolutionary emancipations in the new Latin American republics of Venezuela, Colombia, and Chile. In 1822, Mexico and parts of Brazil passed gradual emancipation laws. Just a few months later, abolitionists in Parliament began their crusade to reform and abolish slavery in the British West Indies. For American abolitionists, the wave of emancipations abroad underscored the waywardness of the United States, the way in which an empire for liberty had turned into a slave republic. Far from spurning slavery, the United States seemed to be embracing it, and even worse, it was rejecting the prospect of black citizenship that had been the prime goal of early national abolitionists. Instead, the country’s leaders were rallying to the dishonorable program of colonization, represented by the ACS. At the same time, events abroad buoyed antislavery hopes that world opinion had turned decisively against slavery and that the United States would soon have no choice but to resume its role as a beacon for freedom. Benjamin Lundy was convinced that “[t]he ball of reformation is now moving in a proper direction.”

Quakers and New England Congregationalists capitalized on the mix of resentment and optimism in the post-Missouri North by stepping up their antislavery campaign. They sent

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petitions to Congress and their state legislatures demanding federal action against slavery in areas under the control of Congress. In Ohio, Lundy, who had little funds and almost no knowledge of printing, established his ground-breaking antislavery newspaper, *The Genius of Universal Emancipation*, in 1821. *The Genius* became a pulpit for antislavery views that were increasingly marginalized in Congress after 1821, in particular the agenda of gradual state-by-state abolition. Lundy also leapt headlong into politics, knowing that an organized opposition would best combat the political power of slaveowners, who had the formidable doctrine of property rights as their first line of defense. After he moved his paper to Baltimore in 1824, he helped form the Maryland Anti-Slavery Society. The society’s agenda reflected the two-pronged strategy of American antislavery from Lundy onward: at the state level, it pressed Maryland legislature to tackle the question of abolition; at the national level, it demanded the removal of the Three-Fifths clause, the source of slaveowners’ inordinate influence on federal policy-making. With the help of a freedom-promoting federal government, the southern states could resume the process begun in the North during the Revolutionary Era.  

In January, 1823, Lundy introduced the first systematic proposal for universal emancipation in the United States. Published in the *Genius*, Lundy’s plan elaborated on the 1790 Quaker petitions by combining into one program the accumulated proposals for federal and state action that Quakers had introduced over the previous thirty-two years. Altogether, the proposals constituted the first-ever national antislavery agenda in the United States, the preliminary sketch of a national policy for jumpstarting state-by-state abolition. Crucially, Lundy’s plan applied

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constitutional arguments from the slavery debates of the recent past, providing a logical structure to what had been a scattered, inchoate antislavery response.⁵⁷

Lundy’s first point was also the leading demand in Quaker petitions: abolition of slavery and the slave trade in Washington, D.C. Lundy wrote that, because the Constitution had given Congress “exclusive control” over the District of Columbia, it could easily repeal the slave codes it had re-enacted in 1801.⁵⁸

Second, Lundy called upon Congress to ban slavery from the federal territories and prevent the admission of any new slave states – to stop slavery “from spreading over a greater extent of the country, and consequently increasing in magnitude.” This was especially important in the wake of the Missouri defeat, which showed how easily slavery could expand with no “express provision” in the Constitution against it. It was essential that Congress take steps to cut off the growing western market in slaves, Lundy wrote. Both the internal slave trade and the illegal African trade owed their strength to the emergence of markets in the American Southwest. So long as “there is a market for slaves in this country, it will be hard... to curb the avaricious disposition” of slaveowners, whose greed consistently trounced the intentions of the benevolent. “Neither the moral force of precepts and examples; nor the enactment of penal laws, will have their proper effect while the 'breeding' of slaves is considered lucrative: but cut off the facility of acquiring wealth by that means, and there will then be no incentive to continue the practice.” Lundy pointed to Ohio, Indiana and Illinois, states that had prohibited slavery, as recent examples of a successful containment policy; by preventing the creation of new slave markets in

⁵⁷ Genius of Universal Emancipation, Sept., 1821.
⁵⁸ ibid.
the North, those new states contributed to a decrease in Virginia slave prices that, had it not been for the Deep South trade, would have struck a death blow to slavery in that state.59

Lundy’s third proposal called for Congress and the states to act together in breaking up the internal slave trade and preventing the kidnapping of free black citizens in the North. Lundy vacillated as to whether Congress could ban the slave trade (a fully-developed commerce-power argument against the slave trade was still another ten years away), but he was adamant that state legislatures pass laws regulating the trade out of existence. Fourth, Lundy insisted that slave states resume what the northern states had begun during the Revolution – “gradual though certain Emancipation” via the legislative process. They should also pass legislation liberalizing manumission laws, preventing the re-enslavement of freedmen, declaring that children born to current slaves would be free, and establishing specific dates for when existing slaves would become free. In states where slaves were scarce, such measures ought to adopted quickly; in those states where slaves comprised a majority of the population, legislatures should establish a “system of tenantry” for preparing slaves for freedom and republican citizenship. Slave state legislatures should also repeal laws expelling freed blacks from their limits and should instead join the northern states in granting them a modicum of citizenship.

Lundy’s final three proposals were designed to facilitate abolition in the southern states. Northern states should grant freedmen entering into their limits the same legal status as white “aliens” – i.e., migrants with the privileges and immunities of American citizens – and help “improve their minds” with instruction regarding agriculture and republican citizenship. Colonization should be voluntary; freedmen themselves should make the decision as to whether or not they should go to Liberia or Haiti. Finally, delegates from each state should attend a

59 ibid.
convention in which “the details of a regular system of operations” would be worked out, setting the stage for state-by-state abolition.  

Lundy’s plan was the first-ever *national* antislavery agenda produced in the United States. It was a product of the post-Missouri Crisis era, a time when slavery agitation was being systematically shut out of national politics. It was the most detailed policy its kind, but it was not the only antislavery proposal in the early 1820s. In the Old Northwest, where antislavery sentiment boiled over in the wake of slavery conflicts in the late 1810s, state politicians found it necessary to strike an antislavery posture on their constituents’ behalf. In 1824, the Ohio legislature passed a resolution asking Congress to recommend to the slave states a plan for gradual emancipation and colonization. The resolution declared that the “evil of slavery is a national one” and that Congress ought to pass a law for colonization with the consent of the state governments. Before long, identical resolutions were passed by the legislatures of Pennsylvania, Maryland, New Jersey, Illinois, Delaware, Connecticut, Vermont, and Indiana. Then, in 1825, Rufus King proposed using the proceeds from federal land sales to help pay for gradual abolition and colonization in the slave states.  

Beyond these specific proposals, there were signs that the central government might adopt policies that would discourage slavery and facilitate state-by-state abolition. John Quincy Adams’s election to the presidency marked the first time since the Jefferson Revolution of 1800 that a person with dubious fidelity to the federal consensus occupied the White House. Adams was an avowed proponent of expansive federal powers, a National Republican with deep roots in the Federalist political culture of New England. His inaugural address put the fear in the hearts

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60 ibid.
of many a slaveowner, as he dared Congress not to “to slumber in ignorance or fold up our arms and proclaim to the world that we are palsied by the will of constituents.”62 The National Republican platform of direct federal regulation of economic activity and moral development appealed not only to antislavery Quakers and New Englanders, but also to antislavery politicians like Thomas Morris of Ohio, whose enthusiasm for internal improvements matched his resentment of southern power after the Missouri defeat.63

Meanwhile, John Marshall’s Supreme Court handed down a series of opinions that, on the face of it, appeared favorable to the prospect of general emancipation through federal legislation. Marshall and his associate Joseph Story used their position on the Court to adjust founders’ republican ideals to a rapidly changing society. Marshall and Story were the judicial analogue to the National Republicans, neo-Federal nationalists who read the Constitution broadly in order to foster economic development and unleash the collective energies of the American people. In a succession of landmark cases, most famously *McCullough v. Maryland*, Marshall and Story fortified the Federalist doctrine that the national government was a discrete entity with interests distinct from those of the individual states. In addition to endorsing the theory of divided sovereignty, these decisions raised significant questions about the federal government’s power over slavery. *Gibbons v. Ogden* (1824), for instance, concerned interstate commerce between New York and New Jersey, but it triggered a fierce debate over Congress’s power to regulate the interstate slave trade under the commerce power. In these and other ways, the federal government in the wake of the Missouri Crisis seemed poised to take action against slavery. At the very least, the possibility of antislavery legislation at the federal level was more

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likely than ever in the early 1820s, precisely because the Missouri Compromise had produced such outrage in northern antislavery circles.\footnote{Wiecek, \textit{Antislavery Constitutionalism}, pp. 135-137; Earl Maltz, \textit{Slavery and the Supreme Court, 1825-1861} (Lawrence, Kas.: University of Kansas Press, 2009), \textit{passim}; Lightner, \textit{Slavery and the Commerce Power}, pp. 65-69. On the broader significance of these opinions, see White, \textit{Marshall Court and Cultural Change}, pp. 485-588; Killenbeck, \textit{M'Culloch v. Maryland, passim.}; Maltz, \textit{Slavery and the Supreme Court}, pp. 12-19.}

\textbf{Conclusion}

The Missouri Compromise created the template that national leaders would use to keep slavery out of national politics for the next four decades. But the crisis over Missouri’s admission to the Union also laid bare the fundamental contradictions arising from two legal regimes in one country – a nation half-slave and half-free. The debates in Congress between 1819 and 1821 introduced into American politics a mature proslavery nationalism built on the many premises and assumptions that Southern slaveowners had developed since the 1790s. Primary among these was the assumption that the property right in slaves was not only recognized by the Constitution but guaranteed protection by that instrument – in other words, that the national government had a positive duty to protect slavery in the territories and aid its expansion into areas outside the Union. The restrictionists’ defeat in Congress demonstrated the degree to which federal policy had become, at very least, functionally proslavery. More importantly, by sanctioning Missouri’s status as a slave state and by extending the slavery-freedom “line” into the West, the Missouri Compromise exemplified national political leaders’ acceptance of Southern slavery as a permanent institution in the United States. It accepted the \textit{Union as it was} rather than the Union as it ought to be. In practice, the moderate vision of Union inherent in the Compromise benefitted the proslavery view of central government power much more than it did the antislavery view. Though it made no explicit nod to “property in man” as a
constitutional right, the Compromise’s central premise was that two legal regimes in one country was somehow the inescapable norm, the “natural” state of American politics. That was a premise which favored the proslavery argument far more than it did the antislavery one.

For the restrictionists and antislavery northerners more generally, the Compromise confirmed the proslavery drift of federal policy since the turn of the nineteenth century. Not only were southern states evading the question of abolition, the national government was making it easier to avoid that question by aiding slavery expansion’s into the western territories. The Compromise, with its implicit rejection of state-by-state abolition, seemed to betray the legacy the American Revolution as they understood it – using government power to expand liberty.

Yet precisely because the Compromise was so difficult to stomach, it spurred the rise of a more coherent antislavery nationalism in the North. Antislavery nationalism in the North had always been ambiguous, as evidenced by the vague call to action in the Quaker petition of 1790. After the Missouri Crisis, however, antislavery agitation became more consciously national, precisely because Missouri’s admission had been a national issue. Antislavery activists now read the Constitution more carefully, doubling down on the claim that the framers recognized slavery in the states without incorporating “property in man” into the Constitution. They began to emphasize the central government’s key antislavery precedents, depicting the Northwest Ordinance and the 1807 slave-trade ban as the twin bases of a national antislavery policy rooted in the principles of the Declaration of Independence and the legal presumption of freedom adopted by the northern states after 1777. This antislavery nationalism went on to inspire a new generation of radical abolitionists the 1830s, who would form the country’s first-ever national antislavery movement. The central figure in this transmission was Benjamin Lundy, who for years had worked at the state level to affect emancipation. Lundy’s response to the Missouri
Compromise – a point-by-point plan for using federal power to jumpstart state-by-state abolition – set the template for antislavery activism over the next forty years.
Chapter 2

The Making of a National Antislavery Agenda

The aftermath of the Missouri saw a concerted effort among the compromising majority in Congress to keep slavery out of national politics. Though state legislatures continued to debate the slavery question, the issue was now considered too volatile for national politics. By 1826, all three branches of the federal government were actively silencing discussion of slavery in the name of “the Union.” This “shutdown” was designed to stifle the constitutional debate over slavery and federal power which had emerged during the Missouri Crisis, silencing pro- and antislavery extremes with a “moderate” politics modeled on the Missouri Compromise.

It was in this context of political repression that the radical abolitionist movement emerged in the late 1820s. So-called second wave abolitionists formed the country’s first-ever national antislavery organization, and, more importantly, they developed a constitutional program for ending slavery in the United States. They then forced that program into Congress by means of well-organized mass petition drives. Though they openly despised party politics, the abolitionists always believed that republican institutions could be reformed, that the proslavery orientation of federal policy could be reversed so as to promote freedom and discourage slavery. They kept politics at arms’ length but were never apolitical. This chapter recovers the political context out of which the national abolitionist movement emerged and considers in detail the purpose and meaning of the movement’s constitutional program.1

1 This chapter analyzes the origins and premises of the abolitionists’ constitutional program for achieving universal abolition in the United States. We now know more than ever about the ideology, social makeup, and factionalism of the abolitionist movement, yet we know surprisingly little about the movement’s political agenda, its constitutional program. In focusing on that program, this chapter recovers the immediate political context which gave rise to
The mouthpiece for radical abolitionism was William Lloyd Garrison, the mercurial editor of *The Liberator* newspaper in Boston. Born in 1805 in Newburyport, Massachusetts, Garrison was the son of a hard-on-his-luck sailor undone by the embargo policies of Jefferson’s second term. To escape the poverty of his youth, young Garrison dabbled in Federalist-leaning journalism in the 1810s and, by 1829, was working as a writer for Lundy’s *Genius of Universal Emancipation*, where he probably learned the outlines of Lundy’s plan for reviving state-by-state abolition. Garrison adopted his mentor’s antislavery nationalism, comparing his nation’s lack of progress to the emancipations in Latin America and the Caribbean. Yet unlike Lundy, he brought to the slavery debate an uncompromising disposition which reflected the profound exasperation of post-Missouri, post-shutdown antislavery, a disposition he cultivated in dialogue with Boston’s militant black-abolitionist community. His ire was directed not only at obdurate slaveowners but also at the indifferent northerners who were morally complicit in slavery’s resurgence. Above all, Garrison scorned the assumption that slavery was politically off-limits. Slavery was “not felt to be an evil, it is not acknowledged to be evil, it is not preached against as evil; and therefore it is only the more inveterate and fearful an evil. *It hath become constitutional.*”

radical abolitionism in the first place. In so doing, it reasserts the primacy of politics in the emergence of radical abolitionism. In explaining the emergence of radical “second-wave” abolitionism in the 1830s, historians usually point to the social dislocations of the “market revolution” and the rise of free- and wage-labor capitalism, the emergence of an educated and “sentimental” northern middle class immersed in a growing “print culture,” as well as radical Christian impulses in the Second Great Awakening and the rise of a militant black abolitionism in northern cities. (A few historians have tied abolitionism’s emergence to the campaign for “immediate emancipation” in Britain). The standard causation narrative takes place almost entirely in the “public sphere,” often as a matter of changing public opinion, with rejection of the American Colonization Society and David Walker’s *Appeal* setting the stage for Nat Turner’s rebellion and founding of Garrison’s *The Liberator* newspaper. Events in Congress and the federal government, while never invisible, are often kept in the background. While I agree that all of these factors are important, in my view they are secondary rather than primary causes. As I see it, the prime mover in the rise of radical abolitionism was the shutdown of slavery discussion in Congress. An accurate account of radical abolitionism’s emergence must place the shutdown at the center of the story, reordering – not replacing – the standard narrative. See the works cited in Introduction, n. 3, 6.

2 Garrison to Ebenezer Dole, in *Garrison Letters*, vol. 1, p. 122.
Garrison was further radicalized in 1829 when he spent seven weeks in a Baltimore jail for refusing to pay a fine for a libel charge (the young writer had eviscerated a Maryland slaveowner in the local press). The shutdown became personal. Garrison’s activities in the months following his arrest exemplify the trajectory of antislavery in the post-shutdown era from politics to public sphere. Kept out of political debate, he set out to influence public opinion by exploiting the budding communications revolution. On hearing news that no abolition societies existed in New England, the nearsighted twenty-three-year-old set out to abolitionize his home region, giving his first antislavery speech in Boston in 1829. In January, 1831 he published the first installment of The Liberator, an antislavery newspaper with mostly black subscribers in which he proclaimed “I am in earnest – I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD.”

Eleven months later, he organized a meeting of what would become the New England Anti-Slavery Society, the first “immediatist” organization in the United States (later known as the Massachusetts Anti-Slavery Society).

Garrison was a leading presence at the first convention of the American Antislavery Society in December, 1833, and is believed to have written the society’s “Declaration of Sentiments,” which, among other things, revised Lundy’s plan into a systematic program for realizing universal abolition in the United States. The shutdown had forced antislavery out of Congress but it did not drain it of its essentially political character in the wider public sphere.

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3 Quoted in Wyatt-Brown, Lewis Tappan, p. 84.
4 Trish Loughran, The Republic in Print: Print Culture in the Age of U.S. Nation Building, 1770-1870 (New York: Columbia University Press, 2007). Garrison would later spurn politics, infamously burning a copy of the Constitution on the grounds that it was an irredeemably proslavery document. Unlike most abolitionists, Garrison and his followers would eventually promote northern secession from the Union, a policy that would ostensibly liberate northerners from complicity in a nationalized slave system. Yet even with these later deviations, Garrison never abandoned his political agenda. The effort to sway public opinion was broadly political in that it shaped the views of the electorate in a rapidly-democratizing republic, and while his later views on the Constitution precluded direct political action in the form of antislavery third parties, there was a political logic to his “disunion” policy in that northern separation would bring the “line” of freedom from Canada to the Ohio River, radically destabilizing slavery in the Upper South. Garrison, Wendell Phillips and others who rejected electoral politics after 1840.
A Constitutional Crisis Emerges

Slaveowners and their northern allies responded to these impulses by doubling down on the federal consensus. Southerners had been as rattled by the Missouri crisis as Northerners; the crisis had revealed to them the fundamental contradictions in the Jeffersonian coalition between slaveowners and northern workers. Though they had emerged with a victory – a victory made possible with northern assistance – slaveowners recognized that a growing antislavery population in the North posed a significant threat to their future interests. This became especially apparent after about 1820, when the numerical benefits of the Three-Fifths clause diminished as a result of booming population in the North. The panic caused by Denmark Vesey’s conspiracy in Charleston in 1822 heightened these anxieties, especially when it came to light that Vesey was aware of Rufus King’s antislavery rhetoric from the Missouri Crisis. South Carolina’s decision to imprison all black sailors who entered its ports – the infamous Negro Seamen Acts – only added to the siege mentality. Matters got worse after Adams’s attorney general William Wirt issued an opinion describing the acts as unconstitutional. Soon, slaveowners were denouncing the ACS as a federal plot to impose abolition on the southern states. Similarly, the recent decisions from the Marshall Court seemed like a backdoor approach to a federally-imposed abolition. Governor Robert Troup of Georgia denounced Marshall’s ruling in Gibbons v. Ogden (handed down just two months before Wirt’s opinion on the Seaman Acts) as the basis upon

remained on the scene as agitators who ensured that radical ideas remained in public discourse, a vocal faction whose very radicalism gave to the antislavery mainstream a politically-useful “moderate” image. As Garrison’s long career attests, there were many different paths for antislavery in the age of the shutdown, but the centrality of politics never went away. On Garrison, see, among others, Kraditor, Means and Ends; Mayer, All on Fire; McDaniel, Problem of Democracy.
which the federal government would demolish away the “sacred guaranty” of property in the states.\(^5\)

South Carolinian slaveowners led the reaction against federal interference. Abolition was in the air, declared Whitemarsh Seabrook in 1824. “Every breeze from the East and North drafts the intelligence of its speedy consummation. The movements of the public proclaim its fulfillment.” The ACS, Wirt’s Seamen Act opinion, the Marshall Court’s nationalism, the Ohio resolutions, King’s emancipation proposal – all such “dazzling projects” were “vitally affecting the safety of our property.” It was “our whole property” that was at stake, Seabrook added, “for deprive us of our slaves, and you render our lands valueless…” “Whoever has watched the progress of our political events for the last twenty years, whoever remembers the inflammatory speeches on the Missouri bill, must be aware, that no subject, in which the question of slavery may be directly or incidentally introduced, can be canvassed.”\(^6\)

John C. Calhoun – heretofore a leading nationalist – mined the states’ rights theories of Virginia’s “Old Republicans” and used them to develop a sharper, more impenetrable defense of slavery in the states. The federal government was one of limited powers, Calhoun argued; all duties and obligations not expressly granted to it were reserved to the states. That included the power to create, regulate or destroy slavery. This was the basis of the federal consensus: slavery was a state institution; the federal government had no power either to regulate or abolish it. Any outside interference with the domestic institutions of a particular state, whether from the federal


government or from another state, constituted a violation of that state’s sovereignty. On these grounds, the South Carolina legislature declared the Ohio resolutions unconstitutional: the federal government could not interfere “in any manner whatever, with the domestic regulations and preservatory measures in respect to that part of her property which forms the colored population of the state.” Calhoun would later perfect this new strand of states’ rights theory during the famous Nullification Crisis of 1832-3. Once again, an antislavery offensive grounded in natural rights and natural law moved slaveowners to erect stronger positive-law protections for slavery in the states.7

Rightly or not, slaveowners in the mid-1820s feared the prospect of direct federal legislation against slavery in the states, at the very least a ruinous Supreme Court ruling. The intense Jeffersonian Republican backlash to John Marshall’s 1819 *McCullough v. Maryland* opinion, which lasted through the 1820s, reflected, among other things, the consuming fear that a centralizing Supreme Court would wreck the federal consensus and assault slaveowner property rights in the states. As their anxiety escalated, their threats grew fiercer, and more and more began to raise the specter of disunion. By 1825 it was apparent that a constitutional crisis over slavery was once again putting the Union in jeopardy. National leaders accelerated their efforts to clamp down on slavery agitation, both pro- and antislavery, by suppressing all talk of slavery at the national level. The Adams administration stopped pressing South Carolina on the Negro Seamen Act, opting for a gentler policy of political suasion. For the remainder of Adams’ term, the administration largely handed the matter of imprisoned black sailors over to agents of the British Empire and northern states. Adams, a model of antislavery nationalism who had opposed

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Missouri’s admission to the Union in 1820 (albeit privately), was compelled by the looming constitutional crisis to accept the Union as it was.\footnote{Wieck, Antislavery Constitutionalism, pp. 143-149; Killenbeck, M’Culloch v. Maryland, passim.; R. Kent Newmeyer, “John Marshall and the Southern Constitutional Tradition,” in Kermit L. Hall and James W. Ely, Jr., eds., An Uncertain Tradition: Constitutionalism and the History of the South (Athens: University of Georgia Press, 1989), pp. 105-124; Freehling, Prelude to Civil War, pp. 89-133. See also Waldstreicher, “A Funny Thing Happened on the Way to the Amistad.”}

**The Occlusion of Antislavery Dissent from National Politics, 1824-1830**

The effort to suppress the slavery question in national politics began around 1824. Northern politicians increasingly ignored the sizeable antislavery minorities in their home constituencies. No one did this more effectively than Martin Van Buren of Kinderhook, New York. Van Buren, a veteran of New York’s notoriously factional politics, spent Adams’s term forming the basis for what would become the second party system – a system designed, among other things, to stifle the slavery issue in Congress. Van Buren loathed the drift toward “consolidation” under the Adams administration and the Marshall Court; he yearned for a return to the popular constitutionalism of the Jeffersonian era. To make government responsive to the popular will, he set about creating a single party – the “democracy” (named in opposition to the small cabal of “aristocratic” nationalists in government) – dedicated to states’ rights, popular sovereignty, and strict construction of the Constitution. For Van Buren, party strife was a good thing, not because it ushered in a new era a “modern” pluralist politics, but because it gave “the people” a vehicle through which they could resist the creeping certainty of a legislative “aristocracy” (an oligarchy established by law rather than through hereditary status). It also served as means of tempering sectional discord by enforcing a rigid policy of silence on the slavery issue. Van Buren had come out against slavery expansion during the Missouri Crisis but like Jefferson he came away from the episode keenly aware of the slavery issue’s volatility in
national politics. In 1822, in a famous letter to Virginia editor Thomas Ritchie, Van Buren proposed a national party for suppressing the slavery issue, but it was not until the constitutional crisis of the mid-1820s that Van Buren actually took steps to implement his plans.\(^9\)

Van Buren orchestrated Andrew Jackson’s landslide victory in the presidential election of 1828. His resounding win reflected a strategy of equivocation under the new party system: the Democratic Party offered no explicit planks or programs during the campaign, just a clear-cut message of defending popular sovereignty against the anticonstitutional minority in power. Jackson, a slaveowner whose brutal campaign against Indians had cleared the way for slavery expansion in the Old Southwest, said as little as possible about slavery on the campaign trail; by offending neither section, he appealed to the wary states’ righters and disaffected nationalists in both. Upon taking power, Jackson and the Democracy installed a functionally proslavery regime at the highest levels of government. This is crucial: the party was not outwardly proslavery; it was simply dedicated to the suppression of the slavery issue in national politics. A general rule among Democrats was that there was nothing to say about slavery: just as the Constitution steered clear of the issue by avoiding the words “slave” or “slavery,” so too should national politicians dodge the slavery question. Like the Jeffersonian coalition of 1800, the party’s vagueness on slavery papered over its many internal contradictions, not least the old tension between northern workers and southern slaveowners. For the time being, however, the policy of silence, together with commitment to states’ rights, appealed to a wide range of American voters.

from Carolinian slaveowners who liked its stance on the federal consensus, to antislavery
Ohioans who were disappointed with Adams’s timidity and intrigued by Jackson’s personality.¹⁰

One thing was certain: the kind of antislavery sentiment seen in the wake of the Missouri
defeat would henceforth be frozen out of national politics. Democrats introduced to the national
level the state-level strategy of deflecting antislavery attacks by shifting the terms of debate from
property rights to race and the social strains caused by emancipation. More generally, the party
system introduced a new form of constitutional politics that made it difficult to even broach the
subject of slavery. Van Buren’s party system marked a revolution in American politics. After
1828, constitutional conflict became the domain of party politics, as the party machine brought
(albeit simplified) constitutional issues directly to voters. Under the party system, the wide range
of issues characteristic of public debate in the early national period narrowed down to a small set
of vague constitutional planks, such as “strict construction” and “states’ rights.” Where
antislavery agitation was once accepted as a legitimate strand of national political debate, it was
now off the table completely, since it was thought to violate the constitutional creed of the
Democratic Party.¹¹

It is crucial to understand that the Democracy was not simply a defender of slavery in the
states; it was also the vehicle through which slaveowners increased their power in the federal
government and expanded slavery further into the American West. The party’s caucus system,
along with a “two-thirds” rule for nominating conventions, gave southerners a numerical
advantage in the overall party, replacing the political leverage they had lost around 1820, when

¹⁰ My interpretation of the Democrats’ position on slavery relies heavily on Ratcliffe, Politics of Long Division, pp. 138-146. See also Wilentz, Rise of American Democracy, pp. 240ff. The phrase “functionally proslavery
government” is borrowed from Waldstreicher, Slavery’s Constitution, passim.
¹¹ Ratcliffe, Politics of Long Division, pp. 138-143; Leonard, Invention of Party Politics, passim. According to
Kramer, constitutional politics before 1828 took place mainly (though not exclusively) in the courts, where elite
judges ruled on the vexing issues of popular sovereignty and divided powers – rulings that were often contested by
the North’s population boom reduced the benefits of the Three-Fifths clause. Southern Democrats therefore dominated the party from the start, and because they controlled the party’s patronage system, northern Democrats typically towed the line on slavery, supporting southern policies (like Indian removal) while stifling antislavery voices in their home districts. And because Democrats dominated the federal government in the years leading up to the Civil War, the direction of federal policy in the antebellum era largely reflected slaveowner interests. A self-sustaining cycle developed under the auspices of the Democratic Party: each new slave territory produced new slave states, which in turn augmented the power of slaveowners in Congress, who inevitably adopted policies for acquiring more slave territory.¹²

John Marshall’s opinion in the *Antelope* (1826), a federal case involving U.S. policy toward countries engaged in the Atlantic slave trade, was yet another part of the process of excluding antislavery sentiment from national politics. Just as the Adams administration retreated from the fight over South Carolina’s Seamen Acts, Marshall distanced the Court from Justice Story’s natural-law reasoning in the *La Jeune Eugenie* (1819). Marshall’s importation of Sir William Scott’s positive-law reasoning on the slave trade – that, in peacetime, slave-trading was not against the law of nations – reflected a larger trend in post-Missouri, post-*McCullough* U.S. politics of reaffirming the central government’s commitment to the federal consensus. Marshall’s opinion made it clear that the Court’s nationalism would have no connection to abolition; when it came to slavery, the Court would respect the rights of slaveowners in the states. In this way, Marshall did his part in tempering the constitutional crisis over slavery and, as a result, locking antislavery sentiment out of national politics.¹³

Even more troublingly for antislavery groups, Marshall’s *Antelope* opinion suggested that rights to slave property were extraterritorial in the Union, that their validity extended beyond the limits of the slave states. Marshall, channeling Scott, held that the law of nations was a synthetic compilation of positive laws, and because the positive laws at issue recognized slavery, so too did the law of nations. Because American federalism derived from the law of nations, it followed that the central government must recognize the right of the states to engage in the interstate slave trade, based as it was on the positive laws of the states. Implicit in this logic was the idea that property in slaves was as legitimate in non-slaveholding areas of the Union – federal jurisdictions and the free states – as it was in the slave states. In this way, Marshall’s *Antelope* opinion had the effect of legitimizing slavery in the states and hinting at its acceptability at the national level.\(^\text{14}\)

The period 1825-1829 also saw a dramatic decline in antislavery sentiment in the northern states, where resentments owing to the process of gradual abolition ate away at the optimism of an earlier generation. The abolition process in eastern states like New York and New Jersey had contributed to a new and fiercer brand of northern racism, as white laborers, already reeling from the market revolution’s violent fluctuations, competed with former slaves for scarce jobs. In the Lower North and the Old Northwest, where antislavery sentiment had


Expressions of antislavery nationalism could still be seen in high-profile events like the *Antelope* case, in which Francis Scott Key, one of the attorneys for the Africans, claimed that “… those human beings, who are claimed as property, come into the jurisdiction of the court not by any wrongful act of ours, but lawfully, profidentially; and are to be treated just as if they were thrown upon our shore by a storm. The Spanish owners show, as proof of property, their previous possession; and the possessor of goods, it is said, is to be presumed the lawful owner. This is true as to \textit{goods}, because they have universally and necessarily an owner. But these are \textit{men}, of whom it cannot be affirmed, that they have universally and necessarily an owner. In some particular and excepted cases, depending upon the local law and usage, they may be the subjects of property and ownership; but by the law of nature, all men are free. The presumption that even black men and Africans are slaves, is not a universal assumption. It would be manifestly unjust to throw the \textit{onus probandi} upon them, to prove their birthright.” Quoted in Noonan, \textit{Antelope}, p. 126.

been strong in the post-Missouri period, white residents resented the influx of emancipated blacks from the Border South states, who allegedly brought with them higher crime rates and taxes as well as lower wages for workers. These problems accelerated the process by which many northerners abandoned the founding generation’s environmentalism (the notion that peoples’ mental and moral capabilities are shaped by their immediate surroundings, and can be adjusted by changing their environment) in favor of hardline nineteenth-century racism (a belief in the innate inferiority of people of African descent, who were thought to be incapable of contributing to republican society). The steady disfranchisement of free blacks in the North in the 1820s, the dark side of American democratization, bolstered the intellectual shift away from Enlightenment environmentalism and towards “natural” theories of race. Meanwhile, northern politicians, already unnerved by a rising labor movement based on the egalitarian principles of the Declaration of Independence, abandoned the language of natural-rights in their public pronouncements, a move that effectively gagged their antislavery constituents. These developments tempered northern enthusiasm for abolition, and they accelerated the lockout of antislavery sentiment at the national level.\footnote{Donald Ratcliffe argues persuasively that, well before Jackson’s election, “it had become dangerous to express the sort of sentiments on slavery that had been commonplace in 1819-21.” A majority of Ohioans turned against emancipation in the late 1820s, Ratcliffe argues, and in 1827 the state established a local chapter of the ACS with surging membership.” Ratcliffe, \textit{Politics of Long Division}, p. 146ff. See also James Campbell and James Oakes, “The Invention of Race: Rereading White over Black,” \textit{Reviews in American History} 21 (1993), pp. 172-183; Polgar, “Standard Bearers of Liberty,” \textit{passim}; Winthrop D. Jordan, \textit{White over Black: American Attitudes toward the Negro, 1550-1812} (Chapel Hill: University of North Carolina Press, 1968), pp. 542-569; Barbara Fields, \textit{Slavery and Freedom on the Middle Ground: Maryland during the Nineteenth Century} (New Haven: Yale University Press, 1985), \textit{passim}. On the abandonment of natural-rights rhetoric in early nineteenth-century politics, see Daniel Rodgers, \textit{Contested Truths}, pp. 69-79.}

The simultaneous rise of racism and the muting of antislavery sentiment in northern-state politics are exemplified by New York State’s 1820 constitution, which broadened the suffrage for wage-earning white men yet increased the property qualifications for voting among black New Yorkers, turning back many of the civil advances blacks had secured during the Revolutionary era. In the rough and tumble world of New York State politics, where the Jeffersonian Republican coalition had splintered into a dizzying array of rival partisans, the majority Democrats justified the retrenchment of black voting rights as a remedy to the perceived socioeconomic ills wrought by emancipation. See Polgar, “‘Whenever They Judge It Expedient’: the Politics of Partisanship and Free Black Voting in Early National New York,” \textit{American Nineteenth Century History} 12 (Mar., 2011), pp. 1-23.
By the late 1820s, the antislavery nationalism espoused by restrictionists during the Missouri Crisis no longer surfaced in national politics, eclipsed by the compromising nationalism of Clay and the “moderate” majority. For an increasing number of northerners, even those who might have considered themselves antislavery in principle, the moral and political-economic virtues of the existing Union – a positivist regime in which slaveowner property rights abridged the “natural” rights of slaves – far outweighed the risks of slavery agitation. Slavery was a definite evil, but for most northerners in the 1820s it remained out of mind, an abstract political question which paled before to the priorities of the Union. “The Union” increasingly meant the vision of the Union embraced by the compromisers of the post-Missouri era.16

From the start, the party system systematically locked antislavery agitation out of politics. Since Democrats dominated federal politics, they were the default “proslavery” party; but National Republicans (later Whigs) were no less keen on keeping slavery out of political discussion. Like Marshall, Daniel Webster and Henry Clay denounced Calhoun’s states-rights’


16 Dorothy Ross argues that, for nineteenth-century Americans, “a still-powerful republican heritage and newer currents of romantic nationalism made the American nation into a high moral good… Whether defined as a polity and people united by a common language, laws, and ancestry or as a political union bound together by historical affiliation, fraternal feeling, and the principle of states’ rights, the Union was invested with the sentiments of nationality.” Ross, “Lincoln and the Ethics of Emancipation,” p. 383.
theories without abandoning their commitment to the federal consensus. The Nullification Crisis provoked a powerful reiteration of nationalist principles from the likes of Webster (whose debate with Robert Hayne became a staple in the nationalist canon) and Joseph Story, whose *Commentaries on the Constitution* (1833) was intended as a rebuke to the states-rights’ aired by disgruntled Calhounites. But that nationalism did not include an antislavery agenda, which, as far as Webster was concerned, would almost certainly destroy the Union. To this end, Webster assured southerners that the “opinion of the whole North” is that slavery, as a domestic institution, was beyond the purview of Congress.\(^{17}\) Webster’s Union was the moderate post-Missouri Union which rested precariously on sectional compromise and a commitment to suppressing the slavery question at all costs – even if that meant ignoring antislavery constituencies in his home district.\(^{18}\)

*The Emergence of Radical Abolitionism, 1828-1833*

It was in the repressive political context of the “shutdown” – under a new regime systematically designed to exclude slavery from the nation’s political discourse – that antislavery activists developed a more radical message and strategy. One of the last gasps of antislavery dissent was the massive petition campaign in favor of abolition in Washington, D.C. in 1828-9, organized by the Quaker abolitionist Benjamin Lundy and executed by his ally, Pennsylvania

\(^{17}\) Webster to John Bolton, May 17, 1833, quoted in Webster and Edward Everett, eds., *The Works of Daniel Webster* (Boston: C.C. Little and J. Brown, 1851), vol. 6, p. 536.

Congressman Charles Miner. Hundreds of petitions made it to the floor of Congress, only to be ignored by politicians bent on suppressing the slavery question.\textsuperscript{19}

Antislavery frustration led to the emergence of a new generation of radical abolitionists. Black abolitionists, long ostracized from northern and national politics, had been among the first to pick up the language of the Declaration of Independence and use it as cudgel against white hypocrisy; now, in the late 1820s, there arose a new, more militant strand of black abolitionism represented by men like David Walker and James Barbadoes, whose writings aimed to stir the consciences of white voters with direct political influence over slavery. Black abolitionists inspired a new generation of indignant white reformers whose lingering frustrations over the Missouri defeat had been exacerbated by the political lockout of antislavery sentiment. Many in this younger generation were influenced by Lundy’s petition campaign with Charles Miner in 1828-9. Led by Lundy’s protégé Garrison, these so-called “second wave” abolitionists railed against two disturbing trends in contemporary public opinion.\textsuperscript{20}

\textsuperscript{19} Congress renewed Virginia and Maryland’s slave codes in 1801, and from that point forward, Quakers and abolitionists petitioned Congress to repeal them. On slavery in Washington, D.C., see Fehrenbacher, \textit{Slaveholding Republic}, pp. 49-88; Finkelman and Kennon, eds., \textit{In the Shadow of Freedom}. See also Kenneth J. Winkle, \textit{Lincoln’s Citadel: The Civil War in Washington, D.C.} (New York: W.W. Norton, 2013). On Charles Miner’s petition campaign, see \textit{RD}, 20\textsuperscript{th} Cong., 2\textsuperscript{nd} sess., pp. 168ff. See also Fehrenbacher, \textit{Slaveholding Republic}, pp. 69-70.


Black abolitionists operated on the fringes of northern society, but their very militancy reflected the shutdown in mainstream American politics. Boston’s black-abolitionist community established the \textit{Freedom’s Journal} in 1829, the same year in which David Walker, a correspondent for the journal and clothing merchant, published his \textit{Appeal to the Colored Citizens of the World}, a stirring endorsement of violent resistance to slavery and slaveowners. The pamphlet ignited a firestorm in the South, setting alight the ever-smoldering tinder formed by the Haitian revolution, Gabriel’s Rebellion of 1800, and the Denmark Vesey conspiracy of 1822. Along with black leaders like James Barbadoes, Walker was a member of the General Coloured Association, an organization whose purpose was to transcend the agenda set by elite abolitionist societies and focus on changing the consciousness of white Americans, alerting them to the visceral evils of slavery while addressing the much broader and related problem of racism. See Newman, \textit{Transformation of American Abolitionism}, pp. 87-106.
The first target was the creeping acceptance of slave property as a legitimate institution protected by the U.S. Constitution. Garrison lamented northerners’ seeming indifference to the slavery question in the late 1820s. Slavery, he wrote, is “not felt to be an evil, it is not acknowledged to be evil, it is not preached against as evil; and therefore it is only the more inveterate and fearful an evil. *It hath become constitutional.*” Northern apathy was the key political ingredient for protecting slavery in the states and allowing it to expand under the federal aegis. As one abolitionist put it, the South “must be powerless but for the protection and aid of the free states.”

The second trend opposed by the new generation of abolitionists was the accent on gradualism espoused by nominally antislavery institutions like the ACS. Once again, black abolitionists led the way. They had criticized the ACS from the start as a betrayal of Revolutionary principles and a smokescreen for slaveowner dithering. Garrison picked up on these sentiments in the late 1820s, and before long he was denouncing the ACS as a deliberate obstruction of the abolition process, a ruse designed to switch attention from abolition to colonization. The critique of “gradualism” did not mean that radical abolitionists rejected the tactics and strategies of early antislavery as such. For instance, they recognized that there were immediate aspects to the kind of “gradual” abolition that unfolded in states like New York, as in the *immediate* transition in the legal status of slaves from chattel property to servants, or the *immediate* abrogation of slavery’s perpetuity. Instead, their assault on gradualism reflected the immediate political context of the late 1820s, when the hollow doctrines of the ACS and various coopted abolitionist societies dominated national political circles.

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21 Garrison to Ebenezer Dole, in *Garrison Letters*, vol. 1, p. 122.

107
Locked out of politics, abolitionists took their message into the public sphere of newspapers and reform societies. Here they capitalized on the infrastructural improvements wrought by the market revolution. Whereas earlier abolitionists like Lundy had been hampered by poor communication and transportation links, the new generation rode the wave of technological improvements in the early 1830s. The same forces that made it possible to form national political parties – better roads and canals, telegraph communication and more proficient printing technology – also led to the establishment of nationally-oriented reform societies. The middle-class men and women who often ran such organizations applied the tactics learned in the market, including publicity campaigns, bureaucratic organization, and fund-raising, to the project of social reform. Eleven months after Garrison published the first issue of the *Liberator*, he organized a meeting of what would become the New England Anti-Slavery Society, the first “immediatist” organization in the United States (later known as the Massachusetts Anti-Slavery Society).\(^{24}\)

The ranks of abolitionists swelled amid the fallout from Nat Turner’s bloody rebellion in Virginia 1831. Over several days that summer, Turner, who claimed to have envisioned blood falling from the skies over Virginia in the weeks before striking for freedom, launched a violent revolt with over seventy slaves and free blacks from the Virginia. Turner’s forces killed close to sixty white Virginians, including woman and children. The local authorities reacted swiftly and brutally, executing over one hundred of the rebels and suspected participants, hanging many without even the appearance of due process. As the smokes cleared, southerners lay blame squarely at the feet of the abolitionists, whom they said had instigated the Turner rebellion with

their incessant meddling in southern affairs. Enraged slaveowners singled out Garrison specifically, pointing to the incendiary language in The Liberator. His crusader’s penchant for vainglory piqued, Garrison ramped up the vitriol in his newspaper, doubling down on the abolitionist critiques of gradualism and colonization.25

**The Abolitionists’ Constitutional Program**

Among the most important yet least understood contributions made by second-wave abolitionists was their introduction of a national antislavery movement based on a constitutional program for ending slavery in the United States. Arthur and Lewis Tappan founded the American Anti-Slavery in New York a few weeks after British abolitionists introduced the first emancipation bills in Parliament, in July, 1833. They based the AA-SS on the British Anti-Slavery Society as well as the American Temperance Society and other reform organizations in the United States. Directed by the indefatigable Elizur Wright, Jr., the central bureau in New York oversaw the creation of hundreds of regional and local societies throughout the North and Border South in the period 1833 to 1835. The bureau served as headquarters for the society’s newspaper, the *Emancipator,* edited by William Goodell. The *Emancipator* publicized antislavery views that were no longer tolerated in Congress, and it republished pamphlets from the Parliamentary debates over slavery in the West Indies.26

At the society’s first national convention in Philadelphia in December, 1833, delegates drafted a general outline for universal abolition in the United States, basing their plan on the myriad proposals of antislavery leaders since the eighteenth century. The agenda is clearly laid out in the two founding documents of the American Anti-Slavery Society: its constitution and its

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“Declaration of Sentiments,” the latter drawn up chiefly by Garrison. These two documents set down the objectives and limitations of abolitionists working in the United States.

On the one hand, abolitionists sought an “entire abolition of slavery in the United States.” As Garrison put it in the Declaration of Sentiments, the “highest obligation rest[ed] upon the people of the free States, to remove slavery by moral and political action, as prescribed in the Constitution of the United States.” The North’s “relation to slavery is criminal and full of danger: IT MUST BE BROKEN UP.” On the other hand, abolitionists recognized that the kind of direct abolition exercised by Parliament was not possible in the United States. Garrison conceded that, “under the present national compact,” Congress had “no right to interfere with any of the slave States.” The AASS constitution said the same: “each State, in which slavery exists, by the Constitution of the United States, has the exclusive right to legislate in regard to its abolition.”

But this did not preclude antislavery action on a national level. Abolitionists could “endeavor, in a constitutional way, to influence Congress to put an end to the domestic slave trade, and to abolish slavery in all those portions of our common country, which came under its control, especially in the District of Columbia, -- and likewise to prevent the extension of it to any State that may be hereafter admitted to the Union.” Garrison knew from his days with Benjamin Lundy that recognition of the federal consensus was not a total bar to antislavery action; universal abolition could still be achieved, albeit indirectly, through a joint program of federal and state legislation. Here, Lundy’s influence on Garrison and the abolitionists’

27 Proeceedings of the Anti-Slavery Convention, Assembled at Philadelphia, December 4, 5, and 6, 1833, p. 15. See Barnes, Antislavery Impulse, pp. 46-58. As Richard Newman demonstrates, the social and religious composition of the 1833 convention was markedly different from the abolition societies, which were composed mainly of elites. Still, the new generation chose to make Philadelphia rather than New York the site of the convention, partly as a gesture of respect to the still-functioning Pennsylvania Abolition Society (which nevertheless urged against a hastily-organized convention), but also as a symbol of continuity with early national antislavery. See Walters, Antislavery Appeal; Magdol, Antislavery Rank and File; Newman, Transformation of American Abolitionism, pp. 123-129.
constitutional program of the 1830s is most evident. Echoing Lundy, Garrison argued in the “Declaration of Sentiments” that the Exclusive Legislation clause gave Congress the power to abolish slavery in Washington, D.C. The Rules and Regulation clause gave Congress the power to prevent new slave states from entering the Union. Northerners could also petition their state legislatures, demanding, among other things, a “mode of trial” for alleged fugitive slaves, as well as resolutions for the removal of the Three-Fifths clause and the clause implying northern responsibility for quelling slave rebellions.28

These proposals were designed to do more than liberate northerners from the guilt of slavery; they were aggressive proposals for circumscribing slavery to the states where it already existed and forcing the southern states to commence gradual abolition, as abolitionists believed they should have been doing all along. It would also accelerate the process of individual emancipations. Persuaded by Lundy and other early abolitionists, Garrison, the Tappans, and other radical abolitionists knew that containing slavery – a property regime that thrived on expansion – would go a long way toward general abolition. They concluded that the chattel principle was the lifeblood of the slave system, the engine for its profitability and expansion. Annulling the right to “property in man” in all areas outside the slave states would strip slaveowners of the ability to move freely throughout the Union with their slaves. This would be especially damning when it came to the federal territories out west. Slavery in federal areas was “within the compass of national and state official action,” James G. Birney wrote. Congress ought to abolish slavery there and “circumscribe” it “within the limits of the states where it has

been already established.”\textsuperscript{29} “Were the free states this moment thoroughly abolitionized,” declared another abolitionist, “we would at once abolish slavery in the District of Columbia, prohibit the inter-state slave trade, grant civil rights to men without distinction of color; and make the abolition of slavery by the slave states a question of dollars and cents, by refusing to products of slave labor.”\textsuperscript{30}

The abolitionists’ constitutional program is best understood as a policy expression of antislavery nationalism. Like Lundy and the Missouri restrictionists before them, the radicals of the 1830s assumed that the central government was a separate “national” government from the states with a moral duty to promote freedom and discourage slavery. To an extent, antislavery nationalism reflected the predominance of abolitionists with Federalist-New England background. But it was also much more than that. It reflected a larger bipartisan commitment to federal supremacy that national leaders from Jackson to Webster were celebrating in the wake of the Nullification Crisis of 1832-33. Antislavery nationalism was neither Democratic nor National Republican in origin; it appealed as much to Jackson’s supporters as it did to Clay and Webster’s. Though abolitionists alienated large swaths of the North with their strident rhetoric and provocative strategies, their legislative program resonated with the region’s less vocal antislavery majority who agreed that slavery was “local” and that steps should be taken to disconnect it from federal power.\textsuperscript{31}

\textsuperscript{29} Philanthropist, May 5, 1837.
\textsuperscript{30} ibid., July 14, 1837. See also Bonner, Mastering America, pp. 41-78.
\textsuperscript{31} On the neo-Federalist foundations of antislavery, see Mason, Slavery and Politics, passim.; idem., “Federalists, Abolitionists, and the Problem of Influence,” American Nineteenth Century History 10 (2009), pp. 1-27; Rachel Hope Cleves, “‘Hurtful to the State’: the Political Morality of Federalist Antislavery,” in Hammond and Mason, Contesting Slavery, pp. 207-226. The facts surrounding the Nullification Crisis are well known. South Carolina, alarmed by the perceived sectional bias of Congress’s 1828 tariff, threatened to “nullify” the tariff and other federal laws it deemed unconstitutional. John C. Calhoun, once a leading nationalist, developed extreme states’-rights arguments in favor of nullification – arguments he would later use to defend slavery from abolitionist firebrands. President Jackson, leader of a party that was generally committed to states’ rights, responded to the Carolinians’ obstinacy with a forceful vindication of federal supremacy. Meanwhile, Webster and other National Republicans
The nationalism in the abolitionists’ agenda also reflected the robust nationalism of British antislavery, which, unlike its American counterpart, had no federal consensus to constrain it. In the pamphlet *West Indian Question*, Captain Charles Stuart, a leading antislavery voice in the British debates, argued that slavery was “an evil, which government alone can remedy.”

The British people, Stuart argued, were “accomplices in the crime” of slavery, and therefore they must bear the “penalty” of emancipation. These were lessons that American abolitionists took to heart. At the same time, abolitionists recognized that federal action alone would not do the trick; the free states needed to do their part in pressuring the southern states to abolish slavery.

**Abolitionist Strategy**

In pressing their agenda, abolitionists in the early 1830s followed a two-pronged strategy of petitioning and “moral suasion.” The Quakers had pioneered antislavery petitioning in the United States, but it was rather haphazard affair until 1833, when the Boston poet John Greenleaf Whittier recommended that all petitions be directed through the AASS central bureau in New York. Together with Theodore Dwight Weld and Henry Stanton, Whittier remodeled the
petition process, inaugurating a new, more centralized phase of antislavery petitioning. As a result of his efforts, the usual trickle of Quaker petitions turned into a torrent by 1836. A typical petition insisted that Congress had no power to uphold slavery in Washington, D.C., denied that emancipation would infringe on slaveowners’ liberties, and demanded that Congress devise its own plan for universal abolition. Weld himself drew up the template for widely-used petition entitled “Fathers and Rulers.” “We do not ask your honorable body to transcend your constitutional powers, by legislating on the subject of slavery within the boundaries of any slaveholding State,” the petition read, “but we do conjure you to abolish slavery in the District of Columbia where you exercise exclusive jurisdiction.” On the whole, the petitions were meant to do more than just agitate on the slavery question; they were designed to force antislavery back into American Congress.

The petition process followed exactly the agenda sketched in the AASS constitution and Declaration of Sentiments. Petitions were divided between those that went to Congress and those that went to northern legislatures. Petitions to Congress demanded a repeal of slave codes in Washington, D.C. and the federal territory of Florida, as well the prevention of new slave states and a ban on the internal slave trade.

Most petitions focused on Washington, D.C., the perennial target of antislavery agitation since the turn of the century. The second largest batch focused on the territories. As the 1830s

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35 Emancipator, May 16, 1834.
38 For examples of petitions, see the first and second sessions of the 23rd Congress in the Congressional Globe.
progressed, more petitions centered on the interstate slave trade. According to Alvan Stewart, an upstate New York lawyer-abolitionist, a Congressional ban on slave-trading would cripple the slave economy within a few years. With nowhere to send their surplus slaves, the “slave-growers” of the Upper South would “sink under the weight of a population whom their old exhausted slave soil could never support.” The Lower South would “abandon slave labor and employ free colored people, in a great degree, if they could no longer import slaves... to supply the havoc created by overworking, underfeeding, and an unhealthy climate.” A “rigorous law” against interstate slave-trading “would be equivalent to the manumission on the soil of two-thirds of the slaves in the United States in less than ten years.”

William Jay argued that Congress already had authority to ban the coastal slave trade under the provisions of an 1807 law prohibiting slave-trading in ships under forty tons. “It would be easy to show that the Constitution forbids its prohibition in vessels over forty tons burthen,” Jay wrote. “We may take it for granted that “coasting trade will be legally abolished. Should the land traffic not be destroyed, it would not be for want of disposition, or constitutional power in Congress, but on account of the extreme difficulty which would exist in preventing evasions of the law.”

By 1836, abolitionists were arguing that Congress could abolish slavery under the commerce power of the Constitution.

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39 “Address to the Abolitionists of the State of New York. As Reported By a Committee appointed by the first Annual Meeting of the New York State Anti-Slavery Society, of which Committee Alvan Stewart, Esq., was Chairman, and which was unanimously adopted,” Proceedings of the First Annual Meeting of the New-York State Anti-Slavery Society, Convened at Utica, New York, October 19, 1836 (New-York State Anti-Slavery Society, 1836), pp. 51-2.


41 For early arguments against the slave trade, see Lightner, Slavery and Commerce Power, pp. 37-64.
Abolitionists recognized that, if the United States annexed the Republic of Texas, it could add as many as six new slave states to the Union, creating a potentially insurmountable sectional advantage for the South, which could then expand slavery indefinitely. Texas became a central concern for abolitionists in 1836, when American rebels, many of them slaveowners, broke from Mexico and established the Lone Star republic. Shortly thereafter, southern congressmen petitioned to have the United States acquire Texas through annexation. Abolitionists moved swiftly to counter their appeals, knowing that Texas annexation would add at least six new slave states to the Union, a far worse prospect than the Missouri defeat of 1820. Here, once again, they followed Benjamin Lundy, whose 1837 pamphlet, “The War in Texas” painted the southern offensive in Congress as a conspiracy to “re-establish the SYSTEM OF SLAVERY; to open a vast and profitable SLAVE-MARKET therein; and, ultimately, to annex it to the United States.” Slaveowners would use “every facility” to put the power of the Union behind slavery expansion in Texas, creating a massive new market for the slave “merchandise” of “United States, Cuba, and Africa.” Preventing Texas’s entry into the Union was essential to shifting the balance of power toward the free states and sending antislavery representatives to Congress to enact the abolitionists’ constitutional program.

Meanwhile, abolitionists sent petitions to the legislatures of the free states, demanding that they pass resolutions endorsing each aspect of the abolitionists’ constitutional program for the federal level. And like Garrison in the AASS Declaration of Sentiments, they insisted that the free states limit their obligations to slavery under the Constitution, first and foremost by favoring freedom in the matter of runaway slaves. Blacks accused of being runaways ought to have their legal status tested in court, their fates decided by juries, not magistrates. In addition,

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the free states ought to repeal laws discriminating against black residents, since these were thought to legitimate the system indirectly. Last but not least, state-level petitions demanded new and stronger personal liberty laws for protecting black citizens against the threat of kidnapping.\textsuperscript{43}

Next to petitions, abolitionists’ second strategy was moral suasion, which meant using persuasive arguments to win the hearts and minds of wayward slaveowners, who would presumably free their slaves the moment they grasped the extent of their sins. It was also meant to jolt Northerners out of their apparent indifference and push them towards antislavery action. One of the main goals of the American Anti-Slavery Society, according to the society’s constitution, was “to awaken a public sentiment throughout the nation that will be opposed to the continuance of slavery.”\textsuperscript{44} Moral suasion was the most novel aspect of second-wave abolition, the thing that most clearly distinguished them from early national abolitionists. It reflected the idiom of evangelical revivalism that dominated American reform movements in the late 20s and early 30s, in particular the idea of “immediate” repentance from sin. Debates over the extent of commodification and the nature of market society, debates that included the slavery question, were couched in the idiom of evangelical revivalism. Slavery was a “sin against God” as well as a moral evil, Amos Phelps declared; it was \textit{“a yielding up of the PRINCIPLE of slavery as a practical principle – a basis of action, and the adoption of its opposite. This one act is emancipation from slavery. All that follows is the carrying out of the new principle of action, and is to emancipation just what sanctification is to conversion.”}\textsuperscript{45}

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\item[43] For examples of the petitions, see \textit{Cong. Globe}, 23rd Cong.
\item[45] Phelps, \textit{Lectures on Slavery, and its Remedy} (Boston: New-England Anti-Slavery Society, 1834), p. 179. Samuel J. May warned that \textit{“there is a God; and nothing will save us from his wrath, but an immediate and practical submission to his law, of doing unto others as we would they should do unto us.”} \textit{First Annual Report of the American Anti-Slavery Society...} (New-York: Printed by Dorr & Butterfield, 1834), p. 54. Anne C. Loveland defined
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Moral suasion has been derided as an idealistic farce, but it had a certain logic that corresponded to the political geography of abolition in the United States. Abolitionists saw it as the sole means of skirting the federal consensus and influencing the internal affairs of the slave states. They could not petition slave state legislatures or demand direct action from Congress, but they *could* reach slaveowners through a torrent of propaganda. This belief in the “power of abstract truths” underlay the famous mail campaign of 1835, when abolitionists bombarded the South with thousands of antislavery pamphlets and articles, sending them to strategically-picked ministers, judges, and slaveowners throughout the region. The mail campaign sent shockwaves across the South. Irate slaveowners charged the abolitionists with violating the federal consensus by stoking slave rebellion in their states. On July 29, 1835, at the very height of the mail campaign, a mob in Charleston seized whole shipments of mail at the local post offices, setting fire to antislavery materials and parading effigies of Garrison and Arthur Tappan. The furor rose to the highest levels of government. President Jackson’s Postmaster General, Amos Kendall (a Kentucky slaveholder), recommended the national government take steps to halt the delivery of antislavery materials into the South. Jackson himself proposed that Congress enact a law barring antislavery materials from the mails, making clear his strong disapproval of abolitionist agitation.

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In Congress, Calhoun drew up a report in response to Jackson’s proposal, while northern-state legislatures debated whether to shut down the mail campaign. ⁴⁷

As the reaction to the mail campaign set in, with southern Congressmen and their northern allies berating abolitionists for meddling with South’s vital domestic institution, abolitionists insisted that moral suasion did not violate the federal consensus. “We do not aim at any interference with the constitutional rights of the slave-holding States,” one Ohio abolitionist wrote; “for Congress, as it well understood, has no power to abolish slavery in the several States.” ⁴⁸ James G. Birney argued that, as a non-legislative means of influencing politics in the South, moral suasion in no way treaded upon the rights of slaveowners. “Throughout the argument,” he wrote, “we have endeavoured to insist on the distinction between legislative and moral power, as also on the great error of the assumption, that a guaranty against legislation, embraces a guaranty against suasion, and that a moral, is equivalent, to a legal, sanction.” ⁴⁹

Insofar as public opinion influenced politics in a democratic republic, moral suasion had a definite political dimension. In convincing slaveowners to free their own slaves, it would add to the pressure already being levied on the slave states by the federal and northern governments. In the North, meanwhile, it would convince voters that abolition was in fact within their power, that it was not a remote or bygone possibility. A kind of “snowball” logic characterized the thinking of abolitionists on the relationship between moral suasion and abolition legislation: local surges in antislavery sentiment would eventually translate into antislavery legislation at the local and state levels, which would in turn produce antislavery legislation at the national level.

⁴⁸ Olcott maintained that slavery was “a state or individual right, reserved to the states where it prevails by custom, in the general reservation clause of the constitution (vide Amendments, Art. 1), and is wholly under their legal control. They only have the legal right to abolish it by law.” Olcott, Two Lectures, p. 78-79. See also Emancipator, Nov. 4, 1834.
⁴⁹ Philanthropist, May 13, 1836.
until the abolitionists’ constitutional program became the main program of the federal government regarding slavery.\footnote{As Caleb McDaniel has shown, the arts of shaping public opinion and securing legislation were inextricably related in a democratic republic like the United States. See Caleb McDaniel, \textit{Problem of Democracy, passim}. Still, the effort to influence opinion was yet another instance in which American abolitionists followed the lead of their British counterparts. Charles Stuart continually stressed the role of public opinion in forcing Parliament to act against slavery. In order to “give the government the strength which it needs on this subject,” Stuart wrote, the people should more and more urgently and numerous petition.” Stuart, \textit{West India Question}, p. 33.}

Beyond the mail campaign, moral suasion took the form of active preaching and speech-making, mostly in the North but also in the South before the Great Reaction set in. In this endeavor, no one showed greater courage and tenacity than the Connecticut-born Theodore Dwight Weld, whose conversion to evangelicalism was administered by the Revered Finney himself. Weld’s role in the antislavery reformation of the Old Northwest is legendary: throughout the early 1830s, he traveled the preacher’s circuit in the name of antislavery and immediate abolition, using his formidable rhetorical abilities to win over cynical and often hostile crowds in tough towns like Circleville, Ohio. Slowly but surely, important constituencies in the Old Northwest – people whose antislavery inclinations had been muted by the shutdown in all its variants – began rallying to the cause of “immediate” abolition. Meanwhile, Weld brought his message southward, joining the hundreds of antislavery activists who still operated in the South. In Huntsville, Alabama, at the home of the physician John Allan, Weld met a slaveowning lawyer by the name of James G. Birney, a member of the ACS who had long expressed his moral opposition to slavery. After an emotional conversation with Weld, Birney declared a newfound devotion to “immediate emancipation,” expressing his new outlook by freeing the slaves on his estate. Birney, who shortly thereafter moved to Kentucky to form an abolition society in Danville, was Weld’s most important convert. For eastern abolitionists, he
was the very ideal of the reformed slaveowner, a Southerner who personified the “power of abstract truths” – a living embodiment of antislavery nationalism.51

In the summer of 1834, Weld hosted a multiday student debate over slavery and abolition at the Lane Seminary Cincinnati. Located in the Walnut Hills just outside the city, the seminary was Arthur Tappan’s premier western evangelical school, one of many such programs funded in part by the New Yorker’s prosperous silk-trading business. The schools were designed to bring “Christianity” and “civilization” of the eastern seaboard to the frontier, which Tappan and others looked upon as a dangerously breeding ground for wicked and uncivil behavior. For the position of seminary president, Tappan had chosen the Brooklyn Congregational minister Lyman Beecher, who no doubt saw his appointment as a way to combat the growing popularity of his rival Finney. The famous Lane Debates produced a new generation of highly-informed and well-trained abolitionists, among them Henry Stanton of Massachusetts, who would go on to play a vital role in the national antislavery movement. The debates also seemed to have influenced the views of antislavery Cincinnatians like Salmon P. Chase, who paid close attention to the arguments descending from the Walnut Hills. By 1836, Weld recruited a small army of itinerant agents in the service of the AASS – “the Seventy,” as they were called in abolitionist circles. Weld described them “practical men, thoroughly in the work.”52 As they spread out across the North, they drew praise and anger, bringing the slavery question to the fore of American discourse.53


As abolitionists fanned out across the North, they met heavy resistance in cities whose leading citizens feared the consequences of abolitionist agitation or depended on good economic relations with the South. To a wide swath of northerners, abolitionists, with their uncompromising language of moral and religious absolutes and their forceful attack on property rights, represented a grave threat to civil order and economic prosperity. Frightening anti-abolitionist mobs appeared in New York, Philadelphia, Cincinnati, and elsewhere. As early as December, 1833, at the founding of the AA-SS in New York’s Chatham Street chapel, a mob fifteen hundred convened outside, intimidating audience members, hurling epithets and trash, and initiating a three-day riot across the city. In Cincinnati, the Lane debates provoked a fierce reaction among white Cincinnatians, who accused the student participants of racial “amalgamation” and civil disorder. Though they were framed in defensive terms as bulwarks of the Union, anti-abolitionists also suggested that rights to slave property were not only legitimate but national – which is precisely what slaveowners wanted to hear.54

The Meanings of “Immediate Emancipation”

(Metuchen, N.J.: Scarecrow Press, 1980). As much as anywhere in the 1820s and 30s, Cincinnati experienced the wrenching social dislocations associated with the market revolution, and to that extent the city was ripe for the kind of soul-searching evangelicalism promoted by Charles Grandison Finney. Finney’s message of sin and redemption traveled along the same east-west corridors as credit flows that connected commodity production in the West with the markets of the East. See D. Kiesling, The Second Great Awakening on the American Frontier (Findlay, Ohio, 1970). By 1835, the violent anti-abolition backlash was in full swing. From New York and New Jersey to Ohio and Illinois, mobs broke into the offices of abolitionist newspapers and destroyed everything from typeface to printers. In October, a Boston mob seeking out the British abolitionist George Thompson forced its way into a lecture hall, where it instead came upon Garrison himself; satisfied by their discovery, the crowd tied a rope around Garrison’s waist and then dragged him through the city streets. The following year, in Circleville, Ohio, a mob gathered outside a church where Theodore Dwight Weld was giving a speech. As Weld lectured over the roar of the crowd, a large rock crashed through a window above him, striking him in the head and knocking him unconscious for a few seconds, before he returned to his feet and continued lecturing. Richards, Gentlemen of Property and Standing: Anti-Abolition Mobs in Jacksonian America (New York: Oxford University Press, 1970); Barnes, Antislavery Impulse, passim. See also Richard B. Kielbowicz, “The Law and Mob Law in Attacks on Antislavery Newspapers, 1833-1860,” Law and History Review 24 (Fall, 2006), pp. 559-600; Mayer, All on Fire, pp. 196ff.
Just what abolitionists meant by the phrase “immediate emancipation” has been the subject of fierce debate, some of them going all the way back to the 1830s. Beyond the evangelical sense of the term, there was (and is) no consensus on what it meant. Many abolitionists used it in the literal sense of physically emancipating slaves without any further delay. Others disavowed any straightforward explanation of the term. Still others described it as the decisive moment in which the American people decided against slavery. Most, however, seem to have understood it as the immediate abrogation of slaveowners’ property rights and the transition of slavery from a property to a personal status, with steps taken to educate young black indentures in the ways of republican citizenship. This reflected their experience with abolition in places like New York and New Jersey, where property rights in the bodies of slaves themselves

55 For Elizur Wright, immediatism was less a plan than a “doctrine,” a state of mind or mantra. “When we say that slave-holders ought to emancipate there slaves immediately, we state a doctrine which is true. We do no propose a plan. Our plan, and it has been explained often enough not to be misunderstood, is simply this: To promulgate the true doctrine of human rights in high places and low places, and all places where there are human beings. To whisper it in chimney corners and to proclaim it from the house-tops – yea from the mountain-tops. To pour it out like water from the pulpit and the press. To mix it up with all the food of the inner man, from infancy to gray hairs, - to give ’line upon line and precept upon precept,’ till it forms one of the foundation principles and parts indestructible of the public soul.” Wright, The Sin of Slavery and its Remedy (New-York: Printed for the Author, 1833), p. 47. See Davis, “Emergence of Immediatism” and subsequent iterations in Slavery in Revolution, Challenging the Boundaries, Inhuman Bondage, and Slavery in Age of Emancipation.

The very capaciousness of the term “immediate emancipation” signified the radical nature of the abolitionist movement after 1830. It was arguably the most radical of reform movements, since it aimed at removing without any compromise an institution that was both the lynchpin of southern society and, to many observers at the time, the crucial component of the national economy. As historian Aileen S. Kraditor observed, “To have dropped the demand for immediate emancipation because it was unrealizable at the time would have been to alter the nature of the change for which abolitionists were agitating.” Kraditor, Means and Ends, p. 27. As Donald Matthews argued, abolitionists understood the complexity of the institution but took a rigorous ethical approach to it, not a simplistic understanding — an approach that made their demands all the more unpopular and radical. Matthews, “The Abolitionists on Slavery.”

56 James G. Birney captured this understanding when he noted that the first and greatest step toward abolition and social integration was to decide “that slavery shall cease to exist – absolutely, unconditionally, and irrevocably.” Once that decision was made, then “the whole community (of whites) will feel a common interest, in making the best possible preparation for the event.” Abolitionists “do not propose immediate emancipation, but immediate preparation for future emancipation. If the country was now prepared for immediate emancipation, no honest reason could be assigned why it should not immediately take place – and it is precisely because we think the country not prepared, that we urge, upon our fellow citizens, the commencement of preparation, without further delay.” “Constitution and Address of the Kentucky Society for the Gradual Relief of the States from Slavery,” in Dwight Lowell Dumond, ed., Letters of James Gillespie Birney, 1831-1857 (Gloucester, Mass.: Peter Smith, [1938]), vol. 1, p. 104 [hereafter cited as Birney Letters]. This was Gilbert Barnes’ famous depiction of “immediate gradualism”: “measures were immediate whenever they were honestly begun. Thus the longest stretch of gradual abolition was immediate if its beginning was 'immediately prosecuted.'” Barnes, Antislavery Impulse, p. 49.
were transferred to the labor power of former slaves as servants. The destruction of the property right in the slave was instantaneous; what was gradual was the process of integrating slaves into republican regimes and free- and wage-labor economies of the northern states.57

Theodore Dwight Weld explained the abolition process as a legislated adjustment of the property relations between slaves and their masters. Self-ownership was the starting premise of the alteration: to revoke the property rights of the master was to restore the slaves’ property in his own body, the first principle of political society, the foundation for all subsequent civil rights.

To abolish slavery, is to take from no rightful owner his property; but to ‘establish justice’ between the two parties. To emancipate the slave, is to ‘establish justice’ between him and his master – to throw around the person, character, conscience, liberty, and domestic relations of the one, the same law that secures and blesses the other. In other words, to prevent by legal restraints one class of men from seizing upon another class, and robbing them at pleasure of their earnings, their time, their liberty, their kindred, and the very use and ownership of their own persons. Finally, to abolish slavery is to proclaim and enact that innocence and helplessness – now free plunder – are entitled to legal protection; and that power, avarice, and lust, shall no longer gorge upon their spoils under the license, and the ministrations of law.”58

“Slavery is property in human beings,” and immediate emancipation is “nothing more than the immediate cessation of this property,” one Rhode Island abolitionist wrote. Weld enjoined slaveowners to “cease immediately to hold or use human beings as his property” and “immediately offer to empty those who he has held as his property, as free hired laborers.” He then called upon Congress and state governments to “annihilate the right of man to hold man as property.”59 Immediate emancipation did not mean

57 “After the sternest immediatism of doctrine,” wrote Samuel May, “the practical reformation will be sufficiently gradual.” First Annual Report of the American Anti-Slavery Society, p. 50. On the immediate abrogation of property rights in “gradual” emancipation, see Ch. 1, n. 11.
that the slaves shall be turned loose upon the nation to roam as vagabonds or aliens; nor, that they shall be instantly invested with all political rights and privileges; but we mean, that instead of being under the unlimited control of a few irresponsible masters, they shall really receive the protection of the law: that the power which is now vested in every slave-holder to rob them of their dues, to drive them into the field like beasts, to lacerate their bodies, to sell the husband from the wife, the wife from the husband, and the children from their parents, shall instantly cease: that the slaves shall be employed as free laborers, fairly compensated, and protected in their earnings; that they shall be placed under a benevolent and disinterested supervision…

Henry Stanton was even more direct. Congress, he said, “should immediately restore to every slave, the ownership of his own body, mind and soul, and should no longer permit them to be 'deemed, held, and sold, as chattels personal, to all intents, constructions and purposes whatever.'

... they should no longer be regarded [sic] as things without rights, but as men without rights. In a word, ... the right of property, on the part of the master over the slave, should instantly cease.”

The immediate annulment of property rights in slaves would bring slaves under the rule of law, banning slaveowners from selling them as individual commodities on the market. The legal status of slaves would change instantly to something like indentured servitude – a lowly station, to be sure, but one that was at least open to reform. Though most slaves would probably remain under the supervision of their masters, the horrific “appendage[s]” of slavery – whips, chains, and other forms of physical coercion – would no longer exist. Even though abolitionists expected former slaves to work as indentures, many insisted that they should be

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60 First Annual Report of the American Anti-Slavery Society, p. 64. Here again, American abolitionists seem to have followed the example set by their British counterparts. William Wilberforce, Elizabeth Heyrick, James Stephen, Charles Stuart and others had long described “immediate emancipation” as the interposition of public law between master and slave, the restoration of personhood – and thus legal protection -- for slaves. Such action would make slaves into “guiltless British subjects,” Stuart noted. The goal of abolitionists was “immediately to make [West Indian slaves] the subjects of wise and righteous laws, instead of leaving them the slaves of private and irresponsible caprice.” Stuart, West Indian Question, p. 6. See also Davis, Slavery in the Revolution.


62 One abolitionist argued that “all who are not slaves should be immediately brought under the protection and restraint of suitable and impartial laws.” Sunderland, Anti-Slavery Manual, p. 79.

63 Weld, Bible against Slavery, p. 2.
paid “equal and just wages” for their labor. It was the “duty” of slaveowners, Elizur Wright declared, “to employ them as voluntary laborers, on equitable wages.” This aspect of abolitionist thought reflected the movement’s immersion in the incipient free-labor ideology of the Jacksonian North.

Finally, the destruction of property rights in slaves would initiate the lengthy process of assimilating freedmen into political society. Abolitionists disagreed on how quickly and extensively that process should advance. Some tied it to the movement for racial equality, arguing that white intolerance would make freedom a dangerous and unbearable condition for uneducated freedmen. Most, however, deferred the question of social equality for another day, focusing instead on the restoration of slaves’ self-ownership. For Weld, the priority was to bring slaves under the rule of law and involve them in the country’s system of relational rights: “No doubt we should make it our great object to put our colored brethren in possession of their civil rights,” he told Birney, “social rights will follow naturally in their wake.” Few abolitionists thought that freedmen would immediately become citizens. Instead, they envisioned a system in which former slaves climbed a ladder of legal statuses (“servant” to “apprentice,” etc.) while learning the rudiments of republican citizenship. Once they “possessed the qualifications required of other citizens,” freedmen would have every right to join their white countrymen in jury service and voting.

Conclusion

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65 Wright, Sin of Slavery, p. 40.
67 See works cited in Introduction, n. 6, esp. Kraditor, Means and Ends and Rugemer, Problem of Emancipation.
The radical abolitionists of the 1830s responded to the shutdown in the U.S. government by creating the country’s first-ever national antislavery movement, a crusade which reflected the political landscape of the post-Missouri Crisis era. Crucially, they produced a constitutional program for reorienting federal policy and reviving state-by-state abolition in the South. Based on Lundy’s 1821 proposal, the program was a mishmash of state- and federal-level initiatives that would altogether separate slavery from federal power and “localize” the institution in the slave states. The program systematized in concrete form the antislavery nationalism of the Missouri restrictionists, a vision of central-government power suppressed by the new party system of the 1820s. It was not out of respect to slaveowner property rights that the program recognized the federal consensus; it was because the municipal theory, applied to American federalism, was the starting premise of American antislavery. Like Lundy before them, Garrison, Weld, Grimke and thousands of others believed that enactment of their program would not only halt slavery’s expansion but spur the process of state-by-state abolition in the Upper South. In this way, radical abolitionists in the 1830s created an antislavery project that would shape the terms of debate for the next thirty years.
PART II

Crisis & Development
Chapter 3
The Entering Wedge: Slavery and Federal Power in Washington, D.C.

In 1835, the slavery issue reemerged as a subject of constitutional politics in Congress, despite the compromisers’ efforts at maintaining a shutdown. A series of debates sparked by a deluge of antislavery petitions revived the question of slavery’s relationship to federal power. Where the Missouri Crisis had focused attention on the federal territories, the new debates centered on three different arenas: Washington, D.C.; the “free” states of the North; and U.S. coastal waters and the “high seas.” In each arena, antislavery leaders, including both politicians in Congress and activists in the public sphere, argued with proslavery congressmen about slavery’s role in the Constitution.

What followed was a constitutional dialogue in which one side developed its arguments in line with the other, creating in the process two diametrically-opposed constitutional doctrines, one antislavery and the other proslavery. By 1842 – a crucial year in the long history of the American antislavery movement – the debates in aggregate formed a serious constitutional crisis in America, a crisis which reopened the fundamental issue at stake in Missouri Crisis of 1819-21: slavery’s relationship to federal power.

The first theater of constitutional debate, both in terms of chronology and importance, was the controversy over abolition in Washington, D.C. From about 1835 until successive “gags” finally stamped out discussion a few years later, proslavery leaders engaged in a fierce debate with antislavery politicians (mostly Whigs, but also one crucial Democrat, Thomas Morris) over slavery’s constitutional status in the nation’s capital. The debates set the terms for
all subsequent debates over slavery and federal power, shaping conflicts in the free states and at
the international level.¹

The key antislavery figure in the Washington, D.C. debates is Theodore Dwight Weld, the unkempt eccentric whose silver tongue had proven so vital to the abolitionist cause. Few people embodied antislavery nationalism in the 1830s more fully than Weld. The son of a Presbyterian minister, Weld was born in Hampton, Connecticut in 1803. Alongside Garrison and the Tappans, he was an indispensable agent in the making of a national antislavery movement in the post-shutdown era, recasting antislavery arguments from the Missouri Crisis in the idiom of evangelical revivalism. In his perambulatory career as an AASS operative, he spread the antislavery gospel and promoted the abolitionists’ constitutional program, and his proselytizing at the Lane Seminary produced a new generation of abolitionist agitators, “the Seventy,” who would go on to influence debates at the national level. His greatest convert, James G. Birney, embodied the national pretensions of the abolitionist movement, its claim to being American rather than sectional in scope, republican in spirit rather than narrowly partisan. The Washington, D.C. debates would make Weld into the leading articulator of antislavery constitutionalism, an interpretation of the Constitution based on the idea of “national” common

¹ The substantive debate over slavery and federal power analyzed in this chapter has been overlooked by historians, who have framed the slavery controversy in Congress as a debate over the infamous “gag rule.” For instance, the most exhaustive account of Congress’ response to the petitions, William Lee Miller’s Arguing about Slavery, spends considerably more time discussing the gag-rule controversy than it does the constitutional issues surrounding abolition itself. Miller, Arguing about Slavery: the Great Battle in the United States Congress (A.A. Knopf, 1996). See also Freehling, Road to Disunion, vol. 1: Secessionists at Bay, pp. 287-352; Wilentz, Rise of American Democracy, pp. 446-454, esp. pp. 451-452; Howe, What Hath God Wrought, pp. 512-515; Nye, Fettered Freedom; Barnes, Antislavery Impulse, pp. 109-145. I argue that the gag rule was a symptom of the much deeper problem of slavery’s relationship to central-government power, the same core problem as in the Missouri Crisis. This chapter recovers the terms of debate, giving priority to the substantive constitutional arguments in Congress, while placing the gag rule in its proper context. Whereas most historians emphasize the “failure” of abolitionist petitions to spur antislavery action in Congress, I argue that the petitions sparked a fruitful constitutional dialogue with slaveowners which helped them refine their constitutional program and develop antislavery constitutionalism, the seedbed of antislavery politics. In this I follow the lead of William Wiecek in Antislavery Constitutionalism, esp. pp. 172ff. Among other things, the narrative told here emphasizes the productive interplay between abolitionists and antislavery politicians in Congress as they developed each other’s constitutional arguments against slavery.
law which Congress could enact in areas under its jurisdiction, giving it an unquestioned authority to abolish slavery in the District. Under Weld’s guidance, antislavery constitutionalism emerged as the concrete expression of antislavery nationalism, mortar for the antislavery house.2

Weld’s antislavery nationalism reflected his close friendship with the leading British abolitionist Charles Stuart, the Jamaican-born former British Army captain who first met Weld in Rochester in the late 1820s, when both men came under the spell of Charles Finney. Worldly, sensitive, tortured by self-doubt, Stuart joined Finney’s temperance army but soon turned his attention to slavery, returning home to write West Indian Question, one of the most influential pamphlets in Britain’s antislavery movement. A key theme to emerge from that document was that the antislavery movement in Britain was a political movement to reform an “evil... which the government alone can remedy.”3 Despite its claim to being universal in scope, the antislavery movement was in fact a national question involving Parliament’s laws. Moral revolution or not, politics and policy remained the focus of antislavery agitation. From England, Stuart pressed Weld to join the antislavery cause, sending his younger friend volume after volume of antislavery pamphlets, including Thomas Clarkson’s Thoughts on the Haitian Revolution (1823) and issues of the Antislavery Recorder – as well as copies of his own West Indian Question. By 1831, Weld dove headlong into the abolitionist movement, fully convinced that state-by-state abolition would not happen without prodding from the central government. Thus, in addition to abolitionizing the voters of the Northwest, Weld organized the mass petition campaigns that pressed Congress to abolish slavery in Washington, D.C. and other areas under its jurisdiction.

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2 On Weld, see Ch. 2, n. 51.
3 Stuart, West India Question, p. 28. Stuart argued that “government, without countenancing the impious claim of compensation... would provide against loss to its partners in guilt, as far as human help can provide; while in the increased value of land in the colonies; in the newly acquired security of property; in the extension of commerce; and in the general happiness of the people, it would be itself as secure, as human things can be.”
Even as he preached the individualist gospel of immediate repentance from sin, Weld understood that “government alone” could remedy the evil of slavery.4

The Debate over Abolition in Washington, D.C.

Ever since 1801, when Congress reenacted Virginia and Maryland’s slave codes, the District of Columbia had been a key arena for antislavery agitation. Many saw it as the first crucial front in a wider assault on slavery. By the time Benjamin Lundy organized the great petition campaign of 1828-9, Quakers had long been petitioning Congress to repeal the District’s slave codes, and as we have seen, the abolitionists made slavery in the nation’s capital a major part of their constitutional program. In an 1835 speech delivered to the American Anti-Slavery Society in New York, Birney described abolition in Washington, D.C. as the abolitionists’ top priority. By ending slavery in the nation’s capital, he argued, Congress would announce to the civilized world that the U.S. government was living up to the liberal principles of the Declaration of Independence. Abolition in the District would “add greatly to the weight of enlightened public opinion already pressing so heavily on those who are striving to perpetuate” slavery, he proclaimed. Faced with the example of the federal government, the southern states would recommence the process of state-by-state abolition.5

In 1835, as the mail campaign was still underway, abolitionists stepped up their petitioning to Congress. By far the greatest number of petitions called for abolition in the District of Columbia. A handful of antislavery Whigs – John Fairfield of Maine, John Quincy Adams, William Slade of Vermont, and John Dickson of New York – introduced the petitions in the House, while a single antislavery Democrat, Thomas Morris of Ohio, brought them up in the

4 Barker, Captain Charles Stuart, pp. 10-142; Thomas, Theodore Weld, pp. 16-18, 20, 25.
5 Philanthropist, Jan. 1, 1836. On slavery agitation in Washington, D.C., see Fehrenbacher, Slaveholding Republic, pp. 49-88; Finkelman and Kennon, In the Shadow of Freedom, passim.
Senate. The petitions prompted a fierce debate in Congress over its relationship to slavery in the nation’s capital.⁶

Three questions drove the debates. First, should District courts adopt the North’s presumption of freedom, treating all persons as free citizens regardless of skin color, or should they adopt the South’s presumption of slavery, using black skin as a marker of slavery? Second, did the Constitution recognize and guarantee slaves as property in the District? No one doubted that slaves were property in the slave states; but were they also property in the District and in other federal jurisdictions? Third, what was the extent of Congress’s power over slavery in the District? Could Congress regulate or abolish slavery there? If so, was it prudent to apply that power?

There were several reasons why antislavery Whigs introduced petitions in the House, but the main reason was indignation at the seeming nationalization of slavery. By maintaining slavery in the District, Congress seemed to be favoring the laws and legal culture of the South, trampling the North’s presumption of freedom and nullifying the privileges and immunities of northern black citizens (an effect similar to what was happening to black sailors in South Carolina under the state’s “Negro Seaman Acts”). John Dickinson complained about the legal “man-traps” District slave traders used to “seize and drag into perpetual bondage a freeman, entitled to all the rights and privileges of an American citizen.” A black man from a free states, said Dickinson,

may have been well educated, moral, and industrious; have exercised the elective franchise, and voted for the highest officers of the national and State Governments, entitled to all the rights and privileges of the white man, and of an American citizen; yet, in this District, he shall be presumed a slave, and in the city of Washington as a disorderly person, and compelled to give security for his good behaviour for three years. No such presumption of crime is known to the laws of England, to the civil law, nor to the municipal code of the most despotick country.

in Europe. It has no foundation in the law of nature, the common law, nor in common justice, and is contrary to the genius and spirit of all wise and free Governments. It is a maxim, that every man is to be presumed free and innocent, founded on the immutable principles of eternal justice, acknowledged by all, and which can never be changed but by that arbitrary tyranny which feels power, forgets right, and knows neither mercy nor justice.  

Dickinson’s colleague from New York, future president Millard Fillmore, said much the same thing. The people of New York “believed slavery to be improper,” Fillmore declared, “and that it should not be tolerated” in the nation’s capital. The issue of slavery in the District was a “great national question.”

Not all of the antislavery Whigs agreed with the message in the petitions. John Quincy Adams – the former president who was now the scourge of Democrats and southerners in the House – would become the staunchest defender of the right of petition, but he always believed abolition in the District would infeasible and unwise. Yet most of the antislavery Whigs endorsed abolition in the capital. A few of them argued that the power to repeal the District’s slave codes fell within the terms of the Constitution’s Exclusive Legislation Clause, which granted Congress power “to exercise exclusive legislation, in all cases whatsoever” in the District – including the power to abolish slavery. Dickinson argued that there was “no limitation” to the power granted to Congress under the Exclusive Legislation Clause; Congress had “ample and complete” jurisdiction over the District, “the sole power of legislation.”

According to William Slade, Congress could “qualify” the right to “own and trade slaves as property in the capital.”

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9 U.S. Constitution, Art. 1, Sec. 8.
11 *ibid.*, 24th Cong., 1st sess., p. 2043. In keeping with the federal consensus, antislavery Whigs continually distinguished abolition in the District of Columbia from abolition in the states. One of them “disclaim[ed] all
The Proslavery Nationalism of John C. Calhoun

A small but vocal cohort of proslavery congressmen responded to the petitions and their congressional defenders with a stream of vitriolic denials. Led by John C. Calhoun, the group of mostly Whig leaders (many of them former Democrats who had shifted to the Whig Party after the Nullification Crisis) decried abolition in the District as an unconstitutional assault on private property. Behind the barrage of invective was a well-crafted defense of slavery in federal jurisdictions. They doubled down on the proslavery assumption that the property right in slaves was guaranteed protection under the Constitution, the right was extraterritorial in the Union, as legitimate in federal jurisdictions as in the slave states.\(^\text{12}\)

Underneath this line of reasoning were two premises which, together, marked a new era of aggressive proslavery nationalism. First, the Calhounites denied the central premise of antislavery thinking since the early modern era: that slave property was different from other forms of property. For them, any distinction between slaves and so-called “natural” property was artificial and illegitimate. Second, they defended property rights in slaves as an absolute vested right which no government – not even Congress in the District of Columbia – had the interference, or disposition to interfere, with the rights of property in slaves, or control over the slave question, within the jurisdiction of the slave-holding States.” \textit{ibid.}, 23\textsuperscript{rd} Cong., 2\textsuperscript{nd} sess., p. 1463. Dickinson “disclaim[ed] all power in the national Government to control or abridge its duration in the several States of this Union... [and that] in speaking of slavery in this country, I wish to be understood as confining my remarks to that portion of the country over which the national Government has ample and complete jurisdiction, and the sole power of legislation, and that is the District of Columbia.” \textit{ibid.}, p. 1131. For more on the antislavery Whigs in Congress in this period, see Miller, \textit{Arguing about Slavery}, passim.\(^\text{12}\) For an overview of radical proslavery thought, see Freehling, \textit{Prelude to Civil War}, pp. 301-339; Drew Gilpin Faust, \textit{The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830-1860} (Baton Rouge: Louisiana State University Press, 1981); Fehrenbacher, \textit{Constitutions and Constitutionalism in the Slaveholding South} (Athens: University of Georgia Press, 1989); Sinha, \textit{Counterrevolution of Slavery}.  

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power to revoke. Here, they brought forward a potent strand of the vested-rights doctrine which was just then emerging from southern legal culture in the post-1815 era.13

For the Calhounites, the phrase “exclusive legislation” meant many things, but it did not include the power to abolish slavery in the District. The federal consensus applied to the District as much as it did to the slaves states: Congress had no power to interfere with slave property there; its only responsibility was to protect the forms of property sanctioned by the states. Here, the Calhounites were applying the theory of “state sovereignty” to the District of Columbia: just as proslavery expansionists during the Missouri Crisis had argued that the territories were the common property of the states, the Calhounites were now claiming that the nation’s capital was a common space for state interests. Insofar as the Constitution was a “compact” between the states (rather than the formation of a separate “national” government), the states were supreme over the federal government; Congress was simply a vehicle for protecting the interests of the several states in the District, including that of slave property. State sovereignty theory was not the same thing as states’ right theory, though both were cut from the same cloth. Yet it was the former, not the latter strand of thinking, which served as the basis of a proslavery nationalism which envisioned the federal government as the agent of the states -- and by extension, of slavery’s protection.14

13 On the radicalization of slaveowners’ theory of property rights, see Baptist, Half Never Told, pp. 329-331.
14 See, for instance, Cong. Globe, 24th Cong., 1st sess., pp. 2026, 2245. On the proslavery theory of “state sovereignty,” see Arthur Bestor, “State Sovereignty and Slavery: a Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860,” Journal of the Illinois State Historical Society 54 (1961), pp. 117-180. One Calhounite offered a succinct articulation of state sovereignty in an 1836 resolution: “That the Constitution rests on the broad principle of equality among the members of this Confederacy; and that Congress, in the exercise of its alleged powers, has no right to discriminate between one portion of the States and another, with a view of abolishing the institutions of the one, or promoting those of the other.” Cong. Globe, 25th Cong., 3rd sess., p. 26. State sovereignty theory had deep roots in the Jeffersonian tradition. As Robert Bonner reminds us, the proslavery vision of the Union as the aegis of slavery expansions had its origins in the Jefferson and Madison administrations in the first decade of the nineteenth century. It was also a major component of the pro-expansion argument during the Missouri Crisis. See Bonner, Mastering America, pp. 5-14. This theme of southern proslavery expansionism is also explored in Matthew J. Karp, “Slavery and American Sea Power: The Navalist Impulse in the Antebellum South,” Journal of Southern History 77 (May, 2011), pp. 283-324. See also Ch. 1.
This was why Francis Pickens of South Carolina called the prospect of abolition a “solecism in constitutional law”: Congress had no power to abolish slavery anywhere in the Union, since that power had been expressly reserved to the states via the Tenth Amendment. According to Henry Wise of Virginia, Congress could only act as a local legislature in the District, not as a national legislature. “The nation has nothing to do with slave property,” Henry Wise declared. Slavery was “wholly and solely under the control of the States where Slavery exists. It is a reserved State right, with which the general Government has no right to interfere...”

As slaveowners had done during the Missouri Crisis, the Calhounites insisted that slavery was guaranteed protection under the Constitution. But this time, they made that claim more forcefully than ever, pointing to various clauses in the Constitution which, in their view, guaranteed slave property in the District. Wise argued that, by the terms of the Fugitive Slave Clause and the Privileges and Immunities Clause, slaves were “as much property [in the District] as in Virginia: property by the law and the constitution.” Pickens used the Three-Fifths Clause, the Fugitive Slave Clause, and the Slave Trade Clause to argue that the Constitution recognized slaves as “property, as things other than persons,” and that guaranteed protection for them as property throughout the Union. “We all admit this property is guarantied to us by the constitution,” Hugh Garland of Louisiana stated flatly, as if his claim was above challenge. A constitutional guarantee for slave property was implicit in Calhoun’s correlation between liberty and property.

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16 ibid., 23rd Cong., 2nd sess., p. 1399. Wise argued that Congress was a legislature “in two characters and in a twofold relation.” On the one hand, it was a national legislature for the Union with specific enumerated powers. On the other hand, it was a local legislature, with “exclusive legislation” over the District of Columbia. For Wise, any debate over slavery in the District had to recognize this “double relation of Congress.” In addressing abolitionist petitions, Congress acted as a local legislature, not as a national one, “for it will not be contended that there is any such power enumerated or implied in the constitution” concerning Congress and slavery. “Congress's relations to slavery in the District are local.” Its power as a local legislature was not unlimited: it could not, for instance, pass laws abrogating the property rights of slaveowners. ibid., pp. 2027-2030.
17 ibid., 24th Cong., 1st sess., p. 1399.
18 ibid., p. 2246.
19 ibid., p. 2072.
and property: certainly the Constitution guaranteed life and liberty, and if that was true – and it
was – then certainly it guaranteed property, for as Calhoun put it, the “one, in the eye of the
constitution, is as sacred as the other.”

The first and most important premise of the proslavery counterattack was its utter rejection of
the municipal theory of slavery. For the Calhounites, the age-old distinction between slave
property and all other forms of property came down to nothing. “Are slaves not property?”
Calhoun exploded. Indeed they were, and property rights in slaves were as “original” and
“universal” as those vested in other forms of property. In the House, proslavery leaders set their
sights on the antislavery distinction between slaves and other property. According to Henry
Wise, there was no difference between property in slaves and property in the “carriages and
horses” which northerners brought with them into the capital daily. Senator Benjamin Leigh of
Virginia argued that slaves were “universally recognised [sic] as property, property founded in
ancient laws, and clearly defined and regulated; indefeasible property, just as indefeasible as
property in lands or any thing [sic] else,” while Pickens insisted that rights to slave property
predated the formation of the states and the Union, and that the Constitution merely sanctioned
what were the “original” rights of slaveowners in the former colonies. All of these leaders
rejected the key premise of Anglo-American antislavery thought since Somerset – that rights to
slave property were dependent on local positive laws.

