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The 1859 Crisis over Hinton Helper's Book, the Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment - Symposium on the Law of Slavery: Constitutional Law and Slavery

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THE 1859 CRISIS OVER HINTON HELPER'S BOOK, *THE IMPENDING CRISIS*: FREE SPEECH, SLAVERY, AND SOME LIGHT ON THE MEANING OF THE FIRST SECTION OF THE FOURTEENTH AMENDMENT

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INTRODUCTION: SLAVERY, FREE SPEECH, AND *THE IMPENDING CRISIS*[1]

In 1859 the United States of America stood on the verge of civil war. One Southern congressman after another rose in Congress to announce that the election of a "Black Republican" president would justify secession.[2] Republican congressmen answered that secession would be met with coercion.[3] The divisive issue was slavery. Congress convened in December 1859, shortly after John Brown's unsuccessful October raid on Harper's Ferry, a raid designed to free slaves by force of arms. Democrats announced that Brown's raid was the natural consequence of Republican and antislavery agitation.[4]

Exhibit One in the case against the Republicans was an antislavery book written by Hinton Rowan Helper: *The Impending Crisis of the South: How to Meet It*.[5] In this book, Helper, a North Carolinian, appealed for political action by nonslaveholders of the South to eliminate slavery. Although isolated passages from the book were ambiguous and could be read in a more sinister way, at the least the book suggested that if the channels of peaceful political change were closed to opponents of

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1. HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT (George M. Fredrickson ed., Harvard University Press 1968) (1857).

2. *See, e.g.*, CONG. GLOBE, 36th Cong., 1st Sess. 124 (1859-60) [hereinafter GLOBE 36(1)] (Sen. Gwin); *id.* at 272 (Rep. Rust); *id.* at 455 (Sen. Clingman); *id.* at 881-82 (a collection of these statements by Republican Rep. McPherson).

3. *E.g.*, *id.* at 932 (Rep. Edgerton).

4. *E.g.*, *id.* at 94 (Rep. Curry); *id.* at 27-28 (Rep. Mallory); *id.* at 49 (Rep. Pryor).

5. HELPER, *supra* note 1.

slavery by violence and repressive laws then resort to counter-violence was justified. Here, supporters of slavery suggested, was the blueprint for the infamous John Brown raid. Republicans were implicated in the raid, they insisted, because more than sixty Republican Congressmen had endorsed Helper's book.[6] Later in the session, faced with an explicit choice of protecting slavery or endorsing the principle of freedom of speech on all political matters including slavery, Democrats in the Senate chose slavery.

By 1859 the controversy over slavery had become the consuming issue of American politics. A focus of dispute was slavery in the territories.[7] Would slavery be planted in the soil of new territories or would it be excluded? Most parties to the dispute recognized that the territorial issue was, as Don Fehrenbacher has said, a skirmish line in a far more extensive struggle.[8] For Republicans slavery was an anomalous institution, inconsistent with liberty, an institution to be strictly confined within its present boundaries and placed in the course of ultimate extinction.[9] To much of the Southern political elite this plan to confine slavery in the expectation of its ultimate elimination was unacceptable. These Southern leaders hoped to protect slavery from the long term plans of its political enemies by allowing the institution to expand so that the political power of slave states would remain close to that of the free states. If that failed the answer was secession.

The contest over slavery during 1859 and 1860 included another battle: a battle over the meaning of political liberty focused on freedom of speech and of the press. The institution of slavery had a pervasive impact on law and ideology and, in the years before the Civil War, it undermined support for basic liberties of speech, press, and political action. Reaction to the "slave power's" suppression of political liberty in the years before the Civil War shaped the guarantees of liberty added by the Fourteenth Amendment after the Civil War.

In 1859 and 1860 the conflict between slavery and antislavery produced debates on free speech in Congress and repression of antislavery speech and press in much of the South, including a prosecution of an antislavery minister in North Carolina for circulating Helper's book. Together these events cast light on how slavery shaped Republican ideas of

6. *E.g.*, GLOBE 36(1), *supra* note 2, at 43 (Rep. Garnett).

7. *E.g., id.* at 58 (Sen. Trumbull); *id.* at 1836-37 (Rep. Bingham); CONG. GLOBE, 36th Cong., 1st Sess. app. at 136-40 (1860) [hereinafter GLOBE 36(1) app.] (Rep. Corwin).

8. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 311 (1970).

9. *E.g.*, ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 59 (Don E. Fehrenbacher ed., 1989) [hereinafter LINCOLN'S SPEECHES 1859-1865].

free speech, press, and religion and on whether states should be required to respect these liberties.

The events of 1859 are a crucial part of the background that shaped the world view of the people who wrote, proposed, and adopted the Fourteenth Amendment, and particularly its clause prohibiting states from denying the privileges or immunities of citizens of the United States. Because the Fourteenth Amendment today forbids states from abridging freedom of speech, press, and religion, and because this development has had its share of critics, the uproar of 1859 is pertinent to understanding the purposes of those who framed its first section. Today we continue to struggle to assure equal protection for African Americans. The role of free speech on questions related to race and other group characteristics remains very much with us. The events of 1859 are an important part of that story.

Part I of this article provides a broad overview of events leading to the crisis of 1859—from the adoption of the federal Bill of Rights, through the Sedition Act and Southern suppression of antislavery speech, to the debates in Congress in 1859 on free speech and Helper's antislavery book. Part II focuses in more depth on the events of the 1830s leading to repression of free speech in North Carolina and Virginia. Part III puts the uproar over free speech and the Helper book in the broader context of the battle over slavery and then in the specific context of free speech in the states. It looks at some attempts to suppress antislavery speech in the North and South and at repressive legislation and the judicial response in North Carolina and Virginia. The section also studies a libertarian constitutional doctrine that abolitionists developed in response to attempts to repress antislavery agitation. Next Part III examines the uproar over Helper's book in Congress in 1859-60 and Republican and Democratic ideas about slavery and freedom of expression. The section concludes with an examination of the prosecution and conviction of a North Carolina minister charged with circulating Helper's book.

Part IV, "A New Birth of Freedom," focuses on the meaning of these events for the debate over whether the Fourteenth Amendment was designed to require states to obey liberties set out in the federal Bill of Rights. It also looks at the significance of these events vis-à-vis the meaning of freedom of speech and of the press under the Fourteenth Amendment.

I. HISTORICAL OVERVIEW

A. Events leading up to the Uproar Over Helper's Book

Before looking at the crucial events of 1859, I will provide rather extensive background, in an effort to establish some of the context that shaped the debates of that fateful year. The full story of free speech and slavery in the South and in the nation is beyond the scope of this paper. Instead I focus on selected incidents from the larger story.

The present story begins with the adoption of the Bill of Rights of 1791—without explicit guarantees prohibiting states from abridging free speech, free press, and freedom of religion. Soon thereafter the federal government made a major assault on freedom of expression. Under the Sedition Act of 1798 Federalists prosecuted their opponents for criticizing President Adams—political speech and press were thought to have dangerous tendencies. Although the nation repudiated the Sedition Act, the controversy over antislavery publications in the 1830s raised the issue of "dangerous" political speech again, this time on both the state and national levels. In the 1830s a slave revolt in Virginia produced a state legislative debate on slave emancipation and deportation. Opponents of emancipation insisted that antislavery expression was a threat to safety. Soon North Carolina, Virginia, and other Southern states passed laws aimed at antislavery expression. The North Carolina and Virginia laws led to prosecutions for antislavery speech and press, including 1859 prosecutions aimed at distributors of *The Impending Crisis*. In the 1830s Southerners demanded similar laws in the North, and the Governor of New York proposed one. In 1859 some Democrats in Congress advocated reviving his plan for Northern state laws aimed at antislavery speech.

At the state level much of the present story focuses on North Carolina and Virginia. North Carolina produced both the author of the *Impending Crisis* and a North Carolina Supreme Court case involving its dissemination. Virginia was the home of Jefferson and Madison, and of the Virginia resolution against the Sedition Act, the Nat Turner rebellion, one full scale Southern debate on emancipation and deportation of the slave population, and the John Brown raid. Like Virginia, North Carolina, and other Southern states, the legislature of the Kansas territory also passed laws restricting antislavery expression. In 1859 Republicans saw the Kansas laws as a preview of the political repression that the "slave power" had in store for the nation.

Finally, the constitutional theories of a small group of abolitionists are also important for an understanding of Republican thought in the

years from 1859 through 1866 because an adaptation of these theories seems to have shaped the responses of leading Republicans to the crisis over civil liberties and slavery. By 1866, when the Fourteenth Amendment was proposed, a broad range of Republicans expressed this more national and civil libertarian reading of the Constitution.

The conflict between free speech and slavery revived the issue of the relation of free speech to republican government previously raised by the Sedition Act, but with a significant difference. In this second crisis of free speech, suppression came from the states, not from the national government. The crisis over slavery and free speech also highlights the crucial importance of the "incorporated" Bill of Rights as a whole to republican government. For example, Republicans invoked rights referred to in the First Amendment (here involving antislavery speech, press, and religion), the Fourth Amendment (involving unreasonable searches and seizures aimed at antislavery activists and publications), and the Eighth Amendment (involving cruel and unusual punishments for opponents of slavery) in the years 1859 to 1866 to criticize state political repression that the "slave power" aimed at opponents of slavery. In this respect the battle between antislavery and slavery replicated earlier battles for political liberty in which dissenters invoked basic liberties, including criminal procedure guarantees later set out in the American Bill of Rights.[10] In 1859 criminal procedure guarantees were especially pertinent because some Democrats implied that the Republican party was not a normal political party, but instead was a criminal conspiracy.

The 1859 controversy over *The Impending Crisis* provides a case study of conflicting ideas of freedom of expression and of the liberties of American citizens. The debate that swirled around slavery and free speech and press casts some light on early Republican understanding of the concept of freedom of expression. Was freedom of the press limited to protection against restraint before publication or did it also protect some expression from subsequent punishment? Should political speech thought to have bad tendencies be banned, or did the idea of free speech have a hard central core of meaning that protected political speech from suppression? The Southern rejection of free speech about slavery was not as unique as it first appears. In World War I the Court found criminal criticism of the war thought to have a tendency to interfere with the draft.[11] In the 1950s the Court allowed punishment for Communist ad-

10. ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 21, 499, 501, 522 (Athenium 1969) (1964); Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENTARY 359 (1991).

11. *E.g.*, Debs v. United States, 249 U.S. 211, 216-17 (1919).

vocacy of revolution, although the revolution was not to be effectuated immediately, but as soon as circumstances would permit. The main opinion in that case, *Dennis v. United States*, balanced the gravity of the evil against its improbability.[12] To Southerners a slave revolt was a grave evil indeed, and, as the Nat Turner Rebellion showed, not all that improbable. Still the demand to suppress antislavery speech was remarkable and the most profound threat to civil liberty since the Sedition Act: it was aimed at advocacy of political change in peace time by peaceful means.

The controversy over free speech and slavery is also an important part of the history of the Fourteenth Amendment, an amendment shaped by the conflict between slavery and civil liberty. Events of 1859 help us to understand what Republicans were talking about in the debates of 1866 and what they meant when they provided in section one of the Fourteenth Amendment that "[n]o state . . . shall abridge the privileges or immunities of citizens of the United States . . . ."[13] Did they intend that state observance of the commands of the Bill of Rights would remain[14] a matter of state option? Was there anything like a consensus on the issue? Since the meaning of words depends on their context, the historical context in which section one was adopted sheds further light on the original meaning of the words used. The 1859 crisis over *The Impending Crisis* is a crucial part of that context. It provides some additional evidence from which to evaluate two contending theories about section one of the Fourteenth Amendment. One theory insists that section one was originally designed only to guarantee limited equality of treatment under state law; the other insists that it was also designed to prevent states from denying some additional national personal liberties including those in the Bill of Rights. Two themes run through the story about free speech and slavery told in this paper—the need to require states to respect the commands of the Bill of Rights and the need to protect speech and press even when political speech seems to threaten grave public danger.

For years many constitutional law case books began their analysis of freedom of expression with the controversies over free speech connected with World War I or jumped from the Sedition Act of 1798 to the World War I cases. Recently legal scholars have begun to look again at earlier

12. Dennis v. United States, 341 U.S. 494 (1951).

13. U.S. CONST. amend. XIV, § 1.

14. *See* Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

episodes in the history of freedom of expression.[15] The uproar over *The Impending Crisis* is another part of our history of free speech in the United States and of the application of free speech guarantees to the states through the Fourteenth Amendment, a history too often forgotten by lawyers.[16]

15. *E.g.*, David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

16. Historians have focused on the issue from time to time. Deeply researched studies to which I am indebted include, CLEMENT EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH (Harper & Row 1964) (1940) (focusing on events in the Southern states); RUSSELL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860 (1972); W. SHERMAN SAVAGE, THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830-1860 (1968) (1938). For two fine studies that bear directly on the Worth case, see Clifton H. Johnson, *Abolitionist Missionary Activities in North Carolina*, 40 N.C. HIST. REV. 295, 295-301 (1963) and Noble J. Tolbert, *Daniel Worth: Tar Heel Abolitionist*, 39 N.C. HIST. REV. 284, 284-90 (1962).

A number of legal studies have focused on the historical background of the Fourteenth Amendment with regard to guarantees of civil liberty. Typically these have built on prior work and offered new evidence and interpretation as well. For an early scholarly study, see HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (Peter Smith 1965) (1908). For two pioneering studies of antislavery influence, see HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION (1968) and JACOBUS TENBROEK, EQUAL UNDER LAW (enlarged ed. 1965). Both examined antislavery origins of the Fourteenth Amendment. Crosskey built on their insights and added powerful additional research and analysis in William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). Analysis of the issue was further advanced in Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1 (1968) and Robert J. Kaczorowski, *Searching for the Intent of the Framers of Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972-73). RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837-1860 (1976) provides an excellent survey of the rise of the political antislavery movement. For a very important study of early antislavery legal thought, see WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977).

My own work was heavily influenced by Crosskey and my understanding of the subject evolved over time. *See* Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) [hereinafter *A Reply to Professor Berger*]; Michael Kent Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982); Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982). For a critique of Mr. Berger's work, see Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

For an overview of this period of American legal history and significant additional analysis of the meaning of the first section of the Fourteenth Amendment, see HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 386-438 (1982). *See also* Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENTARY 235 (1984). A broad history and critical analysis of the incorporation issue appears in MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) [hereinafter CURTIS, NO STATE SHALL ABRIDGE]. A very important and insightful article by Akhil Amar has added still more evidence and fresh interpretation. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992). A still more recent and important article by Richard Aynes is a powerful answer to the *ad hominem* attacks on Bingham which, unhappily, have been too prominent in discussion of the incorporation issue. *See* Richard L. Aynes, *Charles Fairman and John Bingham's Not-So "Singular" View of the Fourteenth Amendment and the Bill of Rights* 103 YALE L.J. (forthcoming 1993).

For important scholarship denying application of the Bill of Rights to the States under the

B. Freedom of Speech and the Press

1. The First Bill of Rights

By the time of the American revolution, American revolutionaries appealed to the basic rights of Englishmen, including habeas corpus, jury trials, protection against ex post facto laws and unreasonable searches, and other procedural rights. They also appealed to freedom of speech, press, and religion, and the right to counsel. These appeared in bills of rights in many state constitutions. The omission of many of these basic rights from the American Constitution was one of the major arguments against its adoption.

When James Madison proposed the Bill of Rights in 1789, he cautiously expressed his expectation for the role to be played by guarantees of liberty. Madison hoped the Bill of Rights would limit abuses of power by the legislature, the executive, and most of all by the majority against the minority. By declaring guarantees of liberty, a bill of rights would have "a tendency to impress some degree of respect for them, to establish the public opinion in their favor."[17] The judiciary would "consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power."[18] Madison noted that in the British system declarations of rights "have gone no farther than to raise a barrier against the Crown; the power of the legislature is left altogether indefinite. . . . The freedom of the press and rights of conscience, those choicest *privileges* of the people, are un-

Fourteenth Amendment, see RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989) and WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988). Scholars who have concluded that incorporation was intended have included writers of all political persuasions. In addition to Professor Avins, the most recent "conservative" to support incorporation is EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990). Most students of the subject who have studied it in detail have concluded that some form of application to the states of all constitutional guarantees of personal liberty was probably intended by the framers of the Fourteenth Amendment. These include Flack, Crosskey, Avins, Curtis, Hyman and Wiecek, Kaczorowski, Maltz, Amar, and Aynes. Berger and Nelson deny any incorporation. Fairman, TenBroek, Guminski, and Graham opt for some form of selective incorporation. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949); Arnold T. Guminski, *The Rights, Privileges, and Immunities of the American People: A Disjunctive Theory of Selective Incorporation of the Bill of Rights*, 7 WHITTIER L. REV. 765 (1985). For a lively popular history of the Fourteenth Amendment, see HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE (rev. ed., Beacon Press 1978) (1973).

17. 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1030 (Bernard Schwartz ed., 1971) [hereinafter DOCUMENTARY HISTORY] (Madison in the first Congress).

18. *Id.* at 1031. For recent commentary, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Paul Finkelman, *The Ten Amendments as a Declaration of Rights*, 16 S. ILL. U. L.J. 351 (1992); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301 (1990).

guarded in the British constitution."[19]

In addition to the rights that did make it into the Bill of Rights, Madison had also proposed "that no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases."[20] "[E]very Government should be disarmed," he insisted, "of powers which trench on those particular rights."[21] Though some state constitutions secured the rights, there was no reason not to have "a double security on those points."[22] "State Governments," Madison said, "are as liable to attack the invaluable *privileges* as the General Government is. . . ."[23] When a critic suggested that the matter should be left to the states, Madison responded that the limitation on the states was "the most valuable amendment in the whole list."[24] While Congress accepted most of Madison's proposals, the Senate rejected his proposal for explicit limitation on the states. The Bill of Rights, the Supreme Court ruled in 1833, did not limit state or local governments.[25]

2. The Sedition Act

The Sedition Act of 1798 put the Bill of Rights to its first major test.[26] The Act made it a crime falsely and maliciously to criticize the president. Political motives for the Act were clear: it protected the President, John Adams, from criticism, but not the Vice President, Thomas Jefferson, his likely opponent in the election of 1800. The act was set to expire by the time the new President was in office. Federalists used the act to prosecute supporters of Thomas Jefferson for political criticisms of President Adams.[27]

Much of the Jeffersonian attack on the Sedition Act was based on federalism: the Constitution gave Congress no power over speech and press and the First Amendment explicitly denied such power. The Virginia Resolutions, penned by Madison, made a more fundamental criticism: the Sedition Act should "produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which

19. DOCUMENTARY HISTORY, *supra* note 17, at 1028 (emphasis added).
20. *Id.* at 1033.
21. *Id.*
22. *Id.*
23. *Id.* (emphasis added).
24. *Id.* at 1113.
25. Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
26. 1 Stat. 596-97 (1798).
27. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1966).

has ever been justly deemed the only effectual guardian of every other right."[28] Charles Black says such an argument is structural: a conclusion drawn from how republican governments have to function to fulfill their design.[29] The argument suggested an area of political speech that should be beyond the power of government to suppress. This response to the Sedition Act built on and elaborated the Leveller and Radical Whig tradition. By that tradition the people were the master, government officials were the agent, and free speech was an essential mechanism by which the master could control the agent.[30] While Blackstone's *Commentaries*, the leading English text, defended Parliamentary sovereignty and the idea that freedom of the press was limited to a protection against prior restraint,[31] the attack on the Sedition Act emphasized popular sovereignty and a broad concomitant right to criticize government measures and officials. Although the federal courts sustained the Act,[32] Jefferson was elected president, the Sedition Act expired, and Jefferson pardoned those convicted under it.

The consensus that emerged from the controversy over the Sedition Act recognized basic Bill of Rights liberties as fundamental freedoms of American citizens. These fundamental freedoms, like free speech and free press, were protected from federal invasion by the national Bill of Rights. As against state action, these and other guarantees of liberty were thought by many to be protected by state constitutions and state bills of rights. Most of the state and federal rights were criminal procedure guarantees, a recognition that those in power are tempted to use the criminal law to suppress their political opponents. The First Amendment to the federal Constitution assumed a pre-existing freedom of speech and of the press and enjoined Congress not to abridge it.[33] The assumption that the rights of the people were adequately protected by the Bill of Rights as against the federal government and by state guarantees

28. *Virginia Resolutions*, Dec. 21, 1798, *reprinted in* 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 159, 160 (Melvin I. Urofsky ed., 1989).

29. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 9-15, 40-42 (1969).

30. *See, e.g.*, JOHN TRENCHARD & THOMAS GORDON, 1 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 96-103, 249-50, 253 (Da Capo Press 1971) (1755); Curtis, *supra* note 10, at 367-68; David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 823 (1985). For early understandings of free speech, see also DONNA L. DICKERSON, THE COURSE OF TOLERANCE (1990); LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS (1985); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

31. 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (1825).

32. *E.g.*, United States v. Cooper, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865).

33. Amar, *supra* note 16, at 1207.

as against state governments suffered repeated shocks in the crusade against slavery.

II. THE END OF THE CONSENSUS: REPRESSION OF FREE SPEECH IN THE SOUTH

A. A More Radical Attack on Slavery and A More Radical Response

Slaveholders were of two minds about slavery. On the one hand, they professed and often believed that the relation between themselves and their slaves was one of paternal affection.[34] On the other, they said they feared their slaves could be led to revolt and cut their throats. News of incendiary pamphlets and graver threats such as slave revolts and rebellions dramatically heightened slaveholders' anxiety about their safety. An 1829 pamphlet by David Walker, a Massachusetts black, urged slaves to revolt. Walker managed to send his pamphlet into several Southern states. In 1830 copies appeared in Wilmington, North Carolina. In 1831 William Lloyd Garrison began publishing the *Liberator*, a radical anti-slavery newspaper. Though Garrison did not advocate violence, he did send his harsh denunciations of slavery and slaveholders to the South, unsolicited. Nat Turner, a Virginia slave, led a slave revolt in 1831, killing sixty whites before his insurrection was suppressed.[35]

Immediate Southern reaction to such events was close to hysteria. After the Nat Turner rebellion Virginians suffered, as one delegate to the Virginia Assembly put it, from "the suspicion that a Nat Turner might be in every family, that the same bloody deed could be acted over at any time and in any place . . . ."[36] The very omnipresence of slave servants added to the danger. Still, recommendations for action were mixed. The first reaction was repression, often aimed at slaves and free Negroes. After the Walker pamphlet, North Carolina, like some other Southern states, made it a crime to teach slaves to read or write. It provided for quarantine of free blacks sailors on ships entering its ports.[37] It also banned publications with the tendency to excite insurrection, conspiracy, or resistance in slaves.[38] Other Southern states passed similar laws. In

34. EUGENE D. GENOVESE, ROLL, JORDON, ROLL: THE WORLD THE SLAVES MADE 97-99, 102-03, 105-12 (1976).

35. EATON, *supra* note 16, at 89-117.

36. James M'Dowell, Jr. (of Rockbridge), Speech in the House of Delegates of Virginia, on The Slave Question 29 (Jan. 21, 1832) (copy on file with author).

37. 1831 N.C. Sess. Laws ch. 30. *See also* Paul Finkelman, *States' Rights North and South in Antebellum America, in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 125, 130-33 (Kermit L. Hall & James W. Ely, Jr. eds., 1989).

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

Virginia, after the Nat Turner rebellion, the legislature also considered repressive measures. Remarkably, however, the rebellion also led to a legislative attempt gradually to end slavery in Virginia and to provide for colonization of emancipated slaves. Nat Turner's revolt provided an occasion for Virginia egalitarians, mostly from the Piedmont and west, to attack slavery, an institution concentrated in the east. Ridding the state of slavery could also undermine the disproportionate political power (if one white man one vote was the standard) of the slaveholding east.

B. The Virginia Emancipation Debate of 1832: A Dress Rehearsal for 1859?

There are some remarkable similarities between the controversy over emancipation in Virginia and the later controversy that swirled around slavery and Helper's book in 1859. Just as the national debate on slavery became increasingly sectional, the divisions in Virginia were largely, though not entirely, sectional. Delegates from west of the Blue Ridge Mountains tended to favor emancipation and colonization (deportation); those from the heavily slaveholding counties of the east tended to oppose it.[39] Slave counties in Virginia were over-represented in the Virginia legislature, if representation were to be based on their white population.

Slaveholding areas were also over-represented, by virtue of the three-fifths clause, in the federal House of Representatives.[40] So locally and nationally slaveholders came to controversies over slavery with added political power.

Republicans supported banning slavery from the territories. In 1832 a delegate from Western Virginia suggested the desirability of banning slavery from the western part of the state.[41] Like Helper in the late 1850s, supporters of gradual emancipation in the Virginia legislature based their argument more on the safety and economic well-being of the

39. CHARLES S. SYDNOR, THE DEVELOPMENT OF SOUTHERN SECTIONALISM 1819-1848, at 228 (1962). For a fine brief modern account of events in Virginia and later efforts at emancipation in Delaware and Maryland, see WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854, at 162-210 (1990) [hereinafter FREEHLING, ROAD TO DISUNION]. For a detailed modern study, see ALISON G. FREEHLING, DRIFT TOWARDS DISSOLUTION: THE VIRGINIA SLAVERY DEBATE OF 1831-1832 (1982).

40. SYDNOR, *supra* note 39, at 228. Some Southern states based representation in part on "federal population," incorporating the three-fifths clause by reference. Such provisions swelled the representation of slaveholders. *E.g., Amendments to the Constitution,* 1836 PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA, CALLED TO AMEND THE CONSTITUTION OF THE STATE app. at 419 (representation in the House of Commons to be based on "federal population").

41. Charles Jas. Faulkner (of Berkeley), Speech in House of Delegates of Virginia, on the Policy of the State with respect to Her Slave Population 9 (Jan. 20, 1832) (copy on file with author).

white community than on concern for the rights of the slave. Slavery, the Virginians argued, endangered whites, threatening them with slave revolts. It discouraged white artisans and mechanics from working in the state and produced white flight and economic backwardness.[42] As Helper later would, the Virginia emancipationists suggested that abolition of slavery was justified by the power of government to abate nuisances. Indeed, analogies to slavery ranged from mad dogs to diseased cargoes on ships.[43] The list of practical dangers was capped with the prescient claim that slavery was producing sectional parties and was contributing to the future dismemberment of the Union.[44] For Virginia's supporters of emancipation, quarantining blacks on ships and prohibiting teaching slaves to read would not cure the problem. The South was trying to cure cancer with a band aid.