In defending against abolition, the Calhounites brought forward an unprecedented defense of
private property. In their hands, the vested-rights doctrines of the past became more absolute,

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20 ibid., Senate, 24th Cong., 1st sess., p. 97.
21 ibid.
22 Wise quoted in Henry Wilson, *History of the Rise and Fall of the Slave Power in America* (Boston: James R.
23 RD, Senate, 24th Cong., 1st sess., p. 192.
24 ibid., House, 24th Cong., 1 sess., p. 2246. According to Pickens, northern and southern courts had long agreed on
this point.
more impregnable than ever. Slave property, they argued, could only be abolished with the consent of each individual slaveowner in the District of Columbia, as well as the slaveowners of Virginia and Maryland, the states which had ceded the District to Congress. Here, they cultivated the radical interpretation of the Due Process Clause introduced by expansionists during the Missouri Crisis. According to one slaveowner, due process was the “great principle of English liberty.” Calhoun reminded the Senate that property was the basis of liberty in all republics. How could Congress “any more take away the property of a master in his slave, in this District, then it could his life and liberty? They stand upon the same ground.”

“The line that separates the power of Government from private property,” Pickens declared, “is the line that defines the limits of liberty.” If the protection of private property was not “the great principle of the American Revolution, then it has none.” Leigh warned that abolition in the District would lead to government confiscation of land and other property inside the states, while another southern senator described abolition as a “wanton attack” on private property, based on the false notion that “A has a right to take what belongs to B, because A does not wish B should hold such property.” James Bouldin, representing Virginia, railed against those who would “use means, directly or indirectly, to endanger my life or rob me of my property.” “All admit a man’s land or horse cannot be taken from him in this District, any more than elsewhere.” Sure, slaves could be confiscated “for the public use,” but only if Congress provided “just compensation” for their owners. For Henry Wise, even compensation was out of the question.

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25 ibid., Senate, 24th Cong., 1st sess., p. 97.
27 ibid., Senate, 24th Cong., 1st sess., p. 192.
28 ibid., p. 75.
29 ibid., House, 24th Cong., 1st sess., p. 2169.
30 ibid, House, 24th Cong. 2nd sess., p. 2224.
Citing John Marshall, Wise argued that Congress had no power to “change the relation of master and slave, even for public use.”

All of these claims reflected the southern view that a master’s right to property took precedence over a slave’s right to liberty. That view had become more robust in the period after 1815. The rise of a new and more aggressive brand of American slavery in the Deep South had introduced a more forceful strain of vested-rights doctrine in the South, as southern courts and legislatures emphasized the absolute nature of private property rights. In what modern legal historians call “substantive due process,” slaveowners increasingly claimed that property rights were so basic and sacrosanct that they could never be subject to confiscation or regulation. In his famous opinion in *State v. Mann* (1829), North Carolina Chief Justice Thomas Ruffin argued that slaveowners had absolute control over their slaves as property. State power “in no instance, usurped” the dominion of the master over his slave, which derived from the master’s right of property. Courts should presume the master’s absolute dominion; a judge might personally object to slavery, Ruffin wrote, but he could not “allow the right of the master to be brought into discussion” in the courtroom. The Calhounites in Congress represented this new brand of vested-rights doctrine coming out of the state courts in the 1820s and 30s.

The Antislavery Response in Congress

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31 *ibid.* House, 23rd Cong., 2nd sess., pp. 2029-30. Robertson reminded the House that private property could only be confiscated for “public use” or the “general welfare,” neither of which would be served by abolition. Abolitionists, he continued, had deliberately muddled the distinction between public use and public good. *ibid.* House, 23rd Cong., 2nd sess., p. 4019. Pickens argued that compensation would be prohibitively expensive, and would have to be wrung from the Public Treasury by way of legislative appropriation – something that was impossible so long as slaveowners sat in Congress. *ibid.*, 24th Cong., 1st sess., p. 2246.


33 Slavery is “interwoven with our very political existence,” Wise explained. Abolition would undermine the personal liberty of slaveowners and destroy the political equality of the slave states. To attack slavery was to attack “the institutions of the country, our safety and welfare.” *ibid.*, House, 23rd Cong., 2nd sess. pp. 1399. On nineteenth-century vested-rights doctrines, see Introduction, n. 38.
Most members of Congress, Whig and Democrat, responded to the Calhounites’ counteroffensive with a deafening silence. In keeping with the policy adopted during the shutdown of the 1820s, both parties were eager to keep the slavery issue out of national politics. From the majority viewpoint, the pressing issue in 1836 was not slavery in Washington, D.C. but the fallout from Jackson’s war with the Bank of the United States. Still, a handful of antislavery Whigs in the House – and one rogue Democrat in the Senate – defended Congress’s right to abolish slavery in the District. Through their lens of antislavery nationalism, the whole edifice of proslavery constitutionalism rested on the false premises: slaves were not like other forms of property; the states were not supreme over the federal government; the federal consensus did not apply to the District; Congress was not a local legislature bounded by the interests of slaveowners and the slave states; there was no constitutional guarantee for slave property in the District. Since Congress had reenacted Maryland and Virginia slave codes in 1801, they argued, only Congress could repeal those codes; slaveowners living in the District could not limit Congress’s power in this regard, nor could slaveowners in Virginia or Maryland.

William Slade and Samuel Prentiss, representatives from Vermont, defended the municipal theory’s distinction between slavery and other forms of property. According to Prentiss, the “right of property in the persons of slaves is not the same, either in nature or extent, as the right of property acquired in things that have a natural existence, over which the owner has a power of absolute and unlimited dominion and disposal.”34 Both Prentiss and Slade insisted that abolition fell within the bounds of ordinary legislation, and that legislatures did not need slaveowners’ consent to abolish slavery.35

Here, they drew on the common-law regulatory tradition which had undergirded abolition in the northern states. Everyone understood that “the rights of property are subject to legislative action and interference,” Prentiss argued, chipping away at the Calhounites’ claim to absolute private property. To be sure, legislatures could not, by a retrospective law[,] take away or annihilate property already vested under the sanction of existing laws.” But they could regulate property in other ways, “without being supposed at all to interfere with or disturb the principle of vested interests.” For one thing, they could limit the alienation of property and its transmission to heirs by regulating the disposition of property in wills and other legal devices. Drawing on the examples of legislative abolition in Pennsylvania, New York and New Jersey, Prentiss described abolition as the immediate destruction of property rights in human beings and a transmission of those rights into the labor power of servants. In the case of slaves in the District, Congress could prohibit “the future acquisition of [slaves] in any way, whether by inheritance, by purchase, or by birth,” while also banning the local slave trade. By interdicting property rights in slaves themselves (rather than their labor), “the entire abolition of such relation may in time be accomplished, without dissolving any subsisting obligation.”

Slade agreed, arguing that the right to “hold men as goods and chattel, subject to sale and transfer, at the will of the master, should cease and be discontinued instantly and forever.” The revocation of property rights in slaves meant the same thing as inserting the rule of law into the master-slave relationship. Abolition was less confiscation of property than an adjustment of rights in which the property relation of slavery was transformed into the personal relation of servitude. This did not mean that slaves would be “free” from physical coercion (many forms of “free labor” in the 1830s remained compulsory), but it did mean that they would share a basic civil equality with their “masters” and, more importantly, that they would own themselves. Self-

36 ibid., Senate, pp. 669-70. On the common-law regulatory tradition, see Novak, People’s Welfare.
ownership – a right of property in one’s own person – would be restored to slaves in the District, even as they remained tied to their masters as “servants.” Here, Slade confronted the Calhounites’ doctrine of substantive due process. Personal liberty, he argued, was far more important than the right to private property. To be sure, as long as the District’s slave codes remained in effect, slaves there were property; but that legal fiction could not override the fact that they were persons who had been deprived of their liberty without due process. Abolition would restore to District slaves their natural right to liberty, freeing enslaved persons “from the unnatural condition of being the property of another.” This was not confiscation but legislative adjustment. Once freed, a former slave in the District would become, not the “property of the public,” as would be the case in confiscations of “natural” forms of property, but “the proprietor of himself,” a person whose basic human equality had been restored to him.37

These arguments strongly implied that “property in man” was not a constitutionally-guaranteed form of property. Distinguishing slave property from “universal” or “natural” forms of property; claiming that slaves were persons under the laws of the District; insisting that the Privileges and Immunities Clause concerned rights recognized by all the states, not the “peculiar” laws of some states – all of this flew in the face of Calhounite claims of a constitutional guarantee.

Yet neither Slade nor Prentiss expressly denied that claim. In the event, it was a Democrat in the Senate, Thomas Morris of Ohio, who made the debates’ first express denial of a constitutional right to slave property. Like many Ohioans, Morris’s antislavery nationalism reflected the peculiar course of slavery conflict in that state, namely, the struggle to administer the ban on slavery in the Northwest Ordinance and Ohio constitution, respectively. Like most northerners, he had opposed Missouri’s admission into the Union as a slave state.

37 ibid., House, 24th Cong., 1st sess., p. 2052.
He had been a National Republican in the 1820s, one of many Ohioans who supported Henry Clay’s proposals for federally-funded internal improvements. After growing disillusioned with the Adams administration, he had switched his allegiance to Andrew Jackson and the rising Democratic Party. Like many other radical Democrats by the mid-1830s, Morris had grown bitter about the overweening power of southern slaveowners in his party. He agreed with abolitionist petitioners and their Whig allies that the legal presumption of slavery in the nation’s capital made a mockery of northern principles and the legacy of the Revolution.38

On April 13, 1836, Morris delivered a speech on the Senate floor obliterating the claim of a constitutional guarantee for slavery. No such guarantee existed, he scoffed. The question of what could and could not be property was a matter for the states; the Constitution – and thus the federal government – merely recognized as property what the state legislatures had settled upon. It was absurd to think that “the right of the master to his slave as property is founded on, or arises from,” the Constitution. “Property in slaves, as well as other things, is a mere creature of law,” Morris argued, “and in this country [it] is entirely the creature of State laws.” Why did slaveowners “so strongly assert their constitutional right to slaves”? Because it was the foundation of their efforts at “overwhelm[ing]” the free states “by the power of this Government.” Yet there was no indication in the Constitution that slavery ought to be considered a national institution. The founders had deliberately avoided using the terms “slave” or “slavery” so that “no one” in the future “would suppose that slavery existed in [any] form in this republic.”39

By making Slade and Prentiss’ implicit denial of constitutional guarantee for slave property explicit, Morris raised the stakes of the debate over abolition in the District. For if there was no

constitutional guarantee for slave property, such property was no longer safe, certainly in the District, but also in the federal territories and on U.S. coastal waters – and possibly even in between states, in the form of slave trading.

The Calhounites saw grave implications in Morris’ assertion. According to their own theory of state sovereignty, denying that the Constitution guaranteed slave property in the District was the same as declaring war on slavery in the states; it obliterated any distinction between indirect and direct abolition. Calhoun, Pickens, Wise, Garland – all of them at one point or another referred to abolition in the District as an “entering wedge” to general abolition in the United States.40 They claimed that, if the abolitionists’ reading of the Exclusive Legislation Clause won out, slavery would be undermined not just in Washington, D.C., but inside the slave states as well. The clause gave Congress “like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”41 Were Congress to abolish slavery in the District using this clause, John Robertson of Virginia argued,

then is the proposition boldly asserted, that Congress has the power to abolish slavery, not in this District merely, but in the States. Not the district only, but every place purchased for the use of the United States, may be converted into a sanctuary for fugitive slaves, who may be declared entitled to freedom the moment they enter it. Every fort may thus become a stronghold of abolitionism, every magazine a mischief, from whence the enemies of our peace may hurl their firebrands and bombshells among us.42

This was not the irrational outburst of a hot-headed slaveowner. It was a calculated prediction of how abolition in the District would play out nationally, a classic example of the

40 The phrase “entering wedge” came from Wise. See ibid., House, 24th Cong., 1st sess., p. 2028. See also ibid., p. 2226.
41 U.S. Const., Art. 1, Sec. 8.
42 RD, House, 24th Cong., 1st sess., p. 4021. According to southern senator, “the object is the same.” ibid., p. 2171. Wise was typically blunt on this subject: “He who says that it would be merely ‘inexpedient’ to abolish slavery in the District, says that it would be merely ‘inexpedient’ to abolish slavery in the States.” ibid., House, 24th Cong., 1st sess., p. 2028.
cool, zero-sum logic in constitutional sparring. For Robertson and other Calhounites, abolition in District would do much more than just “set an example” for the rest of the country; it would also create the possibility of free-soil islands existing within the slave states themselves, beacons for runaways run by federal employees hostile to slavery. A proliferation of “free” forts and arsenals would hurt the value of slave property, causing a steep and rapid decline in slave prices throughout the South. Precisely because they viewed federal power through the prism of state sovereignty theory, Calhounites considered abolition in the District the first step toward abolition in the states.

_Congress Adopts the Gag Rule_

The Calhounites and their antislavery opponents in Congress represented the extreme margins of the slavery debate in Congress. Neither side’s views held sway in the ranks of mainstream Whigs and Democrats. Ignoring the sniping among the handful of pro- and antislavery antagonists, party leaders moved quickly to shut down the debate and soothe the tensions aroused by abolitionist petitions. Martin Van Buren, leader of the dominant political party and heir apparent to President Jackson, worked behind the scenes to find a solution. Southern slaveowners had long questioned Van Buren’s reliability on the slavery question. He knew that his chances for occupying the White House depended in large part on proving his anti-abolitionist credentials and not alienating his southern base. Whereas the Calhounite James H. Hammond demanded a general prohibition on the petitions, Van Buren endorsed a compromise
position that would keep the petitions off the floor by sending them off to a committee which would ostensibly ignore them.43

The difference between the two proposals reflected the deep divergence between Hammond’s proslavery constitutionalism and Van Buren’s more moderate constitutional views. Van Buren – who had numbered among the restrictionists during the Missouri Crisis – recognized that Congress had the power to abolish slavery in the District of Columbia. In this he was no different from most members of Congress, who quietly recognized that the antislavery position was, strictly speaking, correct. But Van Buren followed John Quincy Adams in refusing to act against slavery in the District, arguing that it would be a “breach of faith” to the slave states. Whereas Calhoun saw abolition in the District as unconstitutional – they insisted that Congress could not abolish slavery there – Van Buren opted for prudence and forbearance. Congress “ought not to” abolish slavery in the District, he said over and over. In this way, the always-dodgy Van Buren evaded, publicly at least, the difficult question of slavery’s constitutional status.44

Luckily for him, Representative Charles Pinckney South Carolina, a key Van Buren ally in the South, proposed a workable solution supported by members of both parties. Pinckney endorsed a policy of tabling the petitions upon their arrival in the House; that would at least avoid the charge of trampling the right of petition. Pinckney issued a report on the petitions in mid-May, 1836. The report struck a moderate tone: it recognized that slave property in the District was subject to legislative interference, a claim that contradicted the Calhounites’

doctrine of substantive due process and a constitutional guarantee for slave property. But Pinckney nevertheless argued that abolition would be “unwise and impolitic,” and here he endorsed the Calhounites’ theory of state sovereignty. Far from being “a general and paternal legislature, equally and impartially promoting the general welfare of all the States,” Congress was the “partial agent” of the states whose sole responsibility was to reflect “peculiar and sectional objects and feelings.” Congress’s power over the District derived, not from the Constitution, but from a “special provision” in the Virginia and Maryland cession, and in that sense it acted as a local legislature in the District, not as a “national” body. On the grounds, Pinckney followed Van Buren in recommending that Congress “ought not” abolish slavery in the District.45

Both the pro- and antislavery wings of the major parties scoffed at Pinckney’s report. The Calhounite Whigs were furious that the report said nothing about a constitutional guarantee for slave property. John Robertson denounced the report as a collection of “newfangled doctrines” and “speculative opinions,” a predictable cave-in from a spineless Van Buren ally.46 “He who says that it would be merely 'inexpedient' to abolish slavery in the District,” warned Henry Wise, “says that it would be merely 'inexpedient' to abolish slavery in the States.”47 For Wise, there was no such thing as moderation on the present question; one either believed abolition was unconstitutional or one did not.

At the same time, antislavery agitators saw the gag as symptomatic of the ongoing effort to shut down antislavery dissent in Congress, as well as the Calhounites’ ability to shape federal

45 Report of the Select Committee upon the Subject of Slavery in the District of Columbia, Made by Hon. H.L. Pinckney, to the House of Representatives, May 18, 1836 (Washington: Blair & Rives, 1836). Quotes from pp. 3, 5, 9,11, 13. Pinckney’s report alluded to the “principles of natural justice and… the social compact,” including Vattel’s dictum that the “great end of civil society is, whatever constitutes happiness with the peaceful possession of property.” p. 10.
46 RD, 24th Cong., 1st sess., p. 4023.
47 ibid., p. 2028.
policy with threats and ultimatums. Here was a policy which, more than any other since the 
shutdown began in the late 1820s, manifested the slaveowner’s ability to stifle northern liberties 
in the name of absolute property rights.

Yet, for the moment, Van Buren’s policy prevailed. Both parties endorsed the idea of 
tabling the positions. It had the full support of Van Buren’s chief rival for the presidency, Henry 
Clay, who supported Pinckney’s depiction of Congress as a local legislature in the District. On 
May 26, 1836, the House passed the infamous “Pinckney gag,” the first in a many such “gags” 
passed between 1836 and 1844. As Democrats and Whigs lined up behind the policy of gagging 
petitions, the question of abolition in the District faded from the halls of Congress. The nature of 
the Congress changed from abolition and federal power to the rights of free speech and 
petitioning. At that point, the debate over slavery’s constitutional status shifted into the public 
sphere.

**Denying a Constitutional Right to Slave Property**

Abolitionists denounced the gag rule as the latest and most galling example of a federal 
government hijacked by slaveowners – an argument that would resonate with northerners in the 
coming months and years, generating a sea change of public opinion on the slavery question. 
Birney explained the contest over federal power in Manichean terms as a fundamental clash 
between incompatible principles:

> Liberty and Slavery cannot, both, live long in juxtaposition. They are antagonist 
elements, and when roused into strife, know neither truce nor reconciliation. This 
is their condition now. They have met, fiercely disputing each other’s reign. They

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48 Clay argued that, if antislavery northerners really wanted change in the capital, they should petition their own 
state legislatures rather than Congress; as the local legislature in the District of Columbia, Congress could not 

49 On the Pinckney gag, see Miller, *Arguing about Slavery*, pp. 140-149; Freehling, *Road to Disunion*, vol. 1, pp. 
are in actual conflict – there is the struggle of death; -- there can be but one triumph, and this in the utter destruction of the adversary. Either Liberty will stand on the lifeless body, rejoicing in the everlasting overthrow, of her great enemy, -- or Slavery, with its chains and its scourges, its woes, its curses, and its tears, will overspread our favored land.\textsuperscript{50}

With the passage of the gag rule, the fight over slavery was now “one, not alone of freedom for the black, but of freedom for the white.”\textsuperscript{51}

But even as they attacked the gag rule, abolitionists kept their eye on the Calhounite contingent in Congress, whom they feared would have the greatest impact on public opinion in the foreseeable future. They moved quickly to counter the Calhounites’ claim that abolition in the District would be unconstitutional, a claim that was making the rounds in the press even though party leaders had quashed the debate in Congress. They feared that if that claim went unchecked, it would spread like a cancer in the realm of public opinion, shaping northerners’ views on the slavery question. Before “the session of 1835 & ’36,” Birney wrote, no one had ever denied the power of Congress to abolish slavery in the District. Then, a “few violent but inconsiderable politicians of the slave states… in their heat, let slip the opinion” that abolition would be unconstitutional, a far-fetched claim which nevertheless forced “gentlemen of influence and distinction” – party leaders like Van Buren and Clay – to “degrade[…] the obligation of constitutional provisions to the level of mere expediency.”\textsuperscript{52}

In a similar vein, the New York abolitionist Gerrit Smith described the Calhounites’ “odious doctrines” as primers for “reducing northern laborers to a herd of slaves.”\textsuperscript{53} If the gag rule exemplified slavery’s status as a de facto national institution, Henry Stanton argued in a speech

\textsuperscript{50}Philanthropist, Jan., 1, 1836. “It has now become absolutely necessary,” Birney wrote,” that Slavery should cease in order that freedom may be preserved to any portion of our land. The antagonist principles of liberty and slavery have been roused into action and one or the other must be victorious. There will be no cessation of the strife, until Slavery shall be exterminated, or liberty destroyed.” Birney to Gerrit Smith, September 18, 1835, in Birney Letters, vol. 1, p. 243.

\textsuperscript{51}Birney to Gerrit Smith, Sept. 18, 1835, in Birney Letters, vol. 1, p. 243.

\textsuperscript{52}Philanthropist, Apr. 22, 1836. See also Miller, Arguing about Slavery, passim.

to the Massachusetts state legislature in early 1837, the doctrine that slavery was guaranteed protection by the Constitution was the intellectual gateway to truly nationalized slavery. “We are a precedent-loving, a precedent-fearing nation,” he said. Judges and lawmakers were “slaves of precedent,” while the great mass of citizens “bow down to the same inexorable deity.” Once people became inured to the notion that slave property was guaranteed protection under the Constitution, it would be impossible to limit and “localize” slavery in the future. Northerners as well as southerners, “tamed into subserviency [sic] by yielding, without resistance, to reiterated aggressions,” would “meekly bow the neck, and kiss the yoke” of slaveowner power. For Stanton, time was of the essence: “OBSTA PRINCIPLES; OPPOSE BEGINNINGS!”

In this way, the debates in Congress – debates sparked by abolitionist petitions – forced antislavery leaders to grapple more intently with the question of slavery’s relationship to federal power. “At the present, more than at any other time,” wrote one abolitionist, “it is highly important that every American should carefully study the Constitution of the United States. Positions are taken and assumptions made, at variance with its liberal spirit, and the manifest intentions of the illustrious men who framed it.” Concerned as they were about public opinion, abolitionists moved to publicize and refine the antislavery arguments made by Slade, Prentiss, Morris and other antislavery voices in Congress. The two leading abolitionist newspapers, the Emancipator in New York and the Philanthropist in Cincinnati, reprinted the pro- and antislavery speeches from Congress alongside editorials ripping the Calhounites and refining the arguments made by Morris, Slade, Prentiss and others.

54 Remarks of Henry B. Stanton, in the Representatives' Hall, on the 23d and 24th of February, 1837 (Boston: I. Knapp, 1837), p. 56.
The process of analyzing and critiquing dozens of recent speeches from both sides of the District debate allowed abolitionists to fine-tune their own constitutional arguments. They could rehearse Slade or Morris’s antislavery arguments while gleaning insights from the speeches of enraged Calhounites, who, in wheeling out their full artillery in Congress, inadvertently handed abolitionists a cache of constitutional ammunition. It is not difficult to envision abolitionists scribbling notes on the political nightmare described in the Calhounites’ speeches.56

This was the most crucial innovation in antislavery constitutional thought. As they moved to attack the claim of a constitutional guarantee for slave property, abolitionists increasingly relied on a strict reading of the federal consensus: if it was true that Congress had no power to touch slavery in the states, then it was also true that it had no power to establish or maintain slavery in areas under its direct jurisdiction – places like Washington, D.C. It was the mirror image of the Calhounite version of the federal consensus, which was based on the theory of state sovereignty. Unlike that version, the antislavery rendering of the federal consensus was based on the premise that Congress was a distinct entity from the states with a clear claim to supremacy – the first principle of antislavery nationalism and constitutionalism. Abolitionists also developed their own antislavery reading of the Tenth Amendment’s Enumerated Powers Clause. Because power over slavery had been reserved to the states, they argued, Congress had no power to either establish or continue it in federal jurisdictions. Reading and rereading the debates in Congress, abolitionists grew confident “that the blow that batters down the gate of the bastile in the District, shakes the entire fabric [of slavery] to its foundations.”57

56 On the “communications revolutions,” see Howe, What Hath God Wrought. Wiecek called this a process of “constitutional sparring.” Antislavery Constitutionalism, pp. 172ff.
Theodore Dwight Weld and the Making of Antislavery Constitutionalism

Leading the charge was Theodore Dwight Weld, who, after losing his voice in early 1836, quit the preaching circuit and took up organizational work at the AA-SS headquarters in New York, including working with John G. Whittier and Lane Seminary alumnus Henry Stanton on a more effective petition strategy – the seeds of the so-called “Great Petition Campaign” of 1837-8, a massive petition drive aimed at turning up the heat on Congress. With a daily commute by horse-drawn wagon from his home in Newark, New Jersey, to the AA-SS offices on Chatham Street in New York, Weld had plenty of time to contemplate the broader constitutional questions in the District debate. Along with Wright, Leavitt, and Whittier, he started amassing materials for a series of pamphlets on different aspects of slavery, all of which were designed to shape public opinion and beat back the proslavery offensive. With Weld leading the charge, abolitionists began answering the Calhoun school in systematic fashion, rebutting each premise and assumption of the proslavery argument while elaborating the arguments of Morris, Slade, and Prentiss.58

In a series of essays published in the New York Evening Post under the pseudonym “Wythe” – essays which would later comprise Weld’s seminal 1838 pamphlet, “The Power of Congress over the District of Columbia” – Weld argued that Congress had exclusive jurisdiction over the District of Columbia and that abolition there would be fully constitutional. Weld blasted the Calhounites’ state-sovereignty theories with a careful exposition of federal exclusivity grounded in antislavery nationalism. The term “exclusive” in the Exclusive Legislation Clause meant that no other legislature – neither Virginia nor Maryland – had concurrent power over the District. Only the dictates of natural law could limit Congress’s power over the District. If it so chose, Congress could follow the northern states in adopting the

common law as the “legal system within its exclusive jurisdiction,” setting the ground for abolition in the District and other federal areas. Should that happen, Congress would honor “the principles of our glorious Declaration” as well as “the highest precedents in our national history and jurisprudence.”

Next, Weld confronted the claim that slave property was guaranteed protection under the Constitution. To be sure, he wrote, the federal government guaranteed that “universal” forms of property would be protected in federal jurisdictions. But slavery was not a “natural” form of property; it was artificial, based on the laws of the states which sanctioned it. Nowhere in the Constitution were slaves referred to “as ‘PROPERTY,'” and there was no reference to them at all in relation to the District of Columbia. “All allusions to them in the constitution are as ‘persons.’ Every reference to them points solely to the element of personalty [personhood]; and thus, by the strongest implication, declares the constitution knows them only as ‘persons,’ and will not recognise them in any other light.” Weld bolstered his constitutional claims with references to the law of nations. Wherever slaves were mentioned “in treaties and state papers,” he wrote, it was always “in such a way as to distinguish them from mere property, and generally by a recognition of their personality.”

59 Weld, Power of Congress, p. 13. “The Power of Congress over Slavery in the District of Columbia” is one of three essays Weld wrote in conjunction with Angelina Grimke, his wife. “The Bible against Slavery” and “American Slavery as It Is” joined “The Power of Congress” as seminal works in the American antislavery movement. (Harriet Beecher Stowe would later use the research for “American Slavery As It Is” to ground her descriptions of slavery in Uncle Tom’s Cabin (1852). Though less well known, “The Power of Congress” is arguably the most important of these essays in terms of its political impact. Published in installments under the pseudonym “Wythe,” it “anticipated the following thirty years of antislavery constitutionalism.” Wieck, Antislavery Constitutionalism, pp. 189-191; Thomas, Theodore Weld, pp. 128-129. Weld researched and wrote “Power of Congress” first in order to combat proslavery claims that the Constitution guaranteed the protection of slave property in Washington, D.C. Yet the pamphlet gets relatively little attention in abolitionist historiography, where most of the focus is on “The Bible against Slavery,” with its radical Christian arguments, and “American Slavery As It Is,” with its vivid depictions of the southern slave system. See, for instance, Miller, Arguing about Slavery, pp. 323-336.

60 ibid., pp. 42, 43.
Following this tradition, the Constitution recognized slavery’s existence in the states but did not guarantee slave property generally; it merely acknowledged that there were “certain 'persons' within [state] jurisdictions 'held to service' by their own laws.” By recognizing “slaves as persons” instead of property, the Constitution “caught the mantle of the glorious Declaration, and most worthily wears it.—It recognizes all human beings as 'men,' 'persons,' and thus as 'equals.'” For these reasons, Weld argued, slavery’s existence in the District had always violated the Constitution. Here, he drew on the antislavery reading of the Due-Process clause which Slade and Prentiss had prepared in Congress. According to that reading, Congress’s reenactment of Virginia and Maryland’s slave codes in 1801 confiscated slaves’ right to self-ownership without due process of law. From that point forward, slaves in the District remained persons “‘deprived of liberty’ by legislative acts.” Abolition would simply restore to them their natural right to liberty.61

Weld’s attack on the claim of a constitutional guarantee for slavery followed the example of Slade, Prentiss, and Morris in Congress, all of whom had responded to the Calhounites by rehearsing the municipal theory’s distinction between slave property and other, “natural” or “universal,” forms of property. “The right of the owner to that which is rightfully property,” Weld wrote, “is founded on a principle of universal law, and is recognised [sic] and protected by all civilized nations.” “Property in man” was, “by general consent, an exception.” Among other things, it contradicted the well known common law definition of property: that “subjects of dominion or property are things, as contra-distinguished from persons.” Here, Weld cited

61 ibid., p. 42, 14, 40. Weld argued that, far from sanctioning slavery, the Fugitive Slave Clause actually proved that slavery was the exception to the rule in America. Slaveholders had “insisted upon the insertion [the Fugitive Slave clause] in the United States Constitution, [so] that they might secure by an express provision, that from which protection is withheld, by the acknowledged principles of universal law... By demanding this provision,” slaveholders actually “consented that their slaves should not be recognized as property by the United States Constitution, and hence they found their claim, on the fact that of their being 'persons, and held to service.' idem., p. 13.
Mansfield’s *Somerset* ruling and the myriad precedents for that case in English judicial history. “THE COMMON LAW KNOWS NO SLAVES... [Its] principles annihilate slavery wherever they touch it,” making it “a universal, unconditional, abolition act.” In all places where slavery was a “legal system,” it was maintained “only by statute, and in violation of the common law.” English common law had followed the colonists to North America, but that common law had been supplanted by a new and more brilliant “American” common law after the Revolution, the principles of which were enshrined by the Declaration of Independence. That distinctively American common law became the “grand element” in the U.S. Constitution when it was adopted in 1788.62

Like the antislavery contingent in Congress, Weld argued that abolition had “always been considered within the appropriate spheres of legislation.” From the late-medieval-era adoption of the freedom principal by the principalities of northwestern Europe to emancipation in the British Empire 1833, from the gradual abolition statutes in Pennsylvania, New York, and New Jersey to the Northwest Ordinance in 1787 and the slave-trade ban enacted in 1807, there was plenty of evidence to suggest that abolition fell within the bounds of ordinary legislation. “Almost every civilized nation has abolished slavery by law,” Weld wrote.63

Here, Weld took direct aim at the Calhounites’ insistence on absolute private property, challenging their extreme vested-rights doctrines with reference to the common-law regulatory tradition of England and the northern states. “[E]ven absolute property is in many respects wholly subject to legislation,” he wrote. “Congress has power to abate nuisances – to remove or tear down unsafe buildings – to destroy infected cargoes – to lay injunctions upon manufactories injurious to public health – and thus to ‘provide for the common defence and general welfare' by

63 *ibid.*, pp. 5-7.
destroying individual property, when it puts in jeopardy the public weal.” The presence of slavery in the nation’s capital was a public nuisance like no other.

Next, Weld explained how abolition in the District of Columbia would proceed, describing the nature of the legislation. In this, he refined the due-process arguments Slade and Prentiss had introduced in Congress – arguments that were based on the northerner experience with gradual abolition. Abolition would simply adjust the property relations between masters and slaves, re-setting them on the basis of “natural” social relations. Both parties in the master-slave relationship would own themselves; the slaveowner would only own the labor power of his slave-turned-servant, not his or her body. The power of government to “take property” for public use was one thing, Weld argued, but “the right to adjust the tenures by which property is held, that each may have his own secured to him, is another thing, and clearly within the scope of legislation.... Instead of taking ‘private property,’ Congress… would say ‘private property shall not be taken; and those who have been robbed of it already, shall be kept out of it no longer…[,] and since every man's right to this own body is paramount, he shall be protected in it.”

“True,” Weld continued, “Congress may not arbitrarily take property, as property, from one man and give it to another.” But abolition would do no such thing. “A legislative act changes the condition of the slave – makes him his own proprietor instead of the property of another. It determines a question of original right between two classes of persons – doing an act of justice to one, and restraining the other from acts of justice; or in other words, preventing one from robbing the other, by granting to the injured party the protection of just and equitable laws.” Abolition would “change the condition of seven thousand ‘persons’ in the District, but would 'take' nothing.”

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64 ibid., pp. 40-1.
65 ibid., p. 41.
Weld, drawing on the antislavery nationalism of the post-Missouri era, argued that the Constitution vested Congress with the moral power to abolish slavery in federal areas. Here he pointed to the Preamble of the Constitution: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” The “fundamental object of the organization of the government,” Weld wrote, was “to establish justice” for persons living in the United States. In this sense,

To emancipate the slave, is to 'establish justice' between him and his master – to throw around the person, character, conscience, liberty, and domestic relations of the one, the same law that secures and blesses the other. In other words, to prevent by legal restraints one class of men from seizing upon another class, and robbing them at pleasure of their earnings, their time, their liberty, their kindred, and the very use and ownership of their own persons. Finally, to abolish slavery is to proclaim and enact that innocence and helplessness – now free plunder – are entitled to legal protection; and that power, avarice, and lust, shall no longer gorge upon their spoils under the license, and the ministrations of law!”

It was impossible for Congress to truly “establish justice” if slavery persisted in the nation’s capital. On this point, the relational understanding of rights and duties in Weld’s thinking comes through clearly, showing the depth of his commitment to the natural-law principles undergirding the common-law regulatory tradition. “If [Congress] has no power to protect one man, it has none to protect another – none to protect any – and if it can protect one man and is bound to protect him, it can protect every man – all men – and is bound to do it.” Everyone recognized "the power of Congress to protect the masters in the District against their slaves,” so why was there no similar protection for the enslaved?

66 ibid., p. 44. U.S. Const., Preamble.
Publicizing Antislavery Constitutional Arguments

Weld’s “Power of Congress over the District of Columbia” laid the foundation for antislavery constitutionalism. Yet he was not the only one making these arguments. In the *Philanthropist*, James Birney attacked the claim of a constitutional guarantee for slave property by insisting on a narrow interpretation of the federal consensus – the opposite of the loose interpretation in Calhoun’s state sovereignty theory. The closest thing to a guarantee for slave property was the federal consensus, and this, Birney insisted, “abolitionists have never denied, nor have they sought its destruction.” Here, Birney followed the lead of Thomas Morris, embellishing Morris’s arguments with his knowledge of the law of nations. Property rights in slaves derived from state law, he argued, and to this extent they were “independent of federal legislation.” The Constitution “recognizes as property what the several states recognize as property,” but “guaranties no species of property within the states – because the state-laws are entirely sufficient – omnipotent – or this purpose.” Slave property had “no other guarantee of protection than any other species of property.” If abolition was really unconstitutional, as the Calhounites were insisting so stridently, then Congress would have “no power to take any property from its owner, either with, or without compensation.” But that was absurd, especially since the South had shown no “less confidence in her tenure of property in man, than in her cattle and her horses.” It was “difficult, if not impossible, to point out any difference, on principle, between the exercise of power in destroying property in a house, and in a slave.”68

Birney’s successor as editor of the *Philanthropist*, Gamaliel Bailey, attacked the claim of a constitutional guarantee in one his first editorials for the paper. The Calhounites were claiming

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68 *Philanthropist*, Feb. 12, 19, Mar. 4, Apr. 22, 29. Birney’s criticism of Van Buren reversed the logic of proslavery attacks on the Little Magician: whereas Calhoun slammed Van Buren for failing to uphold the constitutional guarantee for slavery, Birney charged the New York Democrat with abdicating his constitutional duty to promote freedom.
“express” guarantees for slave property by pointing to clauses whose language only “implied” such assurances, Bailey wrote. But the “truth is, while the rights of speech, press and petition are fully guarantied, in language, direct and positive, the only guaranties of the slaveholder’s peculiar right, are partial, when express, and merely inferential when general. The single express constitutional stipulation in behalf of this right, is the provision for reclaiming fugitives from service or labor,” yet the Fugitive Slave Clause was nothing like a general guarantee for slavery property. All it did was to prevent the free states from passing legislation interfering with a slaveowner’s right of recaption. That was not the same thing as an extraterritorial right to slave property; in fact, the language of the clause – “persons held to service” – fit with the general consensus that slaves were legal persons beyond the limits of the slave states. Here, Bailey followed in the footsteps of his predecessor Birney. The Calhounites had pointed to Fugitive Slave Clause as evidence of a general right to slave property, but according to Birney, that clause was “a legal guaranty, against a certain kind of legislation in the free states,” not a guarantee for slave property as such. Birney and Bailey’s arguments were not constructed out of thin air; they had been built by antislavery lawyers over the years, the product of numerous freedom suits in the North.

In his speech to the Massachusetts state house, Henry Stanton blasted the claim of a constitutional guarantee for slave property, urging Massachusetts’ legislators to proclaim abolition in the District constitutional. Congress had a “constitutional right” and a corresponding duty to “batter down the walls of this American Bastile!” Because slave property was artificial, abolition would “annihilate” a mere legal fiction only, leaving slaveowners’ core natural rights

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69 Philanthropist, Feb. 18, 1840, May 13, 1836. Birney developed arguments first used by antislavery lawyers in cases like Wright v. Deacon (1819) and Jack v. Martin (1834-5). See Chapters 1 and 4, respectively. For more examples of this reasoning, see Olcott, Two Lectures, passim.
70 ibid., May 6, 13, 1836.
intact. The kind of legislation envisioned – “regulating transactions between persons” – happened all the time everywhere. This time it would have to do with slave property, but the northern had proven that it could safely, with harm done to neither masters nor freemen.71

By 1837, the small contingent of abolitionists’ allies in Congress was more emphatic about denying the claim of a constitutional guarantee for slave property. In a speech against slave-trading in the capital, William Slade masterfully evaded the gag rule, bringing up unresolved questions from the earlier (and now stifled) debate over abolition. This time, Slade expressly denied the existence of a “Supposed Constitutional Guaranty in Favor of Slavery.” “What guaranty!” he scoffed. “Where is it to be found?” If the founders had really included such a “constitutional guaranty,” it would have been framed in “clear, distinct, and well-defined stipulations,” not in “obscure intimations” and “far-fetched, labored constructions.” To be sure, the Constitution included “guaranties in favor of particular rights” and “limitations” on the power of Congress, but all of them were “clearly stated” in the document’s text. There was no such guarantee for slave property, not even in the form of the Due Process, which guaranteed protection for “natural” forms of private property only. Slade conceded that there were significant concessions to slavery in the Constitution. But none of the slavery-related clauses could be construed as proof of a general right to slave property. That claim was part of a concerted effort on the part of slaveowners to make slavery into a national institution. This “claim of 'concession and compromise,'” Slade declared, will “never stop, till it has made slaves of us all. It demands everything, and gives nothing.”72

Congressional Debate over the Abolitionists’ Program, 1837-1839

71 Remarks of Henry B. Stanton p. 12.
72 p. 21.
Stymied by the gag rule in the House and yet fearful of the prospect of Texas annexation, abolitionists intensified their campaign in 1837, launching a petition drive which helped push their program into Congressional debate, frustrating the efforts of party leaders to keep slavery out of national politics. The great petition campaign of 1837-8 saw a vast increase in the number of petitions sent to Congress and the various state legislatures since 1835-6, as thousands of petitions from the state abolition societies poured into AASS headquarters in New York, where they were then organized and distributed to pertinent legislative bodies. The purpose of the campaign was not simply to spur a general debate about slavery in Congress; it was to press the abolitionists’ program into national political discussion, to reinforce the existing drive to separate slavery from federal power. 73

An air of excitement surrounded the campaign in abolitionist circles. For Henry Stanton, it was crucial that the petition campaign impress upon Congress and the free state legislatures “all our measures for the nation,” including “jury trial, D. Columbia, etc., etc.” 74 Texas was the most pressing concern, as its annexation to the Union would most likely lead to at least six new slave states, forever altering the sectional balance of power in Congress – a prospect which would make enactment of any part of the abolitionist program nearly impossible. The new petition campaign also coincided with a series of abolitionist lectures to northern legislatures, most notably Stanton’s speech to the Massachusetts legislature in 1837. Stanton urged James Birney to give similar lectures to the legislatures of New York, Pennsylvania and Connecticut. 75

73 Barnes, Antislavery Impulse, pp. 130-145.
75 ibid., p. 411. On the Texas issue, the abolitionist position was virtually indistinguishable from antislavery Whigs. The Whig Party was nearly unanimous in its opposition to annexation, but they were divided into two camps: conservative Whigs who argued on strictly political and constitutional grounds that annexation was unconstitutional and that it would threaten the stability of the Union by abruptly shifting the sectional balance in Congress; and antislavery Whigs, who layered the political and constitutional arguments against slavery with a heavy dose of morality. Daniel Webster represented the moderate anti-annexation position of the conservatives, which was designed to win over antislavery Whigs while maintaining the crucial support of southern Whigs. Antislavery
With few voices to defend them in Congress, abolitionists used the press to elaborate on the logic and details of their constitutional program. In 1837, Sarah and Angelina Grimke explained the political geography of that program in a published letter aimed at their northern critics. Dissident Carolinians turned radical abolitionists, the Grimke sisters had become lightning rods in the slavery controversy and the related debate over women’s rights. During an antislavery lecture tour in New England, they were asked to clarify their program by a Connecticut critic named “Clarkson.” Northerners already viewed slavery as an evil, “Clarkson” wrote. How, specifically, do abolitionists expect to “remove the evil”? Can they offer “any definite practicable means, by which they can put an end to slavery in the South”? The Grimkes responded with a point-by-point description of the abolitionists’ constitutional program. First came the obligatory reference to the federal consensus: abolitionists knew that Congress had no power to abolish slavery in the states. But they would press Congress to abolish slavery in the District of Columbia and the federal territories, especially Florida, and to break up the interstate slave trade. They would support candidates who endorsed these measures and opposed the admission of new slave states. Last but not least, they would press the free states to do all in their power to limit their obligations to slavery, not least by repealing laws in favor of the masters’ right of recaption and replacing them with jury trial provisions for alleged runaways.76

Whigs were led by John Quincy Adams, who based much of his arguments against annexation in the House on the findings of Lundy. JQA tried to deflect the antislavery crusade from the District of Columbia to Texas in 1838. If conservative Whigs downplayed morality while antislavery Whigs put it front and center, the fact remains that both groups used the same constitutional arguments to criticize annexation. With the exception of an explicit moral condemnation of slavery, the Massachusetts committee report on Texas represented the views of both conservative and antislavery Whigs in Massachusetts. Many of the same arguments would later be used by antislavery Whigs in 1844-45, during the second and final phase of the Texas question. See Kinley J. Bauer, Cotton versus Conscience: Massachusetts Whig Politics and Southwestern Expansion, 1843-1848 (Lexington: University of Kentucky Press, 1967), pp. 37-48.

76 Sarah and Angelina Grimke to “Clarkson,” from the Friend of Man, Apr. 6, 1837, in Weld-Grimke Letters, vol. 1, pp. 365-372. The Grimkes also endorsed an economic blockade in which northern merchants boycotted southern goods and “refuse[d] to receive mortgages on these slaves, seeing that this is a virtual acknowledgment that man can hold man as property.” ibid., p. 370.
This time around, more antislavery groups came out in support of the abolitionists’ program, a change which reflected the growing northern alarm about slavery’s constitutional status. On December 19, 1837, Vermont’s Whig-dominated legislature issued a set of resolutions endorsing the entire abolitionist program: abolition of slavery and the slave trade in the District of Columbia and the federal territories; prevention of any new slave states; a ban on Texas annexation; and federal interdiction of the interstate slave trade. Further south, in New York City, William Leggett, the radical Democrat and champion of New York’s emerging working class (who would soon be kicked out of Jackson’s party for his unorthodox views), defended the constitutionality of abolition in Washington, D.C., drawing on the same due process arguments raised by William Slade and Theodore Dwight Weld, among others. In the event Congress repealed the slave codes of Washington, D.C., Leggett wrote in his Plaindealer newspaper, the slaves there would not be “taken but enfranchised, and not for the public use, but for their own; or rather, not for use at all, but in compliance with an exalted sense of the inalienable rights of humanity.”

The latest petition campaign sparked a new round of debate in Congress which went beyond Washington, D.C. to encompass the entire abolitionist program. The proslavery response was swift and unyielding. Calhoun and his associates denounced the program embedded in the petitions, insisting that slavery had been guaranteed federal protection by the U.S. Constitution. This meant that the same prohibition of federal interference with slavery in the nation’s capital applied to all areas under Congress’s direct jurisdiction. In short, the federal consensus applied to all areas of the Union, not just the slave states. The continuation of debates in Congress, despite passage of the gag rule, demonstrated the accuracy of Calhounite logic: Washington, D.C. really was the “entering wedge” to general abolition. Thus the push to shut down the

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message written into the thousands of petitions streaming into the House of Representatives; the Patton gag of 1837, which renewed the previous year’s Pinckney gag, ordered that “all petitions, memorials and papers touching the abolition of slavery, or the buying, selling, or transferring of slaves, in any State, District, or Territory of the United States, be laid upon the table without being debated, printed, read or referred, and that no further action whatever shall be had thereon.”

On December 26, 1837, Calhoun introduced six resolutions which systematically rejected each aspect of the abolitionist program. The resolutions marked the full emergence of proslavery constitutionalism on the national stage. The first resolution restated the federal consensus: the states, Calhoun wrote, retained “the exclusive and sole right over their own domestic institutions and police.” The remaining resolutions followed from that starting premise. As the “common agent” of the states, the federal government was duty-bound to guarantee property relations derived from state law, not “weaken or destroy” them. The relationship between slavery and federal power was strictly positive; Congress could not in any way regulate, restrict, or abolish slavery in federal areas, as that would be an assault on the political equality of slave states in the

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78 Quoted in *Fifth Annual Report of the American Anti-Slavery Society* (New-York: Printed by William S. Dorr, 1838). For examples of proslavery responses, see *Cong. Globe*, 25th Cong., 1st and 2nd sessions, *passim*. The Calhounite position on federal territories – that the Fifth Amendment’s Due Process Clause prevented Congress from confiscating slave property there – was the same argument applied in the Washington, D.C. context. Just as Congress had no power to abolish slavery in the capital, it also lacked power to abolish slavery in the Florida and Louisiana territories. As Christopher Childers has shown, the same theory of state sovereignty applied to the territories, albeit in a unique formula of a proslavery “popular sovereignty” argument. Likewise, Calhounites interpreted the 1819 Adams-Onis Treaty (or Transcontinental Treaty) in much the same way they had interpreted Congress’s 1801 reenactment of Virginia and Maryland slave codes in Washington, D.C. Both were positive-law “compacts” whose negation required the consent of individual slaveowners and the legislatures of the slave states. The treaty guaranteed protection of the right to own slave property; any federal interference would amount to a breach of faith to the slave states. This interpretation relied on the same positive-law construction of the law of nations that proslavery leaders had used to interpret the Constitution: rights to slave property were absolute and unqualified rights, even in “free” jurisdictions. Childers, *Popular Sovereignty*, pp. 80-101.
Union. Calhoun’s 1837 resolutions were the most concise articulation yet of proslavery constitutionalism in Congress.

The constitutional politics of slavery were now in full gear: two weeks after Calhoun’s resolutions appeared in the Senate, Whig leader Henry Clay issued his own resolutions condemning each facet of the abolitionists’ program, though he neglected to say whether or not the program was constitutional. In the House, Henry Wise reiterated Calhoun’s claim that the relationship between slavery and Congress was a one-way street. He expressly denied the constitutionality of the abolitionist program, arguing that Congress could not abolish slavery in federal areas or interdict the interstate slave trade, but could determine the “mode and manner” of fugitive slave recaptures.

In the debates that followed, antislavery congressmen defended the constitutionality – if not always the wisdom and feasibility – of the abolitionists’ program. Representative Benjamin Swift of Vermont defended his state’s endorsement of the program in January, 1838. In passing the resolutions, Swift argued, the people of Vermont had voiced their opposition to nationalized slavery, but had done so from within the bounds of the Constitution. “What principles were asserted that should call forth the invective that had fallen from gentlemen on the opposite side of the house?” Swift inquired. “The [Vermont] legislature never suggested that Congress had control over slavery in the states.” All that was demanded was the separation of slavery and federal power, a plea which was perfectly constitutional.

In the House, John Quincy Adams maintained that Congress could indeed abolish slavery in federal areas. Adams himself opposed abolition in Washington, D.C., on the grounds that it

80 ibid., pp.97.
was politically unworkable – a position which infuriated abolitionists who otherwise revered him. But he was adamant in arguing that slaves were not “guaranteed” property under the Constitution. In “every instance where slaves are alluded to” in the Constitution, Adams contended on the House floor, "it is always as persons, not as property." The words “slave” and “slavery” were “not found in the whole document.” Slaves may have been property under state law, but under the Constitution they were “recognized as members of the community, possessing rights, even in the provisions depriving them of their exercise and enjoyment.” Precisely because slaves were persons not property under the Constitution, they could not be treated as property in the District of Columbia or any other federal jurisdiction. Abolition in such places was therefore in keeping with the spirit of the Constitution.⁸³

In the Senate, Thomas Morris issued a series of antislavery resolutions that turned Calhoun’s proslavery resolutions inside out, complete with verbatim imitations of Calhoun’s prose – evidence of the close, dialectical nature of constitutional conflict over slavery. Like Calhoun, Morris began with the federal consensus: the Constitution, he wrote, was a compact between the states, which retained complete sovereignty over their internal affairs; all power to establish, regulate, or abolish slavery had been reserved to the states. The rest of the resolutions then veered sharply in an antislavery direction, toward an endorsement of the abolitionists’ program. Precisely because Congress had no power over slavery, it could not establish or maintain slavery in places like Washington, D.C. or the territories. Indeed, it was the right as well as the duty of Congress to abolish slavery in those places and prevent the admission of Texas into the Union as a slave state. It could also use the commerce power to “prohibit any article, though made property by the laws of a state, from being used in [interstate] commerce.”

⁸³ Adams quoted in Philanthropist, May 26, 1837. See also Samuel Flagg Bemis, John Quincy Adams and the Union (New York: Knopf, 1956), passim.
Moreover, the free states had a similar duty to apply pressure on their sister states in the South by using all legal and constitutional means to limit their ties to slavery.\textsuperscript{84} Morris’s 1838 resolutions were at the time the most cogent articulation of antislavery constitutionalism in national politics.

Vexed by the antislavery insurgency in Congress, militant proslavery figures began to speak openly of disunion in 1838. If Congress implemented even one aspect of the antislavery program, they argued, the southern states would have no choice but to leave the Union. South Carolina’s legislature passed a resolution declaring that the Constitution not only recognized slavery but \textit{guaranteed} “our title to slave property” throughout the Union. Any attempt by an “extraneous power” to determine what “shall or shall not be property,” warned the editor \textit{Charleston Mercury}, would leave the southern states no choice but to leave the Union.\textsuperscript{85}

With the slavery issue inching back into national politics, party leaders redoubled their efforts at stifling antislavery dissent, an approach which pushed them closer than ever to the Calhounite position. In December, 1838, Charles G. Atherton, a proslavery Democrat from the southern-friendly state of New Hampshire, issued a set of resolutions in the House which, among other things, renewed the gag rule as the Atherton gag of 1838. The bulk of the resolutions were given to denying the abolitionists’ program. Like Calhoun’s resolutions from the year before, they assumed a vital and intimate connection between slavery and federal power. Congress, Atherton claimed, had “no right to do that indirectly which it cannot do directly,” as “agitation in the District of Columbia or the Territories, as a means, and with the view of disturbing or overthrowing that institution in the several States, is against the true spirit and meaning of the

\textsuperscript{84} Cong. Globe., 25\textsuperscript{th} Cong., 2\textsuperscript{nd} sess., p. 67.
\textsuperscript{85} Quoted in the \textit{Philanthropist}, Mar. 24, Apr. 28, 1840.
Constitution, an infringement of the rights of the States affected, and a breach of the public faith upon which they entered the Confederacy.\textsuperscript{86}

In a speech given in February, 1839, Whig leader Henry Clay repudiated the entire abolitionist program. He did so not simply because he was running for president and needed to boost his anti-abolitionist credentials, but also because he sincerely believed that antislavery agitation would sunder the Union. Clay assured the House that neither party would vote to abolish slavery in federal jurisdictions. For one thing, the conditions in the 1801 cession that carved Washington, D.C. out of Virginia and Maryland inhibited unilateral abolition there by Congress, which could do nothing to slavery without the consent of the people of Virginia and Maryland. Nor could Congress abolish slavery in the Florida Territory, as both the Transcontinental Treaty of 1819 (also known as the Adams-Onis Treaty) and the Missouri Compromise stipulated that slave property could exist there (Florida was of course below the latitude 36°30’). Clay also denied that Congress had the power to break up the interstate slave trade: the commerce power, he argued, could only be applied positively, as a “power of regulation, not prohibition.” Insofar as antislavery agitation was designed to force emancipation upon the slave states, it was an unconstitutional assault on the rights and liberties of the southern people. Clay’s rejection of the abolitionist program reflected the sway of Calhounite threats on his political calculations. As ever, the proslavery forces held the balance of power in Congress.\textsuperscript{87}

Clay’s defense of the interstate slave trade included a forceful vindication of “property in man” as an extraterritorial right in the Union. The antislavery distinction between slavery and other forms of property was little more than “visionary dogma,” “speculative abstraction,” Clay sneered. “That is property which the law declares to be property.” Slaves have been property

\textsuperscript{86}Cong. Globe, 25\textsuperscript{th} Cong., 3\textsuperscript{rd} sess., pp. 21-22.
for over two hundred years, Clay argued, first in the colonies and then, after the Revolution, in the states. Those rights were extraterritorial as far as transit between slave states and federal territories was concerned. “The moment the incontestable fact is admitted, that negro slaves are property, the law of movable property irresistibly attaches itself to them, and secures the right of carrying them from one to another State, where they are recognized as property, without any hindrance from Congress.” If abolitionists were truly concerned about slaves’ well-being, Clay said, they should raise enough money to buy their freedom. Their current mode of agitation would accomplish little except raising the ire of southern property owners. When Clay stepped down from the podium, he was followed by Calhoun, who praised the substance of his speech—telling evidence of the degree to which the compromisers leaned in Calhoun’s direction. 88

Two days later, Thomas Morris once again defended the abolitionist program, taking Clay to task for treating slaves as property rather than persons. As he did with his resolutions the year before, Morris begin by referencing the federal consensus: slavery, he argued, was a “local and ‘peculiar’ interest” in the country, whose benefactors had used federal power to expand it beyond the limits of the original slave states. Now they were claiming slavery as a national institution, a constitutional system in the most important sense. Bolstered by federal power, southern slavery was now undermining the sovereignty of the free states, as slaveowners trampled northern liberties and due process in the “exercise of their undoubted rights.” The legal presumption of slavery in the South was becoming the de facto policy of the national government, as policymakers in Washington assumed that “the black race is the strong ground of slavery in the country.” Northern blacks could expect little security, as slavecatchers had free reign to “make merchandize of them.” Northern states respected the South’s legal regime, Morris said, but they “do not believe in such evidence.” “Slavery has no just foundation in

color: it rests exclusively on usurpation, tyranny, oppressive fraud, and force.” The northern people had long strained to respect the rights of their southern brethren; it was time the South gave a “like return.”

Morris then argued that the Constitution recognized slaves as persons, not property. Because this was so, he reasoned, Congress acted upon slaves as persons in all areas under its direct jurisdiction. This was true of Washington, D.C., where Congress acted as a national legislature, meaning it did not need the consent of District slaveowners to abolish slavery there. The same was true of the Florida Territory. In such areas, immediate and uncompensated abolition in the national capital would “set free a man, not property.” Morris also defended Congress’s right to break up the internal slave trade. Clay’s argument against interference had wrongly assumed that “slaves are proper articles for commerce,” Morris said. But “Congress have power over slaves only as persons. The United States can protect persons, but cannot make them property.” Under the commerce power, Congress could “prohibit from its operations everything but property; property made so by the laws of nature, and not by any municipal regulations.” On these grounds, Morris concluded, Congress should prohibit the slave trade “at once.” Finally, Morris defended the right of states to determine the mode of recaption for black persons claimed as runaway slaves. The legal presumption of freedom in the North – the very essence of the term “free state” – meant that northern courts had to test the validity of slaveowners’ claims against alleged fugitives. Northern judges should read the Fugitive Slave Law in light of natural law, always favoring freedom, for “a man, not a thing, may be held to service or labor under the laws of a State.” Morris concluded that if Clay was right – if these

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89 Speech of Hon. Thomas Morris of Ohio in Reply to the Speech of the Hon. Henry Clay: in Senate, February 9, 1839 (New-York: American Anti-Slavery Society, 1839), pp. 11, 17-18, 32. See also Cong. Globe, 25th Cong., 3rd sess., p. 170. Along with antislavery Whigs, Morris complained about the de facto presumption of slavery in the national capital, by which free black northerners visiting the capital were presumed to be slaves, increasing the likelihood that kidnappers would “make merchandize of them.” ibid., 15.
measures would lead inexorably to universal emancipation – then that would be a “noble and praiseworthy object.”

It was in this speech that Morris reframed the abolitionist program as a bulwark against slaveowner oligarchy, or what he called the “Slave Power.” Fusing the slavery controversy with the rhetoric of hard-money Jacksonians during the Bank War, Morris raised the alarm about the “two great interests – the slave power of the South, and banking power of the North – which are united to rule this country. The cotton bale and the bank note have formed an alliance; the credit system with slave labor.” Both forms of corruption derived from specific evils in the modern economy: the “Money Power” from the device of paper money, the “Slave Power” from the fiction of “property in man.” “Men are made property, and paper is made money,” Morris exclaimed, and [Clay], no doubt, sees in these two peculiar institutions a power which, if united, will be able to accomplish all his wishes... [the] Slave power is seeking to establish itself in every State, in defiance of the constitution and laws of the States within which it is prohibited. In order to secure its power beyond the reach of the States, it claims its parentage from the Constitution of the United States.” In criticizing the disproportionate influence of slaveowners on federal policy, Morris shifted the emphasis in antislavery agitation to the political power of slaveowners – to their political influence as a class. Most abolitionists in 1839 did not yet think in these terms, since for them the emphasis was on the moral flaws of individual masters, who only needed a bit of moral prodding to see the light and free their slaves. But Morris was versed in the anti-oligarchic rhetoric of Jackson’s Bank War, and he well understood that the same dynamic applied to slaveowners, who parlayed their vast wealth into political influence and federal policy-making.

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90 ibid., pp. 18, 22.
91 See Earle, Jacksonian Antislavery, pp. 46-47.
Morris also spelled out the difference between the antislavery meaning of “Union” and that espoused by slavery’s defenders, both radical and moderate. For Henry Clay and most “moderate” politicians, “the Union” meant the existing political merger of eastern, southern and western states, an imperfect entity stitched together through compromise and an enduring devotion to the Constitution – a practice embodied by the Clay-authored Missouri Compromise of 1820. Clay had made it clear that he was “no friend of slavery” and that he hoped to see emancipation unfold “[w]herever it is safe and practicable.” But insofar as the abolitionist program threatened to destroy the existing “happy Union,” Clay could not support it – indeed, he would oppose it in every way he could. “I prefer the liberty of my own country to that that of any other people,” he said, “and the liberty of my own race to that of any other race.” In the current Union, Clay had explained, freedom for the enslaved was “incompatible with the safety and liberty of whites.” Slavery was an exception – an exception resulting from a stern and inexorable necessity – to the general liberty in the United States.” But to use federal power to force abolition on the South would usurp the “the incontestable powers of the States” and lead straight to disunion – and “beneath the ruins of the Union would be buried, sooner or later, the liberty of both races.”

Morris mocked Clay’s version of the Union. Clay would have us believe that it was “slavery, and not liberty, that makes us one people,” Morris jeered, and that “[t]o dissolve the slavery is to dissolve the Union. Why require of us to support the Constitution by oath, if the Constitution itself is subject to the power of slavery, and not the moral power of the country.” For Morris, the “Union” was a political entity in which all persons were presumed free, and where property in human beings was understood to be a local institution. From this vantage, it was *slaveowners* who threatened the Union, not abolitionists. “I am not now contending for the

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92 *Speech of Hon. Henry Clay*, p. 41.
rights of the negro, right which his Creator gave him and which his fellow-man has usurped or taken away. No, sir! I am contending for the rights of the white person in the free States, and am endeavoring to prevent them from being trodden down and destroyed by that power which claims the black person as property.”

Some historians have interpreted this kind of rhetoric as blatant indifference to the plight of slaves, part of a broader effort in antislavery politics to gain political traction by appealing to the class resentments of racist northern whites. Yet, far from severing the anti-slaveowner class argument from the moral campaign for immediate abolition, Morris was actually driving at the intimate connections between the two, showing how the inordinate power of masters over slaves translated into undue slaveowner influence in national politics – a political fact which made universal abolition all but impossible.

Later that same year, voters in Ohio’s Western Reserve sent Joshua Giddings to the House of Representatives, where he joined John Quincy Adams in the campaign against the gag rule and the effort to get slavery back into Congress. (They would be joined by two more antislavery representatives – Francis Andrews and Seth Gates of New York – in the 1839-40 session.) Nudged by the combination of new arrivals and proslavery assertiveness, Adams grew more radical by the month, yet he never publicly endorsed the abolitionists’ program, perhaps because he could not imagine an institution like slavery rolling back in the face of piecemeal legislation. The abolitionist program, he told Lewis Tappan, amounted to little more than “partial ineffective plaisters for the great elemental evil.” Something more authoritative, more direct, was needed to lop the head off the monster.

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93 Speech of Hon. Thomas Morris, pp. 31, 11.
94 See, for instance, Saxton, Rise and Fall of the White Republic, passim.
To this end, Adams introduced three resolutions in the House in early 1839 recommending a constitutional amendment that would force the southern states to begin gradual abolition on their own. Each slave state should end “hereditary slavery” by July 4, 1842, Adams declared, a pattern of gradual abolition that would follow states like New York and New Jersey in preserving slaveowner property rights while removing the crucial element of perpetuity. From that point forward, “every child born within the United States, their Territories or jurisdiction, shall be born free.” Congress should thereafter ban new slave states, with the exception of Florida, and should abolish slavery and the slave trade in Washington, D.C. by July 4, 1845.96

It is hard to square Adams’ proposal with the broader antislavery movement. Except for the internal slave, it referred to all of the items on the abolitionists’ program. But abolitionists wanted their program to be enacted legislatively through via Congress, not through a constitutional amendment. The idea of amending the Constitution so as to force the states to abolish slavery was never a priority for most abolitionists, who, if they mentioned it at all, saw it as a last resort. Given the implausibility of such an amendment, it seems likely that Adams’s resolutions were really meant to mollify abolitionist critics and incite proslavery forces in the House. Yet there is no denying that the resolutions brought the abolitionist program further to the center of national political debate in the late thirties.

Meanwhile, out in the public sphere, antislavery leaders fleshed out the ideal of antislavery nationalism. In 1839, Judge William Jay of New York, the son of John Jay, published View of the Actions of the Federal Government with Regard to Slavery, an exhaustive account of slaveowner influence on federal policy. Slaveowners, Jay wrote, had geared federal policy so as to provide a de facto guarantee for slave property throughout the Union, a situation which contradicted the spirit as well as the letter of Constitution. They had enlisted federal aid in

retrieving fugitive slaves from the North, in evading the ban on Atlantic slave-trading, and in
pursuit of compensation for slaves “lost” on the high seas. The current trajectory had to be
reversed, and the abolitionists’ program was the most effective way to get the ball rolling. The
“antislavery of the North,” Jay wrote, “will carry out its action to the very limits of the
Constitution, but not beyond them.” To be sure, Congress could not abolish slavery in the states.
But it had every right under the Constitution to abolish slavery in Washington, D.C. and “the
territories hereafter to be formed on the West of the Mississippi.” Jay hesitated to say whether
Congress could break up the overland slave trade, but was confident that it could abolish the
coastal trade, as U.S. coastal waters were under the exclusive jurisdiction of Congress. “Thus far
the constitutional power of Congress cannot be rationally questioned” – and this was not even
the “sum total of national legislation” that would “result from the Anti-slavery Action of the
North.”

Jay appears to have hit upon the notion of a “Slave Power” around the same time as
Thomas Morris, though for Jay the term was more than a correlation between slaveowners and
the “Money Power” of the Northeast. For Jay, “Slave Power” echoed Federalist-era complaints
about the Three-Fifths Clause and the unfair advantages it bestowed upon southern and
Republican interests. Yet while “Slave Power” had different valences for Jay and Morris, both
men used the term to describe slaveowners’ disproportionate influence on the balance of power
in Congress.

As he defended the constitutionality of the abolitionist program, Jay also attacked the
rationale behind southern disunionism. In a passage entitled “Consequences of a Separation,” he
argued that a “disregard of the wishes, does not necessarily imply a violation of the rights of the

98 See Richards, Slave Power, p. 49.
South,” he wrote. “Not one of the measures we have contemplated as the probable result of the anti-slavery agitation, encroaches on the constitutional rights of the South; and therefore secession, however it might be professedly justified, would in fact be prompted by other motives than that of self-defence. But so long as the Federal Government confines its action against slavery within the limits of the Constitution, in what way would secession tend to guard and perpetuate the institution?” Jay argued that disunion would be a “most preposterous and disastrous” move for the South. Disunion would deprive slavery of “the protection of the Federal Government.” In the event of widespread slave revolts, “masters would be left to struggle with them, unaided by the fleets and armies of the whole Republic.” Slaves would flee across the “boundary of the new empire,” knowing full well that their freedom would be secure in the American republic of the North. Once-proud slaveowners would realize that “freedom would be the boon of every slave who could swim the Ohio, or reach the frontier lines of the free republic.” This “frontier line” would “continually be advancing South,” as hostile laws in the free North “afford every possible facility to the “fugitive,” and pass laws “not for the protection of human property, but for the protection of human rights.” The coastal slave trade would collapse at the “moment of separation,” as “slave-trading becomes piracy in fact, as well as in name, and the crews of New Orleans and Alexandria, as well as of African slaves, would swing on northern gibbets.” The superior moral influence of the free republic would rush over the sinister fortifications of the slaveholding empire in the South, which would have “no new power to darken the understandings, or benumb the conscience of her citizens.”

99 Jay wrote at length about this in the appendix to his View of the Federal Government.

100 “The anti-slavery agitation at the North, is at present chiefly confined to the religious portion of the community; it would then extend to all classes, and be embittered by national animosity. Slavery would appear more odious and detestable than ever. after having destroyed the fair fabric of the American Union, and severed the ties if kindred and of friendship, to rivet more firmly the fetters of the bondman.” Jay, View of the Action of the Federal Government, p. 89ff.
**Conclusion**

The debate over slavery in Washington, D.C. initiated a broader conflict over slavery’s relationship to federal power, a conflict which centered on slaveowner property rights. All subsequent debates over slavery and federal power elaborated on the arguments first developed in this theater of conflict. The debate pitted two radical and uncompromising camps against each other. The antislavery side, comprised of antislavery Whigs, at least one radical Democrat, and an army of abolitionist agitators working outside Congress, held that rights to slave property did not extend to federal jurisdictions like Washington, D.C., and therefore that Congress ought to repeal the District’s slave codes as soon as possible. The proslavery side, represented by Calhoun and the hardline slaveowning Whigs of South Carolina and Virginia, held that property rights in slaves were as legitimate in Washington, D.C. as they were in the slave states, and that Congress had no power under the Constitution to repeal the District’s slave codes. Here as in the Missouri Crisis, the tension between property and liberty in the Revolution’s natural-rights tradition came into open conflict, and those who paid attention knew it was a fundamental conflict, one which was built into the very structure of the republic itself.

The starting premise of proslavery constitutionalism was Calhoun’s theory of state sovereignty, which subordinated Congress to the states, making it a morally-neutral vehicle for advancing state interests. On these grounds, the Calhounites claimed a general, extraterritorial right to slave property in the Union, a constitutional guarantee for slavery’s protection that was demonstrated – not created – by the various slavery-related clauses in the Constitution. Congress, in their view, had a positive duty to protect slavery in areas under its jurisdiction; it
could, under any circumstances, regulate or abolish “property in man” – not even in Washington, D.C.

Antislavery constitutionalism developed more slowly, as abolitionists absorbed the proslavery counterattack and developed the arguments of antislavery politicians in Congress. Antislavery leaders started with the premise that the federal government was a distinct government from the states, a “national” government that presumed freedom and had a moral duty to actively discourage slavery. Congress, in this sense, was a supreme and paternal legislature whose moral imperatives might clash with the states – certainly in the case of slavery. It had both the right and the duty to repeal the District’s slave codes. The rest of antislavery constitutionalism was about denying the claim of a general right to slave property in the Constitution, a project which emphasized strict construction and limited powers, particularly the Tenth Amendment’s Enumerated Powers Clause. There was no constitutional guarantee for slave property in the Union; slavery derived from state law, and Congress had no power to either establish or maintain it in areas under its jurisdiction.

There was also a strong class component to the antislavery argument. Implicit in antislavery constitutionalism was the claim that slaveowners, having gotten everything they wanted politically, were now attempting to alter the Constitution – to make slavery constitutional, not just national. The denial of a constitutional guarantee for slave property was the classic argument for restraint couched in the language of constitutional politics. To say that there was no general right to slave property in the Constitution was to effectively set limits on the slaveowning class in America. Thus could Theodore Dwight Weld blast the pretensions of slaveowners in the District, who argued that Congress needed the consent of each individual master before taking steps to abolish slavery in the capital. Must Congress “lie helpless at the
pool of public sentiment,” Weld asked sardonically. “Is it a lifeless corpse, save only when popular 'consent' deigns to puff breath into its nostrils?”

With arguments like these closing in on the political center, the comprising majority in Congress – Van Buren, Clay, and the second party system generally – struggled to keep slavery out of national politics. The very fact that slavery debates continued into 1838 and ‘39, well after passage of the first gag rule, demonstrates the abolitionists’ relative success in penetrating the shutdown in Congress. Thanks to the petition campaigns, slavery was once again a subject of constitutional politics – a major breakthrough even if it fell short of immediate antislavery legislation. Moreover, abolitionists succeeded in shaping the terms of the debates that broke out in Congress by forcing Calhounites and slavery apologists to address their constitutional program, point by point. Clay and the compromisers squirmed and cajoled, but the Washington, D.C. debates ultimately sustained James Birney’s grim premonition that “Liberty and Slave cannot, both, live long in juxtaposition.”
Chapter 4

Our Constitution of Liberty: Slavery and Federal Power in the Free States

The free states of the North comprised the second major arena of slavery conflict in the period 1835-1843. Once again, the issue was slavery’s relationship to federal power, and as in the Washington, D.C. context, the debates focused on the nature of slaveowners’ property rights. Did rights to slave property extend into the free states? If so, to what extent were they qualified by the legal presumption of freedom in northern states? These questions were invested with greater import by the Washington, D.C. debates, in which Calhounites pointed to the Constitution’s Fugitive Slave Clause and the Privileges and Immunities Clause as evidence of a general right to slave property in the Union, an extraterritorial right unaffected by northern-state laws and policies. The claim that slavery was a national institution shaped the contours of slavery debate in the free states.¹

¹ The history of slavery conflict in the northern states is typically divided into two separate categories: the fugitive-slave controversy and the problem of comity for transient slaveowners. There are variations on these two themes, but they remain the dominant categories of analysis in the literature. The scope of that literature can seem insular: those who focus on the fugitive-slave controversy rarely discuss the crisis over comity, and vice versa; both strands consistently ignore the national context, missing the arguments and contingent events that overlapped and influenced one another across the state and national levels. It is often overlooked that antislavery agitation regarding fugitive slaves and transient slaveowners was part of a broader effort to get northern states to adopt aspects of the abolitionists’ constitutional agenda. See, for instance, Morris, Free Men All; Finkelman, Imperfect Union; Davis, Problem of Slavery in the Age of Revolution; H. Robert Baker, Prigg v. Pennsylvania: Slavery, the Supreme Court, and the Ambivalent Constitution (Lawrence: University Press of Kansas, 2012); Foner, Gateway to Freedom: the Hidden History of the Underground Railroad (New York: W.W. Norton & Company, 2015). See also Harrold, Border War. In contrast, this chapter emphasizes the interconnectedness of the fugitive-slave and comity questions, portraying them as related theaters in a wider national conflict over slavery’s relationship to federal power. The controversies and arguments sketched in this chapter emerged in the shadow of the Washington, D.C. debate, which gave state-level conflicts greater urgency and import. In stressing the relatedness of state and national slavery debates, I follow in the footsteps of legal historians Jabobus Tenbroek and William Wiecck. See Tenbroek, Antislavery Origins of the Fourteenth Amendment; Wiecck, Antislavery Constitutionalism; Harold Melvin Hyman and William M. Wiecck, Equal Justice under Law: Constitutional Development, 1835-1875 (New York: Harper & Row, 1982).

This chapter pays close attention to the constitutional arguments developed by antislavery lawyers in northern courtrooms. I argue that such lawyers crafted their arguments in dialogue with antislavery judges at the
Among the most important figures in the free-state drama was the Cincinnati lawyer Salmon P. Chase, a Whig nationalist in the mold of Joseph Story and Daniel Webster. In the 1830s, Chase was a commercial lawyer dedicated to the creation of a national market backed by central-government power. As an attorney for the Cincinnati branch of the Bank of the United States, he represented the expansion of the northeastern credit markets into the frontier. He also brought the common-law tradition of the “well-regulated society” into the West, transplanting to state and national levels, jurists whose disdain for “immediate” abolitionism did not dampen their antislavery nationalism, specifically, their commitment to a legal presumption of freedom at the federal level. In a series of key cases in the late 1830s and early 40s, northern antislavery lawyers exploited the antislavery insights in the law books and opinions of influential justices like Joseph Story and Lemuel Shaw. Incremental victories in several states set the stage for the emergence of an aggressively antislavery legal regime in the North by the early 40s, part of a wider pushback against the nationalization of slavery. Insofar as the North’s antislavery legal regime realized key aspects of the abolitionists’ constitutional program, my story is an optimistic one. Here, I follow Thomas Morris, Free Men All.

The relatively positive story I tell here contrasts sharply with the overly pessimistic assessment of antislavery legal activities since the 1970s. On the whole, legal historians have portrayed antislavery activism in the courts as a categorical failure, a noble but ultimately futile attempt at operating within an intrinsically proslavery constitutional regime. In this sense, legal historian Robert Cover still casts an enormous shadow on the literature of antislavery and the law, forty years after the publication of his seminal Justice Accused. Using the antebellum US as a case study for his theory of law and morality, Cover downplayed the social and political conditions of slavery conflict in the US legal system and assumed that the system was structurally and inherently proslavery. Antislavery judges in the North were, in his view, compelled to make immoral decisions against their consciences. William Wiecek’s 1978 article on antislavery activities before the Supreme Court is less cynical but ultimately in agreement with Cover that antislavery lawyers failed to put a dent in the proslavery regime of the post-Missouri Crisis era. In Imperfect Union, Paul Finkelman (1980) shone a light on the successful strategies of antislavery lawyers in the free states to deny comity to slaveowners and erect the foundations of an antislavery legal regime. But the bulk of Finkelman’s work echoes Cover in arguing that northern antislavery lawyers did little to undermine the slave system on a national scale. See Cover, Justice Accused; Wiecek, “Slavery and Abolition before the Supreme Court,” The Journal of American History 65 (Jun. 1978), pp. 34-59; Finkelman, Imperfect Union. See also Maltz, Slavery and the Supreme Court. In the intervening years, this kind of pessimism has pervaded the literature on slavery and the courts, especially in the realm of cultural legal studies. See, for instance, Jeanine Marie DeLombard, Slavery on Trial: Law, Abolitionism, and Print Culture (Chapel Hill: University of North Carolina Press, 2007), whose dazzling portrayal of abolitionist legal appeals in the court of public opinion presumes a structurally and intrinsically proslavery constitutional regime that completely shut down antislavery legal arguments, forcing abolitionists to bring their legal strategies into the public sphere.

In contrast, I argue that antislavery lawyers worked with like-minded judges to develop the constitutional foundations of a national policy for presuming freedom in areas of the Union outside the slave states – a policy which was designed to operate from within the existing constitutional regime. I do not deny that antislavery activists had serious differences with northern judges, nor do I deny that constitutional arguments did little to ease the suffering of slaves living in the United States at the time. But there was far more productive collaboration between the two groups than scholars have recognized. The fruits of their collaborations are important enough to be treated as successes in their own right, rather than as noble failures. In addition to laying the foundations for an antislavery legal regime in the North, antislavery lawyers and judges together developed the constitutional basis for antislavery nationalism, crafting arguments to support the claim that central-government power should discourage slavery and promote freedom. In short, the chief product of the push-pull relationship between antislavery lawyers and judges was a rigorous constitutional foundation for the antislavery project, insights with which to refine the abolitionists’ constitutional program. Where most legal historians have long seen a glass half-empty, I see a glass half-full.
southwestern Ohio a peculiar form of capitalist social organization grounded in self-ownership, free labor, and a legal presumption of freedom.

Beginning in 1837, Chase developed a potent line of argument against the Fugitive Slave Law in Ohio, earning himself the nickname “Attorney General for Fugitive Slaves.” His legal activities on behalf of fugitives and free blacks in southwestern Ohio embodied the antislavery nationalism of the post-shutdown era, reflecting the sentiments of an antislavery mainstream that shied from radical abolitionism yet rejected the claim of a constitutional guarantee for slavery. As both a commercial lawyer and a public advocate steeped in the liberal-republican and natural-law traditions, Chase resented the lack of due process in the Fugitive Slave Law, the way in which it privileged the property rights of slaveowners over those of the accused, trampling the legal presumption of freedom in Ohio – the very essence of what it meant to be a free, not to mention a sovereign, state.

In crafting his arguments, Chase fused the economic nationalism of neo-Federal Whiggery with the antislavery nationalism of the abolitionist movement. Though he would later abandon the former in favor of Jeffersonian laissez-faire principles, Chase would never abandon the antislavery nationalism embedded in his constitutional arguments. Despite his shift toward Democratic political philosophy, he always insisted that the federal government should presume freedom and actively discourage slavery, pressuring the states to abolish slavery until universal abolition was achieved. Chase’s greatest contribution was to frame his antislavery nationalism in the negative language of Jacksonian politics, attacking the federal Fugitive Slave Law with the doctrines of states’ rights and limited powers. Adapting his arguments to the legal-positive bent of post-McCullough, post-Antelope public law, he deemphasized the moral in favor of the strictly legal, defending Ohio’s sovereignty while attacking the constitutionality of the Fugitive Slave
Law. Yet, while Chase’s arguments were couched in negative, states’ rights terms, they rested on the nationalist assumption that the federal government had a moral duty to presume freedom, to promote an expansion of liberty throughout the Union, fulfilling the promise of the American Revolution.

*The Slavery Debate in the North: Transient Slaveowners and Fugitive Slaves*

The debate over slavery’s constitutional status that erupted in Congress in 1835-6 spilled over into the state level by 1837, as runaway slaves and abolitionists forced northern courts and legislatures to confront the North’s relationship to slavery. Conflict over slavery in the free states generally took two forms. The first was the fight over transient and sojourning slaveowners, or those who voluntarily brought their slaves into the free states. This was a matter of interstate comity – a question of whether the northern states, which did not recognize property rights in human beings, would recognize a limited form of that right within their limits. Under the so-called “stay laws” of the northern states, traveling masters enjoyed a limited form of comity which allowed them to hold their slaves in a northern state for a period of up to nine months, at which time they had to either leave the state or renew the “license” by which they held slaves in the state.²

There was little controversy over this issue in the early republic, as northern and southern courts generally ruled in favor of comity – a policy which reflected the importance of maintaining the Union in this early period. Southern courts freed slaves who could prove that

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² The essential work on slavery and interstate comity is Finkleman, *Imperfect Union*. See also “American Slavery and the Conflict of Laws”; Cover, *Justice Accused*, passim.; Wiecek, *Antislavery Constitutionalism*, passim.; Edlie L. Wong, *Neither Fugitive nor Free: Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel* (New York: New York University Press, 2009). Though freedom suits were an important feature of law and politics in the early republic, before 1836 their import was confined to state-level politics and the question of personal (individual) liberty. After 1836, and especially in the context of the Washington, D.C. debates over slavery and federal power, freedom suits took on a new import as test questions regarding the territorial extent of slaveowner property rights and their relationship to central-government power.
their masters had held them in the North for longer than nine months (or six, depending on the state), while northern courts suspended the municipal theory in their states by recognizing, in limited form, masters’ right to hold slaves as property within their limits. In cases like *Harry v. Decker* (1818), *Rankin v. Lydia* (1820), and *Lunsford v. Coquillon* (1824), southern freedom suits in which once-transient slaves won their freedom by appealing to interstate comity with the “free” North, southern judges showed their fidelity to the municipal theory.3

But in the wake of the abolition debates in Washington, D.C., the question of interstate comity took on new dimensions, becoming the latest front in the growing conflict over slavery’s constitutional status. By 1836, abolitionists demanded that state courts and legislatures adopt strict interpretations of the municipal theory. In practice this meant denying comity to transient slaveowners and rejecting the claim that rights to slave property numbered among the “privileges and immunities” of American citizenship.

The second major arena of slavery conflict in the North was that involving fugitive slaves and the states’ obligations under the federal Fugitive Slave Law. Congress had passed that law in order to more effectively enforce the Fugitive Slave Clause of the Constitution. The clause barred the northern states from enacting interfering legislation with the slaveowner’s right of recaption to runaways. In effect, it had suspended the municipal theory as far as fugitive slaves were concerned, making the slaveowners’ right of recaption into an extraterritorial right. (Whether or not the clause made slaveowners’ property rights extraterritorial was, as we shall see, another question altogether). The 1793 law, among other things, made it a penalty to aid or harbor fugitives and expedited the rendition process by allowing masters (or their agents) to

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3 See Ch. 1. See also Wiecek, *Antislavery Constitutionalism*, pp. 194-195.
bring alleged runaways before state magistrates and secure certificates for their removal— all without proving their captive’s legal status.  

In the early republic, fugitive-related freedom suits generally operated on the level of individuals. The point at issue in such cases was not the constitutionality of Fugitive Slave Law or the legitimacy of the Fugitive Slave Clause so much as the legal status of individual runaway slaves. But in the wake of the Washington, D.C. debates of 1835-6, the fugitive-slave issue became yet another site in the conflict over property rights in slaves. Unlike the controversy surrounding transient and sojourning slaveowners, the fugitive issue involved the all-important question of slavery’s relationship to federal power, and in this context, that meant a contest over how to interpret the Fugitive Slave Clause and the 1793 Fugitive Slave Law. In Congress, the Calhounites were pointing to the Fugitive Slave Clause as evidence of a general right to slave property in the Constitution, an assertion which went well beyond the claim that it merely prohibited legislation interfering with the master’s right of recaption. For antislavery northerners watching the debates, the Calhounites’ claim raised serious questions about slavery in the Union— namely, what was the exact nature of the right of recaption invested into the Fugitive Slave Clause? Did masters have, by virtue of the Fugitive Slave Clause, an extraterritorial right to slave property as such (as the Calhounites seemed to be saying)? Or did the right of recaption refer only to the labor power of slaves, a reading of the clause that was in keeping with the

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municipal theory as it applied to federal law? These were the terms of the fugitive-slave debate after 1836.6

**A Nationalist on the Frontier**

Born in 1808 to a family of professionals, Chase grew up in a rapidly-changing New Hampshire in which the seasonal undulations of self-sufficient farm labor were being displaced by the more rigid patterns of petty-commodity production for urban markets. After spending time in Cincinnati in the early 1820s, he attended Dartmouth College, where he befriended the two sons of William Wirt, Attorney General for President John Quincy Adams and future presidential candidate of the Anti-Mason Party. Parlaying his friendship into career mobility, he secured a law tutorship under Wirt himself and, upon graduating in 1826, moved to Washington, D.C., where he established residence at Mrs. King’s boardinghouse and taught classes for extra money. Chase arrived in Washington at the middle point of the Adams administration, a time when the capital was slowly turning into a genuine seat of empire, a majestic city of the future rather than the pig-infested, mud-splattered wood clearing of the recent past. Slave pens and auction-houses existed within sight of the capitol building. Chase saw many of the nation’s leading figures: John Marshall and Joseph Story in the musty chamber of the Supreme Court; Henry Clay, Daniel Webster and John C. Calhoun in the candle-lit Senate; and President Adams himself, as he scampered to and from the White House. Wirt, inundated with his duties as Attorney General, hardly had time to tutor Chase, so the young student taught himself the basics of Anglo-American law. With little to no guidance, Chase’s education differed from that of his

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contemporaries; instead of the rudiments of contract-writing, he learned the intricacies of Anglo-American public law, including the law of nations and American federalism, pools of learning he would use later to combat slavery in Ohio.7

In 1829, Salmon Chase decided to establish his law practice in Cincinnati, the electrifying frontier depot he had left behind six years earlier. From Washington he traveled by coach along the National Road, arriving in Cincinnati on March 13, 1830. The bustling city that greeted him was a very different place from the depression-laden town of his youth. It was now a burgeoning frontier city, at last fulfilling its promise as the “Queen City” of the West. The physical layout of the city had changed radically, with the mostly wooden structures of yesteryear replaced by two-or-three story brick buildings. Merchant offices filled with stacks of paper and books, butcher shops lined with knives and hogsheads, gas-lit hotels packed with businessmen, gamblers, and prostitutes, alleyways strewn with pig guts, chicken bones, and the vomit of fading drunkards. This was a commercial town, a merchant-capitalist depot for the transshipment of commodities south and east. Yet like many northern cities, it was undergoing a fundamental socioeconomic shift away from merchant-capitalism and toward the industrial-capitalism of the future, transitioning from a transitory depot for goods into a manufacturing and processing hub within an emerging capitalist home market in the Northwest.

The town buzzed with commercial activity, and nowhere was the hum of commerce more intense than on the waterfront, where dockworkers on the wharves loaded and unloaded raw materials from around the country: wheat and corn from the West, cotton from the South, and manufactured goods from the East. New factories had popped up around the city, giving the landscape a grim industrial hue, but for the most part the town remained a trading center, a

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pivotal node in a growing national economy. Cincinnati by this time had earned another nickname, “Porkopolis,” for its production and sale of pork and pork-related goods. Pigs roamed the streets, feasting on the city’s human and animal waste, giving the city a distinctly porcine aroma. Southern slaveowners arrived by steamboat to buy pork products in bulk, loading their ships with cheap meat for their slaves in receipt of raw cotton. It was an ideal place for an up-and-coming lawyer, a site of infinite commercial transactions underwritten with a stream of banknotes, IOUs and promissory notes. Young Chase was just one of a legion of Yankee lawyers who descended on the city like gulls in a feeding frenzy, an army of attorneys representing the reach of merchant capital into the western frontier.  

Unlike Northern Ohio, which was generally dominated by Yankee transplants, Cincinnati was a distinctly Southern town. New Englanders like Chase made up a large portion of the city’s population, but on the whole Cincinnati was dominated by “butternuts,” Southern migrants who had moved North in search of economic opportunity. Regardless of origin, the city’s merchant-capitalist class enjoyed close business ties with slaveowners in the South, especially those across the river in Covington, Kentucky. Dissent over slavery was strongly discouraged by this group, who favored the national government’s policy of suppressing antislavery dissent. Cincinnati’s working class – butternuts and Yankees, complemented by droves of Irish and German immigrants – understood slavery’s impact on the value of their labor; many feared that emancipation would result in an influx of southern black migrants who would undermine their wages. Though the South was not a major market for northwestern commodities, both merchant

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capitalists and laborers were convinced that slavery was vital to Cincinnati’s economy and that continued prosperity depended in large part on good relations with the southern states. 9

Together with two partners – including Rufus King’s son, Edward – Chase established his law practice on Front Street, just a few blocks in from the waterfront. After a few missteps with his practice, Chase was hired as counsel for the Bank of the United States in Cincinnati and for Lafayette Bank. This matched his nationalist inclinations at the time: Chase in the early 1830s was a stanch National Republican who understood that he was bringing the legal and political culture of New England into the American West. Like Joseph Story, James Kent, and his mentor William Wirt, Chase was a firm believer in the doctrines of federal supremacy and economic nationalism. He was a part of a new generation state-level lawyers versed not only in the common law of their particular states, but in American federal law as it had developed in the age of John Marshall. He wrote articles for the business-minded Cincinnati American, extolling the wisdom of tariffs and central banks and federally-funded roads, turnpikes and canals. Much of his business took place in the court of Justice John McLean, a prominent Whig who would become Chase’s father-in-law and a perennial Whig presidential candidate, as well as a reliably antislavery voice on the Supreme Court until his death in 1861. Fresh from the nation’s capital, Chase quickly established himself as a leading member of Cincinnati’s National Republican, soon to be Whig, establishment. 10

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9 Howe, What Hath God Wrought, pp. 137-40; Richards, Gentlemen of Property and Standing, pp. 92-93.
Chase’s time in Washington had turned him against Jackson and the states’ rights doctrines of the Democrat Party and toward the neo-Federal nationalism of Adams, Webster, Clay, Marshall and Story. His time studying under William Wirt no doubt influenced his political views, as Wirt was Attorney General under both John Quincy Adams and Andrew Jackson. In the post-Missouri Crisis, post-*McCullough v. Maryland* era, when nationalism gave way to a legal and political culture of states’ rights strict constructionism, Wirt had remained one of the most vehement defenders of federal supremacy in Washington. That spirit carried over into Chase’s early legal career as well as his later antislavery activities.\(^{11}\)

Chase’s first years in Cincinnati coincided with the tariff controversy and the Nullification Crisis of 1832-33. Like many young nationalists, he was deeply impressed by the sentiments in Webster’s famous “reply” to Senator Robert Hayne, which defended the doctrine of federal supremacy against the extreme states’ rights doctrines of Carolinian nullifiers. Chase was especially captivated by Webster’s reference to the Northwest Ordinance, which was to Webster a prime example of “national” supremacy. Chase later followed up on this remark by reading ordinance co-author Nathan Dane’s *Digest of American Law* (1826), which included a brief history of the ordinance. Chase also followed the printed debates over the nullification controversy and read the works of leading neo-Federal thinkers who responded to the states’-rights extremists by expounding on the Hamiltonian nationalism endorsed by Chief Justice Marshall. Like many common lawyers of his day, Chase memorized the lessons in Joseph Story’s *Commentaries on the Constitution* (1833) and *Commentaries on the Conflicts of Law* (1834), two of the most potent rejoinders to the Calhoun school of states’ rights.\(^ {12}\)

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It was in the context of this neo-Federal counterattack that Chase wrote and published his *Statutes of Ohio* (1833-35), a compendium of Ohio’s laws that included a detailed history of the Northwest Territory and the 1787 ordinance. *The Statutes of Ohio* was part of a wave of nationalist literature in the wake of the Nullification Crisis. The emphasis on federal supremacy in this work – new states carved out of the Northwest Territory, Chase wrote, could not tax federal lands or “interference with the primary disposal of the soil by the federal government” – reflected his commitment to neo-Federal nationalism.\(^{13}\) There is also evidence of Chase’s fascination with the abstract lines of American federalism, a strong feature of the antislavery program he would create later on. *The Statutes* raised his profile nationwide; he even sent copies to Chancellor Kent in New York and Joseph Story in Boston, both of whom praised the work for its objectivity and comprehensiveness.\(^{14}\)

*Salmon P. Chase, Northern Lawyer*

Chase’s legal activities in Cincinnati embodied the Janus-faced character of the antebellum legal profession in the North. An attorney for the Cincinnati branch of the Bank of the United States, he was an utterly modern agent of the market revolution, one in a swarm of Yankee lawyers expediting the transaction between eastern credit and western commodities. At the same time, Chase exemplified the earlier tradition of the “Ciceronian” jurist, custodian of morality and civil order, at once interpreter and enforcer of the common good. He belonged to a

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\(^{14}\) Niven, *Chase*, pp. 36-38.

These two aspects of Chase’s legal career were not as contradictory as they appear. For Chase, there was no sharp distinction between morality on the one hand and law and economic development on the other. The moral imperatives of the Ciceronian fused seamlessly in his mind with the hard-charging “progress” of Northern capitalism, precisely because the latter represented the fundamental premise of self-ownership – the right to own oneself and the fruits of one’s labor. In this sense, the dual nature of antebellum Northern legal profession – the traditional common lawyer and the “modern” commercial agent – informed Chase’s views on slavery and shaped his later attack on the federal Fugitive Slave Law.

As a western representative for eastern capitalists, Chase embodied the reach of the capitalist core into the American hinterland. In Cincinnati, he operated at the very nexus of the vast churning of eastern credit and western commodities, a process that was slowly creating an independent “northern” economy by fusing the upper Mississippi Valley and Great Lakes regions to the Northeast. Chase had extensive contacts in the East, among them Lewis Tappan, brother of Arthur and soon to be a leading abolitionist in New York, and like the hundreds of Yankee lawyers who swept into the frontier in the post-1815 era, he was conscious of his role as transmitter of New England legal culture to the West. As the legal historian Matthew Axtell argues, a good deal of Chase’s work for the B.U.S. and Lafayette Bank centered on due process protections for business in an unpredictable frontier economy, anchoring eastern institutions in
the “wild” soil of the Old Northwest. His legal career also dovetailed with his National Republican loyalties. He wrote articles for the Cincinnati American, extolling the virtues of tariffs and central banks and federally-funded roads, turnpikes and canals, and much of his business took place in the court of Justice John McLean, a prominent Ohio Whig who would become Chase’s father-in-law and a perennial Whig presidential candidate – as well as a reliably antislavery voice on the Supreme Court.16

At the same time, Chase saw himself as a custodian of morality and civil order in Cincinnati and Ohio generally, a state-level common lawyer steeped in neo-Roman oratory and the relational understanding of rights and duties in the natural law tradition. The Ciceronian tradition fit together with the liberal republicanism of the founding era and the common-law tradition of the “well-regulated society,” both of which were grounded in the Western tradition of natural law, with its emphasis on reciprocal rights and duties within civil society. As a Ciceronian, Chase’s duties went far beyond boosting profits for his eastern clients; he also had to temper the excesses of democracy and the market, placing limits on both mobocratic zeal and oligarchic greed. A lawyer in this sense had to read man-made laws in light of natural law, and for many lawyers in Chase’s time that meant reading local, state and federal statutes against the backdrop of the Declaration of Independence, especially the claim that “all men are created equal.” This conception of lawyering corresponded with the paternalist strain in Whig political culture, especially the Whigs’ penchant for regulating morality via public law and policy.

Chase’s Ciceronian style reflected his time with William Wirt, whose humanitarian application of the law – he had defended Northern and British black sailors jailed under South Carolina’s “Negro Seaman Acts” and had served as counsel for the Cherokee in Cherokee Nation v.

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16 Sellers, Market Revolution; Niven, Chase, pp. 29-38; Axtell, “What is Still ‘Radical’ in the Antislavery Legal Practice of Salmon P. Chase?”
Georgia (1831) and Worcester v. Georgia (1832) – exemplified the tradition of lawyer as public advocate.\textsuperscript{17}

Both the Ciceronian tradition and the common-law tradition of the “well-regulated society” are evident in Chase’s Statutes of Ohio (1833-5). The language in the text is infused with an unshakable faith in the inherent morality of the rule of law. On every page the reader encounters the Enlightenment faith in the power of law to domesticate the “wilderness” of the American interior. Chase praised the ordinance’s principal author, Nathan Dane of Massachusetts, for enacting a system of “public morals” for the Northwest Territory, a system of relational rights and duties that would serve as the bedrock of civil order:

The ordinance has been well described, as having been a pillar of cloud by day, and of fire by night, in the settlement and government of the northwestern states. When the settlers went into the wilderness, they found the law already there. It was impressed upon the soil itself, while it yet bore up nothing but the forest. The purchaser of land became, by that act, a party to the compact, and bound by its perpetual covenants, so far as its conditions did not conflict with the terms of the cessions of the states.\textsuperscript{18}

In this way, national law imposed a grid of “civilized” logic and order on the chaos of uncultivated nature. For Chase, the project of westward expansion – a fundamentally national project – was intrinsically moral, a process by which the light of commerce and the relational rights and duties of natural law pierced into the “darkness” of the hinterland. Central to that spirit of progress was the concept of self-ownership: all persons owned themselves and the products of their labor.

\textit{Anti-Abolitionism and the Threat to Civil Order in the North}

\textsuperscript{17} Hoeflich, Roman and Civil Law; Rahe, Republics Ancient and Modern; Novak, People’s Welfare; Kielbowiz, “Law and Mob Law”; Howe, The Political Culture of the American Whigs (Chicago: University of Chicago Press, 1979).

\textsuperscript{18} Statutes of Ohio and of the Northwest Territory, pp. 16-17.
The 1834 Lane Seminary debates over slavery took place at the same time Chase was researching and writing his *Statutes*. Given his Whiggish views and his immersion in the slave-and-credit world of merchant capital, Chase probably viewed the abolitionist movement as a troubling breach of social and economic harmony, a threat to both public order and the Union. He would have found the doctrine of “immediatism” chimerical at best, noxious and incendiary at worst. Yet he was not opposed to the abolitionists’ main goal of universal abolition, and he seems to have been affected by the moral and religious teachings of Theodore Dwight Weld. He was antislavery in the traditional sense: a religious man with Calvinist roots intensified by the Second Great Awakening, well-educated and with a deep commitment to human equality, in favor of gradual, state-by-state abolition schemes. He had considered Missouri’s entry into the Union as a slave state a serious blow to American freedom, and in his history of the Northwest Ordinance he celebrated the ban on slavery and the “free” culture of the Northwest. In 1834, however, as Theodore Dwight spread the antislavery gospel in the Walnut Hills above Cincinnati, Chase probably hewed close to the vision of the Union propounded by Henry Clay and the compromisers. As an economic nationalist, not yet a proponent of antislavery nationalism, Chase would have been generally supportive of the abolitionist program, if also skeptical and apprehensive.\(^\text{19}\)

Chase could see that abolitionism frightened Cincinnati’s business community, whose members he knew well, but on the slavery issue, Chase’s moral convictions outweighed his economic nationalism: “property in man” exemplified the excesses of market society and commodification, and the slaveowning class was as close to an antirepublican oligarchy as existed in the United States. More than the abolitionists, slavery – the commodification of human beings – rent the tapestry of rights and duties in civil society. It was the incongruous evil

\(^{19}\) Niven, *Chase*, pp. 45-47.
in a land devoted to freedom, the poisoned apple in the Garden of Eden. Slowly but surely, Chase was losing faith in the vision of Union espoused by Clay and the compromisers back in Washington; he was becoming more receptive to the antislavery nationalism of the abolitionist movement.\(^{20}\)

Already on edge from the Lane Debates, Cincinnati’s business community reacted angrily to news that James Birney had plans to establish an antislavery newspaper in the city. Forced out of Kentucky by hostile proslavery groups, Birney had moved to nearby New Richmond, where he published the first few issues of the *Philanthropist*, a western counterpart to the official AASS newspaper in New York, the *Emancipator*. Now, in the spring of 1836, he was relocating to the printing office of Achilles Pugh in downtown Cincinnati. Feeling threatened, the city’s ruling class organized a series of anti-abolition meetings in nearby courthouses and public spaces, warning Birney of the consequences of slavery agitation. Dominated by “capitalists, merchants and tradesmen,” the meetings were packed with the city’s working-class laborers.\(^{21}\)

On July 12, a small band of mischiefs broke into Pugh’s printing office and trashed the presses and typeset, all with the implicit endorsement of city officials, who did nothing to stop the mayhem. Two weeks later, at an anti-abolitionist meeting attended by working people from Covington and Newport, Kentucky, a committee of prominent citizens issued a resolution warning Birney that if he did not halt publication of the *Philanthropist*, the people of Cincinnati would have no choice but to endorse mob violence. Bills signed “Old Kentucky” began

\(^{20}\) *ibid.*, pp. 46-47; Novak, *People’s Welfare*.

appearing on street corners around town, stirring up anti-abolitionist sentiment. Birney increasingly feared for his safety; the cold, hard gazes of the recent past were quickly being replaced by epithets, death threats, and ominous crowds. This was precisely the kind of behavior that Chase the Ciceronian sought to restrain. As part of a new generation of state-level common lawyers who favored black-letter law over the rough justice of the mob, Chase sought to defend the individual’s right to free speech and property against the community.  

Chase watched as tensions over Birney’s enterprise escalated with the summer heat. On July 30, another anti-abolitionist meeting announced the people’s intent to destroy the *Philanthropist*’s printing office. At nine o’clock, a large crowd began gathering outside Pugh’s shop. Chase heard shouting and running outside his door. From his front window he watched as shadows cast by lanterns loomed and receded on red brick and cobblestone. Realizing that city authorities had no intention of dispersing the mob, he grabbed his coat and went out into the streets, trailing the crowd in the hopes that he could help restore order. The mob reached its tipping point a few hours later, breaking into Pugh’s office and smashing the press into pieces before dragging what was left it into the Ohio River. Emboldened, it marched to the homes of several abolitionists, starting with Pugh and ending up at Birney’s estate. Birney, however, had escaped to the nearby Franklin House hotel, waiting in silence as the crowd rampaged through the city. After learning of Birney’s whereabouts, the mob surrounded the hotel, throwing rocks and demanding he step outside. As the mob lurched towards the hotel, Chase pushed his way to

22 *Narrative of the Late Riotous Proceedings*, pp. 13-39; Birney, *James G. Birney*, pp. 240-242. The anti-abolitionist impulse in Cincinnati – more specifically, its manifestation as mob violence – had deep roots in American legal culture. Far from mere rioters, the individuals who comprised the mobs represented the Jacksonian ideal of democracy-as-law, of using violence to defend public rights and the common good of the community against those individuals and cliques who would tear the social fabric apart in the name of radical individualism. They also saw themselves as defenders of a beloved and indispensable Union, which was at once the basis of their political rights and their economic prosperity. In threatening the Union, abolitionists threatened the well-being of all American citizens; mob violence was thus a legitimate means of shutting down unwelcome dissent. See Keilbowicz, “The Law and Mob Law in Attacks on Antislavery Newspapers.”
the front and stood in the entrance. At six-foot-four, Chase was an imposing figure, the very symbol of the guardian of civil order. He talked down the mob, dissipating its energies with rhetorical skill and reason, until finally, in the early morning hours it drifted down Main Street, where it was finally dispersed by the mayor and his entourage.23

The mob violence of July 30 drew out the latent tensions in Chase’s legal career. As a prominent commercial lawyer, he could count more than a few friends and clients among the “gentlemen of property and standing” who directed the mob, and he probably shared their belief that Birney’s agitation would hurt business in the city. At the same time, his public-advocate side could not brook attacks on private property and free speech, especially when it was expressed through mob violence. In this vein he contributed to an August 2nd editorial published in the Cincinnati Gazette, the city’s leading Whig paper, condemning the violence that had consumed the city four nights before. Co-written by leading citizens, including the paper’s editor, Charles Hammond, the editorial emphasized the protection of private property and defended the right to free discussion under Ohio’s constitution, “the cornerstone of the great temple of constitutional liberty.”24 Four days later, the Gazette published the resolutions of a committee which had convened in the aftermath of the violence. The resolutions, which Chase had a hand in writing, stressed the need for civil order and balancing the rights of slaveowners with those of Ohio’s citizens, rights guaranteed to them under the First Amendment, the Northwest Ordinance, and the Ohio constitution.25

Chase had hardly known Birney when he defended him at the hotel entrance on the night of the mob assault. In the weeks that followed, however, the two became close friends, a Yankee

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23 Narrative of the Late Riotous Proceedings, pp. 40-50; Niven, Chase, pp. 48-9.
24 Cincinnati Gazette, Aug. 4, 1836. Quote from Narrative of the Late Riotous Proceedings. 43. See also Niven, Chase, p. 49. The elite composition of the editorial’s authors suggests that the Cincinnati ruling class was itself divided between pro- and antislavery factions.
25 Niven, Chase, pp. 48-49.
and a southern bound by a common faith in law and antislavery. Both men had experienced recent tragedies that deepened their religious convictions (Chase had recently lost his first wife and daughter, Birney his daughter) and both were lawyers who had studied public law in the nation’s capital (Birney had studied under Alexander Dallas during the War of 1812, becoming proficient in the law of nations). Chase soon realized that Birney was no rabble-rousing lunatic. His arguments against slavery were cogent and concrete, based on precedent and in accordance with federal law. In long nights spent in Birney’s library, the two lawyers talked over the moral and legal points of the slavery question, Chase listening intently to Birney’s elucidation of the antislavery argument. Here was a temple for the Ciceronian lawyer, a candle-lit sanctuary far removed from the churning forces of the market revolution. As soft light flickered against a wall of leather-bound books, Birney explained how civil disorder in Cincinnati was intricately linked to the larger problem of slavery in national politics.  

It was here, in Birney’s library, that Chase learned the particulars of the debate over abolition in Washington, D.C. In his talks with Birney, he began to make connections between the civil unrest in Ohio and the constitutional conflict in Congress. Anti-abolitionist leaders had already made that connection in their published threats to Birney, which made him part of a broader conspiracy to undermine property rights and rent the Union in twain. Chase now saw the fundamental nature of the slavery conflict, the way it pitted northern personal liberty against southern private property, two strands of the same Revolutionary heritage. The clash of slaveowner rights and civil order in Cincinnati reflected the broader question of slavery’s jurisdictional reach in the Union – the same question at stake in the Washington, D.C. debates. It

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was at this point that Chase broke from the bland nationalism of the compromisers and began to champion the Union as it ought to be, not as it was.

The Case of Matilda Lawrence

Back in Cincinnati, Chase and Birney saw the creeping nationalization of slavery in all aspects of the city’s legal, political, and commercial life. Cincinnati’s anti-abolitionist leaders openly linked their hostility to local abolitionism to the ongoing debate in Congress, while Ohio’s “black laws” (legislation concurrent with the federal Fugitive Slave Law expediting the recapture of alleged runaways) and the widespread practice of ignoring the limitations of the state’s “stay law,” helped blur the lines separating Ohio from its slave-states neighbors. The clearest evidence of slavery nationalization came in the form of an 1837 report on Ohio’s “black laws,” which the state judicial committee had written in response to abolitionist petitions seeking the laws’ repeal. The Ohio judicial committee rejected the abolitionists’ request as “unwise, uncourteous, and impolitic,” arguing that it would endanger slave property and undermine commercial relations with the South. According to its report, the Fugitive Slave Clause gave Congress the power to determine the mode of fugitive recaptures; the 1793 Fugitive Slave Law was therefore the “supreme law of the land.” Peaceful and prosperous relations with the South depended on a generous reading of the Fugitive Slave Law – what the report called “national comity.” Though the Fugitive Slave Law conferred no explicit judicial powers to state magistrates, “national comity” required that free states vest such powers in their officers. This was the “expedient” thing to do.27

The judicial committee report confirmed what Ohio abolitionists had already come to suspect: that the defenders of the “black laws” and the Fugitive Slave Law were assuming the same general, extraterritorial right to slave property that the Calhounites in Congress were claiming with regard to Washington, D.C. The fugitive slave issue, they now understood, was part of a wider debate over the extraterritorial reach of rights to slave property in the Union. An anonymous contributor to the *Philanthropist*, possibly Chase himself, denounced the report as an assault on Ohio’s sovereignty. The judicial committee, the author complained, proposed a “virtual abrogation of our CONSTITUTION OF LIBERTY and the setting up in its stead a foreign CONSTITUTION OF SLAVERY.” The author then drew on states’-rights arguments to argue that a policy of “national comity” undermined the presumption of freedom in Ohio and all the free states, wiping out due process for the sake of “expediency.” By allowing slave-state laws to “operate on all” persons within the “acknowledged limits” of Ohio, the black laws placed the civil rights of Ohioans beneath the property rights of neighboring slaveowners. States like Ohio – “free” states that ought to presume freedom – had to read the Fugitive Slave Clause strictly.²⁸

The furor over the committee report was in February, 1837. A few weeks later, the fugitive controversy hit home for both Chase and Birney. On the cold grey morning of March 10, 1837, Chase was sitting in his office, sifting through contracts and correspondence as the heat from a nearby stovepipe fogged up the window panes across the room. This was a quiet place: Chase could hear the irregular rhythm of hammering in the distance, some passing voices in the street punctuated by the clack of horses’ hooves on the cobblestone outside, but overall the law office provided him with a welcome serenity in an otherwise cacophonous town. Suddenly the silence broke. The front door swung open. The flames in the stove blew back as a blast of cold,

²⁸ *ibid.*
raw air pushed across the floor to Chase’s feet. Into the door frame stepped a big man in a hurry. It was James Birney, red-faced and short of breath, his face locked in a disquieting frown. Startled, Chase beckoned him into his office and asked him what was wrong.29

It was Matilda Lawrence, Birney explained, a young woman who had worked as a housekeeper at the Birney estate for much of the previous year. A few days earlier, Lawrence had been running errands when she was confronted in the street by John W. Riley, a Kentucky slave catcher who was notorious in southwestern Ohio. Riley said Lawrence was a runaway slave and that her master, the Missouri planter Lawrence Larkin, wanted her returned under the federal Fugitive Slave Law of 1793. The slavecatcher Riley and his agents nearly captured Matilda that day, but she slipped into Cincinnati’s alleyways, running for her life back to the Birney estate. Trembling, she ran straight to Mrs. Birney, who struggled to understand how the girl would be mistaken for a runaway slave. For all Birney knew, Lawrence was a young white woman from Missouri, one of a wave of southern transplants seeking better opportunities in the Queen City. When Mr. Birney arrived home from a trip to New York City, Lawrence explained to her employers the story behind her near abduction.30

As it turned out, Matilda Lawrence was the mixed-race daughter of Missouri slaveowner Lawrence Larkin, a wealthy Missouri planter who had raised her in his house and made her a housekeeper when she turned sixteen. Unlike most of Larkin’s slaves, young Matilda had access to Larkin’s library, where she learned to read and write and question her legal status. By the time she left with Larkin on a trip to New York in 1835, she was already considering ways to win her freedom. In New York, she learned about the rights of black northerners and the political geography of slavery and freedom in her country. As the trip’s end neared, Lawrence

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29 Birney, James G. Birney and His Times, pp. 261-63. See also Niven, Chase, pp. 50-51.
30 ibid.
asked her father to grant her freedom papers, telling him she did not want to go back to Missouri. Larkin refused, and on the long journey home, he ignored her constant appeals. When they arrived in Cincinnati, the last stop before entering slave territory, Lawrence slipped away in the middle of the night. Acting on information she received from members of Cincinnati’s free black community, Lawrence went to the home of a barber who assisted fugitive slaves. There she stayed for a number of days, hiding and waiting until Larkin left town. Larkin postponed his departure for a week, searching for a daughter who was also a prized investment. When Larkin finally gave up and left town, Lawrence emerged from hiding and found employment as a hotel chambermaid; a few months later, she was hired by the Birney family, who had no idea she was the mixed-race daughter of a Missouri slaveowner, let alone an absconded slave.31

James Birney was stunned by the disclosure. As a lawyer, he knew that Lawrence’s case technically exempted her from rendition under the Fugitive Slave Law, but he also knew that she could hardly expect justice from Ohio’s courts. His first hope was to send Lawrence to upstate New York, where she would be safe with abolitionist friends. But he soon realized that Riley and his agents were not about to give up; a judge had issued a warrant for her arrest, and they surrounded his house day and night, waiting for the right moment to seize Lawrence. That moment came on March 10. Birney could have represented Lawrence himself, but he realized that his reputation in Cincinnati, where his abolitionist activities had made him the most widely despised man in town, especially among the city’s proslavery elite would undermine Matilda’s case. So he went to Chase that cold morning in March, seeking his help in freeing Matilda Lawrence from the grip of the slavecatchers.32

31 ibid., pp. 261-3.
32 ibid., pp. 263.
Both aspects of Chase’s career – the commercial lawyer and the classical republican jurist – compelled him to accept Birney’s plea and defend Matilda’s freedom. The lack of due process involved in the Lawrence seizure – the Fugitive Slave Law truncated civil procedure in the name of slaveowner property rights, so there was no attempt to test her legal status before a court – mocked civil order and the presumption of freedom in Ohio’s constitution. Chase recognized that the case went beyond Matilda’s particular situation, that it epitomized a wider conflict over slavery’s reach in the Union – the same issue as in Washington, D.C. and Massachusetts. Together with Birney, Chase sought and won a writ of habeas corpus on Matilda’s behalf – an important legal maneuver in itself, since it presumed that Lawrence was a legal person rather than an article of property.33

The writ was issued by William Henry Harrison, former governor of the Northwest Territory and future Whig president, then serving as clerk of the Common Pleas Court in southwestern Ohio. Though Chase and Birney had only a few days to come up with their arguments, they had already amassed an arsenal of antislavery precedents during their nighttime conversations in Birney’s library. Their main strategy was to disprove the underlying premise of Larkin’s claim: that property rights in slaves were extraterritorial, that Matilda’s legal status did not change as a result of her coming into Ohio. That strategy took two forms. The first was to deny the existence of a general, extraterritorial right to slave property in the Union – to refuse comity to transient slaveowners on the basis of a radical interpretation of the municipal theory. The second was to attack the federal Fugitive Slave Law, arguing, among other things, that it did

not involve a general right to property in slaves. In crafting these arguments, Chase and Birney drew on a long tradition of antislavery argument.

For Chase, there was a fundamental difference between Matilda’s legal status in Missouri and her legal status in Ohio. Under the laws of the latter state, Matilda was the chattel property of Lawrence Larkin; but once she came into Ohio, she was a legal person with access to basic civil protections. In order to make this distinction, Chase had to deny Larkin’s claim of an extraterritorial right to slave property in the Union. Here, he drew on his own Statutes of Ohio, which celebrated Ohio’s legal presumption of freedom, which the Northwest Ordinance had invested into the state’s constitution. The ordinance’s ban on slavery aligned Ohio with the “national” policy of discouraging slavery and promoting freedom. Like Congress, Ohio courts could not under any circumstances recognize property rights in human beings.

Chase and Birney also looked to Lord Mansfield’s dictum in Somerset, in particular Mansfield’s assertion that slavery contradicted natural law and could only exist by virtue of positive law. Mansfield intended for his remarks to apply to England only, but in tying slavery to positive law, he created a precedent by which positive law could be as a tool for limiting slavery to certain jurisdictions, distinguishing the presumption of slavery in certain “slave zones” from a universal presumption of freedom at the national and international levels. Mansfield himself chose not to make that move, but abolitionists in the 1830s saw the opening and exploited it.34

Chase also familiarized himself with the key premise of Mansfield’s Somerset opinion – that courts in free jurisdictions should treat slavery as a servant status rather than a property status. In other words, slaves who entered into “free zones” were legal persons, not chattel

property, since the property aspect of slavery did not exist beyond the limits of designated “slave zones.” This jurisdictional distinction between slaves-as-persons and slaves-as-property was a crucial facet of the municipal theory, and, as Chase discovered during his preparation, several American judges had already applied it to the American landscape, in *Harvey v. Decker* (1818), *Rankin v. Lydia* (1820), and *Lunsford v. Coquillon* (1824). All of these cases suggested that rights to slave property were “local” in scope and susceptible to regulation outside the South – in other words, that there was no such thing as a general, extraterritorial right to slave property.  

Chase and Birney also looked at two recent works by Supreme Court Justice Joseph Story: the *Commentaries on the Constitution* (1833), which includes a brief passage on the Fugitive Slave Law; and the *Commentaries on the Conflicts of Law* (1834), which discusses the matter of transient slaveowners. In the *Commentaries on the Constitution*, Story described the federal Fugitive Slave Law as an important exception to the presumption of freedom at the national level. The founders could have decided that fugitive-slave returns were a matter of interstate comity. But by inserting the Fugitive Slave Clause into the Constitution, they created a positive injunction against northern interference with the slaveowner’s right of recaption, foreclosing the possibility of northern noncooperation. Thus, as far as fugitive slaves were concerned, slavery was a matter of positive obligation, not comity. Crucially, Story did not depict the Fugitive Slave Clause as part of a general right to slave property in the Constitution. If anything, his passage suggested that the issue of fugitive-slave remands was the *only* instance in which slaveowner property rights could be considered extraterritorial. And even that was unclear: Story’s passage did not say whether the right of recaption in the Fugitive Slave Clause

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35 *ibid.*
referred to property rights in slaves’ bodies – slaves as property – or property rights in slaves’ labor power – slaves as legal persons/servants.36

Story’s slavery-related passage in the Commentaries on the Conflicts of Law had important implications for how northern states slaveowners’ property rights. Here, Story emphasized what jurists around the country already knew: that in all cases outside the fugitive-slave issue, slavery was a matter of interstate comity. He recognized that most northern states had qualified the municipal theory by granting slaveowners’ comity, usually in the form of the so-called “stay laws.” Yet Story’s passage reminded readers that comity was not compulsory, that the northern states could, if they chose to, deny comity to transient slaveowners. Story introduced an aggressive brand of comity that would allow northern states to rescind comity for slaveowners. At the root of his passage was hardline interpretation of the municipal theory. Just as the law of nations recognized slavery in certain countries but did not compel “free” nations to do so, the confederal law in the United States acknowledged slavery in the states but – outside the realm of fugitive-slave remands – did not force “free” states to recognize property in human beings. Here, Story drew on the fiercely independent strand of comity pioneered by the seventeenth-century Dutch legalist Huber, whose doctrines had freed Dutch merchants from the supranational obligations of the law of nations. Story’s application of the municipal theory to the American context suggested, once again, that while there were significant concessions to slavery in the Constitution – not least, an extraterritorial right of recaption to fugitive slaves – there was no such thing as a general right to slave property in the Union.37

36 Commentaries on the Constitution of the United States (Boston: Hilliard, Gray, 1833), pp. 676-677. 37 Story, Commentaries on the Conflict of Laws (Edinburgh: Thomas Clark, 1835), pp. 155-7. Story applied this brand of comity to American federalism: first, he stipulated that state laws had no force beyond their territorial limits; second, he argued that all persons living in a given state, whether or not they were permanent residents, were subject to the laws of that state; and third, he specified that states who engage in comity appreciate that the laws of other states “have the same force everywhere,” as long as “they do not prejudice the power or rights of other
Chase and Birney paid special attention to the arguments from a recent transient case in Massachusetts, *Commonwealth of Massachusetts v. Thomas Aves* (1836). In the summer of 1836, as the debate over abolition in Washington, D.C. rolled forward, abolitionists in Boston sought a legal decision denying slaveowners the right to hold slaves in their state – part of a broader effort to radicalize the municipal theory in the United States. An opportunity emerged when a Mrs. Samuel Slater, a slaveowner from New Orleans, arrived in Boston to spend time with her father, Thomas Aves. Accompanying Slater on the trip was a six-year-old slave girl named Med. Members of the Boston Female Anti-Slavery Society pounced on the case, getting a male acquaintance, Levin Harris, to petition for a writ of habeas corpus on their behalf. Two of Boston’s premier abolitionists, Samuel Sewall and the attorney Ellis Gray Loring, soon joined Harris in court. Thomas Aves issued a countersuit, seeking Med’s return as well as damages. By August, the case went to the Massachusetts Supreme Court before Chief Justice Lemuel Shaw.38

Shaw was a legal lion in the early national period, one of the great expositors of neo-Federal jurisprudence alongside Chancellor Kent, Joseph Story, John Marshall, and other nationalists. Though he disliked Boston’s brand of immediate abolitionism – the Garrisonian wing of the abolitionist were little more than “over-zealous philanthropists” in his opinion -- Shaw was generally antislavery in outlook; he had opposed Missouri’s admission as a slave state in 1820, and had already taken steps to qualify slaveowners’ property rights inside Massachusetts. In *Aves*, Shaw translated his antislavery into policy. He broke from the North’s tradition of granting comity to transient slaveowners, freeing Med on the grounds that

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Massachusetts had no laws upholding master-slave relationships. He adopted the same hardline interpretation of the municipal theory Story had endorsed in the *Commentaries on the Conflict of Laws*. Rights to slave property, Shaw wrote, were local in scope; “such general rights of property cannot be exercised or recognized” in Massachusetts. The right of “property in man” was not among the “privileges and immunities” of American citizenship, since comity pertained “only [to] those commodities which are every where and by all nations, treated and deemed as subjects of property.” It would “be a perversion of terms to say, that such local laws do in fact make [slaves] personal property generally.” This was an aggressive, unqualified rendering of the municipal theory applied to the American context.39

The crucial part of Shaw’s decision – the part which would have the most influence on Chase’s thinking later on – was its painstaking analysis of slavery in the Constitution. When counsel for Aves recommended that the court adopt a “national comity” based on a loose reading of the Fugitive Slave Clause, Shaw responded with an exposition of states’-rights reasoning. When the American people ratified the Constitution in 1788, Shaw wrote, they had given their consent to two different things. On the one hand, they had ratified a “treaty” between the several states, a new and more perfect version of Europe’s law of nations grounded in the unambiguous language of positive law. But they had also formed a new national government, one which stood on par with the “civilized” nations of Europe and existed apart from the state governments. In

39 *Commonwealth v. Aves* 18 Pick. 193 (Mass., 1836). Shaw admitted that slavery was not contrary to the law of nations. (Mansfield himself had said this). To that extent, Curtis was right: as a matter of policy, Massachusetts recognized Louisiana’s right to maintain slavery within her borders, and it had no right to denounce Louisiana’s laws simply because they were in derogation of Massachusetts’ laws. But a duty to recognize Louisiana’s rights was not the same as a duty to enforce Louisiana’s slave laws inside Massachusetts. A spirit of comity could not be wrung from the strict language in the Fugitive Slave Law.

Alongside Marshall, Story, Kent and Wheaton, Shaw was a leading innovator in the neo-Federalist public law of the early nineteenth century. He was a pivotal figure in the transition to a modern market economy in Massachusetts, using instrumental arguments and exploiting the tension between positive law and natural law to advance commercial interests in that state, among other things. On Shaw, see Levy, *Chief Justice Shaw*; Friedman, *History of American Law*, esp. pp. 118-119; Horwitz, *Transformation of American Law*, passim.
this way, the Constitution was comprised of two distinct parts: a treaty or “compact” between the states, and a separate national government. Shaw’s subsequent discussion of slavery concerned only the treaty aspect of the Constitution, suggesting that slavery had nothing to do with the federal government – the very same argument abolitionists were making in the Washington, D.C. context. 40

According to Shaw, only one clause in the Constitution obliged the northern states to recognize slavery within their limits, and that was the Fugitive Slave Clause. That clause belonged to the “treaty” aspect of the Constitution: it was a matter between the states, not an issue of federalism, and it was written in the most precise language, just like a treaty between foreign nations. To this end, Shaw, the arch-nationalist New Englander, the very embodiment of loose construction and “instrumental” law, emphasized strict construction of the Fugitive Slave Clause: Med, he argued, did not fall within the definition of “fugitive slave,” since her master had brought her into the state voluntarily. The relevant body of law was comity, not federal law, and since comity was voluntary, Massachusetts could deny slaveowners the right to hold slaves inside the state. 41

Shaw’s opinion took issue with the arguments made by counsel for Thomas Aves, a team which included future Supreme Court justice Benjamin Curtis. Curtis had based his argument for comity on a loose reading of the Fugitive Slave Clause, arguing that the clause covered transient- as well as fugitive-slave cases, and that it exemplified a broader policy of suspending the municipal theory in the United States. To be sure, Curtis had not argued in favor of total recognition of the master-slave relationship, including the slaveowner’s property rights; instead, he had limited his definition of comity to the master’s right to transport and remove slaves from

41 ibid.
the state. Still, his broad construction of the Fugitive Slave Clause had contradicted the hardline approach championed by Story in his *Commentaries on the Conflicts of Law*, blurring the line between fugitive-slave cases (which involved federal law) and transient-slave cases (which did not).42

In contrast, Shaw endorsed the arguments made by counsel for Med, whose ranks included noted abolitionist attorney Ellis Gray Loring. Loring had drawn directly on the arguments of William Hargrave in the *Somerset* case to insist that comity would contradict public policy in Massachusetts. Massachusetts, he had argued, recognized slavery’s existence in Louisiana, but it treated transient slaves from Louisiana as *persons* rather than property, in keeping with the municipal theory. The state recognized the relations of master and servant, in which two persons enter into a contract regarding labor services; but it did not recognize master-slave relations, “in which the benefit is all on one side.” Loring had replied to Curtis’s loose reading of the Fugitive Slave Clause with a barrage of states’ rights arguments. The Constitution, he had argued, had no bearing on the present question. It recognized slavery’s existence in the states, “conferring certain rights, and prescribing certain duties, growing out of the existence of slavery,” but it did not guarantee slavery’s protection throughout the Union in all cases whatsoever, as Curtis seemed to imply. For Loring, nothing in the Constitution compelled the free states to grant comity to slaveowners. This was the position ultimately endorsed by Shaw.43

Shaw’s opinion had important implications for the antislavery argument against a general, extraterritorial right to slave property in the Union. It helps to view the opinion against the backdrop of the Washington, D.C. debates, to remember that Shaw’s decision appeared in

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42 *ibid.*
43 *ibid.*
August, 1836, at precisely the moment Calhounites in Congress were insisting on a constitutional guarantee for slave property in the nation’s capital. That debate involved slavery’s constitutional status in a federal jurisdiction, a geographic location which was “shared” by the several states, and in that sense it was qualitatively different from the transient issue in northern states like Massachusetts. But there was an important connection nonetheless, and it had to do with the Calhounites’ claim of a constitutional guarantee for slave property. That argument strongly suggested that federal protection rights to slave property extended into the North in the same way that it applied in Washington, D.C. and the federal territories. More than a few Calhounites had pointed to the Fugitive Slave Clause as evidence of an extraterritorial right to slave property as such, rather than a specific right to retrieve runaway laborers. Others had used the Privileges and Immunities Clause to claim a general right to slave property throughout the Union, unqualified by jurisdictional diversity.\textsuperscript{44}

In its own way, the denial of comity in Shaw’s opinion pushed back against the extraterritorial pretensions of the constitutional guarantee argument. By endorsing the aggressive brand of comity advocated by Justice Story in the \textit{Commentaries on the Conflicts of Law}, Shaw indirectly attacked the proslavery nationalism inherent in Calhoun’s state sovereignty theory. If Massachusetts could deny slaveowners the right to hold slaves within their limits, then it was difficult, if not impossible, for slaveowners to claim an extraterritorial right to slave property in the Union. Crucially, Shaw provided antislavery activists with a constitutional interpretation that separated slavery from the federal government, making it easier to deny the claim of a constitutional guarantee for slave property. His distinction between the Constitution as a treaty between the states and a foundation for a “national” government, together with his discussion of slavery in terms only of the treaty aspect, suggested that rights to slave property did

\textsuperscript{44} See Ch. 3.
not reach into the North. In other words, there was no overarching federal protection for slave
property outside the very limited case of runaway slaves; rights to slave property were not
among the privileges and immunities of American citizenship, and they could not be extrapolated
from the specific language in the Fugitive Slave Clause, which was a “compact” between the
states. Here, Shaw made the same point abolitionists were making in the Washington, D.C.
context – slavery had nothing to do with the federal government – points that Chase and Birney
would now deploy in defense of Matilda Lawrence’s claim to freedom.45

If the first part of Chase and Birney’s preparation involved precedents for denying an
extraterritorial right to slave property, the second involved arguments against the
constitutionality of the Fugitive Slave Law. Here, they turned to Birney’s editorials in the
Philanthropist, many of which took issue with the Calhounites’ loose reading of the Fugitive
Slave Clause as evidence of a general right to slave property. The clause, Birney had written in
one of those essays, was a legal “a legal guaranty, against a certain kind of legislation in the free
states,” not a grant of power to Congress, and not a general guarantee for slave property as
such.46 Birney’s reading of the Fugitive Slave Law reflected an antislavery tradition from the
early republic, one that grew out of the experience of northern freedom suits. In particular, they
reflected arguments from two earlier challenges to the law: Wright v. Deacon (1819), which had
taken place in Pennsylvania’s Supreme Court; and later the back-to-back cases known as Jack v.
Martin (1834 and 1835, respectively), which had occurred in New York’s Supreme Court. Both
cases involved the interpretation of the Fugitive Slave Clause – namely, whether the clause was a

45 On the Constitution as treaty, see David C. Hendrickson, Peace Pact: the Lost World of the American Founding
(Lawrence: University Press of Kansas, 2003); Peter Onuf and Nicholas Onuf, Federal Union, Modern World: the
46 Philanthropist, May 13, 1836.
grant of power to Congress or a mere prohibition on free-state interference with masters’ right of recaption. In both cases, counsel for the suspected runaway slaves had argued unsuccessfully that the 1793 Fugitive Slave Law was unconstitutional, on the grounds that the Fugitive Slave Clause did not give Congress the power to legislate on the subject of fugitive slaves and did not invest state magistrates with the power to issue certificates of removal. The power to determine the mode of recaption lay with the states, they had argued, not the federal government.  

When Jack v. Martin moved into New York’s Court of Errors on appeal in 1835, the New York abolitionist William Goodell popularized the antislavery reading of the Fugitive Slave Clause in the Emancipator. The Fugitive Slave Clause, Goodell argued, did not grant power to Congress on the issue of runaway slaves; it reserved the matter to the states, which could provide suspected fugitives with access to civil protections like habeas corpus and jury trial. Goodell early on saw the zero-sum nature of constitutional conflict over slavery. If Congress could “legislate over the heads of the free states,” he wrote, then “why may it not also over the slave states?” By 1837, Birney was long familiar with these arguments, and shared them with Chase during preparation for the case.

Birney also introduced Chase to Chancellor Reuben H. Walworth’s antislavery arguments in New York’s Court of Errors in the second Jack v. Martin case (1835). Walworth argued that the Fugitive Slave Law was unconstitutional, since the Fugitive Slave Clause “vests no power in the Federal Government, or any department or officer thereof, except the judicial power of declaring and enforcing the rights secured by the Constitution.” The clause simply barred the free states from interfering with a master’s right of recaption. Bishop argued that Section 4 of the Constitution, where the framers had placed the Fugitive Slave Clause, concerned

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47 For background on Wright v. Deacon, see Ch. 1. This argument was dismissed by Pennsylvania Chief Justice William Tilghman in Wright, who argued that the Fugitive Slave Clause had indeed granted power to Congress. Jack v. Martin is in 12 Wend. 311 (New York Supreme Court of Judicature, 1834).
relations between the states only. Bishop’s opinion – in particular, his emphasis on reading the Constitution in light of the egalitarian principles of the Declaration of Independence – came in response to the arguments of counsel for the slaveowner, who had claimed that the Fugitive Slave Clause guaranteed the protection of slave property throughout in the Union, even in a free state like New York, since title to slave property was based, not on local statutes, but on common law usage. “The Constitution extends its protection to all slave property, without reference to the residence of the owner,” wrote one of the lawyers for the slaveowner, adding that it was “generally deemed good policy to afford encouragement and protection to the investment of capital by nonresidents.” Bishop’s opinion rejected these claims altogether.48 Chase and Birney would build on this tradition in their effort to save Matilda Lawrence from the clutches of Lawrence Larkin and his agents.

*In re Matilda* (1837)

*In re Matilda* took place in the Hamilton County Court of Common Pleas, where Judge David K. Este presided. Chase began his brief by acknowledging the tensions which the case excited in the city. Many of Cincinnati’s leading citizens took a “personal interest” in the case, “as if their own rights of property were in peril.” He then tried to establish some distance between the case and the broader abolitionist movement, emphasizing his own commitment to positive law – that “far less perfect law... written in the books and statutes of fallible men.” The issue was not slavery per se but whether Matilda had been lawfully “restrained of her liberty.”49

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48 14 Wend. 507 (Court for the Correct of Errors, 1835).
Yet, even with this strategic move, Chase made it clear that he read positive law through the prism of natural law. The first thing he did was apply the municipal theory to Ohio and the federal system more generally. The right to “property in man,” he argued, invoking Somerset, was not “natural” or “universal” right; it was a “naked legal right” based in local, positive law, one that “vanishes” the moment a slave entered a free jurisdiction. Thanks to Article VI of the Northwest Ordinance, which banned slavery from the Northwest Territory and invested the freedom principle in the constitutions of the states carved out from that territory, Ohio did not recognize the relation of master and slave. Slavery, Chase said, was “positively and forever interdicted” in Ohio.50

For these reasons, as long as Matilda Lawrence remained in Ohio, she was “legally free; legally restored to her natural right.” Was there a single person in Ohio who would defend the claim that Lawrence was “a mere article of property, the title to which is founded in natural right, and is recognized by the law of nations, and is protected by the positive law of all states, and as bound to her owner by the same permanent ties which connect him with his horse or his ox”? If so, Chase argued, the “constitution of Ohio frowns upon him,” and “the soil of Ohio is dishonored by his tread.” Chase acknowledged the argument that Ohio had created a de facto recognition of property rights in human beings through its “black laws,” which had been passed over the years to help enforce and expedite fugitive-slave recaptures. In his view, those laws had not changed the fundamental presumption of freedom built into Ohio’s constitution. They treated runaways as “escaping negroes and mulattos – not as slaves, but as persons obliged to service.” The moment a slave entered Ohio, the property right of the master disappeared, and the legal status of the slave shifted from “property” to “servitude,” a status which presumed self-ownership and a basic equality between “master” and “servant.” Here, Chase elaborated on the

50 ibid. See also Ernst, “Legal Positivism, Abolitionist Litigation.”
underlying premise of Mansfield’s *Somerset* opinion – that slavery in free jurisdictions was a servant status, not a property status.\(^{51}\)

Chase then moved to a broader attack on the Fugitive Slave Law. First, he argued that the law violated the ban on slavery in Article VI of the Northwest Ordinance, whose fugitive provision concerned breach of contract by *servants* and applied only to absconders from the *original* states, not newer states like Kentucky or Missouri. Next, he argued that the Fugitive Slave Law violated the Constitution as well as the sovereignty of free states like Ohio. The Fugitive Slave Law, he argued, was a “palpable violation of state rights.” Congress should never have legislated on the subject of runaway slaves, for slavery had nothing to do with the federal government. By the terms of the Tenth Amendment’s Enumerated Powers clause, all power over slavery had been reserved to the states; the Fugitive Slave Clause was a compact between the states, not a grant of power to Congress. “The constitution, (and in this respect the act that follows it), contains no recognition whatever, of any right of property in man. It neither affirms, nor disaffirms the existence, possible or actual, of such property. It leaves the whole matter of property in human beings, precisely where the articles of confederation left it, with the states.” The language in the clause referred to the “natural” and “universal” relationship of master and servant, a relation grounded in common law. It had “nothing whatever, to do with the relation of owner and property.”\(^{52}\)

\(^{51}\) *ibid.*, pp. 7-9, 34-35. According to William Wiecek, Chase developed a “workmanlike construction of the role of state courts and the writ of habeas corpus as guarantors of individual liberty.” Wiecek, *Antislavery Constitutionalism*, p. 192. First, he questioned the validity of the warrant for Matilda’s arrest, arguing that the language in the warrant strayed from that used in the Fugitive Slave Law – for one thing, it did not specify whether Matilda was a fugitive or a transient – and was therefore insufficient for Matilda’s arrest. As written, the warrant amounted to an “extra-judicial” assault on habeas corpus, “one of the surest safeguards of personal liberty.” It was the court’s duty to “ scrutinize the facts in light of the state’s presumption of freedom; it could not conjecture on matters of such great import. *Speech of Salmon P. Chase*, pp. 10-15. Quotes from pp. 10, 13, 14.

\(^{52}\) *ibid.*, pp. 15, 35.
Here, Chase elaborated on Justice Shaw’s strict construction of the Fugitive Slave Clause in *Aves*, setting the clause against the backdrop of the Tenth Amendment’s Enumerated Powers Clause. The Fugitive Slave Clause, he argued, belonged to a section of the Constitution dealing with interstate matters, and in this sense, it merely prohibited the free states from interfering with fugitive recaptures; it did not grant power to Congress. If the clause conferred power to anyone, it was to slaveowners and their agents in their capacity as private officers in the common-law tradition, not state officers. Chase conceded that, under the terms of the Fugitive Slave Clause, a slaveowner could pursue an alleged runaway into a free state and bring him before a judge or magistrate, who would then examine the claim and grant a certificate for rendition. But all the certificate did was protect the claimant from charges of unlawful arrest and removal; it did not give state officers power to capture, imprison, or remove persons claimed as fugitive slaves. That power was invested in the master and his agents, who alone were responsible for arresting and maintaining custody of the runaway until a certificate of removal could be acquired. Chase then made explicit what Shaw’s opinion had only implied – that the Fugitive Slave Clause had “nothing to do with the creation of a form of government,” that it was, “in the strictest sense, a clause of compact.” “The parties to the agreement are the states,” Chase argued. “The general government is not a party to it, nor affected by it... In this view of the national constitution, I am fully sustained by the high authority of chief justice Shaw of Massachusetts.”

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53 *ibid.*, pp. 18-21. Chase’s articulation of that theory is worth quoting in full: “The leading object of the framers of our federal constitution was to create a national government, and confer upon it adequate powers. A secondary object was to adjust and settle certain matters of right and duty, between the states and between the citizens of different states, by permanent stipulations having the force and effect of a treaty. Both objects were happily accomplished. The constitution establishes a form of government, declares its principles, defines its sphere, and confers its powers. It creates the artificial being, denominated 'the government,' and breathes into it the breath of life, and imparts to each branch and member, the necessary energies and faculties. It also establishes certain articles of compact or agreement between the states. It prescribes certain duties to be performed by each state and its citizens, towards every other state and its citizens: and it confers certain rights upon each state and its citizens, and binds all the state to the recognition and enforcement of those rights. These different ends of the constitution – the creation of a government and the establishment of a compact, are entirely distinct in their nature. Either might be
Chase ended his brief by applying to Ohio the same reading of the Due Process Clause that abolitionists were applying to the Washington, D.C. context. The Fugitive Slave Law, he argued, violated the spirit as well as the letter of the Due Process Clause by giving Congress the power to overrun civil procedure in the states. “Who would be safe under such a constitution? How long would society hold together, if the national government had power to void personal liberties?” The negation of due process posed a significant threat not just to Ohio’s black population, but to all downtrodden communities, regardless of color.  

Under the law’s current implementation, Chase argued, whiteness was far less central than wealth and social standing in determining who would be exempt from kidnapping. Rich, educated, and well-connected citizens could always pull strings to secure due process, but there was “no security for the poor, the ignorant and the unfriended,” whose common-law protections had been “withdrawn… by an act of congress.” To bolster the point, Chase cited the recent case of one Mary Gilmore of Philadelphia, a poor Irish girl who had been abducted by slavecatchers who claimed to have mistaken her for a fugitive slave. Though couched in the language of Christian charity, Chase’s point was essentially a class argument about the inordinate power of slaveowners as a class – how a wealthy few had oriented federal policy to pursue their interests at the expense of the many, especially the urban poor.  

In his closing remarks, Chase’s returned to the theme of natural law. Since Matilda’s detention violated Ohio’s constitution, the case could be argued entirely on positive-law grounds, attained independently of the other. If all the clauses of compact in the constitution, establishing a form of government, were blotted from the constitution, the clauses of compact might still remain in full force, as articles of agreement among the states. The clauses of compact confer no powers on the government: and the powers of government cannot be exerted, except in virtue of express provisions, to enforce the matters of compact.” p. 18.  

54 *ibid.*, pp. 23-25. By violated Art. 2, Sec. 2, which gave power to appoint judicial officers to the President. The law also violated “appointing thousands of federal officers at once,” the law the Fourth Amendment’s prohibition on unreasonable search and seizures. pp. 25-26.  

55 *ibid.*, pp. 31-32. See Ashworth, *Slavery, Capitalism and Politics*. My point about class is not meant to diminish the role of race and racism in antebellum America. It is only to emphasize that, for Chase, the problem of slavery was not about race *per se*, but about race’s relationship to power and class relations.
and thus there was no pressing need to invoke natural-law principles. But he reminded the court that positive law must be measured against the universal dictates of natural law, “the constitution of human nature and the code of heaven,” the “original, paramount truth” that had been invested into both the Declaration of Independence and the U.S. Constitution. Free-state judges and juries must always favor freedom by reading statutes, clauses and compacts in light of natural law. For that reason, Chase concluded, Matilda Lawrence should be given the benefit of the doubt. 56

Unfortunately for Matilda Lawrence, Chase’s arguments failed to sway Judge Este, who ignored Chase’s attack on the Fugitive Slave Law and ruled in favor of Larkin. Moments after the decision, Lawrence was surrounded by three brawny men, all Riley’s agents, who whisked her out of the courtroom and into a waiting carriage. The door shut, the driver whipped the reins, and off went the carriage to the city wharfs, where Lawrence was hustled aboard a cross-river ferry to Covington, Kentucky. Later that night, her captors dragged her onto a New Orleans-bound steamship, which would soon deliver her into the slave markets of the South’s largest city. In this way, Matilda Lawrence entered the “social death” of slavery, another “commodity” on the southern auction block. 57

Despite the harrowing loss of freedom, Chase had done much to advance antislavery constitutionalism. He had marshalled an array of antislavery arguments and formed them into a cogent defense of the northern freedom. To be sure, Chase’s arguments ignored the prevailing interpretation of the Fugitive Slave Law, which emphasized the spirit of the Fugitive Slave Clause far more than it did the actual text. But he showed that it was feasible to read the Constitution as a fundamentally antislavery document with several concessions to slavery in the states where it existed. It was perhaps in recognition of this breakthrough that Judge Este

56 ibid., p. 37.
57 Birney, James G. Birney, p. 264-5. On slavery as “social death,” see Patterson, Slavery and Social Death.
ordered the court reporter to publish Chase’s arguments, a rare move which testified to the growing interest in antislavery constitutionalism. Meanwhile, Birney and his successor at the *Philanthropist*, Gamaliel Bailey, quickly began to publicize Chase’s speech. Bailey promoted the sale of a forty-page pamphlet containing Chase’s speech, so “that our readers may have a fair view of both sides, and be enabled to appreciate properly, the arguments, the manner and spirit with which we are met by the ablest of those who differ with us on the great constitutional questions growing out of it.”

Riding the momentum, Birney fired off editorials attacking the black laws and the spirit of “national comity” that undergirded them. It was nothing more than vile subservience to slaveowners, Birney argued. The “fair translation of all this is, that when slave-holders come among us with their retinue of slaves, we should feel so honored by their presence, that we must submissively displace our institutions, in order, that, for the time being, they may substitute theirs. When they enter our houses we must be willing to abolish all the rules we have established for the government of our household, that they may set up such as please them. But will any lawyer – will any man of the plainest common sense contend for this? It cannot be.”

National comity mocked public policy in Ohio, not to mention the state’s sovereignty. Ohio’s constitution “forbids the presumption that any one is a slave within its limits. To presume that any one here is a slave, white or black, is denying the power of the constitution. No legislative enactments can raise such a presumption, -- for the plain reason, that they would contradict, and, if admitted, nullify the constitution.”

A few days after Birney’s editorial was published, Charles Hammond, editor of the Cincinnati *Gazette* and erstwhile ally to Salmon Chase, challenged Birney’s argument that the

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59 Cincinnati *Gazette*, Mar. 21, 1837.
Constitution *recognized* slavery in the states but did not *guarantee* its protection throughout the Union. On the contrary, Hammond wrote, the Constitution “distinctly recognized” the condition of slavery, which “implies absolute property of one man in the person of another.” In this way, the Constitution “guaranties the protection of that species of property as fully as any other.” The northern states were “bound to respect this guaranty,” not merely out of obligation, but out of deep reverence for the Union. The northern states, Hammond argued, had “moral duty... to conform their municipal regulations, upon this subject,” to the Constitution. This was precisely what Ohio’s black laws did: they expedited fugitive-slave recaptures in the name of Union.

Birney, on the other hand, substituted his “private judgment” for the common good and consequently violated both “private right and public law.” For Hammond, the moral imperatives of Union justified a loose reading of the Fugitive Slave Clause which extrapolated from the text a broad constitutional guarantee for slave property – what he would have called “national comity.”

Birney responded in an editorial published on March 23. The northern states, he argued, were completely independent of the laws of southern states, as was evidenced by Justice Shaw’s opinion in *Commonwealth v. Aves*. The only exception to this rule was the Fugitive Slave Clause, which did not did not involve property relations and, in any event, did not apply to Matilda’s case, since she had been a transient when she parted from Larkin. Transient slaves in Ohio were free, Birney argued, in the sense that they acquired self-ownership (though not necessarily the “possession of civil privileges”). The black laws violated Ohio’s constitution by replacing the state’s presumption of freedom with the southern presumption of slavery based on skin color. The policy of national comity – recognizing and enforcing the right to “property in man” in Ohio – was tantamount to a repudiation of the Ohio constitution and the Northwest

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60 *ibid.*
Ordinance. It was a betrayal of the Revolutionary promise of expanding and protecting personal liberty for “all men.”

A few weeks later, Bailey reprinted in the *Philanthropist* an exchange between Hammond and “A Lawyer” (possibly Chase himself) which had taken place in the pages of the Cincinnati *Gazette*. The two writers parsed Chase’s arguments in *Birney v. Ohio*, especially his attack on the 1804 Black Law, and disagreed about his claim that slavery was a servant status in Ohio, not a property status. “A Lawyer” took issue with Hammond’s coverage of the arguments. Chase did not say, as Hammond had reported, that masters could not hold slaves in Ohio; instead, he had argued that masters could not hold slaves as property. The crucial point, “A Lawyer” argued, was not that “proof could be admitted in Ohio that one individual in her limits, was a slave; but that no proof could be admitted in Ohio to establish the fact that one individual was the property of another individual.” Hammond called this an exercise in hair-splitting, a “caviling piece of hypercriticism.” Yet “A Lawyer” did not budge. The anonymous author insisted that there was “broad and palpable” difference between a personal relation and a property relation, a distinction which separated servants from slaves.

*Ohio v. Birney (1837)*

Following *In re Matilda*, Larkin sued Birney for violating Ohio’s 1804 Black Law, which made it a crime to “harbor or secrete any black or mulatto person, being the property of any person whatever.” The day of the trial, Birney spoke for three hours in his defense but was found guilty. He appealed the decision and asked Chase to defend him, hoping that a new trial

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61 ibid., Mar. 23, 1837.
would give them another platform to air their constitutional arguments and undermine Ohio’s black laws. This time, they had more time to prepare their arguments.  

Chase appealed to the Ohio Supreme Court for a reversal of the lower court’s ruling. His first line of attack was to prove that the 1804 Black Law violated Ohio’s constitution. He began by emphasizing the presumption of freedom in Ohio. The charge against Birney rested on the assumption that slaves in Ohio were the property of their masters, he argued. In both the indictment and the 1804 Black Law, runaway slaves were referred to as the “property” of their masters. Yet this was a mistake. Slavery in Ohio was a servant status, not a property status. Ohio’s constitution – like the ordinance on which it was based – did not recognize property relations between human beings. The “relation of owner and property, as existing between person and person, has, or can have, no existence in this state,” Chase argued.

Here, once again, Chase applied the municipal theory to the federal system, tying Ohio to the presumption of freedom at the national level. Ohio’s free constitution, he said, flowed from the principles invested in the Northwest Ordinance and the U.S. Constitution, both of which treated slavery as a local institution. Wherever slavery exists, it is the “creature of positive institutions. It has no support in natural right; on the contrary, it is in direct derogation of natural right. Before slavery can be, natural right must be overborne by force, custom, or legislation.” Because no such laws existed in Ohio, it is “impossible, in Ohio, to commit the offense of harboring, or secreting a person being the property of another person.” For this reason, the 1804 black law was unconstitutional.

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63 The text of the 1804 is in James G. Birney v. The State of Ohio, 8 OHIO 230. For background on James G. Birney v. The State of Ohio (1837), see Wiecek, Antislavery Constitutionalism, p. 193; Niven, Chase, pp. 56-57. See also Middleton, Antislavery Activities of Chase.
64 James G. Birney v. The State of Ohio, 8 OHIO 230.
65 Ibid.
Not even the Fugitive Slave Clause of the Constitution recognized slaves as property, Chase argued, so why did Ohio’s black laws – which were meant to execute the latter – do so?

The Fugitive Slave Clause was taken almost verbatim from the fugitive-slave provision in Article VI of the Northwest Ordinance. Neither document recognized slaves as property. In fact, Chase argued, the Constitution was cautiously framed, so as to avoid all recognition of the condition of slavery, or the relation of ownership between man and man. It left the several states free to create, or continue, or abolish such relations between individuals within their several territories as they pleased, just as they had been under the articles of confederation. It required each state to deliver up servants escaping into its territory from other states, to their lawful masters – to deliver up as servants, not as slaves – far less as property. It bound each state to recognize and protect... the relation of master and servant, as established by the laws of sister states, but no other additional relation. It left the whole responsibility of all other relations upon the states which might establish or continue them.66

The language in the Fugitive Slave Clause – “persons held to service” – encompassed runaway servants and apprentices as well as slaves, and corresponded with the founders’ efforts to keep property rights in slaves out of the Constitution. In fact, the Constitution left reserved to the states the power to define what could be property. The southern states recognized property in human beings, while Ohio did not; yet Ohio’s black laws subordinated the presumption of freedom to the rights of slaveowners by treating slaves as property. All of this was as unnecessary as it was unconstitutional, Chase argued: the Fugitive Slave Clause was sufficient to address the fugitive-slave problem, “without any such degradation of the non-slaveholding states.”67

In the end, Chase drew on Justice Shaw’s reasoning in Aves to argue that, because Matilda had been a transient slave, her case was a matter of comity which had no relation to the 1804 black law. Birney should not have been penalized for hiring a transient slave in a free state.

66 ibid.
67 ibid.
Justice Reuben Wood, however, ignored this line of reasoning and overturned Birney’s conviction on the grounds that he was not aware he was breaking the law. Wood ignored all of Chase’s constitutional arguments, but he did rule that color could not be used as a basis for presumption in Ohio – a signal victory for Chase and Birney, whose saw Wood’s remarks as the first step toward overturning the black laws and creating bulwarks against the Fugitive Slave Law.  

The case of Matilda Lawrence exemplified the conflict over slavery in the free states, a fight that centered on the property rights of slaveowners. In *In re Matilda* and *Ohio v. Birney*, Chase developed a defense of northern freedom based on the states’ rights tradition of strict construction and limited powers. He argued that the Fugitive Slave Law violated Ohio’s constitution by subordinating due process and the presumption of freedom to slaveowners’ property rights and the South’s presumption of slavery. Like abolitionists in the Washington, D.C. debate, he emphasized the Fifth Amendment’s Due Process Clause and the Tenth Amendment’s Enumerated Powers Clause, insisting that the Constitution gave Congress no power to enact a law that eviscerated due process and personal liberty in the free states. The states’ rights orientation of Chase’s arguments reflected the nature of antislavery constitutionalism at the state level, where the emphasis was on denying Congress’s power to extend the legal presumption of slavery into the North.  

But Chase’s arguments did more than defend Ohio’s sovereignty. They also put forward a vision of the federal government as an antislavery force, a separate and supreme “national” government with a moral obligation to presume freedom and discourage slavery. Chase’s antislavery nationalism dovetailed with that of abolitionists in the Washington, D.C. context, whose opposition to slavery in the capital rested on the premise that Congress had no power to

\[68\] *ibid.*
uphold slavery in federal jurisdictions. Because Chase’s arguments applied to the state level, they had a distinctly states’ rights cast; yet, at a foundational level, they were the same arguments that abolitionists were making in the Washington, D.C. debate – the federal government should have nothing to do with slavery. This was the cardinal principle of antislavery constitutionalism, and it would become the indispensable pillar of the denationalization program later on.

Chase’s constitutional arguments in Ohio must not be viewed in isolation. They were part of a broader effort to beat back proslavery nationalism, constitutionally as well as politically. In this sense, Chase’s arguments belonged to a growing conflict over the balance of power in the federal government. In the Matilda cases of 1837, Chase reframed the slavery conflict as at bottom a class conflict, a contest over political power that pitted ordinary Americans (especially the poor) against an increasingly assertive slaveowning class whose concern for their property rights led them to nullify civil procedure in the North using federal power. Perhaps more than the abolitionists in the Washington, D.C. debate, Chase grasped the extent to which the slavery conflict was a class conflict regarding control of the federal government. His emphasis on strict construction and limited powers reflected the broader effort to limit slaveowner power, to restore balance and order and guarantee the presumption of freedom that was so vital to the capitalist system of the North. In defending the legal and civic order of the free states, a regime based on the right to self-ownership and a presumption of freedom, antislavery lawyers like Chase created the foundations for an antislavery legal regime, a bulwark against a growing tide of nationalized slavery.

**Implementing the Abolitionists’ Agenda in the North**

*Denying Comity to Slaveowners*
Between 1837 and 1842, several northern states enacted policies which set the stage for an antislavery legal regime in the North, a bulwark which implemented key parts of the abolitionists’ constitutional program. Together, Shaw’s *Aves* opinion and Chase’s Matilda brief formed something of a one-two punch against the creeping nationalization of slavery in the North. The roots of the resistance lay in the myriad legal precedents and anti-kidnapping statutes of the free states, but if there was one text that shaped the North’s post-1837 legal regime, it was Joseph Story’s *Commentaries on the Conflicts of Law* (1834). The passage on slavery in that book pointed antislavery jurists to an arena of law that was independent of the Constitution, where vigorous and unqualified antislavery action was entirely possible. Not only did it restore the role of the municipal theory in American law, it also infused it with the comity aggressive doctrines of Huber. Justice Lemuel Shaw’s decision in *Commonwealth v. Aves* (1836) made Story’s aggressive brand of comity part of Massachusetts law, and Shaw’s influence on national jurisprudence – he was, along with Marshall, Story, James Kent, and Henry Wheaton, one of great expositors of an emerging body of law that was more distinctly “American” and commercial than the jurisprudence of the eighteenth century – virtually guaranteed that Story’s ideas would be endorsed by other northern courts. Shaw’s denial of comity to slaveowners in Massachusetts affirmed the accuracy of antislavery constitutionalism and pointed the way toward a state-level policy of containing slavery to the South.

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Legal historian Lawrence Friedman wrote of these jurists: “Their spheres were less floodlit, of course, than the great federal courts; their work had less national significance. Some were excellent stylists; all wrote in what Karl Llewellyn has called the Grand Style: their opinions were often little treatises, moving from elegant premise to elaborate conclusion, ranging far and wide over the subject matter boldly defined. They were, at their best, far-sighted men, impatient with narrow legal logic. Marshall, Gibson, and Shaw could write for pages without citing a shred of authority. They did not choose to base their decisions on precedent alone; law had to be chiseled out of basic principle; the traditions of the past were merely evidence of principle, and rebuttable. Their grasp of the spirit of the law was tempered by what they understood to the needs of a living society. Many were conservative men, passionately attached to tradition; but they honored tradition, not for its own sake, but for the values that inhered it. They became famous not for adherence to the past, but as interpreters of living law. … The great judges were
Connecticut was the first state after Massachusetts to deny comity to slaveowners. In April, 1837, constituents of Hartford’s free black community prompted a freedom suit which tested the scope of slaveowners’ privileges and immunities in their state. The case centered on one Nancy Jackson, a slave from Georgia whose master, the Reverend Major James S. Bullock, a Presbyterian elder from Savannah, had brought her to Hartford in 1835. For two years, Bullock kept Jackson as his slaves even though he did not establish a *domicil* in Connecticut – a situation which technically violated the terms of Connecticut’s weakly enforced “stay law.” When black residents in the city learned of Jackson’s condition and her desire to be free, they reached out to a local white abolitionist named Edward Royall Tyler, who had ties to the AASS office in New York. Working through secretive channels, they told him a story which was at once singular and familiar: Jackson had asked Bullock’s wife for her freedom papers but was rebuffed on the grounds that Jackson was incapable of supporting herself and would be sent back to Georgia straightaway, to purge her of this “foolish notion” of freedom. Jackson, the informers told Tyler, became despondent at the thought of going south, and was now considering using legal means to win her freedom.⁷⁰

Almost immediately, Tyler contacted his friends at the AASS headquarters in New York. One of the first to respond was Theodore Dwight Weld, who traveled to Hartford by stagecoach to assist Nancy Jackson and “get a decision from the Supreme Court of Connecticut on the same point settled by Chief Justice Shaw's decision in the case of the slave held last August.” If Connecticut followed Massachusetts in denying comity, it would send a strong message to

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⁷⁰ *Philanthropist*, July 14, 1837. For background on the Nancy Jackson case, see Finkelman, *Imperfect Union*, pp. 127-130.
Working through a mutual acquaintance, a black woman who convinced Jackson that Weld and Tyler were abolitionists rather than Bullock’s agents, Weld and Tyler arranged to meet with Jackson apart from her owners. They asked her if she was, advising her on the emotional and psychological dimensions of breaking from her owners. Jackson replied in the affirmative, swearing that she would rather die than return to Georgia. Tyler then laid out the available options: Jackson could either run away or pursue her freedom through the courts. Terrified by prospect of months spent on the road to an uncertain freedom, the Damoclean sword of recapture hanging over her head, Jackson opted for the legal alternative; Tyler promptly brought a writ of habeas corpus on her behalf in the court of Connecticut Chief Justice Scott Williams. A few days later, Weld, Tyler and their acquaintance set up another meeting with Jackson outside the AASS branch in Hartford (Bullock forbade Jackson from entering any house in Hartford without his permission), this time to steel her for the barrage of insults and appeals from her owner. As the trial approached, Jackson seemed to Tyler like “a person nearly paralyzed with fear and despair,” yet she remained adamant in seeing her case through.\(^7\)

The case generated ever more attention in abolitionist circles. James Birney soon joined Weld in Hartford and joined the effort to replicate Chief Justice Shaw’s \textit{Aves} ruling. Quietly, Weld helped Jackson’s lawyers build their case against Bullock. In a letter to Elizur Wright, Jr., secretary of the AASS headquarters in New York, he requested a list of antislavery precedents in the arena of interstate comity, including Edward G. Loring’s arguments in \textit{Commonwealth v. Aves} and Chancellor Walworth’s opinion in \textit{Jack v. Martin}, the latter of which held, “perhaps \textit{informally}, that the act of the New York legislature authorizing slaveholders to bring their slaves

\(^{71}\) Weld to Tappan, June 8, 1837, in \textit{Weld-Grimke Letters}, vol. 1, pp. 398, 399.
\(^{72}\) \textit{Philanthropist}, July 14, 1837.
in the state and keep them there 9 months is a violation of the Constitution of the state [of New York].”

The trial began on June 2, 1837. When Chief Justice Williams began the proceedings by asking Jackson if she had been compelled by local abolitionists to seek her freedom, Jackson shook her head no, “resolutely repl[y]ing that she wished to be free.” Bullock’s lawyers then took the floor and argued in favor of what Benjamin Curtis in Aves had called “national comity,” claiming that Jackson was property under Georgia law and should be recognized as such in Connecticut. Bullock’s residency in Connecticut was only temporary, they argued, and he should not be denied his “privileges and immunities” as a citizen of a southern state. Thanks in large part to Weld, Jackson’s lawyers responded with the same line of reasoning Loring had applied in Massachusetts: slaves were not property in Connecticut and therefore could not be removed from the state by force. Chief Justice Williams handed down his opinion on June 17. Using the same strict construction rationale introduced by Justice Shaw in Aves, he ruled that Bullock had no right to hold Jackson as a slave in Connecticut. Nancy Jackson was a free woman.

In one fell swoop, Connecticut joined Massachusetts as the second northern state to reject comity for slaveowners, a development which buttressed the claim that property rights in human beings were not among the “privileges and immunities” of American citizenship. Nancy Jackson was “now free,” Tyler wrote in the Emancipator, “and so is every other imported slave in Connecticut.” Henceforth, he continued, slaveowners traveling through Connecticut would have to “submit to the good old honest practice of paying wages to their servants.” Here was “a practical development of our principles in contrast with the principles of our opponents.”

73 Weld to Wright, Weld-Grimke Letters, vol. 1, pp. 399-400. See also Finkelman, Imperfect Union, pp. 129-130.
74 Philanthropist, July 14, 1837.
headquarters in New York circulated the opinion in the abolitionist press, making the most of two back-to-back antislavery developments in the Northeast. If Henry Stanton was right that Americans were a “precedent-fearing people,” then developments like the Nancy Jackson gave were crucial to bolstering the legitimacy of antislavery in the North.  

Meanwhile, a lengthy and vituperative standoff between New York and Virginia over the extradition of three men charged with aiding a fugitive slave heightened tensions between the sections, and made it clear that an aggressive antislavery legal regime was emerging in the northern states. The episode spanned two years, from 1839 into 1840, roughly the same time period as the Amistad affair. In July, 1839, authorities in Norfolk, Virginia charged three black New York sailors with helping a fugitive escape to the North via the schooner Robert Center. Virginian officers were dispatched to New York City, where they boarded the schooner and seized the suspected fugitive, putting him on a ship bound for Norfolk. They arrested the three black sailors and jailed them in New York using a warrant issued in Virginia. The Recorder of the state of New York, however, discharged the sailors on a writ of habeas corpus, arguing that they had not knowingly harbored the accused runaway; more importantly, the judge found that their detainment violated due process in New York. Perturbed by what seemed like a lack of civility, Virginia governor David Campell, a Democrat, issued a request to extradite the sailors from New York to Virginia for trial. Hopkins made it clear that aiding a fugitive slave was a serious offense in Virginia, as it threatened property values and undermined the rights of slaveowners.  

New York’s governor, William Seward, the protégé of New York political mastermind Thurlow Weed and a leader of the emerging “New School” Whigs, rejected Campbell’s

75 ibid.  
extradition request out of hand. In a letter to his petulant Virginia counterpart, Seward explained that his chief duty as governor was to defend the “civil liberty” of his constituents. Drawing on the antislavery rendering of the Constitution and the law of nations, he insisted that slavery was not a “crime” recognized by the “universal laws of all civilized countries.” It was certainly not a crime in New York, where there were now laws admitting that “one man can be the property of another, or that one many can be stolen from another.” As far as slavery was concerned, extradition was a matter of interstate comity, not positive obligation under the Constitution. The extradition clause of the Constitution only pertained to acts deemed “treasonable, felonious or criminal, by the laws of [the extraditing] State”; aiding a fugitive slave was “not a felony nor a crime within the meaning of the Constitution,” especially since the common law – the legal basis for the extradition clause – did not recognize slavery. The Extradition Clause, Seward argued, involved comity between the states, and thus it should construed like international treaties, strictly. The principle of extradition, he explained, “was to recognize and establish this principle in the mutual relations of the States, as independent, equal and sovereign communities.”

For these reasons, Seward argued, Virginia’s request for extradition must be denied.

Virginia, however, kept the pressure on. In 1840, the state’s new governor, Thomas Walker Gilmer, a Whig, wrote Seward a testy letter which demanded extradition of the three sailors. Virginia respected New York’s decision to abolish slavery, Gilmer wrote, but New York was not entirely “free” from slavery. It was limited by the provisions in the Fugitive Slave Clause, which required New York to hand over any citizens found aiding runaway slaves from the South. Here, Gilmer made the classic constitutional move of proslavery politicians in the late 1840s.

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77 This was precisely the same reasoning that antislavery lawyers were using to attack the proslavery argument for “national comity” under the Fugitive Slave Law. *ibid.*, pp. 217-218. It is unclear what Seward’s position on the Fugitive Slave Law was at this point. As a matter of interstate comity, the controversy involved neither the Fugitive Slave Clause nor the 1793 law.
thirties: he extrapolated from the Fugitive Slave Clause a kind of “national comity” derived from an assumed general right to slave property in the Union. Seward and other New Yorkers read Gilmer letter in light of the broader constitutional controversy, and took umbrage at the assumption that slaveowner property rights in Virginia took precedence over the civil liberties of New York citizens. Seward, for one, reiterated his antislavery stance: “I cannot believe that a being of human substance, form, and image—endowed with the faculties, propensities, and passions common to our race, and having the same ultimate destiny, can, by the force of any human constitution or laws, be converted into a chattel or a thing,” he wrote. It is impossible to steal that “which is not and cannot be property.” Echoing Justices Story and Shaw, he argued that northern states were not obliged to grant comity to slaveowners—certainly not in the present case.

Thereafter, Seward left the matter to the state legislature, which, in the same spirit of antislavery dissonance, passed the state’s first personal liberty law in 1840. The law further rankled authorities in Virginia, who claimed that disunion would follow from the North’s denial of comity. For the rest of Seward’s term in office, Richmond pursued a vengeful policy of searching New York ships upon their arrival in Virginia ports. Nevertheless, in New York and the North more generally, Seward’s reputation as an antislavery stalwart and a champion of civil rights grew with each southern threat of retaliation and disunion. In defending the civil rights of New York’s black citizens and guaranteeing due process for suspected runaway slaves, Seward used his power in Albany to make New York a part of the emerging antislavery bulwark.

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80 Ibid.
Limiting Slaveowner Claims under the Fugitive Slave Law

Meanwhile, several northern states took steps to restructure the implementation of the Fugitive Slave Law in their limits, for instance, by giving suspected runaways access to habeas corpus and jury trial, measures which limited the scope of slaveowner property rights by aligning the rendition process with the legal presumption of freedom in the North. The main purpose behind these so-called “personal liberty laws” was to protect black citizens against kidnapping, but they also reflected the growing northern resentment about how the law was being implemented, in particular the way it extended the South’s presumption of slavery into the free states.81

In Massachusetts in 1837, a broad coalition of activists and politicians emerged in opposition to the state legislature’s repeal of the writ de homine replegiando. The legislature eliminated the writ in 1836 on the grounds that it was outmoded and redundant – this was at the height of the so-called “codification” movement, which sought to replace the allegedly arcane and elitist common law with a Napoleonic-inspired system of written laws, or “codes” – but antislavery groups saw the repeal as part of the nationalization of slavery, a “hasty, and arbitrary process... dangerous to the liberty of all,” one of a piece with the Washington, D.C. debates. On January 20, 1837, the legislature convened a judiciary committee to consider the mountain of petitions demanding reinstatement of jury trial.82

The chairman of the committee was James C. Alvord, an -and-coming Whig attorney who would die prematurely in 1842, but not before establishing himself as a pioneering antislavery lawyer in New England. Alvord issued his report on the petitions in April, 1837 –

81 See Morris, Free Men All, pp. 107-129.
the same month Salmon Chase made his arguments in the Matilda case. The report began by recognizing Massachusetts’ positive obligations to slavery under the Constitution, including, most prominently, the Fugitive Slave Clause, which, in Alvord’s reading, simply barred the free states from interfering with slaveowners’ right of recaption.83 Beyond that first point, the Alvord report was a full-scale assault on the constitutionality of the Fugitive Slave Law, which, according to Alvord, rested on the false assumption that the Fugitive Slave Clause was a grant of power to Congress. It was not a grant of power, Alvord wrote, invoking the strict-construction reasoning of Justice Lemuel Shaw; it was a federal ban on northern-state interference with slaveowners’ right of recaption which left the actual process of recaption to slaveowners and their agents. Yet, in its current manifestation, the Fugitive Slave Law effectively overturned the legal presumption of freedom in the North and infringed the sovereignty of Massachusetts, voiding civil liberties as well as the due-process protections guaranteed by the Fourth and Fifth Amendments. But any honest reading of the Constitution would show that there is no “reference to slaves,” Alvord wrote; on the contrary, the Constitution “establishes the rights of citizens, who alone can take advantage of them.” Precisely because Massachusetts presumed freedom, jury trial was essential to testing the claims of slaveowners -- not, as slaveowners wanted, to merely determine the mode of recaption, a practice which would presume slavery.84

Later that month, the Massachusetts legislature adopted the recommendations in Alvord’s report and reinstated the writ de homine replegiando, making jury trial available to all persons in the states, even suspected runaways. This was the first of the so-called “personal liberty laws”

83 Alvord rejected the petitioners’ demand for a personal-liberty provision in the Fugitive Slave Law, not because he disagreed on principle, but because the Massachusetts legislature had no power to amend a federal law. The law was in derogation of public policy in Massachusetts, but the state was bound to recognize it under the terms of the Constitution. In this way, Alvord distanced himself more radical claims of Boston abolitionists, giving an air of relative legitimacy to his positive-law argument against the Fugitive Slave Law.

passed in the critical period 1836-42; alongside the *Aves* decision, it was a major endorsement of antislavery constitutionalism and a crucial factor in the rise of an antislavery legal regime in the North. A few weeks later, the highly respected *American Jurist and Law Magazine* published an Alvord-penned article entitled “Trial by Jury, in Question of a Personal Freedom,” which introduced the arguments in the committee report to a much broader audience in the Northeastern legal community. The publication of Alvord’s article, together with the legislature’s endorsement of his report, reflected the rising salience of antislavery constitutionalism in the circle of high law and politics in the North.85

Alvord’s report appeared the same month that Salmon Chase defended Matilda Lawrence in Ohio. The style of argumentation in the two cases – a heavy emphasis on positive law and strict-construction analysis – was remarkably similar, though it does not appear that Alvord had any direct contact with Chase. Both were up-and-coming state-level Whig lawyers versed in the neo-Federal reasoning of John Marshall’s Supreme Court. And they were not alone. In late 1837, the New York *Colored American* published the antislavery arguments of a young New York City lawyer, A.J. Pickering, who argued that due process for alleged fugitives was necessitated by the legal presumption of freedom in New York. Like Chase and Alvord, Pickering used the Tenth Amendment to argue that the Fugitive Slave Clause was not meant as a

85 *Report and Resolves on the Right of Petition, State of Massachusetts* (Boston: Commonwealth of Massachusetts, 1838); Alvord, “Trial by Jury, in Question of Personal Freedom,” *American Jurist and Law Magazine* 17 (1837), pp. 94-113. Alvord’s article included a brief history of the fugitive-slave controversy in the northern states since the founding era. In it, he emphasized the contentious of the issue, demonstrating that it was in no way a settled point, despite pronouncements to the contrary in Pennsylvania Chief Justice Bushrod Washington’s 1819 *Wright v. Deacon* opinion. Precedents in this matter were “few, conflicting, and in some respect unsatisfactory,” Alvord wrote. Massachusetts presumed that every man was “prima facie a freeman,” while New York led the way in challenging the Fugitive Slave Law, not just by aiding suspected runaways, but by questioned the law’s constitutionality in the two *Jack v. Martin* cases (1834 and 1835, respectively). Quotes from pp. 106, 111.
grant of power; in fact, he said, “the Constitution was as silent as the grave” when it came to slavery.  

It was not long before constitutional arguments of this sort began to drift from the courts to the state legislatures. In 1837, Pennsylvania state senator Francis James complained that the presumption of slavery in the Fugitive Slave Law undercut the sovereignty of his state and that the law should be read as strictly as possibly, always in favor of freedom. James emphasized the antislavery reading of the Fugitive Slave Clause, depicting it as a compact between the states which had nothing to do with the federal government. He also highlighted the antislavery interpretation of the Due Process Clause: in a case where a black man is seized as the property of a slaveowner, the Due Process Clause “comes directly to his aid,” he wrote, precisely because it privileged the natural right to personal liberty over that of private property.

Giving alleged runaways access to habeas corpus and jury trial provisions had always been a part of the abolitionist agenda. But by the end of 1837, abolitionists began to look at that project differently. If before the emphasis had been on limiting northern complicity in slavery, now the accent was on aggressively destabilizing the power of Border State slaveowners, whose

86 Philanthropist, Oct. 24, 1837. Despite the fact that they were both state-level Whig lawyers with antislavery inclinations and a deep commitment to New England legal culture, Chase and Alvord do not appear to have been in contact, nor is there any evidence that they read each other’s arguments. Like Leibniz and Newton, seventeenth-century contemporaries who developed the rudiments of calculus independently of one another, Chase and Alvord appear to have constructed their arguments simultaneously yet independently, both responding to the broader nationalization of slavery in the 1830s.

87 “The Right to Jury Trial,” in The Anti-Slavery Record (New York: Published for the American Anti-Slavery Society by R.G. Williams, 1837), vol. 3, pp. 5-6. Like Chase and Alvord, James framed the argument for racial equality in legal and constitutional terms, as a matter of due process and civil procedure. The Fugitive Slave Law, he argued, presumed slavery on the basis of black skin, contradicting the due-process protections against unreasonable seizure in the Fifth Amendment. “Now, sir, gentlemen must show either that persons who from the color of their skin, may become the object of this unceremonious seizure are not embraced within the meaning of ‘people,’ or they must prove that the seizure is not an unreasonable seizure, or they must admit that this part of the law at least is an infringement not only of the spirit but the letter of the constitution.” Without a jury trial provision, the Fugitive Slave Law created a situation in which a free man’s “destiny may hang upon the contents of a single ex-parte affidavit. Who ever heard of such a mockery of justice?” The law “sports thus with human liberty, and human rights.” James concluded his speech with an early articulation of what legal historians would later call procedural due process: insofar as the fugitive-slave issue brought into conflict two kinds of rights, the liberty of the claimed and the property of the claimaint, it was incumbent on northern courts to test the status of the accused as well as the legitimacy of the claim, always presuming and favoring freedom.

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property rights would necessarily be constricted by the legal processes written into the personal liberty laws, processes rooted in a presumption of freedom. Abolitionists, one activist declared, were “bound to rescue all the slaves we fairly can, by that means.”\textsuperscript{88} In a speech to an AASS convention in 1837, Elizur Wright drew on Alvord’s report to argue that the language in the Fugitive Slave Clause concerned common-law contracts and “ordinary debt,” not property relations as such: the clause did not require proof that the person claimed was the property of the claimant; instead, it stipulated that the claimant prove that the person being held by him was indebted to him for labor service lost. The language in the clause gave no indication that it recognized a property relation between master and slave. Yet under the prevailing construction of the clause in northern courts, Wright argued, a slaveowner can “claim his own magistrate” and remove alleged runaways without any test of the claim. For these reasons, Wright concluded, the Fugitive Slave Law should be repealed (or at the very least have its constitutionality tested by the Supreme Court), and other northern states should follow Massachusetts’ example and provide civil protections to blacks claimed as runaway slaves.\textsuperscript{89}

An antislavery legal regime emerged in the months and years after Massachusetts denied comity and guaranteed jury trial in fugitive-slave renditions. Between 1837 and 1840, New Jersey, Vermont and New York passed “personal liberty laws” which were ostensibly mean to test the legal status of blacks claimed as runaways, but which in fact made it very difficult for slaveowners to recover their slaves. In Ohio, which was until recently among the most proslavery of northern states, two signal rulings from the state supreme court evidenced a drastic shift in public opinion and a key tilt in the balance of power in the state.\textsuperscript{90}

\textsuperscript{88} \textit{ibid.}, p. 162.
\textsuperscript{90} Morris, \textit{Free Men All}, pp. 71-93.
Both rulings grew out of the fugitive slave controversy, specifically the uproar surrounding the state’s 1839 Black Law, which was meant to expedite fugitive renditions under the federal Fugitive Slave Law. The Black Law was the product of negotiations between Kentucky and Ohio delegates charged with stamping out obstruction of fugitive renditions by Ohio antislavery activists like John B. Mahan, who was caught aiding a group of runaways in 1839. Hoping to avoid a New York-and-Virginia-style standoff, the Ohio General Assembly invoked the doctrine of “national comity” and passed the Black Law, hoping it would quell the issue once and for all. The Black Law confirmed how deeply entrenched proslavery interests were in Ohio’s politics, and the law would be a target of antislavery action for the next few years, a focal point in the fight over the balance of power in Ohio. But the anti-Black Law campaign produced some key legal precedents for the antislavery side, decisions which added Ohio to the growing list of states comprising the antislavery bulwark in the North.91

The passage of the Black Law generated more, not less, antislavery dissent in Ohio, spawning a new debate over slavery’s relationship to the Ohio constitution – a debate which was a microcosm of the larger national debate over slavery and federal power. Proponents of the law argued that Ohio had a positive obligation under the U.S. Constitution to hunt down and return fugitive slaves, especially since the right to slave property was a general right invested into the Constitution, in the Fugitive Slave Clause and Privileges and Immunities Clause, among others. The Constitution, one supporter wrote, allows for slavery “in our midst, and guarantees the right of the slaveholder to them, as property.” Good Christian citizens of Ohio should respect those rights, no matter how ignominious they were; abolitionists who flouted the Black Law by invoking morality and religion did nothing more than upend civil and constitutional order.92

Antislavery activists decried the Black Law as the latest incursion of southern law and power into the free states – the establishment of “quasi slavery in Ohio!!” according to Gamaliel Bailey. Proponents of the Black Law “would have the constitution liberally construed, out of comity to the South – that is, to southern white men. – I would have the constitution strictly construed, out of naked justice to the black men of the South.” Opponents of the Black Law based their resistance on constitutional principle, Bailey explained, not religious law or the theory of revolution. The Constitution treats slaves as persons, not property. To that extent, the only responsibility imposed by the Fugitive Slave Clause was “to surrender a fugitive when claimed; which involves the duty of prescribing the process, and providing the tribunal for trying the case, and determining the character of the evidence necessary to substantiate the claim.” Beyond this point, free-state officers had nothing to do with the recapture of fugitive slaves.93 One anonymous contributor the Whig-backing Cincinnati Gazette – the author may very well have been Salmon Chase – admitted that the law of nations required Ohio to respect Kentucky slave law and that federal law barred it from interfering with fugitive-slave renditions. Yet that was the full extent of Ohio’s relationship to slavery: “The Constitution simply guarantied the statu quo,” the author asserted. “Further it did not go…” The Black Law violated Ohio’s constitutional ban on slavery because it was explicitly tied to matters of “ownership” and “property,” rather than servitude and indebtedness. This was a legal and constitutional solipsism in Ohio, where all persons were presumed free. The author ended with a wry flourish: “The privilege of Habeas Corpus does not extend to a horse.”94

This was the backdrop to Chase’s defense of fugitive slaves from 1839 to 1843, when the Black Law was finally repealed in the face of rising public disgust – tellingly, just a few months

93 Philanthropist, Nov. 12, 1839, June 30, Dec. 22, 1841.
94 ibid., June 9, 1841. See also Finkelman, Imperfect Union, p. 167.
before Congress repealed the gag rule. By that point, there had already been a decisive shift in Ohio’s balance of power in favor of antislavery forces, a shift manifested in two crucial legal decisions in 1841 – the so-called Mary Towns case and *State v. Farr* – both of which were personal and political victories for Chase the attorney and nascent politician. Both victories occurred in the afterglow of the Supreme Court’s *Amistad* and *Groves* opinions, which, as we will see, heightened the optimism of antislavery activists, who turned to the courts as it became apparent that Congress and the state legislatures were unforthcoming.95

The first was the case of Mary Towns, a ten-year resident of Cincinnati who had been seized by agents of her one-time master in 1841. Members of Cincinnati’s free black community alerted Chase to the situation, at which point he brought a writ of habeas corpus to Judge Nathaniel C. Read of the Ohio Supreme Court, a former prosecutor who had argued against Chase in the *Matilda* and could barely conceal his contempt for the rising antislavery leader. When the time came for arguments, Chase reiterated the points he had made in *Matilda* and *Ohio v. Birney*, emphasizing the right to due process under Ohio’s constitution. But having already learned the hard lessons of overreaching, Chase focused on the specifics of the case: the Fugitive Slave Law, he argued, did not pertain to the present case, he argued, for the language in the affidavit used in Towns’ arrest did not specify that she had run away from her master – in other words, it did not “state that she had escaped from his service in Kentucky, into the State of Ohio.” This argument seems to have persuaded Judge Read, who not only freed Towns from her captors, but also endorsed the principle that “liberty is the rule, and involuntary servitude the exception,” in Ohio. Though narrow, Read’s statement was just the kind of forceful and unqualified rendering of the North’s legal presumption of freedom that Ohio antislavery activists

95 See Ch. 5.
wanted from their courts, at a time when proslavery interests still dominated the state legislature. It was a signal victory for Chase.  

Just a few months later, Cincinnati’s free black community once again sought Chase’s help in a fugitive slave case. This time their efforts led to a landmark decision by the Ohio Supreme Court. *State v. Farr* developed out of yet another conflict between transient slaveowners and antislavery Ohioans. In 1839, a group of abolitionists help several slaves gain their freedom by surrounding a convoy of Virginia slaveowners and informing the slaves that Ohio law presumed freedom. After a lower court convicted them of riot, the abolitionists appealed the convictions to the Supreme Court. The chief justice cagily avoided the interstate comity issue by overturning the convictions on technical grounds. But in obiter dicta he endorsed the strict interpretation of the municipal theory backed by everyone from Story and Shaw to Chase, Alvord, and Elizur Wright: a slave, the chief justice wrote, “became free when brought to this State by his master, since the Constitution and the act of Congress, under which alone the state of slavery subsists in Ohio, applies to *fugitives* only.” This was only dicta, but it proved to be very influential in the coming months and years, as Ohio stopped granting comity to slaveowners after 1841, joining the host of northern states who had adopted a more hostile stance toward slavery in the period 1837-1843. The case was a huge victory for Salmon Chase, whose ongoing efforts on behalf of fugitive slaves earned him the nickname “Attorney General for Fugitive Slaves.”

The *State v. Farr* ruling symbolized the changing balance of power in Ohio between the proslavery core in the state legislature and a growing antislavery majority who resented their

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97 Quoted in Finkelman, *Imperfect Union*, p. 165.
98 For background on *State v. Farr*, see Finkelman, *Imperfect Union*, pp. 165-6.
state’s complicity in the nationalization of slavery, not least in the form of the 1839 Black Law. Sensing their own loss of power, proslavery elements in Cincinnati’s ruling class – the “gentlemen of property and standing” with close business ties to the South – orchestrated yet another mob action in their city. The result was a deadly race riot in the hot summer of 1841.

Few places in the Union were as ripe for violence as Cincinnati in the summer of 1841. Stifling heat combined with palpable social tension had put the city on edge. White workers, already embittered by the depression, fumed at the advances of antislavery forces in their state. Rumors that a white woman had been assaulted by three black men fanned the flames of racial animus. When the anticipated riot finally broke out, white mobs of up to two thousand people rampaged through the city, rolling cannon into black neighborhoods and setting fire to black homes and businesses, murdering several black residents in the process. As black Cincinnatians took up arms to defend their homes, genuine race war – the nightmare scenario of moderate politicians across the country – seemed to be materializing. As in 1836, the mobs attacked the office of the *Philanthropist*, this time under the pretext that abolitionists had armed Cincinnati’s black community. Civil order returned when Governor Thomas Corwin sent in the militia; local authorities expelled blacks who could not provide proof of residency, using the 1839 Black Law as justification for the ad hoc policy. An air of terror and suspicion lingered over the city for several months thereafter.99

Yet, far from reflecting the strength of proslavery interests in the state, the riots revealed the growing desperation among the city’s proslavery capitalists and politicians. Worse from their point of view was that the riot actually backfired, spurring the rise of antislavery sentiment across the state. Ohioans viewed the riots as yet another expression of the violence inherent in the slave system, which was now spreading into the state thanks to a one-sided federal policy.

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99 Niven, *Chase*, pp. 64-65.
They were losing the battle for public opinion, and quickly, as the gag rule controversy stoked northern animosity toward the southern “Slave Power.” The 1841 Cincinnati riots emerged in the context of a rapidly-changing political context in Ohio, where the balance of power had shifted dramatically in favor of antislavery forces, all in a matter of months.

Chase told his friend Charles Dexter Cleveland that public opinion now seemed to be moving in an antislavery direction, as the state Supreme Court endorsed legal arguments that had been flatly rejected in 1837. With *State v. Farr* on the books, “any slave brought voluntarily into this state, for any purpose, though but for an instant, becomes immediately free… This decision excites a great deal of notice and must produce the most important consequences.”¹⁰⁰ For Gamaliel Bailey, *State v. Farr* was “one of the most important judicial decisions ever made.”¹⁰¹

**Conclusion**

1836 proved to be a turning point in the constitutional crisis of the 1830s. In the months and years following Lemuel Shaw’s decision in *Aves*, there emerged in the North an aggressively antislavery legal regime which implemented key parts of the abolitionists’ constitutional program, namely, strict construction of the Fugitive Slave Law and a denial of comity to slaveowners. Prodded by abolitionists and affronted by southern proslavery demands, northern judges like Shaw endorsed policies that exemplified the principles of antislavery nationalism, from the notion of a federal presumption of freedom to the argument for strict application of the municipal theory to federal law.

In recounting the emergence of this regime, the indispensable figure is Joseph Story, whose influential *Commentaries* series brought the antislavery nationalism of the early republic

¹⁰⁰ Chase to Charles D. Cleveland, May 18, 1841, in *Chase Papers*, vol. 2, p. 75.
¹⁰¹ *Philanthropist*, June 30, 1841.
into the legal-positivist world of post-Missouri, post-Antelope shutdown politics, presenting it to a new generation of antislavery jurists and common lawyers. In *Aves*, Judge Shaw – like Story an exponent of early-republic antislavery nationalism – incorporated Story’s municipal-theory principles into Massachusetts law, creating the vital precedent for the antislavery legal regime after 1836.

Antislavery lawyers like Chase and Alvord built on these fundamentals by forging positive-law arguments against the Fugitive Slave Law and exploiting Story and Shaw’s application of the municipal theory to American federalism. The legal regime they helped construct was ostensibly negative in its orientation; it aimed to limit or repeal federal and state laws that gave extraterritorial effect to slaveowners’ property rights. But it was not a simple defense of northern-state sovereignty; it did not seek to maintain the status quo of a half-free, half-slave Union. As part of a larger crisis that included the Washington, D.C. debates, it reflected a vision of an antislavery Union in which state and federal laws rested on a legal presumption of freedom. It was a concrete manifestation of the antislavery project.