In addition to practical arguments against slavery, one Virginia delegate questioned whether slavery was not "the most striking [instance] upon record, of a people resolutely violating towards others, that principle of absolute freedom on which they erected their own independence . . . ."[45] Finally some Virginia emancipationists appealed to the humanity of the slave.[46] One major difference between the Virginia debate of 1832 and the Congressional debate of 1859 is the increased expression of humanitarian concern for the slaves in Congress in 1859. Still, in 1859 leading Republicans saw colonization as the next step after emancipation, and supported it for free blacks as well as slaves.[47]

While in 1832 an important segment of the political elite and establishment press in Virginia made calls for an end to slavery in the state, by 1859 the press and political elite in Virginia and North Carolina treated very similar appeals by Hinton Helper as criminal. Though the Virginia rhetoric was at times radical, the proposals of the 1832 Virginia emancipationists were more moderate: one resolution provided that emancipation of all slaves born after 1840 be submitted to the voters. The

42. *E.g.*, *id.* at 9-14; Philip A. Bolling (of Buckingham), Speech in the House of Delegates of Virginia, on the Policy of the State in relation to Her Colored Population 13 (2d ed. Jan. 25, 1832) *in* SLAVERY SOURCE MATERIAL AND CRITICAL LITERATURE (Louisville, Ky., Lost Cause Press) (Microfiche Reprint SLA 185 (1971)); John A. Chandler (of Norfolk County), Speech in the House of Delegates of Virginia, on the Policy of the State with respect to Her Slave Population 6-7 (Jan. 17, 1832) *in* COLLECTION OF ANTI-SLAVERY PROPAGANDA IN OBERLIN COLLEGE LIBRARY (Louisville, Ky., Lost Cause Press) (Microfiche Reprint SLB 826 (1964)); Thomas J. Randolph (of Albemarle), Speech in the House of Delegates of Virginia, on the Abolition of Slavery 7 (2d ed. Jan. 21, 1832) (copy on file with author).

43. *See* Chandler, *supra* note 42, at 6; Randolph, *supra* note 42, at 7.

44. M'Dowell, *supra* note 36, at 21.

45. *Id.* at 5.

46. Faulkner, *supra* note 41, at 18.

47. GLOBE 36(1), *supra* note 2, at 60 (Sen. Trumbull) (favoring "deportation" of free blacks).

proposal for gradual emancipation did not necessarily assure freedom for all slaves, though it would free Virginia from slavery. Gradual emancipation left open the possibility that slaves could be sold to the deep South before the date for emancipation arrived.[48]

The Virginia emancipationist-colonizationist attack was answered with an appeal to the rights of private property, including an invocation of the Fifth Amendment guarantee against taking private property for public use without just compensation. Emancipationists answered that the right to private property was limited. It did not include the right to compensation when property endangered the community or was a nuisance.[49] John Chandler, delegate from Norfolk County, suggested that slave owners had a questionable title to their slaves. Since liberty "rightfully, cannot be converted into slavery, may I not question whether the title of the master to the slave is absolute . . . ."[50] The original American owners of the slaves were receivers of stolen goods; passage of time did not improve the title of their descendants.[51] In spite of legislative enactments, Chandler thought title to slaves remained dubious.[52]

The proposals and, to a far greater degree, the logic of the emancipationists seemed to threaten powerful economic interests of slaveholders. A pamphlet by "Appomattox" came to the defense of the institution of slavery. Appomattox cited, with a mixture of horror and sarcasm, some statements by proponents of abolition:

> The gentleman who opened the debate . . . was very, very moderate: he only referred to the declaration in the bill of rights that *all men are by nature free and equal,* and applying it to our slaves, said, "It was a truth held sacred by every American and by every republican throughout the world." And he presumed it could not be denied in that hall, as a general principle, that it is an *act of injustice, tyranny and oppression, to hold any part of the human race* in bondage against their consent.[53]

The speeches, Appomattox angrily announced, had been published in Richmond where they were likely to influence the blacks and to spread. If insurrection by the blacks did break out, it would be due

> not to the hallucinations or imposture of another Nat Turner, nor to the seditious practices of negro preachers . . . nor to the dissemination of the incendiary writings of *The Liberator,* or *The African Sentinel,* or

48. SYDNOR, *supra* note 39, at 227; FREEHLING, ROAD TO DISUNION, *supra* note 39, at 185.
49. Faulkner, *supra* note 41, at 15.
50. Chandler, *supra* note 42, at 8 (emphasis omitted).
51. *Id.*
52. *Id.* at 8-9.
53. The Letter of Appomattox to the People of Virginia 18 (1832), *in* SLAVERY SOURCE MATERIAL AND CRITICAL LITERATURE (Lousiville, Ky., Lost Cause Press) (Microfiche Reprint SLA 1084 (1971)) This letter is also published in the RICHMOND ENQUIRER, Feb. 4, 1832.

> *The Genius of Universal Emancipation*—but to measures proposed, and to speeches delivered, in our own legislature, published and disseminated by our own public journals.[54]

Appomattox urged his readers to "pay no regard" to claims of independence of the press. Slaveholders and their allies should take action to silence opponents of slavery including a boycott of the abolition presses that published these "inflammatory, dangerous, mischievous"[55] writings. He urged private action instead of "sedition laws."[56]

Free speech on slavery can be seen from two perspectives. First it may be viewed from the perspective of formal legal reactions to it: statutes and jury and court decisions. Second it may be viewed from the perspective of the broader social reaction to dissent. Obviously the two systems influence each other. To the extent that Appomattox convinced Virginians that criticism of slavery was illegitimate and tended to produce violence, the long run effect of his efforts would be to produce both legal and extra-legal suppression. To the extent that the community sees dissent on a subject as not only wrong, but illegitimate, free discussion of that topic is likely to disappear.

Virginia proponents of emancipation refuted the claim that public discussion of the issue was a grave wrong. They made a structural argument about the role of free speech in republican government, echoing arguments that stretched back through Virginia's resolution rejecting the Sedition Act to the Radical Whig heritage. Secrecy on the issue was "unsuited to the genius of this government, which is based on the right of the people, to a free and full examination of whatever concerns their interest and happiness."[57] The Richmond *Constitutional Whig* suggested that those who sought to silence debate on the question were reviving the principles of the Sedition Act.[58] One of the delegates to the Virginia Assembly insisted that there was no resemblance "between the free and manly discussion of a subject, by freemen, the representatives of freemen . . . and the under-handed attempts of incendiary cut-throats [like Garrison or Lloyd], to sharpen the dagger in the hand of the midnight assassin."[59] Feeling could no longer be repressed; lips of critics would not remain sealed. "[The] golden rule and slavery are hard to reconcile."[60]

54. *Id.* at 21.
55. *Id.* at 29-30.
56. *Id.* at 30.
57. Faulkner, *supra* note 41, at 2.
58. EATON, *supra* note 16, at 171.
59. Bolling, *supra* note 42, at 8.
60. *Id.* at 14.

In the end, the debate had been free and opponents of slavery had had their say. But they lost on the substantive issue: a resolution supporting legislative action for the abolition of slavery failed by a vote of 73 to 58.[61] Some supporters of emancipation were defeated at the next election.

III. THE CRISIS OVER *THE IMPENDING CRISIS*

A. Sectionalism and Slavery: 1830-60

In the 1830s slavery became an increasingly divisive political issue. In the Northwest Ordinance of 1787 Congress prohibited slavery in every part of the West then under congressional jurisdiction.[62] After that, Congress, faced with increasing Southern demands, compromised the policy of exclusion of slavery from the territories. The Louisiana territory was acquired without an antislavery restriction. In 1820 Missouri was admitted as a slave state, but slavery was prohibited in the remainder of the Louisiana Purchase lying north of latitude 36 degrees, 30 minutes. Although the Kansas and Nebraska territories were included in the Missouri compromise as areas where slavery was forbidden, in 1854 Congress abrogated the compromise, bowing to further Southern demands. The Kansas-Nebraska Act provided for the admission of Kansas and Nebraska with or without slavery as their constitutions might provide.

The Kansas-Nebraska Act struck the political world like a giant asteroid and so changed the environment that some older forms of political life gradually became extinct. The Whig party disintegrated. Thirty-seven of the forty-four Northern Democratic House members who voted for the Kansas-Nebraska Act were defeated in the next election.[63] The Republican party, founded in 1854 largely on hostility to the Kansas-Nebraska Act, made a strong run for the presidency in 1856.[64] In 1857, in *Dred Scott v. Sanford*, the Court ruled that Americans had a federal constitutional right to hold slaves in all territories, a right whose exercise Congress lacked the power to prevent.[65] Since the keystone of the Republican platform was exclusion of slavery from the territories, *Dred*

61. SYDNOR, *supra* note 39, at 228. For a discussion of Maryland and Delaware emancipation debates, see FREEHLING, ROAD TO DISUNION, *supra* note 39, at 202-10.

62. Kentucky, Tennessee, Mississippi, and Alabama were not yet under federal control. A proposal to apply the ban on slavery to all new American territory, north as well as south, had been defeated in 1784. FREEHLING, ROAD TO DISUNION, *supra* note 39, at 138.

63. DON E. FEHRENBACHER, THE DRED SCOTT CASE 188 (1978).

64. *Id.* at 188, 192.

65. 60 U.S. 393, 425-26 (1857).

Scott implied that the Republican party platform was itself an unconstitutional proposal.

After *Dred Scott,* Republicans feared a slave power conspiracy to nationalize slavery, planting it not only in all the territories but in the free states as well.[66] And slavery, as many Republicans saw it, inevitably required the suppression of liberty. As Senator Charles Sumner put it in 1860, denial of rights to the slave "can be sustained only by disregard of other rights, common to the whole community, whether of person, of the press, or of speech . . . . [S]ince slavery is endangered by liberty in any form, therefore all liberty must be restrained."[67] Tobias Plants, a conservative Republican congressman, would make essentially the same point in 1866.[68] It was part of the common faith of the Republican party. The progression seemed clear and grim. From enslaving blacks to limiting the free speech rights of Southerners and Northerners in the South; from censorship in the South to censorship in slave territories and demands for censorship in the North; from demands for Northern censorship to the clubbing of Senator Sumner in the Senate; from slavery in the Southern states with a ban on slavery in national territory to a constitutional requirement that slavery be tolerated in all national territory and next, Republicans feared, in Northern states also.[69]

The Kansas territory showed just what the rules against antislavery expression meant in practice. Slave owners and opponents of slavery poured into Kansas and the territory literally became a battleground in the sectional conflict. The proslavery government of the territory enacted a slave code. It made expressing antislavery opinions a crime; provided the death penalty for helping slaves escape; and required voters to take an oath to support these laws.[70]

One critic of the Kansas laws was John A. Bingham, an antislavery congressman from Ohio and the future author of most of the first section of the Fourteenth Amendment, which was proposed in 1866.[71] Bingham's 1856 speech in the House of Representatives bristles with antipathy to the Kansas statute:

> Congress is to abide by this statute, which makes it a felony for a citizen to utter or publish in that Territory "any sentiment calculated to

66. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 313-24 (1981).

67. GLOBE 36(1), *supra* note 2, at 2595-97.

68. CONG. GLOBE, 39th Cong., 1st Sess. 1013 (1866) [hereinafter GLOBE 39(1)].

69. LINCOLN'S SPEECHES 1859-1865, *supra* note 9, at 53, 57-58; JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 178-88 (1988).

70. MCPHERSON, *supra* note 69, at 147.

71. The citizenship clause was added in the Senate and was not written by Bingham.

> induce slaves to escape from the service of their masters." Hence it would be a felony there to utter the strong words of Algernon Sidney, "resistance to tyrants is obedience to God"; . . . a felony to read in the hearing of one of those fettered bondsmen the words of the Declaration, "All men are born free and equal, and endowed by their Creator with the inalienable rights of life and liberty"; . . . . Before you hold this enactment to be law, burn our immortal Declaration and our free-written Constitution, fetter our free press, and finally penetrate the human soul and put out the light of understanding which the breath of the Almighty hath kindled.[72]

As in earlier and later cases of suppression of political speech, laws against antislavery speech and press were often explicitly framed or justified in terms of the bad tendencies the speech was thought to have.[73] Bingham's invocation of the Declaration showed the havoc that a theory justifying suppression of political speech because of "bad tendencies" could play with the protection of political speech. But Bingham underestimated the potential reach of laws suppressing antislavery expression because of its perceived bad tendencies. By 1860 the North Carolina Supreme Court would hold that the incendiary statements need not initially be heard by or directed to slaves or blacks to justify conviction of those circulating them. Suppression of distribution to whites was required because of the danger the statements would eventually reach blacks.[74]

The Kansas statute was much like those enacted in Southern states. Since Kansas was a federal territory, Bingham insisted, the limitations of the First Amendment clearly applied to it. Under the decision in *Barron v. City of Baltimore*,[75] the guarantees of the Bill of Rights did not prevent the states from enacting such statutes. There was significant dissent from *Barron*, however.[76] Indeed a significant minority of state supreme courts held that the rights in the Bill of Rights limited state legislation, *Barron* to the contrary notwithstanding.[77]

B. The Struggle Over Free Speech in the States

1. Abolition and Reaction

Having taken a broad look at sectional conflict and slavery, it is

72. CONG. GLOBE, 34th Cong., 1st Sess. app. at 124 (1856).

73. *E.g.*, N.C. REV. CODE ch. 34, § 16 (1855) (referring to circulation of matter "the evident tendency whereof is to cause slaves to become discontented . . . .").

74. State v. Worth, 52 N.C. (1 Jones) 488, 492 (1860).

75. 32 U.S. (7 Pet.) 243, 250-51 (1833).

76. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 22-56; Amar, *supra* note 16, at 1205-16, 1223-38.

77. Nunn v. Georgia, 1 Ga. 243 (1846); Cockrum v. State, 24 Tex. 394, 401-02 (1859); Rinehart v. Schuyler, 7 Ill. (2 Gilm.) 473, 522 (1846). Most state courts followed *Barron*.

worthwhile to drop back and look particularly at the free speech component of the controversy in the states. By the 1830s abolition had merged with a religious revival. To many abolitionists slaveholding was a sin and slaveholders were sinners. The tone of much abolitionist rhetoric was "fierce, bitter, and abusive."[78] In that, it was at least matched by Southern antiabolition rhetoric. In 1835 the American Anti-Slavery Society produced a great stream of antislavery pamphlets and newspapers. Many of these were given away and mailed to Southern states.[79] Some in the Southern political elite reacted. South Carolinians seized from the mails and publicly burned sacks of antislavery publications in Charleston, South Carolina.

The controversy over antislavery publications provoked a battle in Congress over abolition publications and the mails.[80] In response to increased antislavery agitation, Southern legislatures passed resolutions demanding that Northern states suppress abolition publications and the Governor of Alabama demanded extradition of a New York abolitionist.[81] The argument raised in the Virginia emancipation debates—that criticism of slavery was an incendiary abuse of free speech—was beginning to win out in much of the South.[82]

Governor William Marcy of New York advocated legislative action to punish persons who engaged in acts calculated and intended to produce rebellion in other states. The New York legislature did not pass such a law. It responded that mobs made legislative action unnecessary.[83] While the response of most Northern legislatures to Southern demands for suppression and extradition was equivocal, the legislature of Vermont defended free expression. It announced that "neither Congress nor State Governments have any constitutional right to abridge free expression of opinions, or the transmission of them through the public mail."[84]

Faced with an attack on their right to freedom of expression, abolitionists responded with an invocation of the right to free discussion. In response to suggestions that political speech with bad tendencies should be suppressed, they invoked a core area of liberty beyond governmental power. In their invocation of the rights to free speech and press and their warnings about the dangers of censorship to political liberty, radical abo-

78. SYDNOR, *supra* note 39, at 238-42.
79. *Id.* at 232.
80. WIECEK, *supra* note 16, at 174-77.
81. *Id.* at 179-80; SAVAGE, *supra* note 16, at 37-38, 43-60.
82. EATON, *supra* note 16, at 162-237, 335-74.
83. WIECEK, *supra* note 16, at 179.
84. *Id.* at 181-82.

litionists anticipated the Republican reaction to the events of 1859. In February of 1836, Alvan Stewart of New York—antislavery legal thinker, lawyer for the slave, and leader of the New York antislavery society—responded to Governor Marcy's call for suppression of antislavery expression. He ridiculed the idea of an abolition monster so powerful that its extermination required "loss of liberty of the press, of conscience, discussion, and of the inviolability of the mail."[85] Marcy had argued that because the power to suppress abolition publications was not delegated to the federal government, it was retained by the states. "There is a class of rights," Stewart responded, "of the most personal and sacred character to the citizen, which are a portion of individual sovereignty, never surrendered by the citizen . . . either to the State or General Government, and the Constitutions of the State and Union have told the world, after enumerating them, that there is a class of unsurrendered rights . . . ."[86] The legislatures of the states and of the Union, Stewart insisted, "are forbidden by the constitutions of the States and Union from touching those unsurrendered rights . . . ."[87] This was so "no matter in what distress or exigency a State may find itself . . . ."[88] To support his conclusion, Stewart cited the New York Constitution.

Stewart also made a shrewd analysis of the centrality of guarantees of free expression to republican government. If those in power could use the criminal justice system to silence their political critics, then the people would be deprived of democratic choice. Although he did not cite the Sedition Act, Stewart feared a replay of what it had attempted.

> Oh, what scenes of abuse would have been played off before this world, if licensed presses, gagged discussion, and mail inquisitors had been tolerated! And we should have seen such laws passed in this State by a party who had the ascendancy, if the constitution had not forbidden it, by which one half of the community could neither speak, write, nor publish anything of their adversaries, under pain of indictments, fine and imprisonment.[89]

The citizens of New York, Stewart concluded, had the right to discuss, print, and circulate "their sentiments on any moral problem, or any question of right and wrong, of liberty and slavery."[90]

Stewart relied primarily on his state constitution as a protection against state action suppressing antislavery expression. He identified an

85. ALVAN STEWART, WRITINGS AND SPEECHES OF ALVAN STEWART ON SLAVERY 59 (Luther R. Marsh ed., 1860).
86. *Id.* at 65.
87. *Id.*
88. *Id.*
89. *Id.* at 66.
90. *Id.* at 84.

area of discussion that he suggested was simply beyond legislative power, however compelling the reasons for action the legislature might assert. While Stewart related free speech to natural rights, as the slavery controversy intensified, Southerners began to repudiate the natural rights philosophy. While Stewart relied on the right of the individual to discuss political and moral questions, by 1859 Southerners in Congress relied instead on the right of the community to suppress dangerous doctrine. By 1860 the rejection of individual rights arguments and invocation of the rights of the community were well developed by Southern congressmen.[91]

2. Before 1859: State Statutes and Prosecutions in Virginia and North Carolina before the John Brown Raid

a. Statutes

The reason given for suppression of antislavery and abolitionist speech in the South was that it had a dangerous tendency to cause violence. The essence of the abolitionist position was that slavery was a crime: the crime of kidnapping. All people were created equal, so keeping victims of kidnapping and their children as slaves were gross affronts to civil liberties. Some opponents of slavery invoked the Declaration of Independence and cited statements by people of the revolutionary generation to show that many recognized the inconsistency between the Declaration and slavery. But the Declaration, of course, indicated that violent resistance to tyranny was justified. The theory of the Declaration and the fact of the Nat Turner rebellion produced a decided intellectual tension. By 1859 many Southern leaders in Congress resolved the tension by rejecting the philosophy of the Declaration.[92] They certainly rejected a broad right to speak and write against the institution of slavery.

Statutes in Virginia and North Carolina reflected a reaction against antislavery expression. North Carolina led the way with an 1830 act suppressing expression with a tendency to cause slaves to rebel.[93] On March 23, 1836, Virginia passed a comprehensive act aimed at antislavery agitation.[94] It was a response, the Virginia legislature noted, to attempts by antislavery societies and "evil disposed persons . . . to interfere with the

91. *E.g.*, GLOBE 36(1), *supra* note 2, at 1618 (Sen. Chestnut); *id.* at 436 (Rep. Smith) (repudiating many statements by men of the revolutionary generation as "false in philosophy and unsound in fact."). *See also id.* at 1049 (Sen. Collamer) (quoting Sen. Calhoun).

92. *E.g.*, GLOBE 36(1), *supra* note 2, at 436.

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

94. An Act to Suppress the Circulation of Incendiary Publications, ch. 66, 1836 Va. Acts 44-45.

relations existing between master and slave in this state" and to incite a spirit of insurrection and insubordination in blacks.[95] The legislature noted the flood of "incendiary books, pamphlets, or other writings of an inflammatory and mischievous . . . tendency."[96] The antislavery societies were not sending their tracts to slaves, but the Virginia legislature was in no mood for fine distinctions.

The law provided for a fine and mandatory imprisonment of "any member of an abolition or antislavery society . . . who shall come into this state, and shall here maintain, by speaking or writing, that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery . . . ."[97] That part of the statute targeted outsiders. Another section of the act made it criminal for any person to produce or circulate any book or writing "with the intent of advising, enticing, or persuading persons of colour within this commonwealth . . . to rebel, *or* denying the right of masters to property in their slaves, and inculcating the duty of resistance to such right."[98] Slaves violating this section were to be whipped, sold, and transported out of the country. Whites were to be imprisoned not less than two years. A third section of the act required postmasters to notify justices of the peace if incendiary documents appeared in the mail. The justice was to burn the document and, if the recipient had willingly received the book or pamphlet knowing its tendency, he too was to be punished. Finally, the act provided for punishment of postmasters who failed to comply with the act.[99] Under this statute the *New York Tribune,* a leading Republican paper, was banned by a Virginia postmaster in 1859.[100]

Some provisions of the Virginia act clearly reached political speech that did not directly incite criminal conduct. Under the Virginia act, publication of some speeches emancipationists had made in the Virginia legislature could be criminal. Virginia had taken a long step toward censorship of political speech. In 1832 "Appomattox" branded emancipationist sentiments incendiary and called for private action to suppress them. Significantly he refused to call for a sedition law, a law making criticism of government and existing institutions a crime. But by 1836 Virginia had passed one.[101]

95. *Id.* at 44 (Preamble).
96. *Id.*
97. *Id.* § 1.
98. *Id.* § 2 (emphasis added).
99. *Id.* § 3.
100. EATON, *supra* note 16, at 211-12.
101. 1836 Va. Acts 44, § 3.

b. *Judicial Response*

Still, the Virginia Court construed the statute of 1836 narrowly. It did not, however, conclude that the Virginia Constitution simply prohibited such legislation. In 1839, in *Commonwealth v. Barrett*,[102] Barrett was prosecuted for circulating an antislavery petition to Congress. Barrett's petition denounced slavery in the District of Columbia as a sin against God and a foul stain on the national character.[103] The Court concluded that Barrett could not be convicted under the first section of the act without proof that he was a member of an abolition society. Furthermore, the prosecution under the third section of the act was a felony and could not proceed by information. The legislature later plugged the loophole in the act.[104]

In 1849 Jarvis Bacon, a minister, was indicted and convicted for words in a sermon: "If I was to go to my neighbor's crib and steal his corn, you would call me a thief, but [it is] worse to take a human being and keep him all his life, and give him nothing for his labour, except once in a while a whipping . . . ."[105] Listeners, not surprisingly, understood him to refer to slavery. The defense attorneys suggested that the Virginia statute of 1836 reached only the denial of legal right to property in slaves, not moral right.[106] Nor could the legislature make denial of moral right to property in slaves a crime. To do so would violate the Virginia constitution's free speech and freedom of religion guarantees

> which [declare] that they shall pass no "law abridging freedom of speech . . . . Nor shall any man be enforced, restrained, molested or burthened in his body or goods, or otherwise suffer on account of his religious opinions or belief, but all men shall be free to profess, and by argument to maintain, their opinions in matters of religion."[107]

Justice Lomax, writing for the Court, held that statutes tending to restrain freedom of speech or freedom of religion "or supposed to have that tendency," should be strictly construed.[108] The court found the defendant's words ambiguous. After all, if one kept a slave and gave him no comforts and nourishment but only whipped him, even supporters of slavery might find this act worse than stealing corn. The defendant's

102. 36 Va. (9 Leigh) 665 (1839).

103. The right to petition Congress might well have been held protected under the federal Constitution even though the guarantees of the First Amendment apparently did not limit states. *Compare* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833) *with* United States v. Cruikshank, 92 U.S. 542, 552-53 (1875) (*dicta*).

104. 1848 Va. Acts ch. 10, § 25.

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

106. *Id.* at 604-06.

107. *Id.* at 607.

108. *Id.*

statements might have referred only to spiritual concerns, not to legal title. To find the defendant guilty, "[w]e must make him say, that to take and keep a human being (or say slave) is worse than stealing corn, such taking and keeping being equally without right of property in the slave-owner, as in the thief who has stolen the corn."[109] While the court decided for the defendant, it did not announce a broad constitutional protection for free speech.

Defendants in North Carolina did not fare so well. Jesse McBride was an antislavery preacher from the Wesleyan Church. He came to North Carolina from Ohio and, with a fellow Wesleyan minister who had preceded him, preached to congregations in Guilford and surrounding counties. McBride gave a young white girl a pamphlet on the Ten Commandments; it suggested that slaveholders lived in violation of the Commandments. He was charged with violation of an 1830 North Carolina statute that made it a crime knowingly to circulate or publish any pamphlet with a "tendency" to cause insurrection or resistance in slaves.[110] The Declaration of Rights of the North Carolina Constitution contained no explicit free speech provision, but it provided "[t]hat the freedom of the Press is one of the great bulwarks of liberty, and therefore, ought never to be restrained" and that "all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."[111] At trial, these provisions did not protect McBride.

The press account does not discuss McBride's legal arguments sufficiently to know how guarantees of free press and religious liberty were applied or even if the issues were raised.[112] Perhaps the freedom of the press provision might have been read, in the Blackstonian tradition, as limited to prior censorship rather than prohibiting subsequent punishment. Perhaps freedom of the press was more broadly understood, but simply was not thought to include attacks on the institution of slavery. At any rate, McBride was convicted and sentenced to imprisonment for one year, to stand in the pillory for one hour, and to twenty lashes. He was released as part of an agreement that he leave the state. Though his colleague continued preaching for a time, as public pressure mounted he

109. *Id.* at 612.

110. *Crooks and McBride*, RALEIGH REG., Oct. 23, 1850, at 3. *See also* N.C. REV. STAT. ch. 34, § 17 (1837).

111. *Declaration of Rights*, N.C. CONST. §§ 15, 19, *quoted in* 1836 PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA CALLED TO AMEND THE CONSTITUTION OF THE STATE 410.