In *The Market Revolution: Jacksonian American, 1815-1846*, historian Charles Sellers described northeastern lawyers as “the shock troops of capitalism,” crucial agents in the marketization and commodification of American life, particularly on America’s western frontier. In much the same vein, Chase, Alvord and other antislavery lawyers can be seen as shock troops of abolition. They represented a brand of capitalist social organization in the North that explicitly rejected property rights in human beings. Like its southern counterpart, northern capitalism was not a static regime in the 1830s; it was in flux, constantly expanding, and increasingly coming into conflict with the legal and political institutions of southern slave capitalism. In courtrooms and newspaper columns across the North, antislavery lawyers helped form a legal bulwark
against nationalized slavery, foisting the antislavery project into the center of national political debate.
Chapter 5

Following the Flag: Slavery and Federal Power on the High Seas

Aside from Joseph Story, John McLean was the only antislavery justice on the Supreme Court in the 1830s and 40s. Born in New Jersey in 1785, McLean had a peripatetic childhood, moving to Virginia in 1789 and finally to Ohio in 1796. From humble origins and with no formal education, McLean practiced law in the Hamilton Country Court of Common Pleas (the same court in which his future son-in-law Chase would defend Matilda Lawrence). After serving a term in Congress as a representative for Ohio, McLean took a seat on the Ohio Supreme Court in 1816. His antislavery nationalism was on full display in *Ohio v. Carneal* (1819), a freedom suit involving a transient slave from neighboring Kentucky. McLean ruled that the slave was free, grounding his opinion in antislavery nationalism. “SLAVERY,” he wrote, “except for the punishment of crimes, is an infringement upon the sacred rights of man: Rights, which are derived from his Creator, and which are inalienable.” The Fugitive Slave Clause of the Constitution was an exception to the rule: “From the nature of our federal compact, and the laws of our national legislature, this Court are [sic] bound to respect the laws of a sister state, however repugnant, in our conception, and contrary to the policy of our own laws.” Still, northern judges were required to presume freedom. “The right of a citizen of Kentucky to the possession and service of his slave, when presented for judicial investigation, must be tested, like every other right, by the laws governing the state.” This was certainly the case with transient slaves, but even in the case of fugitive slaves, where federal law applied, actual legal process reflected a presumption of freedom.¹

McLean exemplified the antislavery nationalism of the early republic. His early years on the Ohio Supreme Court coincided with Ohioans’ efforts to beat back slavery’s expansion into the state, giving teeth to the Northwest Ordinance while fostering a “northern” antislavery political culture. Like Story and Massachusetts Chief Justice Lemuel Shaw, McLean opposed Missouri’s admission as a slave state, and though it was President Jackson who appointed him to the Supreme Court in 1829, McLean was to his dying day an economic nationalist who fused his Whig inclinations with his antislavery nationalism, running for president multiple times as a candidate for the Whig, Free Soil, and finally Republican parties. On a Supreme Court stacked with proslavery states’-rights Jacksonians, McLean and Story comprised the antislavery minority, keepers of the flame of antislavery nationalism. Their opinions in *U.S. v. Amistad* and *Groves v. Slaughter* (both 1841) were crucial interventions in the constitutional crisis over slavery. Neither justice endorsed the abolitionists’ program; in fact they denounced calls for “immediate emancipation.” But both in their own way endorsed the fundamental principles of antislavery nationalism, hinting at more effective avenues for combating slavery in national politics.  

U.S. coastal waters and the high seas constituted the third major arena of constitutional conflict over slavery in the period 1836-1842. As in the Washington, D.C. and free-state contexts, the debates over slavery on the high seas centered on the property rights of slaveowners. Did such rights extend into U.S. coastal waters and out into the sea lanes, perhaps even into foreign jurisdictions? Did the Constitution guarantee protection for slave property in U.S. coastal waters, a federal jurisdiction like Washington, D.C. and the territories? As always, the conflict boiled down to the relationship between slaveowner property rights and federal

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2 *ibid.*
power: would the U.S. government presume that blacks on the high seas were slaves – a policy that would have rested on a legal presumption of slavery -- or would it presume freedom, in line with Britain and the free states of the North? These were the same issues at stake in the Washington, D.C. and free-state debates; constitutional arguments developed in those two spheres of conflict now migrated into the high-seas controversy, where they produced new insights (both pro- and antislavery) concerning slavery in Washington, D.C. and the free states.3

Though similar in many ways to the Washington, D.C. and free-state debates, the high seas controversies were different in that they raised the stakes of the slavery conflict by

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3 Historians of the coming of the Civil War have written a great deal about slavery on the high seas. Still, there is no systematic account of how debates over slavery’s status on the high seas impacted the constitutional politics of slavery inside the United States circa 1835-43. Most accounts of slavery controversies on the high seas focus on the famous Amistad and Creole affairs, rightly portraying them as milestones in the development of sectional conflict in early 1840s. Yet these seemingly “external” slavery conflicts are treated separately from ostensibly “internal” conflicts like the debates over slavery in Washington, D.C. and the “free” states. This is an anachronistic distinction. For one thing, it obscures the degree to which arguments and strategies developed in the latter theaters overflowed into the high-seas theater, and vice versa. Stellar works on U.S. diplomatic relations and the “Caribbean origins” of the Civil War have shed light on world of slavery controversy on the high seas, yet more can be done to link events on the high seas to the constitutional politics of slavery in Congress and free-state courts and legislatures, as well as the public sphere of newspapers and other printed materials. See Rugemer, Problem of Emancipation; Howard Jones, Mutiny on the Amistad: The Saga of a Slave Revolt and its Impact on American Abolition, Law, and Diplomacy (New York: Oxford University Press, 1987) idem., “The Peculiar Institution and National Honor: The Case of the Creole Slave Revolt,” Civil War History 21 (March, 1975), pp. 28-50 and Jones and Donald A. Rakestraw, Prologue to Manifest Destiny: Anglo-American Relations in the 1840s (Wilmington, D.E.: SR Books, 1997), pp. 71-96. See also Drescher, Abolition, pp. 311-317; Stewart, Holy Warriors, pp. 112-13; Wilentz, Rise of American Democracy, pp. 473-9, 522, 555-8; Fehrenbacher, Slaveholding Republic, pp. 104-111; Davis, Inhuman Bondage, pp. 12-15, 269; Fladeland, Birney, pp. 221-222; idem., Men and Brothers, pp. 322-341; Maltz, Slavery and the Supreme Court, pp. 52-82.

This chapter depicts the high-seas controversies as part of an ongoing constitutional debate over slavery’s relationship to federal power in areas of the Union outside the slave states. It stresses the continuity of themes and arguments across the three theaters of conflict, showing how arguments developed in the Washington, D.C. and free-state context reemerged in the high-seas context, always in light of the same basic question: What was slavery’s relationship to central-government power in areas of the Union outside the slave states? Insofar as they spurred the development of two diametrically-opposed pro- and antislavery constitutional doctrines, the high-seas controversies, like concurrent conflicts in Washington, D.C. and the free states, were formative moments in nineteenth-century American constitutional development. Simply put, to understand the dynamics of slavery conflict inside the United States in the 1840s, we must first understand the terms of slavery controversy on the high seas. In this sense my analysis follows in the path of Oakes, Freedom National, pp. 22-25, 34-35; Wiecek, Antislavery Constitutionalism, pp. 214-215; idem., “Slavery and Abolition before the Supreme Court,” which analyzed the abolitionists’ efforts before the Supreme Court (yet had little to say about antislavery politics); Hyman and William M. Wiecek, Equal Justice under Law, pp. 103-5, which placed Wiecek’s earlier findings into a context of nineteenth-century constitutional development. International developments are generally downplayed in several key works on abolitionism and antislavery politics, including Kraditor, Means and Ends; Sewell, Ballots for Freedom; Gerteis, Morality and Utility; Earle, Jacksonian Antislavery; Johnson, Liberty Party.
projecting a once-domestic conflict onto the world stage. The participants in the debates knew that, in a very real sense, the struggle over slavery’s constitutional status would go a long way toward determining slavery’s legitimacy in the Atlantic World, especially since the United States was poised to become the dominant power in the Western Hemisphere and would thus have outsized influence on the law of nations. The law of nations, as we have already seen, played an important role in the other spheres of constitutional debate: in both the Washington, D.C. and free-state arenas, competing interpretations of the law of nations had led to different readings of the Constitution and interstate comity.4

In the high seas controversies, the direction of influence was exactly the reverse: competing interpretations of the Constitution led to fundamentally incompatible readings of the law of nations. Would the federal government continue to act as a slaveholding power on par with Portugal and Spain? Or would it begin to move in the direction of freedom by joining Britain in the campaign against slavery and the slave trade? These were not idle questions; the future of the “civilized” community of nations seemed to hang in the balance. By placing a heretofore “internal” debate into a global context, the high seas controversies juxtaposed more clearly than ever the rival claims of “Slavery National” and “Freedom National.”

This chapter clarifies the terms of the high-seas debate and explains how the constitutional arguments produced in this sphere of conflict furthered the development of two fundamentally opposed constitutional doctrines, one proslavery and the other antislavery. The

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4 Both sides understood that American federalism derived from the law of nations. For proslavery leaders, the law of nations recognized slavery and the slave trade, and therefore so did the Constitution; just as free nations had to provide comity to slave nations under the law of nations, so too must the free states of the North provide comity to slaveowners from the South. Antislavery people insisted that the law of nations rested upon – or at least paralleled – natural law principles, and therefore could not recognize “property in man.” In the view, comity regarding slave property could only be granted on the basis of a positive stipulation agreed between two parties, a stipulation which was understood to traverse a universal presumption of freedom. On the relationship between American federalism and the law of nations, see Golove and Hulsebosch, “A Civilized Nation”; Mark W. Janis, America and the Law of Nations, 1776-1939 (New York: Oxford University Press, 2010); Onuf and Onuf, Federal Union, Modern World.
emphasis is on the antislavery side, in particular the process by which activists exploited the antislavery implications of important Supreme Court cases like *U.S. v. Amistad* and *Groves v Slaughter*. Justices Joseph Story and John McLean, whose devotion to the Union made them hostile to radical abolitionism and deeply committed to positive law, nonetheless believed that the U.S. government ought to presume freedom. Their opinions pointed antislavery activists in new and more effective directions, by providing them with hints as to how to navigate the federal system and exploit its antislavery possibilities.

**The Enterprise Resolutions**

Between 1830 and 1835, three American ships involved in the coastal slave trade – the *Comet* (1830), the *Encomium* (1834), and the *Enterprise* (1835) – unintentionally entered British territorial waters, where local authorities emancipated their slave “cargoes.” The *Comet* and the *Encomium* wrecked on the rocky narrows between Florida and the Bahamas, and in both cases, Bahamian officials compensated the owners of the freed slaves. But the third ship, the *Enterprise*, entered the port of Hamilton in Bermuda on August 1, 1835, the very day that Parliament’s Emancipation Act went into effect. The slaves were freed, and Bermuda’s governor refused to remunerate the freedmen’s former owners, on the grounds that Bermuda no longer recognized “property in man.” When American diplomats cried foul, Britain’s Prime Minister, Lord Palmerston, issued a written statement defending the governor’s actions. The emancipations were justified, Palmerston wrote, because Parliament’s Emancipation Act had extended the freedom principle to all parts of British Empire, universalizing the *Somerset* doctrine, which until then had only applied to England. From this point forward, Palmerston asserted, Britain would no longer grant comity to slaveowners in British territories; imperial
officers would neither re-enslave emancipated blacks nor issue compensation for “property” lost.  

Palmerston’s statement actually advanced a policy that was underway at least since 1807, when Britain outlawed British involvement in the African slave trade and began suppressing slave traffic in the North Atlantic. For years under this policy, Britain had been extending the “line” of freedom outward from its own shores, into the sea lanes patrolled by the British navy. This process was severely restricted by Sir William Scott’s rulings on the slave trade after 1815, but it was never discontinued. The Emancipation Law of 1833 in fact just the latest and most aggressive stage of an ongoing policy in the British Atlantic. The law laid the foundation for a general presumption of freedom throughout the British Empire. It also pushed the law of nations in the direction of freedom by creating a massive positive-law precedent against slavery. Most jurists in second third of the nineteenth century viewed the law of nations, not as an ethereal code grounded in natural law, but as a composite of statutes, treaties, and constitutions from around the Atlantic world, a compendium of positive agreements. Most agreed with Marshall – and before him, Sir William Scott and Lord Mansfield – that the law of nations recognized slavery and slave-trading even though both were repugnant to natural law. Parliament’s Emancipation Act echoed the natural-law indictment of slavery, but it was not a statement of natural law; it was a written statute affecting a huge swath of territory, a man-made law which adapted the natural-law critique to the “modern” legal context. As a legal precedent attaching to “positive” law of nations, it tipped the scales of the international system against slavery and toward freedom.

6 For more on the “line” and British policy, see Drescher, Abolition, pp. 263-266. On the shift toward positivism in the law of nations, see Onuf and Onuf, Federal Union, Modern World.
Henceforth, the law of nations weighed heavily against slavery. British and American abolitionists could argue with confidence that slavery was repugnant to the law of nations, not simply because the latter derived from natural law, but because a steady accretion of positive-law precedents on the world stage -- the several anti-slave trade accords signed by European powers, the free constitutions of the northern states, Haiti and the various Latin American republics, as well as the Emancipation Act -- outweighed the effects of Spanish, Portuguese, French, Brazilian and southern state slave codes. To be sure, jurists continued to hold that the law of nations recognized the right of countries like Spain to maintain slavery and trade slaves who had been “legally” enslaved. But in future conflicts of law between slave and free zones in the Atlantic, the law of nations would almost always favor freedom.7

The new antislavery regime put increased pressure of southern slaveowners. In addition to the opprobrium already heaped upon them by “enlightened” opinion in the North and in Europe, they now had to confront a radically different legal and political landscape in the Atlantic. The ever-fluctuating “line” separating freedom from slavery in the British Atlantic, which had never posed a direct threat to southern interests, was now, in the case of the Bahamas, just a few miles off the coast of Florida, at a critical juncture in the coastal slave trade linking Northampton, Virginia with New Orleans. The South was now surrounded by a ring of “free” territories, from Canada and the U.S. free states in the north, to British Bermuda and the Bahamas in the east, to Jamaica, Demerara, and other British Caribbean holdings in the south (as well as British-allied Haiti), and, last but not least, in the west, the possibility of a free Texas under British control. Slaveholders like John C. Calhoun saw how the Enterprise affair signaled a new and dangerous phase of antislavery policy at the international level, a policy which

7 For more on the concept of an antislavery legal regime, see Ada Ferrer, Freedom’s Mirror: Cuba and Haiti in the Age of Revolution (New York: Cambridge University Press, 2014), passim.
directly undermined the value of slave property and the southern way of life. They denounced Palmerston’s message and launched a vehement defense of slaveowner property rights, just as they had done in the Washington, D.C context. The militancy of their response mirrored the radicalism of the new antislavery regime.\(^8\)

Calhoun moved quickly to counter the new policy, demanding full compensation for the Enterprise slaves in a speech to the Senate. The argument put forward by Palmerston, Calhoun argued, butchered the law of nations, which made no distinction between property rights in persons and property rights in things. His remarks this time were designed to obliterate the municipal theory’s jurisdictional distinctions between free and slave zones, to universalize the presumption of slavery so vital to the protection of slaveowner property rights. In a complete reversal of Palmerston’s application of Somerset principle to the British Atlantic, Calhoun argued that rights to slave property were universal while positive laws interdicting slavery were merely local. The property rights of Enterprise slaveowners were unimpaired by the vessel’s entry into British territory; the legal status of the slaves did not change in any way. Here, Calhoun employed the same reasoning he had used to block abolition in the U.S. capital. The right to “property in man,” he insisted, was an “original” right whose protection was guaranteed by the U.S. Constitution; it did not derive from positive slave codes, and thus could not be limited by reference to the municipal theory of slavery. The federal government, he continued, was the common agent of the states and thus was obliged to protect slavery anywhere and everywhere, both inside and outside the Union. Here, Calhoun grafted his constitutional arguments onto the law of nations: just as the Constitution guaranteed protection for slave property in the Union by investing the federal government with a legal presumption of slavery,

\(^8\) On American slaveowners’ reaction to British Emancipation, see Karp, “Slavery and American Sea Power”; Rugemer, Problem of Emancipation, pp. 189-202; Fehrenbacher. Slaveholding Republic, pp. 104-107; Drescher, Abolition, pp. 245-266ff; Bonner, Mastering America, pp. 56-68.
so too the law of nations guaranteed protection for slavery on the high seas by favoring a legal presumption of slavery – despite the precedent of British Emancipation. In other words, all nations, even those which did not recognize slavery, had a duty under to recognize and enforce the property rights of slaveowners from “slave” nations. Here, Calhoun applied his theory of state sovereignty to the law of nations.  

As Calhoun railed against the new policy in Congress, the American minister in London, Andrew Stevenson, a close ally of Calhoun, pressed the British for compensation, going so far as to threaten war if Britain refused. In a December, 1836 letter to his counterpart, Stevenson attacked Britain’s policy with the same logic Calhoun had used in his Senate speech. There was “no distinction” in the law of nations “between property in persons and property in things,” he wrote. No matter how many antislavery precedents appeared on the world stage, the law of nations could never lean against slavery, since it was a neutral reflection of the international legal landscape as it existed, not as it should be. The law of nations was commercial public law; it had no moral content, and thus could not favor “free” nations over “slave” nations. The latter group had every right to engage in slave-trading on the high seas, as long as the slaves being traded were legitimate “property” (as opposed to kidnapping victims smuggled out of Africa). The United States government, along with the governments of Spain and Portugal, regarded slaves as property and recognized slave-trading as a legitimate form of commerce. By virtue of this legal fact, the law of nations – and by extension Britain – had to recognize slavery and the slave trade.  

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9 Cong. Globe, 26th Cong., 1st sess., pp. 266-270. On state sovereignty, theory, see Ch. 3, n. 17.  
For Stevenson, the United States as a nation recognized and enforced slaveowner property rights. His view of the law of nations rested on the premise that slavery was a national institution, that the U.S. government favored a legal presumption of slavery both inside and outside the Union. This was enshrined in a constitutional guarantee for the protection of slave property. The U.S. Constitution, Stevenson wrote his British colleague, did more than just recognize slavery’s “existence” in the states; it also ensured that slaves were to be “regarded and protected as property” everywhere in the Union – even in foreign jurisdictions. To buttress the point, Stevenson referenced the intermittent debates in Congress over compensation for slaves killed or emancipated during the War of 1812, in which some argued that Congress treated slaves as property rather than persons. The debates, Stevenson told his British counterpart, proved that “slaves killed in the service of the United States, even in a state of war, were to be regarded as property, and not as persons,” that Congress made the U.S. government “responsible for their value.”\footnote{ibid.}

By virtue of U.S. recognition of the validity of slavery and slave-trading, Stevenson continued, the law of nations required Britain to offer compensation for slaves emancipated in British jurisdictions. In classic proslavery reasoning, Stevenson ignored the long history of the municipal theory in American federalism and collapsed the distinction between southern slave laws in the South and the Constitution, a move which allowed him to claim a general right to slave property in the Constitution. This was the position of the American minister to Britain in the late 1830s, a prime example of the proslavery orientation of federal policy in this period.

Palmerston and his ministers refused to be bullied; compensation was out of the question. Slaveowners were livid, but so too were many non-slaveholding Americans, who saw the Enterprise affair as the latest outrage against American sovereignty on the high seas, part and
parcel of a deeper enmity stemming British impressment of American sailors during the War of 1812. Partly for this reason, the Senate unanimously adopted a series of resolutions written by Calhoun, by a vote of 33-0. The *Enterprise* resolutions, as they became known, reiterated Calhoun’s total rejection of the municipal theory. The emancipation of the *Enterprise* slaves, Calhoun wrote, amounted to a violation American sovereignty, not just the sovereignty of the states or the property rights of individual masters. There was no legal justification for excluding “property in man” from the sphere of international comity. By the law of nations, a vessel visiting a foreign port remained under the “exclusive jurisdiction” of its home country, “as much so as if constituting a part of her domain.” The rights, duties, and legal status attached to that vessel remained in force, even if the foreign jurisdiction did not recognize them. The “cargo and persons…, with their property, and all the rights belonging to their personal relations,” enjoyed “the protection which the laws of nations extend to the unfortunate.”

It is unlikely that all thirty-three senators who voted for the resolutions endorsed Calhoun’s brand of proslavery reasoning; yet their votes had the effect of sanctioning Calhounite constitutionalism on the national and international stage, putting the U.S. government in direct conflict with Britain’s antislavery legal regime. Once again, proslavery interests in the highest reaches of government had succeeded in making slavery not just national, but *constitutional*.

If the Washington, D.C. debate had forced abolitionists to scrutinize the Constitution, the Senate’s endorsement of the *Enterprise* resolutions led them to reconsider slavery’s relationship to the law of nations. And if Calhoun’s resolutions embodied what might be called the *proslavery* version of the law of nations, antislavery activists in turn developed an *antislavery*

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version of the law of nations, an interpretation which combined the traditional natural-law critique of slavery with the more “modern” emphasis on building antislavery legal regimes through positive-law precedents. Like Calhoun, they too imposed their reading of the Constitution onto the law of nations, applying to the high seas arguments they had originally developed with regard to Washington, D.C. and the free states.

Several antislavery figures had extensive knowledge of the law of nations, and in their view, the Enterprise resolutions were an ominous precedent for American foreign policy and the western civilization more generally. Judge William Jay of New York, son of John Jay, was a leading neo-Federal jurist and a known antislavery advocate, as well as one of the country’s leading lights on the law of nations. He described the Enterprise resolutions as “an outrage on the rights of nations…[,] an insult to humanity.”¹³ James Birney – who, it will be remembered, studied law under Alexander Dallas during the War of 1812, during which time he became familiar with the law of nations – condemned the Enterprise resolutions in a letter published in the New York American. At Calhoun’s behest, Birney wrote, the Senate had moved to “displace the laws of a free country and set up those of the rankest despotism that now makes the earth mourn. And this the Senate of the United States declares to be a part of the law of nations!” It was bad enough that thirty-three U.S. senators had sanctioned the notion of “property in the bones and muscles and sinews” of “fellow creatures”; worse, the resolutions showed that an effort was underway to “engraft the rights (!) of the slave-trader and slave-holder on the law of nations.” Not once in over two hundred years, Birney fumed, had a treaty recognized the right to

slave property a universal “right” under the law of nations. No “nation of modern times, except our own,” he wrote, “has ventured openly to regard slavery as a fundamental system.”

Having thrashed the resolutions, Birney explained the antislavery law of nations and its relationship to the U.S. Constitution. Here, he applied to the international context the same municipal-theory logic he and other abolitionists had emphasized in the other slavery debates. Rights to slave property, Birney argued, derived from state law and were not guaranteed protection by the Constitution. Slavery had nothing to do with the federal government, which was separate from the states and which favored a legal presumption of freedom in its foreign and domestic affairs. The United States was a free state under the law of nations, even though it contained states whose peculiar laws sanctioned a right to property in human beings. The law of nations did not consider those laws; it only recognized the laws of the United States as a single nation (rather than a common agent of the states, as Calhoun would have it). The Enterprise resolutions overturned these premises in the name of slaveowner property rights.

Birney elaborated on these arguments in a speech delivered at the first annual World Anti-Slavery Conference in May, 1840. The convention, which met in London at the height of British abolitionists’ power in Parliament, embodied the rise of a unified (though by no means conflict-free) transatlantic antislavery movement. Before an audience that included mainly

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14 See Seth Gates to Birney, Jan. 24, 1842, in ibid., pp. 667-669. True, Birney conceded, nations had often arranged for the return of slaves stolen or emancipated in wartime. But these were isolated agreements, positive stipulations which did nothing to change the broader antislavery orientation of the law of nations. Indeed, “the very fact of the arrangement shows that there is no rule relating to it.” Here, as ever, Birney applied antislavery reasoning from one sphere of constitutional conflict to another, joining the exponents of the antislavery law of nations in arguing that, by its very nature, the Fugitive Slave Clause demonstrated that the U.S. government ought to presume freedom generally; like the provisions in foreign treaties concerning slave property, the Fugitive Slave Clause was an exception to the rule of freedom in the Constitution. Calhoun’s ambiguous language in the Enterprise resolutions betrayed the “difficulty of framing a law for the legal security of slavery.” With characteristic deviousness, Calhoun muddled the peculiar “personal relations” of the slave states with the universal “rights” associated with the high seas, forging a practical link between slaveowner property rights and the U.S. government. ibid., p. 668-669. The letter to the American was actually published in 1841 as an intervention in the Creole affair. Birney’s arguments dealt specifically with the Enterprise resolutions, which served as the basis of the proslavery position in the Creole controversy. See below.

15 ibid.
British abolitionists, Birney described the *Enterprise* resolutions as “the first attempt known in the history of nations, to convert the pretentions of slaveholders into rights, and, as such, to engraft them on the system of public law [the law of nations], by which the intercourse of nations is regulated...” Following Birney at the speaker’s podium was the Irish reformer Daniel O’Connell, renowned, among other things, for his campaign to “repeal” the Union between Ireland and Britain. O’Connell ripped into Calhoun with a scathing, humor-filled speech that took antislavery constitutionalism as the “true” interpretation of the U.S. Constitution. Calhoun’s demand for compensation, he argued, followed ineluctably from his twisted readings of the Constitution and the law of nations.16

O’Connell’s familiarity with antislavery constitutionalism reflects the degree to which British and Irish opponents of American slavery grappled with U.S. constitutional politics. Antislavery activists on both sides of the Atlantic realized that Calhoun’s resolutions were more than political bluster; they were the blueprint for an expanding slave regime, the constitutional basis for an aggressive southern policy of loosening the cordon which British emancipation had established. British authorities continued to do their part, adding to the list of legal precedents which weighed against slavery. In October, 1840, just five months after the World Anti-Slavery Convention, the government of the Bahamas emancipated thirty-eight slaves who had escaped the slave vessel *Hermosa*, which had wrecked on the nearby shoals. No compensation was offered.17

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16 *Philanthropist*, Aug. 20, 1840.
In Boston, a young Charles Sumner praised Birney’s attack on the Enterprise resolutions in the New York American, adding only that it needed a dash of “professional learning.”

Sumner was Joseph Story’s protégé at Harvard Law School, an expert on the law of nations who had done much of the research for Story’s Commentaries on the Constitution and Commentaries on the Conflicts of Law. He had recently returned to Boston from an extended trip in Europe, where he had become engrossed in Britain’s push for a new treaty allowing for a mutual right of search in British, Austrian, Prussian, and Russian ships. The Quintuple Treaty, as it was known, would renew and expand efforts at ending the slave trade. Sumner realized that Britain’s Emancipation Act had created a positive-law precedent that turned the law of nations against slavery, and he defended Britain’s policy of searching suspected slave ships to verify their nationality -- a policy which was roundly condemned by U.S. slaveowners. It was while defending the Quintuple treaty that Sumner immersed himself in the controversy over the Enterprise resolutions. In the years ahead, Sumner would indeed give Birney’s unpolished antislavery arguments a coat of “professional learning.”

**The Amistad Affair**

The Hermosa emancipations in 1840 took place against the backdrop of a brewing controversy surrounding the Spanish slave ship, La Amistad. Like the shipwreck episodes that preceded it, the Amistad affair centered on the U.S. government’s disposition toward slavery, in particular, the type of legal presumption it should favor on the high seas – slavery or freedom.

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19 Sumner defended British policy in a series of articles published in the Boston Advertiser, articles he shared with Story, Chancellor Kent, Rufus Choate, Theodore Sedgwick, and Francis Leiber. See Sumner to Harvey, ibid., p. 203. On Sumner’s early years, see Taylor, Young Charles Sumner, esp. pp. 88-139.
The debates generated by the affair advanced the dual pro- and antislavery interpretations of the Constitution and the law of nations.

In April, 1839, an illegal slave ship named the Tecora carried five hundred kidnapped Mendians from Lomboka in West Africa to Havana, Cuba, where the survivors were loaded into barracoons (close to a third of the Tecora’s human cargo had died over the course of the two-month journey). In late June, two Spaniards, Jose Ruiz and Pedro Montes, purchased forty-nine adult males from the owners of the Tecora and secured a passport for transporting them to Puerto Principe. The vessel which was to convey the Africans to Puerto Principe was called La Amistad – Spanish for “Friend.” At some point in the journey, however, the Africans rose up and killed most of the Amistad’s crew, including the ship’s captain. Their revolt spanned only a few minutes: when it was over, only Montes, Ruiz, and the cabin boy remained alive. The leader of the revolt, Joseph Cinque, ordered the Spaniards to steer the ship towards Africa. Montes and Ruiz did as they were told during daylight hours, but during the night, they shifted course and headed west toward U.S. coastal waters. For over two months, the Amistad zigzagged in a general northwesterly direction. In late August, U.S. coast guard officials spotted the vessel off the coast of Long Island. After seizing it in New York waters, they towed the Amistad to New London, Connecticut, where U.S. District Judge Andrew Judson charged the Africans with murder, mutiny, and piracy.20

Immediately upon making landfall, Montes and Ruiz contacted the Spanish consul in Boston, demanding his help in recovering their slave “property.” The Spanish minister to the

U.S., Chevalier de Argaiz, pressed Secretary of State John Forsyth to extradite the rebels to Cuba, where they could be tried for murder in a Spanish court. According to Argaiz, the terms of the Spanish-American treaties of 1795 and 1819, as well as general principles of comity, compelled the U.S. government to extradite the rebels to Cuba. Pointing to the Enterprise resolutions, he argued that the law of nations prohibited foreign powers from interfering with legitimacy slave-trading voyages during peacetime. Forsyth and others in the Van Buren administration were eager to comply with Argaiz’s request. Facing an uphill battle for re-election and already reeling from the Panic of 1837, the White House could ill afford another blow-up over slavery, and so the administration moved quickly to eliminate the Amistad case from public view, placating southern allies in Congress without alienating northern voters.

Forsyth asked the U.S. district attorney in Connecticut, William Holabird, a loyal Jackson man, to ensure that the Mendians remained under the purview of the executive branch. At the same time, Forsyth assured Argaiz that the administration would do all in its power to honor the minister’s request.\(^{21}\)

With the Van Buren administration favoring on a presumption of slavery, extradition seemed a foregone conclusion. Yet Connecticut abolitionists threw a wrench into the proceedings. Dwight P. Janes, a New London abolitionist who had accompanied authorities during the initial investigation of the ship, had uncovered the truth of the Amistad’s origins – that its human cargo had come to the America via the Tecora, an illegal slave-trading vessel under Spain’s own anti-slave trade laws. Janes, who was affiliated with the AASS, began arguing that, because the Mendians were neither “property” nor Spanish subjects, Spain had no standing in court to demand extradition. These arguments persuaded Justice Joseph Story, on circuit in the Connecticut, who looked into the validity of Montes and Ruiz’s property claims. Story’s inquiry

\(^{21}\) Jones, Amistad, pp. 29-30, 55-57, 140-141.
pitted a presumption of freedom by a federal judge against a presumption of slavery by the executive branch – just the kind of combustible situation the Van Buren administration wished to avoid.22

Meanwhile, Connecticut abolitionists reached out to the AASS headquarters New York, where the Tappans lost no time in making the *Amistad* a national sensation. Aware that the case could rally antislavery opinion and ease tensions between “political” and “moral” abolitionists, Lewis Tappan recruited Joshua Leavitt and Simeon Jocelyn for a “Friends of the Amistad Africans Committee.” Leavitt threw himself into the role, publishing detailed accounts of the *Amistad* proceedings in the *Emancipator* and hiring a politically-diverse team of young lawyers to represent the Mendians, including Whig Roger Baldwin and Democrat Theodore Sedgwick. Leavitt’s agitation began to pay dividends by the spring of 1840. In May, John Quincy Adams introduced resolutions in the House slamming the Africans’ detention and denying the legality of their extradition.23

Frustrated by Story’s investigation into the Spaniards’ papers, Forsyth asked Attorney General Felix Grundy to write a defense of the administration’s policy. Grundy’s report encapsulated the administration’s preference for a legal presumption of slavery at the federal level, as well as the proslavery reading of the law of nations. Grundy, like Forsyth, assumed that the Spaniards had legitimate title to the Mendians; no effort was made to investigate their claims to freedom. The Mendians, the report concluded, had to be returned to Spain *as property*, in accordance with the two countries’ treaties and the general principles of comity. In support of this claim, Grundy cited Justice Marshall’s opinion in *The Antelope* (1826), in which Marshall, elaborating on Sir William Scott, argued that the law of nations recognized the legitimacy of

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22 *ibid.*
23 *ibid.* Adams’s resolution is in *Cong. Globe*, 26th Cong., 1st sess., p. 416.
slavery and the slave trade. Because Spain sanctioned slavery and engaged in slave-trading to Cuba and other Spanish holdings, any interference in that trade would constitute a violation of Spanish sovereignty and the law of nations more generally. In this sense, Montes and Ruiz’s title to the Africans was beyond dispute, immune to the scrutiny of prying judges like Joseph Story, who exceeded their judicial authority by undermining rights to private property.  

Antislavery activists greeted the Grundy report with the same scorn they had poured on the Enterprise resolutions. William Jay was among the first to blast the administration’s presumption of slavery. Grundy’s report, Jay wrote, assumed that the Africans were property, when it was by no means certain that that was the case. The administration’s preference for the southern presumption of slavery prostrated civil procedure in New York, in whose territorials waters the Coast Guard had found the Amistad. By “our own laws,” Jay wrote, “no alleged fugitive slave can be sent to another state” without first testing the accused’s legal status. The claimant “must PROVE his property where he finds it.” The Africans were found in New York waters and should therefore be treated as free persons.  

Jay interpreted the treaties of 1795 and 1819 through the prism of the antislavery law of nations. The language in the 1819 treaty, Jay wrote, said that lost or stolen “merchandize” must be returned “to the true proprietor as soon as due and sufficient proof shall be made concerning the property thereof.” Under the law of nations – which for Jay meant a system of international relations firmly rooted in natural law – human beings could not be “merchandize.” The only “true proprietors” of the Mendians were the Mendians themselves, whose rebellion aboard the Amistad was justified by both natural law and the law of nations. “If ever there were a justifiable

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25 Jay’s letter is in the Philanthropist, Dec. 16, 1840.
homicide for the recovery of personal liberty,” Jay concluded, “surely that committed by these negroes was one.” But that was not even the main point. The crucial point was that Grundy’s report – the entire policy of the Van Buren administration – had presumed slavery when there was every reason to presume freedom. Justice Story’s inquiry presumed freedom, and that was the right policy.

The legal drama surrounding the *Amistad* extended across four separate trials in 1840 and into 1841, first in the district courts of Connecticut, then in the U.S. circuit court in Connecticut, and finally, in the Supreme Court in Washington, D.C. In each of the four trials, lawyers for both sides elaborated on the pro- and antislavery versions of the Constitution and the law of nations, respectively. Counsel for the Spaniards used the *Enterprise* resolutions to insist that the Africans ought to be treated as property. Roger Baldwin and Theodore Sedgwick countered these measures by trying to shift the terms of debate from property to personhood, trying (and failing) to win a writ of habeas corpus on the Africans’ behalf, a move that would force the claimants to recognize the Africans as legal persons by filing a criminal complaint against them. The judge in the second trial denied the habeas corpus request on technical grounds, a decision which was likely influenced by a felt need to conform to the *Enterprise* resolutions.

By the time the *Amistad* case reached the Supreme Court in early 1841, the story of the Mendians had become a national sensation. John Quincy Adams, prodded into action by E.G. Loring of Massachusetts (Med’s lawyer in the *Aves* case four years earlier), joined the Africans’ legal team, replacing Baldwin as lead counsel. In a letter to Loring, Adams argued that the *Amistad* Africans had never been legitimate property, and even if they had been, they were now “self-emancipated” persons by virtue of their revolt. Adams was an expert on the law of nations

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26 *ibid.*
and had recently fought in Congress against compensation for slaves “lost” during the Second Seminole War. As a member of the rapidly-disappearing Revolutionary generation, he embodied an older tradition which viewed the law of nations as a branch of natural law. Like William Jay, Adams viewed the treaties of 1795 and 1819 – specifically, the words “merchandise” and “property” – through the prism of natural law. Slave property had a “peculiar character,” he told Loring, and as a result it had to be “specially named” in treaties. Neither the 1795 nor the 1819 treaty included “special” language which distinguished slave property from other forms of property, an omission that rendered Argoiz’s request – and the administration’s entire policy – moot. Moreover, there was no broad rule of comity involving the return of slave property: “The restitution of fugitive or rebellious slaves never can be claimed under any general stipulation for the restitution of property.”

The first to argue before Justice Story and the Supreme Court was Baldwin, who had remained on the Africans’ legal team despite being replaced as lead counsel by Adams. Baldwin was another up-and-coming Whig lawyer with favorable political prospects. He had deep roots in New England’s legal and political culture, and an impressive family background: his maternal grandfather was none other than Roger Sherman, that critical figure at the constitutional convention of 1787, whose compromises set the stage for the very constitutional issues at stake in the Amistad. Baldwin’s brief rehearsed the key arguments of antislavery constitutionalism as it had developed in the late 1830s, with its stress on strict construction and limited powers. In

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28 Adams’s letter to Loring quoted in Jones, Amistad, p. 83. Adams elaborated on his position in a letter to his constituents, later published in the Philanthropist, Jan. 21, 1840. For Adams, there was a world of difference between Britain’s pledge to compensate slaves taken during the War of 1812 (a pledge he had pursued as James Monroe’s secretary of state) and a general rule under the law of nations for returning slaves as property.
the process, he elaborated on the antislavery law of nations which had emerged in the wake of the *Enterprise* resolutions.²⁹

Baldwin’s first move was to argue that the federal government had no jurisdiction in the case, that responsibility for determining the statues of the Africans fell to the state of New York, in whose waters the Coast Guard had found the Africans. (The first three *Amistad* trials, of course, had taken place in Connecticut, where the ship had been towed after the arrest of the Africans in New York waters; Baldwin argued in each of those first three trials that this never should have happened, that because the Africans had been found in New York waters, their legal status should have been tested in New York courts). It was true, Baldwin said, that the *Amistad* had become a “*national* concern,” a sensation in the political press; but that did not make it an issue for the U.S. government. The latter, he argued, had nothing to do with slavery, and therefore had nothing to do with the case. Federal authorities, not least members of the administration, had no power under the Constitution “to become *actors* in an attempt to reduce to slavery men found in a state of freedom, by giving extra-territorial force to a foreign slave law.” The case of the *Amistad* rebels was therefore a matter between New York and Spain only, not the federal government and Spain. And New York, Baldwin argued – no doubt drawing on Story’s passage on slavery from the *Commentaries on the Conflicts of Law* – would not have been compelled to grant comity.³⁰

Yet both Spain and the Van Buren administration had acted as if there were a *national* policy regarding the fugitive-slave renditions; both sides had operated on the premise that the United States was a slave country which presumed slavery. Baldwin attacked this assumption by

²⁹ On Baldwin, see Jones, *Amistad*, p. 37. It is worth pointing out that Sherman’s antislavery credentials are complicated by his crucial role in facilitating one of the great compromises over slavery at the 1787 constitutional convention, which helped forge agreement on the Constitution but also sowed the seeds of future constitutional conflict.

stressing the mutual exclusivity of slavery and federal power, an argument which allowed him to elaborate on antislavery constitutionalism and the antislavery law of nations. The United States “as a nation,” Baldwin argued, is “to be regarded as a free State.” The Constitution recognized slavery “as existing in regard to persons held to labor by the laws of the States which tolerated it,” but it gave no general sanction to property in human beings, and gave Congress “no power to establish or legalize the institution of slavery.” On the contrary, Baldwin argued, the Constitution contains a compact between the States [the Fugitive Slave Clause], obliging them to respect the rights acquired under the slave laws of other States in the cases specified in the Constitution. But it imposes no duty, and confers no power on the Government of the United States to act in regard to it. So far as the compact extends, the courts of the United States, whether sitting in a free State or a slave State, will give effect to it. Beyond that, all persons within the limits of a State are entitled to the protections of its law.

The Fugitive Slave Clause did not create ground for a national policy regarding foreign slaveowners and comity; it was a compact between the states, and constituted a positive and artificial exception to a general presumption of freedom in the United States. There was no a national policy regarding comity for slaveowners, no presumption of slavery at the national level. The Mendians “stand before our courts on equal ground with their claimants.”

Nor was there a basis for such a policy in the law of nations. Here, Baldwin ignored the precedent set by John Marshall’s Antelope opinion and jumped straight to Story’s opinion in Le Jeune Eugenie. Slavery, he argued, was repugnant to natural law, which was the moral underpinning of the law of nations. The latter only recognized slavery insofar as it had been established by the positive laws of slaveowning nations or explicitly included in the language of bilateral treaties (as the founders had done when they inserted the Fugitive Slave Clause into a

31 ibid.
Constitution that presumed freedom -- though, crucially, they had used the language of persons rather than property.)\textsuperscript{32} On these grounds, Baldwin argued that slaves were “not acknowledged as [property] by the law or comity of nations generally, but only by the municipal laws of the particular nations which tolerate slavery.” This meant that Spain’s request for extradition depended entirely on the language in the treaties of 1795 and 1819, and under the law of nations, treaties needed to make “special” reference to slaves as property for the master-slave relationship to be recognized and enforced under comity. This was the policy of the U.S. government going back to the founding era, Baldwin argued: “whenever our Government have intended to speak of negroes as property in their Treaties, they have been specifically mentioned, as in the Treaties with Great Britain in 1783 and 1814.” Alas, since there was “no special reference to human beings as property” in either treaty, and because the United States – a “free State,” in Baldwin’s terms – did not treat slaves as “merchandize,” it did not have to send the Mendians back to Cuba.\textsuperscript{33}

John Quincy Adams followed Baldwin with a multi-day speech that extended Baldwin’s ideas on the Constitution and the law of nations. For Adams, there was no justification for the administration’s denial of due process for the Africans, no reason why they should have presumed slavery in order to expedite the rendition process. Neither the law of nature nor the law of nations as such recognized slave property, Adams argued; international comity involving slave property was only possible through bilateral treaties with “special recognition” of slave property in phrases like “slavery” or “slave property” or “slave merchandize.” Spain’s treaties with the U.S. did not have that kind of explicit language.\textsuperscript{34}

\textsuperscript{32} Note that this line of reasoning could just as easily have been made by Henry Stanton in the Washington, D.C. context or by Salmon P. Chase in the free-state context.
\textsuperscript{33} \textit{ibid.}
\textsuperscript{34} \textit{ibid.}
More importantly, the U.S. government had no power under the Constitution to treat slaves as property. There is not a single clause in the Constitution, Adams argued, in which “human beings [are recognized] as merchandise or legitimate subjects of commerce.” The framers were “careful to exclude… every expression that might be construed into an admission that there could be property in men.” Adams admitted that his arguments went well beyond the immediate issue in the case, which was the validity of Montes and Ruiz’s title to the Mendians. On the score, the argument was quite simple: the Mendians had been kidnapped and thus had never been the property of the Spaniards, and thus could not be remanded to Cuba as human chattel.\footnote{ibid. Here, Adams cited Madison’s notes on the 1787 constitutional convention and Justice Philip Barbour’s opinion in \textit{Miln v. New York} (1837). Adams also reiterated Baldwin’s argument that a federal guarantee for slave property meant that Congress could impose slavery on all the states under the commerce clause.}

Representing the administration was Van Buren’s new Attorney General, Henry Gilpin (Grundy died in office), who argued that the treaties with Spain did in fact require the U.S. government to return fugitive or rebellious slaves to Spain \textit{as property}. Gilpin rehearsed the same proslavery line which Calhoun had written into the \textit{Enterprise} resolutions. The Constitution – and thus the federal government – treated slaves as property, not as persons, which meant that the federal government favored a presumption of slavery and granted comity to slaveowning countries. If this was true domestically – and Gilpin took for granted that it was – it was also true internationally. Under the terms of the American treaties with Spain, as well as the general dictates of comity, the U.S. government was obliged to send the Mendians to Cuba as the property of Montes and Ruiz. This was the exact opposite reasoning from Adams and Baldwin. The proslavery sentiments adopted by the Senate in the \textit{Enterprise} resolutions had become both the official policy and legal strategy of the executive branch.\footnote{ibid.}
This is where the issue stood on March 9, 1841, the day Justice Story handed down his opinion. Given Story’s background on the slavery question – in particular, his controversial ruling in *Le Jeune Eugenie* (1819), and his endorsement of the municipal theory in the *Commentaries on the Conflicts of Law* (1834) – it seemed likely that he would side with Adams and Baldwin over Gilpin and the administration. Adams and Baldwin’s arguments derived from the same antislavery tradition that Story had invoked in *Le Jeune Eugenie*, while Gilpin’s brief represented the abandonment of that tradition after John Marshall’s *Antelope* decision in 1826.

Yet Story knew that a palpably antislavery decision would aggravate southern leaders and exacerbate a fast-growing constitutional crisis over slavery. To protect the Union and all the moral, political, and economic benefits it provided, Story sought an opinion that would balance sectional interests and, if possible, avoid deeper constitutional issues.\(^\text{37}\)

That objective is the likeliest explanation for the scope of Story’s opinion, which ruled in favor of freedom but did so in the narrowest way possible. In a moral victory for abolitionists, Story agreed with Adams and Baldwin that the Mendians had never been enslaved and therefore could not be the property of Montes and Ruiz. They were free to return to Africa. But his opinion suggested that, if foreign slave traders could provide legitimate papers – prove their title to captive blacks aboard a given vessel – the U.S. would have to return the captives as property. This reflected the post-*Antelope* reading of the law of nations, which held that the law of nations (considered as a composite of positive laws and agreements) recognized the legitimacy of slavery and slave-trading.\(^\text{38}\)

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\(^{38}\) *U.S. v. Amistad.*
Yet this does not mean that Story endorsed the proslavery version of the law of nations expressed in the *Enterprise* resolutions, which put the property rights of slaveowners above a presumption of freedom in free jurisdictions, precluding inquiries into the legal status of “enslaved” persons. In fact, Story’s ruling suggested that, while U.S. courts were bound to recognize the legitimacy of slave-trading, federal judges could and should favor a presumption of freedom in their dealings with foreign countries. In other words, nothing in the “positive” law of nations precluded courts from assessing the legal status of persons claimed as slaves. In this sense, Story’s opinion was an important intervention in the ongoing debates over slavery on the high seas.

The first thing Story did was dispense with the treaty issue, since, in his view at least, the Mendians had clearly been kidnapped. Because they had never been enslaved, all the hairsplitting over “property” and “merchandize” was irrelevant. Next, Story argued that the Mendians’ rebellion had been fully justified. Because they had never been enslaved, and because there was no evidence that Spanish slave codes applied to the *Amistad*, the Mendians had every right to rise up against the crew, even if their revolt entailed “dreadful acts” of violence.\(^{39}\) Both the law of nature and the law of nations, he argued, recognized the right to “self-emancipation,” that “ultimate right of all human beings in extreme cases to resist oppression, and to apply force against ruinous injustice.”\(^{40}\) Here, Story endorsed the reasoning put forward by Adams, Baldwin, and counsel for the Africans.

But Story did not reject comity out of hand; in fact, his opinion suggested that, had Montes and Ruiz been able to supply the court with legitimate papers, he would have been compelled by the terms of the treaties to return the Mendians to Spain as property. Yet treaty

\(^{39}\) *ibid.*

\(^{40}\) *ibid.*
obligations were not the same thing as general principles of comity, and here, Story tellingly remained silent. Because he avoided the issue, it is impossible to say what he really believed; but if his passage in the *Commentaries on the Conflicts of Law* is any indication, Story did not think countries were bound to return slaves by virtue of a general rule of comity, a realm of international relations dominated by what he called the “eternal principles of justice and international law.”

In fact, Story’s use of positive law actually contradicted the spirit of the *Enterprise* resolutions, which had attempted to break free from the municipal theory by universalize slaveowner property rights through the prism of “the Union.” Story’s opinion pushed against this reasoning by limiting the number of situations in which slaveowner property rights could be treated as legitimate on the high seas, namely, cases in which slave traders could produce legitimate papers. In this sense, the opinion showed how an emphasis on positive law and strict construction could, in practice, circumscribe slavery in ways that undermined the institution itself.

Most importantly, Story’s actual opinion seemed to favor a presumption of freedom at the national level, suggesting that federal judges and the U.S. government more generally should presume freedom by insisting on procedural due process for accused blacks. By inquiring into the validity of the Spaniard’s papers, Story implied that claimants’ property rights should not override civil procedures designed to test the legal status of persons claimed as property. This was the opposite of a legal presumption of slavery: Story could have endorsed Gilpin’s argument that the U.S. Constitution, and thus the federal government, recognized slaves as property; but he did not, and his omission is important. While the terms of the opinion were exceptionally narrow, reflecting the hard lessons of Marshall’s *Antelope* opinion in 1826, the actual outcome of

41 *ibid.*
the case – freedom for the Mendians – maintained the basic premise of Story’s 1819 *Le Jeune Eugenie* opinion: the U.S. government should always presume freedom by reading positive law in the light of natural law.\(^{42}\)

**Groves v. Slaughter (1841)**

On March 10, 1841 – the day after Justice Story issued the *Amistad* opinion – Justice Smith Thompson handed down the majority opinion in *Groves v. Slaughter*, the first Supreme Court case to directly address the issue of slavery’s relationship to federal power. The case grew out of a commercial dispute between two southern planters. Moses Groves of Mississippi used $7,000 worth of promissory notes to buy a group of slaves from Louisianan Thomas Slaughter in 1836. When actual payment came due, Groves backed out of the transaction on the grounds that it had violated a provision in Mississippi’s constitution prohibiting the importation and sale of slaves in that state so as to stabilize slave prices. Groves argued that the provision voided the whole transaction with Slaughter, and he refused to pay up or return the slaves. Slaughter and his associates sued and won in the federal circuit court of Louisiana, whereupon Groves’s attorney appealed and the case went up the Supreme Court in Washington.\(^{43}\)

*Groves v. Slaughter* focused on the broader implications of Mississippi’s anti-importation provision: could states regulate the interstate slave trade, or did the provision conflict with Congress’s power over interstate commerce via the Commerce Clause of the Constitution? A

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\(^{42}\) See Ernst, “Legal Positivism, Abolitionist Litigation.”

\(^{43}\) On *Groves v. Slaughter*, see Hyman and Wiecek, *Equal Justice under Law*, pp. 101-2; Newmeyer, *Supreme Court Justice Joseph Story*, pp. 366-8; Earl Maltz, *Slavery and the Supreme Court*, pp. 68-82; Lightner, *Slavery and Commerce Power*, pp. 71-8; Finkelman, “John McLean,” pp. 552-554. As Lightner points out, “The clause was not an antislavery measure. It did not stop new settlers from bringing slaves with them when they came to live in Mississippi, nor did it prevent residents from of the state from traveling beyond its borders, doing their slave-buying there, and then bringing their acquisitions home with them. Rather, the measure reflected concerns that too much capital was being drained away from the state, that the price of the slaves there was being undermined, and that the slaves brought in by commercial traders were often misrepresented and so were more likely to turn out to be unhealthy, unreliable, or rebellious.” Lightner, *Slavery and Commerce Power*, pp. 71-72.
narrower question was whether the anti-importation provision was self-executing or needed implementing legislation to be enforceable. Behind both questions was the issue of slavery’s relationship to the commerce power, a raw nerve in national politics since at least the 1790s, especially so after Justice Marshall’s opinions in the late 1810s and early 20s. On its face, *Groves v. Slaughter* seems far removed from the controversy over slave property on the high seas; but because so much of the slave trade took place along U.S. coastal waters – particularly between the Chesapeake and New Orleans – the participants in the case understood its connections to the *Enterprise* resolutions and the *Amistad* affair. The question was the same: What was the relationship between slavery and federal power?

Slaveowners sought a ruling which would allow the states to regulate the slave trade while barring federal interference with the trade under the commerce power. Economic nationalists wanted an opinion that would affirm federal exclusivity in matters of interstate trade. Antislavery activists wanted an opinion that would arm Congress with an aggressive commerce-power rationale for breaking up the interstate slave trade. Not surprisingly for a case in which so many interests and doctrines were at stake, *Groves* brought together a formidable group of national leaders. Counsel for Groves included, among others, Senator Robert J. Walker, the Pennsylvania-born proslavery Democrat from Mississippi who would go on to become the chief proponent of Texas annexation after 1843. On the side of Slaughter and his associates was both Henry Clay and Daniel Webster, economic nationalists with a deep interest in striking down Mississippi’s anti-importation provision and, with it, state regulation of interstate commerce. The ubiquitous John Quincy Adams, who surely grasped how the case overlapped with the *Amistad* affair, sat in the front row as both sides made their arguments before the Court.44

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44 On Adams’s attendance, see Lightner, *Slavery and the Commerce Power*, p. 72.
William Walker argued first. His defense of Groves rested on the claim that, while Congress controlled interstate commerce, it could not force states to import merchandise they did not want – in this case, human merchandise. Mississippi’s anti-importation provision was self-executing and was fully in line with the police power over domestic relations. In order to make this argument – in order to shift the ground from commerce power to police power – Walker emphasized the personal status of slaves, arguing that the Constitution recognized them primarily as persons, not as property. Slaves, Walker said, were not “merchandize” in any universal sense. Property rights in slaves derived from a “local and peculiar” system of “social relations” in the states, and that is precisely how they were recognized by the Constitution, as a local system involving personal (rather than property) relations. “It is as ‘persons,’” he argued, using the example of the Fugitive Slave Clause, “[s]laves are surrendered in one state when fugitives from another.” If slaves were persons not merchandise, slave-trading did not constitute the kind of commerce Congress could regulate under the commerce power. In other words, the federal consensus – the principle that Congress could not touch slavery in the states – applied as well to the interstate slave trade, which was a “local” trade “peculiar” to the slave states of the South. Walker’s arguments were designed to thwart federal interference with the slave trade, but his claim that the Constitution treated slaves as persons came very close to endorsing the cardinal principle of antislavery constitutionalism – something Justice McLean would exploit in his concurring opinion.45

45 Groves v. Slaughter (1841 U.S. Lexis 278). Walker’s argument that the Constitution treated slavery as a local system of “personal relations” reversed the logic of proslavery constitutionalism. As we have seen, it was axiomatic among the Calhounites that the Constitution guaranteed the protection of slavery property and that the U.S. government had to protect such property in all areas of the Union, not just in the slave states. According to Walker, the master-slave relationship involved persons living in civil society, and as such, it resembled all other “social relations” regulated by state law. “The relation of master and slave, of master and apprentice, of owner and redemptioner, of purchaser and convict sold, of guardian and ward, husband and wife, parent and child, are all relations depending exclusively on the municipal regulations of each state.” Local laws regulating slavery amounted to a kind of police power for the “internal security of the state.” That Walker would use the municipal theory to his
Clay and Webster argued that Mississippi’s anti-importation provision violated the Commerce Clause, which in their view had given Congress exclusive control over interstate commerce. To make that claim stick, both men had to argue that the Constitution treated slaves as property, which meant that the slave trade was a legitimate form of commerce, as normal as any other trade in merchandise. Webster was especially disdainful of Walker’s attempt to shift the terms of debate from property to personhood. The word “slave” implied a property right, just as the word land implied property ownership. “This is property.” The Constitution referred to slaves as persons, but it recognized them as property and thus the federal government was bound to treat them as articles of commerce. Congress therefore had full power to regulate the slave trade. Because Mississippi’s anti-importation provision violated the Commerce Clause, Groves’ refusal to compensate Slaughter had no legal justification. Here, economic nationalism dovetailed with proslavery constitutionalism.

Justice Thompson’s majority opinion ruled in favor of Slaughter and his associates. Thompson argued that the anti-importation provision required enacting legislation, and because such legislation was not in place at the time of transaction, Groves’ contract with Slaughter was valid and binding. And because the provision had not been in force, it did not come into conflict with the Commerce Clause. In this way, Thompson skirted the constitutional issue. But his opinion did sanction the slave trade by redeeming the value of Slaughter’s promissory notes, granting recognition to the very lifeblood of the internal slave trade. Yet, crucially, Thompson’s advantage is not surprising, given that he was arguing against federal interference of the domestic slave trade. Nor was it out of the ordinary for a defender of slavery to shift the terms of the debate from property to personal relations, emphasizing the social and customary aspects of slavery over its legal and constitutional side. In shifting the terms of debate from property to personal relations, Walker did precisely what Theodore Dwight Weld had warned abolitionists about during the Washington, D.C. debate. See Ch. 3.

46 ibid. There is nothing to suggest that Webster thought the Constitution guaranteed the protection of slave property. His actions on behalf of the Tyler administration were no doubt functionally proslavery, but in his official statements he carefully distinguished the Constitution from slaveowner property rights derived from state law. Still, by arguing that the “protection of this right of property” was a “duty under the Constitution,” Webster came very close to the Calhounite claim of a federal guarantee for slavery.
opinion did not clarify whether the slave trade was a distinctly “local” (regional) form of commerce or part of the nation’s general commercial activity. 47

Thompson’s opinion put Joseph Story in a bind: on the one hand, he did not want to legitimize the slave trade; on the other hand, he did not want to address the constitutional question of slavery and the commerce power. In a concurring opinion which he wrote with Justices James Wayne and John McKinley, Story agreed with Thompson that the Commerce Clause “did not interfere with the provision of the constitution of the state of Mississippi, which relates to the introduction of slaves as merchandise, or for sale.” But he endorsed Walker’s argument that the anti-importation provision was self-executing and that Slaughter’s promissory notes were therefore void. States, in other words, could regulate the internal slave trade, precisely because it was a “local” traffic involving human merchandise – a peculiar form of commerce, different from the rest. In this way, Story balanced his commitment to the Union status quo with his commitment to the municipal theory in American federalism. Yet the legal gymnastics required to maintain that position in the post-Antelope context were becoming increasingly difficult to pull off, a fact which Story confronted one year later in Prigg v. Pennsylvania. 48

Justice McLean of Ohio was the only justice to use his concurring opinion to address the constitutional question of slave-trading and the commerce power, and his opinion had profound ramifications for antislavery constitutionalism and later antislavery policy. McLean, together with Story, comprised the Court’s antislavery minority. Like Story, he struggled to balance his

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47 *ibid.* Newmeyer offers the insightful argument that, “[b]y not ruling on the constitutional conflict between the commerce power and the state constitution, that is, by ruling that the state prohibition was inoperative, the Court had in fact validated several million dollars’ worth of notes held by slave traders.” Newmeyer, *Supreme Court Justice Joseph Story*, p. 367.

48 *ibid.* See also Newmeyer, *Supreme Court Justice Joseph Story*, pp. 366-368.
commitment to the municipal theory with his duty to fulfill the positive obligations to slavery in the Constitution.

McLean looked askance at the radical abolitionism associated with William Lloyd Garrison and Wendell Phillips, but he sympathized with efforts to separate slavery and federal power and reduce as much as possible the North’s obligations to slavery under the Constitution. He agreed with the proposition that the federal government should have nothing to do with slavery, that rights to slave property were strictly “local” and certainly not guaranteed protection and extraterritorial status by the Constitution. It was in this spirit that McLean pounced on William Walker’s argument that Congress could not regulate the slave trade because the Constitution treated slaves as persons not property. That was exactly right, McLean wrote. “The Constitution treats slaves as persons,” McLean wrote, and while some states treated them as movable property, this did not “divest [slaves] of the leading and controlling quality of persons by which they are designated in the Constitution.” Congress therefore “acts upon slaves as persons, and not as property.” Slaves were not like other forms of merchandise in that their status as property was dependent on state law. The slave trade, like slavery itself, was a local institution in the South; it did not belong to the general definition of commerce intended by the Commerce Clause of the Constitution.49

On these grounds, McLean argued that Congress had no power to interdict the slave trade via the commerce power. “A power may remain dormant,” he wrote, referring to the commerce power, “though the expediency of its exercise has been fully considered. It is often wiser and more politic to forebear, than to exercise a power.”50 Yet, far from endorsing Walker’s proslavery conclusions, McLean’s used this reasoning to promote the cardinal principle of

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49 Groves v. Slaughter (1841 U.S. Lexis 278).
50 ibid.
antislavery constitutionalism – that property rights in slaves had no connection at all to federal power. Here, McLean drew on the same post-Antelope, positive-law understanding of slavery and the law of nations that Justice Story had used in his *Amistad* opinion: because the law of nations recognized the legitimacy of slavery and the slave trade (as a function of positive law and not a universal law of nature), free nations could not interfere in the trade in the name of morality or justice. McLean applied that logic to the American federal system. The U.S. government, considered as a free state, could not interfere in the slave traffic between slaveowning states, precisely because that traffic was a local institution grounded in the positive laws of the states. In other words, the municipal theory, and thus the federal consensus, applied as much to the slave trade as it did to slavery itself. Slave trading was local and sectional; it was not national like most other forms of commerce. If Thompson’s opinion addressed an audience of economic nationalists and states’-righters, McLean’s opinion was meant as an intervention in the constitutional dialogue between proslavery Calhounites and antislavery activists like his son-in-law Salmon P. Chase.

Chief Justice Roger Taney, together with Justice Henry Baldwin, issued a dissenting opinion that showcases the way in which Calhoun’s proslavery constitutionalism had seeped into the judicial branch. Taney and Baldwin rejected William Walker’s (and thus McLean’s) argument that Congress could not regulate the slave trade because it was a “peculiar” and “local” traffic in persons not property. The Constitution, they argued, treated slaves as property; Congress therefore had every right to regulate the slave trade. Slaves, Baldwin wrote, “were embraced by the Constitution as the subjects of commerce and commercial regulations, to the same extent as other goods, wares, or merchandise.” To be sure, the right to slave property had been established long “before the adoption of the Constitution” and therefore existed.
“independently of the Constitution, which does not create, but recognises and protects it from violation, by any law or regulation of any state, in the cases to which the Constitution applies.”

But unlike Webster and Clay, Taney and Baldwin made it clear that the power to regulate did not include the power to destroy the slave trade. Slaves were “the subjects of commerce between the states that recognize them, and the traffic in them may be regulated by congress, as the traffic in other articles; but no farther.”

Here, they used the same substantive due process arguments Calhoun had applied to Washington, D.C.: Congress could not deprive citizens of their vested rights to private property, which were absolute and outside the sphere of government regulation.

**The Impact of Amistad and Groves on the Abolitionist Movement**

Neither the *Amistad* nor *Groves* was an unqualified victory for abolitionists. Many lamented the narrowness of Story’s opinion, while others chafed at Thompson’s apparent sanction of the interstate slave trade. Yet most abolitionists believed that the two cases validated their constitutional doctrines, especially the idea that the federal government must presume freedom -- treat slaves as persons rather than property. For Gamaliel Bailey, the two opinions demonstrated the “vast importance of judicial decisions, on questions affecting human rights.”

Story’s *Amistad* opinion was narrow in scope, but the actual outcome of the case confirmed Story’s commitment to a presumption of freedom at the federal level. As a federal judge on circuit, Story had refused to presume that the Africans were the Spaniards’ property; his inquiry into Montes and Ruiz’s papers set the stage for the four *Amistad* trials of 1840-1, all of which tested the validity of the Spaniards’ claims and, by the same token, tested the legal status

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51 ibid.
52 See Ch. 3.
53 *Philanthropist*, May 26, 1841.
of the accused. True, Story had clearly backed away from his more assertive natural-law stance in *Le Genie Eugenie*; not only did he ignore Adams and Baldwin’s broader antislavery arguments, he also avoided the constitutional question of property rights in slaves. But his opinion was a victory for abolitionists, not merely because it exonerated and freed the Africans, but because it demonstrated how U.S. authorities could presume freedom in practice.

McLean’s opinion in *Groves* was even more important to the abolitionist cause. A sitting Supreme Court justice – or, as a buoyant Gamaliel Bailey put it, “the authority of the Supreme Court” – endorsed the key premise of antislavery constitutionalism – that the Constitution treated slaves as persons not property. If it was true that Thompson’s opinion recognized the legitimacy of the slave trade, it was also true that it left open the possibility that traffic in human beings was not the same as commerce generally – an omission which McLean exploited in his concurring opinion. Abolitionists could now point to *Groves* as evidence that the slave trade itself was “local,” bounded by the municipal theory. McLean made explicit what Story had merely implied in his *Amistad* opinion: the federal government must favor a presumption of freedom.

McLean’s opinion convinced abolitionists that it was politically more effective to include the slave trade in the federal consensus than it was to insist on federal interference with the trade via the commerce power. As we have seen, interdiction of the slave trade had long been a part of the abolitionist agenda. As early as 1836, Alvan Stewart and Henry Stanton had argued that the Commerce Clause gave Congress power to break up the slave trade. An influential committee report issued by the Massachusetts state legislature in 1838 found that Congress indeed had the power to break up the slave trade, and in 1839, Senator Thomas Morris of Ohio insisted that

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55 See Ch. 2, p. 24ff.
Congress should prohibit the slave trade “at once.”\textsuperscript{56} That same year, William Jay argued that the 1807 ban on the Atlantic slave trade gave Congress power to break up both the coastal and overland trade. “It would not be easy to show that the Constitution forbids its prohibition in vessels over forty tons burthen,” Jay wrote. “We may take it for granted that “coasting trade will be legally abolished. Should the land traffic not be destroyed, it would not be for want of disposition, or constitutional power in Congress, but on account of the extreme difficulty which would exist in preventing evasions of the law.”\textsuperscript{57}

The \textit{Groves} case illustrated how these arguments contradicted the basic premises of antislavery constitutionalism, not least the claim that slaves were persons under the Constitution, not property, and that the federal government should have nothing to do with slave property. William Walker had highlighted the abolitionists’ inconsistency in his argument for Groves. Abolitionists, Walker had argued, insisted that slaves were persons not property; yet their argument for breaking up the slave trade rested on the premise that slaves were merchandise like any other property. “It is the abolitionist,” Walker said, “who must wholly deprive the slaves of the character of persons, and reduce them in all respects to the level of merchandise, before they

\textsuperscript{56} The Massachusetts report was written by the antislavery lawyer-politician James C. Alvord, the author of the 1837 report on the writ of de homine replegiando. Alvord introduced some new and sophisticated arguments against the slave trade. He replied to the argument that Congress could regulate but not destroy commerce by distinguishing slave property from other commodities. The issue, Alvord argued, was not the destruction of commerce \textit{per se}, but rather the excision of \textit{slavery} from the general category of commerce – to “interdict trade in a particular article or class of articles.” To clarify this distinction, Alvord quoted Justice Story in \textit{Commentaries on the Constitution}: “A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases, suspend its operations, or restrict its advancement of scope.” James C. Alvord, et. al., \textit{Report on the Powers and Duties of Congress upon the Subject of Slavery and the Slave Trade} (Boston: s.n., 1838), pp. 22-31.

Thomas Morris argued in his 1839 response to Henry Clay that Congress could in fact interdict the internal slave trade – though Morris did not point to a specific clause in the Constitution. Clay, he argued, was wrong to say that Congress could not destroy commerce between the states. Clay assumed rather than demonstrated that “slaves are proper articles for commerce.” Abolitionists, on the other hand, argued “that Congress have power over slaves only as persons. The United States can protect persons, \textit{but cannot make them property}.” Congress had the power to regulate commerce, and thus could, “in such regulation, prohibit from its operations everything but property; property made so by the laws of nature, and not by any municipal regulations.” On these grounds, Morris argued that Congress should “prohibit the slave trade “at once.” \textit{Speech of Hon. Thomas Morris of Ohio, In Reply to the Speech of the Hon. Henry Clay} (New York: American Antislavery Society, 1839), pp. 11, 27, 32.

\textsuperscript{57} See Ch. 2, n. 41.
can apply to them power of congress to regulate commerce among the states.” The claim that slaveowners had property rights in the “flesh and blood, the bones and sinews of any man under the laws of the south” was an “abolitionist slander,” not legal reality. The “radical error” of abolitionists was to treat slavery as a universal property relation, when in fact it was no more than a domestic “social relation.”

None of Walker’s argument was actually true: slavery was in fact a property relation in the states, and many abolitionists believed Congress could break up the slave and still act upon slaves as persons. But the fact remained that positive federal action against the slave trade would conflict with the spirit of antislavery constitutionalism, which was about withdrawing or minimizing slavery’s existing ties to federal power, not augmenting federal power. Worse, Walker had highlighted the problem of unintended consequences. If Congress exercised a power to destroy the slave trade, it would create a precedent by which Congress had power to establish slave-trading anywhere in the Union, in Massachusetts as well as in Mississippi. This “uniform effect,” as Walker put it, complicated the abolitionists’ argument against the slave trade.

McLean’s opinion offered abolitionists a way out of the impasse, namely, by dropping the slave trade from their constitutional program. McLean’s statement that it is “often wiser and more politic to forebear, than to exercise a power” was aimed at mainstream antislavery activists like his son-in-law Salmon Chase as much as economic nationalists like Webster and Clay. The opinion pointed toward a more effective strategy against slave trade. It was better to have consistent constitutional reasoning – to maintain the premise the Constitution treated slaves as persons, and that slavery and the slave trade were local institutions – than to attack the slave trade with ill-considered arguments that could backfire badly. This was antislavery reasoning in

58 Groves v. Slaughter (1841 U.S. Lexis 278).
59 ibid.
the post-Antelope context: like Story’s *Amistad* opinion, which recognized that the U.S. could not interfere with “legitimate” slave-trading on the high seas but could, in practice, adopt the presumption of freedom, McLean’s opinion recognized that Congress could not interdict the slave trade but confirmed that the federal government must always presume freedom. Both the *Amistad* and *Groves* cases seemed to push back against the presumption of slavery intrinsic to the *Enterprise* resolutions of May, 1840.

Abolitionists took the hint. In addition to celebrating McLean’s endorsement of antislavery constitutionalism, by mid-1841 they dropped the slave trade from their list of legislative actions Congress should pursue against slavery. In an “Appeal” to abolitionists published in the *Emancipator*, Arthur Tappan and Joshua Leavitt exclaimed: “Let the principle that ‘the constitution regards slaves only as persons, and not as property,’ be fully carried out, in all departments of the Federal Government... As law-abiding citizens, pledged to constitutional measures for the abolition of slavery, we seem to owe this [McLean’s *Groves* opinion] to our own consistency.” The cause of liberty has “gained much more than it has lost.”

In a separate editorial, Leavitt answered critics who said that Thompson’s majority opinion had settled the slavery-commerce power problem once and for all. That was far from the case, Leavitt argued; because Thompson’s opinion actually said nothing about the constitutional status of slavery and slave-trading, McLean’s opinion was the only statement of the Court on that all-important question, and in that sense, the Court “decided in favor of the great fundamental principle of the abolitionists, to wit, that the Constitution of the United States no where recognizes persons held to labor as being property. We consider this as in effect, a decision that

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60 *Philanthropist*, Nov. 3, 1841.
the Constitution does not recognize them as *slaves*, for the being property is of the very essence of slavery."

After *Amistad* and *Groves*, some abolitionists grew hopeful that the Supreme Court would strike down slave codes in federal jurisdictions. The rapid string of “victories” at both the state and federal levels seemed to suggest that a new strategy was in order, a shift away from Congress and toward the Supreme Court. Chase and Bailey saw the *Mary Towns* and *State v. Farr* cases as part of a broader movement underway in the nation’s judicial arteries, from county courts to the federal circuit and finally the Supreme Court. In early December, 1841, Leavitt told Chase that a new slavery case was needed to test the constitutionality of slavery in federal areas, above all in Washington, D.C. Thomas Morris was convinced that the “the Supreme Court have jurisdiction, derived from the Constitution, over the question of Slavery, not only in the District of Columbia, but throughout the United States, in all places over which Congress has exclusive power,” including federal forts and arsenals in the South. Morris added sarcastically: “Light is breaking in upon us from the slaveholding states themselves… Even Mississippi is aiding in this great work.” McLean’s *Groves* opinion confirmed that the “municipal or local laws of a State can only regulate the tenure and evidences of property, not those of freedom and liberty,” which were the basic entitlements of every person living in the United States. For antislavery activists across the North, shifting to the courts now seemed to be the most effective strategy for enacting bits and pieces of the abolitionists’ agenda, state by state, year by year. Yet the bubble of optimism which emerged in the afterglow of the *Amistad* and *Groves* opinions suddenly burst in early 1842 with the appearance of Joseph Story’s opinion in *Prigg v.*

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61 ibid., Aug. 20, 1841.
63 *Philanthropist*, Dec. 8, 1841.
Pennsylvania. The season of optimism was brief; Justice Story’s opinion disabused abolitionists of the idea that antislavery action would proceed through the Supreme Court.64

The Creole Resolutions

Around midnight on October 25, 1841, the Creole, a slaving vessel packed with some one hundred and fifty slaves, disembarked from Richmond, Virginia, on its way to the slave markets of New Orleans. The Creole’s captain and crew thought the slaves on board were passive and obedient, so they let them linger below deck without chains or guards. But this group of slaves was far from docile: as the Creole made its way down the James River, into the Chesapeake and then U.S. coastal waters, a group of male slaves gathered in the shadows, quietly planning a revolt. Their leader was the aptly-named Madison Washington, the ship’s cook. The rebels planned to kill all the officers on the ship, sparing only the captain’s wife and children. Their mutiny began in the twilight hours of November 7, 1841. Washington’s collaborator, Elijah Morris, was the first to go above deck; with a pilfered gun, Morris fired at one of the crew. Within minutes, seventeen slaves emerged from the hull, arming themselves with handspikes and bowie knives. After snuffing the lanterns on the deck, plunging the ship into an eerie, panic-laden darkness, the rebels surrounded the cabin and struggled with the crew, killing the captain’s mate and his dog. By one o’clock in the morning, the revolt was over: the Creole was now under the control of Washington’s rebels.65

64 See Chapter 6.
Washington ordered the surviving crew members to steer the *Creole* in a northeasterly direction, toward Liberia on the west coast of Africa. The rest of the mutineers, however, disagreed, arguing instead that the ship should go to the Bahamas, where they would be treated as free men by local authorities. Washington complied, and shortly after daybreak on November 8, the *Creole* changed course, heading southeast toward the Bahamas. The next morning, the ship entered the port of Nassau and was intercepted by a British schooner, whose crew boarded the vessel and navigated it safely into port. Upon making landfall, the surviving crew members rushed to the American consulate for help in retrieving their slaves. The American ambassador presented their claims to the governor of the Bahamas, who agreed to detain the rebels for a few days. He did so, however, not out of respect for the crews’ property rights, but as a procedural measure to inquire into murder charges against the rebels; in accordance with British imperial law, the Bahamian authorities presumed that the *Creole* rebels were free men who deserved access to basic rights like *habeas corpus* and free movement. Within a few weeks, the Bahamian authorities found the rebels innocent of murder and set them free. Many remained in the Bahamas, while others moved on to Jamaica and other destinations in the Caribbean.\(^{66}\)

The *Creole* affair of 1841-2 sparked another intense round of constitutional conflict over slavery on the high seas. This time, however, antislavery forces succeeded in bringing their constitutional arguments directly into conflict with slaveowners in Congress. In March, 1842, as the controversy surrounding the rebellion enraptured national politics, Joshua Giddings, an antislavery Whig from Ohio, introduced nine resolutions in the House which summarized the antislavery reading of the law of nations and the Constitution. The fallout from the Giddings’ *Creole* resolutions, including his expulsion from the Whig Party and his subsequent reelection a

\(^{66}\) On the *Creole* rebels’ geopolitical consciousness, see Troutman, “Grapevine in the Slave Market.”

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few months later, not only generated animosity in the North against southern political power, but also popularized the argument that federal power should be in the service of freedom, not slavery.

News of the Creole uprising reached Washington on December 15, 1841. Once again, as with the Enterprise affair, the decision of British authorities to emancipate American slaves triggered a hail of protest from slaveowning congressmen and their allies, who saw it as the latest and most galling infringement of American sovereignty yet. Calhoun was particularly incensed, so much so that he skipped the usual parsing of principles and jumped right into open saber-rattling. In resolutions he introduced in early 1842, Calhoun demanded that the Tyler administration do everything in its power to reclaim the “slaves on board” the Creole and “redress the wrong done to our citizens, and the insult offered to the American flag.”

Augustus Porter, a two-term senator from Michigan, objected to the language in Calhoun’s resolution and insisted that it be amended to reflect the language in the Constitution, which referred to slaves as “persons.” Calhoun chose the occasion to not only skewer an antislavery senator, but also to expound on his proslavery reading of the Constitution. Porter’s motion had all the trappings of abolitionist strategy, Calhoun argued. It is a source of endless consternation, he continued, that “our ancestors were so fastidious with regard to the certain rights gauranteed in the Constitution. The word 'slaves,' instead of ‘persons held to service or labor,’ ought to have been asserted manfully and boldly.” The resolution would lose all of its meaning if the word “persons” was substituted for “slaves.” Calhoun insisted that he “would rather the resolution was rejected altogether, than that the word 'slaves' should be stricken out.” Calhoun understood well that such language would fundamentally alter the terms of the Creole controversy, by allowing for the very presumption of freedom which was the basis of Britain’s

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policy. Porter withdrew his motion after being browbeaten by slaveowning senators. The resolution, its original language intact, passed unanimously. 68

Meanwhile, proslavery senators kept up the war chant. Calhoun’s ally William King of Alabama warned the Senate that, “unless the [British] government retrace her steps, war must inevitably ensue.” 69 George Anderson, the Attorney General in Nassau, pushed back against these complaints by making the same argument Lord Palmerston had made in the Enterprise affair. Slavery, Anderson wrote, “is abolished throughout the British dominions, the moment a vessel comes into a British port with slaves on board, to whatever nation such vessel may belong, and however imperious the necessity may have been which drove her into such port, such slaves become immediately entitled to the protection of British laws, and that the right of their owners to treat and deal with them as slaves, ceases.” 70

Cowed by the Calhounites, the Tyler administration pressed Britain for compensation and demanded a change in policy regarding slave vessels in British territorial waters. Daniel Webster, the Secretary of State, made these demands in a letter to Edward Everett, the American minister in London. Webster knew that, unlike in the Amistad case, there were no treaties between Britain and the U.S. concerning peacetime emancipations aboard U.S. slave vessels. The argument for compensation would therefore rest on general principles of comity, and here, Webster turned to the precedent set by the Senate’s 1840 Enterprise resolutions. 71

Webster argued in the letter that the U.S. government treated slaves principally as property, not as persons. Because the Constitution recognized that slaves were property in the

states, the U.S. government treated slaves as property throughout the Union, including in U.S. coastal waters. General principles of comity dictated that Britain should remunerate the owners of the emancipated Creole slaves, whose property rights had been unduly expunged. Here, Webster interpreted the law of nations in light of his constitutional views regarding slavery inside the Union (views which were central to his argument in Groves v. Slaughter the year before): just as the U.S. Constitution (a “more perfect” form of the law of nations) recognized slaves as property and thus compelled the U.S. government to tolerate the internal slave trade, the law of nations recognized the international slave-trade and required countries like Britain to recognize, if not enforce, foreign property rights in human beings. To bolster the argument, Webster pointed to the Senate’s Enterprise resolutions and argued that slavery followed the American flag and did not change as a result of entering into “free” waters. If Britain continued to undermine American property rights on the high seas, Webster wrote, the U.S. government would have no choice but to declare war.\footnote{Jay, Creole Case, pp. 5ff.}

Webster’s Creole letter epitomizes the degree to which Calhoun’s proslavery constitutionalism informed federal policy in the early 1840s. To be sure, Webster did not say that the Constitution guaranteed protection for property rights in slaves, that there was a general right to slave property invested in the Constitution; he only said that the Constitution recognized that slaves were property in the states, which was true. Like Joseph Story, he was squirming to find middle ground in a constitutional crisis that was tearing the seams of the post-Missouri Crisis Union. Nevertheless, unlike Joseph Story in the Amistad case, Webster’s actions on behalf of slaveowners clearly showed that he favored a presumption of slavery at the federal level. In fact, shortly after Webster’s letter appeared in the press, Story sent Webster a private letter in which he refuted Webster’s resort to comity and argued that governments were not
required to return slaves as property under general principles of comity – in short, that every premise behind the *Enterprise* resolutions was wrong. Yet, while Webster’s economic nationalism put him in conflict with extreme states’-rights advocates in the South, his view of national power was – at least for now – perfectly compatible with Calhoun’s proslavery nationalism.

Antislavery activists decried Webster’s complicity in the effort to reimburse slaveowners using federal diplomacy and threats. Gamaliel Bailey scoffed at the implications of Webster’s demand, namely, that “every nation must recognize the law of slave property as a part of the law of nations.” The U.S. government acted as a “free” state, Bailey argued; it had no power to seek compensation for slaves emancipated in foreign jurisdictions, and certainly could not threaten war over the loss of such “property.” If the “free states are compelled to make war on the question of slavery,” Bailey wrote, “it will be their duty to turn their arms against slavery.” One contributor to the *Philanthropist* focused on Calhoun’s retort with Porter, describing it as an “open insult to the constitution” and a “bold denial” of Justice McLean’s *Groves* opinion, which affirmed that the Constitution treated slaves as persons not property. Bailey himself noted the significance of Porter’s motion to amend the Calhoun’s resolution. “The word *person*,” he wrote, “was the proper word, and the only proper word,” Bailey argued. “It is the word used in the Constitution, and the substitution of another is not only an unwise departure from Constitutional usage, but in the present case, a most unwarrantable and indefensible prejudgment of the great question at issue.”

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73 *Philanthropist*, Mar. 9, 1842. A correspondent for Bailey’s *Philanthropist* called Calhoun’s retort to Senator Porter an “open insult to the constitution” and a “bold denial” of principle laid down in Justice McLean’s *Groves* opinion – that the Constitution recognized slaves as persons not as property. Bailey recognized the importance of Senator Porter’s motion to amend the language in Calhoun’s resolution. “The word *person was* the proper word, and the only proper word,” Bailey argued. “It is the word used in the Constitution, and the substitution of another is not only an unwise departure from Constitutional usage, but in the present case, a most unwarrantable and indefensible prejudgment of the great question at issue.” The Porter-Calhoun exchange was no mere quibble over
Calhoun exchange was no quibble over language; it was part and parcel of the broader conflict over slavery and its relationship to the Constitution and the law of nations.

The most potent critique of Webster came from William Jay, who blasted Webster’s loose construction of both the Constitution and the law of nations in relation to the slavery question. Congress had no power under the Constitution to demand compensation for slave property. Such a demand had no basis in comity. Jay disregarded the “modern” view of the law of nations which undergirded Webster’s reasoning in the letter (and the Enterprise resolutions), and elaborated instead on an older view based on natural law. There was “no sanction” for Webster’s appeal to comity in the law of nations, a body of law “which must be founded on universal Justice.” The law of nations, he argued, did not recognize “property in man” on the high seas: “The case is stronger for Liberty on the ocean than on the land – for the Earth may be, has been, subjugated by the iron hand of Power; but the free, the untamed Sea, disdains the puny grasp of the mightiest early despots – laughs to scorn ‘the peculiar institutions,’ dear and well-guarded though they may be at home, of people, however chivalrous... Once out of American jurisdiction, American law cannot be applied to them [the Creole rebels] as slaves; the only law that can be applied is the universal law of nature. Out of American jurisdiction, they are the subjects of no Government.” The freedom principle, according to Jay, applied as readily to U.S. coastal waters as it did to the free states of the North.74

It was true to some extent, Jay admitted, that U.S. law followed vessels onto the high seas. But “like all propositions,” this one was “liable to exception,” and the exception here was “precisely the case of slaves,” whose “mixed character of property and persons” distinguished them from all other forms of property. “In fact and in truth,” Jay wrote, slaves were “human

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74 Jay, Creole Case, pp. 31, 20, 22.
beings, men and women, not bushels of wheat or hogsheads of tobacco. The law which regards them as such – as chattels, property – is local, not general, limited and not universal – while the law which defies and guaranties merchandize properly so called, is comprehensive and every where accepted and obeyed.”

Charles Sumner defended the *Creole* emancipations and took issue with Webster’s demand for comity. Like Jay, Sumner believed that the law of nations rested on a foundation of natural law and that the freedom principle applied to the high seas. Property rights in slaves never “followed the flag” onto the high seas, he wrote. If it was true that the “air of England was too pure for a slave to breathe in,” it was also true that “the air of the ocean is too pure for slavery. There is the principle of manumission in its strong breezes, -- at least, when the slave is carried there by the voluntary act of his owner.” While on the high seas, the *Creole* slaves were “remitted to their natural rights.” Their physical subjugation rested on brute force alone, not law, and in this sense they had every right to rise up and kill their oppressors.

The Bahamian authorities were fully justified in emancipating the rebels and refusing compensation to their former owners, Sumer argued. Britain had “laid down a rule not to recognize property in human beings since the date of her great Emancipation Act” and thus could not “lend her machinery of justice” to compensating slaveowners. It was “common learning among jurists,” he wrote, citing Justice Story’s passage in the *Commentaries on the Conflicts of Law*, that nations could choose not to “enforce contracts or obligations of an immoral character.” Sumner elaborated on his argument with reference to the northern states’ denial of comity to slaveowners. “Our New England courts have decided that a slave coming to our soil by the consent of his master – as, for instance, a servant – becomes entitled to his freedom. The

75 ibid., p. 29.
76 Sumner to Jacob Harvey, January 14, 1842, in *Memoir and Letters of Charles Sumner*, vol. 2, p. 200.
invigorating principle of the common law manumits him. And why? Because the Constitution of the United States has provided for his surrender; but the case of a fugitive slave is the only one provided for.” Webster’s reliance on “comity alone” served to highlight the glaring absence of any positive precedent for his demand. It was a “most acute and ingenious piece of advocacy,” Sumner wrote, given the fact that neither the U.S. government nor the law of nations treated slaves as property. Far from being the “national institution” Webster claimed it was, slavery was “peculiar to certain States” and derived “its vitality from the legislation of those States. It is not extra-territorial in its influence.” Sumner openly backed Britain’s policy against American slaveowners: “I wish the great moral blockade, with which the South is to be surrounded, to be strengthened and firmly established.”

Sumner did much of the research for William Ellery Channing’s *The Duty of the Free States*, which condemned Webster’s letter by elaborating on the antislavery law of nations. Channing was among Boston’s foremost Unitarian ministers. He had been a moderate voice in the 1830s, but the proslavery drift of federal policy in the late thirties and early forties radicalized him considerably. By 1842, he advocated forceful antislavery action by the northern states. Like the *Enterprise* resolutions, Channing wrote in *The Duty of the Free States*, Webster’s demand for compensation rested on the assumption that rights to slave property were indistinguishable for other property rights, that they were universal rather than “local” rights. Yet the law of nations derived from the law of nature, and because slavery was repugnant to the latter, it was also repugnant to the former. The law of nations may have recognized the slave laws of particular countries and states, but it did not sanction property rights in human beings as

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77 *ibid.*, pp. 199-200. Note that this the same argument James G. Birney had made in his letter to the New York American, which Sumner had read and praised. See above.
78 Sumner to Jacob Harvey, Mar. 17, 1842, Jan. 14, 1842; Sumner to Lord Morpeth, Mar. 29, 1842, in *ibid.*, pp. 203, 200, 204.
such. Comity depended on “common sense and common justice,” not a blind obedience to the peculiar laws of slave-trading nations.

Can a little state at the South spread its web of cruel, wrongful legislation over both continents? Do all communities become spell-bound by a law in a single country creating slavery? Must they become the slave's jailers? Must they be less merciful than the storm which drives off the bondman from the detested shores of servitude and casts him on the soil of freedom? Must even that soil become tainted by an ordinance passed, perhaps, in another hemisphere? Has oppression this terrible omnipresence? Must the whole earth register the slaveholders' decree? Then the earth is blighted indeed. Then, as some ancient sects taught, it is truly the empire of the Principle of Evil, of the Power of Darkness. -- Then God is dethroned here; for where injustice and oppression are omnipotent, God has no empire. 79

Channing took issue with Webster’s intimation that the U.S. Constitution treated slaves as property. A “recognition of a moral right in the slaveholder is most carefully avoided” in the Constitution, which referred to slaves “three times…[,] but always as persons, not as property.” Webster himself had acknowledged this in the letter, Channing wrote: Webster’s argument “slaves are recognized as property by the constitution of the United States” was immediately followed by the phrase “in those states in which slavery exists.” This was “the limit precisely

79 Duty of the Free States: or, Remarks Suggested by the Case of the Creole (Boston: W. Crosby, 1842), p. 4.

Channing began his pamphlet by invoking the radical strand of “modern” natural-rights theory. An individual’s right to liberty, he argued, overrode the duties and obligations of political society. “Man is older than nations, and he is to survive nations. There is a law of humanity more primitive and divine than the law of the land. He has higher claims than those of a citizen.” The purpose of government – the “fundamental idea of political association” – was to protect the individual’s natural right to liberty. The legal positivism which undergirded Webster’s letter (and the Enterprise resolutions on which it was based) echoed the false premise that custom, convention and political imperatives overrode the natural rights of persons. It was this “contemporary worship of governments” which allowed Webster to insist that “property is an arbitrary thing, created by governments; that a government may make anything property at its will; and that what its subjects or citizens hold as property under this sanction, must be regarded as such without inquiry by the civilized world.” Such a worldview meant that a country could “attach the character of property to whatever it pleases,” including “men and women, beef and pork, cotton and rice,” and that other nations were “bound to respect its laws in these particulars.” The “right of the master must not be questioned at home or abroad.” But human beings were not natural forms of property, no matter what Webster or Calhoun said. Natural property had “its foundation in the great laws of nature, and these cannot be violated without crime.” God willed “that certain things should be owned… as property,” things created through human labor and ingenuity. Insofar as the “grounds of property” lay “in the nature of the articles so used,” human beings could never truly be property. *ibid.*, pp. 3-4, 11. On Channing, see Rugemer, Problem of Emancipation, pp. 145-179; Arthur W. Brown, *William Ellery Channing* (New York: Twayne Publishing, 1962); Howe, *What Hath God Wrought*, pp. 613-614, 626-629.
defined, within which the constitution spreads its shield over slavery.” The moment a slave left a slave state, “the constitution knows nothing of him as property.” 80

In March, 1842, Ohio representative Joshua Giddings introduced nine resolutions in the House which encapsulated the antislavery argument in the Creole affair. The famous Creole resolutions, as they came to be called, were in principle the exact reverse of the Senate’s 1840 Enterprise resolutions. The first one established the fundamental premise of antislavery constitutionalism: slavery was a strictly state institution which had no connection to the U.S. government. The remaining resolutions reiterated the argument that freedom was the natural state of all persons on the high seas, where “artificial” property rights in human beings had no force, and where all persons returned to a state of equality marked by self-ownership. Congress, by virtue of the Commerce Clause, had exclusive “jurisdiction over the subjects of commerce and navigation upon the high seas,” and because it had nothing to do with slavery, Congress treated all seafarers – even slaves – as free persons. Slave-state laws – the positive law of slavery – did not extend into U.S. coastal waters, so when a slaving vessel left the territorial waters of a slave state and entered “upon the high seas, the persons on board cease to be subject to the slave laws of such State.” This was precisely what had happened in the Creole case: the moment the Creole left Virginia waters, the slaves on board “resumed their natural rights to liberty.” From that point forward, their enslavement was a matter of brute force, not law, which meant they had been fully justified in rising up and killing the crew. 81

The Creole resolutions did more than simply reverse Calhoun’s Enterprise resolutions; they also organized antislavery Creole arguments around the principles set forth in Justice

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80 ibid., p. 7. Channing conceded that the framers recognized slavery as a social and political fact in the late eighteenth century. But the “phraseology and history of the constitution afford us some shelter, however insufficient from the moral condemnation of the world; and we should not gratuitously cast it away.”

Story’s *Amistad* opinion and Justice McLean’s opinion in *Groves v. Slaughter*. Giddings framed the *Creole* uprising as an instance of what Story had called “self-emancipation,” while his depiction of slavery on the high seas corresponded with McLean’s argument that the U.S. government acted upon slaves as persons, not property. To be sure, Giddings’ view of the law of nations went well beyond Story’s in that Giddings applied the municipal theory to the high seas wholesale, whereas Story was prepared to recognize slavery’s legitimacy on the high seas in cases where the positive law of slavery (provable title) pertained. Story most likely would have disagreed with Giddings’ assessment. But Giddings was not a judge; he was a politician who understood that the “self-emancipation” narrative resonated in the North, where many saw the *Amistad* and *Creole* rebellions as exemplary of the Revolutionary spirit.

Slaveowners in the House ignited in fury. Having failed to eject Adams from the House, they directed their rage at Giddings, who seemed more than happy to receive it. A northern ally looking to quash the controversy moved to table the resolutions, but his proposal was defeated 52 to 123. Giddings held out for a while but ultimately withdrew his resolutions on the condition that his peers set a date to consider them in depth. For slaveowners, this was too much to bear: Henry Wise and others wasted no time in engineering a censure vote which expelled Giddings from the House and sent him packing for the Western Reserve.  

Yet in one of the crucial turning points in antebellum politics, Giddings’ constituents re-elected him to the same seat in late April, sending him back to Washington just a month after his censure. (This was yet another testament to Weld’s influence on American politics, for in addition to writing the *Creole* resolutions, Weld had helped “abolitionize” the Western Reserve nine years earlier). Giddings’ reinstatement was a major blow to the functionally proslavery gag rule regime which had dominated the House since the Pinckney gag in 1836. It forever changed

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the disposition of the House toward the slavery question. More than any event since the Missouri Crisis, it showed that the balance of power in that chamber was changing more quickly than ever, that the size and assertiveness of the northern antislavery vote would make it increasingly difficult for southern representatives to find reliable northern allies in the future. Giddings’ reelection helped undermine the gag rule consensus. The bipartisan commitment to the gag, which had depended on cross-sectional coalitions within each party, began to crumble. Northern representatives from both parties – especially the dominant Democratic Party – began to break loose from the gag rule consensus. In December, 1844, the gag was repealed by a vote of 108 to 80, as southern leaders failed to get adequate northern votes for renewal. If the Enterprise resolutions reflected southern control of the Senate, the Creole resolutions reflected the changing dynamics of the House, where it was becoming increasingly difficult to smother antislavery dissent. Those dynamics would become more evident in the coming years, as the North in 1842 was on the cusp of a demographic explosion tied to industrialization.83

Giddings’s reinstatement also turned the gag rule into a dead letter: whereas Adams and Giddings and other antislavery representatives had tip-toed around the gag by addressing slavery indirectly, they could now attack slavery openly on the House floor. This is precisely what Giddings did upon his return to the House. To slaveowners who pressed the U.S. government to seek compensation for the Creole slaves, Giddings argued that the federal government “cannot honorably lend any encouragement or support to 'that execrable commerce in human flesh.'” “Every principle of morality, of national honor,” he exclaimed, “forbids that we should lend any aid or assistance to those engaged in a traffic in the bodies of men, of women, and of children.”84

U.S. coastal waters were “national territory” like Washington, D.C. and the western territories, areas in which “freedom, and not slavery, prevails.” When the Creole slaves entered upon those waters, they were “were governed by the common law, modified by the laws of Congress regarding 'commerce and navigation“… They were free in law, although made slaves in fact, by the superior intellectual and physical power of their oppressor.” On the high seas, the figurative chains of Virginia law “fell from their limbs; the bars of their prison were broken; they were free, they again became men, clothed with the attributes with which nature and nature's God 'has endowed all men;’ they again owned their bodies; they again came into possession of themselves – of their intellects; they again assumed a position among men, and were no longer chattels.” Because the Creole slaves had reverted to a state of nature on the high seas – because they owned themselves – they had had a “moral right” to rise up against their oppressors.

Instead of denouncing them as murderers, the American people ought to “rejoice” that the rebels had redeemed Revolutionary principles of liberty.85

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85 *ibid.*, pp. 23-24. Months later, in April, 1844, an unfettered Giddings rehearsed these arguments in another context. Pennsylvania’ Charles Ingersoll, Chairman of the House Committee on Foreign Affairs, introduced an amendment to a spending bill that would have provided $70,000 in federal monies to the *Amistad* Spaniards, Montes and Ruiz. Ingersoll’s accompanying report based his proposal on the *Enterprise* resolutions and the U.S. treaties with Spain (the same line of reasoning adopted by the Van Buren administration during the *Amistad* affair). Giddings denounced Ingersoll’s proposal on the grounds that it involved the U.S. government in the Atlantic slave trade and operated on the premise that Congress should presume slavery on the high seas. “How many gentlemen who placed their names on record to suppress this African slave-trade, are now willing to record their names in favor of an appropriation of seventy thousand dollars to promote it?” Giddings asked. He denied that the Constitution – by extension the U.S. government – treated slaves as property. “[W]hen upon the mighty deep, where no aid could be obtained to hold them in that condition, the hidden fire of their natures burst forth into a flame; their chains were cast from them, their fetters were broken, their arms were nerved, they struck for freedom, and those who attempted to restrain their action, were laid low in death.” The Africans on board the *Amistad* “were neither slaves in law, nor slaves in fact.” Ingersoll’s proposal never came to a vote. The controversy erupted into a broader debate over slavery’s relationship to the law of nations. Pointing to the fact that Ingersoll had based his proposal on the *Enterprise* resolutions, Giddings chided his colleague for endorsing “some new principle in the law of nations; some doctrine unknown to the savans and jurists who have written upon the principles of international law.” It was certainly true, Giddings admitted, that the law of nations changed with every treaty signed “between two or more nations.” But surely it was not the case that “one nation, can, by its own act, so change or modify this international code, as to affect the interest, or the rights, of any other nation; yet the Senate of these United States made the attempt.” Pressed to defend the “the attempt,” Ingersoll insisted that slave laws were “regarded as law by all civilized nations.” Giddings, *Speeches in Congress*, pp. 75, 83, 89, 86-7. Ingersoll’s amendment is in the *Cong. Globe*, 28th Cong. 1 sess., p. 534.
Diplomatic tensions over the Creole uprising subsided in the wake of the Webster-Ashburton Treaty of August, 1842. Though Ashburton made no actual concessions, Webster – and, behind him, Calhoun – was apparently satisfied with the minister’s promise to no longer emancipate American slaves in British waters. Crucially, Calhoun, who, in a twist of political fate, became Tyler’s Secretary of State just a few months later, seems to have read Ashburton’s promise as an implicit validation of his Enterprise resolutions.86

**Conclusion**

The high seas controversies were the third major arena of constitutional conflict over slavery in the period 1836-42, after Washington, D.C. and the free states of the North. The terms of the debate were the same as in the other spheres of conflict: the controversy turned on the nature and territorial extent of slaveowners’ property rights, yet this time it had to do with the high seas and foreign jurisdictions. As always, the problem manifested itself in constitutional terms, namely, in the existence or not of a constitutional guarantee of protection for slave property in and out of the Union. And once again, the conflict brought to a head the fundamental contradictions of the Revolution’s liberal republican heritage, with proslavery leaders claiming an absolute and unqualified right to private property, and antislavery activists insisting on a universal right to self-ownership and personal liberty.

The proslavery argument was encapsulated in Calhoun’s Enterprise resolutions, which held that rights to slave property followed the American flag wherever it traveled aboard southern slave vessels, including into British territorial waters. The same constitutional guarantee which protected slave property in Washington, D.C. applied in U.S. territorial waters,

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precisely because the Constitution and the U.S. government treated slaves as property, not persons. This logic was reflected in the Van Buren administration’s rendition policy in the Amistad affair and, less overtly, in Henry Clay and Daniel Webster’s economic nationalist arguments in Groves v. Slaughter. The Enterprise resolutions essentially discarded the municipal theory as it applied to American federalism.

The Creole resolutions did the exact opposite: they reaffirmed the municipal theory’s application to American federalism and the high seas more generally. They insisted that rights to slave property were dependent on state law and did not extend into U.S. coastal waters, where Congress had exclusive jurisdiction. Because the Constitution treated slaves as persons, not property, the U.S. government must presume freedom on the high seas. Slaves on the high seas became slaves in fact, not in law, as Giddings might have put it; they returned to a “natural” state of equality with their oppressors, a state of self-ownership which necessarily implied a right of self-emancipation. This line of reasoning was reflected in countless antislavery pamphlets in the Enterprise and Creole affairs, in the arguments of Adams and Baldwin in the Amistad case, and in Justice McLean’s pivotal opinion in Groves v. Slaughter. Joseph Story did not endorse this position in his Amistad opinion, but his insistence on due process for the Africans fit the general argument that U.S. officials should presume freedom on the high seas.

Though the terms of debate were largely the same as the others sphere of slavery conflict, everyone knew that the stakes were higher in the high seas controversy – that slavery’s constitutional status in the Union would have outsized influence on the relationship between slavery and the law of nations. That is why antislavery activists in the United States strove to explain to their British counterparts the terms of the constitutional debate over slavery inside the Union. Britain was the world power most responsible for turning the law of nations against
slavery in the 1830s; it was crucial that Britons in positions of power understand how, exactly, the constitutional crisis over slavery in the Union affected the broader Atlantic legal regime.

It was in this spirit that Charles Sumner wrote a letter to his friend George Howard, Lord Morpeth, whom he had met during his travels in England. “I agree with Mr. Giddings in his resolutions. Indeed, they are the exact reverse of Mr. Calhoun's famous resolutions, adopted by the Senate three years ago; and from Mr. Calhoun's I most thoroughly dissent.” Sumner explained to Morpeth that

the Constitution of the United States does not recognize man as property. It speaks of slaves as persons. Slavery is a local institution, drawing its vitality from State laws; therefore, when the slave-owner voluntarily takes his slave beyond the sphere of the State laws he manumits him. This was the case with the owner of the ‘Creole;’ and Mr. Giddings, in asserting the freedom of those slaves under the Constitution of the United State, laid down a constitutional truth. Sumner later encouraged Salmon Chase to contact Morpeth and explain further how antislavery activists in the United States were engaged in a close constitutional dialogue with proslavery leaders. In a letter to Lewis Tappan outlining his plans to write Morpeth, Chase described how a significant minority in the United States rejected Calhoun’s Enterprise resolutions on the grounds that slave laws did not extend onto the high seas. The slaves aboard the Comet, Encomium, and Enterprise, respectively, were “freed by the operation of our National Constitution the moment they passed the local jurisdiction of a slave state into national jurisdiction on the High Seas.” Just as transient slaves became free upon entering a free state, slaves on the high seas reverted to a natural state of self-ownership – personal liberty. Chase related how antislavery Americans deeply resented the federal government’s efforts to help compensate southern slaveowners for “property” lost on the high seas. There was a political project underway in the United States to completely sever the relationship between slavery and

87 Sumner to Lord Morpeth, Mar. 29, 1842, in Sumner Memoir, vol. 2, pp. 203-4. Like most of his countrymen, Morpeth was largely unfamiliar with the structure and limitations of the U.S. Constitution.
the federal government. It was “time,” Chase wrote, for those who wished to “clear themselves of participation” in the slave system, to do so “by an emphatic protest against it.”\textsuperscript{88}

Chapter 6


By early 1842, when he submitted his opinion in the case of *Prigg v. Pennsylvania*, Justice Joseph Story had long been Chief Justice John Marshall’s key ally in the effort to promote economic nationalism on the Supreme Court. A nominal Republican since the 1790s, he joined Marshall in espousing neo-Federalist principles in the nation’s highest court, blending the natural-law jurisprudence of the eighteenth century with the positivist legal instrumentalism of the nineteenth. Unlike the radical wing of the Jeffersonian coalition, Story avoided the “modern” theories of “natural rights” associated with Hobbes and John Locke on the grounds that they were redundant, having been recognized already by the common law of England and the American states. Though he abided by the strictures of positive law, he always favored the older theories of the western natural law tradition, which emphasized the fair distribution of rights in society over abstract notions of individual vested rights, unassailable by either government power or social necessity. The exemplar of high law in the early republic, Story was the first dean of Harvard Law School and, through his *Commentaries on the Constitution* (1833) and *Commentaries on the Conflict of Laws* (1834), a hero to a generation of common lawyers in the North, including antislavery lawyer-politicians like Salmon P. Chase, James T. Alvord, and Charles Sumner.¹

Yet, as much as anyone in the early republic, Story was torn between upholding the Union as it was and heralding the Union as it might be, a country dedicated to the freedom principle in both practice and principle. In other words, Story was caught between two

¹ On Story, see McClellan, *Joseph Story*; Newmeyer, *Supreme Court Justice Joseph Story*. 

308
nationalisms: economic and political. On the one hand, Story was one of the principal exponents of antislavery nationalism in the early republic. His *Le Jeune Eugenie* opinion (1819) portrayed the U.S. government as an antislavery entity that was in harmony with natural law and an antislavery law of nations. Like many northerners, he opposed Missouri’s admission as a slave state but accepted the compromise measures. His *Commentaries* applied the municipal theory to American federalism and suggested that the Fugitive Slave Clause was an exception to the rule of freedom in the United States. His back to back opinions in *U.S. v. Amistad* and *Groves v. Slaughter* (both 1841) maintained the cardinal principle of antislavery constitutionalism: that the U.S. government must always presume freedom, treating everyone as free regardless of skin color.2

Yet Story’s economic nationalism wedded him to a Union that was half-slave and half-free. The constitutional crisis of the 1820s saw Story retreat from his natural-law claims about the U.S. government, especially after Marshall repudiated his *Le Jeune Eugenie* opinion in the *Antelope* (1826). As a manifestation of the shutdown, Marshall’s *Antelope* opinion echoed Henry Clay’s Missouri Compromise in acquiescing to the idea of a permanent North-South divide in America and silencing slavery discussion at the federal level. In the few remaining slave cases to come before the Supreme Court, Story opted for narrow, legal-positivist approaches, abandoning the sweeping natural-law pronouncements he had made in *Le Jeune Eugenie*. His *Amistad* ruling was framed in the narrowest of terms, and in *Groves* he avoided giving the U.S. sanction to the internal slave trade the -- hardly an aggressive antislavery move. In both cases, Story’s goal was to accommodate the interests of both sections while upholding a

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2 See Chs. 1 and 4, as well as “American Slavery and the Conflict of Laws”; Finkelman, *Imperfect Union.*
federal presumption of freedom. Like Clay and Webster and Van Buren, Story sought sectional balance in an effort to maintain the *Union as it was*.\(^3\)

Still, even with sectional tensions escalating, Story never abandoned his antislavery nationalism. In a post-shutdown, post-\textit{Antelope} legal and constitutional climate, he framed his natural-law positions on slavery in positive-law arguments about slavery’s territorial limits in the Union. While his *Commentaries* on the Constitution affirmed his commitment to the positive-law obligations of the Constitution, above all the Fugitive Slave Clause, his discussion of comity in the *Commentaries on the Conflict of Laws* created a space within American federalism for keeping slavery local. In this way, Story can be viewed as the Supreme Court counterpart to John Quincy Adams in Congress, an antislavery New Englander committed to keeping slavery local in fact as well as in doctrine, without endorsing the more radical proposals in the abolitionists’ agenda. Story may have disdained the Garrisonian brand of American abolitionism, but he was generally sympathetic to the presumption of freedom argument. The fact that his opinions in *Amistad* and *Groves* indirectly endorsed that argument in the narrowest terms possible reflects the tension in Story’s own mind between antislavery nationalism and his economic nationalism – the Union \textit{as it is} versus the Union \textit{as it ought to be}.

By 1842, Joseph Story found it increasingly difficult to reconcile these two conceptions of nationalism. The rolling debates over slavery’s constitutional status in Washington, D.C., the free states and U.S. coastal waters had foiled the party system’s efforts at stifling slavery-related conflict. Despite successive renewals of the gag rule in Congress, the politics of slavery kept rising to the surface in Congress and the Supreme Court as well as in state courts and legislatures. Growing sections of the North came out in favor of the abolitionists’ constitutional

\(^3\) See Ch. 2.
program, especially those parts which called on the northern states to divorce themselves from slavery. The regime of silence established in the 1820s began to buckle, especially in wake of sensational episodes like the *Amistad* and *Creole* affairs.

It was in this context that Justice Joseph Story issued his controversial opinion in *Prigg v. Pennsylvania*, the most consequential Supreme Court case regarding slavery before *Scott v. Sanford* in 1857. The case embodied all of the issues involved in the constitutional crisis over slavery, not least the territorial reach of slaveowners’ property rights. Story, the archetype of the morally-anguished northern judge bound by the Constitution to uphold slavery, struggled to reconcile sectional interests in a way that would extinguish the constitutional crisis and preserve the Union. His tortuous reasoning in the opinion reflected the basic intractability of the crisis, which, instead of solving, his opinion ultimately enflamed. Still, despite its compromises, Story’s opinion endorsed the argument for a presumption of freedom at the federal level – and for this reason it was a crucial intervention in the slavery debates. Long before rumors of Texas annexation scrambled the political order, the *Prigg* episode confirmed that slavery was indeed tearing the Union apart.4

“A Triumph of Freedom”: Joseph Story’s Opinion in Prigg v. Pennsylvania (1842)

It was in the context of a growing constitutional crisis over slavery – including the Creole affair and the development of an antislavery legal regime in the North – that Justice Joseph Story issued his controversial opinion in the fugitive-slave case, Prigg v. Pennsylvania (1842). Story’s ruling in Prigg is second only to the notorious Dred Scott v. Sanford (1857) as the most important slavery-related opinion before the Civil War, more important even than Story’s Amistad ruling. Though the case arose out of the fugitive-slave controversy, it was understood at the time to have implications for the broader constitutional question about slavery’s relationship to federal power. Most modern historians have missed this because they have stripped the case of its broader context, focusing exclusively on the fugitive-slave debate without referencing the overlapping constitutional controversies that informed that debate – not least the fight over the Creole emancipations, which rose to a crescendo in the months just before and after the Prigg case reached the Court. As a result, the scholarly consensus is that Story’s opinion was conservative at best, proslavery at worst, a sacrifice of moral principle by an erstwhile 1840s,” (Dissertation, University of Michigan, 2010); Jamal Greene, “The Anticanon,” Harvard Law Review 125 (2011), pp. 409, 428; Baker, Prigg v. Pennsylvania; Foner, Gateway to Freedom, pp. 108-110.

I argue that, precisely because they do not place Prigg into the larger context of a constitutional crisis over slavery and federal power, these historians do not see how different Story’s opinion was from the truly proslavery position of the 1840s: Calhounite constitutionalism. I argue here that, when we place Story’s opinion against the wider backdrop of the constitutional crisis of 1835-43 – and more specifically against the backdrop of Calhounite proslavery constitutionalism – it becomes clear that, while the opinion made significant concessions to slaveowners and ignored the finer points of antislavery constitutionalism, it nevertheless supported the basic antislavery notion that the federal government ought to operate on a legal presumption of freedom, in keeping with the legal systems of the northern “free” states and the British Empire after 1833. In other words, the opinion pointed toward new avenues for keeping slavery “local” and freedom “national.” In this sense, my narrative builds on those who see a silver lining in the Story’s opinion, including Morris, Free Men All, pp. 94-106, esp. pp. 96-99; Leslie Freidman Goldstein, “A ‘Triumph of Freedom’ After All? Prigg v. Pennsylvania Re-examined,” Law and History Review 29 (August, 2011), pp. 763-796 and especially Baker’s brilliant “A Better Story in Prigg v. Pennsylvania?” Journal of Supreme Court History 39 (July, 2014), pp. 169-189, which arrives at a similar conclusion to mine, except that, where Baker see Story’s opinion as an attempt to ground slaveowner property rights on the positive law of the Constitution – thus rejecting radical proslavery attempts to make slavery into a “natural” right “protected by implication in the Constitution but grounded firmly in international and natural law” – I go somewhat further, arguing that Story distinguished the right of recaption in the Fugitive Slave Law from the right to property in slaves, which he treated as a “local” right grounded in the positive law of states, not the Constitution. Quote from p. 185.
antislavery judge who fell on his sword to preserve the Union. A handful of recent scholars have questioned this orthodoxy by pointing to Story’s endorsement of the municipal theory in the opinion; yet even these scholars miss the extent to which Prigg reflected and influenced a crisscrossed and multifaceted constitutional crisis in the period 1836-42.\(^5\)

Though Story’s opinion included some big concessions to slavery, it did not endorse the Calhounites’ claim to a general right to slave property in the Constitution. Indeed, it actually aligned with the proposition that federal officers should always presume freedom, the silent premise in Story’s Amistad ruling the year before. In the short run, the opinion also helped to strengthen the antislavery legal regime developing in the North. The following analysis of Story’s opinion is not about exonerating Story or explaining away his morally repugnant ruling. It is, however, an effort to distinguish Story’s ruling from the truly “proslavery” position of the day, which held that rights to slave property were “constitutional” in the broadest sense possible, meaning that they were not simply recognized or sanctioned by specific clauses in the Constitution – in this case, the Fugitive Slave Clause – but were guaranteed protection by the Constitution itself. Story did not adopt that position; in fact, his opinion made it clear that, beyond the issue of fugitive slaves, the federal government should have nothing to do with slavery (for example, transient slaveowners in the North). In other words, there was no such thing as a general right to slave property in the Union, such as the Calhounites claimed. In this way, Story maintained his commitment to a legal presumption of freedom at the national level, despite having wrecked his reputation as an antislavery judge.

In Prigg v. Pennsylvania, the Court contemplated the clash between free-state personal liberty laws and the federal Fugitive Slave Law. Slaveowners wanted a decision which would

\(^5\) Ibid.
strike down the personal liberty laws of the North and expedite fugitive recaptures by putting the full power of the federal government behind the rendition process. Many hoped for a ruling that would make the federal government the sole enforcer of rendition, exclusive of the states. Antislavery activists wanted a ruling which would strike down the Fugitive Slave Law using arguments developed by Chase, Alvord and other antislavery lawyers. They anticipated a decision which would make rendition a matter between the states, in accordance with the basic premise of antislavery constitutionalism – that the federal government should have nothing to do with slavery.⁶

*Prigg v. Pennsylvania* began in York County, Pennsylvania in 1837, when a slavecatcher named Edward Prigg seized Margaret Morgan and her children, who lived in York County as free people. Prigg hauled the family before a local justice of the peace, claiming that they were the property of one Margaret Ashmore of Hartford County, Maryland, the widow of slaveowner John Ashmore. When the justice refused to grant a certificate of removal, Prigg and his agents decided to ignore the legal process and convey the Morgans back to Maryland on their own. Two months later, a Pennsylvania grand jury indicted Prigg on kidnapping charges under the state’s 1826 personal liberty law. The Maryland legislature rejected Pennsylvania’s request for Prigg’s extradition, instead issuing resolutions which called for more stringent enforcement of the Fugitive Slave Law. Both sides dug in their heels as the case against Prigg rose through the appellate courts until finally, in May 1840, the case reached the Supreme Court on a writ of error.⁷

Crucially, the case did not address the specifics of legal process -- how, exactly, fugitive slaves in the North should be returned to their southern masters. That is because, by the time

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⁶ For antislavery arguments against the Fugitive Slave Law, see Ch. 4.
Prigg entered the Court’s docket in 1841, two different juries (one in Pennsylvania, the other in Maryland) had already found Margaret Morgan to be a slave. The Court, therefore, had only to examine the issue of which sphere of government, federal or state, was responsible for executing the law. The manner and disposition of legal process did not come up for consideration, and as we shall see, this was an important omission as far implementation of the law was concerned after 1842.\(^8\)

Like the *Amistad* and *Groves* cases, *Prigg v. Pennsylvania* also impinged on the constitutional debate over slavery and federal power. The case seemed to encapsulate every aspect of the slavery question since 1836, from the federal government’s disposition toward slavery to the constitutional status of slaves outside the slave states. As always, the key issue lingering in the backdrop was the relationship between slaveowner property rights on the one hand, and the Constitution and federal law on the other. In *Prigg* -- as in all other fugitive-slave cases -- that issue centered on the exact nature of the right of recaption in the Fugitive Slave Clause. As we shall see, Story’s opinion made it clear that, in his view, a right of recaption to fugitive slaves was not the same thing as a general right (constitutional guarantee) for slave property in all areas of the Union, including U.S. coastal waters. Moreover, the language in Story’s opinion was ambiguous about the exact nature of the right of recaption, namely, whether it concerned property rights in the *body* of a runaway slave – thus making slavery extraterritorial to some extent – or property rights in the *labor* of the runaway – a position which would have been in keeping with the antislavery tradition going back to *Somerset*.\(^9\)

Most slaveowners presumably wanted a decision which would secure their property by giving fugitive-slave renditions the full backing of the federal government, yet proslavery

\(^8\) See Goldstein, “A ‘Triumph of Freedom’ After All?”; Finkelman, “Story Telling on the Supreme Court.”

\(^9\) See my discussion of the *Amistad* and *Groves* cases in Ch. 5.
radicals also wanted a statement from the Court making the Fugitive Slave Clause the mere expression of a general right to slave property in the Constitution. They wanted the Court to sanction the argument for a constitutional guarantee for slavery in the Union. Antislavery activists, on the other hand, viewed the case through the prism of the *Amistad* and *Groves* decisions, which had buoyed hopes for an antislavery Supreme Court, even if those cases were hardly outright victories. In particular, antislavery activists sought a ruling which would affirm Justice McLean’s statement in *Groves* that the Constitution, and thus the federal government, recognized slaves as persons, not property. Such a decision would allow the free states to test the legal status of alleged runaway slaves in their limits, in keeping with the due process protections implicit in the North’s legal presumption of freedom.

As it turned out, a clear-cut solution from the Court was not in the offing; the seven justices radiated ambiguity, as five of them wrote their own separate opinions. Yet Justice Story’s opinion was (and still is) considered to be the central position of the Court, the starting point for interpreting the broad range of opinions on the case. Story, writing for justices John Catron and John McKinley, submitted his opinion on March 1, 1842, just as the *Creole* affair gathered steam in Congress and the national press. As in the *Amistad* and *Groves* cases, Story searched for an opinion that would balance sectional interests while preserving a legal presumption of freedom at the national level.¹⁰

Story began by elaborating on the same “compact theory” of the Constitution that Justice Shaw had used in the *Aves* case in 1836. It was a “known historical fact,” Story wrote, that several provisions in the Constitution “were matters of compromise of opposing interests and opinions.” Thus it was crucial to use “all the lights and aids of contemporary history” to recover

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the exact distribution of rights and duties invested into the Fugitive Slave Law. Viewed against
the backdrop of the founders’ intentions, Story argued, the Fugitive Slave Clause was clearly
meant to “secure to the citizens of the slaveholding States the complete right and title of
ownership in their slaves, as property, in every State in the Union into which they might escape
from the State where they were held in servitude.” That security took the form of a right of
recaption, a common-law right to retrieve lost or stolen property from different jurisdictions.
The “full recognition of this right and title was indispensable to the security of this species of
property in all the slaveholding States.” Without it, the southern states would not have joined the
Union.11

Story then applied the municipal theory to American federalism, using his own
Commentaries to elucidate the contours of freedom and slavery in the Union. Here, he endorsed
Justice Shaw’s argument from Aves that slavery was a local institution which the free states were
not obliged to enforce in their limits, except in the case of fugitive slaves. Northern states were
not obliged to grant comity to slaveowners, an argument which implied that rights to slave
property were not “general” or “guaranteed” under the Constitution. Ironically, this was Story’s
own argument from the Commentaries on the Conflicts of Law (1834); Shaw had made it a part
of state law in Massachusetts, and now Story gave it the sanction of the Supreme Court. But
unlike Britain, which could unilaterally emancipate fugitive or rebellious slaves who entered its
territories, the free states of the American North were bound by the Fugitive Slave Clause of the
Constitution – a positive stipulation to return slaves which superseded the principles of comity
inside the United States. The Fugitive Slave Clause, Story continued, qualified the municipal
theory as it applied inside the Union: the slaveowner’s right of recaption was “a new and positive

and Plaag, “Prigg.”
right, independent of comity, confined to no territorial limits, and bounded by no state institutions or policy.”

In drawing this sharp distinction between “domestic” constitutional obligations and “external” principles of comity, Story confirmed his commitment to the positive-law regime of the post-Antelope era. But it also allowed him to narrow the scope of slavery’s relationship to federal power to just one topic: fugitive slave renditions. In other words, the matter of fugitive slaves was the only instance where the Constitution bound the free states to recognize and enforce slavery; in all other cases, including those of transient slaves, the free states could act as independent entities, not unlike British authorities in Canada, the Bahamas or Bermuda.

Having established the parameters of the issue, Story turned to the nature of the right of recaption in the Fugitive Slave Clause. The clause, Story wrote, “contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state can in any way qualify, regulate, control, or restrain. The slave is not to be discharged from service or labour” by way of legislative or judicial interference. Indeed, any state law or state regulation, which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service or labour” amounted to a “pro tanto… discharge of the slave therefrom.” For Story, the question was not, “how much the slave is discharged from; but whether he is discharged from any” service or labor, for the issue was not one of “quantity or degree, or controlling the incidents of a positive and absolute right” of property. The Fugitive Slave Clause placed the “right to the service or labour [of the slave] upon the same ground and to the same extent in every other state as in the state from which the slave escaped, and in which he was held to the service or labour.” Insofar as it contained a “positive

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12 Prigg v. Pennsylvania (1842 U.S. Lexis 387). On Shaw’s use of Story’s Commentaries, see Ch. 4.
13 In essence, this was the same point Story had made in his discussion of slaveowners and comity in Commentaries on the Conflicts of Law (1834).
and unqualified recognition of the right of the owner in the slave,” northern states were bound to respect the right of recaption, which, being a common law right, was “self-executing,” meaning it did not need enacting legislation.\footnote{Prigg. v. Pennsylvania (1842 U.S. Lexis 387).}

It is important to stop here and consider for a moment the notable ambiguities in Story’s language. Story clearly thought that the Fugitive Slave Clause gave slaveowners an extraterritorial right of recaption to runaway slaves. But beyond that first premise, his opinion hedges on the exact nature of the right of recaption: did it mean a right to the body and labor of a slave, or to the labor power of a runaway “servant”? Nowhere in the opinion does Story say that rights to slave property as such were “sanctioned,” “secured” or “guaranteed” by the Constitution – standard language among the Calhounites. Instead, he says that the Constitution “recognizes” and “contemplates” a right of property in slaves derived from state law, but that the Fugitive Slave Clause only “secured” a right to the “service or labour” of slaves who escaped to a free state – standard language in the antislavery movement. The Fugitive Slave Clause, Story wrote, gave “full recognition” to slaveowners’ “complete right and title of ownership in their slaves…[.] which the local laws of his own state confer upon slaves as property.” It “contemplates the existence of” property rights in slaves – yet “secured” only a “right to the service or labour” of the slave.\footnote{Italics are mine. Compare Story’s language to the proslavery language of the Calhounites in Ch. 3.}

This language hints at the subtle but profound distinction in the antislavery tradition between slaves-as-property in “slave” zones and slaves-as-legal-persons in “free” zones. That was the key premise of the municipal theory as it appeared in the law of nations, which Lord Mansfield had assumed in his Somerset ruling. The premise had two parts: first, that to recognize the existence of property rights in slaves was not the same thing as to sanction or
guarantee such rights; and second, that courts in “free” jurisdictions could treat slaves as legal persons, not property, even if they were property in their domicil, or home jurisdiction. Moreover, Story’s claim that the slaveowner’s right of recaption was grounded in common law points in an antislavery direction, since Story well knew that English common law did not recognize “property in man.” Whether or not Story intended to make this jurisdictional distinction, it is telling that his opinion does not expressly sanction an extraterritorial right to “property in man” as such.\(^\text{16}\)

Next, Story turned to the crux of the case: the problem of jurisdiction in fugitive-slave returns. Citing Pennsylvania Chief Justice William Tighman’s opinion in *Wright v. Deacon* (1819), which had upheld the constitutionality of the Fugitive Slave Law, Story argued that American judges had shown “the same uniformity of acquiescence in the validity” of the Fugitive Slave Law as a “constitutional duty.” The federal government had exclusive jurisdiction over fugitive-slave renditions. Precisely because the framers had invested the Fugitive Slave Clause with an extraterritorial right of recaption, the “national government is clothed with the appropriate authority and functions to enforce it.” And because the right at issue was “a right of property capable of being recognized and asserted” in a court of law, Congress had full power over the “mode and extent” of the Fugitive Slave Law’s implementation. In contrast, the free states had no positive relation to slavery, only a negative obligation to refrain from interference with slave recaptures. The slaveowners’ right of recaption derived from the Constitution and was thus “uncontrolled and uncontrollable by state sovereignty or state legislation.” On the basis of these observations, Story concluded that the personal liberty laws of northern states were unconstitutional while the Congress’ 1793 Fugitive Slave Law

\(^\text{16}\) On the antislavery distinction between slavery and servant statuses, see Ch. 1.
flowed logically from the imperatives listed in the Fugitive Slave and Necessary and Proper clauses of the Constitution.\textsuperscript{17}

Story then attacked the logic of the chief antislavery argument against the Fugitive Slave Law: that the Fugitive Slave Law was unconstitutional because Congress had no power to pass laws on slavery. That claim collapsed under scrutiny, Story wrote, its “artificial and technical structure” antagonistic to the spirit of compromise so cherished by the framers. Here, Story invoked the Necessary and Proper Clause, arguing that the Fugitive Slave Clause fulfilled an important function in the Union. The antislavery argument (put forward by the likes of Chase and Alvord) was “too narrow to provide for the ordinary exigencies of the national government, in cases where rights are intended to be absolutely secured, and duties are positively enjoined by the Constitution.” The Fugitive Slave Law was therefore entirely constitutional, while the personal liberty laws of the North were not. In theory, this gave fugitive-slave renditions the full backing of the federal government.\textsuperscript{18}

Yet there was a crucial detail missing from Story’s argument for federal exclusivity, namely, the precise mode and manner of legal process in federal fugitive-slave renditions. As we have seen, that issue did not come before the Court, so Story did not feel compelled to elaborate on an issue which everyone knew determined the effectiveness of the Fugitive Slave Law. Presumably he believed that slaveowners or their agents could seek a writ of removal from a federal judge on circuit in the free states to which their slaves had run away. Yet he did argue in dictum that the provision in the Fugitive Slave Law conferring federal authority on state magistrates was open to interpretation: state authorities, whether judges, constables, or sheriffs, could choose to “exercise” the “authority” bestowed on them by the Fugitive Slave Law, but

\textsuperscript{17} \textit{Prigg} v. \textit{Pennsylvania} (1842 U.S. Lexis 387).
\textsuperscript{18} \textit{ibid.}
there was no positive obligation to do so. Indeed, Story wrote that state legislatures could pass laws banning state officers from enforcing the Fugitive Slave Law.⁹

In this way, Story made fugitive-slave renditions an exclusively federal matter, but did not elaborate on – indeed, even muddied – the issue of enforcement and process. In their dissenting opinions, Justices Roger Taney and Peter Daniel, both of whom agreed with Story that the right of recaption was an extraterritorial right, argued that the omission fatally undermined the rendition process. State judges were the “most active and efficient auxiliary” of federal laws in the country, Daniel wrote, but the ambiguity in Story’s opinion gave them an excuse not to enforce the law. The “inconsiderable number of federal officers in a state, and their frequent remoteness from the theatre of action, must in numerous instances, at once defeat [a slaveowner’s] right of property, and deprive him also of personal protection and security.”²⁰ (Tellingly, Story offered no rebuttal to Daniel’s observation.) The loophole in Story’s opinion had important implications for the development of the North’s antislavery legal regime, but for now it is important simply to note that a loophole existed.

Stepping back from the details, we might ask how, exactly, Story’s opinion in *Prigg* fit into the broader constitutional struggle over slavery and federal power. The first and most important point is that the opinion maintained Story’s commitment to a presumption of freedom at the national level. To be sure, it recognized that slaveowners had a “positive and absolute” right to slave property derived from state law, and that the Fugitive Slave Clause (and the law which stemmed from it) protected those property rights with an extraterritorial right of recaption to runaway slaves. Most egregious from the perspective of antislavery activists, it held that the federal government had sole jurisdiction over the mode of recaption in the free states. Yet for all

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⁹ *ibid.*

²⁰ *ibid.*
its concessions to slavery, Story’s opinion cannot rightly be called a “proslavery” decision, insofar as “proslavery” in 1842 meant a belief that the Constitution guaranteed the protection of slave property throughout the Union. A truly proslavery opinion would have employed the language of John C. Calhoun, whose mantra since 1836 was that slavery in all arenas was guaranteed protection by the Constitution. It is significant that Story did not use that language in *Prigg*, and that he chose instead to emphasize the language of freedom.

The opinion came down right in the middle of the *Creole* affair, as proslavery congressmen and their allies in the executive branch claimed an absolute, extraterritorial right to property in slaves in U.S. coastal waters and beyond — a right which, they claimed, followed the flag by the terms of the Constitution. Story’s endorsement of Justice Shaw’s reasoning from the *Aves* case — that the Fugitive Slave Law was the positive-law exception to the general rule of freedom in the United States (an argument Story himself had championed in the *Commentaries on the Conflicts of Law*) — effectively denied the claim of a general right to slave property in the Constitution. True, the Fugitive Slave Clause provided slaveowners with a right of recaption to runaway slaves, but that was different from a general guarantee for slave property as such. For Story, it was possible for Congress to legislate on fugitive-slave matters without conferring a constitutional status on “property in man.”

Moreover, it is not even clear that for Story the right of recaption extended a right to property in slaves to the free states. If anything, the language in his opinion suggests that he made a jurisdictional distinction between slaves-as-property in slave states and slaves-as-persons in free states. There is a sense that, for Story, the right of recaption in the Fugitive Slave Clause derived from local property rights but was ultimately distinct from those rights; the clause and the federal government *recognized* “property in man” as it existed in the states, but insofar as

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21 On the *Creole* affair, see Chapter 5.
fugitive recaptures took place by definition in areas outside the slave states, federal officials should treat slaves as persons, not as property. In terms of legal process, the thing “claimed” and “removed” by the slaveowner was the labor power of the runaway, not the body of the slave himself.22

Second, while Story’s case for federal exclusivity repudiated the whole thrust of antislavery constitutionalism, it did not preclude the possibility that, in the not-too-distant future, federal fugitive-slave recaptures would operate on a presumption of freedom – in other words, that federal judges would treat slaves as persons whose legal status needed to be tested before a certificate of removal could be granted. Because the issue of legal process never came before the Court, it is difficult to know if Story considered federal process to this extent. But his decision to strike down the North’s personal liberty laws does not mean he was averse to a federal procedure granting alleged slaves access to habeas corpus and jury trial. One recent historian has argued persuasively that Story foresaw the possibility of an amendment to the Fugitive Slave Clause inserting a federal habeas corpus provision that would effectively nationalize the due process protections of the free states – in other words, altering the clause so that it reflected a legal presumption of freedom at the federal level. This fits with Story’s mindfulness of due process in the Amistad case, as well as his reproach of Daniel Webster during the Creole affair (Story agreed with Webster’s reasoning – that the U.S. Constitution recognizes slavery in the states – but chided Webster for demanding compensation for the emancipated Creole slaves, a position which put Webster in the ostensibly inconsistent position of presuming slavery while acting as a minister of the national government). For Story, it was entirely possible for the U.S. government

to have exclusive jurisdiction over domestic fugitive renditions while operating on as a “free”
state on the world stage, presuming freedom both inside and outside of the Union.\(^{23}\)

Federal exclusivity also cut both ways. On the one hand, it struck down northern
personal liberty laws. On the other hand, it also struck down northern “black laws” (such as
Ohio’s 1839 Black Law) and southern laws that reinforced the Fugitive Slave Law (for instance,
those which gave state officers the power to hold alleged runaways in jail until their owners were
contacted) on the grounds that no concurrent state legislation was necessary to implement the
federal Fugitive Slave Law. Justices Taney and Daniel noted this in their dissenting opinion.
Though they agreed with Story that that the right of recaptio
n was an extraterritorial right, they
broke with Story on the issue of federal exclusivity, arguing that state officers had an obligation
to actively assist in the recapture of runaway slaves. This aspect of Story’s ruling also had
important implications for the development of an antislavery legal regime in the North.\(^{24}\)

In a letter to his son William Wetmore Story written shortly after he issued his ruling,
Story claimed that his opinion would come to be seen as a “triumph of freedom.” Many have
seen this remark as evidence of Story’s fundamental hypocrisy, the morally bankrupt rationale of
a judge lost in self-delusion.\(^{25}\) Yet, while it is easy to dismiss Story’s claim in the light of what
followed – the *Prigg* opinion laid the foundation for the 1850 Fugitive Slave Act, an

\(^{23}\) Here I rely heavily on the interpretation of *Prigg* in Goldstein, “A ‘Triumph of Freedom’ After All?,” pp. 784-788. Given the manifest demographic changes already underway in the North, it was not altogether inconceivable that such an amendment could emerge from a drastically altered Congress in twenty years’ time. On Story’s reaction to the Webster letter see Newmeyer, *Supreme Court Justice Joseph Story*, passim.

\(^{24}\) Goldstein, “A ‘Triumph of Freedom’ After All?”

\(^{25}\) This conclusion is reinforced by a letter Story wrote to Whig John Berrien (former governor of Georgia) just a few months later, in which he recommended a federal provision for enforcing the Fugitive Slave Law. Story envisioned a future system where federal courts appointed commissioners in each county to administer the law; a comprehensive system of this sort, Story told Berrien, would allay southern angst and help stabilize the Union. This anticipated the federal Fugitive Slave Act of 1850, which created a new tier of federal marshals for retrieving runaway slaves. On the Berrien letter, see McClellan, *Joseph Story*, pp. 262, n. 94; Holden-Smith, ”Lords of Lash, pp. 1137-138; Finkelman, ”Story Telling on the Supreme Court,” pp. 291-93. For a different view, see Goldstein, “A Triumph of Freedom?”; Baker, *Prigg*, pp. 157-158; idem., “A Better Story.”
unprecedented intrusion of federal authority into the spheres of state and local law – it is wrong to say that Story’s opinion in *Prigg* was a proslavery decision. The tortured reasoning in Story’s *Prigg* opinion – the way in which it balanced a vehement defense of the slaveowner’s right of recaption with a structural commitment to the presumption of freedom – reflected the gravity of the constitutional crisis he faced. For much of his career, especially in the years after the *Antelope* case, Story sought to avoid the slavery issue on the Court. When that proved impossible, he tried to proffer rulings that balanced sectional interests in the name of the (existing) Union. The constitutional crisis triggered by abolitionist agitation in the mid-1830s made that increasingly difficult to pull off, as the *Amistad* and *Groves* cases put Story in progressively more awkward positions, doctrinally as well as politically. The *Prigg* opinion is Story at the precipice of constitutional discord, but it is not a proslavery decision.²⁶

Story, the exemplar of conservative reform in the antebellum era, certainly disagreed with Chase, Alvord and others about the nature of the Fugitive Slave Law, but he was sympathetic to the general goal of keeping slavery “local” in a constitutional sense. In other words, the difference between Story and Salmon Chase was not a matter of proslavery and antislavery, but of divergent strategies in the same broader movement for localizing slavery. Chase and Alvord wanted Congress or the Court to repeal the Fugitive Slave Law so as to leave the rendition process in the hands of the free states; Story, on the other hand, gave the federal government

²⁶ Story’s predicament was shared by other northern judges, notably Lemuel Shaw, as well as “moderate” politicians like Daniel Webster and Martin Van Buren, who struggled to maintain the status quo in the face of proslavery extremism. On this theme, see Cover, *Justice Accused*. Historians tend to read the *Prigg* decision through the prism of the infamous Fugitive Slave Act of 1850, which built on Story’s ruling to establish an unprecedented policy of federal intervention in the states – in this case, the northern states. But the fact that Congress passed a proslavery law eight years later does not mean that the opinion itself was intrinsically proslavery. After all, as Eric Foner reminds us in *Gateway to Freedom*, in the aftermath of the Civil War, as the Republican-led Senate worked on the legislation that would become the Civil Rights of 1866, Senator Lyman Trumbull, Chair of the Senate Judiciary Committee, used the same logic of federal intervention to guarantee the protection of black southerners’ political rights. In other words, Story’s *Prigg* opinion had two legacies: the proslavery legacy of the Fugitive Slave Act, but also the enshrinement of a federal presumption of freedom in the Civil Rights Act and later, the Fourteenth Amendment.
exclusive jurisdiction over the entire process, but, crucially, his decision allowed for a federal rendition process that would operate on a presumption of freedom – a “nationalization,” in effect, of the due process provisions in northern personal liberty laws. In that sense, it is not so easy to dismiss Story’s claim about a “triumph of freedom.”

**The Antislavery Response to Prigg v. Pennsylvania**

In the weeks following the Court’s decision, antislavery activists parsed through Story’s opinion in an effort to separate the invidious from the beneficial. Virulent criticism of the opinion was not part of the initial reaction; that would come a few months later, during the infamous *Latimer* trial of late 1842. Early on, antislavery activists responded to the decision with a mix of dismay and guarded optimism.

Almost all activists denounced Story’s decision to give the federal government exclusive jurisdiction over fugitive-slave renditions, a move which upended the consensus among antislavery activists that the Fugitive Slave Clause was a limit on free-state legislation, not a grant of power to Congress. For Gamaliel Bailey, allowing slave agents to seize northern blacks “without any legal form” made “a wreck of state sovereignty.” Story’s opinion

> has done more to consolidate, centralize this Government, than any or all acts of the Government since its establishment. If the states have no power to throw around their citizens the bulwarks of habeas corpus and jury trial; if they cannot even inquire into the validity of an arrest of their citizens as slaves, or of a demand for them as criminals; of every personal right of every citizen of every state is to be placed at the sole discretion of Congress, and such agents as it may appoint; then indeed are the states mere appendages of a Power as consolidated and despotic as the most central government in the old world.  

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27*Philanthropist*, Mar. 30, 1842. Bailey continued: “Not a single legal security as a single citizen of this State, against the arts and violence of the two hundred and fifty thousand slaveholders of this republic, for whose interests the sovereignty of the States and every guaranty of personal freedom must be utterly subverted.”
A meeting of Ohio abolitionists declared Story’s opinion to be “‘in opposition to sound principle’” and “‘inconsistent’ with American federalism as envisioned by the founders. Salmon Chase deplored the “monstrous doctrine” of federal exclusivity in fugitive slave renditions, a doctrine which eviscerated his central constitutional argument: that the Constitution gave Congress no power whatsoever over slavery, and banned federal protection for slavery through the Fifth and Seventh amendments.  

Yet some activists recognized that the opinion was an important intervention in the constitutional debate over slavery and federal power, one that was in line with the antislavery implications of Story’s *Amistad* opinion and McLean’s *Groves* opinion. Charles Sumner was among the first to note that Story’s opinion effectively denied the proslavery claim of a general right to slave property in the Constitution, precisely because it endorsed Justice Shaw’s reasoning in the *Aves* case, which had insisted on a strict reading of the municipal theory in the United States. Two weeks after the opinion came down (around the time Giddings introduced the *Creole* resolutions in the House), Sumner told his friend Jacob Harvey that Story’s ruling essentially repudiated the reasoning behind the *Enterprise* resolutions of 1840, which had served as the basis for proslavery federal policy in the *Amistad* and *Creole* affairs. “Judge Story tells me that, in delivering the opinion of the Supreme Court of the United States on this recent slave question, he has declared that, by the law of nations, we [the United States government] cannot require the surrender of fugitives; thus throwing the weight of our highest tribunal upon that of the English House of Lords.”

In other words, while Story affirmed the positive obligation of free states to return fugitive slaves to slave states – a process which was understood to take place inside the Union – his endorsement of Shaw’s reasoning allowed him to maintain the principle

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29 Sumner to Harvey, Mar. 17, 1842, in *Sumner Memoir*, p. 203.
that U.S. authorities should presume freedom on the international stage, namely the high seas.

Five years later, Sumner told a despondent Chase (whose arguments in the fugitive-slave case *Jones v. Van Zandt* were ignored by the Supreme Court) that, while the practical consequences of Story’s opinion were to be regretted, the opinion itself was a triumph of freedom. Story, Sumner said, was “happy in obtaining from the Sup. Ct. a recognition of the *locality* of Slavery, as the creature of municipal law. I think that his mind was so much occupied with this idea, that he did not reflect upon the tyrannical powers which he placed in the hands of of [sic] a slave-hunter.”

Antislavery activists viewed the *Prigg* decision against the backdrop of the ongoing *Creole* affair. William Ellery Channing was among the first to connect the dots and develop the antislavery implications of *Prigg* in the public sphere. In *The Duty of the Free States*, the bulk of which dealt with the Tyler administration’s machinations during the *Creole* affair, Channing argued that the North belonged to the same antislavery regime as the post-1833 British Empire; both had established jurisdictional distinctions between property in persons and property in things. Northerners “cheerfully recognize” a southerner’s property right in his watch or trunk, Channing explained, but “when he brings a slave we do not recognize his property in our fellow creature.” Justice Story’s *Prigg* opinion had to be viewed in that broader context: it showed that the primary duty of the free states was to whittle down their obligations to slavery so that only one requirement remained: returning fugitive slaves – and even here, a fugitive should not be

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30 Sumner to Chase, Mar. 12, 1847, in *Chase Papers*, vol. 2, p. 144. Chase, startled by the disclosure (and no doubt disheartened by the recent annexation of Texas and the Mexican cession), replied that Story’s dictum looked good on paper, but, like McLean’s *Groves* dictum, would have little effect on national politics, where the Slave Power held sway.
returned “as a slave, but as a ‘person held to service by a law in another state,’” in line with the proposition that slaves were persons under the Constitution.\(^{31}\)

Meanwhile, in a series of essay under the pseudonym “Pacificus,” Joshua Giddings exploited Story’s ambiguity regarding on-the-ground enforcement of the Fugitive Slave Law. The same principle was at stake in both the *Creole* and *Prigg* episodes: “self-emancipation.” Like the slaves aboard the *Creole*, whose exit from Virginia waters returned them to a natural state of freedom, slaves who escaped to the North acquired all the rights and privileges of men, and it was their God-given responsibility to resist re-enslavement by any means necessary, including violence. Once they made it the North, slaves stood on equal ground with their pursuers; northerners had no obligation to intervene in what was essentially a private contest between two individuals – a slave and his alleged master. Giddings shrewdly inferred from Story’s delicate language that the “master's power extends so far as is necessary to arrest and take back his slave; beyond this he cannot go.” And while Giddings made it clear that *Prigg* forbid northern citizens from assisting slaveowners and their agents, he did not say if the opinion barred assistance for fugitive slaves, a telling omission which implied he supported the latter.\(^{32}\)

In Ohio, Gamaliel Bailey wrote in the *Philanthropist* that federal exclusivity actually voided the state’s infamous Black Law. Not only did the *Prigg* ruling hold that “Congress can confer no judicial or executive power on state officers,” Bailey remarked; it also held that “a state may prohibit them from acting at all.” Because “there are but three persons in all Ohio, who have any business to help the slaveholder or his agent catch and deliver up a fugitive… the pathway to Canada is a pretty broad one.” For Bailey, Justice Taney’s dissent was proof enough that enforcement of the Fugitive Slave Law would be all but impossible after *Prigg*, a situation

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\(^{31}\) Channing, *Duty of the Free States*, p. 12.

that would help destabilize the slave system generally, as more slaves exploited the legal loophole. The free states should therefore “immediately pass laws, prohibiting their officers from all interference in the case” and making it a felony to aid slaveowners and their agents. “The Court says they have a clear right to do this.”

Others exploited the fact that the opinion said nothing about legal process. Here, the devil was in the details. New York governor William Seward noted that the Court’s omission on this score left due process provisions in his state “unimpaired.” New Yorkers, Seward announced, are “not obliged to retrace what is justly regarded as an important advance towards that complete political and legal equality which, being conformable to divine laws and essential to the best interests of mankind, will ultimately constitute the perfection of our republican institutions.” Seward’s message was echoed in Ohio, where Gamaliel Bailey tied it to the possibility of a constitutional amendment inserting federal habeas corpus protections into the Fugitive Slave Clause. The struggle to provide alleged runaways with access to due process, heretofore carried out at the state level, “should not be given up without a fight,” Bailey wrote.

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33 Philanthropist, Mar. 30, July 23, 1842. At first, the Cincinnati clique struggled to find a proper response to Prigg. Early on, Chase and Bailey harkened back to Chase’s radical arguments from Matilda concerning the Northwest Territory – that the Fugitive Slave Law applied only to the original thirteen states, not to new states. According to this view, slaves in “new” slave states like Kentucky were not actually property, since they came from territories that had been under the direct purview of Congress. Since all such states had no legal slavery, rights deriving from their state laws had no binding effect, masters could not claim slaves in other states under the federal Constitution. This radical argument was too instrumental and innovative to attract serious attention, however, and soon the Ohio clique returned to the arguments Chase had furnished in the late 30s and early 40s – that slavery was a local institution over which the federal government had no power whatsoever. The Cincinnati Vigilance Committee, for example, urged citizens to aid fugitives in any way possible and for the state’s lawyers to assist those charged with assisting fugitive slaves, and for the state to enforce “stringent legal measures” denying comity to slaveowners in the aftermath of the Ohio Supreme Court’s State v. Farr ruling (1841). Philanthropist, April 12, 1843.

34 Philanthropist, Oct. 1, 1842.Long before he gave his famous “High Law” speech in 1850, Seward, like most of his antislavery colleagues, judged man-made laws against the moral standards of natural law. As we have seen, there was nothing remarkable about this propensity, nothing that would justify the claim that Seward was some sort of religious zealot, as scholars incorrectly assume. See, for instance, Goldfield, America Aflame.
If it must be surrendered, Congress must be compelled to grant one, or our union is not worth two straws.”

The Case of George Latimer

A deeper and more visceral antislavery backlash to the Prigg decision came about in late 1842, in the wake of the arrest and detainment of George Latimer, a suspected fugitive slave living in Boston. Latimer was first detained in October by James B. Gray, a Norfolk slave catcher working on assignment for Latimer’s purported owner in Virginia. Needing a certificate of rendition, Gray hauled Latimer before a federal court in Boston, where, as it happened, Joseph Story was sitting on circuit. Crucially, Story did not issue a certificate right away; instead, he gave Gray two weeks to contact his employer and get solid proof of title to Latimer as a slave. In the meantime, Latimer would be sent to a local jail to await the results of the inquiry. Story’s orders were consistent with his position in the Amistad and Prigg cases, in which he favored policies that favored a legal presumption of freedom. In the event, the postponement proved to be crucial, as it gave Latimer’s allies time to organize his defense.

Samuel Sewall, the same abolitionist attorney who had fought for Med’s freedom in the Aves case, now sued for a writ of personal replevin, citing the jury trial provisions in Massachusetts’ 1837 personal liberty law. By this point, Justice Story had fallen ill and was replaced on the bench by Chief Justice Shaw, who denied Sewall’s request on grounds that Prigg had struck down all personal liberty laws in favor of federal exclusivity in fugitive matters. In a court of law, Shaw argued, straining at legal formalism, the positive obligations of constitutional

35 Philanthropist, Oct. 1, 1842.
law took precedence over considerations of morality and natural right. It was this sentiment which brought on the avalanche of condemnation from Garrisonian abolitionists in Boston, who scorned Shaw and Story as morally-bankrupt automatons in service to the Slave Power. Still, the ongoing logjam in court created a space for greater agitation in the public sphere, as abolitionists formed a “Latimer Committee” and even a small newspaper, the *Latimer Journal, and North Star*, to vindicate George Latimer’s freedom. Their tirelessness paid off: Latimer’s owner soon realized that his legal costs were now equal to Latimer’s worth as slave property, and so he exchanged his title for the money raised by the Latimer Defense Fund, which freed Latimer as soon as the transaction was complete.  

The *Latimer* episode exacerbated a growing divide in antebellum America – in the antislavery movement particularly – over the relationship between morality and law. For the majority of jurists and politicians working in antebellum America, even a broad swath of antislavery activists, Justice Shaw had done the right thing; constitutional obligations had to take precedence over the moral qualms of individuals and private organizations. But for a growing proportion of radical abolitionists, Shaw’s rejection of jury trial bolstered the need for a more aggressive stance against fugitive renditions, to the point of even ignoring and obstructing immoral laws in the name of individual conscience. One radical abolitionist declared that the Fugitive Slave Law “is not morally binding upon the American people, and should be disregarded by all who fear God and love righteousness.” Everything the Bible to Blackstone showed that “divine law” had primacy over man-made law and that “the people” had a right to overthrow an unjust government.  

At Boston’s Hollis Street Church, the Reverend John Pierpont described the Fugitive Slave Law as “immoral, unnatural, contrary to the common law

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38 *Emancipator*, Nov. 17, 1842.
and to the divine law, and therefore null and void, and of no binding force whatsoever, either on the courts or of the people.”39 Pierpont’s remarks reflected a broader shift in the antislavery movement toward radical interpretations of the Constitution and law in general, a shift which emphasized the categorical refutation of laws deemed inconsistent with moral conscience. 40

Yet for many, this went too far. Gamaliel Bailey warned that interference with fugitive slave recaptures would do nothing but delegitimize antislavery in the public eye. Obviously, Bailey said, human laws had to be weighed against the higher law of God and conscience. But they could not be openly flouted, since to do so would be to reject the basic idea of democratic republicanism, in which the laws ultimately derived from the people. To balance the fight against the Fugitive Slave Law with the principles of the republic, antislavery activists had to work through political channels, pushing for both legislative repeal and a constitutional amendment. To go outside the Constitution was to undermine the legitimacy of antislavery action, to alienate the American people and render impossible the abolitionists’ broader agenda.41

A Policy of “Noncooperation” Emerges

Most antislavery activists in the wake of Prigg and Latimer backed a policy of “non-interference,” or “non-cooperation,” which meant removing all state power from the rendition process, leaving the task of enforcement with slaveowners and their agents. State legislatures could pass laws banning magistrates and officers from partaking in renditions, or state authorities could simply recuse themselves from participation. This fit with the antislavery movement’s general inclination to fight slavery from within the parameters set by contemporary law – in this

39 Quoted in Morris, Free Men All, pp. 111.
40 On the intertwined themes of slavery, morality and law, see Cover, Justice Accused. See also Weicek, Antislavery Constitutionalism, pp. 240-241; Gerteis, Morality and Utility, esp. pp. 62-85.
41 Philanthropist, May 25, 1842.
case, the narrow confines of the *Prigg* decision.\(^{42}\) Noncooperation developed out of the antislavery interpretation of *Prigg* developed by William Ellery Channing and Joshua Giddings in their published works. At the “Great Meeting for Human Rights” at Boston’s Faneuil Hall, convened in response to George Latimer’s arrest, activists demanded that Massachusetts penalize state officers found aiding slaveowners or their agents.\(^{43}\) Abolitionists in Columbus, Ohio pressed state legislators to repeal the Black Law immediately, as it contradicted the claim of federal exclusivity in the *Prigg* decision. Justice Story’s opinion, one abolitionist wrote, relieved state officers from participation in fugitive slave renditions, leaving “the claimant and the alleged slave to settle the matter between themselves by the law of the strongest.” Another added that, if federal judges in the northern states required “strict proof of claim of services” from slaveowners, “few or no fugitives could be reclaimed” – a prospect which would spell doom for the slave system generally.\(^{44}\)

In early 1843, Massachusetts led the way in developing a post-*Prigg* policy of noncooperation. A broad segment of that state’s population resented that *Prigg* had struck down the personal liberty law of 1837. In response, they petitioned the legislature to prohibit state officers from assisting in fugitive slave recaptures – a policy which was eventually dubbed “noncooperation.” In the state house, Charles Francis Adams, son of John Quincy, already disturbed by the opinion’s nullification of the hard-won *writ de homine replegiando*, answered the petitions with a report capitalizing on the ambiguities in Justice Story’s *Prigg* opinion.

Acting on the report, the legislature passed a law in March, 1843 making it illegal for magistrates

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\(^{42}\) On noncooperation, see Morris, *Free Men All*, pp. 107-129. Joshua Leavitt flirted with the doctrine of interference in the immediate wake of the *Latimer* case: in late 1842 he wrote that “it can be no ‘crime’ for a slave to flee from bondage, nor… to aid any escaping slaves,” yet by early 1843 he was arguing that the “good of society requires that law, as law, should be sustained, till it is regularly appealed.” Quoted in Davis, *Leavitt*, p. 215.

\(^{43}\) *Emancipator*, Nov. 3, 1842. They also pressed for a repeal of the Fugitive Slave Law.

\(^{44}\) *Philanthropist*, Feb. 23, 1842. At first, Bailey’s responded to the *Latimer* case by insisting the Fugitive Slave Law was “grossly, palpably immoral” and therefore “null and void” and “ought not to be performed.” But the ever-vacillating Bailey did not hold this position for long. See *Philanthropist*, Dec. 28, 1842.
and officers to participate in slave renditions – the first of the post-Prigg noncooperation laws in the North. Though mainly intended to protect free black citizens from unscrupulous slavemasters, it was widely understood that the law would help undermine the slave system by making it difficult for slaveowners to retrieve runaway slaves.45

Similar laws began to appear in states across the North, as the region’s antislavery legal regime adapted to the Prigg decision. Between 1843 and 1848, eight northern states joined Massachusetts in passing noncooperation laws, including Rhode Island, New Hampshire, New Jersey, Ohio, Pennsylvania, and Vermont. In Connecticut, Governor Roger Baldwin – yes, that Roger Baldwin, the former Amistad attorney and relative of Roger Sherman – presided over the state legislature’s passage of the noncooperation law. Antislavery activists in Ohio pressed for a noncooperation law but were ignored by the state legislature in Columbus. The legislature did, however, repeal the Black Law on January 19, 1843 (while also reinstating part of Ohio’s 1831 anti-kidnapping statute). One year later, the growing antislavery contingent in Ohio’s legislature introduced a bill prohibiting Ohio citizens, not just officers, from participating in fugitive-slave recaptures -- a bill which was too extreme to pass in 1844 but which nevertheless reflected the shifting balance of power in that crucial state. The passage of noncooperation laws across the North reflects the enduring influence of William Channing’s The Duty of the Free States in the 1840s. Together with the policy of denying comity, the noncooperation laws strengthened the antislavery legal regime of the North, drawing a more definite line between slavery and freedom in the United States.46

Jones v. Van Zandt (1843)

46 Morris, Free Men All, pp. 117-127.
Meanwhile, antislavery activists continued to challenge the Fugitive Slave Law in the courts. From the moment Justice Story handed down his *Prigg* decision, Salmon Chase and others sought another case which would repudiate Story’s claim of federal exclusivity in fugitive renditions and strike down the Fugitive Slave Law. An opportunity emerged in Ohio with the case of old John Van Zandt, a penurious farmer known in southern Ohio for his occasional antislavery interventions.47

On a bright morning in April, 1842, Van Zandt was traveling by wagon on the road to Cincinnati when he encountered nine slaves from Kentucky. All of them were the property of Kentucky slaveowner Wharton Jones, whose agents were already in pursuit. Van Zandt inferred that the nine were runaway slaves, but he asked no questions and instead offered to take them to either Springfield or Lebanon, about thirty-five miles north. Off they went in Van Zandt’s creaking wagon. Four hours into the journey, two broad-shouldered white men appeared in the road, as the chirps and croaks and rustling of a breezy Ohio afternoon gave way to the sounds of southern slavery: hounds barking, chains clinking, shotguns loaded. Without a word, the nine runaways leapt from the wagon. Only one of them got away – a young man named Andrew, who would never be seen again. The rest were rounded up and promptly returned to the Jones estate in Kentucky. Jones filed two federal suits against Van Zandt in the Kentucky District Court, the first to recoup losses owing to Andrew’s escape and the expense of recapturing the others, the second to claim the five hundred dollars granted to slaveowners under the Fugitive Slave Law.48

As a federal action, Salmon Chase defended Van Zandt in the Ohio District Court in late spring 1843. In addition to Humphrey Howe Leavitt, the presiding judge was none other than Justice McLean, Chase’s father-in-law and the darling of American antislavery since early 1841, when he handed down his concurring opinion in *Groves v. Slaughter*. In his written brief, Chase described the *Van Zandt* case as the first test of *Prigg*: “no single decision of any tribunal, however exalted,” he wrote, “should be regarded as absolutely final and conclusive,” especially a decision which was clearly “not unanimous.” As always, Chase began with technical arguments which showcased the antislavery emphasis on strict construction and natural law. The court ought to interpret the law against a presumption of freedom, he wrote. The case against Van Zandt did not hold up, since the language in the indictment failed to comport with that in the Fugitive Slave Law; it was too broad, evidencing the legal presumption of slavery undergirding Jones’ suit. Jones’s charge of harboring runaways also fell flat, since Van Zandt had not known that his fellow travelers were escapees. Chase then moved on to a more comprehensive assault on the federal Fugitive Slave Law. Slavery, he argued, was a state institution with no connection to the federal government. The Fugitive Slave Clause was not a grant of power to Congress; it involved relations between the states only (here, once again, Chase cited Justice Shaw’s analysis from *Commonwealth v. Aves*). The Fugitive Slave Law desecrated the “principles of natural right and justice” in the Northwest Ordinance and Ohio’s constitution, and it blasted the protections and limitations in the Fifth, Seventh and Tenth Amendments. For these reasons alone, Chase concluded, the Fugitive Slave Law was unconstitutional; it could not and should not be enforced in Ohio.

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49 On *Groves v. Slaughter*, see Chapter 5.
50 *Reclamation of Fugitives from Service: an Argument for the Defendant Submitted to the Supreme Court of the United States in the Case of Wharton Jones v. John Van Zandt* (Cincinnati: R.P. Donogh & Co., 1846). Quote from
In the event, Justice McLean rejected Chase’s arguments. The Fugitive Slave Law, he argued, was entirely constitutional. Like Justice Story, McLean read the Fugitive Slave Clause as a grant of power to Congress (not a restraint on state legislation), and like Justice Shaw in the Latimer case, he instructed the jury to ignore matters of conscience and focus instead on the primary legal issue – namely, the alleged infringement of Wharton Jones’ property rights. McLean accepted the major premises in Chase’s brief, including the presumption of freedom in Ohio and Van Zandt’s ignorance of the blacks’ legal status. But formal notice of their legal status was not necessary, he argued; Van Zandt should have avoided the group altogether, and the fact that he did not suggested that he intended to obstruct their recapture. Van Zandt was guilty as charged.  

Antislavery activists in Ohio denounced the opinion. Gamaliel Bailey noticed how it embodied the same spirit of loose construction as Story’s opinion in Prigg. That was the opposite of what the courts should be doing; because the Fugitive Slave Law was the exception to the rule of freedom, Bailey wrote in the Philanthropist, judges had to interpret it as strictly as possible. At the very least, McLean should have questioned the constitutionality of the provision in the law punishing the act of harboring or concealing slaves. McLean had joined Story and Shaw on the list of fallen angels. Yet, even here, Bailey saw a silver lining: for one thing, McLean’s opinion reaffirmed Story’s implicit argument in Prigg that American slaveowners did not have a right of recaption to slave property outside of the Union, in Canada or the Bahamas. Second, the opinion bolstered the growing consensus (especially after State v. Farr in 1841) that

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p. 71. When the case went to the Supreme Court in 1847, Chase sent copies of his 1843 arguments to Taney and the other justices. See Chapter 8.

color could not be a basis of legal presumption in Ohio. These were important points, despite the overall disappointment with McLean’s opinion.\textsuperscript{52}

It is clear from Chase’s argument in the \textit{Van Zandt} case that mainstream antislavery activists in 1843 continued to believe that fugitive-slave renditions were a matter between the states, exclusive of the federal government. If it is true that Justice Story in \textit{Prigg} envisioned a federal habeas corpus and jury trial provision, Chase, for one, did not take the hint, nor would he have wanted to, since that contradicted the essence of antislavery constitutionalism as he understood it. In the early 1840s, the fight against the Fugitive Slave Law was still part of the broader campaign to completely separate slavery from the federal government.

\textbf{Conclusion}

The \textit{Van Zandt} case captured the state of antislavery activism in the early 1840s. As ever, the fight against nationalized, “constitutional” slavery took place at both the state and national levels simultaneously. At one level, the case represented the struggle over the balance of power in Ohio, where a string of significant antislavery victories in the courts, together with the repeal of the Black Law and a steady but unambiguous shift in the state legislature, portended a revolution in the balance of power between proslavery interests and antislavery forces in the Buckeye State. On another level, the case belonged to the broader national controversy involving the extraterritorial reach of property rights in slaves, specifically fugitive slaves in the North. At both levels, \textit{Van Zandt} captured the gravity and intractability of the growing constitutional crisis over slavery in the early 1840s, a crisis which was quickly devolving into open class conflict between slaveowners and the antislavery majority of the North.

\textsuperscript{52} \textit{Philanthropist}, July 26, 1843.
The crisis began in 1835-6 with the controversy over slavery in Washington, D.C., a dispute which had been instigated by abolitionist petitions. In that debate and in the subsequent debates over slavery in the free states and on the high seas, the focus of conflict was initially the abolitionists’ agenda; but in each case, the focus ultimately turned to slaveowner property rights, their nature and scope both inside and outside the Union. Taken as a whole, the crisis produced a more refined strand of antislavery constitutionalism which appealed to radical abolitionists and moderate antislavery activists alike, both of whom recognized that the existing Constitution provided ample room for legitimate antislavery action at the national and state levels. As the crisis unfolded in dramatic episodes like the *Amistad* and *Creole* cases, activists, lawyers, and politicians brought antislavery constitutionalism to the center of national politics, introducing once-obscure arguments to an audience of increasingly angry and receptive northerners. The crisis also gave the abolitionists’ agenda a sharper and more confident edge, as antislavery jurists and politicians defended the agenda against proslavery claims that it was patently unconstitutional.

Far from quashing the North’s aggressive antislavery, Story’s opinion in *Prigg* created new avenues of resistance to the Fugitive Slave Law, from northern “noncooperation” to more radical notions of a future constitutional amendment to the Fugitive Slave Clause. Story’s endorsement of federal exclusivity in fugitive-slave matters cut against the arguments of Chase and Alvord, but it did not undermine the abolitionists’ program in general, for Story also affirmed the proposition that there was no general right to slavery property in the Constitution, no constitutional guarantee for the protection of slave property as such. That was a key non-endorsement, one which allowed the North to continue obstructing slaveowner property rights.
from within the framework of the Constitution. In that sense, *Prigg* only exacerbated the constitutional crisis begun in the mid-1830s.
PART III

Politics
Chapter 7

Absolute and Unqualified Divorce

By 1839, there were indications that some elements in the American Antislavery Society thought it was time for abolitionists to move into the realm of electoral politics, opting for direct political action in the form of an antislavery third party. The irony was that, while abolitionists could claim limited success in getting their program into the realm of national politics, the likelihood of Congress passing that program seemed further away than ever, especially given the broad bipartisan reaction to the petition campaign of 1837-8. Crucial endorsements from state and federal judges were important, but they were not the means to achieving a complete separation of slavery and federal power; Congress alone had the power to do that, yet it seemed less inclined to do so than ever. Buoyed by small victories, exasperated with congressional obduracy, antislavery activists of all stripes began contemplating direct political action – bringing the abolitionist program directly into electoral politics in the form of independent antislavery candidates, or even an entirely new antislavery political party. In this way, the exigencies of the constitutional crisis produced not just antislavery constitutionalism and a budding antislavery legal regime, but also the first stirrings of antislavery politics in the United States.¹

¹ On the whole, accounts of the abolitionists’ shift toward electoral politics and the formation of the Liberty Party have been rather narrow in scope. The story is almost always told from the perspective of the abolitionists, with very little said about the Liberty Party’s role in the broader sectional conflict of the 1840s. There is much emphasis on coalition-building and internecine conflict, with little systematic analysis of the party’s political platform and how it differed from Whig and Democratic platforms. Reinhardt O. Johnson’s Liberty Party is typical: though it is the best and most exhaustive account of the Liberty Party we have, Johnson’s account glosses over the basic unity of Liberty Party leaders when it came to goal of universal abolition -- the essential fact that most Liberty men rallied around the original antislavery project fashioned by the American Antislavery Society in 1833. See Johnson,
Many so-called “political abolitionists,” including the architects of what became the Liberty Party, envisioned an antislavery party that was more than a mere extension of the old AA-SS. Radicalized by the obstructions of “Slave Power” in Congress, many wanted to transcend the constitutional program of 1833 by repudiating the federal consensus and demanding direct federal intervention in the states. They grew convinced that the Constitution was an unqualifiedly antislavery document. Slavery was unconstitutional throughout the country, even in the states, where Congress had full power to abolish it. This was antislavery nationalism taken to its logical conclusion, without reference to history and political reality.

Most political abolitionists disagreed vehemently. They envisioned an antislavery third party that could bring the antislavery project to the center of American politics, where it could more directly confront the Slave Power in Congress – namely, the regime of silence instituted by the two-party system. The constitutional program of 1833 had been fortified by years of constitutional conflict; it was now the mirror image of proslavery nationalism, the greatest hope for “localizing” slavery and jumpstarting the process of state-by-state abolition. An antislavery party might not be able to enact the abolitionist program in full, but it could push the program more vigorously into the nation’s politics, forcing Whigs especially to confront questions about actual policy. But to do so, antislavery politics had to work from within the existing Constitution, exploiting the insights of constitutional conflict as well as the grievances of northern voters, who resented the constitutionalization of slavery in Congress and the courts. It would foolish, many argued, to abandon the antislavery project at precisely the moment it was


In contrast, I place the party’s platform at the center of the story, expanding the frame of view so that we see the Liberty Party not simply as an extension of the abolitionist movement, but as the vital product of constitutional conflict over slavery after 1835 – in other words, as a more direct political manifestation of post-Missouri Crisis, post-shutdown antislavery nationalism. The Liberty Party platform was essentially the same as the abolitionist constitutional program of the 1830s, but it was retailed in ways that reflected the changed circumstances of northern political economy and national electoral politics in the early 1840s.
most needed. Far from being an obstacle to abolition, the federal consensus was the indispensable premise of antislavery politics, the original application of the municipal theory to American federalism. Without it, localization of slavery would be impossible, and the process of state-by-state abolition would be forever out of reach.

One of the earliest and most vocal critics of the new innovation was Cincinnati Philanthropist editor Gamaliel Bailey, the devout Methodist who had traveled to India as a young missionary in the 1810s. Worldly, sharp-witted and unflappable, Bailey’s path to antislavery began in 1834, when Theodore Dwight Weld captured his imagination at Lane Seminary and introduced him to James G. Birney, the soon-to-be-editor of the Cincinnati Philanthropist. Three years later, when Birney moved to New York to take a more active role in the American Antislavery Society, Bailey took over as editor of the Philanthropist, churning out blistering editorials and continuous coverage of the Congressional debates over slavery. Around that time he became fast friends with Salmon Chase, who recognized in the diligent editor a mutual commitment to moral reform and civil order. Their affinities in matters of religion, intellectual life, and politics made them close partners from that point until the Civil War.²

At first, Bailey opposed direct political action, but after the passage of the Atherton gag in 1838, the paper moved in a decidedly political direction. The conventional issues in party politics – banks, tariffs, land policy – all took a back seat to the slavery question, Bailey told readers. The Philanthropist joined other antislavery institutions in seeking to “magnify fundamental principles of government far above mere modes of policy.”³ Yet Bailey insisted that, should an antislavery third party emerge on the national scene, its leaders must make every effort to ensure its harmony with the Constitution. Alongside Chase, Bailey appealed for an

² See Harrold, Gamaliel Bailey and Antislavery Union (Kent, OH: Kent State University Press, 1986). Quote from p. 20. See also Niven, Chase, p. 60.
³ Quoted in Harrold, Bailey, p. 20.
antislavery party that endorsed the abolitionist program of 1833, with minor adjustments in light of the lessons of constitutional conflict. In his view, the legitimacy of antislavery politics depended entirely on its apparent continuity with the original antislavery project. Even as he sought to rein in the textualists, Bailey worked with Chase and others to reframe the abolitionist constitutional program as a “modern” party platform, an appropriate foundation for broader antislavery coalitions.

*Toward an Antislavery Politics*

The aftermath of the great petition campaign of 1837-8 left abolitionists deeply frustrated: in one sense, the campaign had effectively pushed the abolitionist program into national politics and generated more support for it in northern antislavery circles, despite the efforts to party leaders to shut down dissent; yet on the other hand, the odds that Congress would act against slavery seemed slimmer than ever, as the fierce reaction of proslavery interests meant greater repression from the party system. The debate in Congress over slavery and federal power helped abolitionists refine their constitutional arguments, and it established a basic constitutional consensus among antislavery Whigs and abolitionists – a foundation for antislavery politics. But the petition campaign failed to muster support for antislavery legislation in Congress; in fact, it seemed to push the moderate majority toward the Calhoun line, as evidenced by Henry Clay’s 1839 speech. Both parties were determined to keep slavery agitation out of national politics. “The power of influencing Congress by mere petition has already failed,” James Birney declared.
in 1839. With the “ears of the popular branch… hermetically sealed,” abolitionist petitions faded into “the dust and cobwebs of oblivion.”

The peculiar dynamics of the situation – an inflated optimism pierced by brutal political realism – led many abolitionists to drop their professed detachment from electoral politics and instead stress the need for more vigorous political action, namely, voting for individual politicians who endorsed their constitutional program (or at least parts of it). Entrenched obstruction in Congress convinced them that a more direct and aggressive strategy than petitioning was needed to “grapple with that concentrated Power in Congress.” It is inaccurate to assume that second-wave abolitionists were apolitical; from the beginning they worked hard to shape the terms of national political debate over slavery. It is more precise to say that, given the party system’s intrinsic and structural bias against antislavery, abolitionists preferred to keep electoral politics at an arm’s length, influencing legislation from the periphery so as to preserve their moral purity and effect a broader moral revolution among the American electorate. Theodore Dwight Weld captured the tension between effecting political change and avoiding party intrigue when he rebuked a fellow abolitionist in 1836, reminding him that slavery was “preeminently a moral question” that required abolitionists to focus on “the heart of the nation,” not “its purse strings.” The constant emphasis on moral purity was precisely why abolitionists rallied around a vague credo like “immediatism,” which could be interpreted in multiple ways, from a specific political program to broad moral and religious exhortation.

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5 *Emancipator*, June 2, 1841.
By 1838, most abolitionists were confident that an “abolitionized” North would translate into a viable antislavery politics. In a long speech delivered to the Fifth Annual Convention of the AASS in 1838, Alvan Stewart, an abolitionist attorney based in upstate New York’s “burned-over district,” observed how the rolling debates over slavery in Congress had strengthened the antislavery argument and augmented the ranks of antislavery northerners. Stewart saw how the first principle of Calhoun’s now-infamous 1837 resolutions – that Congress had no power over slavery – “gives the benefit of it as much to abolition, as to pro-slavery institutions.” Time and again Calhoun had insisted that Congress could not disturb the domestic institutions of the states, yet the practical effects of his constitutional arguments – nothing less than the nationalization of slavery – did just that, impairing the institutions of free labor and due process in the northern states.\(^7\)

Stewart cheered the mounting evidence that northerners were becoming more vocal and more political in their antislavery. The Van Buren Democrats, he said, had long chafed under the dominance of slaveowners in their own party, and now they were beginning to voice their frustrations in the language of constitutional dissent. The Whig Party, by contrast, squirmed its way through the slavery controversy, offering hollow platitudes to northern voters while officially rejecting the abolitionists’ program. Crucial developments in northern courts, not least the denial of comity in Massachusetts and Connecticut, as well as the rejection of color as a legal basis of presumption in *Ohio v. Birney*, signaled the North’s tilt toward abolitionism. Soon, an abolitionized North could make a dent in national politics, altering the distribution of “patronage and power” so as to restock federal offices with antislavery men, who would then initiate policies to destabilize the slave economy and lower the prices of slaves across the South. “The great stream of enterprise and capital which has heretofore flowed to the southern states from the

northern, and given value to men as beasts, will then be cut off. Should this not result from the aroused conscientiousness of the capitalists, it will from their apprehensions. Who will buy an estate, the title of which is generally considered to be worthless?"8

An abolitionized North would also erect an antislavery legal regime hostile to the interests of slaveowners, Stewart explained. More northern states should follow Massachusetts’ example and deny comity to slaveowners on the grounds that civilized nations do not recognize property in human beings, and they should make it as difficult as possible for slaveowners to retrieve runaway slaves under the Fugitive Slave Law, which, according to Stewart, only granted power to slaveowners and their agents, who were solely responsible for the recapture of runaway slaves – and here he cited New York Chancellor Walworth’s opinion in *Jack v. Martin* and Salmon Chase’s arguments in *Ohio v. Birney*, among others. “Let moral power achieve this triumph, and what will become of the value of slaves on the border? How long will that border remove southward? And where will it stop?”9

The only way slavery could escape the noose now encircling it, Stewart warned, was for Congress to annex Texas as a slave state, a prospect which would add as many as six slave states to the Union and secure southern parity with the North in the Senate, at least for the time being. The intensity of northern opposition to annexation seemed to grow by the day: the legislatures of Vermont, Massachusetts, Rhode Island, New York, Pennsylvania, Ohio and Michigan had all issued resolutions stating their unequivocal hostility to annexation. These were resolutions which could “curb or destroy slavery,” Stewart said. Even if the Deep South seceded and annexed Texas, the Upper South would not join them, for they knew that the rearing of slaves for the market is not a business which can be made profitable in such circumstances.” Thus it was

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9 *ibid.*, pp. 113, 119, 121. Quote from p. 121.
absolutely critical that northern congressmen block the annexation of Texas, not just to contain slavery in the South, but because it would be the death blow for an institution reliant on territorial expansion.

Stewart delivered his speech against the backdrop of a rapidly changing North, not just economically and demographically but also politically, as the antislavery nationalism of the post-Missouri era gained traction among growing segments of the population outraged by the perceived nationalization of slavery. A few weeks earlier, a subcommittee of the Massachusetts state house charged with responding to abolitionist petitions issued a report on the abolitionists’ program. The report was written by James C. Alvord, the same antislavery lawyer who, one year earlier, had produced the committee report in Massachusetts calling for reinstatement of the writ de homine replegiando. The report found that the entire abolitionist program was constitutional, and recommended that the legislature endorse some – though not all – of its parts. Alvord recognized that, while the program was comprised of different “classes” of legislation, the basic objective was to separate slavery from federal power. It was “highly important,” he wrote, “that the precise boundary between the powers of the national and state governments” on slavery “be defined and established.” Turning to the program, the report found that every demand made by the abolitionists was constitutional, from abolition in Washington, D.C. to prohibition of the interstate slave trade. But Alvord only recommended that the Massachusetts legislature resolve against the slave trade and the admission of new slave states, which the legislature ended up passing a few months later (Connecticut’s legislature did the same a short time after that).  

Though Alvord’s report shied away from a full endorsement of the abolitionists’ program, it did say that the program was constitutional. More importantly from the perspective

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10 Report on the Powers and Duties of Congress: upon the Subject of Slavery and the Slave Trade (Boston: s.n., 1838). Quote from p. 32.
of political abolitionists, it demonstrated that there was significant support for the program outside the ranks of hardcore antislavery activists. If the surge of antislavery sentiment in the late 1830s reflected anger over slavery’s nationalization, the Alvord report represented growing support for the project of localizing slavery in the South. In both cases, radical abolitionists were the prime movers, inciting debate while offering up a well-honed political solution.

By 1838, after years of constitutional conflict, abolitionism’s moral and religious accent began to fade. As political abolitionists looked for ways to augment moral suasion’s impact on politics, they began inching toward greater involvement in party politics. Many considered it the moral as well as political duty of every northerner to vote for candidates who supported the abolitionist program. The shift toward political action began as early as January, 1837, when Henry Stanton introduced a resolution at the NEA-AS convention calling for abolitionists to vote for antislavery candidates. The resolution provoked some opposition but was defended by William Lloyd Garrison, who reminded the audience that the “Declaration of Sentiments” of the American Anti-Slavery Society “expressly states that we are to make us of ’moral and political action’ for the removal of slavery.” Abolitionists could vote for antislavery candidates if they so chose.  

Joshua Leavitt, an early opponent of independent nominations, changed his mind by 1839, insisting that it was “the duty of American citizens to meet [slavery] in the very citadel of power, vis., in politics.” Slavery’s “peculiar power is here, rather than in the church,” Leavitt wrote. “[I]t is restless in the church because it is restless in the State. We are eminently a political people.”  

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12 Quoted in Davis, Leavitt, p. 149.
are framed by state and national legislatures. The abolition of slavery is nothing more nor less than the repeal of these slave laws.... What we want,” Gooddell continued, “is to have the members of the national and State legislatures in favor of the abolition of slavery.”

13 Gamaliel Bailey was even more direct: “An evil exists by legislation for which I am responsible,” he wrote in the Philanthropist, “and by legislation it must be abolished.” Direct abolition in the states was “out of the question,” but in federal areas slaveowner property rights were “under the control of political action: by political action they can be terminated.”

It was at this time that the majority of abolitionists rallied around a policy of questioning political candidates about their respective positions on the abolitionists’ program. Questioning candidates was another way of forcing the abolitionist program into state and national politics. This was yet another strategy borrowed from the British abolitionists, but in adopting the policy of questioning, abolitionists also capitalized on the insights provided by their proslavery counterparts in Congress, who constantly complained about the abolitionists’ impact on northern — and therefore national — politics. The North was divided into countless factions, Francis Pickens had argued in 1836, and “[f]rom the division of these parties, the abolitionists become important and powerful, as holding the balance of power; hence it is that all other parties, desiring their strength, acquiesce, to a certain extent, in their measures and movements.”

15 When the American Antislavery Society endorsed questioning at the society’s 1838 convention, the business committee noted that the free states comprised a “large majority” in Congress whose representatives could, if prodded, abolish slavery in federal jurisdictions and prevent the annexation of Texas. “To secure these results, so fatal to the protracted existence of slavery in every part of the country... is in the power of the free States...[.] the friends of human

13 Philanthropist, September 25, 1838.
14 ibid., Sept. 3, 1839.
rights, in a large number of Congressional Districts, HOLD THE BALANCE OF POWER.” As more antislavery representatives entered Congress, the committee wrote, the “action of Congress will be but the echo of the action of the State Legislatures” in the North. 16

By the middle of 1838, abolitionist societies across the North adopted the interrogation strategy as part of their broader campaign. In addition to testing candidates and agitating the slavery question, the new strategy was designed to push the abolitionists’ program into state and national politics. The questions followed the same pattern as the petitions the year before, focusing on slavery’s relationship to federal power. Did the candidate support abolition in Washington, D.C. and the federal territories? If elected, would he block the admission of new slave states, “including Texas”? 17 Did he agree that Congress had the power to interdict the domestic slave trade? Such questions tested the candidate’s commitment to the abolitionist program as a whole. Very few endorsed every point in the program, but that was hardly the point. Questioning exerted pressure on northern candidates, forcing the abolitionist program onto the table in ways that circumvented the gag rule and the party system’s structural ban on slavery agitation. 18

A small group of upstate New York abolitionists went even further, calling for direct political action in the form of an antislavery third party with independent candidates who would push the abolitionist program. As early as 1837, Myron Holley, William Goodell and Alvan Stewart implored their fellow abolitionists to transform the American Antislavery Society into an overtly political organization. By September, 1838, Goodell was telling anyone who would listen that it was time to chart a “more vigorous course of political action, in order to teach by

16 Philanthropist, Oct. 23, 1838.
17 ibid.
18 On the strategy of questioning candidates, see Sewell, Ballots for Freedom, pp. 10-20. Sewell’s analysis of the questioning strategy emphasizes the implementation of questioning; he says little about the substance of the questions themselves and even less about the overall program embedded in the questions.
example what we have found it so difficult to teach by precept. “19 Stymied by the majority, Goodell and company met in Warsaw, New York to discuss the possibility of forming a separate organization – the seeds of what would become the Liberty Party. The Warsaw convention nominated James Birney for president and issued a broad statement calling for antislavery to occupy local, state, and federal offices. Yet little action was taken in the following months, and it seemed as if the drive toward third-party politics would peter out. Through 1838, the upstate New Yorkers were the lone voices in favor of direct third-party action.20

Whether or not they supported direct political action, most abolitionists recognized that a sea change in public opinion was underway in the North, a shift which contrasted sharply with the intransigence of “doughface” accomodationists in Congress. As anger grew over the gag rule and other signs of slavery’s nationalization, the time seemed right to press the abolitionist program more aggressively in politics, to translate antislavery sentiment into legislative results. 1837 was the high tide of anti-abolitionism in the North. (The deadliest act of mob violence occurred in November, 1837 in Alton, Illinois, where anti-abolitionists shot and killed the Maine abolitionist Elijah P. Lovejoy as he fled from a burning warehouse). Mob violence tapered off as northern resentment turned against the slaveowning class, whose success in gagging antislavery petitions was viewed as one element of an anti-republican design to make slavery constitutional as well as national – a design which necessarily undermined the constitutional liberties of the northern states. The Enterprise, Amistad, and Creole affairs further inflamed northern opinion, while the proslavery sentiments expressed by Calhounite leaders in Congress drew the ire of

19 Philanthropist, Sept. 25, 1838.
20 Sewell, Ballots for Freedom, pp. 43-58; Johnson, Liberty Party, pp. 13-19. Sewell writes, “third party action was necessary to give point and purity to moral suasion. Slavery, as a moral evil entrenched in a political system, had to be attacked simultaneously on two fronts. To shun political weapons was morally contaminating. Hence the best course seemed to be to combine moral appeals with an independent politics designed to seek legislative cures for legislated evils...” Ballots for Freedom, p. 81.
northern workers, who resented the proslavery orientation of federal policy. Persecuted and vilified just a few years before, abolitionists now found themselves at the vanguard of public opinion in the North.²¹

Many northerners who voted Whig, especially in New England and Ohio’s Western Reserve, genuinely supported the abolitionists’ program throughout the 1830s, despite their party’s inherent opposition to the program. The more telling change in the late 1830s was the growing support among radical Democrats, whose general antipathy toward blacks existed alongside a deep resentment of slaveowner influence in the Democratic Party. Persuaded that slaveowners posed a greater threat to the Union than abolitionists, northern radicals joined abolitionists in calling for greater restraints on slaveowner power. For all their differences with abolitionists – whom they believed had glorified the plight of slaves while underestimating the conditions of northern labor – radical Democrats shared with abolitionists the basic belief that the world emerging around them – the world of liberal capitalism – was in need of restraint. The Radicals’ core constituency was the rising class of upwardly-mobile labors in northern cities, the product of the North’s rejection of servile labor statuses in the early nineteenth century. While they celebrated the Jacksonian virtues of individualism and limited government, they looked to government for a fair distribution of rights and rewards in American society, which often meant checking the prerogatives of would-be “aristocrats.” By 1840, it was clear to many Radicals that nothing in the North – not even the Bank of the United States or the exploitative northern capitalist – rivaled the immense power of southern slaveowners, whose property rights

²¹ On the seismic shift in public opinion from the late 30s into the earlys, see especially Stewart, Holy Warriors, p. 91; Ashworth, Slavery, Capitalism, and Politics, vol. 1, pp. 381-414.
undermined the dignity of labor and shaped the orientation of federal policy. Radicals agreed with abolitionists that the U.S. government ought to presume freedom.22

Thus it was a Radical Democrat, Thomas Morris, who issued the first explicit denial of a constitutional guarantee for slave property in the Washington, D.C. debate.23 In a similar vein, New York radical William Leggett took issue with proslavery claims of substantive due process in the Washington, D.C. debate. If Congress abolish slavery in the nation’s capital, Leggett wrote in his Plaindealer newspaper in 1837, slaves would not be “taken but enfranchised, and not for the public use, but for their own; or rather, not for use at all, but in compliance with an exalted sense of the inalienable rights of humanity.”24 This was the same argument for procedural due process that everyone from William Slade to James Birney had made since the controversy of slavery in the national capital erupted in Congress in 1835. Leggett and other Radicals were cool to abolitionist appeals to racial equality, but they were receptive to antislavery arguments grounded in the Jeffersonian tradition of strict-construction and limited-powers. It is often forgotten that a sizeable number of northern laborers signed abolitionist petitions to Congress in the late 1830s, at the height of the anti-abolitionist reaction.25

Schism and the End of the American Anti-Slavery Society

Garrisonian Non-Resistance

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22 Bauer, Cotton versus Conscience, passim.; Howe, What Hath God Wrought, passim.; Earle, Jacksonian Antislavery. See also Foner, Politics and Ideology, pp. 57-76.
23 See Ch. 3.
25 Foner, Politics and Ideology, pp. 57ff. Latent in the 1830s, concerns about slavery’s nationalization moved to the forefront of national political debate as the country emerged from depression in the early 40s, as free- and slave-labor systems increasingly came into conflict in both state and federal jurisdictions. See Huston, Calculating the Value of the Union, pp. 67-103.
Not all abolitionists galloped toward political action. Into 1839 a schism emerged in the antislavery movement between so-called “political abolitionists,” who comprised the great majority of abolitionists, and a minority of self-described “non-resistants,” who held that it was immoral to participate in electoral politics such as it was in the 1830s. The latter group was led by William Lloyd Garrison, who now argued that it was better and more effective to shape electoral politics indirectly through public opinion than to do so through straightforward voting. The latest obstruction in Congress pushed Garrison and his followers in a completely different direction than most abolitionists. For the majority, the conflicts of the previous three years had confirmed the legitimacy of antislavery constitutionalism, showing that antislavery action was indeed possible within the confines of the Constitution. For Garrison, the debates proved just the opposite; the Constitution was for him an irredeemably proslavery document which indeed guaranteed protection for slave property in the Union, just as the Calhounites insisted. It was, as Garrison put it in 1842, a “compact with the Devil,” a document so fundamentally flawed that it precluded all efforts at piecemeal reform. The current regime proscribed any antislavery reform, let alone the kind of political action being encouraged in abolitionist circles.²⁶

At a time when most abolitionists involved themselves in greater political action, the Garrisonians became more absorbed than ever in the pursuit of moral purity. As they saw it, to vote within the existing regime was to commit an immoral act, possibly a sin against God, and it was a surefire sign of moral dilution in the abolitionist movement. Grounded in an immoral Constitution, American politics was an inherently wicked institution dominated by patronage-obsessed politicians whose scurrility reflected the moral degradation of the electorate. To engage that system by voting for candidates or forming a third party was to ruin the antislavery

²⁶ On the abolitionist schism, see Kraditor, Means and Ends, passim.; Stewart, Holy Warriors, pp. 92-93; Sewell, Ballots for Freedom, pp. 24-79ff. For a different view of the Garrisonian position, see McDaniel, Problem of Democracy, passim.
cause, diluting it with the hollow imperatives of coalition-building and electioneering. Instead, Garrisonians called upon abolitionists to adopt a strategy of “non-resistance,” which in effect meant rejection of electoral politics – of human institutions generally – in favor of working for deep and lasting moral regeneration through public opinion agitation. Inspired by the primitivism ideal of “perfectionism,” Garrison’s vision of total moral revolution in the United States exemplified the radical individualism of the Second Great Awakening’s later years. Abolition of slavery would be stage in a broader movement in favor of “human rights,” including the liberation of women from patriarchal subordination to their husbands and the restrictions of the past. Politicians in a republic were only as wicked as the people they represented; what was needed was a root-and-branch moral revolution, a soul-by-soul revival that could establish the basis for meaningful political transformations in the United States. Whereas most abolitionists sought to work with the party system, Garrisonian and his followers now sought to work through the party system, emphasizing moral revolution over piecemeal legislation.²⁷

A central premise of non-resistance was the conviction that moral revolution among whites had to precede legislative abolition -- that slavery’s demise had to rest, not on political expediency, but on whites’ acceptance of black equality. For Garrisonians, universal abolition had to rest on a foundation of Christian love and racial equality, not just political expediency. If abolition unfolded without the requisite moral “uplift” of the white population, former slaves

²⁷ Kraditor, Means and Ends, passim; McDaniel, Problem of Democracy, passim By 1842, Garrisonians’ indirect form of political action through public opinion formation led him to the policy known as “disunion.” An eminently political tactic, disunion called for northern secession and, by extension, repudiation of the Constitution. Abandoned by their northern allies and shorn of their constitutional protections, the hard “line” of freedom at their doorstep, southern slaveowners would face ruinous instability in the Border South, as slaves ran to the free nation of the North – a more southerly version of Canada. To be sure, disunion, with its taint of treason, disunion placed the Garrisonians well outside the antislavery mainstream. But it was not an apolitical program, and to many Garrisonians it appeared to be a more effective abolition strategy than separating slavery from federal power. See below. My interpretation of disunion is based on the discussion in McDaniel, Problem of Democracy as well as McDaniel’s unpublished comments about disunion at the “Antislavery Bulwark: The Antislavery Origins of the Civil War” conference in October, 2014. For McDaniel’s talk, see https://www.youtube.com/watch?v=v_WA6UtPrSU ht.
would be vulnerable to a hostile and most likely violent majority, nominal freedmen in an inimical democracy. In this sense, Garrison did not reject the political objectives stated in the 1833 Constitution of the American Antislavery Society; he simply changed his mind about how that objective should be achieved.28

*Political Abolitionists*

By 1839, the antislavery movement split between Garrisonian “non-resistants” and those who favored political action, now dubbed “political abolitionists” or “constitutional abolitionists.” The latter group comprised the vast majority of abolitionists, who considered non-resistance to be a striking deviation from the movement’s original aims. Though many in this camp fretted over the so-called “woman question,” the real concern was with Garrison’s view of politics; it seemed that he was abandoning politics at the very moment it was becoming useful to the antislavery cause. Worse, by insisting that the Constitution was inherently proslavery, Garrison was walking right into the trap set for him by the Calhounites. In response, political abolitionists claimed to represent “abolitionism as it was,” meaning, a mainly political movement for achieving the ends described in the 1833 constitution. Many shared Garrison’s fear that political action would dilute the moral purity of their movement, but crucially, they did

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28 Central to the non-resistants’ outlook was the belief that antislavery politics would abolish slavery before white Americans accepted the principle of racial equality, that legislative success would be tragically premature from a social point of view. For Garrison and his followers, universal abolition had to proceed on the basis of Christian love, not political expediency. Minus the moral and spiritual reformation of the majority population, abolition would leave former slaves at the mercy of a hostile white majority, resentful of black economic competition and pumped up with racial animus. On these grounds, Garrisonians prioritized the policy of “racial uplift”: integrating former slaves into republican society in ways that challenged the racist assumptions of white Americans. Racial uplift was not an innovation; it was a key component of the constitutional program spelled out in the 1833 AASS Constitution. The Garrisonians simply gave it precedence over the legislative agenda component, which for most abolitionists in the late 1830s remained the top priority. See Kraditor, *Means and Ends*, pp. 118ff.
not let that fear undermine their commitment to pushing the abolitionist program into American politics.²⁹

Though they placed greater emphasis on voting, political abolitionists remained committed to the strategy of moral suasion, and they were not opposed to the kind of moral regeneration touted by the Garrisonians. Indeed, they refused to see the two strategies as mutually exclusive; to engage in electoral politics in no way undermined the project of moral reformation. Political action was a more cutting and direct companion to public opinion agitation, a sister strategy to the vital yet slow-moving project of moral revolution. To be sure, political abolitionists saw key differences between moral suasion and political action: moral suasion was non-legislative and thus “national,” whereas political action was confined to jurisdictions where abolitionists had direct responsibility for slavery – namely, Congress and the free states. Still, by “abolitionizing” the northern electorate, moral suasion provided the basis for the votes needed to pass each element of the abolitionist program in Congress. In this way, moral suasion and political action worked together, pressuring the party system from within as well as from without.³⁰

Long-simmering tensions first emerged at the New England Anti-Slavery Society’s annual meeting in January, 1839. Henry Stanton, the official representative of the American Antislavery Society in Massachusetts, confronted Garrison about his claim that voting was a sin, filling the room with a palpable tension. Two months later, at the Massachusetts Antislavery Society’s annual meeting, James Birney insisted that voting was the duty of all abolitionists, a claim which implied that non-resistants were not true abolitionists and should therefore resign their posts. When Birney published his remarks in an open letter to the abolitionist community,

²⁹ See Sewell, pp. 33-42.
³⁰ See Bailey’s remark in Philanthropist, August 11, 1840. See also Sewell, Ballots for Freedom, pp. 33-42, esp. p. 34.
Garrison responded with a cagey and scathing letter of his own. The divergence was now in the open. By the time Stanton and other political abolitionists walked out of the New England Antislavery Society’s annual meeting later that year, it was obvious that the two sides were going their separate ways.\(^{31}\)

When abolitionists met in New York for the sixth annual convention of the AASS in May, differences over strategy led to a full-blown schism. Birney, Stanton and the political abolitionists arrived at the convention determined the settle the issue once and for all. After trying and failing to get Garrison to defend non-resistance, Birney joined Arthur Tappan and others in arguing that the AASS constitution enjoined abolitionists to partake in politics, which meant voting for antislavery candidates. “Slavery is an *institution* which requires political action to eradicate it,” the business committee wrote in a resolution favoring political action. The suffrage is “the only remaining means by which Congress can be influenced.” The “strength of abolitionism in the polls may be despised at first, but it is ever increasing.”\(^{32}\) When put to a vote, the resolution was narrowly defeated 84 to 77. But the damage to the American Antislavery Society had been done.\(^{33}\)

At that same meeting, Henry Stanton issued one of the most strident endorsements of political action ever recorded. The speech envisioned the antislavery possibilities of a future Congress dominated by an abolitionized North. Abolitionists had it in their power to “bring back into the northern hands an available balance of power,” Stanton boomed at the podium. The “numerical power of the free States” was sufficient to wrest concessions from slaveowners in Congress, enacting the abolitionist program one stage at a time. The first stage, abolition in the

national capital, would be the “death warrant” for slavery in the Union. The “moral influence” alone would “pierce to the heart of the whole system, as the “blow which batters down this gate of the citadel in the ten miles square shakes the entire fabric to its foundations.” Moreover, the northern states could secure legislation interdicting the domestic slave trade, the “great jugular vein of slavery.” Such legislation would “drown the profitableness of the system” and “compel” the southern states “to emancipate” the slaves. Hemmed in on all sides, “the monster would die -- starvation would slowly but surely consume him in his southern, and apoplexy in his northern abode.”