112. *See supra* note 110.

also fled, leaving his flock without a minister.[113]

2. An Intellectual Quarantine

By the mid-1830s much of the South was quarantining antislavery expression.[114] This left abolitionists in a curious position. The slaves and slave owners were in the South. Abolitionists had hoped to persuade slave owners to abandon slavery. Increasingly they found themselves unable directly to address them. That left them to persuade the often hostile masses of the North who, however, had no slaves. According to Charles Sydnor, in the mid-1830s Whig Congressmen began pressing the slavery issue by presenting antislavery petitions in an effort to split the Northern and Southern wings of the Democratic party. Congress, over Whig protests, passed the "gag rule," laying all abolitionist petitions on the table without discussion or printing. Because political leaders used congressional publication and dissemination of events in Congress as a major source of public information, the gag rule closed one important channel of communication. As slavery became increasingly politicized, antislavery congressmen emerged in Congress.[115]

The congressional gag rule, the 1837 murder of an Illinois abolitionist editor by a mob seeking to destroy his press, the suppression of free speech in the South, and the congressional battle over antislavery and the mails all enhanced the prestige of abolitionists who began to appear as champions of civil liberty.[116] Although early on Garrison had rejected political action and labeled voting a sin, starting in 1837 an increasing faction of abolitionists favored political action and by 1840 even created an antislavery political party.[117]

The intellectual quarantine in North Carolina became ever more strict. One case shows how times were changing. In 1856, Benjamin Hedrick, a talented professor of Chemistry at the University of North Carolina, was driven first from his job and then from the state for supporting John C. Frémont, the Republican presidential candidate. Laws against antislavery expression were merely the tip of an iceberg, and conformity was, in Hedrick's case, enforced by public opinion expressed through mob action. Hedrick was "exposed" in the *Raleigh Weekly Standard*. At the end of the affair, the *Standard* exalted:

113. *Crooks and McBride*, *supra* note 110, at 3. For a fine account, see Johnson, *supra* note 16, at 299-301.

114. EATON, *supra* note 16, at 88, 335-52.

115. SYDNOR, *supra* note 39, at 232-42.

116. *Cf. id.* at 233-45.

117. SEWELL, *supra* note 16, at 43-72.

> We may have aided to *magnify* him somewhat in the public eye, but that was one of the unavoidable incidents, and not the object. Our object was to rid the University and the State of an avowed Frémont man; and we succeeded. And we now say, after due consideration . . . that no man who is avowedly for John C. Frémont for President ought to be allowed to breathe the air or to tread the soil of North Carolina.[118]

Hedrick became a close friend of another exile from North Carolina, Hinton Rowan Helper, the author of *The Impending Crisis.*

C. Abolitionist Constitutional Doctrine

As abolitionism developed and as states like North Carolina and Virginia quarantined themselves to protect against the contagion of abolition, abolitionist legal theory also began to change. The changes are significant for our story because parts of radical abolitionist legal theory were embraced by mainstream Republicans.

In spite of a lack of enthusiasm by some Southern courts for enforcing laws against antislavery expression,[119] the prospect of broad protection of free speech for abolitionists under Southern laws and court decisions looked bleak. One group of radical political abolitionists began to appeal to the federal Constitution for protection of civil liberties against state action.[120] For Garrisonians, however, there was little abolitionist legal theory in any event. They agreed with extreme Southerners that the Constitution was a proslavery document, and Garrison denounced it as a "covenant with death" and an "agreement with hell."[121] Garrison's ally, Wendell Phillips, insisted on judging the Constitution based on original intent. Phillips insisted that it did not sanction interference with slavery in the states, a view shared by most opponents of slavery before the Civil War. But Phillips went further. He insisted that even free blacks were viewed as inferior beings at the time of the adoption of the Constitution, and it did not "concede them any of its privileges."[122] But the Radical political abolitionists had a very different

118. *Mr. Hedrick, Once More*, RALEIGH WKLY. STANDARD, Nov. 5, 1856, at 1. For other articles in the same paper, see *Professor Hedrick's Defence*, RALEIGH WKLY. STANDARD, Oct. 8, 1856, at 4; *Prof. Hedrick, of the University*, RALEIGH WKLY. STANDARD, Oct. 8, 1856, at 1. *See also* JOHN S. BASSETT, ANTI-SLAVERY LEADERS OF NORTH CAROLINA 29-47 (reprint 1973) (1898).

119. *E.g.*, Bacon v. Commonwealth, 48 Va. (7 Gratt.) 602 (1850). For other prosecutions see State v. Read, 6 La. Ann. 227 (1851); State v. McDonald, 4 Port. 449 (Ala. 1837).

120. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 42-44.

121. PHILLIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 3 (1975).

122. WIECEK, *supra* note 16, at 239. W. PHILLIPS, THE CONSTITUTION, A PRO-SLAVERY COMPACT 96-97 (photo. reprint 1969) (1844).

view. For them the Constitution protected civil liberties against both state and federal action.

Joel Tiffany, author of an 1849 *Treatise on the Unconstitutionality of American Slavery,*[123] was a lawyer and reporter for the New York Supreme Court who grew up in a hot bed of antislavery sentiment in Ohio. Tiffany believed that the guarantees of liberty in the original Constitution and in the Bill of Rights limited the states and protected all citizens of the United States from state action infringing their rights. In this his views, though unorthodox, were not unique.[124] Citizens were entitled to "all the privileges and immunities . . . guaranteed in the Federal Constitution"[125] which included all its "guarantys . . . for personal security [and] . . . liberty."[126] These were protected from hostile state legislation. Some of the privileges guaranteed were listed by Tiffany: for example, the right to petition, to habeas corpus, to keep and bear arms, and against unwarrantable searches and seizures.[127]

As between citizen and citizen, Tiffany thought protection of rights was left largely to the states. Although the Bill of Rights limited the states, where states fulfilled their duty of protection of citizens' rights, the Bill of Rights typically did not provide a remedy for one citizen wronged by another private citizen. As a result, Tiffany insisted that his theory charted a middle course between states' rights and consolidation.[128] Then, in a dramatic leap of faith, Tiffany concluded that slaves, like all persons born or naturalized in the United States, were citizens.[129] Although few antislavery politicians agreed that slaves were citizens, Tiffany's other constitutional doctrines became increasingly influential. Congressman John Bingham of Ohio was one person influenced by a view of civil liberty like that espoused by Tiffany.

In 1866 Congressman Bingham wrote most of section one of the Fourteenth Amendment including the provisions that

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

123. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (photo reprint 1969) (1849).

124. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 24-25, 46-56; Amar, *supra* note 16, at 1205-14.

125. TIFFANY, *supra* note 123, at 97.

126. *Id.*

127. *Id.* at 56-57, 84-89, 99.

128. *Id.* at 57-58.

129. *Id.* at 93-94.

of the laws.[130]

Senator Jacob Howard of Michigan presented the Fourteenth Amendment to the Senate on behalf of the Joint Committee on Reconstruction. Howard said that the privileges or immunities clause of the Fourteenth Amendment was designed to require states to respect the liberties guaranteed in the Bill of Rights.[131] John Bingham made similar statements.[132]

Even before the Civil War, however, Bingham read Article IV, Section 2 as directing states to respect all constitutional guarantees of liberty. One orthodox reading of Article IV limited it to protecting temporary out-of-state visitors from discrimination in certain basic rights. Article IV provides: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states."[133] Bingham read it as containing an ellipsis, as implicitly containing the material added in brackets: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens [of the United States] in the several States."[134] He read "privileges" as dictionaries of that time and today do: as meaning rights.[135] Included were those rights in the Bill of Rights. In using the word "privileges" in this way, Bingham was using it exactly as members of the Revolutionary generation often had used it and as James Madison used the word in the debate on the Bill of Rights.[136] Bingham believed that states were morally obligated to obey the guarantees of the Bill of Rights by the oath state officers took to support the Constitution. Still, he believed the Article IV, Section 2 obligation was not legally enforceable. Although this reading seems strange to us today, it was a federalism-based reading of Article IV that fit well with interpretations the Court had put on other provisions of the Arti-

130. U.S. CONST. amend. XIV, § 1.

131. GLOBE 39(1), *supra* note 68, at 2765-66 (Sen. Howard).

132. *Id.* at 2542 (Rep. Bingham); *see also* CONG. GLOBE, 42nd Cong., 1st Sess. app. 84 (1871) [hereinafter GLOBE 42(1) app.].

133. U.S. CONST. art. IV, § 2, cl. 1.

134. CONG. GLOBE, 35th Cong., 2nd Sess. 984 (1859).

135. For Bingham's views in 1859 see *id.* at 983-84; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 60-63. "Privilege . . . 1. a right, immunity or benefit enjoyed by a particular person or a restricted group of persons . . . 5. any of the rights common to all citizens under a modern constitutional government." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1074 (1991). An 1851 law dictionary included among other definitions, "a right peculiar to some individual or body." 2 A NEW LAW DICTIONARY AND GLOSSARY 828 (1851). In *Dred Scott*, as Professor Crosskey noted, the Chief Justice said that all rights and privileges under the Constitution belonged only to American citizens. Blacks could not be citizens and so had no rights under the Constitution. 60 U.S. (19 How.) 393, 404, 449; Crosskey, *supra* note 16, at 5.

136. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 64-65, 67, 75-76 (Blackstone describing English liberties as "privileges" and "immunities"). For the mixed heritage of the words, see *id.* at 67-68. For Madison's use of the word privilege to describe Bill of Rights liberties, see *supra* text accompanying notes 19 and 23.

cle.[137] This interpretation preserved an appeal to the moral authority of the Bill of Rights, and that moral authority was one way Madison hoped the Bill would function to protect liberty.[138] But if moral suasion failed, judicial protection was not available.

The range of constitutional thinking before the Civil War was quite broad. Some followed the orthodoxy of *Barron v. Baltimore* which held that the Bill of Rights did not limit the states. Some, like Bingham, believed that in some sense states were obligated to obey the guarantees of the Bill of Rights. Some, including many Southern and Northern Democrats, believed that slaves were property and that the Due Process Clause guaranteed the right to take them into federal territories and that antislavery legislation was unconstitutional. In 1856 and 1860 the Republican platform said that slaves were persons and the Due Process Clause banned slavery in federal territories, though not in the states.[139]

A similarly broad range of ideas existed on the subject of slavery and free speech. For some, the issue was simply up to the states. For others, state statutes banning free speech and press on the subject of slavery violated constitutional obligations. Although much attention was devoted to the subject in Congress in 1859 and 1860, there was little discussion of the speaker's underlying legal theory. Still, the debate that swirled around the topic on the eve of the Civil War gives us some guidance as to different theories people held at that time about the First Amendment, free speech, and free press. It also sheds light on whether the speaker thought local option on the issue of free speech was acceptable. The centerpiece of the debate on free speech in Congress in 1859-60 was Hinton Rowan Helper's, *Impending Crisis of the South: How to Meet It.*

D. The Impending Crisis *and the Free Speech Issue in Congress*

1. Helper and his Book

Hinton Rowan Helper was born to a farm-owning family in Davie County, North Carolina, in 1829. Except for a foray into California and South America in an unsuccessful attempt to make his fortune, Helper lived in North Carolina until publication of the *Impending Crisis* in 1857.[140]

The book was an appeal for antislavery political action by non-slave

137. *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860); Prigg v. Pennsylvania, 41 U.S. (7 Pet.) 539 (1842). Curtis, NO STATE SHALL ABRIDGE, *supra* note 16, at 63-64.

138. DOCUMENTARY HISTORY, *supra* note 17, at 1030.

139. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 27-28, 46-47.

140. BASSETT, *supra* note 118, at 11-12.

owners of the South. Helper supported forming an antislavery party, refusing to vote for slaveholders, socially ostracizing slaveholders, boycotting proslavery newspapers, and boycotting slave labor.[141] Helper's plan involved no compensation for slave owners; instead they would be taxed to pay the costs of colonizing their former slaves. Helper sought to prove, with assistance from census data, that the South had become an economic disaster area because of slavery. He saw slavery as especially inimical to the interests of nonslaveholding whites. Much of the book consisted of charts, tables, and statistics from the census to demonstrate Southern backwardness, statements from men of the Revolutionary generation to show the evils of slavery, and excerpts from the Virginia abolition debates of 1832.[142]

Helper was a self-described abolitionist (free soilers, he said, were just abolitionists in the tadpole stage),[143] and he faced the same dilemma other abolitionists faced. He sought to speak emancipation to the South and the South refused to listen. Abolition expression was silenced by laws and mobs.

The most sympathetic interpretation of the violence suggested by some of Helper's rhetoric is that it was contingent and designed to demonstrate Helper's willingness to meet violence with violence to protect access to the channels of political expression for supporters of emancipation. He repeatedly noted that free speech was denied to opponents of slavery in the South, and he protested mobbings and tar-and-featherings. "Free speech," Helper wrote, "is considered as treason against slavery: and when people dare neither speak nor print their thoughts, free thought itself is well nigh extinguished."[144] "Give us fair-play," he demanded, "secure to us the right of discussion, the freedom of speech, and we will settle the difficulty at the ballot box, not on the battleground—by force of reason, not force of arms."[145] Critics of the book did not usually cite such statements. Instead, like the *Richmond Whig,* they quoted other parts of the book, including the following passage:

> So it seems that the total number of actual slave owners, including their entire crew of cringing lickspittles, against whom we have to contend, is but three hundred and forty-seven thousand five hundred and twenty-five. Against this army for the defense and propagation of slavery, we think it will be an easy matter—independent of the negroes,

141. HELPER, supra note 1, at 155-56; BASSETT, *supra* note 118, at 23-24.

142. *E.g.*, HELPER, *supra* note 1, at 35-39, 62-66, 175-79.

143. *Id.* at 116. Unlike most Northern abolitionists, Helper advocated colonization of the South's black population.

144. *Id.* at 409.

145. *Id.* at 149; BASSETT, *supra* note 118, at 23.

> who, in nine cases out of ten, would be delighted with an opportunity to cut their masters' throats . . .—to muster one at least three times as large, and far more respectable for its utter extinction. . . . We are determined to abolish slavery at all hazards—in defiance of all opposition, of whatever nature, which it is possible for the slavocrats to bring against us.[146]

These sentiments were followed by a plea for a peaceful and political resolution of differences,[147] but the *Whig* did not reprint those statements.

The sentiments quoted in the *Whig* would have enraged Southern supporters of slavery in the calmest of times. In fact, however, most of the controversy about the *Impending Crisis* occurred during a period of great alarm and excitement in the South—after John Brown's raid at Harper's Ferry, a raid that was designed to free slaves by force of arms.

Helper's book was first published in 1857, on the heels of Frémont's defeat. It was praised by many Northern opponents of slavery and enjoyed significant but limited success. Opponents of slavery and Republican politicians hit upon the idea of publishing an abridgment, a "compendium" of the work and circulating it as a campaign document.[148] This project was advertised and well underway before Brown's October 1859 raid. Over sixty Republican members of Congress had endorsed the project.[149]

2. The Context for Congressional Discussion in 1859-60: John Brown's Raid at Harper's Ferry; Congress and Free Speech

On October 18, 1859, the *New York Herald* reported, "NEGRO INSURRECTION AT HARPER'S FERRY. STRANGE AND EXCITING INTELLIGENCE . . . . [R]egular negro conspiracy."[150] The *Herald's* editor saw the event as a potent means of discrediting the Republican party. This, the Democratic spin doctors of the day announced, was the natural consequence of Republican doctrine. On the next day, together with more news of Harper's Ferry, the *Herald* reprinted a speech by Senator Seward of New York, a leading contender for the Republican nomination.[151] Seward had suggested an "irrepressible con-

146. HELPER, *supra* note 1, at 149, *quoted in A False and Genuine Helper*, RICHMOND WHIG, Jan. 8, 1860, at 4.

147. HELPER, *supra* note 1, at 151.

148. DAVID M. POTTER, THE IMPENDING CRISIS 1848-1861, at 387 (1976).

149. *Revolutionary Designs of the Abolitionists—New York Names Endorsing Treason*, N.Y. HERALD, Nov. 26, 1859, at 4.

150. N.Y. HERALD, Oct. 18, 1859, at 1.

151. *The "Irrepressible Conflict," Wm. Seward's Brutal and Bloody Manifesto*, N.Y. HERALD, Oct. 19, 1859, at 2.

flict"[152] between slavery and freedom. "No reasoning mind," the *Herald* announced, "can fail to trace cause and effect between the bloody and brutal manifesto of William H. Seward . . . and the terrible scenes of violence [at Harper's Ferry]."[153] Later the *Herald* printed a list of Republican endorsers of Helper's book and what it claimed were inflammatory passages from the book. "TEXT BOOK OF REVOLUTION," screamed the headline, "Republican Congressmen Franking Revolutionary Appeals."[154] Here was another "Black Republican" blueprint for Harper's Ferry. In December 1859 a grand jury in Wilson County, North Carolina, added a literal indictment to the political ones: it branded the *Impending Crisis* treasonous to North Carolina and had called on New York Republican Governor Edwin Morgan to deliver "to indictment and punishment" Republican endorsers of the book, including himself.[155] Of course, no trial followed the indictment because the defendants were beyond the power of the court.

3. The Democratic Attack

When Congress convened in December 1859, the Democrats attempted again and again to nail John Brown's raid to the Republican party. Democrats, particularly Southern Congressmen, cast themselves in the role of prosecutor and judge. They cast Republicans as criminal defendants—accessories before the fact to the Harper's Ferry raid. Helper's book tended to cause violence; the violence of John Brown's raid followed publication of the Helper book; Republicans had endorsed the book; therefore the Republicans had endorsed violence. At a minimum, violence was the natural consequence of their doctrines.[156] To support this charge Democrats offered the expert opinion of a veteran abolitionist agitator. John Brown's raid, they quoted Wendell Phillips as saying, was "the natural result of antislavery teaching. For one, I accept it; I expected it."[157] Although the debate on *The Impending Crisis* began in the House, it soon spilled over into the Senate.

152. Speech by Gov. Seward, (Oct. 25, 1858) *in* COLLECTION OF ANTI-SLAVERY PROPAGANDA IN THE OBERLIN COLLEGE LIBRARY (Lousiville, Ky., Lost Cause Press) (Microfiche Reprint SLB 1255 (1964)).

153. *"Irrepressible Conflict," supra* note 151, at 2.

154. *The Text Book of Revolution*, N.Y. HERALD, Nov. 28, 1859, at 1.

155. N.Y. WKLY. TRIBUNE, Dec. 24, 31, 1859 *cited in* Earl S. Miers, *Introduction to* HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH 13 (Collier Books 1963) (1857).

156. *E.g.*, GLOBE 36(1), *supra* note 2, at 17 (Rep. Clark); *id.* at 21 (Rep. Millison); *id.* at 24 (Rep. Keitt); *id.* at 28 (Sen. Mallory); *id.* at 29-30 (Sen. Iverson); *id.* at 45 (Rep. Lamar); *id.* at 49 (Rep. Pryor); *id.* at 61-62 (Rep. Davis); *id.* at 95-96 (Rep. Curry); *id.* at 110-11 (Rep. Stewart); *id.* at 121 (Sen. Clay); *id.* at 281-82 (Rep. Pryor).

157. *Id.* at 94 (Rep. Curry); *id.* at 121 (Sen. Clay).

John Sherman, Republican candidate for Speaker of the House of Representatives, like nearly half the Republican Congressional delegation, had endorsed publication of an abridged version of Helper's book. A resolution proposed by Democratic representative John Clark of Missouri announced that no endorser of Helper's book was fit to be speaker.[158] After forty-four ballots Republicans fell just short of electing John Sherman speaker. Finally Sherman withdrew in favor of a compromise candidate.

Between ballots Democrats in the House (and also in the Senate) discussed slavery, Senator William Seward, and most of all *The Impending Crisis*. Democrats, by placing the worst possible construction on Helper's (or Seward's) words, sought to reap the benefits of putting the worst possible construction on the actions of their political opponents. Fire was the dominant metaphor. Senator Alfred Iverson of Georgia announced that Helper's book "inculcates incendiary sentiments."[159] Republicans, said Representative Roger Pryor of Virginia, had applied "the spark, and then affect astonishment at the explosion."[160] Congressman Clark emphasized Helper's announcement that nonslaveholders should act peaceably if they could, forcibly if they must, to strike against slavery. "Do these [Republican] gentlemen expect that they can distribute incendiary books, give incendiary advice, advise rebellion . . . ?" "Such advice," he thundered, "is treason[,] . . . rebellion . . . ."[161] Those knowingly giving it deserved a fate it would not be respectful to announce.[162]

Concern for such civilities did not last long. Helper's book, said Senator Iverson, returning to the attack, advised "our slaves to fire our dwellings and put their knives to our throats."[163] We "ought to hang every man who has approved or indorsed it."[164] Senator Seward shared the billing with Helper as an incendiary. Senator Jefferson Davis of Mississippi, after noting the law of accessories before the fact, cited Seward's irrepressible conflict speech: "That Senator made his speech before the event; he may not have contemplated the fruit it bore—if, indeed, it bore

158. *Id.* at 3; Ollinger Crenshaw, *The Speakership Contest of 1859-60*, 29 MISS. VALLEY HIST. REV. 323, 323-24 (1942).

159. GLOBE 36(1), *supra* note 2, at 14.

160. *Id.* at 281.

161. *Id.* at 17.

162. *Id.*

163. *Id.* at 30.

164. *Id. See also id.* at 43 (Rep. Garnett); *id.* at 62-63 (Rep. Davis); *id.* at 71 (Rep. Moore); *id.* at 94 (Rep. Curry); *id.* at 104-05 (Sen. Johnson) (claiming that Harper's Ferry was the result of Republican teaching).

this."[165] But, Davis said, when Senator Lyman Trumbull of Illinois defended the speech after the Harper's Ferry raid (arguing that it was being misconstrued), he was "far more guilty" than Seward.[166] Representative Reuben Davis, also from Mississippi, later suggested that Seward "deserves, I think the gallows . . . ."[167] John Brown, announced representative Thomas Hindman of Arkansas, "was the tool of Republicanism, doing its work; and now, that the work is done, Republican politicians cannot skulk the responsibility." The country would "gibbet them for it" and the hemp that strangled Brown would strangle the instigators.[168]

So it went, week after week, as Republicans repeatedly fell a few votes short of the majority required to make Sherman the Speaker. Congressmen came to the floor armed and some Southerners contemplated coups and blood baths and wondered about the best way to launch secession.[169] Slave state Democrats announced that the election of a "Black Republican President" would be good cause for secession. One suggested that the Union could be preserved only if the essentially criminal Republican party disbanded.[170]

4. The Republican Response

Most Republicans in the House concluded that discussion of substantive issues was improper before the election of a Speaker.[171] So they sat in silence. Sherman announced that he had no recollection of endorsing Helper's book and in any case had not read it. He had relied on the suggestion of a friend. He disavowed any action by the North to interfere with the domestic institutions of the South. A letter from one of the sponsors of the compendium project indicated that the compendium was supposed to delete offensive passages.[172] Republicans worried that the Democratic effort to link them to Harper's Ferry might work, and a few rushed to dissociate themselves from Helper's book.

A few conservative Republicans were the first to respond to the Democratic indictment. Several recanted their endorsements, pleading ignorance, and repudiated the book.[173] Representative Lucius Q.C. La-

165. *Id.* at 62.
166. *Id.*
167. *Id.* at 69.
168. *Id.* at 524.
169. Crenshaw, *supra* note 158, at 332-37.
170. GLOBE 36(1), *supra* note 2, at 819 (Rep. Anderson, Mo.); *see also id.* at 841 (collection by Rep. Clark).
171. *Id.* at 346 (Rep. Wells).
172. *E.g.*, *id.* at 21 (Rep. Sherman); *id.* at 74 (Rep. Stanton); Crenshaw, *supra* note 158, at 325.
173. GLOBE 36(1), *supra* note 2, at 4 (Rep. Kilgore); *id.* at 40 (Rep. Kellogg); *id.* at 394 (Rep. Morris).

mar of Mississippi suggested that the effort at repair came "too late for the victims of the Harper's Ferry tragedy."[174] Republicans were guilty of the blood spilled on that occasion. Several House Republicans said that the Democrats had grossly misrepresented Helper's book and, after the eight week speakership deadlock was broken, more did so.[175]

The early Republican reticence is curious. They were a few votes short of what they needed, and perhaps conciliation by conservative members and silence by the rest was intended to be reassuring. At any rate, the lack of a vigorous defense disgusted the *New York Tribune* and some party activists.[176] William Herndon, Abraham Lincoln's law partner, suggested that Republicans in Congress were "grinding off the flesh from their knee caps . . . ."[177] Eventually, after a speaker was finally selected, Republicans spoke powerfully and explicitly to the issues of the day. Then Republican after Republican roundly condemned the South for its repression of free speech. All in all the session was remarkable for its lengthy discussions of slavery, the territories, natural rights, the views of the founding generation, the Declaration of Independence, secession, and free speech. The debate on free speech was one of the centerpieces of the session.

5. The Debate on Free Speech: Politics and Theory

The 1859 congressional debate was conducted by politicians, not jurists, legal theorists, or political philosophers. As a result, theories, to the extent they were present, were often implicit rather than explicit. Some Democrats suggested that Helper's book and Seward's irrepressible conflict speech[178] had incited the Harper's Ferry raid, and that the inciters were as guilty as the perpetrators. Still they did not frame their analysis in terms of the limits on free speech. Nonetheless they necessarily, though implicitly, embraced the theory that political speech with bad tendencies could be suppressed.[179] When they supported silencing abolitionists in Southern states, they were, at least, making implicit statements about the reach of guarantees for free expression under both state and federal constitutions.

The Democrats focused the debate on Helper and Seward, as exam-

174. *Id.* at 45.
175. *E.g., id.* at 826 (Rep. Fenton); *id.* at 930-31 (Rep. Edgerton); *id.* at 1887-88 (Rep. Alley).
176. *Id.* at 40 (Rep. Kellogg) (quoting from N.Y. WKLY. TRIBUNE, Dec. 6, 1859).
177. SEWELL, *supra* note 16, at 357.
178. Seward, *supra* note 152.
179. The Southern "bad tendency" approach was later followed in Massachusetts and in the United States Supreme Court. Commonwealth v. Karvonen, 106 N.E. 556, 557 (Mass. 1914); Debs v. United States, 249 U.S. 211 (1919).

ples of the evil tendency of Republican doctrine—a doctrine said to be capable of producing horrible acts of violence. There were curious aspects to the attack. The official justification for suppression of antislavery speech in the South was that it had the tendency to cause violence and insurrections by the slaves. The slaveholder was particularly vulnerable, Jefferson Davis noted, because "[t]he negroes, as domestics, have access at all hours through the unlocked doors of their master's houses . . . ."[180] Still, for important and "proper" political purposes, Southerners and Democrats were republishing the very statements thought to be too dangerous to tolerate. Democratic and Southern newspapers were spreading excerpts from Helper's "incendiary" book throughout the North and South, as they had done with Seward's speech.[181] Indeed when Republicans complained that their doctrines were not permitted to circulate in the South, Southern members of Congress pointed to Southern papers that had reprinted Seward's "irrepressible conflict" speech.