But there was more. An organized antislavery bloc in Congress could also ban the admission of new slave states. As Congress admitted “State after State from the free northwest,” slavery would “melt away” in the southern states, and the balance of power would shift radically toward the North. “Then the perpetuation of freedom will be the great idea of national legislation… Freedom will gain the ascendancy… [and] the Republic shall go forth to enstamp its free principles on the face of the globe.” None of this included “independent State action” against slavery, from the repeal of racially-prejudiced laws to a denial of comity in line with the Aves decision; from granting jury trial to runaway slaves (a policy that would “drain” slaves from the Upper South) to introducing “legislative remonstrance[s]” of the southern states.

Should these measures prove insufficient, Stanton said in the same spirit as John Quincy Adams, an antislavery majority could “alter the constitution and bring slavery in the States within the range of Federal legislation, and then annihilate it at a blow.” Given the changing demographics of the North, a constitutional amendment was not “beyond the reach of

34 Sixth Annual Report of the Executive Committee of the American-Antislavery Society, pp. 12-14. Echoing Thomas Morris’s remarks in the Senate, Stanton thrashed Clay’s argument that Congress had only a positive relationship to the slave trade as a “sophistical and puerile” line of reasoning. ibid., p. 13.
35 ibid., pp. 15-16.
possibility.” And what of slaveowner threats of disunion? Never mind those, Stanton scoffed. Disunion would be a “suicidal act” which would forfeit the protections slavery enjoyed under the current Constitution. In the event of secession, Stanton predicted, “[n]o constitutional compact would make it our duty to suppress,” while slaves would “rush en masse over the border,” seeking freedom in the North. The South, already encircled by the British, would find herself in an even more “isolated condition among the nations of the earth.” All of these possibilities were within reach, Stanton concluded. Now was not the time to retreat from politics; it was precisely the right time to engage with politics more directly, to push the abolitionist program in Congress while stimulating a moral revolution in society.

The call for political action was echoed in the West by Gamaliel Bailey, who used his pulpit as editor of the *Philanthropist* to criticize non-resistance and encourage political action on the basis of antislavery constitutionalism. As early as December, 1836, Bailey had described voting as a “religious duty.” After the passage of the 1838 Atherton gag in Congress, which not only banned petitions but also denied the constitutionality of the abolitionists’ program, Bailey led the charge for greater political action in the West. In a speech to the Ohio Antislavery Convention in April 1840, he insisted that moral suasion was “but preparatory” to greater involvement in electoral politics. “Political action must consummate the work,” Bailey exhorted. “Wicked legislation must be repealed and substituted by such laws, as shall secure to the oppressed their rights. We all calculate on such action among slaveholders. But have we nothing to do? … Are we to think and feel away these evils? Or, is it by action they must be remedied?” Antislavery sentiment “must become action,” Bailey continued, “or it is worthless. Water corrupts by stagnation. Iron rusts for want of use. Inaction destroys health. Principle, if

36 *ibid.*, pp. 16-18.
37 *Philanthropist*, Dec. 30, 1836.
unacted on, wastes away.” The slaveowning class would not relent in its campaign to undermine Liberty. “If good principles are to triumph,” Bailey resolved, “they must be acted out, in every legitimate way.” After listing each point on the abolitionists’ program, including an “amendment of those parts of the constitution which in any way recognize slavery,” Bailey posed the vital question: “how long could the system last?”

Political abolitionists found support for their argument in James Madison’s notes on the 1787 constitutional convention, published in 1840 as part of Henry D. Gilpin’s *The Papers of James Madison*. Though the records showed that the framers had indeed compromised over slavery’s protection in the states, a discovery which further alienated the Garrisonian faction, Madison’s notes also suggested that the founders had agreed to keep slavery local in the states, avoiding any indication that it was a national institution. Above all, political abolitionists directed attention to Madison’s claim during the debates over the Slave Trade Clause that it would be “wrong to admit in the Constitution that there could be property in men.” Antislavery activists of all stripes pointed to this claim as they combatted slavery after 1840. John Quincy Adams referred to it in his *Amistad* speech in early 1841; Charles Sumner made it the centerpiece of his *Creole* critique; and Salmon Chase used it in his legal brief for *Jones v. Van Zandt* (1843). It would go on to become a cornerstone of mainstream antislavery constitutionalism, bedrock for antislavery politics.  

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39 On the antislavery movement’s reaction to Madison’s notes, see Oakes, *Freedom National*, pp. 19; Wieck, *Antislavery Constitutionalism*, p. 81. For examples of how the notes were applied, see Chs. 5 and 6. Madison’s notes, particularly their confirmation of compromises over slavery in the states, pushed the Garrisonians further in the direction of repudiating the Constitution. For them, the notes confirmed that the existing Constitution was irredeemably proslavery, with no room for antislavery maneuver at the national level. In this sense, the publication of Madison’s notes was a major impetus in driving the Garrisonians away from the original constitutional program and toward the more radical perfectionist plan of moral regeneration and, ultimately, disunion.
northern opposition to the “Slave Power” while propagating once-obscure antislavery constitutional arguments.

In May, 1840, the AASS – the organizational apparatus of the country’s first national antislavery movement – broke apart. The split played out at the society’s seventh annual convention, an episode which has been well-documented by historians of the antislavery movement. The Garrisonians packed the convention and nominated their rising star, Abby Kelly, for the convention’s business committee, a move which epitomized their commitment to broad social reform, not just abolition. The political abolitionists responded by walking out, leaving the Garrisonians in control of the organization. From that point forward, the AASS became a shadow of its former self, a rump society dominated by an increasingly irrelevant minority of radical abolitionists. As for the political abolitionists, a few joined Lewis Tappan’s newly-formed American and Foreign Antislavery Society (AAFS) in New York. But the overwhelming majority responded to the split by advocating not just voting for antislavery candidates, but direct political action in the form of an antislavery third party. For Birney, Stanton, Leavitt, Wright and many others, the time was right for antislavery politics.  

The Liberty Party

Even before the breakup of the AASS, talk of a third party had circulated in political abolitionist circles. Myron Holley, Alvan Stewart and other upstate New Yorkers had revived their push for direct political action at the 1839 AASS convention, where it was overshadowed by the confrontation between Birney and Garrison. Discarding efforts to transform the AASS, the upstate New Yorkers now set about forming an entirely new political organization based on the same principles as the AASS. In midsummer 1839, they met in Albany, nominating James

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40 Kraditor, Means and Ends, passim.; Sewell, Ballots for Freedom, pp. 74-79.
Birney for president and the Pennsylvania physician Francis J. Lemoyne for vice president. Once again, they issued a broad statement calling for the total makeover of American government on all levels -- antislavery men in local, state, and federal offices.\textsuperscript{41} 

Most political abolitionists in 1839 had resisted calls for direct political action, satisfied that voting was enough to shape electoral politics at the state and federal levels. Arthur and Lewis Tappan stuck with the policy of voting for antislavery candidates from the established parties, while Gamaliel Bailey thought an antislavery third party was gratuitous, perhaps even unconstitutional. Even Henry Stanton expressed doubts as late as February, 1840.\textsuperscript{42} 

But by the time the AASS broke apart in May 1840, mounting frustration and sheer momentum pushed more political abolitionists into the third-party camp. Pushing this drive was the gradual realization that both the Whig and Democratic parties were structurally incapable of endorsing and enacting the abolitionists’ program – indeed, they were committed to stifling it. This fact had been driven home by a succession of disheartening developments in 1839. Neither party had nominated an unambiguously antislavery figure for the 1840 presidential election. Martin Van Buren, architect of the party system, seemed the very embodiment of functionally proslavery federal policies, from the gag rule to the \textit{Amistad} affair. (Van Buren himself was far less committed to slavery than his administration’s policies suggested). His party, long viewed as the proslavery party in Congress, had ousted Thomas Morris from their party and replaced him with Benjamin Tappan, brother of Arthur and Lewis, an antislavery man who nevertheless kept his moral scruples to himself. Around the same time, Ohio passed the Black Law of 1839, a state-level move which reflected the proslavery drift of national politics.\textsuperscript{43} 

\textsuperscript{42} \textit{ibid}. 
\textsuperscript{43} Sewell, \textit{Ballots for Freedom}, pp. 47-49.
Harrison, the Whigs’ candidate, was equally insidious in the eyes of abolitionists. Antislavery westerners remembered Harrison as the former Ohio governor who, in the late 1810s, conspired with slaveowners to repeal that state’s ban on slavery. Hardly any abolitionists saw antislavery potential in Harrison, but even non-abolitionists antislavery activists -- those who had long assumed that the Whigs were the “antislavery party” -- began to realize that the party’s antislavery rhetoric was hollow, that there was no substantive commitment to legislative action. Northern Whigs appeared to use antislavery sentiment instrumentally, soothing constituents’ consciences in order to secure their votes, without any intention of pressing the abolitionists’ program in Congress. Thus, while voting for antislavery candidates might result in some minor agitation, by 1839 it had become clear that implementation of the abolitionist program would depend on a more direct and independent involvement in electoral politics.44

The impending collapse of the AASS accelerated the shift to direct political action in the form of independent antislavery candidates. As usual, radicals in upstate New York led the charge. At another convention in Albany, this time in April, 1840, they nominated Birney and Thomas Earle for president and vice president, respectively, and implored abolitionists across the North to establish independent tickets for the fall election. This was the unofficial beginning of an antislavery third party. Though at first the party had several different names – Human Rights Party, Abolition Party, Freemen’s Party, Liberal Party -- activists eventually settled on the name suggested by Gerrit Smith at the 1839 Albany convention: the Liberty Party. Such names reflected the political abolitionists’ concern to make their party a national one, in line with the antislavery nationalism of the post-Missouri Crisis era – a party whose mission was to make slavery a local institution. Still, antiparty sentiment pervaded the Liberty coalition, and in the

early months it remained unclear what, precisely, the party would stand for – other than calling for the election of antislavery men to political office.  

A swirl of uncertainty enveloped Birney’s campaign from the start. Birney himself refused to hit the campaign trail, leaving for London in May 1840 (where he participated in the World Antislavery Conference) and returning only days before the November election. A combination of disorderliness and naivety, together with a vague and unappealing political message, resulted in the party’s drubbing at the polls. Activated by Whigs’ “Log Cabin and Hard Cider” campaign, the American electorate went to the polls in droves, giving the 1840 election the highest voter turnout in the country’s history to that point. But in a sobering, if not unexpected, development, the Liberty ticket received less than one percent of the vote -- a total of 7,000 votes. To be sure, the party won over a pocket of disaffected Democrats, exploiting the interparty consternation over Van Buren’s handling of the Amistad affair. But it failed to convince antislavery Whigs that the Liberty Party was the best route to antislavery reform. Most antislavery northerners continued under the delusion that the party of Webster, Clay and Harrison was the best hope for ridding the country of slavery.

Unlike the Whigs and Democrats and, later, the Free Soil and Republican parties, the Liberty Party would never become a national party with a centralized, top-down administration. It was more like a loose federation of state and regional affiliates, each with its own unique political culture. Yet despite its regionalized structure and pitiful showing in the 1840 election, the appearance of the Liberty Party in electoral politics marked a turning point in American

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46 Tappan, Leavitt and the “Amistad Committee” had put Van Buren in a difficult situation. The administration’s machinations on behalf of Spain infuriated antislavery northerners, while Joseph Story’s opinion angered Van Buren’s Democratic allies in the South. This was a treacherous political situation, increasingly untenable, even for as wily a politician as the Little Magician.
political development. Independent nominations gave political abolitionists a new pulpit for pressing their constitutional program in national and state politics, a strategy which, however ineffectual in 1840, at least had the benefit of being free from the chicanery of established parties. In forming a third party, political abolitionists traveled the classic trajectory of “popular constitutionalism” in the United States. When they had been shut out of politics by the party system the 1820s, they turned to petitions and speeches and print-based agitation; when that strategy met stiff resistance by entrenched interests in Congress, they turned to voting and, eventually, direct engagement with the party system. The irony is rich: a party system designed in large part to stifle antislavery dissent now became the vehicle through which abolitionists pressed their constitutional program. In the short run, the party system stifled antislavery dissent; but in the long view, it was the necessary precondition to the rise of antislavery politics.48

A Balance-of-Power Strategy

In the months following their drubbing at the polls, Liberty activists developed a balance of power strategy in state and national politics that exploited the association in the North between Whigs and antislavery, a correlation which was underserved in the eyes of political abolitionists. Spearhead by Joshua Leavitt, the restless editor of the New York Emancipator and unofficial leader of the Liberty Party, the new strategy focused on the small contingent of antislavery Whigs in the House, whose opposition to slavery very often devolved into anti-gag rule strategies, which, important as they were, kept the abolitionists’ program out of the spotlight. In early 1841, Leavitt went down to Washington, D.C. to lobby on behalf of that

program, personally nudging representatives John Quincy Adams, Joshua Giddings, and Seth Gates into action. 49

Leavitt’s lobbying paid off. The “select committee” of antislavery Whigs in the House developed a strategy of circumventing the gag rule by discussing slavery “collaterally,” addressing slavery indirectly through topics such as the Seminole War or the rights of northern blacks in the nation’s capital. For some of the Whigs, including Adams, the purpose of the new strategy was to undermine the gag rule and redeem northern liberties. But for Leavitt and possibly Giddings, the “collateral” assault on slavery was just another means of getting the abolitionist program into national politics. To that end, Leavitt printed up model petitions and distributed them to the group, urging them to introduce the petitions in the House. Each one listed the abolitionists’ program in full: the repeal of slave codes in Washington, D.C. and the federal territories; prohibition of the interstate slave trade; a ban on new slave states.

Giddings began the “collateral” assault on February 9, 1841, addressing the U.S. Army’s campaign against the Seminole Indians in Florida Territory. Invoking the limited-powers reasoning in Thomas Morris’s 1838 resolutions (which, it will be remembered, Morris had written as an explicit response to Calhoun’s proslavery resolutions of 1837), Giddings reminded his audience that the U.S. government should have no power over slavery, which was a state institution under the Constitution. It was therefore unconstitutional to tax northerners for a war they did not support, to make them unwilling agents in the rendition of fugitive slaves by the U.S. Army. And that is precisely what had happened in the Seminole conflict: U.S. soldiers have been “put in motion to capture negroes and slaves,” Giddings deplored, becoming de facto

“slave catchers” in the process, “companions of the most degraded class of human beings who disgrace that slave-cursed region...[,] experts in this business of hunting and enslaving mankind.” Presaging the remarks he would later make about the high seas, Giddings lamented that the U.S. Army had declared “open war” against a “people, who had sought liberty in the wilds of Florida.”

Around the same time, Leavitt orchestrated the arrival in Washington of Theodore Dwight Weld, who was given responsibility for researching the slavery issue (Leavitt pulled enough strings to get Weld his own study carrel at the Library of Congress). The appointment symbolized Weld’s long journey from apolitical outsider to definitive insider -- a personal spin on the larger story of American abolitionism in the late 1830s and early 40s. No one – not even Garrison himself – embodied the abolitionists’ program more fully than Weld, whose arguments in favor of abolition in Washington had basically created antislavery constitutionalism, and whose efforts in the Nancy Jackson case had helped to replicate the Aves decision in Connecticut, setting the stage for an antislavery legal regime in the North. During long nighttime discussions at Mrs. Sprigg’s boardinghouse, where Giddings and Adams had rooms, Weld explained the intricacies of antislavery constitutionalism to his guests with the distinctive clarity of a Charles Finney protégé. These arguments would show up later in Adams’s Amistad speech (March, 1841) and Giddings’s Creole resolutions (March, 1842). Instead of making

50 Giddings, Speeches in Congress, pp. 6-19. Quotes from p. 9. The Seminoles were comprised mostly of militant young Creeks who, unlike other Indian tribes, welcomed fugitive slaves into their villages. An integrated fighting force beat back the incursions of Georgian and Alabaman slaveowners, who wanted Seminole land as much the return of their fugitive “property.” Congressmen from both states had long complained about the danger posed to the slave system by an enemy league existing just outside the American South. “While this indomitable people continue where they are now,” one of their resolutions read, “the owners of slaves in our territory, and even in the States contiguous, cannot, for a moment, in any thing like security, enjoy this kind of property.” The complaint drew on the constitutional logic of Calhoun’s 1837 resolutions, insisting that it was the federal government’s positive duty to protect slavery in all areas of the Union, even outside its existing borders. The Tyler responded to the resolutions with full backing of a U.S. military expedition into Seminole-held territory. Resolution quoted in ibid., p. 8.
general attacks on slavery, the Whig lobby began tailoring their arguments to match the architecture of the abolitionists’ program. “Again and again,” Henry Wise wrote in the days after Adams’s death in 1848, Adams “told me vauntingly” that “people who had no tie and no association with slavery” would someday attack “the slave-trade between the States, the slave-trade in the District of Columbia, slavery in the District, slavery in the Territories” – and eventually “slavery in the States.” “Again and again,” Wise recounted, “he said that he would retain it as a bone of contention, -- a fulcrum of the lever for agitation, agitation, agitation, until slavery in the States was shaken from its base.”

Of all the fruits of Leavitt’s labors, none was more important than the Creole resolutions, which Joshua Giddings introduced in the House in March 1842. The Creole slaves’ rebellion presented the lobby with a golden opportunity to attack slavery collaterally. In preparing their assault, they worked in tandem with leading abolitionists, including James Birney, who sent copies of his 1840 letter to the New York American – the letter which Birney used to eviscerate Calhoun’s Enterprise resolutions – to Seth Gates. In late January, 1842, the group asked Theodore Dwight Weld, still on retainer at the library of Congress, to draw up resolutions based on the municipal theory. The resolutions would capitalize on the Creole affair by making an antislavery response to the Enterprise resolutions of 1840. Weld’s draft resolutions were ready by early February, and after a lengthy delay – the group waited to present the resolutions until after the House completed its censure trial of Adams, who had triggered an uproar by submitting petitions in favor of disunion – Giddings introduced the Creole resolutions on March 21, two weeks to the day after Joseph Story handed his Prigg opinion. In this way, Leavitt and other

Liberty activists influenced the terms of the debate in Congress, pressuring antislavery Whigs into adopting more aggressive measures against the Slave Power.\(^{52}\)

**Salmon Chase Joins the Liberty Party**

Meanwhile, support for the Liberty Party grew steadily across 1841 and 1842, as candidates picked up key electoral victories at the state and local levels, all in the shadow of national events like the *Prigg*, *Creole* and *Latimer* affairs. Hundreds of erstwhile holdouts joined the party in the spring of 1841, when the Supreme Court’s *Amistad* and *Groves* decisions put wind in the sails of the antislavery movement. Just weeks after those opinions came down, president-elect William Henry Harrison -- never the ideal candidate for antislavery Whigs -- succumbed to the pneumonia he had contracted in the hours after his inaugural address, a three-hour speech which he had delivered in cold drizzle without a coat. Harrison’s vice president, the Virginian John Tyler, who was handpicked by Thurlow Weed for his states-rights’ credentials, now moved into the White House – a man who surely had no interest in seeing any part of the antislavery program effectuated in Congress. Tyler’s ascendancy symbolized the tenacity of the Slave Power, and it radicalized the handful of antislavery men who had their faith in Harrison, from Joshua Giddings and Roger Baldwin to the Tappans and Salmon P. Chase.\(^{53}\)

One-time outliers came in droves to the Liberty Party. While Gamaliel dropped his opposition to third-partyism in the spring (amid the euphoria of the *Groves* decision), Chase joined the Liberty Party in the summer, just weeks after his back-to-back victories in the Mary Towns and *State v. Farr* cases in Ohio. Chase, who was already moving away from the Whig Party by endorsing hard-money politics and Van Buren’s subtreasury proposal, realized even

\(^{52}\) Birney’s letter to Gates is in *Birney Papers*, vol. 2, pp. 665-670. See also Fladeland, *Birney*, pp. 221-222; Thomas, *Theodore Weld*, pp. 209-211.

before Harrison’s death that the Whigs were as beholden to the “Slave Power” as the Democrats – that it was the existing party system, not parties themselves, which were intrinsically proslavery. Chase’s political evolution began in the critical year of 1840, at the nadir of post-Panic depression, as anti-Bank fury pummeled his legal practice and strained his relationship with the Cincinnati BUS branch, whose managers looked askance on his antislavery activities. In that fateful year, Chase parted ways with the Bank and ran for a seat on the city council as a Whig. Though his abolitionism lost him the backing of the city’s “respectable” classes, Chase’s bid was successful – though he made enemies straightaway by refusing to issue liquor licenses to city taverns.\(^5^4\)

It was during this transitional phase, as he tested the political waters in a city increasingly dominated by up-and-coming Democrats, that Chase made slavery into the central issue of his political career, fusing antislavery principles with the limited-government tradition of Jefferson and Jackson – and, less consciously, with his still-present Whig nationalism. At first glance, Chase’s move appears like the rash decision of a man spurned by respectable society and swept up in by the radical currents of evangelical Christianity and second-wave abolitionism. But that was hardly the case. Chase read the political winds deftly, tapping into a tidal surge of antislavery sentiment in Hamilton County and Ohio generally, exploiting the resentment which had accumulated over the years since the Missouri Crisis, from the shutdown and the gag rule to the *Enterprise* resolutions and the *Amistad* affair – and above all the perceived subordination of Ohio freedom to slave-state laws. Sensing the sea change of opinion over slavery’s nationalization – its constitutionalization – Chase pored over Madison’s notes on the constitutional convention and studied the arguments in Theodore Dwight Weld’s *The Power of Congress over the District of Columbia* (1838) and Jay’s *A View of the Action of the Federal*

Government, in Behalf of Slavery (1839), merging these with his own states’-rights reasoning from In re Matilda and other fugitive-slave cases. When he finally joined the Liberty Party in 1841, it was on the grounds that slavery’s relationship to federal power, not the BUS or Anglo-American relations, was the republic’s gravest problem. Chase would make his mark as an antislavery politician, transferring to the realm of legislation what he had already developed in the courtroom: a historical and constitutional case for localizing slavery and redeeming the legacy of the American Revolution.55

Debating the Objective of Antislavery Politics

As the Liberty Party appeal gained momentum, political abolitionists began to disagree about the nature of antislavery politics. The issue came down to constitutional interpretation. If the constitutional crisis – and, after 1842, the Prigg and Creole episodes – helped form an antislavery mainstream based around the divorce project, they also radicalized eastern Liberty men, especially the radical fringe of upstate New Yorkers, who responded to the dual affairs by rejecting the federal consensus and advocating direct abolition in the states. For this group, a successful antislavery politics meant using the levers of federal power to abolish slavery throughout the Union, not just in federal territories. To stop at denationalization was to abide by outmoded and immoral strictures, to needlessly hamper the antislavery crusade. The federal consensus no longer applied: the purpose of antislavery politics was to win control of federal government so as to use the central government to abolish slavery in the states. The objective of antislavery politics was direct abolition in the states.56

55 See, for example, Chase Papers, vol. 1, p. 147. See also Niven, Chase, pp. 60-62.
56 On radical antislavery constitutionalism, see Wieck, Antislavery Constitutionalism, pp. 249-275; tenBroek, Antislavery Origins of the Fourteenth Amendment, esp. pp. 42-70; Sewell, Ballots for Freedom, 50-51; Johnson,
In contrast, a contingent of mostly western abolitionists led by Chase and Birney moved to restrain that radical group, arguing that the success of Liberty Party depended on its continuity with the 1833 AASS program. For them, to make direct the party’s objective would be to violate the Constitution, whose strictures applied more directly to political parties than they did to reform societies like the AASS. They represented the old program of going to the limits of the Constitution while respecting the federal consensus. That was the basis of antislavery politics: the municipal theory ideal that slavery was a state institution with no connection to the federal government. Especially after the Groves opinion by McLean, it was important to maintain the premise that the Constitution treated slaves as persons, and therefore that it was better not to try and abolish slavery using federal power.57

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57 Wiecek labeled this group “moderate.” See Wiecek, Antislavery Constitutionalism, pp. 202ff. See also Johnson, Liberty Party, pp. 56-57; Gerteis, Morality and Utility, pp. 52-61.
Radical abolitionists started moving toward direct abolition as early as 1841, but at first it was muted and implied, not direct. One could see it at the party’s first-ever national convention in New York in May 1841, a meeting dominated by the original core of upstate New Yorkers. The convention had a distinctly religious cast, heavy on the evangelical rhetoric of eastern abolitionists. Joshua Leavitt, fresh from his travails in Washington, insisted that the Liberty Party carry into politics the same moral program as the AASS – immediate and universal emancipation. With Alvan Stewart, Gerrit Smith and Myron Holley leading the charge, the delegates resolved to vote only for immediate abolitionists. There was nothing particularly radical here as far as the Constitution was concerned.58

But others left the door open to direct federal abolition in the states. In a rousing speech, Stewart depicted the overthrow of the Slave Power by a “thoroughly abolitionized national administration.” He urged followers to start at the local level, voting antislavery men into local offices at the ward, city, village, township, and county levels, places where antislavery sentiment was strong and impervious to party chicanery. Local officers – those “called upon so often to act on questions involving human liberty” – should be the focus of antislavery politics early on, Stewart implored, since they were the ones who implemented policy and had outsized influence on their communities. Once antislavery men became the majority of judges and constables in the North, Stewart said, the ground would be set for an abolitionized North, the indispensable foundation for a national administration dedicated to antislavery principles.59

Crucially, Stewart said little about the policies an antislavery administration would enact at the national level. This was a striking omission, given that abolitionists since the early 1830s never failed to mention the ways in which federal power could be used to limit slavery’s reach in

59 *Philanthropist*, June 16, 1841.
the Union. Perhaps he assumed that his audience knew each aspect of the abolitionist program. Still, that the keynote address at the first major Liberty Party convention said next to nothing about policy was itself an implicit suggestion that the party represented something different from the constitutional program of 1833. What would an antislavery administration do once it came to power?

One answer can be gleaned from the constitutional arguments that Stewart himself had devised during the constitutional crisis after 1835. For Stewart and his growing band of followers, the Constitution was a radically antislavery document which gave Congress sweeping powers to eradicate slavery throughout the Union. In an article published in the Utica *Friend of Man* in 1838, Stewart argued that slavery was unconstitutional should be abolished immediately by Congress. Slavery, he wrote, had no legal basis in any of the states, as it violated the Due Process Clause of the Constitution (which guarded against government confiscation of “life, liberty, and property”). Stewart’s radical constitutional views derived from his unique reading of Lord Mansfield’s *Somerset* ruling: whereas most abolitionists held that the decision only affected the common law of England, Stewart believed that the Somerset ruling impacted a general, disembodied common law which applied to the former colonies as much as it did to the metropole. And whereas most abolitionists recognized the lack of a “national” common law in the United States (they acknowledged that the existence of such a common law depended on the assent of Congress), Stewart argued that an “American” common law, superior to the regimes of the states, had existed since the founding era. An antislavery common law grounded in *Somerset* principles pervaded the entire United States; slavery’s continuance in the South was a crime against the common law, and Congress had a positive duty to strike down slave laws and restore slaves to their natural state of freedom. This was radical antislavery constitutionalism, and it was
part of a broader reaction in antebellum America against the legal formalism of the courts, where natural law was being increasingly flouted in favor of man-made, positive law. Stewart had introduced a resolution on these grounds at the AASS annual convention in 1838, insisting that Congress amend the Constitution so as to permit direct abolition in the states.60

These views went well beyond what most Liberty men thought about antislavery politics. As far as they were concerned, Stewart, Smith and other radicals were charting a course that was as reckless and delusional as it was novel. A very different interpretation of antislavery politics emerged in southwestern Ohio, where Chase, Bailey and others in the so-called “Cincinnati clique” emphasized a strict separation of politics and moral reform and made it clear that they did not believe in direct federal abolition in the states. In their view, while universal abolition was the ultimate objective, the Liberty Party could only effect the complete separation of slavery and federal power – nothing more, nothing less. As a political organization bound by the provisions in the Constitution – including the ban on federal interference with the domestic institutions of the states – the Liberty Party could not make federally-accomplished state abolition its raison d’etre. That was beyond the power of northern voters, who could only affect federal policy. Individual members of the party, as abolitionists, could champion the cause of direct abolition, but the party itself would only aim at the divorce of slavery and federal power.61

The great majority of Liberty men emerged from the constitutional crisis more firmly convinced than ever that respect for the federal consensus was crucial to the antislavery project. For one thing, the federal consensus was a mere expression of the municipal theory, which in turn was the foundational principle of antislavery constitutionalism and Liberty Party politics; to

reject the federal consensus was to undermine the municipal theory’s place in American federalism, to jeopardize the hard-won consensus in northern politics that slavery was a creature of state laws which had nothing to do with the federal government. In favoring an instrumental reading of the Constitution, radical Liberty men jettisoned history and precedent as well as the meticulously-crafted architecture of mainstream antislavery constitutionalism, which had only emerged after years of constitutional dialogue with proslavery leaders.

Gamaliel Bailey was the first to develop this line of reasoning. Bailey had been among the first to criticize Stewart’s “strange views” back in 1838. Though he admired the upstate New Yorker’s ingenuity, Bailey censured Stewart’s instrumental interpretation of the Constitution on the grounds that it ignored history and alienated voters. Stewart seemed to have no grasp of the Constitution’s origins, “the ends contemplated by it, and the limitations to its provisions clearly understood by the parties to it.” His analysis of the founding was impossibly abstract, almost mythical, and it was too radical and instrumentalist to be taken seriously by the average voters. The crux of Stewart’s argument – that slavery was unconstitutional throughout the Union – had no basis in history, “record or tradition.” It was utterly “false,” a mere piece of “fiction.” Enough “positive proof” existed to show that slaveowners’ gained control of the federal government “some years” after the founding, not at the moment of ratification, as Stewart’s essay insinuated. The publication of Madison’s Notes proved to Bailey that there had been several “shameful” compromises over slavery, not least over the importation of slaves from Africa. Bailey cautioned against instrumental arguments. “A character of immutability should be stamped on our principles,” he advised. It was unwise to “alter the foundation principles of an agreement binding together large bodies of individuals.”

For Bailey, distinguishing moral reform from electoral politics helped put the Liberty Party on firm constitutional ground. Reform movements were fully within their rights to pursue individual emancipations by slaveowners in the states, Bailey reasoned, but a political party could not ignore the federal consensus. To demand direct abolition would be to “pervert the ballot-box from its only legitimate end – the fulfillment of the will of the people in just legislation under the constitution.” Instead of an “abolitionist” party, Bailey envisioned an “antislavery” party whose purpose it was to limit the power of slaveowners -- a “Liberal” or Human Rights Party” based on the “fundamental principles” of the Declaration of Independence” and opposed to all forms of “Servile-ism,” not just slavery. “Without meddling with slavery in the slave states, its main object will be, to circumscribe the encroachments of the slaveholding power, and wipe out from the national the foul blot of slavery, by direct legislative action, *always within the limits of the federal constitution.*” It would “release the citizens of the North from all political responsibility for the holding of men as property, ... divorce the General Government from slavery, and ... bring about a system of legislation favorable to Freedom and Free Labor.”  

When Chase joined the Liberty Party in mid-1841, he quickly endorsed Bailey’s distinction between antislavery politics and abolitionist moral agitation. The Liberty Party could only endorse the separation of slavery and federal power. Liberty men who endorsed direct abolition violated the Constitution and undermined their party’s legitimacy in the eyes of the voting public. Abolition, Chase told a friend in October, 1841, is “not properly speaking a political object,” whereas “antislavery is.” Chase defined antislavery as “hostility to slavery as a power antagonist to free labor, as an influence perverting our Government from its true scope and end, as an institution strictly local, but now escaped from its proper limits and threatening to

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63 *Philanthropist*, April 30, September 3, 1839; Dec. 22, 1841; Feb. 9, 1842.
overshadow and nullify whatever is most valuable in our political system.” It sought the “complete deliverance of the Government of the Nation from all connection with & all responsibility for slavery.” Liberty men had “nothing to do with slavery as a *local* institution,” but as a national institution, they “must nevertheless examine fully the merits & demerits of the system of slavery itself.”

Chase and Bailey’s insistence that divorce be the sole objective of antislavery politics reflected their faith in the municipal theory as the safest and most effective means of instigating slavery’s gradual demise. The constitutional debates of the previous five years convinced them that if Congress adopted a strict reading of the municipal theory, slavery in the states would not last long. Like most antislavery activists, they assumed that slavery was an inherently weak institution whose economic viability depended on the “artificial” supports of the federal government. Once that support was withdrawn, the slave economy would collapse of its own accord; surrounded on all sides, the market in slaves would dry up as slave prices dropped precipitously, creating an unsustainable situation whose only solution was abolition and conversion to free labor.

Proslavery Calhounites had inadvertently confirmed the essential soundness of these assumptions over the course of the constitutional debates. In their rush to disavow the abolitionists’ program, proslavery leaders had revealed the truth about slavery and federal power: that slavery itself would unravel without a federal guarantee for slave property. It was a zero-sum contest: slavery was either a national or it was a local one; there were no grey areas. If Liberty men hoped to exploit that insight in the political sphere, they would have to show voters that they respected the federal consensus – that they would not use federal power to break up slavery in the states. To say otherwise was to surrender the first principle of antislavery politics:

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that slavery was a local institution, totally dependent on the laws of the states. That was the best weapon in the antislavery arsenal. Why stray from the solid ground of constitutional precedent?

A strict reading of the municipal theory was also the primary lesson from Chase’s court battles in Ohio, as well as the two most important slave cases before the Supreme Court in 1841, the *Amistad* and *Groves* cases. All of these cases showed the utility of reading positive law as strictly as possible, insisting that southern slave codes did not extend beyond the limits of the slave states. From Justices Story and Shaw, Chase had learned how to read the Fugitive Slave Law as narrowly as possible, distinguishing the right of recaption from comity and a general right to slave property. In the Matilda trial and the fugitive-slave cases that followed, Chase himself had developed a powerful strand of constitutional interpretation which stressed strict construction and a natural-law presumption of freedom – the freedom principle applied to the American federal system. Justice Story’s opinions in *Amistad* and *Prigg* were compromised and complex, but they nevertheless had affirmed the ideal of a presumption of freedom at the national level. Justice McLean’s opinion in *Groves v. Slaughter* had buttressed the strict-construction claim that slaves were persons under the Constitution, not property – a key precedent on which to build a political project. More importantly, it argued against federal action against the slave trade via the commerce power, on the grounds that it was better to apply the municipal theory to the entire trade than sacrifice the principle that Congress should have nothing to do with slavery and that the Constitution treated slaves as persons. Each of these precedents demonstrated the political appeal of strict-construction, limited-powers reasoning, of curbing slavery and slaveowners through application of the municipal theory.65

Finally, the strict separation of politics and reform in the Cincinnati clique reflected the changing social and political landscape of that city in the early 1840s, as the emergence of wage-

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65 See Chs. 4, 5, and 6.
earning class of potential land-and business-owners heralded a decisive shift toward the Democratic Party and its doctrines of individual freedom, states’ rights, and strict construction. The nationalist appeal of the Whig Party, whose promise of internal improvements had attracted development-hungry Ohioans since the 1820s, faded rather rapidly after the debacle of 1840 and the general turn to egalitarian politics. Burned by the vagaries of the money markets, many once-proud National Republicans in Ohio became hard-money Democrats in the late 1830s, as Andrew Jackson waged his “war” against Nicholas Biddle and the Bank of the United States. They rallied around Jackson’s demand for a complete “divorce” of bank and state, satisfied that a strict reading of the Constitution yielded no evidence of a power to form a national bank. By 1841, Cincinnati was dominated by a Democratic political culture which emphasized an aggressive strand of Jeffersonian strict construction fashioned by the opposition to Chief Justice John Marshall’s nationalist opinion in *McCullough v. Maryland* (1819). 66

Cincinnati’s Democratic-leaning political culture deeply influenced antislavery activism there. Chase, Bailey and others in the Cincinnati clique molded their message to an electorate that was fast becoming more Democratic and more aggressively antislavery. What had once been a rabidly anti-abolitionist city was by 1841 a deeply divided place, as proslavery capitalists and their street-goon allies lost their grip on public opinion and city policy. Workers who once feared that an influx of emancipated blacks would undermine their economic prospects now realized that the true source of concern was the expansive slave system just across the border, a system whose very proximity threatened to undercut their wages and undermine the dignity of labor. Now, in a stunning reversal of fortune for abolitionists, a rising tide of Cincinnati voters angry about the proslavery bent of national policy – some of them workers who, just a few years earlier, had participated in the anti-abolitionist riots – began to support the plan for separating

slavery and federal power, if not the more elevated goal of racial equality. Thomas Morris appears to have had an impact on antislavery Democrats in Ohio, despite his being ejected from the party in 1839. A growing swath of Cincinnati’s population warmed to a program that would divorce slavery from the federal government in the same way Jackson had separated the state from the BUS.67

With one eye on these voters, Chase and Bailey concentrated on the connection between constitutionality and political appeal. To be viable in electoral politics, they argued, the Liberty Party had to present a program which voters would find constitutional, not just in a black-letter sense, but in the broader sense of showing respect for the sovereignty of the states and the rights of their citizens. “Hundreds and thousands” of voters would support a party against “Despotism,” Bailey told a friend in 1841, whereas voters would spurn any party in favor of universal abolition.68 This was not simply because northern voters were racist or apathetic about slavery; it was because nineteenth-century Americans were deeply jealous of state sovereignty and generally shunned policies which granted sweeping powers to the central government. This was especially true of Democrats, whose votes sustained the Slave Power in Congress. Any chance of enacting the abolitionist program depended on bringing antislavery Democrats into the Liberty fold, and that meant disavowing any plans to abolish slavery in the states using federal power.69

None of this means that Chase and Bailey forsook universal abolition. To be sure, they were unyielding in their claim that political parties could not endorse direct abolition because it would violate the Constitution. But they honestly believed that separating slavery and federal power was the first and most crucial step toward universal abolition. In this sense, Chase and

67 ibid.
68 Philanthropist, April 30, 1839.
Bailey’s distinction between politics and moral reform was really about policy, not principle; it was meant to mitigate criticism and widen the party’s appeal, but it did nothing to alter the goal of abolitionist agitation. Chase was adamant that, while denationalization was the Liberty Party’s main objective, “another more general but not less prominent” goal was to “establish liberty – to secure to each man the fullest exercise of all his faculties & powers.”\textsuperscript{70} Bailey echoed these sentiments when he told readers that, in the event northerners gave their support to a denationalization policy, slaveowners would “find it every way to their interest to renounce slavery.”\textsuperscript{71}

Chase and Bailey did say that a future constitutional amendment could impose universal abolition on the states, but that was contingent upon enough states abolishing slavery on their own. The “proper way” to an amendment, Bailey wrote in the \textit{Philanthropist}, was to have two-thirds of the states agreed to it – something which could only arise after a sizeable portion of southern states had already abolished slavery. In this “constitutional way,” the “great work” of universal abolition could be “accomplished by a solemn national act” in a period of no less than fifteen years.\textsuperscript{72} Yet although talk of amending the Constitution was prevalent in antislavery circles, it rarely went beyond piecemeal measures, like amending the Fugitive Slave Clause (a proposition which gained momentum after Justice Story’s \textit{Prigg} opinion) or removing the Three-Fifths Clause. An amendment for universal abolition such as that proposed by John Quincy Adams in 1839 and supported by Vermont’s legislature in 1842 went against the grain of

\textsuperscript{71} \textit{Philanthropist}, Feb. 9, 1942.
\textsuperscript{72} \textit{Emancipator}, Mar. 17, 1842.
mainstream antislavery, which had never been about expanding federal power. Instead, the emphasis was on goading the slave states to abolish slavery on their own.\textsuperscript{73}

Western Liberty men followed Chase and Bailey in viewing their party as a movement against political inequality in all its guises, not just slaveowner power. “We aim at something more than the freedom of the slave,” declared one abolitionist, who “almost lost sight of the emancipation of the slaves, when contemplating the grandeur and sublimity” of conquering despotism – the true objective of the Liberty Party. Insofar as slavery was the “essence of despotism,” Hudson said, it was the party’s foremost concern, yet it was not the purpose of the party to seek abolition in the states.\textsuperscript{74}

\textit{Salmon Chase Develops an Antislavery Platform}

In December, 1841, Chase traveled to the Ohio Liberty Convention in Columbus to make divorce (rather than universal abolition) the object of antislavery politics. Over two hundred delegates gathered in the dank basement of the Baptist Church, mostly westerners. Led by Chase, Thomas Morris, and the newspaper editor Samuel Lewis, the business committee issued a set of resolutions which put the Liberty Party firmly in line with western constitutional thinking. Chase’s influence can be seen in the language as well as the spirit of the resolutions. They began by deploving the state of federal policy, which had been commandeered in such a way as to “enlarge,” “increase,” and “protect” slavery in all areas of the Union. The national government did everything it could to “disregard and “neglect” the interests of the free states, to “enervate” the regime of free labor in the North. Slaveowners had overturned the policy of the founders,

\textsuperscript{73} See \textit{Philanthropist}, Feb. 24, July 7, 1837; June 9, Aug. 11, 1840; Feb. 16, 23, May 4, 25, Dec. 21, 1842. The Vermont legislature issued a resolution calling on the federal government to “prevent the existence and maintenance of slavery in the United States in any form or manner.” Quoted in \textit{Philanthropist}, December 21, 1842.

\textsuperscript{74} \textit{Emancipator}, Mar. 17, 1842.
who sought to “establish justice, promote the general welfare and secure the blessings of liberty.” The Northwest Ordinance demonstrated that it was the “settled policy of the Government, not to extend or nationalize, but to limit and localize Slavery,” a policy to which the federal government “ought immediately return.” That is precisely what the Liberty Party sought to accomplish: an end to the “patronage and support” which slaveowners enjoyed from the federal government. Though Liberty men disclaimed “all right to interfere with slavery in the States where it exists,” they were convinced that Congress “may and ought to interfere with slavery in the District of Columbia, in Florida, and on the seas.”

Chase then delivered his first speech as a Liberty Party affiliate, elaborating on the resolutions with a mixture of history and constitutional argument. The founders, Chase said, never placed slavery “in the frame of the national government.” But because slaveowners had hijacked the federal government, slavery “has overleaped its prescribed limits and usurped the control of the national government... It is strictly a state institution, but it has arrogated to itself a national character.” A plain reading of the Constitution demonstrated that slavery was not a national institution. According to the “celebrated Mississippi case [Justice McLean’s opinion in Groves], the Constitution treated “all the inhabitants in the States as persons, and nowhere recognizes the idea that men can be the subjects of property.” It “found slavery and left it a State institution – the creature and dependant [sic] of State law – wholly local in its existence and character. It did not make it a national institution. It gave it no national character; no national existence.”

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76 Schuckers, *Life and Public Services of Salmon Portland Chase*, pp. 48-49.
The “honor, the welfare, the safety of our country,” Chase declared, “imperiously require the absolute and unqualified divorce of the government from slavery.” Congress should repeal slave codes in federal areas and ban the admission of new slave states. Northern legislatures should repeal race-prejudiced legislation and replace it with laws aiding black “self-improvement.” Northern judges should interpret the Fugitive Slave Law as narrowly as possible, in line with a presumption of freedom, always confining it to cases in which “service may be claimed to be due” – language which included servile states, not just slavery. 77 “Denationalizing” slavery in this way would ease the way for peaceful and gradual abolition in the states, ridding the Union of slavery once and for all.

In hindsight, Chase’s speech and resolutions marked a turning point in the development of antislavery politics. For one thing, Chase tailored the original abolitionist program so that it reflected the lessons of constitutional conflict over the previous five years. For instance, the resolutions added U.S. coastal waters (“the seas”) to the list of federal areas where Congress could take action against slavery, a move which reflected the issues surrounding the Enterprise, Amistad, and Creole affair (the other two federal areas were Washington, D.C. and the federal territories). Chase also left out any reference to Congress’s power over the internal slave trade, an omission which capitalized on the key lesson in Justice McLean’s Groves opinion: that it “is often wiser and more politic to forebear, than to exercise a power” – in this case, the power to regulate the slave trade under the Commerce Clause of the Constitution. 78 In substance, the Columbus platform was the same as the abolitionist constitutional program. But it was smarter and stronger, the product of years of intense constitutional dialogue with slaveowners and antislavery jurists.

77 ibid., pp. 49-50.
78 See Ch. 5, n. 49.
Crucially, Chase adapted the abolitionists’ program to the realm of mass party politics in the early 1840s, turning a cumbersome list of discrete initiatives into a straightforward yes-or-no policy prescription: divorce. Denationalization packed into one neat slogan the many intricacies of antislavery constitutionalism, translating a complex issue for a political audience inundated by images of war heroes, log cabins and hard cider – the *lingua franca* of the era-defining election of 1840. Denationalization also had “ready access to the minds of thousands,” since the quest to make freedom national transcended party and section, stirring the hearts of antislavery Democrats as well as Whigs and other outliers.\(^79\)

**Coalition on the Basis of Denationalization**

One reason why Chase and Bailey resisted the call to vote for immediate abolitionists only was that, unlike the eastern half of the party, the Cincinnati clique openly courted antislavery members of the major parties. Chase, Bailey, and other “coalitionists,” including former Democrat Thomas Morris and the Michigan editor Samuel Lewis, recognized that the Liberty Party’s electoral success – in particular, its ability to “secure the balance of power” in free-state legislatures and Congress, as Chase put it – depended in large part on its ability to make Liberty men out of antislavery Whigs and Democrats.\(^80\) In early 1842, in the midst of the *Creole* and *Prigg* affairs, Chase fired off a series of letters to leading antislavery Whigs in the hopes that they would join the Liberty Party and perhaps replace Birney on the 1844 presidential ticket. Chase was convinced that Birney was too obscure and radical a candidate to make much of a difference in the upcoming election; a more prominent figure, someone with truly national


\(^80\) Chase to Joshua Giddings, Jan. 21, 1842, in *ibid.*, p. 85.
appeal, was needed to boost the Liberty Party’s electoral performance. To that end, Chase asked Birney not to accept the party’s nomination. In his letters to Whig leaders like Adams, Giddings, and Seward, Chase enclosed a copy of his resolutions from the Columbus Liberty convention of December, 1841 – the basic outline of the denationalization program.\footnote{Sewell, Ballots for Freedom, pp. 121-126; Johnson, Liberty Party, pp. 32-34; Earle, Jacksonian Antislavery, pp. 151-154.}

Chase told Giddings in early 1842 that the resolutions from the May 1841 Liberty Party convention in New York City did not reflect the views of all Liberty men, some of whom made a strict distinction between politics and reform. A more accurate picture of Liberty principles could be found in Chase’s own resolutions from the Ohio Liberty Party convention in December 1841 -- “a broad platform on which all can stand of both parties who desire the deliverance of the country from the Slave Power."\footnote{Chase to Giddings, Jan. 21, 1842, in Chase Papers, vol. 2, p. 86.} In his letter to Adams, Chase described the Ohio resolutions as “a platform on which all lovers of liberty may rally, and the only ground on which legislation in reference to the great interest of the country can safely proceed.”\footnote{Chase to Giddings, Feb. 15, 1842, in ibid., p. 89, n. 3.}

Chase sent copies of his resolutions to the Reverend William Ellery Channing (whose \textit{Duty of the Free States} deeply impressed him), explaining how they placed the “political duty of American citizens in relation to slavery upon its true basis. ... If the action against Slavery can be directed against the unconstitutional countenance & sanction of it by the general Government, leaving each state free to act upon the subject according to her own views of expediency and duty I cannot but think that thousands will be found throughout the south deeply sympathizing with those who are active in the contest."\footnote{Chase to Channing, May 3, 1842, in ibid., pp. 94-5.} The antislavery majority cannot “compromise anymore,” Chase told Giddings in the midst of the \textit{Creole} affair. “The principle must be established & acquiesced in that the government is a nonslaveholding government – that the
nation is a nonslaveholding nation – that slavery is a creature of state law – local – not to be extended or favored, but to be confined within the states which admit and sanction it.”

Though none of his correspondents joined the Liberty Party, Chase’s overtures did influence their views on the question of slavery and federal power. In the first of several essays published under the name “Pacificus” (later released collectively as *The Rights and Privileges of the Several States in Regard to Slavery*), Giddings argued that it was the duty of northern representatives to “separate and wholly divorce the Federal Government from all support of slavery.” The Constitution left slavery to the state government; “no proportion of it” was “delegated to the General Government.” Unsuccessful as a means of conversion, Chase’s letter campaign raised denationalization’s profile at a critical moment in the constitutional crisis over slavery. Lewis Tappan finally joined the Liberty Party in 1843, telling Chase that the divorce platform was “truly National in its principles,” the most promising path toward state-by-state abolition.

**Denationalization Becomes the Official Platform of the Liberty Party**

In harkening back to the original 1833 program, Chase’s antislavery platform sought to rein in the Liberty textualists, a strategy which had the unintended effect of emboldening the latter group. By the spring of 1842, after the *Creole* crisis and the *Prigg* decision, the radicals began to openly aver their belief in direct federal abolition, doubling down on Stewart’s constitutional doctrines. In early 1842, at the New York State Liberty Convention in Peterboro, radical Liberty men wrote these ideas into resolutions that provoked an intense backlash from mainstream antislavery leaders (not to mention the usual suspects of Calhounites and major-party

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85 Chase to Giddings, Feb. 15, 1842, in ibid., p. 88.
87 Tappan quoted in Harrold, *Bailey*, p. 86.
The delegates recommended the usual steps against slavery: northern states should deny comity to slaveowners and provide jury trial to runaway slaves; Congress should repeal slave codes in Washington, D.C. and the federal territories, block annexation of Texas, and withdraw support for slavery on the high seas and in foreign jurisdictions. There was nothing new here. But the convention went far beyond these recommendations: “powerful as are these weapons of attack,” one resolution read, “does not the Constitution furnish still more potent engines for demolishing our American bastille?” The Supreme Court could declare slavery unconstitutional in all of the states to emerge from federal territories (Florida, Mississippi, Louisiana, Arkansas, Missouri), while Congress could abolish slavery in the older slave states so as to guarantee republican government throughout the Union. Congress could also emancipate slaves through its war powers, which were invested in the Constitution.  

Frustrated by the pace of change and inspired by the example of the Creole rebels, Gerrit Smith issued an “Address to the Slaves” in which he urged the South’s peculiar “property” to run away and rise up collectively against the master class. For Smith and other radicals, the Liberty Party could not stop at denationalization; it had to take more aggressive action against the slaveowning class, using every means available at the federal level.

Western Liberty men pushed back, defending the federal consensus and the distinction between reform and politics. They began to argue not only that a policy of direct abolition was unconstitutional, but that it would alienate voters in both sections of the country, eliminating whatever appeal antislavery politics had in relation to the major parties. The Petersboro resolutions included not one but two taboos of antebellum politics: overt sectionalism and federal interference in the states. “[N]ine-tenths” of the American people believed that abolition was a

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88 Emancipator, March 10, 1842. Article IV, section 4 of the Constitution guaranteed to all the states
89 Address of the Peterboro State Convention to the Slaves (Cazenovia: M.L. Myrick, 1842).
matter for the states, not the federal government, Bailey explained. The threat of “force” went well “beyond the ballot box,” undermining the “glorious cause” of abolition. Now, more than ever, it was important to “check all incendiary action” in the Liberty ranks. In a diplomatic letter to Smith, Chase warned that the “use of offensive technics [sic]” undermined the legitimacy of the Liberty Party by proving right the wild accusations of proslavery radicals. In Ohio, Chase told Smith, the success of antislavery politics depended on winning over skeptics, demonstrating to them that the Liberty men “stand upon the Constitution.” A silent majority supported denationalization but “are not prepared to go further.” It was self-defeating to stoke the “jealousy and resentment” of “worthy and sensible people, who think the Constitution authorizes no such interference.” There was already enough “unnecessary odium” attached to the word “abolitionist.” Why “enhance this feeling against us by taking positions of a doubtful sort?”

Western Liberty men were convinced that non-slaveowning southerners in the Upper South quietly favored state-by-state abolition and would rally to Liberty principles if given the chance. Chase told Lewis Tappan about an “influential and conspicuous slaveholder” who had informed him that public opinion in the South was favorable toward denationalization. There were “not a few” – indeed there were “very many” – southerners who were “awakening to a sense of their true interests.” If northerners would only “act as Liberty Men against National Slavery,” Chase prophesied, they would give much-needed encouragement to their Southern brethren, who supposedly chafed at life under the Slave Power. That is why I avoid the term “abolitionist” in my public statements, Chase explained, and why I respect the “political and proprietary” rights of Southerners generally. Southerners need only hear the “the truth”: that the

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90 Bailey quoted in Leavitt’s editorial on the matter, Emancipator, March 17, 1842.
slaveowning class usurped all power for themselves, and had no intention of giving it up. In the same spirit, Bailey published ample material suggesting that non-slaveholding southerners agreed that slavery was not national and should be divorced from the federal government. In hindsight, these claims seem delusional at best. Yet they made sense to those who saw the slavery problem as an issue of class power, of slaveowners against everyone else -- including ordinary southerners.

Radical Liberty men responded to these critiques with a withering attack on the judgment and motivations of “moderate” westerners. Chase, Bailey and the Cincinnati clique were too timid, too conservative, they argued, to lead the emerging antislavery majority, who would demand more far-reaching and aggressive policies than divorce. Bailey’s constitutional scruples were petty and outmoded, Smith wrote in a published letter. Slavery was an eternal fraud; why pretend that it deserved protection under the Constitution? It is “as cowardly as it is untrue” to claim that action against slavery was limited by the Constitution, Smith scorned. Smith turned the Ohioans’ distinction between reform and politics against them, accusing Chase and Bailey of caring more about the rights and wages of white workers than they did about the freedom of black slaves. What else could explain their overtures to southern voters, their abject servility to the “rights” of southern states? The controversy appeared to radicalize the textualists in the East. One of them noted in an editorial that the “entire abolition” of slavery could be accomplished by an act of Congress or, if need be, a “simple Proclamation of the President” via the war power – “a power to suspend or repeal municipal law ... not... exerted under law, but over, and controlling law.”

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93 See Harrold, Bailey, 81-93.
94 Philanthropist, May 4, 1842.
To his credit, Bailey responded to these attacks with a blend of conviction and conciliation. The disagreement between radicals and so-called moderates came down to “manner,” he wrote, not “doctrine.” Smith, Stewart, and other radicals were “as true and honest as any in our ranks,” Bailey wrote in the Philanthropist.\textsuperscript{96} Both camps shared in the “great object of the entire anti-slavery movement”: the “extinction of slavery and the slave trade, everywhere.” They simply disagreed about the proper “mode” of accomplishing that end – the correct “policy,” as Bailey put it. Ohio Liberty men were convinced that the separation of slavery and federal power would “lead inevitably to the extinction of slavery in the states.” The distinction they made between politics and reform was not arbitrary or conciliatory; it merely acknowledged the political fact that voters would not support federal interference in the states. The divorce platform adapted the abolitionist program to electoral politics in a way that minimized controversy.\textsuperscript{97} Yes, Bailey admitted, Ohio Liberty men appealed to the self-interest of white voters. But they also appealed to conscious and morality. The two were not mutually exclusive. “Human nature is both selfish and social,” he explained. “He who attempts to succeed, by appealing to man, as a merely mercenary creature, will as certainly undershoot the mark, as he overshoes it, who expends all his persuasion on his disinterested feelings.”\textsuperscript{98}

All of these issues came to a head in 1843 at the Liberty Party’s national convention, the first truly national meeting of the party’s myriad state branches. The delegates arrived in Buffalo to nominate presidential and vice-presidential candidates for the 1844 election and come up with a platform based on Liberty Party principles, among other things. Crucially, the convention beat back an effort by the radicals to make state abolition the party’s central objective. Led by an

\begin{footnotes}
\textsuperscript{96} Philanthropist, May 11, 1842.
\textsuperscript{97} ibid., April 13, Aug. 27, 1842.
\textsuperscript{98} ibid., May 11, 1842.
\end{footnotes}
indefatigable and seemingly omnipresent Salmon Chase, the majority of delegates backed a platform modeled on Chase’s Columbus resolutions.99

After a brief tussle over the nominations – Chase and Stanton’s last-ditch effort to replace Birney with a more established political figure like Adams or Seward was rebuffed by Joshua Leavitt’s anti-coalition majority – the business committee introduced the convention’s resolutions, the basis for what would become the 1844 Liberty Party platform.100

The idea of an official party platform was relatively new in 1843. As with so much in the second party system, the Democrats were the pioneers; the party of Jackson issued the first-ever platform in 1840, laying out in clear and palatable paragraphs the full list of Jeffersonian states’ rights, based on its strict construction philosophy – an innovative move which helped distinguish them from the Whig opposition. The Democratic platform of 1840 tied the party to its states’- rights, limited-powers heritage. The party’s creed was synonymous with the “liberal principles embodied by Jefferson in the Declaration of Independence, and sanctioned in the Constitution...” It promised “an equality of rights and privileges” and maintenance both states’ rights and the federal consensus regarding slavery (the platform denounced abolitionists as the gravest threat facing the Union). The introduction of the party platform was a milestone in American politics.101

The Liberty Party’s Buffalo resolutions were deeply imbued with Chase’s influence. They began with the usual reference to the founders’ intentions. According to one resolution, the framers of the Constitution never intended for slavery to become a national institution. Evidence that slavery would left to the states was everywhere in the Constitution, not least in the

100 Philanthropist, Sept. 27, 1843.
Fifth Amendment’s Due Process Clause, which barred Congress from depriving any person of his life, liberty or property. On these grounds, Congress had “no power to establish or continue slavery any where” outside the slave states. Slavery in all federal areas was therefore unconstitutional; all slave codes and treaty agreements by which it was upheld should be repealed by Congress or struck down by the Court. The time had come to “rescue” the federal government from the grasp of slaveowners, to enforce the “absolute and unqualified divorce of the General Government from Slavery.”

There were a number of ways in which the federal government could be an “example of influence” to the slave states. Holding slaves as property in federal areas “ought to be prohibited by law,” while the “patronage and support” slaveowners received from the federal government should be withdrawn immediately. Foreign policy should be reoriented so as to locate and open markets for free-labor goods, as opposed to the products of slave labor. Meanwhile, northern states could penalize their citizens for assisting in the recapture of fugitive slaves and by repealing their own prejudicial laws. This was basically an exact replica of Chase’s speech at the Ohio Liberty convention in December, 1841.

A total of thirty-seven resolutions passed unanimously. Crucially, none of them endorsed the radicals’ demand for direct federal intervention in the states, even though Smith and others pushed hard to for its inclusion in the platform. Still, two of the thirty-seven resolutions reflected the radicalization of post-Prigg, post-Creole antislavery. The twenty-sixth resolution implored Liberty men to vote only for candidates who supported immediate abolition, a condition which automatically precluded coalition with antislavery Whigs and Democrats. The thirty-seventh resolution, proposed by the Reverend John Pierpont of Boston (the same John Pierpont who

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102 *Philanthropist*, Sept. 27, 1843.
103 *ibid.*
denounced Justices Story and Shaw in the aftermath of the George Latimer case), declared the Fugitive Slave Law “void” on the grounds that it violated divine law and moral conscience.  

The two resolutions clearly had enough support among eastern Liberty men to make into the platform, but they troubled the more moderate westerners who felt that they surrendered the party’s best argument against the Fugitive Slave Law and alienated potential recruits from the major parties. Henry Stanton complained to Chase that Pierpont’s resolution “seems to yield up our strongest ground” on the Fugitive Slave Law – that it referred to all servile statuses, not just slavery. Stanton charged himself with confronting the radicals on this point at the Massachusetts state convention later that year. Meanwhile, Bailey argued that the word “void” drew unwelcome animosity and obscured the party’s actual strategy regarding fugitive slaves, which was to “to amend the Constitution, by repealing the fugitive slave clause, in a constitutional way.” Bailey pointed a clip from a conservative Cincinnati newspaper in which the “object and purpose of the Convention” was ignored in favor of the two radical resolutions -- proof that the radicals were undermining the larger project. It was the “phraseology,” not the principle, which Bailey opposed. Ohio Liberty men do “not hold that such a law is to be opposed by force, he wrote. “We hold that it is to be opposed at the ballot box, until amended or repealed.” In the meantime, it was the duty of Liberty men to obey the law, interpreting it in the narrowest terms possible.

Despite the discord over the radical resolutions, it was clear that Chase, Bailey, Stanton and other moderates prevailed at the Buffalo Convention. The Buffalo resolutions sent a message to the party faithful that antislavery politics carried forward the same objective of the abolitionist movement of the 1833: to completely divorce slavery from the federal government.

104 ibid.
105 Stanton to Chase, Feb. 6, 1844, in Chase Papers, vol. 2, pp. 105.
That was a victory in itself, as it laid the foundation for all future platforms in the realm of antislavery politics. The abolitionists’ constitutional program had transformed into a political platform.

Conclusion

Even as they fought over policy and the Constitution, Liberty men in the early 1840s rallied around a bold vision of an antislavery Union. The high tide of constitutional crises stretching from the Amistad in 1839-40 to the Creole, Prigg and Latimer affairs in 1842 bolstered them in the conviction that working within the Union was the best possible route to peaceful abolition. That sentiment gained strength in late 1842, as Garrison and his followers embraced a policy of disunion – breaking up the Union in order to free the North from its constitutional obligations to slavery and move the “line” of freedom from Canada to the Ohio River. Designed in part to stir the “ocean” of public opinion, Garrisonian disunion policy generated much controversy in the press, creating an uproar that was totally out of proportion to the number of abolitionists who supported it.  

107 Unlike political abolitionists, who responded to the Prigg and Latimer cases by doubling down on a policy of non-cooperation, Garrisonians reacted to those cases by demanding northern secession from the Union. Their “disunion” policy reflected the Garrisonians’ belief that the Constitution was inherently and irredeemably proslavery. Yet, for all their “apolitical” rhetoric, the Garrisonians appear to have viewed disunion as a political strategy. Sundering the Union would free the North from its commitments to slavery (including the Fugitive Slave Clause) and move the “line” between freedom and slavery from Canada to the Border South, a frightful prospect for slaveowners. As Caleb McDaniel argued, disunion was a more radical means to the same end as denationalization: universal abolition in the name of antislavery nationalism. Garrisonian disunionism paralleled similar reform movements in Europe, especially Irish reformer Daniel O’Connell’s movement for “repealing” Ireland’s union with Britain. Disunionism garnered tremendous publicity throughout the United States, largely because it was so extreme, but also because the Garrisonians excelled at churning the “ocean” of public opinion. Their influence on the slavery question (and the subsequent history of that debate) far exceeded their actual numbers. On the “ocean” of public opinion and the political implications of disunion, see McDaniel, Problem of Democracy, passim. See also Kraditor, Means and Ends, pp. 196-207, 211-217.

It was the Latimer case, in particular, that pushed the Garrisonians further toward repudiating the Constitution. Chief Justice Shaw’s resort to legal formalism in that case deeply angered them. Yet, instead of arguing against Shaw’s logic, the Garrisonians embraced it, using legal formalism to bolster their reading of the Constitution. In a speech at the “Great Meeting for Human Rights” (the same meeting in which delegates demanded
Liberty men reacted to disunion in ways that strengthened their commitment to the Union. They rejected disunionism on the grounds that it surrendered the first premise of antislavery politics: the prospect of state-by-state abolition guided by an antislavery federal government. Liberty men looked to the Union “not blindly,” Bailey wrote in the Philanthropist, “but because they think the highest welfare of the whole republic can be best secured by it.” For them as for most Americans in the nineteenth century, the Union was the foundation and guarantor of individual as well as collective rights, the vehicle through justice and equality for all was maintained. It was better to suffer wrongs in the current Union, read one resolution from the 1842 Ohio Liberty Party convention, than to “right ourselves by destroying” the whole thing.108 The entire antislavery project – the promise of the Revolution – would be unattainable without the framework of the Union.

Disunionism fused the certitude of the evangelist with the rashness of the romantic. Is “slavery to be abolished by having its victims all run off to Canada?” Bailey wrote exasperatedly. Disunion would be “a curse, not a blessing, as bad as the evils they now seek to remedy.” It would forfeit all of the advantages an antislavery North could enjoy under the existing system, not least the ability to cordon off the South, forcing the states to abolish slavery on their own, one by one. Pointing to Chase’s arguments in the Van Zandt trial (1843), Bailey insisted that “redress may yet be hoped for under the constitution.”109

Bailey underestimated the political acumen of the Garrisonians, who were masters in the art of public opinion agitation. But his remarks capture the unwavering commitment to Union in

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108 Philanthropist, Mar. 16, 1842. See also Harrold, Bailey, passim.
109 ibid., Feb. 9, Mar. 9, 1842.
the Liberty Party ranks. The party emerged from its birth pangs with a powerful vision of the Union as the aegis of antislavery nationalism, a Leviathan which delivered on the promise of personal liberty in the Declaration of Independence, using the Constitution to delegitimize property in human beings. This take on the Union diverged in radical ways from the mainstream view championed by Jackson, Clay, Van Buren, Webster and others in the political center, whose vision of the Union explicitly denied the prospect of liberty to the enslaved, and whose myriad compromises over slavery were designed to evade, not solve, the moral dilemma of property in human beings. More obviously, the antislavery vision of the Union clashed with the proslavery version of the Union propounded by the Calhounites, who saw the Union as the great guarantor of white men’s liberty, especially in the form of private property rights. In the months and years to follow, as the slavery debate came to focus once again on the western territories, these three definitions of Union came into conflict on the national stage, forever altering the question of what, exactly, was to be made “more perfect.”
Chapter 8
A Common Platform

Joshua Giddings was the very embodiment of antislavery nationalism in Congress. A successful lawyer-politician from Ohio’s Western Reserve, Giddings suffered financial and political setbacks after the Panic of 1837. Following a period of self-doubt and spiritual inflection, he made antislavery the centerpiece of his political comeback. He was elected to Congress for the 1838-39 session, joining John Quincy Adams and William Slade in the fight against the gag rule. Along with Joshua Leavitt and the “select committee” of antislavery Whigs in the House, Giddings spearheaded the effort to discuss slavery “collaterally.” The Creole resolutions were the crowning achievement of that effort, a bold proclamation of antislavery constitutionalism in Congress and a turning point in the effort to roll back the gag rule and stimulate northern opposition to slavery.

All the while, Giddings was fully persuaded that Whig and antislavery principles were compatible, even complimentary, aspects of his political makeup. In this he was profoundly mistaken; the Whig Party was structurally incapable of taking real action against slavery. Yet in some ways he was right: in its insistence on a fair distribution of rights maintained by government power, antislavery nationalism dovetailed neatly with the moral vision and economic nationalism of National Republican/Whig ideology. The Whig Party may have been functionally proslavery, but the principles which the party represented were in no way incompatible with the antislavery nationalism espoused by Giddings and his “select committee” in the House. As the sectional crisis unfolded and the scales fell from their eyes, Giddings and
other antislavery Whigs abandoned their party but maintained their commitment to economic nationalism, fusing it with the antislavery nationalism of the post-Missouri Crisis era.¹

When the Texas annexation controversy reemerged on the national scene in 1843, Giddings was right there to denounce it. Giddings readily perceived how the Texas question intensified an existing crisis over slavery. Slaveowners were now demanding that Texas come into the Union as a slave state, lest it be subsumed into the British Empire as a free territory, fatally undermining southern slavery expansion by foreclosing the possibility of westward expansion. Implicit in their entreaties was the assumption that the U.S. government had a positive duty to protect slavery by guaranteeing avenues for its expansion – in other words, that there was a federal guarantee for the protection slave property. Giddings jumped at the opportunity to expose and then denounce this claim. Where is this guarantee, he asked. A “lifetime is too short to find it, nay... eternity will not disclose it, for it does not exist.” There is no “convenant or stipulation in the Constitution” which guaranteed the protection of slave property. “I have finally chased this notable guaranty into the region of southern abstractions; but I declare I never came so near finding it before.”²

Insofar as Texas annexation was a ploy to extend slavery, Giddings argued, it could have no basis in the Constitution, which reserved all power over slavery to the states. If anything, the power of Congress “ought to be exerted for the overthrow of slavery, and not for its continuance.” Congress, he continued, should block Texas annexation, precisely because its admission would add up to six new slave states, introducing new slave markets while augmenting the power of slaveowners in Congress, who would use their numerical advantages to further fortify slavery in the South and press for its continued expansion – and quite possibly its

¹ Stewart, Giddings, pp. 3-97.
² Giddings, Speeches in Congress, p. 108.
nationalization. Yet the growing likelihood of annexation signaled a dire shift in American politics. “[U]p to the present session of Congress,” Giddings groaned, “no man of any party, or from any portion of the Union, ever dared to stand forth before the nation and avow the doctrine, that this government possessed the constitutional power or right to exert the influence of the nation, to degrade its character, and exhaust its revenues, in support of slavery, or of the slave-trade.” Yet now, “the President assumes to himself the power of making slavery a national, instead of a State institution, and of extending the power and influence of the federal government to its support.”

Giddings’s critics, especially his fellow Whigs, noted how Giddings’s position on Texas was identical to that of the Liberty Party, whose potential for siphoning off antislavery votes posed real problems for Whigs in the run-up to the 1844 election. They were right: it was axiomatic among Liberty men that the same constitutional argument against slavery in the Florida Territory or in Washington, D.C. and U.S. coastal waters applied to Texas -- Congress had no power under the Constitution to establish or expand slavery. Giddings denied the similarities, pledging his fealty to the Whig platform. But whereas other northern Whigs fended off Liberty advances by mouthing empty antislavery platitudes, Giddings got to the substance of the Texas crisis in ways that were unknown outside Liberty Party circles. As the Texas controversy and the ensuing Mexican War intensified the slavery crisis, Giddings convictions moved him to closer to Liberty Party principles, dashing his erstwhile vision of an antislavery Whig Party.

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3 *ibid.*, pp. 11-12.
4 It is often assumed that the furor over Texas annexation marked the beginning of the sectional crisis that led to secession and war in 1861. Implicit in this claim is the assumption that, however grave, the slavery controversies before 1843 did not pose a fundamental threat to the Union in the way that slavery’s expansion into the western territories did. In other words, the slavery controversies described in the previous four chapters were mere skirmishes that were effectively contained by the second party system. Despite outbreaks of tension, the existing
Texas annexation and the war with Mexico produced major rifts in the two main parties, altering the political landscape and fostering antislavery coalition. With the question of slavery’s expansion engulfing American politics, northern citizens were more engaged than ever in the basic conflict between northern liberty and “national” slavery. To antislavery northerners, the crisis illuminated the South’s disproportionate influence on federal policymaking and the Slave Power’s efforts at “nationalizing” slavery. The famous Wilmot Proviso of August, 1846, which sought to ban slavery from territories acquired during the Mexican War, was just the latest in a rush of antislavery dissidence going back to the Texas controversy of 1844-5, which inflamed residual tensions from the Creole and Prigg affairs of 1842.

As antislavery minorities in both parties rallied around the proviso, Liberty coalitionists began to build a consensus around what Chase called a “common platform” – a constitutionally-sound and politically-viable abolition program with appeal for both factions. This was aggressive and comprehensive denationalization, not just non-extension. Coalitionists viewed the proviso as the precondition for divorce, and to that extent they developed a theory of non-extension that was grounded in antislavery constitutionalism. They did this in the hope that

Union was well-equipped to preserve a nation half-slave and half-free. Irreconcilable sectional conflict could only emerge from the territorial question, which was categorically different from earlier slavery controversies in that it pitted two incompatible socioeconomic regimes – two visions of American empire – against one another in a high-stakes theater, reviving the fundamental problem of the Missouri Crisis. See Introduction, n. 16 for examples and exceptions.

In contrast, I argue that the territorial crisis kicked off by the Texas-annexation controversy was an extension of the existing constitutional crisis that began in 1835 in the wake of the abolitionist petition campaigns. Insofar as they revived the problems of the Missouri Crisis, the Texas and territorial crises were just the latest theaters of constitutional conflict over slavery’s relationship to federal power. The context was different and the stakes appeared higher, but the fundamental problem was the same. In this sense, the Texas controversy exacerbated an existing sectional crisis, ramping up tensions created by the Washington, D.C. debate, the transient- and fugitive-slave controversies in the North, and the Enterprise, Amistad, and Creole affairs. And whereas political histories of the sectional crisis tend to ignore the role of Liberty Party coalitionists in hastening the defection of antislavery Whigs and Democrats from their respective parties in the 1840 — thus distorting our understanding of second party system’s collapse — I place the coalitionists at the very center of my narrative, emphasizing their use of the antislavery project as common ground for an otherwise diverse series of coalitions. I argue that the antislavery project of denationalization appealed to antislavery defectors from the major parties precisely because it addressed the deeper constitutional problem of slavery’s relationship to federal power.
northern voters would soon demand more than mere non-extension. With dissident Whigs backing divorce from the start, Chase and Bailey focused their efforts on Radical Democrats, who conceded the municipal theory’s validity but shied away from its implications. Attacking the Slave Power with appeals to Jeffersonian strict construction, the Cincinnati clique perfected the antislavery strain of what legal historians Joseph Fishkin and William Forbath call the “anti-oligarchy Constitution,” an American reform tradition steeped in Jacksonian constitutionalism.

**The Furor over Texas Annexation**

In the wake of the *Prigg* and *Creole* affairs, proslavery officials in the federal government turned their attention to the republic of Texas, which, as the great western borderland of the Deep South, affected the long-term viability of southern slavery acutely. Men like Calhoun understood that the high-profile skirmishes of the early 1840s – the *Enterprise*, *Amistad*, *Creole*, *Prigg* and *Latimer* affairs – had transformed the slavery controversy into a full-scale constitutional crisis, weakening the North’s obligations to slavery while shaking slaveowners’ commitment to the Union. For them, the current Union was no longer safe for slave property: an antislavery legal regime similar to Britain’s had begun to form in the North, where the Liberty Party’s balance-of-power politics now disrupted state and local elections. Frightened by this changing political and constitutional landscape, slaveowners shifted their gaze to Texas, which could become either the panacea to their troubles – a new and vast frontier of slavery expansion – or the ultimate nightmare scenario – a free-soil barrier to the west, the latest and most fatal extension of the antislavery cordon.  

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Texas was of great concern to both pro- and antislavery leaders ever since the 1836 Texas revolution, when the possibility of annexation to the U.S. first arose. The Jackson and Van Buren administrations had allayed those concerns in the late 1830s, but the Texas question never quite disappeared from the political calculus of American expansionists. By 1843, it came back in a very big way, as proslavery pundits and politicians grew anxious over British designs on Texas. Abolitionists in Parliament were at the height of their power in the early forties, and many wanted to rid Texas of slavery and prevent future immigration of slaveowners there. It seemed increasingly likely that, under their stewardship, Britain would annex Texas or at least subsidize the free-soil republic there. American abolitionists strongly backed the plan: at the Second Annual World Antislavery Conference in London, Joshua Leavitt pressed Britain to do all it could to block U.S. annexation of Texas. John Quincy Adams told Lewis Tappan that, “If slavery is abolished in Texas it must speedily fall throughout America; and when it falls in America it will expire throughout Christendom.”

Reading these statements with great trepidation, slaveowners moved quickly to thwart antislavery schemes on Texas. They knew that if Britain took Texas, the “line” of freedom would be extended from the Caribbean to the American Southwest, cutting off expansion and the development of crucial new slave markets. A steep drop in slave prices in border states like Louisiana and Arkansas would ensue, as the Deep South became a replica of older slave states like Virginia and Maryland, where diminishing returns on slave labor translated into less value for slave property. There were other perceived dangers as well: a British Texas would fatally

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undermine the South’s cotton economy and destroy the U.S. national economy, which slaveowners considered vital the country’s economic and political well-being. Calhoun, in particular, viewed Britain’s interest in Texas as a ploy to hurt southern slavery to make up for its disastrous policy of emancipation in the West Indies. Even for expansionists who were not explicitly proslavery, British annexation of Texas spelled serious trouble for the American republic, as it would eclipse the Jeffersonian ideal of a western “safety valve” for white workers and free blacks and replace it with a European system of economic stasis and class distinction. A Union simmering with internal social and political tensions – not least the growing crisis over slavery – would be hemmed in forever, cut off from the dream of expansion. 7

It was with this (in their view) dystopian image in mind that Tyler administration officials began pressing for Texas annexation, led by Tyler’s new secretary of state, Abel Upshur of Virginia. Not all proponents of annexation were proslavery; expansionists of all stripes wanted Texas for reasons wholly unconnected to the slavery issue. Many saw Texas as the pathway to the Pacific and with it the markets of the Far East, while others saw it as a trump card for keeping Britain dependent on southern cotton. But even these groups depicted annexation as a palliative to the recent disquiet over slavery. They reasoned that Texas would open up new avenues for slave diffusion and take the nation’s collective mind off the internal troubles over slavery and abolition. The Calhounites, on the other hand, always viewed Texas annexation in terms of slavery expansion, and their influence was never far from the administration’s policy maneuvers. With Calhoun in his ear, Upshur spread rumors of British annexation and made Texas the centerpiece of his stint as secretary of state, nudging the already-enthusiastic Tyler toward concrete action. When Upshur died in an explosion aboard a gunboat in March, 1844,

7 Hietala, Manifest Design, 10-26; Drescher, Abolition, pp. 319-321; Bonner, Mastering America, p. 29; Niven, Calhoun, pp. 264-282.
Tyler replaced him with Calhoun himself, whose triumphant return to the executive branch highlighted the proslavery drift of federal policy in the early forties. Calhoun’s infamous Pakenham letter, in which he defended not only annexation but slavery itself, convinced antislavery northerners that annexation’s sole purpose was to increase the political power of slaveowners.  

The looming prospect of Texas annexation threw the parties into a tailspin. The Whig Party’s official position was outright opposition to annexation. Annexation, they argued, was bad policy on economic and constitutional grounds, a blatant power grab by the South. A smaller group of antislavery Whigs, most of them from Massachusetts, agreed with their colleagues but added a moral component, arguing that universal abolition would be impossible once Texas came into the Union. Charles Francis Adams, fresh from his role in passing Massachusetts’ noncooperation law, issued a set of resolutions against annexation, depicting it as the “perpetuation of slavery and the continued ascendancy of the slave power.” Adams derided the effort to balance free and slaves states on in national politics, all on the basis of “avowed guaranties” for slavery which did not exist. Upon winning a seat in the Massachusetts senate in 1844, he published a long pamphlet against Texas annexation that elaborated on the earlier arguments of Benjamin Lundy and William Ellery Channing. Later that year, several antislavery colleagues joined Adams in the senate, including Henry Wilson, Stephen C. Phillips, John Gorham Palfrey, Charles Allen, Samuel Hoar, Ebeneezer Rockwood Hoar and Linus Child. These “Young Whigs” sought to exploit the rift between supporters of Daniel Webster and

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8 Hietala, Manifest Design, pp. 27-54; Freeling, Road to Disunion, vol. I, pp. 388ff; Bonner, Mastering America, pp. 29-30; Drescher, Abolition, pp. 319-322; Rugemer, The Problem of Emancipation, pp. 204-221. See also Wilentz, Rise of American Democracy, pp. 559-556.

9 “Adams and Others, Address to the People of the Free States of the Union,” March 3, 1843, in Merck, Slavery and the Annexation of Texas, p. 206.

Robert C. Winthrop, pushing their party toward more radical antislavery measures. Outside the state house, they joined Garrisonians in forming a committee against annexation, establishing a new paper, the *Free State Rally and Texas Chain-Breaker*. Meanwhile, in Congress, Adams’ father John Quincy renewed his campaign against Texas annexation, excoriating the administration as the tool of the Slave Power. As the Texas issue mounted, the cracks in the Whig Party grew ever more apparent.\(^{11}\)

The Democratic Party’s response was more complicated. Southern Democrats unanimously supported annexation, but northern Democrats split into two general camps. Advocates of annexation were a motley sort, ranging from members of the expansionist Young America movement (whose ranks included John L. O’Sullivan, coiner of the phrase “Manifest Destiny”) to the more sober geopolitical strategists who wanted Texas as a buffer to Britain’s presence in the west. Opponents of annexation were mainly Van Buren Democrats who resented slaveowner influence in their party and in federal policy generally. For them, Texas annexation vastly increased the numerical power of slaveowners in Congress and in their own party, with far-reaching consequences for federal policy. It also contradicted the interests of their constituents – northern laborers whose wages and aspirations depended to a large extent on the localization of slavery.\(^{12}\)

Crucially, the Texas issue rekindled the antislavery strand of the northern Democracy, reviving an impulse which had been muted by party uniformity during the gag rule years. As we saw in earlier chapters, Van Buren Democrats never adopted the Calhounite position that slaves were constitutionally- guaranteed property, nor did they argue that abolition in federal

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jurisdictions like Washington, D.C. would be unconstitutional. In principle, they believed that Congress had power to abolish slavery in those areas, but for the sake of expediency, they never acted on that belief, choosing instead to quash the matter with all manner of parliamentary maneuvers. In this way, their opposition to Texas reflected more than a litany of petty grievances; it stemmed also from a conviction that federal power should not be used to actively expand slavery beyond its current limits. If the rabble-rousing of Thomas Morris in the late thirties had not been enough to move them, the prospect of at least six new slaves did the trick. Northern workers and radical Democrats, who, for all their qualms about abolitionists, were always in agreement on the basic immorality of slavery, now rallied to the antislavery standard.\(^{13}\)

Theodore Sedgwick, a disciple of William Leggett and one of the *Amistad* attorneys, helped resuscitate Jacksonian antislavery in a series of rousing articles published in the New York *Evening Post*. Sedgwick’s articles captured the zeitgeist among radical Democrats in New York State, where Silas Wright and his protégé Preston King came out strongly against annexation. Those two held sway over the party nationally; shortly thereafter Marcus Morton of Massachusetts and John P. Hale of New Hampshire voiced their opposition to Texas annexation. Cracks in the party’s national coalition soon followed. In the House, radical Democrat R.D. Davis of New York resurrected the case for abolition in the nation’s capital. Channeling Leggett’s views from the District debate of the late thirties – views that, as we saw, were perfectly consistent with those of Birney, Weld, Stanton, and other abolitionists at the time – Davis argued that Congress in 1801 had no constitutional right to renew the District’s slave codes, “for there were limitations to the power of this Government, as it could not make a king, neither could it make a slave.”\(^{14}\) This arresting phrase – “as it could not make a king, neither

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\(^{14}\) *Cong. Globe*, 28\(^{th}\) Cong., 1\(^{st}\) sess., p. 84.
could it make a slave” – captured both the principle and the essence of antislavery constitutionalism and would become a defining slogan for antislavery politics later on. Davis then argued that southern Democrats owed it to their northern colleagues to repeal the District’s slave codes, especially given all the work northerners had done sustaining the gag rule. Davis’s proposal was easily rebuffed, but the larger tectonic shifts in the Democratic Party had already begun; by 1844, enough northern Democrats had rebelled against the party’s southern wing to defeat a motion for renewing the gag rule.\footnote{On Sedgwick, Wright, King, Morton, and Hale, see Earle, \textit{Jacksonian Antislavery}, pp. 564-565. See also Wilentz, \textit{Rise of American Democracy}, pp. 419-420, 458, 460.}

Liberty Party coalitionists like Chase and Bailey followed these disturbances closely. They viewed Texas as an opportunity to promote Liberty principles nationally. For them, expansion by itself was perfectly compatible with antislavery constitutionalism: since Congress had no power to establish slavery, annexation would nullify the Texas republic’s slave codes and prevent any reenactment later on. In Bailey’s words, “owing to a want of Constitutional power, the Congress of the United States, \textit{cannot} re-enact those laws – so that annexation is to all intents and purposes whatever, equivalent to the abolition of slavery in the territory annexed.”\footnote{\textit{Philanthropist}, August 23, 1844.}

Statements like these, published in the \textit{Philanthropist}, signaled the Cincinnati coalitionists’ recent shift in strategy, from luring antislavery Whigs to enticing disaffected Democrats. It is important that their constitutional argument on Texas stemmed from the same principle as R.D. Davis’s point about Congress and slavery – “as [Congress] could not make a king, neither could it make a slave.”

\textit{The Election of 1844}
The Texas issue dominated the presidential campaign of 1844. The Whigs trotted out perennial warhorse Henry Clay, who took the party line by opposing annexation without mentioning slavery. The party’s platform – its first – endorsed the American System and said nothing about Texas, and during the campaign the party as a whole adopted a cagey wait-and-see strategy that would satisfy its northern and southern wings. To combat the Liberty Party in the North, Whigs went on the offensive, painting Liberty men as subversive agents of the Democratic Party. Whigs constantly reminded voters that a Liberty surge would not only help the Democrats, but would essentially guarantee Texas annexation. In this they tried just about everything to undermine Liberty support and keep antislavery Whigs in the fold. Typical of this strategy was the infamous “Garland letter” episode, in which Whig conspirers tried to paint James Birney as a secret Democrat by forging a letter from Birney to the Michigan Democrat J.B. Garland. Though it is impossible to gauge the letter’s impact on electoral behavior, the episode illustrates the Whigs’ determination to quell antislavery rumblings within the party.17

The Democratic campaign was far more frenzied. Martin Van Buren, the presumptive nominee early on, gambled on the Texas issue by opposing annexation unequivocally. In breaking from the party’s tradition of conciliating slaveowners – a tradition he had pioneered in the 1820s – Van Buren rallied his base of northern radicals and workers but alienated the pivotal wing of southern Democrats. Van Buren’s opposition to annexation was sincere; it came from the same fount of antislavery principle that informed his resistance to Missouri in 1820. But his gamble backfired: his overtures did little to convince antislavery northerners, who viewed the Democratic Party as the principal agent of sectional compromise and slavery expansion, and who

distrusted Van Buren for his roles in the gag rule and *Amistad* affairs. Most stuck with the Whigs, viewing them as the antislavery party despite their fatal equivocations.  