Senator Benjamin F. Wade of Ohio, a strong foe of slavery, thought he saw a curious paradox. If incendiary matter was dangerous, asked Wade, was not the "most dangerous" of all that "which went to teach the people [of the South] that a great party, controlling all the free States, were sympathizing with raids upon the South; were ready to lend themselves to any uprising that might be got up there."[182] Still this "most dangerous of all" incendiary speech was carried into Southern states by the Democratic version of Republican ideas, without Republican antidote or explanation. This was so because Republican papers were not permitted to circulate there.[183]

A final irony was that the attack on Helper's book transformed it from a moderate success to a raging best seller. One hundred and forty-two thousand copies of the book had been distributed by the fall of 1860.[184] In December 1860, the *New York Tribune*, which was promoting the book, cheerfully reported that Southern "Fire-eaters" and Northern "Doughfaces" had by their persistent discussion of *The Impending Crisis* generated a circulation rapidly approaching that of *Uncle Tom's*

180. GLOBE 36(1), *supra* note 2, at 63.

181. *E.g., Revolutionary Designs of the Abolitionists*, N.Y. HERALD, Nov. 26, 1859, at 4; *The Text Book of Revolution*, *supra* note 154, at 1; *Incitement to Treason and Civil War*, RALEIGH WKLY. STANDARD, Dec. 7, 1859, at 1.

182. GLOBE 36(1), *supra* note 2, at 141.

183. *Id.*; *see also id.* at 58 (Sen. Trumbull).

184. Joaquin J. Cardoso, *Lincoln Abolitionism, and Patronage: The Case of Hinton Rowan Helper*, 53 J. NEGRO HIST. 144, 147 (1968).

Cabin.[185]

The opponents of slavery were quick to see a political agenda in the paradoxical Democratic approach to the problem. Early in the session Senator John P. Hale of New Hampshire suggested that Northern Democrats, decimated by their support of the Kansas-Nebraska Act, were weeping crocodile tears for the victims of the Harper's Ferry raid. Some Northern Democrats, he said, "whom the tender solicitude of their constituents had left in the retirement of private life, free from the corroding cares of public station . . . received the news of this outbreak in Virginia with a perfect yell of delight."[186] They hoped to use it as "something they could catch hold of to ride into power."[187] Abraham Lincoln, in his Cooper Institute Speech, suggested Democrats were trying to use "John Brown, [the] Helper book, and the like [to] break up the Republican organization."[188] Political implications were never far from the center of the controversy. Southern nationalists used Helper, Seward, and Harper's Ferry to show why secession was imperative if a "Black Republican" were elected President; Northern Democrats used the same events as a stick with which to beat the "sectional" Republican party; and Republicans used the secessionist speeches to discredit Northern Democrats.

In the controversy over antislavery expression, Republicans thought they heard the jingle of gold coins. John Bingham suggested that a powerful slave owning plutocracy sought to protect slavery in order to protect its economic interests. "These gentlemen apprehend," said Bingham, "that if free speech is tolerated and free labor protected by law, free labor might attain . . . such dignity . . . as would bring into disrepute the system of slave labor, and bring about if you please, gradual emancipation, thereby interfering with the profits of these gentlemen."[189] Abraham Lincoln warned of the "proneness of prosperity to breed tyrants."[190]

Although one complaint about Helper's book was that it would lead the slaves to violence, another concern was clearly present. Some Democrats warned of means "other than those which John Brown resorted to."[191] Helper and Republicans, Democrats insisted, were trying to de-

185. *Helper's Crisis*, N.Y. TRIB., Dec. 27, 1859, at 4.

186. GLOBE 36(1), *supra* note 2, at 7.

187. *Id.*

188. 3 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 541 (Roy Basler ed., 1953).

189. GLOBE 36(1), *supra* note 2, at 1861.

190. 2 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 406 (Roy Basler ed., 1953).

191. GLOBE 36(1), *supra* note 2, at 240-41 (Rep. Smith, Va.).

velop a local opposition among the nonslaveholding white majority of the South. Ultimately, Democratic Senator George Pugh of Ohio charged, they hoped "to strike down slavery [in the South] by changing state constitutions."[192] Indeed, Republicans did hope to use nonslaveholders as a great lever to achieve emancipation in the South. In particular, Republicans planned to use patronage, free speech, and free access to the mails to develop this local opposition after a Republican was elected President. John Sherman wrote Lydia Child suggesting that within two years of the election of a Republican President, there would be a Republican party in every Southern state. A Republican victory, Sherman insisted, would encourage emancipation by the Southern states themselves. In this sense the Southern fear of an attack on slavery in the South was well founded. Republican postmasters would not be likely to censor Republican or antislavery literature. Democratic Senator William Gwin of California suggested that Southern states would not tolerate Republican postmasters.[193] (In those days, of course, postmasters were key political operatives and organizers, not just deliverers of mail.)

Some Republican complaints about suppression of speech in the South could be handled by constitutional doctrine that was consistent with *Barron*. Some Southern laws and actions explicitly discriminated against out-of-state "agitators" or publications. Those might be answered by a conventional reading of Article IV, Section 2 that prohibited discrimination against out-of-staters. Democrats had long pointed out, however, that laws in the South typically did not discriminate against those from other states. Antislavery expression was equally forbidden for Southern opponents of slavery.[194] Sometimes Southerners suppressed supporters of the national Republican party or its candidates. Such actions might be dealt with not by invoking a broad view of free speech, but by insisting that the republican nature of the national government meant that such behavior was unconstitutional.[195] Such limited responses might have been the main ones made, but they were not.

Because Republicans thought free speech on the subject of slavery in the South was essential to the development of a Republican party there, Republicans did not embrace a view of free speech that limited it to "le-

192. *Id.* at 407.

193. FONER, *supra* note 8, at 122, 207; GLOBE 36(1), *supra* note 2, at 240 (Rep. Smith, Va.); *id.* at 282 (Rep. Pryor, Va.); *id.* at 462 (Rep. Underwood); *id.* at 95 (Rep. Curry); *id.* at 912 (Sen. Seward) (asserting that freedom of speech and ballot would produce a large Republican party in the South); *id.* at 125 (Rep. Gwin); *id.* at 407 (Sen. Pugh).

194. CONG. GLOBE, 24th Cong., 1st Sess. app. at 9 (1835) (report of Postmaster General Kendall).

195. *E.g.*, United States v. Cruikshank, 92 U.S. 542, 552 (1875); BLACK, *supra* note 29, at 33-50.

gitimate" subjects of national legislation. For slavery in the states, most Republicans conceded, was not such a subject.[196] Because they insisted on the right of people in the South to discuss slavery, they did not embrace the view that the privileges of American citizens were limited to protection of national political speech or to protection of out-of-staters against discrimination. So the Republican demand for free speech on slavery was a seamless fabric, moving without any marked transition from complaints about suppression of free speech on national topics and complaints about suppression of speech of Northerners to complaints about the suppression of antislavery expression by Southerners on both state and national topics. Nor was freedom of expression aimed at slavery limited to political speech, narrowly defined. It included antislavery religious expression by ministers who discussed the theological aspects of slavery and antislavery artistic expression, like the best seller *Uncle Tom's Cabin*. Similarly, appeals to the privileges and immunities of citizens of the United States which Republicans thought were protected by Article IV often moved seemlessly from complaints about discrimination against citizens from other states to complaints about violation of the "absolute" rights of American citizens to free speech.[197]

6. The Republican Demands for Free Speech

From the beginning, Republicans had made demands for free speech a centerpiece of their political program. Their campaign slogan in 1856 had been "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Frémont."[198] When Republicans embraced "free speech" in the context of the struggle over slavery, that decision also implied ideas about the role and limits of free speech. Implicitly, and sometimes explicitly, most who spoke to the issue repudiated the bad tendency test by appealing instead to a core area of speech beyond government power to suppress.[199]

Early in the 1859 congressional session, Democratic Senator Albert Brown of Mississippi pointed out that Republican Senator Henry Wilson of Massachusetts had attended an antislavery meeting. The sponsors of the meeting passed a resolution declaring the right and duty of slaves to resist their masters and of Northerners to incite them to resistance.

196. GLOBE 36(1), *supra* note 2, at 54 (Sen. Trumbull); *id.* at 66 (Rep. Leach); LINCOLN'S SPEECHES 1859-1865, *supra* note 9, at 61.

197. *See infra* notes 213, 221-25, 232-33, 248, 253-56.

198. SEWELL, *supra* note 16, at 284.

199. For a discussion of the two approaches to the free speech issue, see Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1430-32 (1962).

Brown asked if Wilson had spoken against the resolution. Wilson explained that he had spoken a few days before to a large meeting where he had condemned John Brown's raid. He had been invited to the second meeting to hear from the other side, and he had attended.[200]

Senator Brown's question to Senator Wilson opened a running discussion of free speech, North and South. The debate took place in the context of a resolution passed by a meeting in Massachusetts that was a clear call to resistance by slaves. It was the very sort of incitement the Democrats were trying, with the use of less promising material, to pin on the Republicans. "Senators should remember," Wilson said, "that the right to hold meetings and to utter opinions upon all matters of public concern is an acknowledged right in my section .... I wish the people of other sections of the country would thus cherish the sacred right of free discussion."[201] Senator Fessenden, later Chairman of the Joint Committee on Reconstruction in the 39th Congress (the committee that proposed the Fourteenth Amendment), made much the same point. He refuted the claim that the resolution urging resistance by slaves was proof that public opinion in the North approved the Brown raid.[202] "[W]e allow everybody to hold a public meeting that wants one, and he may say what he pleases .... We are not in the habit of interfering with the expression of opinion by anybody; persons may say what they like."[203]

That freedom of speech was denied to opponents of slavery in the South struck Republicans as an outrage against the principles of liberty. Senator Trumbull discussed Republican support for a ban on slavery in the territories, and compared it to the chameleon-like Democratic approach to the issue. "We do not preach popular sovereignty in the North, and scout it as a humbug in the South,"[204] Trumbull announced. "You do not preach it in the South at all," interjected Senator Pugh, Democrat of Ohio.[205] Trumbull retorted that "the men who do not allow our principles to be proclaimed in the South talk about sectionalism. A sectionalism, so pure . . . that it will not tolerate the exposition of the principles of its opponents at all where it is in power, talks to the other party about sectionalism!"[206]

In the Lincoln-Douglas debates, Lincoln made a similar point. Douglas argued that the Republicans were a sectional party because they

200. GLOBE 36(1), *supra* note 2, at 12.
201. *Id.*
202. *Id.* at 31.
203. *Id.*
204. *Id.* at 57.
205. *Id.*
206. *Id.*

could not proclaim their doctrines in the South. Lincoln responded that the exclusion of Republicans from the South was the result of despotism. Douglas also could not go to Czarist Russia to proclaim democracy and denounce monarchy.[207] Senator Wilson protested that there was not a Republican Senator who could send his frank into Southern states without subjecting "his letter to be opened, examined, and destroyed."[208] Southern papers and some Southern legislatures had offered rewards, he noted, for the heads of opponents of slavery, including some Republican members of Congress.[209]

Senator Wilson engaged in a lengthy dialogue with Southern Senators on free speech in the slave states. He was not discussing, Wilson insisted, inciting slaves to rebel. Southerners held such men "amenable to their laws."[210] But, said Wilson, "throughout a large portion of the South," men who entertain opinions on slavery like those of Washington, Jefferson, and Patrick Henry, "cannot reside, . . . cannot exist, in safety."[211] Senator Brown of Georgia said that Wilson could go into his state and avow "any sentiments which he has a right to entertain."[212] He would not, however, be permitted to urge Brown's slaves to cut Brown's throat. Wilson insisted that was not the issue. He noted that Professor Hedrick had been driven from North Carolina because he supported Frémont and that John Underwood was compelled to leave Virginia because he attended the Republican national convention of 1856.[213] Senator Brown replied that support for Frémont was, indeed, a far different matter:

> [T]here was a great deal more involved in the . . . election of Mr. Frémont . . . beyond the mere avowal of that sentiment [that Kansas should be a free state] . . . . I would not myself tolerate any man who would go to my State and avow his preference for the election of Mr. Seward upon the program he laid down in his Rochester speech . . . .[214]

Seward would not be permitted to teach his irrepressible conflict doctrine "because our safety, . . . our peace, the peace of our hearths, depends upon the repression of such doctrines with us."[215]

207. CREATED EQUAL? THE COMPLETE LINCOLN DOUGLAS DEBATES OF 1858, at 290-91, 300 (Paul Angle ed., 1958).

208. GLOBE 36(1), *supra* note 2, at 128.

209. *Id.*

210. *Id.* at 64.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

Wilson said that Brown had conceded his point. "Mr. Stanard was driven from Norfolk for simply attempting to vote for Frémont . . . . In the [South], where we have an inbred constitutional right to advocate these doctrines, it is confessed that we will not be permitted to do it."[216] "Every American citizen," Wilson insisted, had a right "to advocate exclusion of slavery from the Territories . . . . Slavery will not tolerate free speech and a free press."[217] Wilson also defended Helper's book. It contained "the most valuable information" together with a few phrases those who had recommended it would disavow.[218]