Seeing that Van Buren’s limited support in the North fatally undermined his prospects, party leaders deserted him in favor of Tennessean James K. Polk, a favorite of Andrew Jackson and a sturdy proponent of annexation and expansion. At the party’s Baltimore convention in the spring of 1844, delegates issued a platform reiterating the Democratic creed of states’ rights, limited powers, and “liberal principles” of the Declaration of Independence. As in 1840, the platform also reaffirmed the federal consensus and denounced the meddling of abolitionists. Like the Whigs, the Democrats went into the campaign with its antislavery wing fully in check.

That left the Liberty Party, the only party to adopt denationalization as its platform. With Birney as their nominee, Liberty men endorsed a platform based on the resolutions from the party’s 1843 Buffalo convention. It called for the complete divorce of slavery from the federal government, including a repeal of the 1793 Fugitive Slave Law. It also demanded a more complete denial of comity to traveling slaveowners in the North, one based on post-*Prigg* noncooperation. Eastern radicals, who dominated the convention that produced the platform, successfully inserted a statement declaring the Fugitive Slave Clause “null and void.”

Party leaders derided the platforms of the other two parties: the Democrats’ odes to strict construction flatly contradicted the party’s role in nationalizing slavery, while the hapless contortions of Whigs seemed to confirm their moral vacuity. But whereas the Democrats were easy to confront because they were blatantly proslavery, the Whigs propped up the illusion that they were the antislavery party of the North, and for this reason they had a far more damaging

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impact on antislavery electoral behavior than the Democrats. That is why Liberty men pointed their artillery at the Whigs during the campaign, painting Clay as the supreme con artist of American politics, the architect of the Union’s fatal compromises with the Slave Power, the consummate orator whose siren song of bland antislavery distracted voters from the hard cider of denationalization.  

Bailey warned his readers about the false appeal of Whig magniloquence. A world of difference separated antislavery platitudes from Liberty principles, Bailey wrote. Liberty men “require something more than denunciations of slavery and prejudice against color. We demand action against the aggressions of the Slave-Power.

We demand a recognition of the doctrine, that the constitution of the United States does not recognize the idea that there can be property in man – that it does not confer upon Congress the right to extend or sustain slavery – that it does not confer on the federal executive the right to disgrace the nation by negotiations for its support, -- that it is solely a creature of state-law, and is to be restricted within the limits of the state creating it, -- that it is a wrong to the free people of this country, to allow the principle offices of the general government to be filled by slaveholders – that it is a wrong to those interested in the prosperity of Free Labor, to have the entire legislation of Congress, and the diplomacy of the Chief Executive, shaped with a view to the protection and advancement of Slave-Labor interests.

History demonstrated that “the slaveholders will tolerate a great many hard sayings against slavery, so long as they may be permitted to control the administration of the General Government for their own ends.”

Most Liberty men, particularly those in the East, opposed making overtures to antislavery elements in the major parties, but coalitionists in the West pressed ahead with the effort to bring disillusioned politicians into a broad antislavery alliance. Chase and the Cincinnati Clique led

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22 *Philanthropist*, Sept. 20, 1843.
the charge, wooing Democrats by stressing the basic unity of “Liberty principles” and
Jeffersonian strict construction – in other words, by highlighting the two groups’ shared faith in
antislavery constitutionalism. Bailey noted that the Liberty position on Texas merely extended
the central principle of antislavery constitutionalism to the Texas issue: Congress had no power
to establish slavery. Shrewdly, he took up the example of R.D. Davis, who “expressed his
conviction of its truth, when he said, ‘Congress could no more make a slave, than a king.’”
Appealing to Democrats like Davis, Bailey restated the Liberty Party’s Jeffersonian core – that,
under the Fifth Amendment, Congress had no “power to make one man the property of another –
to make a Slave, or make a King.” The “great practical inference” of that principle, Bailey
wrote, was that slavery in all federal areas amounted to unconstitutional “usurpation.”23 The
same logic would apply to Texas in the event Congress approved annexation.24

For his part, Chase lobbied Democratic circles with what he called the “Liberty Man’s
Creed,” a restatement of antislavery constitutionalism that worked the Jeffersonian angle of strict
construction and limited powers. According the Chase, the Liberty creed reflected the ideas in
the Declaration of Independence, whose assertion of basic human equality underscored the
Democratic belief in fair wages for all laborers. The creed also derived from the Somerset
principle that slavery “violates inalienable rights,” and all it purported to do was resume the
“settled policy” of the founders, which was to “limit and localize, not to extend and nationalize
slavery.” The Constitution bestowed on Congress no power whatsoever to regulate or destroy
slavery, but the Fifth Amendment did prevent Congress from establishing slavery in federal
areas, and on that score, slavery in Washington, D.C, Florida, and “in all States created out of

23 ibid., August 23, 1844.
24 On Liberty coalitionists’ overtures to antislavery Democrats, see Earle, Jacksonian Democracy, pp. 154-159;
also Hyman and Wiecek, Equal Justice under Law, pp. 115ff.
any Territory of the United States is unconstitutional.” It was also precisely why slavery could not continue in Texas in the event of annexation.25

In substance, the “Liberty Creed” was Chase’s denationalization program rebranded as Jeffersonian doctrine. It promised nothing less than the “extinction of slavery by the constitutional action of Congress and the State Legislatures.” It began by promoting antislavery candidates, who, once in office, would repeal slave codes in Washington, D.C. and Florida Territory; prohibit the overland and coastwise slave trades; pass Congressional resolutions declaring slavery in states carved out from the federal territories to be unconstitutional and recommending to the slave states proven methods for managing gradual abolition; abrogate the Three-Fifths Clause “by an expressed amendment to the Constitution”; and, through the vehicle of an antislavery Supreme Court, reinforce Congress’s legislation by making slavery illegal and unconstitutional in all areas of federal jurisdiction. At the state level, Liberty office-holders would repeal “all unjust and oppressive enactments” aiding slavery, like Ohio’s Black Laws and other racially-inspired legislation. (The latter plank suggests that, for many coalitionists, racial equality was a state matter, not a federal one).26 Chase’s message to antislavery Democrats was clear: abolishing slavery and reining in the slave oligarchy were two sides of the same coin.

The coalitionists’ Democratic strategy was on full display at the 1844 Liberty Convention for Hamilton County, Ohio, where delegates echoed Bailey’s interpretation of R.D. Davis: “we do not believe that Congress has or ever had any more power to make a slave than to make a king, ... we do not believe that any man can, without any legal proceedings at all, be lawfully deprived of Liberty and all wages for his hard labor, under the Constitution.” On these grounds,

25 Chase’s Liberty Creed speech is in the Philanthropist, Sept. 11, 1844. See also Johnson, Liberty Party, p. 52ff; Earle, Jacksonian Antislavery, pp. 155-156.
26 Philanthropist, Sept. 11, 1844.
slaveowners had no right to establish slavery in the federal territories. These resolutions brought antislavery constitutionalism directly into the Texas controversy and the 1844 election.

The election results reflected the disorder of northern politics regarding Texas, a disorder that benefitted the Democrats in the end. Polk defeated Clay by a narrow margin, aided by the Liberty Party’s capture of two percent of the national vote, which, though dismal, marked an advance over 1840 and was enough to sink Clay. There was, however, great irony in the results, for the Liberty Party had done exactly what the Whigs predicted: they contributed directly to the annexation of Texas. With the election results in, President Tyler and Calhoun rushed to annex Texas before they left office, devising a special joint resolution which would require a mere majority in both house of Congress. It was perhaps in these last few months of the Tyler administration that Calhoun’s proslavery nationalism most directly influenced federal policy. On February 27, 1845, Congress passed the joint resolution annexing Texas to the Union; two days later, Congress approved Florida’s entry into the Union as a slave state. With Texas poised to produce as many as six new slave states, the balance of power in Congress now swayed decisively in favor of the South.

Antislavery Dissidents Rally around Denationalization

The devastating one-two punch of Polk’s victory and Texas annexation aggravated an already tense political landscape in the North. The Liberty Party may have lost the election, but its long-term balance-of-power strategy seemed to be paying off, as antislavery elements from the major parties took up the call of denationalization. The election marked a turning point for

27 ibid., Aug. 9, 1844.
28 Wilentz, Rise of American Democracy, pp. 574-576; Silbey, Storm over Texas, pp. 77-79.
Van Buren Democrats, whose defeat at the hands of Polk supporters cost them the presidential nomination and undermined whatever antislavery appeal they had. In contrast to backbiting Democrats, the Whigs appeared to be, at the very least, on message. Yet for antislavery Whigs, who understood all too well the proslavery function of their party, the election signaled the need to push more aggressively for antislavery action. Though groups like the anti-Texas committee dissolved after annexation, the Texas affair had fundamentally changed the political trajectories of Young Whigs like Charles Francis Adams and Charles Sumner, who now made the divorce of slavery and federal power their top priority. In this sense, Liberty men – or at the very least, the party’s minority of coalitionists – could take solace in the fact that, while they lost an election, they were finally influencing the terms of the debate over slavery and federal power.

The antislavery Whigs of Massachusetts – dubbed the “Conscience Whigs” because their commitment to conscience put them at odds with the political and economic elite of Boston Whiggery, the so-called “Cotton Whigs” – now took every opportunity to impose the denationalization agenda upon their recalcitrant colleagues. At an anti-Texas rally at Boston’s Faneuil Hall in early November, 1845, Charles Sumner proposed indirect federal action for limiting slavery to the states where it already existed. Texas, he said, would open vast new slave markets and create huge demand for slave labor. It was not too late to halt slavery’s extension there. “We do not offer to interfere with any institution of the southern States, nor to modify any law on the subject of Slavery under the Constitution,” Sumner said. “Our movement is conservative. It is to preserve existing supports of Freedom; it is to prevent the violation of free institutions in their vital principles.”

A few months later, in late January, 1846, Massachusetts governor George N. Briggs sent the state house several petitions from Georgia

29 Bauer, *Cotton versus Conscience*, pp. 77-158.
protesting Massachusetts’ personal liberty laws. Henry Wilson’s committee on the petitions recommended that the house pass one resolution denouncing the Slave Power and another declaring Massachusetts’ determination to block slavery’s expansion and surround the South using all constitutional means. When Wilson’s proposal met fierce opposition from conservative Whigs, he defended in a lengthy speech that described Texas as the Slave Power’s latest incursion on northern liberties. Feeling the pressure, the conservatives issued their own report on Texas and slavery, but Wilson matched it with a more radical minority report. Both reports went before the House, where they sparked fierce debates between conservatives and radicals. It was in the midst of this furor that Samuel Rockwood Hoar said it was “as much the duty of Massachusetts to pass resolutions in favor of the rights of man as in the interests of cotton,” a remark that introduced the famous distinction between Cotton conservatives and Conscience radicals.31

On the Democratic side, Texas annexation produced the first full-scale defection of antislavery Democrats in none other than New Hampshire, the most reliably proslavery bastion of the antebellum North. John P. Hale, heretofore a stalwart party hand (he had counted himself as an anti-abolitionist in the late thirties) published a well-received letter denouncing the forces behind Texas annexation. Hale’s about-face reflected his recent drift toward religious contemplation and his resentment of southern power in the Democracy. Spurred by the surprising public support for Hale’s stand, on February 4, 1845 forty-eight antislavery Democrats convened in the northern New Hampshire town of Colebrook to express their support. The party machine, led by future president Franklin Pierce, acted quickly, reading Hale out of the party and clamping down on all antislavery dissent. But it was not enough to stop the bleeding: nine days

after Hale’s ouster, supporters in Exeter passed a series of resolutions condemning slavery and Texas annexation and demanding Hale’s election to Congress. A revolution in New Hampshire politics had begun— a political “Hale Storm,” as contemporaries put it. The David-and-Goliath contest between Hale supporters and Pierce’s legions foreshadowed the Democracy’s gradual splintering over the course of the late forties and 1850s.32

Hale supporters soon went about creating a separate and permanent political organization based on antislavery principles. At a meeting at Exeter Congregational Church on February 22, 1845, they passed another round of resolutions decrying slavery and the Slave Power and introducing themselves as the Independent Democrats, a new party which purported to be the true heir of Jeffersonian democracy, one devoid of the warped constitutionalism of southern slaveholders.33 Hale, who had expected to resume his private law practice, now took to the campaign trial. In a speech at the Exeter Church on April 21, he revived the spirit of Thomas Morris, cutting the figure of a Democratic abolitionist by denouncing slavery in moral as well as political terms. Slavery, Hale said, was a “political, social, and moral evil of the highest turpitude, and a curse to the country.” There were three main compromises regarding slavery in the Constitution: the Slave Trade Clause, Three-Fifths Clause, and the Fugitive Slave Clause; this was the “Union as it is,” and there were no grounds for extending beyond it—say, by annexing Texas, which was in Hale’s view a blatant display of unconstitutional opportunism.34 There were powerful constitutional objections to Texas annexation, Hale said, but the immorality of slavery should be enough to sway northern opposition. The Texas affair found the

33 Democratic Mass Meeting: Proceedings of a Democratic Meeting at Exeter, N.H., in Opposition to the Present Scheme for the Annexation of Texas and in Favor of the Re-election of Hon. John P. Hale, a Member of Congress ([Exeter, N.H.: [s.n., 1845]).
34 Quote from Earle, Jacksonian Antislavery, p. 92.
Democratic Party at a crucial juncture: either it would continue on as the nation’s proslavery party, or it would revamp itself as the nation’s truly egalitarian party. For Hale, the choice was stark and simple: the Democrats must be remade as an antislavery party.\(^\text{35}\)

Meanwhile, the Cincinnati coalitionists pounced on the opportunity to exploit Democratic divisions over slavery and insert denationalization into the debate. In the wake of the New Hampshire revolt, Chase and Bailey redoubled their efforts at attracting dissident Democrats, even going so far as to rechristen the Liberty Party as the “True Democratic Party.” Chase reached out to Hale as early as January, 1846, apprising him of his ongoing efforts to place the Liberty Party on solid Jeffersonian foundations.\(^\text{36}\) At the Southern and Western Convention of the Friends of Constitutional Liberty in 1845 (one of three large Liberty gathering held in the wake of the 1844 election), Chase elaborated on the historical lineage of “True Democrats” and their constitutional program. From the very start, he said, the Declaration of Independence was understood to be “THE BASIS OF A NATIONAL POLITICAL FAITH.” Guided by those principles, the founders placed the “national Government and Policy” on a foundation of “equal rights” and “Universal Freedom.” The Northwest Ordinance was “a significant indication of NATIONAL POLICY...[,] restricting slavery to the original States, and ... excluding it from all national territory and from all new States.”\(^\text{37}\)

The framers of the Constitution invested this policy into the founding document: not a single line referred to slavery as a national institution “to be upheld by national law,” and the Fifth Amendment’s Due Process Clause prohibited Congress from creating or upholding “the relation of master and slave,” which could not last without “the support of the public force.” In


\(^{36}\) Chase to Hale, Jan. 30, 1846, in *Chase Papers*, vol. 2, pp. 122-123.

Chase’s telling, this founding-era policy succumbed to the machinations of the Slave Power, a small coterie of oligarchic slaveowners whose manipulation of the party system gave them undue influence over federal policy. But the situation was not irreversible; the Constitution allowed for antislavery action to minimize the power of slaveowners and turn back the tide of slavery expansion. Universal abolition could still be accomplished “peacefully, constitutionally, without real injury to any, with the greatest benefit to all.” This could done by denationalizing slavery – repealing all federal slave codes; “discontinuing all action” in support of slavery “at home and abroad,” including slaveholding on American “vessels upon the seas, in forts, arsenals, navy yards”; banning the use of leased slaves on federal public works projects; and by demanding the “immediate adoption” of other antislavery measures at the federal level. A policy of divorce would return the United States to the trajectory set by the founders, a trajectory based on Jeffersonian principles of equality and limited powers.38

It is important to remember that, while Chase courted Democrats, he did not abandon the hope that sympathetic Whigs would join the Liberty camp. To this end he repeatedly wooed William Seward, insisting that Seward’s principles and actions were at home in the Liberty Party, not the Whig Party, which was a dead end as far as antislavery went. “How can he act against us, when we, alone, represent his faith?” Chase wrote Gerrit Smith.39 But Seward rebuffed Chase’s overtures every time, comfortably convinced that the Whigs were the best hope for antislavery legislation. He saw the Liberty Party as a quixotic sideshow, and blamed them for Clay’s loss and the subsequent annexation of Texas. Yet Seward did express interest in Chase’s constitutional program, promising Chase that he would circulate his Southern and

38 ibid., pp. 85-87, 100.
39 Chase to Smith, July 31, 1845, in Chase Papers, vol. 2, pp. 112.
Western Convention speech in New York and emphasize those points on which Whigs could agree.\textsuperscript{40} The plea for divorce transcended party lines.

\textit{Resistance to Coalition}

On the topic of coalition, Cincinnati Liberty men were distinctly in the minority. Most Liberty men responded to the 1844 loss by endorsing radical antislavery constitutionalism, which received a critical boost with the publication of two influential pamphlets that took Alvan Stewart’s ideas to their logical extreme, William Goodell’s \textit{Views of American Constitutional Law} (1844) and Lysander Spooner’s \textit{The Unconstitutionality of Slavery} (1845).\textsuperscript{41} Stewart himself contributed to the radical surge in a series of published letters and a widely-covered New Jersey Supreme Court case in which he elaborated on his constitutional theories.\textsuperscript{42} By 1846, large numbers of Liberty voters in the Northeast and upper west supported direct abolition in the states. Before long leading Liberty figures were endorsing the same, including Birney, Theodore Foster, Elizur Wright and Joshua Leavitt. At the Great Convention of the Friends of Freedom in the Eastern and Middle States held in Boston on June 11-12, delegates committed the party to “the abolition of American slavery,” they declared, insisting that the Constitution gave no “countenance whatever to slavery.” Not a single clause bound citizens to “act in favor of the claim of the slaveholder,” whereas several clauses gave Congress direct power over slavery in the states. The Fugitive Slave Law was unconstitutional and ought to be repealed by all courts, federal or state, and it was still possible to reject Texas’s constitution under the Guarantee clause


\textsuperscript{41} Goodell, \textit{Views of American Constitutional Law: in its Bearing upon American Slavery} (Utica, N.Y.: Lawson & Chaplin, 1845); Spooner, \textit{The Unconstitutionality of Slavery} (Boston: B. Marsh, 1845). See also Wieck, \textit{Antislavery Constitutionalism}, pp. 256-258; Knowles, “Seeing the Light.”

\textsuperscript{42} Wieck, \textit{Antislavery Constitutionalism}, pp. 256-257; Ernst, “Legal Positivism, Abolitionist Litigation.”
of the Constitution (as antislavery forces had done during Illinois’s application to the Union in 1819, and had tried to do during the Missouri Crisis). The convention’s resolutions were later endorsed by the Vermont legislature, the first (and only) northern state to sanction state abolition.43

The Cincinnati clique also differed from the majority in sticking to the “one idea” of abolition. After 1844, many Liberty men, including Birney, pushed for a general platform that would make abolition into one of several reform initiatives, thereby broadening the party’s appeal. The idea for a reform party began in Michigan, and soon it spread to all branches of the Liberty Party, including the upstate New York wing, where it was eagerly embraced. For the Cincinnati clique, Birney’s endorsement was particularly troubling, since it would further undermine his credibility with voters and hurt the Liberty brand in the public eye. As most Liberty men followed Birney’s endorsement of direct abolition and general reform, Chase and Bailey stuck to the call for divorce, hoping that their consistency would attract dissidents in the major parties. Events would soon bear out their predictions.44

*The Mexican War Spurs Antislavery Coalition-Building in the North*

Mexican leaders had warned that U.S. annexation of Texas would lead to war, and by late 1845 conflict seemed imminent. President Polk was eager to draw the sword, since war with Mexico would presumably bring California and other northern Mexico territories into the Union. As war loomed, public opinion polarized, and antislavery dissidents in the North moved closer toward a new coalition built on the denationalization program. The first stirrings of coalition

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43 The proceedings of the Great Convention of the Friends of Freedom are recorded in the *Emancipator*, October 8, 1845. On the post-1844 surge in support for radical antislavery constitutionalism, see Johnson, *Liberty Party*, pp. 57-61.

began in New Hampshire during the winter of 1845-6. Antislavery Whigs in that state supported Hale’s run for the state legislature in exchange for Democratic help in sending Whig Anthony Colby to the governorship. A turning point arrived with the state elections in March, 1846, when the “Allies,” together with a sizeable contingent of New Hampshire Liberty men, picked up several seats in the state legislature. Hale was elected speaker of the House, Colby became governor, and the Allies dominated the legislature when it convened in June of that year. Among their first acts was a joint resolution written by Hale denouncing Texas annexation and war with Mexico and supporting all measures for abolishing slavery in the United States. When House Democrats rejected the resolution, Hale stepped down from the speaker’s podium and delivered a two-hour speech in defense of it. Shortly thereafter, his Independent Democrats issued another resolution imploring the state legislature to demand repeal of all slave codes in federal areas – in other words, to endorse denationalization. They also passed New Hampshire’s first personal liberty law, basing it on the precedent of Massachusetts’ 1843 law. Colby signed both resolutions into law, and one week later, Hale went to the U.S. Senate, the first Independent Democrat to arrive on the national stage. June, 1846 was the high point for New Hampshire’s Independent Democrats.45

It was also a high for Liberty coalitionists. The New Hampshire Alliance electrified Chase and Bailey, who saw the Independent Democrats as the ideal political coalition. Not only had they bolted from their parties; they had also taken “open Liberty ground” once in power, laying the foundation for national action.46 As he did with Seward, Chase offered to send Hale


copies of his Southern and Western Convention speech. Meanwhile, Western Liberty men
boosted denationalization’s profile at the Great Convention of the North West in Chicago in
June, 1846. Delegates there issued resolutions squarely in line with the Cincinnati clique: the
Liberty Party, they wrote, was committed to the Union, but not the present, proslavery Union;
instead, they championed the antislavery Union of the founders, a Union in which freedom was
national, slavery local. Unlike the corrupt major parties, Liberty men would “divorce the Federal
Government from Slavery” and step “to the verge of our constitutional powers” to destroy
slavery itself.47

The New Hampshire Alliance also galvanized coalition-minded Whigs. Giddings
pressed Chase about forming a similar alliance of antislavery Whigs and Liberty men in Ohio.
He recommended that they hold a bipartisan meeting of state antislavery leaders to assess those
leaders’ views on the antislavery agenda (everything from denationalization to the repeal of
Ohio’s 1839 Black Law). Chase deferred Giddings’s request on the grounds that a meeting
would be “inexpedient” for the moment; he could not bring himself to support a Whig platform
of banks and tariffs, and would only come to the table once the Whigs adopted Liberty
principles; in the meantime, he would continue wooing dissident Democrats. Chase did,
however, agree with Giddings on the need for antislavery consensus regarding political action.
Even if coalition was not yet feasible, antislavery northerners needed a “common platform,”
regardless of party. And that platform needed to be strong: “What we want, in my judgment,”
Chase wrote, “is, not resistance to encroachment, but direct aggression.” Your Creole
resolutions were extraordinary, he told Giddings, but they would not suffice as the basis of a

47 The proceedings of the Great Convention of the North West are recorded in the Emancipator, July 15, 1846. For
more on Chase’s attempts at coalition-building, see Earle, Jacksonian Antislavery, pp. 154-159; Sewell, Ballots for
political movement; for that, antislavery leaders needed something more like Chase’s “Liberty
Creed,” which Chase forwarded to Giddings.\(^{48}\)

**The Wilmot Proviso**

Talk of coalition – and with it, support for denationalization – soared after David Wilmot
issued his famous proviso against slavery extension in August, 1846. By late June, the U.S. war
with Mexico had begun, and it was now a foregone conclusion that huge swaths of northern
Mexico would come under American control. To fund the war effort, President Polk presented
Congress with a $3 million appropriation bill in August. Wilmot, a Pennsylvania Democrat
whose sympathies lay with the Van Burenites, attached the proviso to the bill, asking Congress
to ban slavery from all territories acquired from Mexico during the war. Wilmot, who until then
was an unremarkable party stalwart, had, like Hale before him, grown resentful of southern
domination. His decision to issue the proviso was almost certainly influenced by the angry
protests of constituents back home in Pennsylvania. Though Wilmot’s authorship of the proviso
has been the subject of debate – some say Wilmot was the sole author, while others argue it was
Jacob Brinkerhoff of Ohio or Preston King of New York, and yet others say it was a combination
of all three – his relative anonymity made him the ideal person for presenting it to Congress.\(^{49}\)

Wilmot and his radical allies opposed slavery extension for two reasons. The first was
that it would enhance the political influence of Slave Power oligarchs by creating new slave
states with more slaveowner representatives in Congress. It was one thing to abide by slavery

\(^{48}\) Chase to Giddings, Aug. 15, September 23; Giddings to Chase, Aug. 31, 1846, in *Chase Papers*, vol. 2, pp. 125-

\(^{49}\) On Wilmot and his Proviso, see Foner, “The Wilmot Proviso Revisited”; Potter, *Impending Crisis*, pp. 18-23;
*Jacksonian Antislavery*, pp. 123-143; Rayback, *Free Soil*, pp. 23-33; Freeling, *Road to Disunion*, vol. 1, pp. 458-
459; Howe, *What Hath God Wrought*, pp. 467-468; Blue, *Free Soilers*, pp. 20ff. See also Brad Goudeau, “Free Soil:
the Wilmot Proviso and Northern Opposition to the Extension of Slavery” (diss., Southeastern Louisiana University,
2008).
compromises within the Union (e.g., rejecting abolition in Washington, D.C.); it was quite another to stand by as slaveowners wrecked the sectional balance in Congress. The second reason was that slavery appeared to undermine the value as well as the dignity of labor – a point which resonated deeply with northern laborers, the radicals’ central constituency. Slavery cast a shadow on labor generally, since the system operated on the premise that labor was lowly and degrading, performed by subhuman slaves whose toil allowed gentleman masters to cultivate the fruits of democratic civilization. On a more direct level, slavery jeopardized laborers’ prospects in the West and seriously undermined the value of their wages. The nature of slave property – the master’s ability to pick up his labor force and move west at the drop of a hat – gave slaveowners a premium on the best lands in the territories, leaving northern migrants in the dust. And the presence of slave labor in the territories would undercut the wages of northern workers, many of whom had already experienced wage declines along the Border North and in federal areas where slaves worked federal projects.  

Significantly, the proviso did not rest on antislavery constitutional grounds. Wilmot, King and other anti-extension radicals in 1846 based their policy on the precedent set by the Northwest Ordinance, which they viewed rather straightforwardly as a practical policy precedent, not the foundation to an antislavery tradition. And though, in the coming months, they would draw on the anti-extension constitutional arguments from the Missouri Crisis, they used these arguments selectively and instrumentally, eschewing the kind of systematic constitutionalism propounded by Liberty men. In time, however, radicals would come around to the idea that Congress lacked power to establish slavery in the territories.  

51 Hyman and Wiecsek, Equal Justice under Law, pp. 127-129.
The territorial issue sparked by Wilmot’s proviso would dominate national affairs until 1850, but at first the proviso had little impact on public opinion and Congress. War fever gripped the nation in 1846, and the twenty-ninth Congress spent most of its term handling funding and strategy issues. Yet the proviso emboldened the Conscience Whigs in Massachusetts, who continued their strategy of forcing denationalization into the Whig agenda. At the Whig state convention at Boston’s Faneuil Hall (held on September 23), Charles Sumner delivered a searing indictment of slave expansion and Whig complacency. “Slavery is everywhere,” he proclaimed to a startled audience. It is in the nation’s capital and in its western territories, and its vessels daily traversed the coastal waters of the American South. By the intrigues of the Slave Power, the U.S. had become a “slaveholding republic,” and northerners were by no means guiltless. To be sure, Massachusetts had led the way in fighting national slavery, denying comity to slaveowners, passing personal liberty laws, and producing resolutions in favor of denationalization. But Massachusetts and the North could do much more; they could now withdraw their support for slavery entirely.52

That meant the “REPEAL OF SLAVERY UNDER THE CONSTITUTION AND LAWS OF THE NATIONAL GOVERNMENT” -- a cause “far higher and noble” than the “repeal of the Tariff.” It was “by constitutional legislation, and even by amendment to the Constitution, that slavery may be reached.” Congress could begin by abolishing slavery in Washington, D.C., in the territories and on the high seas, and then by banning the admission of new slave states, whereupon it could amend the Constitution to further constrict slavery. The time for dismissing divorce as unconstitutional had passed; Whigs now had a duty to fight “not only against

52 “Antislavery Duties of the Whig Party,” in Pittsfield Sun, Oct. 1, 1846. The proceedings of the convention are recorded in Wilson, Slave Power, vol. 2, p. 118; Boston Atlas, Sept. 23, 1846; Emancipator, Sept. 23, 30, 1846. For more on Whig antislavery in Massachusetts, see Laurie, Beyond Garrison, pp. 153-188. On the immediate reaction to the proviso, see Potter, Impending Crisis, pp. 21-22.
[slavery’s] further extension, but against its longer continuance under the Constitution and Laws of the Union.” It was crucial that they become “thorough, uncompromising advocates of the repeal of slavery… of its abolition under the laws and Constitution of the United States. They must be Repealers, Abolitionists.” Cheers erupted after Sumner stepped down from the podium.  

But Sumner’s speech was far in advance of anything the Cotton majority was willing to say about slavery, and when the convention got down to writing a platform, palpable tensions moved to the surface. In their draft platform, the Cotton Whigs framed Texas annexation as a partisan rather than a sectional issue, blaming the fiasco on “Loco Foco” Democrats and Liberty lunatics rather than a Slave Power oligarchy. Two resolutions in J. Thomas Stevenson’s majority report tried to paint the Whigs as the true antislavery party: the first described slavery as “great moral, political and social evil” which Massachusetts Whigs opposed; the second declared the Whigs’ intent to use “all constitutional and proper means” to combat slavery expansion in Congress. This was strong language, and it reflects the shift in Whig thought following the proviso.  

But it was a relatively vague stance compared to what Conscience Whigs were demanding. Buoyed by the shouts of antislavery supporters, Stephen C. Phillips approached the podium and slammed Stevenson’s resolutions, substituting them with a more radical set that, in the words of Emancipator editor Joshua Leavitt, pushed the Whigs “to the verge of the constitution in favor of the abolition of slavery” and pledged them “to support only such men as will steadfastly advance this object.” The grand purpose of the Constitution, Phillips wrote, was

53 Pittsfield Sun, Oct. 1, 1846.
55 The Emancipator noted that Stevenson’s resolutions “aimed to come as near saying something anti-slavery, as they could and yet say nothing.” Emancipator, September 30, 1846.
to “establish justice,” but the Slave Power had made a mockery of that object. Whigs should therefore not only endorse the Wilmot Proviso, which would limit slavery’s expansion, they should also work toward a complete separation of slavery from the federal government. Like Sumner before him, Phillips insisted that the party go further than non-extension; it must also oppose slavery’s “continuance where it already exists” and use all “constitutional measures” to “promote its abolition.” In addition to the usual list of actions Congress could take against slavery, Phillips added that states like Massachusetts could “discourage and frustrate the arrest” of fugitive slaves by their masters.\(^56\)

Cotton Whig Linus Child then rose to podium, scoffing at Phillips’ “redundant” resolutions and demanding that they be tabled. But Charles Francis Adams and Charles Allen insisted that they go up for a vote, especially since Stevenson’s resolutions “did not proclaim the whole truth.”\(^57\) The stakes were high, Allen said; the question was not simply “whether slavery shall be endured, but whether liberty shall be endured, upon the American Continent.”\(^58\) Samuel Rockwood Hoar broke the gridlock by suggesting the party adopt three of the “the most stringent” Phillips resolutions. On this proposal the convention chair acceded to their adoption, but they were ultimately voted down by a majority of forty-seven (137 to 91). Outnumbered, the Conscience Whigs at least knew where they stood; the Whig Party was unlikely to adopt the antislavery platform any time soon. This conviction probably sunk in the moment Daniel Webster entered the hall, where he gave a short but stirring speech in favor of Union and

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\(^{56}\) Boston *Atlas*, September 24, 25, 1846.  
\(^{57}\) *Ibid*.  
\(^{58}\) Wilson, *Slave Power*, vol. 2, p. 120.
compromise. The Whig Party would remain in the hands of the conservative majority into 1847.\textsuperscript{59}

Antislavery Whigs refused to give up. In May, 1847, the Massachusetts legislature formed a committee on slavery and the Mexican War. The committee passed another round of insipid antislavery resolutions that won unanimous support in both houses. Conscience Whigs resisted, however, and pressed their colleagues to adopt a stronger position on the slavery question. John Shepard Keyes, editor of the Dedham \textit{Gazette}, introduced a minority report based on Phillips’ Faneuil Hall resolutions from the previous fall. The report denounced Texas annexation and the Mexican War and called for “all constitutional efforts for the destruction of the unjust influence of the slave power, and for the abolition of slavery within the limits of the United States.”\textsuperscript{60} The lower house received the report and ordered that copies be printed for members. In a sign of changing opinion in Massachusetts, the legislature then adopted the more radical set of antislavery resolutions endorsed by Conscience Whigs.

Meanwhile, Chase and the Liberty coalitionists hailed the proviso’s arrival in Congress. Though it was limited to the issue of territorial expansion, Chase saw it as an important step in the direction of divorce. Blocking slavery’s expansion westward comprised one part of a much broader program to denationalize slavery and contain it to the states. The territories were simply the latest theater of constitutional conflict over slavery. In a letter to Gerrit Smith, Chase predicted that the proviso would enhance the public stature of antislavery principles in the west; as antislavery northerners rallied around extension, they would become more familiar with

\textsuperscript{60} \textit{National Era}, May 13, 1847. See also Wilson, \textit{Slave Power}, vol. 2, pp. 122-123.
antislavery constitutionalism, and the movement’s very momentum would push them toward denationalization.\textsuperscript{61}

The Cincinnati clique therefore gave their full-throated support to the Proviso Democrats. They argued that, insofar as non-extension restrained the political power of slaveowners in Congress, it was a good thing, a necessary prerequisite for drawing a tighter cordon around the South. “Slavery lives by expansion,” Bailey wrote, so halting its progress was tantamount to a death strike. The slave system would collapse if it was deprived of new soil: as rich cotton soil grew scarce, slaves would lose their value as property and would instead become (in Bailey’s logic) worthless bondspeople. The population of the slave states would also drop precipitously, as free inhabitants fled the South and postponed marriage while slaveowners tried to curb slave births. All of this, Bailey argued, would result in a “constant diminution of political power.” Slaveowners’ attempts at diversifying their crops would almost certainly fail, and they would soon be forced to “convert [their] slaves to freemen.” “The result,” Bailey concluded, was “a state of things in which the voice of self-interest imperatively demands emancipation.” The slaveowner “must leave the State, or free his slaves.”\textsuperscript{62}

Whether or not Bailey’s logic is correct is beside the point. What matters is that, in Bailey’s mind, non-extension was a necessary condition for denationalization. A “constant diminution” of the South’s political power would open the door to wide-reaching antislavery legislation in Congress. In this way, blocking slavery in the west was directly tied to abolition in Washington and the high seas.

\textit{The Democratic Party Frays}

\textsuperscript{61} Chase to Smith, Sept. 1, 1846, in \textit{Chase Papers}, vol. 2, pp. 128-130.  
\textsuperscript{62} \textit{National Era}, Feb. 4, 1847.
On January 4, 1847, Preston King attached the proviso to another of President Polk’s appropriations bills. King’s proviso passed in the House, revealing a clear sectional divide in both major parties. Ten days later, the House Committee reported a bill for the organization of the Oregon Territory – a bill that, in the charged climate of early 1847, gained a degree of importance well out of proportion to its purpose. When House radicals tried to attach the proviso to the Oregon Bill, a furious Calhoun sent his allies into action. Armistead Burt, Calhoun’s proxy in the House, motioned for an amendment to the bill which would extend the Missouri Compromise line to the Pacific. The House rejected Burt’s proposal, reflecting the radicals’ predominance there, and on the very next day, it once again attached the proviso to the Oregon Bill. Soon it became apparent that the proviso would be the long-term policy of the radical Democrats, especially after several northern states passed resolutions in favor of it.\textsuperscript{63}

Unlike in August, 1846, the proviso in early 1847 provoked a firestorm in and out of Congress. By early spring, the Democratic Party fragmented along sectional lines into two hostile pro- and anti-proviso camps, the former led by northern radicals, the latter run by Calhounite slaveowners. The Calhounites confronted the proviso with a ready-made arsenal of time-tested constitutional arguments. Applying the same logic to the territories as they did to the high seas and the District of Columbia, they argued that rights to slave property were guaranteed by the Constitution and were therefore extraterritorial throughout the Union – meaning they were as legitimate in the territories as they were in the slave states. In February, 1847, Calhoun introduced a series of resolutions in the Senate insisting on the right of slaveowners to bring slaves into the territories. The resolutions repeated the themes of his 1837 and 1840 resolutions, including his theory of state sovereignty, but this time Calhoun stressed the notion of “constitutional equality.” Slaveowners, he argued, were being denied the right to bring their

\textsuperscript{63} Potter, \textit{Impending Crisis}, pp. 64ff.
property into the territories, which were the “joint and common property of the states” (rather than the sole domain of an independent Congress). This was a denial of southern equality, a violation of the “perfect equality” of states under the Constitution. Congress, as the “joint agent and representative” of the states, had no right to deprive any one state of its “full and equal” right to enjoy the territories. If Congress adopted the proviso, it would almost certainly “subvert the Union itself.”

A few weeks later, Virginia’s legislature – already inflamed by its comity fight with New York State – issued its own endorsement of Calhoun’s resolutions. The right of a slaveowner to “reside with his property, of whatever description” in the territories was a “natural and independent” right, immune from federal interference, the state resolutions declared. The legislature’s call for “firm, united and concerted action” against the proviso was so fierce that southerners eventually labeled Calhoun’s resolves the “Virginia resolutions.” Spurred by the support coming from Virginia and especially Charleston, Calhoun tied the southern swell to his ever-restless presidential ambitions, hoping that a southern unity party would send him to the White House. A series of anti-proviso conventions in the South put wind in the sails. In three conventions held between May, 1847 and February, 1848, Alabama held three such conventions. The first convention reworked the Virginia resolutions as the “Alabama Platform.” Their principal author, William Lowndes Yancey, was as fire-breathing as they came in the mid-1840s. To the throng of anti-Proviso Alabamians assembled before him, Yancey vowed that southern Democrats would block any attempt by their radical foes to nominate a Proviso candidate for office. Georgia’s legislature passed similar resolutions in July of 1847, and proslavery

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65 Quoted in National Era, July 22, 1847.
Democrats even broached the idea of starting a proslavery newspaper in the nation’s capital, one that would offset the influence of Bailey’s *National Era*.  

Uniting proslavery Democrats was the realization that non-extension into the territories represented one strand in a much larger project which, if adopted by northern Democrats, posed an immediate threat to their interests. It did not matter that northern Democrats in early 1847 did not always see it that way; for the Calhounites the Wilmot Proviso was merely the latest example of northern hostility to slavery. In a letter to an Alabama politician, Calhoun connected the dots of antislavery legislation, tying the proviso to the North’s denial of comity (the most infamous case being that of New York and Virginia), the passage of personal liberty laws (Hale’s New Hampshire Alliance being the latest affront), and the recent surge in petitions calling for abolition in the nation’s capital. These were not mere chimeras; Calhoun saw the writing on the wall, and in his view, only a southern party could stem the tide of abolition. Calhoun’s ally at the Charleston *Mercury*, Duff Green, saw the very same writing: “We deny that Congress has any jurisdiction as to slavery, either in the States or Territories, or District of Columbia, or the slave trade between them; and we will not permit any attempted exercise of it.” The rights to slave property in the territories were “as certain and fixed as those which the citizens of a free State enjoy in his house of horse. They are rights which cannot be divested: recognized in the Constitution, attached to the person of the citizen of a slave State, and which he is entitled in all places and in any manner to enjoy.”

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Compared to southern Democrats, radicals had a rather flimsy justification for the Proviso. Initially they demanded little uniformity from their ranks as far as constitutional arguments were concerned. Radical leaders tolerated a wide range of justifications for the proviso. Most pointed to the precedent of the Northwest Ordinance – the proviso and its many copycats simulated the language in the ordinance – while others revived the Missouri restrictionists’ reading of the Rules and Regulations and Guarantee clauses of the Constitution, which, radicals argued, gave Congress full power to ban slavery in the territories and establish free republics instead. (In making this claim, some relied on Joseph Story’s Commentaries on the Constitution). None of them endorsed antislavery constitutionalism publicly, and all took great care to recognize the federal consensus and distinguish non-extension from direct aggression. The proviso was a preventive measure, not an assault on slavery. Abolitionists were factious zealots, not prophetic warriors. Most of this was genuine, but sometimes it was strategic, reflecting the useful role that abolitionists played in northern politics: by touting radical positions in the public sphere, abolitionists created space for moderate politicians to lurch in a generally antislavery direction.69

Controversy over the proviso continued into the spring of 1847. On March 3, just before the first session of the twenty-ninth Congress expired, the Senate passed the Oregon Bill with the proviso excised, which the House then tabled. But with a handful of northerners joining the southern bloc, a proviso-free bill finally passed in the House. Things died down for a while, but the controversy picked up again in May, 1847, when Congress again took up the Oregon Bill. By June, it was clear that the slavery issue was not going away. With the Democratic Party split

69 On the radicals’ justifications for the Proviso, see Potter, Impending Crisis, pp. 54-55; McPherson, Battle Cry of Freedom, pp. pp. 54-55; Wilentz, Rise of American Democracy, pp. 596-597; Rayback Free Soil, pp. 56ff; Hyman and Wiecek, Equal Justice under Law, pp. 129ff.
along sectional lines, party leaders worked to impose unity by sending up moderate alternatives to the party’s two extremes. Polk privately supported a plan to extend the Missouri Compromise line to Pacific, but kept his silence until conditions for a deal emerged in Congress. In the meantime, Polk had James Buchanan float the idea in the press. Buchanan, Pennsylvania’s leading Jacksonian, was the very archetype of the northern Doughface: his compromises with slaveowners went back to the Missouri Crisis, and he had been one of the main promoters of the gag rule in 1836.70

One month after Buchanan’s initiative, Vice President George Dallas introduced a plan to have the people of the territories decide for themselves if they wanted slavery – the forerunner of the famous “popular sovereignty” argument. This idea was soon being trumpeted by Lewis Cass, the corpulent, opportunistic former governor of Michigan Territory, who had his (perpetually half-shut) eyes on the White House. In a letter to the Nashville slaveowner A.P.O. Nicholson published in December, 1847, Cass argued that Congress only had power over the soil of the territories, not their social organization; in the latter regard, settlers had full control and discretion – they were, in other words, fully sovereign. On a rhetorical level, popular sovereignty dovetailed nicely with Jeffersonian themes of democratic self-government, but in practice it contradicted the territorial policies Jefferson himself had pioneered. Little bother for Cass and his allies, who saw it as the ideal tool for suppressing slavery agitation and forwarding the business of expansion. When proviso Democrats in the House tabled the pro-popular sovereignty resolutions of Cass’s Senate ally, New Yorker Daniel S. Dickinson, Cass did not abandon his theory; instead, he eased up on the argument that it was antislavery, shifting to the safer ground of silence and ambiguity. With support for Buchan’s “Missouri line” proposal

70 Potter, Impending Crisis, pp. 55-57. See also Rayback, Free Soil, pp. 116.
collapsing by 1848, moderate Democrats rallied around Cass and popular sovereignty, convinced that it would prove the antidote to the slavery problem.\textsuperscript{71}

Together with the southern counteroffensive, the compromise measures pushed radical Democrats toward a more aggressive and comprehensive antislavery. This was a crucial development. In the first place, proclamations like the Virginia resolutions and the Alabama Platform had reframed the territorial conflict into a contest between northern freedom and nationalized slavery. Radicals had little choice but to push back, and try as they might to disavow abolitionism, they began to attack slavery itself, not just its extension. Radicals in Paulding County, Ohio decried Calhoun’s resolutions “as inconsistent with the rights of the free States, and hostile to the preservation of the Union.”\textsuperscript{72} David Wilmot – who had always taken care to distinguish non-extension from abolition – now blurred that distinction in his public addresses. After insisting in an October, 1847 speech that the proviso’s sole object was to “protect free soil from the unlawful and violent aggressions of Slavery,” Wilmot explained that “[s]lavery has within itself the seeds of its own dissolution. Keep it within given limits, let it remain where it now is, and in time it will wear itself out. Its existence can only be perpetuated by constant expansion.” Hemmed in, its soil exhausted, the entire system would collapse, putting “an end to slavery and all its concomitant evils.”\textsuperscript{73}

Meanwhile, radicals viewed the moderates’ various compromise measures as perfect illustrations of the Slave Power’s ability to wrest concessions from the Democratic Party. Whereas in reality Cass had been working to restore party unity, radicals saw his proposal as a capitulation to the Alabama Platform, a Janus-faced sham-policy that would almost certainly aid

\textsuperscript{71} Potter, Impending Crisis, pp. 57-59; Rayback, Free Soil, pp. 113-121; Childers, Popular Sovereignty, pp. 136ff.
\textsuperscript{72} Cincinnati Morning Herald, quoted in National Era, Sept. 30, 1847.
slavery in practice. The proslavery drift of Cass’s policy drove Van Buren himself to pick up the pen and defend the proviso, which, he wrote in a published letter of April, 1848, had both the Constitution and the Northwest Ordinance to recommend it. Yet – crucially – neither Van Buren nor any other radical endorsed denationalization at this point.

**Antislavery Whigs Revolt**

As the Democrats fought over the proviso, antislavery Whigs revolted against their party and began considering the possibility of coalition. Unlike radical Democrats, Conscience Whigs favored denationalization well before the Wilmot Proviso, which they saw as a single component of the larger program (much as Chase and the coalitionists did). But when the proviso controversy hit full throttle in May, 1847, Conscience Whigs intensified their efforts at making denationalization into the Whig creed. In that same month, in Massachusetts’s state legislature, Keyes introduced a set of Sumner-authored resolutions which insisted that Whigs make “all constitutional efforts for the destruction of the unjust influence of the slave power, and for the abolition of slavery within the limits of the United States.”

Conservative Whigs at the national level were no less anxious to quell antislavery revolt than their Democratic counterparts. Faced with the reality of growing antislavery constituencies at home and a minority revolt in their midst, party leaders first tried to co-opt antislavery sentiment while beating back radical proposals for denationalization. Whig-dominated state legislatures churned out dozens of resolutions featuring tepid antislavery platitudes, carefully-constructed bromides that were antislavery on the surface only. Daniel Webster, with Clay the

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75 Quoted in *National Era*, May 13, 1847. See also Wilson, *Slave Power*, pp 252.
great proponent of compromise, famously argued that the Wilmot Proviso was nothing new; it was his position on slavery and the territories as far back as he could remember. Thomas Corwin’s forceful opposition to the Mexican War won him plaudits from antislavery members in his party, but they soon retracted their support when they realized he had no intention of supporting the proviso.

Party leaders finally settled on the policy of “No Territory,” which meant a complete rejection of all territorial acquisitions from the war with Mexico. Introduced in early 1847 by Senator John Berrien and Representative Alexander Stephens, the “No Territory” platform soon became linked to Henry Clay, who, in a November 1847 speech on the Louisville Courthouse steps, made it the official policy of the Whig Party. “No Territory” was classic Whig caginess: by claiming to renounce territorial acquisition altogether, the party could avoid the slavery issue in the short term while leaving open the possibility of future acquiescence. The important point is that tepid half-measures like the “No Territory” platform convinced Conscience Whigs that their party was fundamentally subservient to the Slave Power, and that any chance of turning denationalization into law would have to transcend it.

**Grounding the Proviso in Antislavery Constitutionalism**

With compromise measures reframing the debate and radical Democrats struggling to meet the constitutional objections of the Calhounites, Liberty coalitionists sought to ground the proviso in a foundation of antislavery constitutionalism, giving it greater leverage against the proslavery attack and the drift toward evasion. Across 1847 and early 1848, they set about persuading radical Democrats that the proviso was an expression of antislavery constitutionalism.

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76 Rayback, *Free Soil*, pp. 121-130.
and was only part of a larger project – the denationalization of slavery. Once again, Chase, Bailey, and the Cincinnati clique led the way. For Chase, the proviso was the “stone which the builders rejected,” Chase wrote in biblical overtones. In time it would “become the head of the corner.”

The coalitionists scorned Calhoun, Yancey and the entire anti-proviso movement. Bailey portrayed Calhoun’s 1847 resolutions as the latest expression of nationalized slavery, linking them to Calhoun’s infamous 1837 and 1840 resolutions. As was the case then, Bailey argued, the “South Carolina Abstractionists” were peddling false doctrines in the halls of power, deleting the distinction between slaves and other property and claiming a constitutional guarantee for slave property in the Union. Calhoun’s insistence on “constitutional equality” in the territories missed the crucial point: slavery was not a common form of property and was therefore not a subject of “equality” between the states; the proviso had nothing to do with state equality, since it applied only to a peculiar form of property from the South.

Bailey and Chase also condemned the compromise measures of the two parties, depicting them as the logical end of Slave Power domination. “Away with your artful dodgers,” Bailey wrote in the *National Era*. For Chase, the moderates’ attempt to “smother” the proviso with lukewarm antislavery would never convince antislavery diehards, but they might sway the broader electorate, spelling doom for the antislavery agenda in the North. Resistance to compromise was therefore critical. In keeping with Liberty strategy, Bailey saved his strongest criticism for the Whigs’ “No Territory” platform, calling it a weak and passive policy that sacrificed freedom on the altar of slavery by placing both on the same footing. “Thus is Freedom wounded in the house of her professed friends; and it must be admitted that the Whigs struck the

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first blow. … We detest this policy… because it is only another development of the tactics of the Slave Power, which, by bribing and dividing, has always succeeded in accomplishing its will.”

But it was popular sovereignty that posed the greatest threat to the proviso, and with it, the crucial momentum of antislavery opinion. Alarmingly, Cass’s theory transcended the Constitution and Congressional precedent, shifting the debate to the “natural or original rights” of slaveowners when the real issue was their “actual rights… under our Constitution.” For Bailey, the right of settlers derived not their own natural rights but from Congress, which had unchallenged supremacy over the social organization of the territories.⁸⁰

Chase and Bailey knew that Van Buren Democrats agreed in principle that Congress had the power to abolish slavery in the territories. In several public statements – from the 1836 Pinckney Report to Van Buren’s letter that same year acknowledge Congress’s right to abolish slavery in in the District of Columbia – northern Democrats had conceded Congress’s power to abolish slavery in federal areas; yet they had never acted on that assumption, having chosen instead to enact stopgap measures like the ill-fated gag rule.⁸¹ For Chase and Bailey, the trick in 1847 was to get Van Burenites to revive that principle and apply it to the proviso – to argue that Congress’s right to ban slavery from the territories derived from the same power to abolish slavery in Washington, D.C. Using the twin weapons of Bailey’s editorials in the newly-minted National Era (which set up shop in downtown Washington, D.C.) and Chase’s prolific correspondence, the coalitionists exploited the crisis in the Democracy by publicizing their commitment to “True Democratic” principles – strict construction, limited powers, and the

⁸⁰ ibid., July 8, Aug. 12, Sept. 2, Sept. 16, Dec. 23, 1847. According to Bailey, the open-endedness of popular sovereignty led to all sorts of absurdities in the name of self-government, including the possibility that settlers voted for monarchy or aristocracy in the territories. He blasted Dickinson’s House resolutions by publishing a set of mock resolutions in which the Constitution became the vehicle for proslavery interests, all in the name democratic republicanism: “That Domestic Slavery is the corner stone of Republican Institutions,” one of them read, “and that the Constitution is the corner stone of Domestic Slavery.” National Era, Dec. 23, 1847.

⁸¹ See Ch. 3.
federal consensus – and by constantly emphasizing the proslavery nationalism of the anti-proviso movement. Chase in particular sensed that these arguments would get a fairer hearing than in the past, since northern Democrats now felt the pressure of antislavery constituencies whose opposition to slavery might not stop at non-extension.

As the territorial debate intensified in Congress across 1847, Bailey wrote a series of clear and concise essays laying out the contours of antislavery constitutionalism. These essays introduced antislavery constitutionalism to a wider audience in the nation’s capital, but more specifically, they were aimed at radical Democrats looking for a potent rejoinder to the Calhounites. Bailey’s main argument in the essays was that the Liberty Party’s antislavery constitutionalism – the application of the municipal theory to the Constitution and American federal law – was the proper foundation for the Wilmot Proviso and a broader coalition favoring denationalization. Bailey argued that radical Democrats could agree with Liberty men that, because the territories had no laws upholding slavery, slaveowners could not bring slaves there without forfeiting the right to hold them as property. Slaves were not like other forms of property; they were property only by the laws of the slave states. Since the federal government had no power under the Constitution to establish or support slavery in areas under its jurisdiction, the mere act of carrying slaves into the territories would not establish slavery there. “Precisely this condition of things would exist in California and New Mexico, were they in our permanent possession. Slavery could not be legalized in either, till they should become States of this Union. While Territories, slaves introduced there in any way, would be entitled to freedom,” with access to all the rights of due process offered in free areas. Slaves whose masters voluntarily brought them into the territories could test their masters’ claims before the Supreme Court, which (in Bailey’s view) would probably rule them free. To bolster the point, Bailey referred to McLean’s
opinion in *Groves v. Slaughter* and Story’s explanation of the municipal theory in *Prigg v. Pennsylvania*.  

In this way, Bailey argued, a positive ban on slavery was actually unnecessary. The Wilmot Proviso was “properly nothing but a *declaration* by Congress of a principle which would have the same legal force, though the same practical operation, if undeclared by Congress.” Yet, while the proviso was redundant, it was important to “make assurance doubly sure” that the territories were stamped free—especially given the South’s insistence that the right to slave property was an extraterritorial right guaranteed by the Constitution. According to Bailey, several Democrats had stumbled into this reasoning without grasping its full implications; R.D. Davis, he wrote, had applied the municipal theory to Washington, D.C. when in fact it applied to all federal areas, while Silas Wright had based his opposition to slavery extension on the municipal theory, not the proviso. The evil appeal of popular sovereignty, Bailey noted, was that it had aspects of the municipal theory in it: Congress, so the theory went, had no power to establish slavery in the territories; that was for the people to decide.

Chase linked the proviso to antislavery constitutionalism in resolutions he presented to the Hamilton Country, Ohio Liberty Convention on September 4, 1847. The resolutions began by claiming that the Slave Power was the “controlling element” of the party system. They insisted that Congress reserve the territories for free labor. Since Congress had no power to establish or support slavery, slavery in the “National Territories is unconstitutional” and could not exist there under federal authority. This, Chase wrote, was the “true basis” of the Wilmot Proviso. Last but not least, the resolutions called for a “complete divorce” between slavery and federal power. These were familiar demands in Liberty circles, but they were especially

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82 *National Era*, Feb. 27, Sept. 23, Oct. 28; Dec. 23, 1847; Jan. 20; January 27, 1848. See also Chs. 5 and 6.
83 *ibid.*, Sept. 23, Oct. 28, 1847.
significant in September 1847, as Chase and Bailey lured radical Democrats with a *Somerset*-based proviso defense.  

*Coalition on Liberty Principles*

At the same time, Chase and Bailey kept in contact with Conscience Whigs about the possibility of a political merger. The first stirrings of coalition occurred in May 1847, shortly after Keyes introduced his antislavery resolutions at Faneuil Hall. Charles Francis Adams, now editor of the newly-established Boston *Whig*, the latest print bastion of Conscience Whiggery, published the resolutions in his paper and sent copies to Bailey at the *National Era*, calling them the Whig “system” for ending the Mexican War and overthrowing the Slave Power. Bailey responded positively but confessed to Adams that Whigs would never adopt such a system. Adams did not respond, but it is likely that Bailey’s warning influenced his long-term political calculations.

Chase, meanwhile, fostered Whig connections through his correspondence regarding the *Van Zandt* case, which finally reached the Supreme Court in March, 1847. This time around, Chase was joined by William Seward, whose presence on the defense illustrates the basic unity of Liberty men and antislavery Whigs on the slavery issue. Not only did the two lawyers share an aversion to the Fugitive Slave Law; they also agreed on the plan to divorce slavery from the federal government. In their brief, which updated Chase’s 1843 argument before the Ohio circuit court (in front of his father-in-law Justice McLean), they argued that the Constitution – including the Fugitive Slave Clause – recognized slaves as *persons*, not property. There was no “positive and unqualified recognition of property of the *owner* in the slave” anywhere in the Fugitive

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84 Chase’s Hamilton County resolutions were recorded in the *National Era*, Sept. 23, 1847. For background on *Van Zandt*, see Ch. 6.

85 *ibid.*, June 17, Sept. 23, Oct. 28, 1847.
Slave Clause, which was a limitation on free-state interference, not a grant of power. The clause had nothing to do with property relations. It concerned labor relations, not property relations – "a right of the obligee, to a delivery of his debtor."  

Frustratingly for Chase and Seward, Justice Taney pushed *Van Zandt* far down the Court’s docket in the hopes of dodging the slavery issue. McLean informed Chase in early 1847 that a trip the nation’s capital was unnecessary; the Court would simply read his brief and decide the case without him. Justice Levi Woodbury of New Hampshire, notorious for his proslavery tendencies, issued the Court’s opinion. Woodbury added little to McLean’s opinion from the circuit court, which had rejected Chase’s reasoning in favor of federal exclusivity on fugitive matters. Classifying slavery as a moral rather than a political issue, he performed the proslavery jurists’ classic sleight of hand, insisting that slavery was a state institution while upholding the extraterritorial right to slave property in the Fugitive Slave Clause – the “sacred” compromise between the North and the South.  

Chase expressed his vexation with the Court’s opinion in letters to Seward and Charles Sumner. The “detestable doctrin of property in man is spreading having received the countenance of the Supreme Court,” he told Sumner exasperatedly. Sumner responded on a positive note, praising the soundness of Chase’s arguments. They may not have convinced the Court, he wrote, but they “cannot be forgotten” and would indeed “serve to rally a political movement to remedy the fatal judgment of the Court.” Sumner then offered to publish Chase’s brief in the influential *Law Reporter*, which he co-edited. A summary appeared in the

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87 *Wharton Jones v. John Van Zandt*, 46 U.S. 215. See also Niven, *Chase*, pp. 82-83.
88 Chase to Sumner, April 24, 1847, in *Chase Papers*, vol. 2, p. 1149.
Like Sumner, Seward expressed optimism in his correspondence with Chase. Antislavery arguments that had been anathema just a few years before were now gaining in popularity across the North, not just in antislavery bastions like Boston and the Western Reserve. Though neither man was ready to bolt from the Whigs, the Van Zandt case strengthened their commitment to the denationalization program, part of which was the repeal of the Fugitive Slave Law.

In this sense, the constitutional grounds for coalition were stronger after Van Zandt, not weaker, despite the fact Chase had lost the case. Chase’s commitment to constitutional procedure – testing the Fugitive Slave Law in court; building constituencies to vote for its repeal; urging an amendment to remove the Fugitive Slave Clause from the Constitution – put him in line with antislavery Whigs, who were wary of the abolitionist label and unswervingly faithful to the federal consensus. Chase’s appeal was enhanced by his conscious detachment from the constitutional textualism of eastern Liberty men, who had begun calling for federal abolition in the states. Compared to the textualists, Chase looked like the ideal reformer – at once a reforming conservative and a conservative reformer, to paraphrase Joseph Story.

Beating back the radical surge was in fact a crucial part of the coalitionists’ national strategy. The Liberty Party was never more than a temporary vehicle for Chase and Bailey, who were not about to let eastern idealists hinder progress. Better to leave the party outright than jeopardize the task of constitutional abolition. But the party as a whole seemed to be against them. The textualists had swayed James Birney, the Tappan Brothers, and even Joshua Leavitt, who began flirting with radical antislavery constitutionalism in early 1847. At the Massachusetts Liberty convention in January, 1847, Leavitt oversaw resolutions endorsing state abolition on the

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89 Sumner to Chase, Mar. 12, 1847, in ibid., pp. 144-145.
90 Seward to Chase, Mar. 24, 1847, in ibid., pp. 145-146.
91 See Story’s reform views, see McClellan, Story.
grounds that slavery was unconstitutional throughout the United States. The resolutions put Massachusetts Liberty men squarely in the textualist camp.\footnote{The resolutions also called for a repeal of the 1793 Fugitive Slave Law. See \textit{National Era}, Feb. 11, 1847. See also Johnson, \textit{Liberty Party}, p. 60; Sewell, \textit{Ballots for Freedom}, p. 153; Davis, \textit{Leavitt}, pp. 221-250}

Bailey criticized the resolutions in the \textit{National Era}, using the occasion to distinguish western Liberty men from their extreme brethren in the East. All the time, he had his eye on the changing political landscape in Washington and the North. As usual, he drew a strict line between reform societies and political parties, arguing that the latter had no business pursuing abolition in the states. In a string of editorials published across the spring 1847, he met the resolutions point-by-point, using all the historical and constitutional precedent he could muster. The \textit{Somerset} ruling did not apply to the colonies, he argued; slavery and the slave trade were wholly legal there, and the Constitution including serious compromises with the institution as it existed in the southern states. Ignoring these realities in favor of instrumental readings of the Constitution would do little except alienate northern voters and inflame southern opinion. After Leavitt accused him of defending slavery, Bailey explained that his critiques were designed to put antislavery action on solid constitutional ground, away from the abstract reasoning of inspired reformers.\footnote{\textit{National Era}, Feb. 12, Mar. 4, 11, 13, 18, 25, Apr. 8, 15, 22, Oct. 21, 1847; \textit{Emancipator}, Mar. 17, 24, 31, 1847. See Harrold, \textit{Bailey}, pp. 112-113.}

Bailey emerged from the scuffle with the upper hand. Support for direct federal abolition peaked in mid-1847, and around that time Leavitt reversed course, ending his dalliance with textualism. At another Massachusetts Liberty convention in September, he helped pass resolutions that endorsed divorce and the Wilmot Proviso and said nothing about state abolition. In the end, the high-profile exchange in the press redounded in the coalitionists’ favor, as non-Liberty readers of the \textit{National Era} got a better sense of what Bailey, Chase and the western
Liberty men stood for. This proved crucial in the coming months, as antislavery elements from all three parties began to coalesce around the denationalization program. 94

**Conclusion**

Texas annexation and the Mexican War created an opening for a northern coalition centered on denationalization. Conscience Whigs, whose attempts at promoting denationalization had been thwarted by conservative colleagues, now considered a merger with Liberty men. Proviso Democrats held the line at non-extension, disavowing all abolitionist intentions, but their increasing radicalization across 1847 left them vulnerable to Liberty overtures, especially given their affinity with Chase on Congress’s right of to abolish slavery in federal areas. From Chase and Bailey’s perspective, the Democratic side of the equation was the most important, since a wide-scale defection of Democrats would undermine the Democracy (for them the principal agent of the Slave Power) and help legitimize an independent coalition. This is not to say that the Whigs were unimportant; Chase and Bailey never took them for granted, as seen in Van Zandt correspondence. But a Liberty-Whig coalition would never be enough to kick denationalization into gear. For that, Chase and Bailey needed the numerical and theoretical support of antislavery Democrats, the dominant party of the antebellum era. This is why they worked doubly hard to win radicals over to their *Somerset*-based reading of the proviso. Any coalition would have to be based on Chase’s “True Democratic” principles, which Bailey captured in his reformulation of Democrat R.D. Davis’s phrase: “Congress has no more power to make a slave than a king.” But would radicals warm to these proposals?

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94 For the Massachusetts resolutions, see *National Era*, Sept. 23, 1847.
More than any leading politician of his generation, Martin Van Buren was perpetually vexed by the slavery question in national politics. The trajectory of his career between 1820 and 1848— from architect of the shutdown to leader of the Free Soil revolt—mirrored the inherent difficulties of trying to uphold the existing Union by suppressing the slavery issue. On the one hand, Van Buren is deeply implicated in the rise of the “Slave Power,” and not simply because the party system he created led to a total shutdown of slavery discussion. His beloved Democracy—in particular the caucus system it introduced—preserved the numerical advantage slaveowners had enjoyed under the three-fifths rule, fostering a functionally proslavery federal government whose policies accorded with southern views on the Constitution. When the Washington, D.C. debate erupted in the mid-1830s, Van Buren straddled the political center, avoiding the constitutional issues while facilitating passage of the gag rule in 1836. He did much the same thing during the Amistad affair of 1839-41: caught between two poles of radical opinion, Van Buren opted to shut down debate as fast as possible by sending the Mendians to Cuba for trial. In practice, the affair damaged his standing in the North, as his administration based its policy on blatantly proslavery constitutional views. (There is no indication that Van Buren himself supported those views). Like Henry Clay, his counterpart in the Whig Party, Van Buren aimed to suppress the slavery issue in the name of preserving the existing Union.¹

But Van Buren was no proslavery ideologue, nor was his politics incompatible with antislavery nationalism. He had opposed Missouri’s admission as a slave state, backing down

¹ See Chs. 2 and 3. See also Niven, Van Buren, passim.
only when the crisis threatened to undo the Union. His Democratic Party was dedicated to states’ rights, but Van Buren’s understanding of states’-rights theory diverged sharply from the kind of proslavery nationalism implicit in the Calhounites’ state sovereignty theory. In addition to guarding republican liberty against powerful merchants and bankers in the central government, the states’-rights doctrine was meant to protect southern slavery from outside attack, whether from the federal government or the northern states. It was a defensive doctrine, grounded in the belief that slavery was a state institution, and in theory it fit with the antislavery view that the federal government should operate on a legal presumption of freedom. All of this came before the rise of radical proslavery constitutionalism in the 1830s, an interpretation grounded in the aggressive, reaching doctrine of state sovereignty.

Van Buren’s thoughts on slavery and politics are difficult to discern from year to year, let alone from one decade to the next. Still, there is a general pattern in his relationship to slavery from the 1820s to the late 1840s. To be sure, Van Buren refused to take action against slavery in Washington, D.C.; but at the same time, Van Buren rejected the claim that abolition was unconstitutional, that is, that the Constitution guaranteed the protection of slavery property. He opposed the annexation of Texas, not simply because he thought it wrong to extend slavery, but more specifically, because he believed the federal government had no power to annex a country for the explicit purpose of expanding slavery’s reach. By 1844, when he was passed over as the Democratic presidential candidate, Van Buren rightly perceived that southern Democrats – proslavery radicals of the Calhoun school – had hijacked his party. The Democratic Party – the entire party system – was now a vehicle for advancing the interests of a slaveowning oligarchy. In place of northern merchants and bankers, a southern “aristocracy” now threatened the principles and institutions of the American republic. Van Buren’s turn to the Free Soil revolt reflected his
determination to defend the northern states’-rights view – his own brand of antislavery nationalism – against the aggressive doctrines of radical proslavery nationalism.²

It was apparent to most political analysts in late 1847 that the slavery issue would dominate the upcoming presidential campaign. This was precisely what the Liberty coalitionists wanted. Into 1848, they remained in touch with antislavery Whigs about the possibility of coalition, knowing full well that the latter group would rally around denationalization. The real question was whether Radical Democrats would do the same. It was unclear if antislavery Democrats would even consider coalition, let alone endorse the program of denationalization.

A crucial shift came in October, 1847, when New York’s Radical Democrats walked out the state party’s nominating convention in Syracuse and reconvened at Herkimer to endorse the Wilmot Proviso and declare their fidelity to the Jeffersonian legacy. The Radicals – rechristened as Barnburners – had finally broken from the Democratic Party. Coalition seemed more likely than ever, though no one could say what the future held. As Chase and Bailey worked to form an antislavery fusion party, one question loomed over the rest: Would the Barnburners join a coalition for denationalizing slavery?³

³ It is often assumed that the Free Soil Party stood for non-extension of slavery into the territories. On the basis of this assumption, many historians depict the party as a morally-compromised coalition of self-interested northerners who cared more about crushing slaveowner power and keeping the territories “white” than they did about the moral problem of slavery. As far as morality is concerned, the Free Soil Party was a pale shadow of the Liberty Party, which had adopted as its official platform the much more aggressive program of denationalization. On these grounds, the Free Soil Party is portrayed as the quintessential cooptation of radical principles by a mainstream liberal political party, a watering-down of radical abolitionism in favor of broad antislavery appeal among the wider northern electorate. See the works cited in Introduction, n. 17. But it is inaccurate to say that Free Soilers focused solely on the territorial question, ignoring the problem of slavery itself. The Free Soil Party went well beyond non-extension by endorsing the Liberty Party policy of denationalization. To put it more forthrightly, the Free Soilers adopted as their official platform a program which was, in its essentials, indistinguishable from the abolitionists’ constitutional program of the 1830s. This is sometimes explained away with the argument that the platform was the product of horse-trading at the party’s nominating convention in 1848: Liberty Party holdovers were given a radical platform in exchange for Van Buren’s nomination as the presidential candidate (a concession to the party’s
Like Texas annexation during the 1844 election, the territorial issue dominated the 1848 presidential campaign, the first rumblings of which took place in mid-1847. Everyone knew that the leading contender was General Zachary Taylor, the “hero of Buena Vista,” whom both parties courted until he sided with the Whigs in early ’48. From the start of the campaign, Taylor was the heavy favorite, yet other candidates saw fleeting moments of support across the winter of 1847-8. Daniel Webster, Justice John McLean, and General Winfield Scott each saw their prospects as the Whig nominee surge and collapse over the course of a few months, and by the spring of 1848, the Whig contest came down to Taylor and Clay. Clay’s prospects quickly dimmed, however, and before long Taylor was the only man standing for the Whigs.⁴

For the Democrats, there was James Buchanan, whose early support withered as interest in his proposal dried up, and proslavery Justice Levi Woodbury of New Hampshire, a Franklin Pierce ally who (as we’ll see) had just ruled against Chase and William Seward in the Supreme Court’s Van Zandt opinion. Tragically, the leading contender for the Radical Democrats, the

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Barnburner-Democrat faction) and Charles Francis Adams’s nomination as vice-president (a concession to the Whig faction). See, for instance, Mayfield, Rehearsal for Republicanism, pp. 113-114. The conclusion is that, whatever their reasons for adopting denationalization as their party platform, Free Soilers – the bulk of them, at least – did not do so on the basis of moral principle. The emphasis in this interpretation is on straightforward coalition-building, with little attention to the constitutional issues at stake in the unfolding crisis.

In contrast, I argue that the Free Soilers endorsed denationalization on principle, precisely because it addressed the underlying constitutional issue at stake in the territorial crisis: slavery’s relationship to federal power. Initially, the antislavery revolt rallied around the Wilmot Proviso policy of non-extension; but as the territorial crisis dragged on, it became clear to the coalition’s Barnburner contingent that the territorial crisis was symptomatic of a wider conflict over slavery’s nationalization and that non-extension failed to address that deeper crisis. By 1848, they abandoned non-extension and joined the Liberty and Whig factions in supporting denationalization. This chapter places the Free Soil revolt into the wider context of the “long” constitutional controversy over slavery and federal power circa 1835-1848. It recovers the combination of contingent events and structural forces that forced Barnburner Democrats to endorse denationalization, rather than non-extension, as the official platform of the Free Soil Party. Here I build on insights from Hyman and Wiecek, Equal Justice under Law, pp. 140-142; Currie, Constitution in Congress: Descent into the Maelstrom, pp. 133-156; Earle, Jacksonian Antislavery, pp. 159-162; Wilentz, Rise of American Democracy, pp. 624-625.

proviso-endorsing Silas Wright, died suddenly of a heart in mid-1847, depriving stunned Van
Burenites of their antislavery leader. With Calhoun’s support ebbing in the South, the
Democratic nomination went to Lewis Cass, whose popular sovereignty proposal enjoyed
widespread support.5

Liberty men favored John P. Hale (who had been in talks with Liberty leaders through
1847) for president and Ohio’s Leicester King as vice president. Party leaders wanted a
nominating convention for late 1847, but coalitionists in the West resisted, arguing that it was
better to wait until the spring to capitalize on the parties’ upheaval. Chase was actually cool to
Hale’s nomination, which (in his view) alienated possible allies and squandered Hale’s chances
at leading an internal reform of the Democratic Party. Instead, Chase went for his father-in-law
John McLean, whose Van Zandt opinion of 1843 had dented but not wrecked his antislavery
credentials. Compared to Justice Woodbury, who had endorsed the claim of extraterritorial
property rights in slaves, McLean was an antislavery stalwart with broad popular appeal. His
position on the Wilmot Proviso extended his antislavery Supreme Court opinions to the
territories: the proviso, he argued, was already in the Constitution, which recognized slaves as
persons outside of the slave states. This was essentially the same position as Chase’s. Together
with Bailey, Chase lobbied to postpone the Liberty nominating convention, hoping that time
would create opportunities for fusion.6

**Building an Antislavery Consensus**

Signs of encouragement emerged in New York, where Van Buren Democrats finally
broke from their conservative colleagues at the state Democratic convention in Syracuse on

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October 20, 1847. The convention, which was charged with picking delegates to the 1848 National Democratic convention in Baltimore, quickly devolved into a row between Radical and conservative factions, whose mutual antipathies went back as far as the 1844 election. Much of this resentment was peculiar to New York’s byzantine political culture, but for Radicals it owed mainly to conservative perfidy in 1844, when conservatives backed Polk over Van Buren, sinking the latter’s chance at winning the nomination. More immediately, the two camps split over the Wilmot Proviso. After a conservative-lead committee issued resolutions making no reference to the proviso, Radical J.C. Smith of introduced his own resolutions in favor of non-extension and free white labor in the territories (as well as a disavowal of federal interference with slavery in the states). The conservative majority – called “Hunkers” by their Radical opponents – tabled Smith’s resolutions, barring them from consideration. But Radical David Dudley Field reintroduced them, adding another which made it the duty of Northern Democrats to “declare their uncompromising hostility to every act of the Federal Government for the introduction of Slavery into Free Territory hereafter to be acquired.” In a separate speech, Field foretold the dire consequences of Northern compliance. “Remember, if a slave is brought into this territory, it is by your law, the law of the Federal Government. It is your law, it is your act, which is to consign your fellow-beings to unrequited toil which shall end only with their lives.” Unmoved, the Hunkers quashed the resolutions; the Radicals then walked out of the convention, resolving to meet one week later in Herkimer, New York, where they would plan their next move.7

On October 28, the Radicals – now dubbed Barnburners, after the apocryphal Dutch farmer who torched his own barn to rid it of rats – descended upon Herkimer, meeting in the town’s huge railroad depot. David Dudley Field supervised the resolutions, which, in addition to the original Syracuse resolutions, cited Congress’s power to ban slavery under the Rules and Regulations clause of the Constitution. As before, the Barnburners touted their fidelity to the federal consensus, describing the proviso as a strictly preventative measure. They had upheld their constitutional obligations to slavery, and had even gone beyond them in the case of Washington, D.C., but they could not tolerate the prospect of slavery entering the federal territories.8

Evidence of the Calhounite reaction on Barnburner thinking pervaded the convention. After castigating the Hunkers, delegates expressed their anxiety over Southern extremism. One of Field’s resolutions blamed Southern Democrats for the Barnburners’ sudden shift, arguing that Hunkers to smother the proviso in the North. John Van Buren, Martin’s son, used Calhoun’s resolutions and Yancey’s Alabama Platform to explain the Slave Power’s disavowal of the Northwest Ordinance precedent. The party’s compromise measures were in fact concessions to the Slave Power: Buchanan’s extension of the Missouri line allowed slavery to expand into the Mexican cession, which, unlike the Louisiana Territory, had no slaves before American acquisition. Such a plan, noted C.C. Cambrelen, met the South “more than halfway.” Together with the Calhounite offensive, the compromise measures pushed Barnburners in a radical direction. But in November, 1847, Barnburners continued to meet the anti-Proviso argument with reference to the Northwest Ordinance and the Rules and Regulation Clause, not with the municipal theory and antislavery constitutionalism – as Chase and the coalitionists had

hoped. At the convention’s close, the delegates resolved to meet again in early 1848 to prepare for the national convention in Baltimore, to which they planned to send delegates.\(^9\)

The Herkimer convention lifted the spirits of Chase and the Cincinnati clique, whose outlook had dimmed in the months since *Van Zandt*. The Democracy seemed to be undergoing a massive realignment, with Barnburners’ remaking the party on Jeffersonian, or “True Democratic,” grounds. A Northern party based on the example of the Northwest Ordinance (Chase’s expertise) had arisen in New York, and Chase hoped that Democrats in other states would follow suit. The “old platforms” of the established parties no longer had traction in the North, he argued, where growing antislavery constituencies now chafed at evasion.\(^10\)

With coalition seeming more likely, Chase renewed his campaign to postpone the Liberty nominating convention until the spring. After losing that battle, he decided (at Bailey’s urging) to attend the convention in order to shape its outcome. Chase beat back several of the extremists’ proposals in Buffalo, including calls for state abolition. George Bradburn introduced a resolution calling for Liberty men to nominate only those candidates who believed slavery was unconstitutional throughout the Union. Gerrit Smith argued against coalition with the major parties and endorsed the idea of a general reform party. Together with Henry Stanton and Joshua Leavitt, Chase wrote up resolutions that left the textualists in the cold. Instead of demanding direct abolition – and thereby sanctioning sweeping federal powers – the convention endorsed denationalization and a constitutional amendment removing the three-fifths clause – all of which was based on the theory of strict construction and limited powers. The rest of the platform focused on state-level actions against slavery, including the repeal of black laws and other


\(^10\) *National Era*, Dec. 2, 1847; Jan. 9, 1848.
discriminatory legislation in the North. Together, state and federal action would “result, in no distant day, in the establishment of peaceful emancipation throughout the Union.”11

The Liberty Party’s post-1844 surge of textualism had ended; it was now once again the party of denationalization. Upon hearing the news from Buffalo, Bailey lauded the direction of Liberty policy. The “new doctrine” of state abolition had proven unacceptable to most Northerners, who remained fiercely “opposed to Consolidation.” The great majority of antislavery Northerners were content with the plan “to divorce whatever is good in our political institutions, in our sects and parties, from Slavery.”12 Back at the convention, Chase made one more attempt at postponing the nominations until the spring but was overruled, as the delegates nominated Hale and Leicester King for president and vice president, respectively.

Over the winter of 1847-8, Chase and Bailey stepped up their campaign to win Barnburner converts to antislavery constitutionalism. Playing to the Barnburners’ unease with the Calhoun-Yancey faction, Bailey argued that the proviso, in its current formulation, failed to meet the principal claim of the Calhounites – that the right to slave property was a general right guaranteed protection under the Constitution. Antislavery constitutionalism said the exact opposite: slaves were persons, not property, under the Constitution, and they could not be treated as property by federal institutions. “This principle we repeat again, for the twentieth time without contradiction, has been settled by the Supreme Court of the United States, in the case of Prigg vs. Pennsylvania, and in that which is called the Mississippi case [Groves v. Slaughter].” In the latter case, “the Court held that the slaves were regarded as persons, sustaining peculiar relations, and not as property; that character being fixed upon them by the local law of the States,  

11 ibid., Nov. 4, 11, 1847. See also Johnson, Liberty Party, pp. 80-82; Niven, Chase, pp. 102-103.
12 National Era, Nov. 4, 11, 1847.
which had no force beyond the jurisdiction of the Power enacting it.”13 Bailey emphasized the strict-construction quality of antislavery constitutionalism and its roots in the *Somerset* tradition.

Chase, meanwhile, kept up his contacts with antislavery Whigs and Democrats. At first, he hoped that the Northern Democracy would reform itself on “True Democratic” principles. To that end he advised Hale to stay in the Democratic Party and build on the successes of the New Hampshire Alliance; but as the New Hampshire experiment wilted, so too did the idea of an antislavery Democracy. From late 1847 on, Chase focused his energies on fusion, using New Hampshire as the template for a national coalition. To antislavery factions in both parties, he suggested a joint Democratic-Whig ticket, with McLean as the vice presidential choice. He sent this proposal to several antislavery Whigs, including Seward and Giddings, all while rejecting their entreaties for him to join the Whigs.14

Fusion advocates received a major boost in May, 1848, when the Barnburners walked out of the Democratic National Convention in Baltimore. In choosing Cass as their nominee, the Democrats made popular sovereignty their official policy on the territories, eschewing the proslavery doctrines of the Calhounites. The convention’s resolutions also struck a middle ground, ignoring Calhounite demands in favor of the usual references to non-interference and anti-abolitionism. But Southern extremists still managed to influence the proceedings by getting the convention to recognize the Hunker faction of the New York Democracy, leaving the Barnburners in the cold.15

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13 *ibid.*, Jan 27, 1848.
14 See, for example, Chase to Hale, Jan. 30, 1846, May 12, 1847, *Chase Papers*, vol. 2, pp. 122-123, 151-154. See also Niven, *Chase*, pp. 103-108.
A furious William Yancey led the Southern assault. Yancey introduced a minority report condemning popular sovereignty and insisting on the right to bring slaves into the territories. Later, with John C. M'Gehee of Florida and J.M. Commander of South Carolina, he pushed a resolution against interference with slave property *anywhere* in the Union, in the territories as well as the states. In a separate speech, he argued that the slavery-related compromises in the Constitution amounted to a general guarantee for slave property, any denial of which would violate Southern “equality.” Yancey’s offensive pushed the more radical Barnburners toward a more aggressive antislavery stance. To be sure, the convention rejected Yancey’s proposals, but this was little consolation to the Barnburners, whose recognized the Slave Power’s role in their marginalization. Provoked by Yancey’s proslavery nationalism, Barnburner Preston King rose to the podium and condemned the Alabama Platform. A ban on slavery in the territories, he argued, would have no bearing on state equality, since the right to slave property had no equivalent in the North. When the Barnburners walked out on the convention’s the third and final day, they were closer than ever to adopting antislavery constitutional as the basis of the proviso.16

Conscience Whigs led a similar revolt at the Whig national convention in Philadelphia on June 7. For months, Taylor’s nomination had seemed like a foregone conclusion, yet antislavery Whigs were optimistic that they could get Taylor to endorse the proviso, and, barring that, replace him with another candidate who would. They made several attempts at forcing the antislavery agenda into the convention’s platform. Daniel R. Tilden of Ohio introduced a resolution endorsing Congress’s power to ban slavery from the territories. John A. Bingham offered to back Taylor if and only if the general endorsed the Wilmot Proviso. Charles Sumner

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gave another blistering speech on the slavery question, considered by some to be his greatest speech until that point. But these gambits were for naught: the majority of the delegates ignored the Conscience revolt and overwhelmingly backed Taylor for the nomination. At this point, the Conscience Whigs walked out of the convention and agreed to meet again later in the month to consider the option of coalition.\textsuperscript{17}

\textit{The Pearl Affair}

Through May, 1848, most Barnburners continued to support the proviso on the relatively narrow ground of legislative precedent (the Northwest Ordinance) and instrumental constitutional arguments (the Rules and Regulations clause). But a highly-charged episode in the early summer – the famous \textit{Pearl} affair – underscored the national scope of the slavery problem and forced Barnburners to confront “national” slavery, not just slavery expansion. As a result, they began to inch closer to Chase and Bailey’s position, lured by the latters’ incentives while pushed by the more brazen arguments of Calhounites. Union with antislavery Whigs and Liberty men quickly gained favor among the more radical Barnburners.

The \textit{Pearl} affair roiled Washington, D.C. over the summer of 1848, escalating tensions in an already tense environment. On April 13, the \textit{Pearl}, a vessel commandeered by one Edward Sayres, arrived in Washington, D.C. A few weeks before, in the port of Philadelphia, Sayres had met a Daniel Drayton, an abolitionist who had convinced Sayres to lend his vessel to the rescue of dozens of slaves from the nation’s capital. Drayton was the white agent for free black activists in Philadelphia, who were working in tandem with free blacks in Washington on behalf of a Daniel S. Bell, a slave trying to free his family. In the early morning hours of April 16, forty-six slaves boarded the \textit{Pearl}. Just before dawn, the ship sailed down the Chesapeake and

\textsuperscript{17} Wilson, \textit{Slave Power}, pp. 133-9; \textit{National Era}, June 15, 1848.
turned northward. Sayres was only a few miles from the capital when strong winds forced him to anchor in a small cove, leaving the fate of the forty-six in limbo. As the sun rose over Washington, groggy-eyed and incredulous slaveowners found their slaves missing. In the interrogations that followed, one slave exposed the plot. A group of armed men then set off in pursuit of the *Pearl*. By late morning, they found the still-anchored ship and recaptured all the slaves on board. The posse then marched the runaways back to the capital, where an angry mob had assembled to hound the kidnappers Drayton and Sayres. For their own protection, the two men were whisked to a local jail under the control of a U.S. marshal; they would stay there for the next few months as they awaited trial. A spirit of vigilantism pervaded the District. The mob, oblivious to the machinations of the city’s free black community, blamed the “kidnapping” on white abolitionists and pinned their fury on Gamaliel Bailey and the *National Era*. For two straight nights, hostile crowds gathered outside Bailey’s office, throwing rocks and demanding Bailey’s immediate departure from the capital. Bailey himself denied any involvement in the rescue attempt and refused to leave the city. He used his editorial pulpit to once again distinguish his brand of “constitutional abolition” from the law-breaking schemes of fringe abolitionists. The spirit of mob action finally died down after city authorities took action two days later.  

But the *Pearl* issue did not go away; in fact, it became a lightning rod for slavery debate in Congress, where it raised obvious parallels to the territorial issue. Antislavery leaders like Joshua Giddings used the affair to criticize slavery and the slave trade in Washington, D.C. Giddings delivered a powerful speech in favor of the *Pearl* runaways, and when they were put for auction at the District’s slave market, he redoubled his agitation, even going to visit Drayton

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and Sayres in prison. In the Senate, John P. Hale introduced a bill holding local governments inside the District of Columbia liable for property damages caused by mob activity. The bill said nothing about slavery, but it nonetheless riled Southern senators. For one thing, it ignored what they considered to be the initial grievance of the whole affair, the kidnapping of slave property – the basis of the mob’s legitimacy. Second, by ignoring the abduction of slave property, Hale’s bill for property protection assumed that slaves were not universal property, and thereby denied the crucial premise of the Southern position on slavery in federal areas, including in the territories. The bill went out of its way to exclude slavery from what it called “natural” forms of property in the District: “... any church, chapel, convent, or other house... and dwelling house... any ship or vessel, ship yard or lumber yard, any barn, stable, or other outhouse, or any articles of personal property...”\(^{19}\)

Calhoun and his proslavery colleagues instantly recognized Hale’s move. Calhoun denounced Hale as a dangerous lunatic. Henry Foote of Mississippi insisted that, by undermining the safety of slave property in the District of Columbia, the Pearl affair had discouraged slaveowners from bringing their slaves there. “[I]n this covert and insidious manner,” Foote declared, “the abolition of slavery in the District of Columbia may be accomplished.” For Foote, Hale’s bill “obviously intended to cover and protect negro stealing!” It was the latest evidence of Northern aggression against slaveowners – their property, their equality, their freedom. In one of the more infamous remarks to emerge from the slavery conflicts of 1848, Foote then threatened Hale with the hangman’s noose: “I invite him [to Mississippi], and will tell him beforehand, in all honesty, that he could not go ten miles into the interior before he would grace one of the tallest trees of the forest, with a rope around his neck.

\(^{19}\) Cong. Globe, 30\(^{th}\) Cong., 1\(^{st}\) sess., app., p. 501. On Giddings’s speech, see Fehrenbacher, Slaveholding Republic, pp. 81-82.
with the approbation of every virtuous and patriotic citizen; and that, if necessary, I should
myself assist in the operation.”

With tensions mounting, Illinois Senator Stephen Douglas stepped into the breach. Douglas could see the changing landscape of American politics, the way in which pro- and antislavery fringes had moved quickly and inexorably to the fore as the territorial crisis deepened. “The extremes meet,” he observed, aptly. To his mind, there was no reason why Southerners should indulge the zealous crusading of John P. Hale and his ilk. Every inflammatory retort issued by the Calhounites gave rise to an abolitionist candidate in the North. Their response to the Pearl affair in Congress weakened attempts to find a suitable compromise over the territories. Already, Douglas was positioning himself as the reliable navigator between a proslavery Scylla and an antislavery Charybdis.

The Pearl affair also revived agitation over the District of Columbia’s slave codes. By early June, thousands of antislavery petitions poured into Congress demanding abolition of slavery and the slave trade. Amos Tuck, a Conscience Whig, moved to introduce them in the House but was defeated by a vote of 89 to 54. On June 19, Whig John Crowell of Ohio introduced a bill for repealing the District’s slave codes. In the bill’s defense, Crowell resorted to the first principle of antislavery constitutionalism – that Congress has no power to establish or continue slavery. Such a power “cannot be found,” Crowell said, “for it was not given, nor was it intended to be given; and it cannot be inferred upon any just principles of interpretation,

20 Cong. Globe, 30th Cong., 1st sess., app., p. 502. Also in National Era, Apr. 27, 1848; May 4, 1848. It was precisely this kind of language, Bailey wrote in the National Era, which gave northerners “additional reason for setting limits to the aggressions of a Power stamped with the attributes of the darkest Despotism.” National Era, May 4, 1848.
22 On Douglas’s role in the emerging crisis, see Potter, Impending Crisis, pp. 74-75; Wilentz, Rise of American Democracy, pp. 642-644.
23 National Era, Jun 15 1848.
recognized as authoritative by sensible men.” Nor was it a “natural” or “original” right, as the Calhounites were insisting with regard to slavery in the territories. Together with Tuck’s measure, Crowell’s appeals fell on deaf ears. But everyone knew that his arguments applied as much to the territories as they did to Washington, D.C. In other words, even though it failed to repeal slavery in the District, Crowell’s campaign heightened the sense among antislavery leaders that this was not just a territorial issue. It was the same old battle over slavery and federal power, raised to dangerous new levels.

Three Fusion Conventions

In late June, all three groups – Liberty coalitionists, Conscience Whigs, and Barnburner Democrats – met separately to discuss the idea of fusion. Chase and Bailey set the agenda, organizing an “Ohio Free Territory Convention” for June 21. Chase drafted a set of emphatic resolutions demanding “NO MORE SLAVE STATES AND NO MORE SLAVE TERRITORY.” Crucially, Chase’s resolutions grounded the proviso in antislavery constitutionalism. Congress could not establish slavery in the territories, he wrote, since that would directly contradict its duty to “establish justice” and would violate the Due Process Clause of the Fifth Amendment. Congress could, however, prohibit slavery’s “introduction” on the basis of the municipal theory and the precedent set by the Northwest Ordinance. Chase’s “Free Territory” resolutions differed from his earlier Liberty resolutions in that they dealt solely with the western territories, but in substance they were no different from Chase’s previous statements; they simply applied to the territories the same logic that pertained to Washington, D.C., the free states, and the high seas. Chase concluded the resolutions with praise for the antislavery

\[\text{ibid.}, \text{p. 958.}\]

\[\text{On renewed demand for abolition in the District of Columbia in the late 1840s, see Fehrenbacher, Slaveholding Republic, pp. 81-87.}\]
elements in both parties. He thanked Barnburners for “maintaining the principles of Jefferson against the Extension of Slavery” and lauded antislavery Whigs for their commitment to principle. (Chase added a nod to McLean’s candidacy, praising the justice’s theory regarding the proviso’s concordance with the Constitution.) Finally, he called for a convention of “free soil” supporters to meet in Buffalo on August 9. Bailey cheered the resolutions in the National Era, calling them “a platform... broad enough for all the friends of freedom to rally upon in the present crisis.”

The Barnburners met the very next day at Utica, where they confirmed their support for the Wilmot Proviso. Two general camps emerged at the convention: the radicals, led by Preston King, William Cullen Bryant, and David Dudley Field, who were receptive to the constitutional arguments of Chase and the Liberty coalitionists; and the more conservative Democrats like John Van Buren, Samuel J. Tilden, and John A. Dix. The radicals expressed interest in fusion, while the more conservative group hesitated on the grounds that regeneration of the Democratic Party would be more effectual. Despite these fissures, both groups backed Martin Van Buren as the Barnburner nominee for president.

Knowing in advance that he would be nominated, Van Buren sent a letter to the convention explaining his views on the territories. The letter is important because it highlighted the fundamental agreement between Van Buren’s outlook and Chase’s “Free Territory” resolutions, and also because it underlined the awkwardness of Van Buren’s continued opposition to abolition in Washington, D.C. The letter began, like Chase’s speeches, with an

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28 Proceedings of the Utica Convention, for the Nomination of President and Vice-President of the United States, held at Utica, N.Y., June 22nd, 1848 (Albany: 1848); Wilson, Slave Power, pp. 140-141; National Era, June 29, 1848. For context on the Utica Convention, see Earle, Jacksonian Antislavery, pp. 74, 77; Rayback, Free Soil, pp. 206-212; Mayfield, Rehearsal for Republicanism, pp. 109-11.
explanation of the founders’ intentions. The founders knew that a “speedy abolition” of slavery was impossible in their own day, so they established a policy of restricting slavery to the states where it already existed. That policy “guarantee[d]” to the slave states “an exclusive control over the subject within their respective jurisdictions,” but prevented “by united efforts, its extension to territories of the United States, in which it did not in fact exist.” Congress fulfilled this policy “with alacrity and good feeling,” beginning with the Jefferson-inspired Northwest Ordinance.

The Northern states, meanwhile, bore their obligations to slavery and even exceeded them by agreeing to slavery in Washington, D.C. and stifling abolitionist agitation. But when it came to the territories, Congress had a clear right to ban slavery. Like Chase (and Weld before him), Van Buren listed the many precedents for Congress’s power to prohibit slavery, beginning with the Northwest Ordinance. The power to ban slavery was “fully granted to Congress by the Constitution.”

Van Buren’s views on the constitutionality of a ban went back to 1836, when he had very clearly granted the right of Congress to abolish slavery in Washington, D.C. “I distinctly announced my opinion in favor of the power of Congress to abolish slavery in the District of Columbia,” he wrote. “The question of power is certainly as clear in respect to the Territories as it is in regard to that District.” But this draw attention to a core inconsistency in Van Buren’s position: was he still opposed to abolition in the national capital? Yes, he wrote; he was “very decidedly opposed to its exercise there... for reasons which were then, and are still satisfactory to my mind.” In other words, Van Buren separated Washington, D.C. from the territorial question. From the point of view of Liberty coalitionists, Van Buren recognized in principle that

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29 *Proceedings of the Utica Convention*, p. 11.
antislavery constitutionalism was correct, but he was unwilling to act upon that recognition by going beyond the immediate issue of the territories.\(^{30}\)

Having explained the founders’ intentions and defended the constitutionality of non-extension, Van Buren deplored the proslavery course of his Democratic Party. By endorsing Cass and the theory of popular sovereignty, he wrote, Democrats had broken from the founders’ policy and put themselves in opposition to “civilized” opinion.\(^{31}\) This point underscored another key difference between Van Buren’s Barnburners and Chase’s coalitionists: for Chase, the story of the Democratic Party’s proslavery deviation was indistinguishable from the rise of the Slave Power, going back at least to the 1790s, whereas for Van Buren that digression began only in the 1840s, with the annexation of Texas. The twin assaults of the Alabama Platform and popular sovereignty confronted Van Buren with the reality of nationalized slavery, but as yet he did not see the territorial issue as an element of a broader constitutional conflict over slavery. At this point he saw no need to endorse denationalization.

Just moments after reading Van Buren’s letter to the crowd, B.F. Butler of New York introduced the convention’s resolutions. They nominated Van Buren for the presidency and reiterated the Barnburners’ commitment to the federal consensus and the Wilmot Proviso. Slavery was “a great moral, social, and political evil – a relic of barbarism which must necessarily be swept away in the progress of Christian civilization.” Allowing it to expand into the territories would be “an act of gross injustice against all the free laborers of our own country.” The resolutions insisted that Congress could ban slavery from the territories, but they did not base that claim on antislavery constitutional grounds; instead, they argued that

\(^{30}\) ibid., p. 12.  
\(^{31}\) ibid., pp. 13.
Congress’s power derived the Rules and Regulations (Territories) Clause of the Constitution.\textsuperscript{32} This remained a key difference between the Barnburner position and that described in Chase’s “Free Territory” resolutions the day before.

Yet there were signs that some Barnburners were dissatisfied with this defense, viewing it as a weak response to the Calhounites’ efforts at nationalizing slavery. The president of the convention, Samuel Young, depicted the South’s anti-proviso conventions as the very embodiment of the Slave Power. The Alabama Platform, Young argued, made slavery into a national institution. By insisting on the right of slaveowners to bring slave property in the federal territories, the Platform assumed slavery was “entitled… to all the privileges and immunities of the United States, [as] belong to it in the States.” This reasoning did not stop at the territories; it also applied to the free states and other federal jurisdictions. If Northerners did not resist, the Slave Power would make the U.S. government into the “instrument of abolishing Freedom, and establishing slavery.”\textsuperscript{33} Young’s perspective more clearly aligned with Chase’s “Free Territory” resolutions, which made the territorial question into the first line of the much larger battle against nationalized slavery. In late June 1848, most Barnburners were still coming around to that perspective, but voices like Young’s grew louder as the Calhounites kept up their demands and as the Liberty coalitionists pointed to a stronger antislavery response.

Six days later, on June 28, thousands of antislavery Whigs descended upon Faneuil Hall in Boston for what was dubbed the “People’s Convention.” Disenchanted with Taylor, the delegates backed the move toward fusion. Joshua Giddings, J.C. Lovejoy, Charles Francis Adams and Charles Sumner all gave rousing speeches in favor of coalition around the platform

\textsuperscript{32} \textit{ibid.}, p. 16.
\textsuperscript{33} \textit{ibid.}, p. 22.
of denationalization. Each speaker framed the territorial issue as one phase in an ongoing battle between “national” slavery and “national” freedom. Non-extension was a good start, Sumner said, but it would not overthrow the Slave Power. That required a stronger policy, namely, divorcing slavery from the federal government and squeezing it in the states. “[T]his great cause of Freedom, to which we now dedicate ourselves, will sweep the heart-strings of the People!”

Northern voters would follow antislavery elements from the major parties in coalescing around denationalization policy.

**Building a Coalition**

Liberty coalitionists in Ohio knew that antislavery Whigs were committed to denationalization; the problem for them was getting the Barnburners to share that commitment. In the weeks leading up to the August 9 Buffalo Convention, Chase, Bailey and other Ohio fusionists increased their efforts to pull Barnburners past non-extension and toward denationalization. In a *National Era* editorial aimed squarely at Barnburners, Bailey criticized the Barnburners for missing an opportunity in Utica to take the lead in a broader antislavery coalition. He warned them that a tepid stance on slavery would garner little sympathy in the North, where more voters than ever opposed slavery itself and saw the proviso as a national rather than a territorial issue. Barnburners therefore ought to “throw themselves wholly, heartily, trustingly, upon the Popular Sentiment in favor of Human Liberty.”

Bailey then set forth the main obstacle to a Barnburner-Liberty union. There were some Barnburners, he argued, who seemed to recognize the conflict’s true dimensions. Preston King

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35 *National Era*, June 15, 1848.
was foremost among this group. But most Barnburners did not seem ready to go beyond non-extension toward denationalization; their opposition to slavery stemmed from a racist impulse to keep the territories “safe” for free white labor, not a desire to end slavery. Bailey recognized as a political fact that it was unlikely the Barnburners would adopt a “platform of thorough, consistent, anti-slavery principles.” Yet why should the Barnburners “be at pains to place a great gulf between themselves and those who do stand there?” Bailey pressed the Barnburners to drop their increasingly tenuous claim to being concerned with only slavery the territories, not slavery’s relationship to the federal government. “If not prepared fully to resist an evil,” he wrote, “at least concede nothing to it. If policy prohibit the open acknowledgment of a Truth, let conscience and self-respect operate so as to prevent a denial of it.”

Ohio coalitionists like Samuel Lewis, a long-time member of the Cincinnati clique, insisted that fusion take place on strictly Liberty grounds – meaning denationalization, not just non-extension. At the Ohio State Liberty Convention on June 22 (the day after Chase’s “Free Territory” convention), Lewis pushed through resolutions demanding that any future coalition be based on the “Free Territory” resolutions. It was not enough for a coalition to endorse non-extension; it must stand for the “repeal of all unjust and partial legislation, and for the Abolition of Slavery throughout the Union, by the constitutional action of the National and State governments.”

A Proslavery Speech

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36 *ibid.* As part of his campaign to woo Barnburners, Bailey used the *National Era* to distinguish denationalization from the twin extremes of Garrisonian disunion and direct abolition (the latter of which was now associated with Gerrit Smith’s Liberty Leaguers). See *ibid.*, July 6, 1848.
37 *National Era*, July 6, 1848.
As the Ohio coalitionists tried to “pull” Barnburners in a radical direction, the Calhounites inadvertently “pushed” them in the same direction. In late June in the Senate, Calhoun delivered perhaps his most proslavery speech yet. The speech grew out of renewed controversy over the Oregon Bill. Back in May, the Polk administration – now anxious to break the deadlock in Congress – pushed for a settlement based on the Missouri Compromise line. Calhoun was initially receptive; he was opposed to the measure on principle but was willing to accept it as a political compromise. With Calhoun’s backing, Polk dictated to Senator Jesse Bright a plan to amend the Oregon Bill by adding a sentence extending the Missouri line to the Pacific Ocean. Bright did as he was told in late June. The bill – with Bright’s amendment attached – passed in the Senate and went to the House for debate. Radical Democrats reacted viscerally, spurning the bill and redoubling their commitment to non-extension. New York Barnburner John A. Dix came out strongly against slavery extension, citing all the usual precedents for Congress’s power to block slavery from the territories – the Rules and Regulations clause, the Northwest Ordinance, and several Supreme Court decisions.  

It was at this point that Calhoun rose to the podium and delivered his proslavery lecture. His speech went beyond the immediate issue of the territories by claiming in stark terms that there was a constitutional guarantee for slave property. “Slave property was the only description of property recognized by the Constitution.” Calhoun then linked that claim to his theory of state sovereignty: “if we disturb this property, it is a denial that the Constitution intended there should be an equality between all the States.” Congress had no power under the Constitution to exclude slavery from the territories. The Rules and Regulation clause concerned the land only, not the population of the territories. The same limits to Congress’s power that existed in Washington, D.C applied also to the territories. Here, Calhoun explained the theory of state sovereignty in a

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38 Dix’s speech is in Cong. Globe, 30th Cong., 1st sess., p. 874. See also Potter, Impending Crisis, pp. 65-66.
revealing analogy between the Exclusive Legislation and Rules and Regulations clauses. Just as Maryland had not ceded sovereignty to Congress over its part of the District of Columbia, the states as a whole did not cede sovereignty over the territories to the U.S. government. There were no “national” territories separate from the interests of the states. “The power of Congress is not absolute in the Territories. It is limited. We are trustees to administer the benefits of government to the Territories. To whom does the property belong? To the United States. Who are the United States? The States in their sovereign and independent character. There is no right in the Government of the United States to make a discrimination between the citizens of one State and those of another.” Calhoun concluded his speech by renouncing the practical application of the principle that “all men are created equal.”

By the middle of July, a bisectional House committee led by Senator John Middleton Clayton set to work on a grand compromise for organizing the California and New Mexico territories. After dismissing several proposals, the committee abandoned the idea of extending the Missouri line to the Pacific. Instead, it issued a report based largely on Calhoun’s thinking: Congress would not interfere with slavery in the territories; Oregon would retain the laws against slavery that the current provisional government had adopted; the territorial governments of California and New Mexico would not pass laws concerning slavery. The only part of the report that directly contradicted Calhoun’s position was a stipulation that slaves brought into the territories could sue in federal courts. This was a crucial condition, and it marked the first time Congress attempted to foist the territorial question onto the courts.

The introduction of the Clayton Bill came at a crucial moment for Barnburners. It was the capstone to what seemed the latest and most aggressive Southern offensive regarding

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39 Cong. Globe, 30th Cong., 1st sess., p. 876. See also Niven, Calhoun, pp. 315-316.
40 Potter, Impending Crisis, pp. 73-77.
territorial organization. Coming so soon after Calhoun’s hardline proslavery speech, the bill looked to them like another capitulation to the Slave Power, another obsequious recognition of “national” slavery. Just as it had done four years before with Texas, the Slave Power used its leverage in Congress to put federal power in the service of slavery expansion. John Van Buren captured the Barnburner zeitgeist when he wrote in a published letter that the Calhounites were trying to “to degrade our National name and flag in the face of the civilized world, and would rescue our glorious Union from the perils to which they are now exposing it, by suicidal attempts to make it the instrument of overturning freedom and propagating the slave and curse of slavery.”  

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Anti-Coalitionism in the Liberty Ranks

By July, coalitionists in the Liberty Party were growing more optimistic that Barnburners would join Liberty men and antislavery Whigs in a political coalition based on the denationalization program. Yet most Liberty men were far less willing than Bailey and the Cincinnati clique to give Barnburners the benefit of the doubt. This was especially true in the East, where Liberty leaders had only recently come around to backing Hale’s candidacy. There, resistance to coalition was fierce, especially as the likelihood of fusion grew more apparent from June into July, 1848. Opponents of coalition argued that fusion would dilute the principles of the Liberty Party by exposing the party to corrupt and ambitious office-seekers, who cared nothing for the rights of slaves. In his “Address to the Friends of Liberty,” first printed in the Emancipator and then copied in the National Era, Lewis Tappan warned against joining the “Free Territory” movement, arguing that it would distract from abolition by focusing all energy

41 An excerpt of Van Buren’s letter was published in the Cleveland Signal, July 19, 1848, in Lucy Fisher West, et. al., eds., The Papers of Martin Van Buren (Alexandria: Chadwyck-Healey, 1987) [hereafter cited as Van Buren Papers].
on the territorial question. “Non-extension is not abolition, though [it is] included in it,” he wrote. For Tappan, it was imperative that Liberty men stand their ground and resist fusion with antislavery Whigs and Democrats. They must resist the fleeting appeal of an anti-extension candidate and vote instead for denationalization and the true antislavery candidate, John P. Hale.  

Bailey responded to Tappan in a full-length editorial in the National Era. Drawing his usual distinction between reform societies and political parties, Bailey explained that as long as the federal consensus existed, no political party – not even the Liberty Party – could demand universal abolition. To be sure, the Liberty Party could “augment Anti-Slavery sentiment, and in this way promote indirectly and ultimately the abolition of all slavery, but this is not the object of its political action.” Northerners could only act against slavery in areas where they had political responsibility, namely, the free states and federal jurisdictions. In these areas, the only antislavery policy that could be enforced legitimately was denationalization – “and no other.” At the moment, the Liberty Party was focused on the federal territories, the front line in a much wider battle over slavery and federal power. This was not a harbinger of dilution; it was a strategy. By “concentrating for a season its labors” on the territorial question, the Liberty was not “losing sight of its great object,” it was “attending strictly to it.”

Bailey illuminated his point with a pair of fitting analogies. The first was a military analogy: just as Winfield Scott’s assault on Vera Cruz was one part of his Mexican War strategy, the current focus on the territories was one aspect of a war against the Slave Power. The second analogy used the image of a mountain climber to explain the link between non-extension and abolition. “The summit of the mount is the final aim of the weary traveller who climbs its steeps.

42 National Era, July 6, 1848. See also Johnson, Liberty Party, pp. 80-84; Sewell, Ballots for Freedom, pp. 132-133; Rayback, Free Soil, p. 183.
43 National Era, July 6, 1848. See also Harrold, Bailey, pp. 118-119.
Can he reach it but by steps? To extend slavery is to augment its power, and multiply obstacles to its abolition. To restrict it, is to weaken its power, and pave the way for its abolition. Slavery-restriction, then, is a necessary step towards slavery-extinction. To unite in a movement for the former is to open a way for the latter.” Once it became clear that non-extension was the first line of attack, there was no reason to fear a dilution of principle. “The union of Liberty men in a general movement to prevent the extension of slavery, does not compromise necessarily their main object, whether that be the divorce the General Government from all slavery, or the abolition of slavery in the whole country by Federal action.”

**Pressuring Barnburners to Endorse Denationalization**

Bailey’s chief correspondent for the *National Era*, the poet John G. Whittier, recognized that coalition would be impossible if the Barnburners stuck to non-extension. In an editorial published in the *National Era* on July 20, less than a month before the proposed fusion convention at Buffalo, Whittier pressed the Barnburners to go beyond non-extension and endorse denationalization. The Wilmot Proviso was “too narrow” to be the foundation of a “great party,” especially given that the upcoming session of Congress could render it meaningless by extending the Missouri Compromise line to the Pacific. “A mere cold and timid negation will not answer – there must be something positive. The axe must be laid at the root of the tree; the mere lopping off a branch here and there is not worth the effort which it costs.” To bolster the point, Whittier cited Charles Sumner’s 1846 speech to the Whig convention in Worcester, Massachusetts, in which Sumner made divorce the central pillar of antislavery coalition.

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44 *National Era*, July 6, 1848.
45 *ibid.*, July 20, 1848.
By the middle of July, Bailey was using his pulpit at the National Era to both lure Barnburners and placate wary Liberty men. In one editorial published on July 13, he told Barnburners that Liberty men would enter a coalition “provided the movement be regarded as progressive, to the extent of the Federal Constitution, and do not involve us in voting against what we hold to be vital principle.” At the same time, Bailey tried to ease Liberty apprehension over Martin Van Buren, the Barnburner candidate for president. Bailey recognized Van Buren’s record in the gag rule and Amistad affairs but – rather unconvincingly – described that period (roughly 1836-1840) as an aberration in an otherwise antislavery career that began with Van Buren’s opposition to Missouri’s admission in 1820.46

Bailey then returned to his Barnburner audience. Martin Van Buren’s stance on slavery in Washington, D.C. was a troubling issue for many antislavery activists, not just Liberty men. Van Buren’s statement on the subject at the Utica convention – that he was “very decidedly opposed to its exercise there... for reasons which were then, and are still satisfactory to my mind” – flatly contradicted the position taken up by Liberty men and antislavery Whigs. If true, it would almost certainly prevent a coalition from forming. Bailey then threw down the gauntlet, asking Van Buren to clarify his position on slavery and abolition in Washington, D.C.47

Bailey’s public ultimatum got the attention of coalition-minded Barnburners, who began urging Van Buren to change his stance. Preston King warned Van Buren that his position would prove a liability over the long haul, as it would prevent coalition and undermine electoral support for antislavery Democrats generally. “I am in favor of abolishing slavery in the District of Columbia,” King wrote. He believed it to be a foregone conclusion that Barnburners would attend the Buffalo Convention in August and that Van Buren would be nominated for the

46 ibid., July 13, 1848.
47 ibid.
presidency. If you are to “consolidate the friends of Freedom,” King told Van Buren, you
“should not oppose the wishes of your friends in favor of abolishing slavery in the District...”
Two anxious Barnburners sent Van Buren a copy of Bailey’s editorial and urged him to endorse
abolition in the District of Columbia. Opposition to his current policy was growing quickly, and
“something had to be done.” To this end, they suggested that he publish an editorial responding
to Bailey’s initial query.  

Meanwhile, Chase used his correspondence with leading Barnburners to urge coalition
around the denationalization program and force Van Buren to change his policy on Washington,
D.C. Chase included an invitation to the August 9 Buffalo Convention in a letter to John Van
Buren (Martin’s son). In the same letter, Chase suggested replacing the Barnburner nominee for
Vice President, Henry Dodge of Wisconsin, with Justice John McLean, whose views on slavery,
Chase argued, paralleled those of the late Silas Wright. A Martin Van Buren-John McLean
ticket would then sweep the North, as voters rallied around the proponents of the freedom
national tradition. Chase then raised the issue of Martin Van Buren’s continued opposition to
abolition in Washington, D.C. – a policy that, in Chase’s view, clashed not only with the views
of Liberty men and Conscience Whigs, but also with those of the Radical Democrats and the
Northern electorate generally, who, he argued, increasingly favored denationalization over non-
extension. Van Buren’s position, Chase wrote, was “very distasteful to almost all anti slavery
men, whether whig, democratic or liberty.”

According to Chase, Van Buren’s stance denied what was no longer deniable – that the
territorial issue was part a larger struggle between “national” slavery and Northern freedom. By
its very nature, the territorial issue brought up “the whole slavery question.” Van Buren’s

48 King to Van Buren, July 12, 1848, in Van Buren Papers.
49 [names illegible] to Van Buren, July 14, 1848, in ibid.
candidacy would go nowhere fast if he stuck with non-extension as a platform. “Our contest is with the Slave Power, and it will break us down, unless we break it down. The People will not stop with the exclusion of slavery from the territories: they will demand its complete denationalization.” Public opinion had changed drastically since 1836; surely Van Buren would follow his base in dropping his opposition to abolition in the national capital.51 Samuel Tilden responded to Chase’s letter on John Van Buren’s behalf. Barnburners would definitely resist substituting McLean for Dodge, Tilden wrote, but they had agreed to send delegates to the Buffalo Convention, even though they considered it a mass gathering rather than a formal political convention. On Martin Van Buren’s position on Washington, D.C., Tilden said nothing.52 Into August, the issue lingered like a dark cloud over the process of coalition-building.

One week before the Buffalo convention was to meet, Bailey sent his own letter to Van Buren pressing him on the D.C. question (Bailey included a copy of his July 13 editorial from the National Era). This letter did more than seek answers; it also primed Van Buren for the adoption of denationalization in Buffalo. As he did so many times before in his newspaper, Bailey distinguished the divorce program from the more extreme doctrines northerners often associated with the Liberty Party, including disunionism and state abolition. This time, however, he was making that distinction in an effort to sway the policy opinions of the coalition’s leading presidential contender.53

On the same day Bailey sent his letter to Van Buren, John G. Whittier published another editorial balancing Barnburner overtures with Liberty assurances. On the one hand, Whittier advised Liberty men to withdraw Hale’s nomination if Barnburners agreed to a denationalization

51 ibid.
52 Tilden to Chase, July 29, 1848, in ibid., pp. 179-181.
53 Bailey to Van Buren, August 2, 1848, in Van Buren Papers.
platform. On the other, he proposed a set of resolutions to which all potential fusionists had to agree—what he called a “proper platform—a stable basis.” The first resolution captured the principles of antislavery constitutionalism in a single sentence: “That the Constitution of the United States, framed to establish justice, promote the general welfare, and secure the blessings of liberty, denies to the General Government the power to deprive any person of life, liberty, or property, without due legal process, and gives to the Congress of the United States no more power to create a slave than to create a King.” This resolution had it all: the liberal principles of the Preamble, the Due Process clause, and R.D. Davis’s now-famous phrase, which Bailey and the Ohio coalitionists had reworked into the slogan of antislavery politics.

Whittier’s second resolution called for the denationalization of slavery: “That all acts of Congress, therefore, having their object the protection and legalization of slavery in any portion of the national domain, or in any Territory or District under its exclusive legislation, are unwarranted by the Constitution, disgraceful and inhuman, and should be forthwith repealed, and the law of Liberty extended and enforce over every rood of American soil not included within State limits.” It remained to be seen whether the Buffalo Convention would consider these resolutions. But by inserting into the conversation a clear synopsis of antislavery constitutionalism—what Chase called “True Democratic” principles—Whittier reminded Liberty men and Barnburners of their essential similarity on the slavery question. As we shall see, his editorial came at a critical moment in the move toward fusion.

At this point in our story, it is worthwhile to step back and look at the tectonic shifts which were making fusion possible in 1848. Until Herkimer and the events of early 1848,

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54 National Era, August 2, 1848.
55 Ibid.
radical Democrats had defended the Wilmot Proviso by way of the Northwest Ordinance precedent and the Constitution’s Rules and Regulations clause. Fusion with antislavery Whigs and Liberty men would have been impossible had the radicals continued to tow that line. But after Herkimer, the Barnburner’s radical wing became more receptive to Chase and Bailey’s warnings that the territorial issue was one theater in a larger conflict over slavery’s constitutional status. As 1848 progressed, more conservative Barnburners found it increasingly difficult to hold the line at non-extension. For one thing, the aggressive proslavery counteroffensive punched holes through their constitutional defenses, leaving them with no viable response to the claim that slavery was guaranteed protection by the Constitution. Faced with the visceral proslavery reaction to the *Pearl* affair in May and June, Preston King and others sought out stronger methods of resistance, something that could meet the exigencies of the moment. In this sense, events were “pushing” the Barnburners beyond non-extension and toward denationalization.

At the same time, the Barnburners were being “pulled” toward denationalization by Chase, Bailey, and the Liberty coalitionists, who recognized that the proviso addressed only a portion of the wider constitutional crisis. As a lawyer schooled in the art of discerning core principles, Chase looked past the clamor of daily events to determine how, exactly, denationalization could draw the Barnburners into a coalition. He began with his resolutions at the Ohio Free Territory Convention on June 21, which set the terms for a future coalition by emphasizing the limited-powers, states’-rights language of the Democratic Party. At the Barnburner convention which met the next day in Utica, New York, there were palpable signs of dissatisfaction with non-extension, evidence that more radicals wanted the potent denationalization platform. As Chase and Bailey worked feverishly behind the scenes,
Calhoun’s proslavery speech in the Senate – delivered on the very same day that antislavery
Whigs convened at Faneuil Hall for the third of three fusion conventions – pushed more
Barnburners to abandon non-extension and embrace denationalization.

Still, nothing was certain, and as the Buffalo convention approached, Liberty coalitionists
stepped up their efforts to ensure Barnburner support for denationalization. Bailey warned that
fusion was possible only if Whigs and Democrats accepted denationalization, while John G.
Whittier reworked Chase’s Free Territory resolutions into terse abstracts of Jacksonian
antislavery. They also turned up the heat on Van Buren himself, recognizing that, while his
speech to the Utica fusion convention showed that he was committed to bland non-extension, it
also indicated his growing alarm at the spread of proslavery constitutionalism. Van Buren had
reminded his audience of his unwavering devotion to the argument that abolition in federal areas
was constitutional, if not always expedient. Reading these statements optimistically, Chase and
Bailey barraged Van Buren with questions about slavery and federal power, augmenting their
efforts after Calhoun’s infamous speech. As radical Barnburners began to endorse
denationalization, one question lingered above the rest: would Martin Van Buren do the same?

The Buffalo Convention

About 20,000 people, including hundreds of delegates from each Northern state,
descended on Buffalo during the two days of the Free Soil convention, August 9-10. The center
of the convention was a huge tent erected in the park across from Buffalo’s main courthouse. An
air of excitement and novelty shot through the convention. Witnesses described the event as
having an almost-religious quality, the same mix of euphoria and trepidation that pervaded camp
meeting revivals. It was hot, crowded, chaotic, and loud, but it was also the beginning of
something new, a rousing break from the past. Many of the thousands who arrived in Buffalo came to see the convention’s awesome array of speakers, which included Frederick Douglass—who recently quit the Garrisonians in favor of political action—and Joshua Giddings, the keeper of the antislavery flame in the House of Representatives. A family of singers entertained the crowd with a medley of traditional and antislavery tunes.56

The convention’s leaders wasted little time in setting up a committee of organization. On Preston King’s suggestion, the committee was split in two. One large group would remain in the tent while a smaller deliberative body would assemble in city’s Universal Church, conducting the convention’s actual business and sending it back to the larger committee for ratification. The deliberative committee was comprised of six at-large delegates plus three delegates for each congressional district, giving each party the same number of representatives. Once this was settled, and after the convention chose Charles Francis Adams as its president, the deliberative committee retired behind the closed doors of the Universal Church. The committee’s proceedings are shrouded in mystery, as not even reporters were allowed to sit in. It is known, though, that Chase was made chairman of the business committee, which promptly formed a committee on resolutions that included Chase for Ohio, Joshua Leavitt for Massachusetts, and Benjamin F. Butler and Henry Stanton for New York.57

Back in the big tent, delegates fought over the nominations. Each of the three parties came to Buffalo with their preferred presidential candidates. Barnburners wanted Van Buren at the head of the Free Soil ticket, while Whigs favored McLean and Liberty men backed John P.


Hale. It quickly became apparent, however, that McLean’s wavering over the past year had cost him support even among Whigs, so the contest really came down to Hale and Van Buren. Hale had widespread support in the early stages of the convention, so much so that one historian has argued that Hale would have won the nomination if delegates had voted on the first rather than the second day of the convention.58

In the meantime, speaker after speaker riveted the crowd. Barnburner speeches rehearsed that group’s familiar themes, including non-extension and the cause of free white labor in the territories.59 Conscience Whig and Liberty speakers framed the territorial issue as the frontline of a war against slavery nationalization. For Conscience Whig E.D. Culver of New York, the basis of unity among Free Soilers was their opposition to slavery nationalization, not just slavery’s extension into the territories. I am getting tired, the provocative Culver exclaimed, of Southerners “who say we must look out for the guaranties of the Constitution. -- I have heard men talk as though the Constitution was got up for the express purpose of maintaining slavery. John C. Calhoun said that slavery was the only kind of property guaranteed by the Constitution, and he never blushed, but said it with all the *sang froid* of a Connecticut schoolmaster.”

Calhoun’s insistence on the right of slaveowners to bring slaves into the territories – a claim that derived from his theory of state sovereignty – was a “ridiculous farce,” Culver bellowed. Congress clearly had uncontested sovereignty over the social organization of the territories. The Constitution nothing about slavery; much less did it include guarantees for slave property. Culver pushed the convention to go beyond non-extension and endorse the more radical program of denationalization. He had promised his constituents that “as long as there is a loophole through which I can fire on this abominable old institution, I shall fire away. Now I mean to be

58 *Phonographic Report of the Free Soil Convention.*
aggressive in this matter... I go for putting it to them [the Calhounites]. Don't give sweetened water to these spunky children."\(^{60}\)

If the Barnburners’ speeches seemed moderate compared to those of their Whig and Liberty counterparts, their radicalism came through in the convention’s resolutions, where their influence was most directly felt. Preston King set the tone at an informal meeting of the business committee on the first day of the convention. He introduced three non-binding resolutions that did precisely what Chase and Bailey had been seeking from the Barnburners since the spring of 1847 – they put the proviso into a larger context of national antislavery action. King described the resolutions as “practical applications” of Chase’ “Free Territory” resolutions. The first endorsed the denationalization of slavery: “it is the duty of the Federal Government to relieve itself from all responsibility for the extension or continuance of slavery, whenever that Government possesses constitutional authority, and is responsible for its existence.” The second repeated the Democratic Party’s usual affirmation of the federal consensus: “the States within which slavery exists, are alone responsible for the continuance or existence of slavery within such States, and the Federal Government has neither responsibility nor Constitutional authority to establish or regulate slavery within the States.” Only after laying down these radical premises did King reference the proviso: “the only safe means of preventing the extension of slavery into territory now free, is to prohibit its existence in all such territory by an act of Congress.”\(^{61}\)

Though they were non-binding, King’s resolutions prefigured those which the general convention ultimately adopted. Chase backed them right away, recognizing that they only slightly amended his Free Territory resolutions. King rebuffed attempts by a Barnburner minority in the committee to get a narrower platform, “declaring,” as Chase later explained, “that

\(^{60}\) ibid., pp. 11-12.

\(^{61}\) ibid., p. 5.
he was of opinion that not only should slavery be excluded from Territories now exempt, but the General Government should rid itself of all responsibility for its existence under the sanction of national legislation.” This last point was “received with acclamation” by the committee, whose decision to use King’s language “as the platform on Slavery... prevailed without dissent.” Led by Chase and Butler, the committee on resolutions worked all through the day of August 10. When they sent their draft resolutions to the deliberative committee, they were “adopted unanimously,” with only a few “unimportant verbal alterations.”

Later that day, in the sweltering heat of the tent, Butler introduced the resolutions to the general convention. As he read them out, it became clear that the Free Soil coalition would go beyond non-extension by endorsing a policy of denationalization. It would back a “National Platform of Freedom” against the South’s “Sectional Platform of Slavery.” Like King’s resolutions from the day before, these resolutions were grounded in the basics of antislavery constitutionalism. They began by affirming the party’s commitment to the federal consensus: Free Soilers sought “no interference by Congress with slavery within the limits of any State.” Slavery was a state institution which could not be “repealed or modified” by the federal government. Yet this also meant that Congress was “not responsible” for upholding slavery outside the slave states; in fact, it was the “settled policy” of the founders “no to extend, nationalize, or encourage, but to limit, localize and discourage, slavery” – in the words of the Constitution’s Preamble, “to establish justice, promote the general welfare, and secure the blessings of Liberty.”

**Endorsing the Denationalization Program**

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Such sentiments eased the way for the party’s endorsement of denationalization. It was “the duty of the federal government,” Butler declared, “to relieve itself from all responsibility for the existence or continuance of slavery wherever that government possesses constitutional authority to legislate on that subject, and is thus responsible for its existence.” Crucially, the resolution on non-extension did exactly what Chase and Bailey had been urging Barnburners to do over the previous year – it gave the proviso a municipal theory justification. A positive ban on slavery in the territories was necessary and constitutional, not least because the founders “expressly denied to the Federal Government, which they created, all constitutional power to deprive any person of life, liberty, or property without due legal process.” This was the foundational principle of antislavery constitutionalism, and the committee bolstered it with a reference to resolutions John G. Whittier’s had proposed in his National Era editorial: “Congress has no more power to make a slave than to make a king: no more power to institute or establish slavery than to institute or establish a monarchy: no such power can be found among those specifically conferred by the constitution or derived by just implication from them.” The resolutions concluded with an application of antislavery constitutionalism to the territories. Congress had complete authority over the territories. Since it had no power to establish slavery, it could not stand by as slaveowners imported slaves there. A positive ban was necessary to that free institutions reigned in Oregon, California, and New Mexico.64

The platform also contained planks designed to unify an otherwise-incompatible group of former Whigs and Democrats. For the Barnburners, there was cheap postage, a pledge to pay off the national debt, and homestead legislation. For former Whigs, there was a resolution championing internal improvements.65 But unlike modern historians who emphasize these

64 ibid., p. 19.
65 ibid.
planks, the Buffalo delegates understood that they were subordinate to the antislavery portions of the platform. New York Democrat Erastus D. Culver, whose first act as a congressmen three years earlier was to introduce petitions calling for abolition in Washington, D.C., put the platform into perspective. We do not have to “set our stakes at the same notch,” Culver said. The real unity of the party lay in the denationalization program – rescuing the federal government from the Slave Power, repealing federal slave codes, and preventing the formation of new slave states. All that mattered was that Free Soilers “start out on some good ground and go it strong as thunder as far as we do go.”66 It was this spirit of antislavery unity that imbued the platform’s famous rallying cry: “Free Soil, Free Speech, Free Labor, and Free Men.”67

The Meaning of the Free Soil Platform

“Congress has no more power to make a slave than to make a king.” There it was – R.D. Davis’s phrase from 1843, reformulated first by Bailey and the Hamilton County Liberty Party, then by Whittier in his editorial of early August, now restyled as the centerpiece of the Free Soil platform on slavery. In a single, stark sentence, that phrase summed up an entire universe of antislavery premises: the right to self-ownership; the municipal theory’s role in American federalism; the “persons-not-property” argument; the due-process safeguard against enslavement. There was undeniable elegance in its simplicity. Its rhetorical force came more from what it did not say than from what it did say.

The strength of the platform as a whole lay in its arresting minimalism, its reduction of the antislavery agenda into terse statements of principle. The platform made no mention of the interstate slave trade or abolition in the District of Columbia, and it said nothing about repealing

66 ibid., p. 11.
the Fugitive Slave Law or amending the Constitution. It did not endorse direct abolition in the states, and it omitted any reference to immediate abolition. Critics on the fringes of the abolitionist movement read the omissions as evidence of a dilution of principle, craven backtracking in the name of political expediency. But this mistook nonappearance for lack of principle, ignoring the fact that silence and omission had been a key strategy of the antislavery movement since Justice McLean’s opinion in *Groves v. Slaughter* (1841). “It is often wiser and more politic to forebear, than to exercise a power,” McLean had warned regarding slavery and the commerce power. Activists like Chase took McLean’s caution to heart, emphasizing the “negative” aspects of antislavery – repeal, restraint, restriction – over the more inflammatory language of “positive” legislation. The Buffalo platform followed in the footsteps of mainstream antislavery politics up to 1848, emphasizing the curtailment rather than the extension of central-government power. Its watchwords were strict construction and limited powers. It was about “de-nationalizing” an institution that had overleapt its bounds, restraining the power of slaveowner oligarchs in the federal government. This is what most antislavery groups sought to do in 1848; only a small handful of radicals disregarded the federal consensus and championed direct abolition.68

From McLean and Justice Story, Chase had learned the power and political appeal of selective silence, the ability to invest short statements with vast significance. The Buffalo platform was certainly more laconic than Liberty Party platforms of the early 1840s, but in substance it was no different from what Chase and the Ohio Liberty men had been saying since 1841. Insofar as the phrase “Congress has no more power to make a slave than to make a king” summarized the first principles of antislavery constitutionalism – that slavery was a local institution with no connection to the federal government – it contained everything that needed to

68 See Chs. 4, 5, and 6.
be said in favor of denationalization. There was no special need to reference the District of Columbia, the territories, or the Fugitive Slave Law. A concise platform had the dual advantage of appealing to a large antislavery audience – some of whom might not have embraced all parts of the antislavery agenda – while leaving all the program’s components on the table.

The platform’s omission of any statement regarding racial equality has been the subject of intense criticism, from contemporary abolitionists to modern historians. But here again, there is a tendency to sideline the Cincinnati Liberty Party and use their detractors’ views as the gold standard of antislavery. In truth, the platform’s omission of racial equality was in keeping with Chase and Bailey’s long-held distinction between politics and reform. In their view, racial equality was an issue of moral reform, not political legislation. To be sure, they knew that discriminatory laws in the North obstructed racial equality, and to that end they called for their repeal. But insofar as racial equality was a subset of social equality, the Cincinnati clique considered it an issue for social reformers, not political parties. Another reason why racial equality did not make it into the platform is that Chase and company believed racial equality was a state, not a federal, issue. Racial equality was tied up with questions of citizenship, which at the time meant rights to vote and serve on a jury – matters that were still associated with states in the 1840s. For Chase, whose experience as an Ohio attorney gave him a different perspective than antislavery reformers, questions of social equality and citizenship were best handled at the state level, not in a national party platform.

Delegates at the Buffalo convention recognized the platform’s radical orientation. In a letter which Joshua Giddings read to the crowd, Vermont’s governor William Slade urged Free

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69 Foner, “Politics and Prejudice,” esp. p. 239.
70 See Chs. 4 and 7.
Soilers to unite around the “platform of 'no more slave States --- no more Slave territory. Free soil for free men.”” Lest this be read as an endorsement of non-extension rather than denationalization, Slade wrote that “A rally on this platform will give a tone and direction to be left undone, all that the Constitution will permit to be done, to separate the National Government from its participation in the guilt of Slavery.”

Former Ohio governor John B. Mahan scoffed at critics who had predicted a mere “territorial platform” from the convention. The Free Soilers proved them wrong, Mahan said, by rallying around a “broader platform… on which the Genius of Liberty can walk through the length and breadth of the land.”

Several abolitionists at the convention drew a direct line backwards from the platform to the original antislavery agenda set forth in the AA-SS Constitution and Declaration of Sentiments in 1833. The Reverend W.J. May, a leading abolitionist for over twenty years, described how his initial skepticism of the Free Soilers – he had likened non-extension to “straining at a gnat, after we had swallowed the camel” – had dissipated upon his grasping the importance of non-extension to the overall strategy of denationalization and universal abolition. Now I understand, May confessed, that “the extension of slavery was one of its essential elements – one of its main supports, and that opposing extension we struck a powerful blow at slavery itself in its strong hold – for it lived and was perpetuated – held on to its power and increased it by extending its withering curses over free territory.” Another veteran abolitionist who had helped write the “anti-slavery platform in 1833” described the Buffalo resolutions as a “new platform, upon which all could mount.”

For Mahan and Giddings, the platform represented the first real entry of the antislavery project into the political mainstream. It was to be the foundation for all antislavery ventures in

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72 ibid., 22.
the coming years. “[E]very battle that shall ever be fought hereafter between Liberty and Slavery, must be fought on our platform. Liberty friends, what more could you have asked? (Nothing.) Barnburners, what more could you have asked? (Nothing). Whigs, what more could you ask for? (Nothing.) Then we have got our platform.”

Joshua Giddings echoed these sentiments when he commended the Free Soilers for “erect[ing] a POLITICAL PLATFORM today by which your Representatives in Congress will learn what to do in future.” This was a startlingly prescient

Two weeks later, in a spellbinding speech to delegates at Faneuil Hall, Sumner linked the Buffalo Platform to the founding era and the economic nationalism of the Whig Party. Antislavery leaders “not only propose to guard the territories against Slavery, but to relieve the Federal Government from all responsibility therefor [sic], every where [sic] within the sphere of its constitutional powers. In short, on the subject of Slavery, they adopt substantially the prayer of Franklin, who by formal petition called upon Congress ‘to step to the verge of its constitutional power to discourage every species of traffic in human flesh.’” Far from a radical levelling of social and property relations, antislavery men sought to return “the government to the truths of the Declaration of Independence and to the principles of the fathers,” so that “it shall be administered no longer in the spirit of Slavery, but in the spirit of Freedom.” To be sure, the antislavery coalition held out enticements for a wide array of northerners, including cheap postage, internal improvements, limits on federal patronage and abolition of “unnecessary offices.” But make no mistake, Sumner warned, such matters paled before the “grand primal principles of opposition to Slavery and the Slave Power. It is no longer banks and tariffs which are to occupy the foremost place in our discussions, and to give their tone, sounding always with

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73 ibid., p. 21.
74 ibid.
the chink of dollars and cents, to the policy of the country. Henceforward, PROTECTION TO
MAN shall be the true AMERICAN SYSTEM.”

In a final flourish exhibiting the neo-Roman oratory for which he was known (and often
derided), Sumner portrayed denationalization as the Free Soilers’ vital foundation.
Denationalization, heretofore the policy of a “small and faithful party, has now for the first time,
become the leading principle of a broad, formidable, and national organization.” Daniel Webster
was right to say that it was “no new idea,” for separating slavery from central-government power
was “as old as the Declaration of Independence.” It was “an idea now for the first time
recognized by a great political party” which broke from the proslavery mold of the “old parties.”
Denationalization was the creed of a “new party” whose “corner-stone is Freedom,” whose
“broad, all-sustaining arches are Truth, Justice, and Humanity.” And “like the ancient Roman
capitol, at once a Temple and a Citadel, it shall be the fit shrine of the genius of American
institutions.”

With the platform behind them, the delegates turned to the nominations. Chase
announced that Hale had withdrawn his nomination, and after balloting, Van Buren held the
majority. In a series of crucial backroom maneuvers, Chase and Stanton, who favored Van
Buren over Hale, won the latter enough votes to tip the scales for good. Joshua Leavitt, in a
stunning gesture of unity, took to the podium to withdraw Hale’s name from the running and
motioned for a unanimous vote for Van Buren. The motion passed easily, and soon Van Buren
was the party’s official nominee for president. The convention then picked Charles Francis
Adams as the vice-presidential candidate, a nod to the Whigs and a tribute to John Quincy

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75 Sumner, Orations and Speeches, vol. 2 (Boston: Ticknor, Reed and Fields, 1850), p. 268.
76 ibid.
Adams, who had passed away just a few months before. On the afternoon of August 10, Benjamin Butler read a letter from Van Buren (dated August 2) in which the elder statesmen offered to rescind the Barnburners’ nomination at Utica and instead accept the Free Soil nomination. In the closing hours of the convention, Chase, Butler, and Joseph L. White of New York formed a subcommittee to inform the candidates of their nominations. Chase and Butler were put in charge of writing each candidate to inquire about their views on the party’s platform. The task of writing to Van Buren fell to Chase, who planned to press the Little Magician on his District of Columbia position.77

Reactions to the Platform in the Press

In the days following the Buffalo convention, newspapers around the country reported on the Free Soil platform. The most striking thing about these reports is that nearly all of them understate the platform’s radicalism in one way or another. Not surprisingly, those Liberty men who had resisted coalition from the start found the Buffalo platform underwhelming and hollow. The “ancient platform… has been departed from,” declared an Ohio paper, referring to the 1833 constitution of the American Anti-Slavery Society. The paper compared the new platform to those Chase had written in Buffalo five years before at the 1843 National Liberty Convention. The earlier resolutions had “spoken plainly out, in a manner that left nothing for construction”; the new resolutions, by contrast, seemed like a “falling off!”78

Party newspapers – the great majority of newspapers in the 1840s – routinely dismissed the platform’s significance. Whig and Democratic editors deliberately slanted information to fit the party line. Whig papers were unanimous in ignoring the substance of the Free Soil platform.

77 ibid. See also National Era, Aug. 17, 1848.
They ignored the Free Soil endorsement of denationalization, making no distinction between that policy and non-extension. This made it easier for editorialists to paint the Free Soilers as naive extremists whose platform stumbled into redundancy. Most editorials dismissed the platform’s antislavery resolutions altogether, focusing their attention instead on resolutions that resonated with the major parties, namely, postage, currency, and internal improvements. When they discussed the antislavery resolutions at all, Whig papers either dismissed them as idealistic or described them as a Van Burenite ploy to win the support of politically-naive Liberty men. According to the *National Intelligence*, the major Whig organ, the first six resolutions contained “nothing practical.”

Modern historians have largely repeated this narrative in their accounts of the Free Soil Party.  

Free Soilers recognized that party newspapers were trying to smother the Free Soil platform just as they had tried to snuff the Wilmot Proviso. “Enough of this,” Bailey wrote in the *National Era*. “Let the People judge between the Buffalo Convention and its nominees on one side, and the Philadelphia and Baltimore Conventions and their nominees on the other.”

The Buffalo platform was a “safe platform for union,” Bailey wrote. It accorded with the “right principles” set forth in Whittier’s editorial from early August, which were in turn based on Chase’s “Free Territory” resolutions. It pushed the Free Soilers beyond non-extension toward the policy of denationalization. Not only had the Free Soilers adopted the view that Congress had no power to “create or authorize”; it also endorsed the “practical corollary” of that principle – that slavery must be divorced from federal power.

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79 See, for example, Boston *Atlas*, Aug. 25, 1848; New-Bedford *Mercury*, June 24, 1848; *National Era*, Aug. 25, 1848. Here, arguably, lay the seeds of the perennial misreading of the Free Soil platform.  
82 *ibid.*, Aug. 24, 1848.
Whig leaders in Congress addressed the platform more directly, but did so in order to co-opt and dilute its antislavery appeal. In the Senate on August 12, Webster delivered a speech in which he claimed the municipal theory had been the basis of Whig opposition to slavery expansion all along – a patent falsehood that contradicted his own arguments in the *Groves v. Slaughter* case and in countless speeches in Congress. Slave property, Webster reasoned, was the creature of local law, and “wherever that local law does not extend, property in persons does not exist.” It was on these grounds that Whigs opposed slavery’s extension into the territories. There was nothing anti-Southern about slavery restriction, Webster said. “[T]here is only the exclusion of a peculiar local law.”

Webster’s announcement, coming just two days after the Buffalo Convention, smacked of opportunism. Was this the same Webster who helped shut down the Conscience Whigs’ push for denationalization at the 1846 Whig state convention in Springfield, Massachusetts? Apparently not.

Bailey saw what Webster was doing, but instead of criticizing him, Bailey depicted Webster’s endorsement of the municipal theory as a victory for the Free Soilers’ Liberty contingent. Liberty principles, “being stamped now with the authority of Mr. Webster, … will doubtless command the profound consideration of many who would otherwise remain skeptical or indifferent.” It was great to see Webster give a “strong and concise… refutation of the favorite argument of the Calhoun School against slavery restriction…”

All of this confirmed Bailey’s sense that the political center had shifted dramatically in a matter of weeks. The Whigs, like the Barnburners before them, now supported the proviso by reference to the municipal theory and antislavery constitutionalism. Even when personal ambition and hardscrabble

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83 Webster’s speech was recorded in the *National Era*, August 24, 1848.
84 *ibid.*
political calculation are accounted for, this was a stunning turn of events, the result of the Cincinnati clique’s year-long campaign to alter the terms of the proviso debate.

**Luring the Little Magician**

In the weeks following the Buffalo convention, the great question was whether Van Buren would accept the party’s endorsement of denationalization, which contradicted his position on Washington, D.C. As Chase wrote up his letter to Van Buren, Butler told him that the former president would probably drop his opposition to repealing slave codes in the District. The same “magnanimity” that had prompted Van Buren’s endorsement of the proviso “will prompt him to write such a letter as will more than satisfy the hopes of his friends and more than disappoint the wishes of the enemies of our cause.”

Chase finally sent his letter on August 21. It thanked Van Buren for accepting the nomination, but also implored him to write a “line” in the public papers endorsing the platform and disavowing his actions regarding Washington, D.C. and the Amistad affair. This was necessary “to fully satisfy the wishes of the people.” Not only Liberty men, but also a growing portion of the Northern electorate, found it necessary to come out strongly against “national” slavery. Events had produced a surge of antislavery sentiment in Maryland and Virginia, Chase wrote, and “under these circumstances you will never interpose any obstacle” to repeal, but would instead “feel yourself bound to promote it.”

Into the last week of August, 1848, it remained uncertain whether Van Buren would endorse the platform. Most of the former Liberty men in the coalition remained optimistic. Joshua Leavitt visited Van Buren in New York and later told Chase that he was now convinced Van Buren was “with us, heart & soul, & will be with us to the last battle against the Slave

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85 Butler to Chase, Aug. 12, 1848, *Chase Papers*, vol. 2, p. 182.
86 Chase to Van Buren, Aug. 21, 1848, in *ibid.*, p. 187.
Power.”\(^87\) Bailey continued to tout Van Buren’s antislavery credentials, depicting his record from 1835–40 as an aberration in a long antislavery career. Most of Bailey’s own reservations about Van Buren had been “happily dissipated” by the former president’s letter to the Buffalo Convention. But Bailey still insisted that Van Buren issue a public statement endorsing the Free Soil platform, specifically that part which called for denationalization.\(^88\)

Free Soilers of all stripes sent a barrage of letters to Van Buren, pressing him on the District of Columbia question. New York Democrat William Reeves advised Van Buren to “use all constitutional measures against slavery where it now exists,” particularly in the nation’s capital.\(^89\) William F. Channing, son of the late W.E. Channing, told Van Buren that the platform’s legitimacy – even the momentum of the Free Soil movement itself – depended upon his endorsement. “It is in your power to give interpretation and force to the enterprise so auspiciously commenced at Buffalo. In your acceptance of the nomination, the platform may be recognized as a limited one as regards slavery, or as a thorough ground of constitutional opposition...” Free Soilers needed Van Buren’s endorsement of “the latter ground... to reduce slavery to its narrowest constitutional limits and retrieve the ground of its first usurpations.”

Time was of the essence, Channing wrote; the platform would be “tame” by November, as popular anger subsided and the major parties hammered out another compromise.\(^90\)

Van Buren finally responded with a published letter on August 22. In it, he endorsed the Free Soil platform and made clear that he supported abolition in the District of Columbia. The Free Soil platform had the “right spirit,” Van Buren wrote, “and presents a political chart, which... I can in good faith adopt and sustain.” He dismissed the statement he made about

\(^87\) Leavitt to Chase, Aug. 21, 1848, in *ibid.*, p. 188.  
\(^88\) *National Era*, Aug. 17, 24, 1848.  
\(^89\) William Reeves to Van Buren, Aug. 12, 1848, in *Van Buren Papers*.  
\(^90\) William F. Channing to Van Buren, Aug. 13, 1848, in *ibid.*
Washington, D.C. at the Utica convention in June (that he was still “very decidedly opposed” abolition there). That was a random utterance, he argued, an offhand remark that did not reflect his “sincerest views.”The impediments to abolition that existed in 1836 no longer applied in 1848. Now, the best policy was to discourage slavery with the power of the federal government. This policy reflected the principles in “your own condensed and excellent resolution, ‘Slavery is the creature of the States of this Union which recognize its existence, should depend upon State laws, which cannot be repealed or modified by the Federal Govt.’”

Van Buren’s letter is something of a capstone to the remarkable shift in Barnburner thinking across 1847 and 1848. In early 1847 Barnburners had carefully distinguished non-extension from abolition and justified the proviso with instrumental constitutional arguments, not antislavery constitutionalism. But they had always been susceptible to the enticements of antislavery leaders like Chase, who had implored Van Buren and his followers to base the proviso on the municipal theory of slavery. Van Buren did that and more in his letter, endorsing the Free Soil Party’s call for denationalization. Just a few days after the letter’s publication, Van Buren wrote Chase a personal letter explaining how his letter would satisfy antislavery opinion. The positions he had taken on Washington, D.C. and the Amistad affair reflected his political duties at the time, not his personal views. And as those duties no longer applied, he was now ready to make slavery into a truly local institution.

*Election Results: 1848*

In early September, 1848, Free Soil conventions met in several Northern states to endorse the Buffalo platform. The Conscience Whigs dominated the Massachusetts convention, which

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91 Van Buren to Chase, Butler, et. al., August 22, 1848, in *ibid*.
92 Van Buren to Chase, Aug. 29, 1848, in *Chase Papers*, vol. 2, p. 190.
met first on September 6. Soon thereafter, a Barnburner-led convention in New York endorsed the platform. Ohio’s convention did the same a few days later, adding a resolution in favor of repealing the state’s Black Law – evidence of the way states tailored the national platform to their unique political situations. A Free Soil convention even took place in Maryland, bolstering Chase’s (ultimately mistaken) prediction that the South would, with a little nudging, join Northerners in combatting the Slave Power. All eyes were on the big states of the North – Massachusetts, New York, and Ohio. Chase promised to deliver Ohio, while the Barnburners were confident they could swing New York. Everyone knew that Massachusetts came down to a bare-knuckle scrap between Free Soilers and the more established Cotton Whigs.93

But even though Free Soilers went into the 1848 election with a surplus of enthusiasm, from an organizational point of view, they lacked both time and money – crucial deficits for a fledgling third party. In the weeks leading up to the election, it proved especially difficult for Free Soilers to win over fence-sitting Democrats and Whigs, let alone each party’s unflinching base. Most antislavery Whigs stuck with their party out of fear that defection would hand Cass the presidency. William Seward rebuffed calls to join the Free Soil movement, claiming as usual that the antislavery project was best channeled through the Whig Party, which, he argued, was finally moving in an antislavery direction. Democrats, meanwhile, took every opportunity to denounce the Free Soilers as traitorous vote-stealers, demagogues playing to the worst fears of misinformed Northerners. In this way, the election of 1848 followed the same pattern as the previous two elections: a lot of populist hullabaloo and mud-slinging, with very little focus on

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the issue of slavery and federal power. Whigs emphasized Taylor’s war hero status, while Democrats stressed the tried-and-true formula of patriotic expansionism.\textsuperscript{94}

In the end, the election was not even close: Taylor trounced Cass. He received more than half the popular vote in the South and was especially strong in the Upper South, where the most optimistic Free Soilers had hoped to see a minor revolt. Crucially, Taylor took New York State, where Democrats and Free Soilers cancelled each other out. The Free Soil ticket won just ten percent of the popular vote nationally, and only fifteen percent of the free-state vote. Van Buren beat Cass in New York, Vermont, and Massachusetts, but the party as a whole did not win a single electoral vote. The drubbing reflected the Free Soilers’ lack of organization going into the campaign, as well as its own self-defeating idealism, which had blinded them to the effectiveness of the parties’ counterassault. Democrats and especially Whigs were generally successful in painting the Free Soil Party as a bad choice on Election Day, a fleeting fever-dream touted by disaffected Democrats and abolitionist zealots.\textsuperscript{95}

The election results were a huge disappointment for all Free Soilers, especially novices like Charles Sumner, who had expected something of a moral revolution at the polls. Yet, even Sumner recognized that the election was not a complete disaster. In fact, in the long-term view, there was much to celebrate. The total vote for the Van Buren-Adams ticket was more than five times greater than that for the Liberty ticket in 1844. And while the Free Soilers lost the presidential election, the party made critical advances in Congress and at the state level. Eight Free Soilers went to the House of Representatives, while a coalition of Ohio Free Soilers and Democrats sent Chase to the Senate, where he joined John P. Hale as the second of two Free Soil senators (Hale was now a Free Soiler). And though Seward was still a Whig, his election to the

Senate rode the same wave of antislavery sentiment that propelled the Free Soilers, and for many he was the third member of the Senate’s new antislavery triumvirate. Sumner’s prediction to Chase in the wake of the 1847 Van Zandt decision – that Chase’s arguments would someday “serve to rally a political movement” – was now becoming a reality. Three of the leading proponents of denationalization were now seated in the nation’s highest political body. Never before had the abolitionist agenda come so close to the levers of national power.96

In this way, the immediate disappointment of the election overshadowed its long-term significance for the antislavery movement. There was no resounding victory, no clear-cut moral triumph at the national level. But the Free Soil revolt did alter the terms of the slavery debate in the United States by making a fight over the territories into a fight over federal power generally. Chase, and Seward now joined Hale in the Senate, where they could square off directly with Calhoun and the Slave Power. Van Buren may have lost the election, Chase told Sumner, but the Free Soil platform lived on in the halls of Congress. It was “the beginning of the end” of American slavery, Chase wrote. “I think that now, through the twilight of the present and the mist of the future, the end may be discerned – at least, by eyes appointed with Faith.”97

Conclusion

The Free Soil platform went beyond non-extension by endorsing the Liberty Party’s policy of denationalization. The centerpiece of the platform was not its call for currency reform or internal improvements; it was the phrase “Congress has no more power to make a slave than to make a king” – a phrase coined by a Democrat, reformulated by a poet, and catapulted to political prominence by the central figure of antislavery coalition in 1848, Salmon P. Chase.

Antislavery Whigs and Liberty men had long advocated a policy of denationalization. It was the Barnburners – the dominant faction in the Free Soil coalition – who were the holdouts. But by the time Chase hammered out the Buffalo resolutions with Preston King and Benjamin F. Butler, enough Radical Democrats were convinced that non-extension was a mere palliative. A stronger policy of denationalization was needed to meet the Calhounite threat and satisfy an increasingly antislavery Northern electorate. To be sure, not all Barnburners supported denationalization, and the decision to adopt it was full of straightforward political calculation. But Preston King’s resolutions early in the Buffalo convention signaled that a key faction of Barnburners finally accepted Chase and Bailey’s argument that an antislavery party could not rest on non-extension alone. The Free Soil platform would have to address the broader constitutional crisis over slavery and federal power, taking a stand against slaveowner oligarchy and placing the federal government firmly on the side of freedom. By transcending the policy of non-extension into the territories, Van Buren and the Barnburners joined antislavery Whigs and former Liberty men in repudiating the Union as it had become. Despite their losses at the polls, the Free Soil Party marked a turning point in American politics: the moment when antislavery nationalism finally entered the political mainstream.
Conclusion

The Antislavery Project

The pages above describe the political evolution of the antislavery project, broadly conceived, from the Missouri Crisis of 1819-21 to the Free Soil revolt of 1848, explaining its origins and contours as well as its key premises and assumptions. The antislavery project sought to restart the process of state-by-state abolition by withdrawing federal aid for slavery and slaveowners, limiting slavery to the states where it already existed and pressuring the slave states to begin abolition on their own. Congress could abolish slavery in Washington, D.C., the federal territories, and possibly in federal forts and arsenals inside the slave states. It could discourage slavery in U.S. coastal waters and the high seas by adopting a presumption of freedom. Finally, it could ban the admission of new slave states. Though it was expressed in the negative language of anti-oligarchy constitutionalism (limited-powers, strict construction) and emphasized repeal and restraint, the antislavery was never just a laissez-faire argument. Denationalization presumed a distinct national government that was antislavery and, by the same token, pro-free labor, a central government whose policies would promote freedom and a dynamic national economy.

For a variety of reasons, the antislavery project has been either ignored or deemphasized in the literature, lost in the chasm between abolitionist scholarship and the study antislavery politics. It is simply incorrect to assume – as many historians continue to do – that the abolitionists had no concrete plan to abolish slavery, or that the Free Soil coalition that succeeded them jettisoned the moral crusade against slavery and stood for mere “non-extension”
of slavery into the territories.¹ There was a project and it was remarkably consistent across the second third of the nineteenth century. The abolitionists’ constitutional program systematized Benjamin Lundy’s 1821 proposal for a post-Missouri Crisis national antislavery agenda. The Liberty Party carried that program into the realm of electoral politics after 1840, and the Free Soil Party pushed it further into the mainstream of national politics after 1848. The Free Soil platform was essentially the same program that abolitionists sketched in the 1833 American Antislavery Society’s constitution, but it was smarter, stronger, and more attuned to the political climate of the 1840s – all thanks to the lessons of constitutional conflict after 1835.

Among other things, the story told in these pages revises our understanding of the sectional crisis and the origins of the Civil War. It helps to recover the “antislavery origins” of that pivotal conflict, demonstrating that antislavery activists did far more than stoke the fevered nightmares of paranoid slaveowners with rhetorically bold yet politically meaningless threats – they had a political project, and as time progressed, a growing body of northern politicians and voters assembled around their program for separating slavery from the federal government. In this sense, the history of the antislavery project has much to say about the American reform tradition, especially the relationship between moral reform and political expediency. If nothing else, it reveals the importance of staying on message through the many phases of social struggle, boiling reform sentiment down to a specific political program. This is not to say that efforts at shaping public opinion are futile; the implicit collaboration between Garrisonian non-resistants and mainstream political abolitionists in the 1840s proves that, in a democratic republic like the United States, successful political projects succeed only if they are accompanied by a wider campaign of opinion formation. But opinion formation alone is not enough to carry the day. A carefully-constructed political program grounded in history and precedent and adjusted to the

¹ See Introduction, n. 7, 8, 16.
values of the wider electorate and the country’s legal and constitutional institutions, is essential to any reform movement hoping to dislodge powerful interests from government.

**Implications of the Constitutional Crisis over Slavery, 1835-1843**

The story of the pre-1846 crisis over slavery has important implications for the study of the origins of the Civil War. The myriad overlapping slavery controversies before 1846 cannot be reduced to isolated episodes in different parts of the Union, separate skirmishes which paled before the “real” controversy over slavery in the territories. When the links are made between seemingly disparate conflicts in the period 1835-43, what emerges is a broad-scale constitutional crisis over the central government’s disposition toward slavery. That crisis began in the 1830s and only grew worse in the 1840s, with the annexation of Texas and the acquisition of new territories during the Mexican War. The territorial crisis sparked by the Wilmot Proviso extended and amplified an existing crisis over slavery’s constitutional status in the Union. At the very least, the story presented here raises key questions about several long-held premises in coming-of-the-Civil-War literature.

The problem is not that historians have ignored the slavery controversies of the period 1835-1843; it is that those conflicts are often divided into separate categories of analysis, a tendency that obscures their role in the larger constitutional politics of slavery. As a result, many historians portray the slavery controversies of the period as minor flare-ups in the long and relatively stable period between the Missouri Crisis and the Mexican War, the assumption being that serious, Union-threatening conflict over slavery had to await the issue of territorial expansion.² If, however, they are viewed *in totem* as theaters in a broader crisis over slavery and federal power, it becomes apparent that there was a serious constitutional crisis *before* the Texas

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² See Introduction, n. 16.
annexation and the Mexican War, that the territorial crisis after 1846 was simply an extension of an ongoing debate over slavery and central government policy.

The slavery crisis was rarely about the central government’s power to abolish slavery in the states where it existed, which almost all participants agreed was out of the question. It was not about self-government, state sovereignty, or states’ rights as such, nor was it exclusively about racial or civil equality for African-Americans. It was primarily about the central government’s disposition towards slavery in areas of the Union outside the slave states, in federal jurisdictions and the free states. Articulated through the idiom of constitutional politics, the debate focused on the basis of legal presumption adopted by the central government – whether, as a matter of policy, it should presume freedom or presume slavery. Each controversy – the debate over abolition in Washington, D.C.; the fight over fugitive slaves and transient slaveowners in the free states; the debate over slavery’s reach on the high seas – came down to the issue of legal presumption, to whether the U.S. government favored a southern presumption of slavery or a northern presumption of freedom.

At its most fundamental level, the fight over the central government’s relationship to slavery pitted two conceptions of property rights against one another. Each view reflected the peculiar social organization of capitalism in the North and the South, respectively. For antislavery activists and a growing number of northerners, slavery flatly contradicted what was to them the most important property right in the Anglo-American tradition, the right to property in oneself. Property rights in their view were only legitimate if they were “natural” or “universal.” According to the municipal theory of slavery – the baseline premise of antislavery thought – the right to “property in man” was artificial and local, a creature of custom and social convention; it was a form of legalized theft in which a person’s right to self-ownership was
extinguished in favor of another’s excess, an abridgement which insulted the natural law 
tradition. Proslavery leaders, however, made no such distinction between slave property and 
other forms of “natural” property. For them, the right to “property in man” was a universal right, 
uninhibited by territorial limits or jurisdictional diversity. This was a view which shattered the 
premises of the municipal theory and wrecked its application to both the law of nations and 
American federalism.³

As it happened, the debate over slavery and central-government power focused attention 
on the right to “property in man,” specifically on their territorial reach in the Union and beyond. 
That was a constitutional question about whether the Constitution guaranteed the protection of 
the right to “property in man,” giving it an extraterritorial legitimacy beyond the limits of the 
slave states, or whether it treated slavery as a strictly state institution, meaning that the right to 
own slaves was jurisdictionally limited to the states where slavery existed – or was at least 
qualified, by being transformed into a right to the labor power, rather than bodies, of slaves.

These were the terms of debate, and it is against this backdrop that the truly proslavery 
position in antebellum politics emerges most clearly. Proslavery Calhounites claimed that the 
right to “property in man” was a general, extraterritorial right under the Constitution, guaranteed 
protection in federal jurisdictions, the free states, and even in foreign jurisdictions. According to 
Calhoun’s doctrine of state sovereignty, a throwback to the Articles of Confederation, Congress 
was a mere agent for advancing state interests, and federal jurisdictions were the shared domain 
of the states. When it came to slavery, the central government’s relationship to slavery was 
entirely positive; it could promote and protect slavery both inside and outside of the Union, but it

³ The idea of legal and political conflict as an expression of class conflict between rival definitions of property rights 
esp. p. 261, where Thompson writes: “What was often at issue [in class conflict over land in eighteenth-century 
England] was not property, supported by law, against no-property; it was alternative definitions of property rights...”
could never take steps to limit, regulate, or abolish slavery. Developed on the fringes of southern politics in the 1830s, the tenets of proslavery nationalism deeply influenced federal policy into the 1840s and moved much closer to the center of national politics by 1848.

The antislavery position applied a strict reading of the municipal theory to the Constitution and American federal law. From the viewpoint of antislavery nationalism, the central government was a *national* government with interests and responsibilities that were distinct from the states. Congress had exclusive jurisdiction over federal jurisdictions, and could, in certain cases, act against the interests of the states. Antislavery constitutionalism applied the municipal theory to the American federal system. The right to “property in man” was a creature of state law, a “local” right which the Constitution recognized but did not guarantee or sanction. The Constitution reserved all power over slavery to the states, giving Congress no power whatsoever to establish or maintain slavery anywhere in the Union. Slavery was the ultimate example of Congress’s independence from state interests and prerogatives. Invested with the principles of the Declaration of Independence, the central government had a moral duty to presume that all persons in the Union were free, to adopt policies that discouraged slavery and prompted the southern states to enact abolition on their own, on a state-by-state basis. In ways that defy simple categories of analysis, the antislavery position effortlessly blended moral, political and economic arguments, simultaneously striking at the political power of slaveowners and the moral wrong of property in human beings.

The history of antislavery politics cannot be explained without reference to the constitutional crisis after 1835, a crisis which shaped the assumptions and premises of the antislavery political project.
For one thing, the crisis helped to crystallize and refine the antislavery nationalism that abolitionists shared with and a growing segment of northern opinion. What had been a vague idea during the Missouri Crisis was by 1848 a powerful vision of the Union as the essential framework for retracting slaveowner property rights and expanding freedom for slaves, paving the way for a more prosperous and just political and economic order. For a growing segment of the northern population, the endless succession of interrelated constitutional conflicts after 1835 affirmed the soundness of the idea of an antislavery Union dedicated to freedom and a free-labor economic regime, a vision of the Union as it should be, not as it was – as the most effective means for recommencing the process of state-by-state abolition. The crisis also enhanced antislavery nationalism by bringing antislavery northerners face to face with the proslavery nationalism of the Calhoun school, whose constitutional arguments and balance-of-power strategy defined the “Slave Power.” The spread of proslavery nationalism pushed more and more northerners to accept and even endorse the antislavery nationalism of the post-Missouri Crisis era.

The crisis also led antislavery activists to develop a more cogent line of constitutional reasoning. The mainstream brand of antislavery constitutionalism that emerged from various slavery conflicts in the late 1830s became the foundation for antislavery politics in the 1840s. Well before the territorial question arose in 1846, antislavery northerners were fully convinced that antislavery constitutionalism was a legitimate strand of constitutional interpretation, that the antislavery political project respected the constitutional limits on central-government power and in no way infringed on the rights or sovereignty of the southern states. Drawing on insights from years of constitutional dialogue with proslavery leaders, the architects of antislavery politics insisted on a strict application of the municipal theory to American federal law. They used the
Fifth Amendment’s Due Process Clause and the Tenth Amendment’s Enumerated Powers Clause to argue that power over slavery had been reserved to the states and that Congress had no power to establish or uphold slavery.

Meanwhile, mainstream antislavery leaders like Salmon P. Chase applied the constitutional lessons of sympathetic judges like Lemuel Shaw, Joseph Story, and John McLean, who acknowledged the basic soundness of antislavery constitutionalism yet warned against flimsy arguments and erring strategies. In *Groves v. Slaughter*, Justice McLean endorsed the core principle of antislavery constitutionalism – that the Constitution treated slaves as persons not property – and pointed to the dangers inherent in having Congress break up the interstate slave trade by way of the commerce power. Justice Story’s opinions in *Amistad* and *Groves* were more narrowly framed, and he strongly disagreed with the main antislavery argument against the Fugitive Slave Law in the early 1840s, but even within the confines of legal positivism and a conscious duty to assuage sectional tensions, Story found space to endorse a presumption of freedom at the federal level, a position which ultimately matched McLean’s opinion in *Groves*.

Most importantly, the crisis proved decisive in pushing abolitionists toward involvement in electoral politics. The thrilling achievements and crushing disappointments in the years after the first petition campaign in 1835 led the majority of abolitionists to consider meeting the Slave Power head-on in Congress with an organized antislavery party. The shift from a broad moral crusade in the early 1830s to a more direct political campaign after 1840 is perhaps the greatest example in the American reform tradition of how a *movement* became into a political *project*.

Crucially, the abolitionists who constructed the Liberty Party went into electoral politics with a clearly defined constitutional program, the legislative agenda first sketched in the 1833
constitution of the American Antislavery Society. Under the guidance of Salmon P. Chase, that constitutional program became the chief platform of antislavery politics, a straightforward call for the “denationalization” of slavery. Chase, the key figure in the transition between moral reform and political action, adapted the abolitionists’ constitutional program to the realm of party politics, using the key lessons of the constitutional crisis to give the program a sharper and more politically appealing edge. Chase’s platform doubled down on the municipal theory’s application to American federalism. It explicitly acknowledged the federal consensus, and in that sense it directly pushed back against the more radical elements of the Liberty Party who proposed using the central government to abolish slavery in the states. With denationalization, the emphasis was on the class element of the antislavery struggle – the effort to rein in the political power of slaveowners. By 1841, Chase was borrowing heavily from the rhetorical playbook of radical Democrats who had opposed the “Money Power” aristocracy and demanded that the Bank of the United States be divorced from the central government. But denationalization always retained the spirit of Chase’s Whig background, that sense that the central government was a distinct national government with a moral duty to promote freedom and deter slavery. For Chase and others, denationalization seemed to promise an orderly and impartial distribution of rights in the Union, the political basis for a prosperous and dynamic national economy.

**Rethinking the Free Soil Coalition**

The crisis over slavery and federal power produced antislavery politics, but it did not end with the Liberty Party’s endorsement of the denationalization program at Buffalo in 1843. The conflict over Texas annexation in 1843-5 and, later, over the Mexican War and the territorial
question, exacerbated the ongoing constitutional debate over slavery and central-government power, deepening a crisis which policymakers in the Polk administration thought would dissipate in the drive for empire. The Texas controversy posed a simple yet vexing question: could Congress reestablish slavery in an annexed territory where it had already been abolished? Before that question could be answered, the Mexican Cession conflict revived the basic issue at stake in the Missouri Crisis – whether Congress could assist slavery’s expansion into the western territories. By the time Preston King reintroduced the Wilmot Proviso in early 1847, everyone who paid close attention to the debates knew the terms of the underlying crisis.

Slavery in the territories was the final straw for radicals in both sections of the country who had reached the breaking point in the debate over slavery and federal power. Neither side was satisfied with the Union as it was, and their disruption of the second party system greatly eroded the dominance of the moderates’ vision of the Union in politics. The crisis concentrated on the presidential election of 1848, which brought the competing nationalisms of pro- and antislavery forces directly into the realm of national politics, straining the party system and its spirit of compromise.

From the Wilmot Proviso in August, 1846 to the November, 1848 election, the antislavery revolt in the North was grounded in antislavery nationalism – a general sense that the U.S. government ought to presume and promote freedom while discouraging slavery on a continental scale. In other words, the revolt, broadly construed, manifested a deep shift in northern politics regarding slavery and central-government power, a reaction to the constitutional crisis after 1835. Radical abolitionists, moderate antislavery politicians, conservative northern voters – all of them belonged to a widespread antislavery movement in the North. At first, the revolt centered on the policy of non-extension, the heart of the Wilmot Proviso, but events in
1847-1848 – not least the insistent lobbying efforts of Liberty coalitionists – led the emerging coalition toward the policy of denationalization, with antislavery constitutionalism at its core. They did so because denationalization addressed the deeper crisis over slavery and federal power, a crisis in which the territories were simply one theater among others, albeit an important one. In so doing, the Free Soilers – a motley collection of antislavery Democrats, Whigs and Liberty men – brought the abolitionists’ constitutional program – Lundy’s original project – into the political mainstream, where it would remain for the next fourteen years, before being enacted by Republicans in Congress. The struggle against slaveowner power, both private and public, had entered a new and more capable phase.

The Antislavery Project towards the Civil War

After 1848, the political center embodied by the second party system fell apart, gradually at first and then quite rapidly, as the issue of slavery and federal power continued to crop up in different contexts, most famously in the domain of the federal territories, but also in the realms of fugitive slaves and transient slaveowners in the North. The two poles of proslavery and antislavery moved closer to the center of national politics. Though the Van Buren-Adams ticket fell far short of the White House, their overall performance was impressive given the novelty of the Free Soil experiment. More importantly, northern voters sent three Free Soil candidates to the Senate – John P. Hale, Charles Sumner, and Salmon P. Chase – bringing, for the first time, advocates of the antislavery project into direct conflict with Calhoun. The Senate was the formidable redoubt of the “Slave Power,” cleansed of antislavery dissent since 1839, when Thomas Morris was expelled from its chambers. Together with a growing body of antislavery
representatives in the House, Chase, Sumner, and Hale shifted the balance of power on Capitol Hill, bringing antislavery nationalism into the heart of American politics.\(^4\)

The crisis was momentarily subdued by the Compromise of 1850, which revived the compromising spirit of the second party system. Like the Missouri Compromise thirty years earlier, the Compromise of 1850 was designed to soothe sectional tensions and stabilize the existing Union, dispersing radical doctrines with moderate paeans to the Union as it was. Henry Clay, the architect of the compromise, evaded the underlying crisis with an omnibus bill offering concessions to both sections of the country (much like Joseph Story had done in \textit{Prigg v. Pennsylvania}). On the most pressing issue, the territories, Clay proposed that California come into the Union as a free state while the territorial governments of the Mexican Cession determine for themselves whether slavery be extend there (this was popular sovereignty). Turning to the nation’s capital, Clay recommended that Congress abolish the slave trade in Washington, D.C., though not slavery itself. Regarding the internal slave trade, that would be off limits to legislative interference. And finally, Clay called on Congress to pass a new, more stringent fugitive slave law – a new measure that could more effectively protect the property rights of American slaveowners.\(^5\) Clay fell ill in early 1850, leaving the whole project in limbo; but it was rescued by the young Democrat Stephen Douglas, who pushed it through Congress with the help of President Willard Fillmore.\(^6\)

The Compromise quashed the Free Soil revolt in the short run, muting the arrival of the antislavery project in national political discourse. But the debates leading up to the compromise


\(^{5}\) The final part of the bill would settle the boundary of Texas and pave the way for a federal takeover of Texas’s public debt

in Congress gave antislavery congressmen an opportunity to attack slavery and promote the antislavery project. Meanwhile, Congress passed the 1850 Fugitive Slave Act, which created a board of federal commissioners – U.S. marshals – with the power to retrieve runaway slaves from the North without testing their legal status. Modeled on Joseph Story’s federal-exclusivity arguments from *Prigg v. Pennsylvania*, the law even compelled northerners to actively particular the capture and remand of fugitive slaves. The Fugitive Slave Act exacerbated the slavery question in the North, reviving the constitutional crisis while undermining the Compromise that produced it. Unable to address the crisis, the Whig Party, already torn apart in the North by a host of other issues, buckled at the national level and finally collapsed in 1852. The handful of Free Soil politicians in Congress, rechristened as “Independent Democrats,” greeted the Whig implosion by promoting the antislavery project. In the Senate, Sumner rehearsed the argument that “FREEDOM, and not slavery, is NATIONAL; while SLAVERY, and not freedom, is SECTIONAL.” Were Congress to “apply these principles” in the form legislation, the “Union Flag of the Republic will become once more the Flag of Freedom, and at all points within the national jurisdiction will refuse to cover a slave.

In all national territories Slavery will be impossible.

On the high seas, under the national flag, Slavery will be impossible.

In the District of Columbia Slavery will instantly cease.

Inspired by these principles, Congress can give no sanction to Slavery by the admission of new Slave States.

Nowhere under the Constitution,” Sumner proclaimed, “can the Nation, by legislation or otherwise, support Slavery, hunt slaves, or hold property in man.”

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7 Charles Sumner, *Freedom National; Slavery Sectional: Speech of Hon. Charles Sumner, of Massachusetts, on his Motion to Repeal the Fugitive Slave Bill, in the Senate of the United States, August 26, 1852* (Boston: Ticknor,
Northern anger over the Fugitive Slave Act was still simmering in 1854 when Stephen Douglass introduced the Kansas-Nebraska bill, which, among other things, proposed an effective repeal of the Missouri Compromise line in the western territories. Douglas was no Calhounite, but for antislavery northerners already upset by the Fugitive Slave Act, the Kansas-Nebraska bill seemed to be the epitome of proslavery nationalism. Chase and the antislavery contingent in Congress responded with the *Manifesto of Independent Democrats*, which reiterated the principles of antislavery nationalism codified in the 1848 Free Soil platform. The revival of the territorial issue accelerated the deterioration of the Democratic Party, as northern Democrats peeled off in disgust. As in the aftermath of the Wilmot Proviso eight years earlier, a wave of fusion activity ensued.\(^8\)

The Republican Party emerged during the fallout from the Kansas-Nebraska Act. As a composite of former Whigs, disaffected Democrats, and Free Soilers, the Republican Party was frequently divided on questions of constitutionalism and economic policy; but when it came to slavery, the party was remarkably consistent, carrying the mantle of the antislavery project. Though its immediate goal was to block slavery’s expansion into the territories, from the beginning the party was committed to a broader project of denationalizing slavery and jumpstarting state-by-state abolition. In virtually every Republican Party state convention between 1854 and 1860, members endorsed the policy of separating slavery from the federal government, going well beyond non-extension of slavery into the territories.\(^9\)

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Chief Justice Roger Taney’s opinion in *Dred Scott v. Sanford* (1857) signaled just how far Calhoun’s proslavery nationalism had moved to the center of national politics by the late 1850s. Taney argued in dicta that the Missouri Compromise was unconstitutional (a point which sanctioned the de facto repeal of the compromise in the Kansas-Nebraska Act) and, by extension, that the right to “property in man” was national, extraterritorial, constitutional. Unlike Joseph Story’s opinion in *Prigg v. Pennsylvania*, Taney’s *Dred Scott* ruling was truly proslavery; it was the consummation of everything John Calhoun had argued since 1835. In that sense it repudiated the entire Republican Party platform, based as it was on the antislavery project.  

Against Taney’s claim that property rights in slaves were guaranteed by the Constitution – that slavery as an institution was a national and constitutional – Republicans doubled down on their antislavery nationalism, promoting the constitutional arguments abolitionists had developed over the previous twenty years. In a speech at New York’s Cooper Union – a speech which dramatically enhanced his national profile – Abraham Lincoln defended his party against the proposition of slavery was guaranteed protection by the Constitution. Lincoln’s speech drew on the same well of antislavery constitutionalism as his predecessors, applying a strict application of the municipal theory to the federal system. Sensing their electoral strength in the upcoming election, the Republican Party adopted a streamlined platform in 1860, boiling the crisis down to the territorial issue – the litmus test for the wider antislavery project. Party members adopted a studied silence on the slavery question in the months and weeks before the election, yet everyone

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knew that the party stood for aggressive antislavery action at the federal level, a radical break from the proslavery policies of previous decades.\textsuperscript{11}

The election of Abraham Lincoln marked a turning point in federal policy, for it was the first time since John Quincy Adams’s administration that a northerner with suspect commitments to slavery occupied the White House. But unlike Adams in the 1820s, Lincoln came into office as part of a broader antislavery movement with a clear policy agenda, a movement whose political wing was the Republican Party that now controlled Congress. His inaugural address set forth the basic premises of antislavery constitutionalism. His administration would not interfere with slavery in the states, but (in a possible nod to Joseph Story’s suggestion in \textit{Prigg v. Pennsylvania}) it would pursue the possibility of inserting a federal habeas corpus procedure into the Fugitive Slave Law. It was clear that, with the Republican Party in power, slavery would be the exception to the rule: freedom would be national, slavery local.\textsuperscript{12}

Southern secessionists in 1860-1861 knew precisely what Lincoln and the Republicans stood for. Their decision to leave the Union rested on the simple premise that an antislavery party now controlled the federal government – that federal policy would now reflect a vision of the Union wholly antithetical to the interests of slaveowners. The new confederacy they established was the logical culmination of Calhoun’s proslavery nationalism: an entire country dedicated to the slave regime and its indefinite expansion. The Confederate Constitution was a monument to proslavery constitutionalism and the proslavery interpretation of the law of nations, the natural outgrowth of Taney’s \textit{Dred Scott} decision. It copied verbatim the language of the 1787 Constitution, but where the framers had referred to slaves as “persons” and “persons held to

\textsuperscript{12} \textit{ibid.}, pp. 49-83.
service,” the Confederates inserted the words “slaves” and “property” – in other words, they
made sure that this Constitution guaranteed the protection of property rights in human beings.
As the vice-president of the Confederacy, Alexander H. Stephens, noted forthrightly, slavery was
the “cornerstone” of the Confederacy, the vital pillar to this new American empire.\(^{\text{13}}\)

Ironically, because secession gave Republicans full control of Congress, it would now
more possible than ever to enact all or part of the denationalization program. The “Slave Power”
was no more; its northern functionaries were isolated and outnumbered. Just as John Quincy
Adams, William Jay, and others predicted in the 1830s, secession proved to be a gargantuan
miscalculation, for slavery’s constitutional safeguards were lost with the Constitution itself,
opening the door to direct federal action in the states in the form of military emancipation.\(^{\text{14}}\)

Even as Republicans turned to military emancipation, they held firm to the antislavery
project of reorienting federal policy and jumpstarting the process of state-by-state abolition in the
South – in this case, Border South slave states which remained in the Union. In the first regular
session of Congress to meet during the war, Republicans passed legislation making
denationalization a reality. On March 16, 1862, Republican Congressman Isaac Arnold of
Illinois introduced a bill “to render freedom national and slavery sectional.” Quickly referred to
the Committee on the Territories, the bill was rescued a few days later by Owen Lovejoy of
Illinois, who renamed it a bill “to secure freedom to all persons within the exclusive jurisdiction
of the Federal Government.” The proposed bill would make the presumption of freedom “the
fundamental law of the land in all places whatsoever, so far as it lies within the powers or
depends upon the action of the Government of the United States to make it so.” It would abolish
slavery and the slave trade in Washington, D.C., the federal territories, and U.S. coastal waters,

\(^{\text{13}}\) ibid., pp. 84-105. On the Confederacy, see, among others, Stephanie McCurry, Confederate Reckoning: Power
and Politics in the Civil War South (Cambridge, Mass.: Harvard University Press, 2010).
\(^{\text{14}}\) Oakes, Freedom National, pp. 256-266.
as well as federal forts and arsenals inside the South. Northern Democrats denounced the bill as a redundant assault on southerners’ constitutional rights, but Arnold and his Republican colleagues insisted that it was constitutional and vital to the war effort. It was designed “to march up to the line of constitutional power wherever we possess that power, and to that extent to prohibit” slavery, Arnold declared. It was meant “to accomplish that, and nothing more; not to invade the constitutional rights of the States, but in all Territories, and everywhere wherever the Federal Government has jurisdiction, there to establish liberty and declare that slavery shall never go.”

Republicans chose not to pass Arnold’s sweeping bill, but they achieved much the same objective in subsequent legislation. In early April, 1862, Congress passed a bill to abolish slavery in the nation’s capital; Lincoln signed it into law a few days later, making good on the promise of Theodore Dwight Weld’s arguments in *The Power of Congress over the District of Columbia*. On April 24, the Lincoln administration joined Great Britain in suppressing American involvement in the Cuban slave trade, and shortly thereafter the administration recognized Haiti (welcoming a Haitian ambassador to Washington) and issued U.S. passports to black Americans – policies which echoed Giddings’ *Creole* resolutions in adopting a legal presumption of freedom on the high seas. On June 17, 1862, Congress passed “An Act to secure Freedom to all Persons within the Territories of the United States,” a positive ban against slavery in the western territories. Lincoln signed the bill into law two days later. Though written in the language of the Northwest Ordinance and Wilmot Proviso, the law was grounded in the municipal-theory logic of antislavery constitutionalism – like the Free Soil platform before it.

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In this way, Republicans enacted denationalization at the earliest possible moment, setting U.S. government policy firmly against slavery and putting pressure on the loyal slave states to begin a process of abolition. The stage was set for a reconstruction policy in which the seceded states would have to abolish slavery in order to gain reentry into the Union. The antislavery legislation of 1862 formalized the antislavery nationalism of the post-Missouri era, setting in stone John Taylor’s contention from 1820 that “the strength of this nation chiefly consists in its moral power.”16 Even as military-emancipation policy unfolded in Confederate-held lands, Lincoln and the Republicans moved toward universal abolition via state-by-state abolition. The campaign for the Thirteenth Amendment followed the state-by-state model, as two-thirds of the states were needed to ratify the amendment. In this way, Republicans remained committed to the constitutional limits of the antislavery program: military emancipation was direct action against, but it was not abolition of the institution. That had to proceed constitutionally, on a state-by-state basis.17

**Antislavery Nationalism and the Rule of Law**

One of the key themes to emerge from this study of the constitutional crisis of 1835-43 is the rise of antislavery nationalism in the North, a vision of the Union in which the central government actively discouraged slavery. Many historians take for granted that the definition of Union promulgated by moderates in the second party system was the only definition of Union. When it is said that the slavery issue threatened “the Union,” what is often meant by “Union” is that which existed in the aftermath of the Missouri Crisis – a Union that secured political rights to most Americans and enabled economic prosperity on a continental scale, which was deeply

moral for many white Americans, and yet recognized, even justified, the abridgement of slaves’ natural rights. There is also the view, propounded by the so-called “neo-Garrisonian” historians, that the Union was intrinsically proslavery from the start, based as it was on a morally flawed Constitution. There is also the widespread assumption that most northerners were racist and therefore incapable of joining abolitionists in seeing the Union as an agent of antislavery reform. From this point of view, “Union” and “antislavery” are treated as incompatible.¹⁸

Yet the majority of northerners since the Revolution were always antislavery in a fundamental sense, and while they spurned the more radical proposals of abolitionists, many shared a basic faith in the antislavery spirit of “the Union,” believing that the central government should, at the very least, presume freedom and discourage slavery. Latent since the Missouri Crisis, antislavery nationalism gained traction as the constitutional crisis continued to escalate in the 1840s. The great majority of antislavery activists and politicians never acquiesced to the argument that the Union as intrinsically proslavery, even after years of blatantly proslavery federal policy. For them, the Union was about expanding the blessings of liberty, not just protecting them, and the central government was the most effective vehicle for advancing that aim. They understood that the issue was about power – about who controlled the central government, not about the central government itself.

The same applies to the Constitution. Many historians, particularly the neo-Garrisonians, assume that the Constitution was inherently proslavery. In establishing structural safeguards for slave property, it was the ultimate example of law as the instrument of class power and white supremacy, a rotten foundation which needed to be removed root and branch before true justice could be established. It created a proslavery constitutional regime that forced even antislavery

¹⁸ Knupfer, Union as It Is; Ross, “Lincoln and the Ethics of Emancipation”; Gallagher, Union War. The best known exponent of the so-called neo-Garrisonian viewpoint is Finkelman, Slavery and the Founders.
politicians and justices to compromise their principles and, if need be, fall on their swords. From this perspective, attempts at working within that regime appear delusional, morally compromised, even wicked.19

There is much truth to this view; after all, the federal government before 1860 was functionally proslavery. But it errs in assuming that the Constitution was the mere instrument of the slaveowning class. For while there is no doubt that there were major concessions to slavery in the Constitution, and that it generally benefitted slaveowners before the Civil War, it is important that the text of the Constitution provided space for an antislavery politics to emerge in the 1840s. The fact that it recognized slaves as persons as well as property – instead of property only -- was a significant opening for an antislavery interpretation of the Constitution and, by extension, a viable antislavery politics. The proslavery bent of federal policy during the first seventy years of the republic reflected slaveowner control of the federal government more than it did the intrinsic proslavery nature of the Constitution.

Antislavery constitutionalism, with its strong anti-oligarchic tendencies, should remind us that law, like politics, is never a static legitimation of class power, that it is often the subject of fierce debate, the very theater of class struggle. In the words of historian E.P. Thompson, while “the law can be seen to mediate and to legitimize existent class relations,” it “also has a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless.”20

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19 See, for example, Van Cleve, Slaveholders’ Union; Finkelman, Slavery and the Founders; Cover, Justice Accuse;.
20 Thompson, Whigs and Hunters: the Origin of the Black Act (New York: Pantheon Books, 1975), pp. 266-7: “... It is true that in history the law can be seen to mediate and to legitimize existent class relations. Its forms and procedures may crystallize those relations and mask ulterior injustice. But this mediation, through the forms of law, is something quite distinct from the exercise of unmediated force. The forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless.” The point is about the utility of the rule of law. On the same page, Thompson writes: “... the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is... a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle about law,
Even as it benefitted slaveowners, antislavery activists used law and the Constitution to make the case for abolition and a reduction of slaveowner power. Antislavery lawyers like Salmon Chase, Roger Baldwin and James Alvord used constitutional arguments to delegitimize the right to “property in man,” localizing slavery by straddling the line between natural law and positive law. The art of constitutional argumentation allowed abolitionists to abstract from their own proslavery moment, to step outside of their own time and articulate an antislavery vision of a “more perfect” Union.21

The antislavery project was the policy embodiment of antislavery nationalism. It was the indispensable program for ushering in a far different Union than the one enshrined in the second party system, a vision of the Union which appealed to increasing numbers antislavery Democrats and Whigs in the 1840s. The key line in the 1848 Free Soil platform – “Congress has no more power to make a slave than a king” – conjured the spirit of the Jeffersonian anti-oligarchy tradition, in which the Constitution was used to check homegrown “aristocracies” who would use central-government policy to expand their political and economic power. At the same time, antislavery nationalism was indebted to the economic nationalism of antislavery Whigs, who considered slavery to be the chief obstacle to dynamic economic growth. Former Whig Henry Wilson captured this sentiment after the Civil War when he wrote:

> When slavery ruled, the energies of the people were comparatively dormant. What little of vigor worked its way up to and through the incrusted surface was made captive by interminable political agitations with which slavery disturbed the country and checked the progress of the Republic. Underlying these agitations were false principles of political economy, unsound doctrines of government, erroneous theories of trade and commerce, ruinous systems of public policy, unjust systems of labor – everything which was calculated to retard the true advancement of the nation.22

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“When slavery ruled....” Wilson wrote those words in 1879, when slavery and the “Slave Power” were gone, the republic’s institutions remodeled on the tenets of antislavery nationalism – at least for a time. That was two years after Reconstruction policy came to an end with the “Compromise of 1877.” It was the beginning of the long, dark era of Jim Crow. Yet, while the overthrow of Reconstruction and the history of racism and disfranchisement in the Jim Crow era should caution against a triumphant nationalism, the dashed hopes and hardships of the postwar period should not obscure the fundamental achievement of the Civil War: that property rights in human beings had been totally discredited, purged from the nation’s legal and political structure. It matters that, with the Republican ascendancy during and after the war, the legal presumption of freedom – the legal expression of “all men are created equal” – had broken free from its northern confines to become the bedrock of national policy. White racism may have persisted and even deepened in the South as well as the North, but “property in man” was no more. The antislavery project had been achieved, and while there were attempts to obstruct its implementation, slavery’s revival was beyond the pale. The way had been paved for a new kind of American empire.
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