Earlier in his remarks Wilson had made a ringing defense of free speech: "[I]n Massachusetts we have absolute freedom of speech and of the press. We deal with all public questions, all social questions, all questions that concern the human race. We have nothing there that prevents the fullest and boldest discussion . . . ."[219] The Senator from Georgia could go there and advocate slavery, the dissolution of the Union, or reopening the slave trade and he would be "listened to in peace" and "received kindly."[220] Wilson knew that this was hard for Senators to understand who came from a section where "freedom of speech on some political, moral, and social subjects is not tolerated . . . ."[221]

Most Republicans denied that Helper's book was incendiary. After the controversy erupted over Helper's book, Senator Wade said he had studied it in detail. By rhetorical questions he suggested that nothing in the book was "dangerous to the people of any section . . . ."[222] It contained nothing that "could not safely be entrusted to the hands of any freeman."[223] It was simply composed of arguments addressed by a nonslaveholder to his fellow nonslaveholders. "Unless such arguments are unlawful there, I see nothing in the book but what is just, right, and proper for the consideration of all men who take an interest in these matters."[224] Wade clearly thought the book *should* be protected expression:

> [H]as it come to this, in free America, that there must be a censorship of the press instituted; that a man cannot give currency to a book containing arguments that he thinks essentially affect the rights of whole classes of the free population of this nation? I hope not, and I believe

216. *Id.*
217. *Id.*
218. *Id.* at 65.
219. *Id.* at 63.
220. *Id.*
221. *Id.* at 64.
222. *Id.* at 144.
223. *Id.*
224. *Id.*

not.[225]

Senator Seward also made a defense of the principle of free speech, and he mixed references to why national action to suppress speech was inappropriate with a more general statement of principle. Southerners had complained he said, that Republicans

> sanction too unreservedly books designed to advocate emancipation. But surely you can hardly expect the Federal Government or the political parties of the nation to maintain a censorship of the press or of debate. The theory of our system is, that error of opinion may in all cases safely be tolerated where reason is left free to combat it.[226]

According to Congressman Sidney Edgerton of Ohio, Republicans were being denounced as traitors for adopting the antislavery opinions of Jefferson, Washington, Madison, and Henry. There had been a complete suppression of free speech in the South. "For years," he said,

> in most of the slaveholding states, the most sacred provisions of the Constitution have been wantonly and persistently violated. Where is the liberty of speech and of the press in the slaveholding states? Can a northern man . . . print and speak his opinions? Not if he believes in the Declaration of Independence.[227]

Nor could preachers "discuss the moral bearings of slavery . . . ."[228]

Threats against opponents of slavery and arrests for selling Helper's book illustrated the denial of free speech and press. Southerners had said Reverend Beecher would be hung if he came South. "And the gentleman from South Carolina informed the House that . . . they had arrested a man for selling Helper's book"[229] and had said they would hang him. Edgerton said he had studied Helper's book. It did not, as charged, advise "insurrection, treason, servile war, arson, and murder."[230] Those who made such charges had "never read the book. And yet to sell this harmless book in a slave State is considered a crime. Where is your constitutional liberty?"[231] The "liberty of South Carolina" was equivalent to the "despotism of Austria."[232] "Gentlemen of the South," Edgerton exclaimed, "the North demands of you the observance of constitutional obligations. She demands that her citizens be protected by your laws in the enjoyment of their constitutional rights. She demands the freedom of speech and of the press; and if your peculiar institution cannot stand

225. *Id.*
226. *Id.* at 913.
227. *Id.* at 930.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 930-31.

before them, let it go down . . . ."[233]

Representative Henry Waldron of Michigan reached similar conclusions:

> This slave Democracy tramples [the Constitution] under foot. We have sacred guarantees in that instrument in behalf of free speech, free thought, and a free press, and yet today Democratic postmasters rifle mails and violate the sanctity of private correspondence. Today a system of espionage prevails which would disgrace the despotism and darkness of the middle ages. The newspaper which refuses to recount the blessings and sing the praises of slavery is committed to the flames. The press that refuses to vilify the memory of the fathers is taken by a ruthless mob and engulfed beneath the waters. The personal safety of the traveler depends not on his deeds, but upon his opinions. And these outrages are daily committed under the rule of the Democracy, because that party has taken under its guardian care an institution which can only exist and prosper at the sacrifice and expense of the constitutional rights of the citizen. Where slavery is there can be no free speech, no free thought, no free press, no regard for constitutions, no deference to courts.[234]

Other Republican members of Congress also complained that slavery caused suppression of free speech and press—by actions of state, federal, or territorial governments, and by mob action.[235] They expressed concern for free speech directed to state as well as national issues. John Bingham said, "today, it would cost a man his life to rise deliberately in the Legislature of Virginia and announce a sentiment in favor of emancipation, such as [were] announced by some of her most distinguished sons in the memorable debate of 1832."[236]

One Republican objection to permitting slavery in the territories was that slavery inevitably would bring its despotic practices with it. Slave owners would pass territorial laws that denied freedom of speech and of the press. "They claim the right to seal every man's lips, and stop every man's mouth, on questions of great national interest," complained Congressman Cydnor Tompkins of Ohio.[237] They would "condemn as a felon the man who dares proclaim the precepts of our holy religion."[238] They would "strip naked and cut into gashes the back of the man who

233. *Id.* at 931.

234. *Id.* at 1872.

235. *Id.* at 1031-32 (Rep. Van Wyck); *id.* at 1039-40 (Rep. Perry) (appealing also to a somewhat more conventional reading of the interstate privileges or immunities clause to bolster his complaint of lack of protection for visitors from the North); *id.* at 1585 (Rep. Wells); *id.* at 1861-62 (Rep. Bingham).

236. *Id.* at 1861.

237. *Id.* at 1857.

238. *Id.*

utters opinions" that did not square with those of the slaveholders.[239]

While Republicans protested the slave states' system of censorship in the interests of slavery and warned that it would inevitably spread to all slave territories, some Democrats advocated extending the suppression of antislavery sentiments to the free states. Representatives Daniel Sickles of New York and Muscoe Garnett of Virginia suggested that Governor Marcy of New York had been correct in 1836 when he advocated legislation to suppress abolitionist expression.[240] Sickles implied that such expression should have been "put down" by law because it "lead[s] to bad consequences."[241] Now that the North was learning that men in their states planned to carry "discord, invasion, and danger" to the South, Sickles said, the North was going to recur to the "wise and patriotic recommendation of Governor Marcy."[242] In February and March of 1860 Abraham Lincoln warned that the "slave power," along with other demands, insisted that "Senator Douglas's new sedition law must be enacted and enforced, suppressing all declarations that slavery is wrong, whether made in politics, in presses, in pulpits, or in private."[243]

In June of 1860, after Lincoln's nomination, the Senate considered a series of resolutions on slavery offered by Jefferson Davis, Senator from Mississippi, former Secretary of War, and future President of the Confederate States of America. One resolution said that slavery, "as it exists in fifteen states of this Union, composes an important portion of their *domestic* institutions . . . ."[244] Slavery, the resolution continued, was recognized by the Constitution as "constituting an important element in apportionment of powers among the states."[245] Nothing could justify "open or covert attacks [on slavery] with a view to its overthrow."[246] Such attacks, the resolution declared, were a "breach of faith" and a violation of the national "compact."[247] Senator James Harlan of Iowa proposed a free speech amendment to the resolution:

> But free discussion of the morality and expediency of slavery should never be interfered with by the laws of any State, or of the United States; and the freedom of speech and of the press, on this and every other subject of *domestic* and national policy, should be maintained

239. *Id.* at 1857.
240. *Id.* at 133 (Rep. Sickles); *id.* at 44 (Rep. Garnett).
241. *Id.* at 133.
242. *Id.*
243. LINCOLN'S SPEECHES 1859-1865, *supra* note 9, at 128 (Address at Cooper Institute); *id.* at 149 (Address at New Haven).
244. GLOBE 36(1), *supra* note 2, at 2321 (emphasis added).
245. *Id.*
246. *Id.*
247. *Id.* at 2321.

inviolate in all the States.[248]

The Senate defeated the amendment on a party line vote, but the amendment received the support of every Republican in the Senate who voted on the issue.[249] The resolution is strong evidence that Republicans were calling for free speech on all issues of policy—local as well as national.

The word "domestic" in the resolution meant local to the states. Slavery, according to Jefferson Davis' resolution, was an important part of the "domestic" institutions of fifteen states.[250] Republicans sought to amend the resolution by calling for free speech on all issues of policy, "domestic" as well as national. The word "domestic" here takes its meaning from the use of the same word earlier in the resolution to refer to the "domestic" institutions of fifteen states. The meaning of the word "domestic" in the free speech resolution is also illuminated by the larger context in which it was used—the context of uproar over a book advocating political action in the Southern states themselves to end slavery.

Democrats in the Senate rejected the free speech amendment. The party of James Madison rejected a demand for free speech on all political issues, including slavery. The institution of slavery reshaped ideas of liberty to suit its needs.

On April 5, 1860, Owen Lovejoy rose to make a bitter denunciation of slavery.[251] Lovejoy was a Congressman from Illinois, a supporter of Lincoln, an intense critic of slavery, an outspoken proponent of assisting fugitive slaves escaping from bondage, and the brother of Elijah Lovejoy, the antislavery newspaper editor who had been killed defending his press from a proslavery mob. His speech, which denounced slaveholding as "the sum of all villainy,"[252] came close to causing a riot on the floor of the House. On the issue of free speech, however, Lovejoy's position was close to that of most Republicans who spoke on the issue. He supported, he said, Helper's object: organizing a party in the Slave states against slavery. Those objecting to the book were insisting that "an American citizen, address[ing] himself to his fellow-citizens, in a peaceful way, through the press . . . must be hanged . . . ."[253] Like John Bingham, Lovejoy invoked the privileges and immunities of citizens of the United States as protecting basic rights, including free speech and press. "I do

248. *Id.* (emphasis added).
249. *Id.*
250. *Id.*
251. GLOBE 36(1) app., *supra* note 7, at 202.
252. *Id.*
253. *Id.* at 205.

claim the right of discussing this question of slavery anywhere, on any square foot of American soil over which the stars and stripes float, to which the privileges and immunities of the Constitution extend."[254] "[T]hat Constitution, which guaranties to me free speech . . . ."[255] protected his right to criticize slavery. Just as the invocation of Roman citizenship protected ancient Romans, so American citizenship should protect Americans in their rights. "That is my response to the question of why I recommended circulation of the Helper book." Lovejoy claimed "the privilege of going anywhere . . . as a free citizen, unmolested, and of uttering, in an orderly and legal way, any sentiment that I choose to utter . . . ."[256] Among his other complaints Lovejoy protested that Southern states "imprison or exile preachers of the Gospel."[257]

Lovejoy's speech ended on a somber note. Representative Elbert Martin of Virginia announced, "[a]nd if you come among us we will do with you as we did with John Brown—hang you up as high as Haman."[258] "I have no doubt of it," replied Congressman Lovejoy.[259]

E. The Impending Crisis *in North Carolina: the Trial of Reverend Daniel Worth*

1. Daniel Worth, his Arrest, and the North Carolina Reaction

On the day that Congressman Lovejoy spoke, and complained about Southern states that "imprison or exile preachers of the Gospel,"[260] the *New York Times* reported that Reverend Daniel Worth, Wesleyan Minister, was convicted in North Carolina of circulating Helper's book.[261] He was sentenced to a year in prison.[262] Worth's arrests in two counties for circulating the Helper book had been reported earlier in the antislavery press. The *National Era* had reported it wearily on January 12, 1860.[263] "We should literally have no room for anything else," the paper reported, "if we were to publish all the details of whippings, tar-and-featherings, and hangings, for the utterance of Anti-Slavery opinions in

254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 207.
259. *Id.*
260. *Id.* at 205.
261. *Case of Rev. Daniel Worth*, N.Y. TIMES, Apr. 5, 1860, at 5; *see also Case of Rev. Daniel Worth*, Apr. 6, 1860, at 6.
262. *Case of Rev. Daniel Worth*, N.Y. TIMES, Apr. 6, 1860, at 6.
263. *Freedom of Speech in the South*, NAT'L ERA, Jan. 12, 1860, at 6.

the South."[264] It expected that Worth would be convicted and suffer "fine, imprisonment, and whipping."[265]

Worth had been born in 1795 in Guilford County, North Carolina to a devout Quaker family. He and his family migrated to Indiana in 1822, as many antislavery Quakers had done. Worth was active in the Indiana antislavery society in the 1840s and later supported the Republican party.

In 1857 Daniel Worth, by this time a Wesleyan Minister, left his clerical duties in Indiana for North Carolina. The American Missionary Association (a strongly antislavery organization) supplied him with financial support and fifty copies of Helper's book. Worth returned to Guilford County, North Carolina, where he began to preach his antislavery version of the Gospel. He sold all fifty copies of Helper's book and ordered more, and he secured subscriptions for the *New York Tribune*, the same antislavery newspaper that was seized from the mail and burned in Virginia in 1859.[266]

Worth was aware that his work was dangerous. "[I] can preach," he reported to his nephew with satisfaction, "and have done it, as strong and direct against slavery as ever you heard me in the north, and I believe that there is not another man that could."[267] He attributed his success to his age, Southern birth, and his influential family connections.[268]

After the raid on Harper's Ferry, pressure to suppress Worth increased. On November 26, 1859, the *North Carolina Presbyterian* warned that "society must be protected against cut-throats and assassins," and demanded that an unnamed abolitionist fanatic preacher be removed from the state.[269] The North Carolina *Raleigh Weekly Standard* asked for the name: was he the fanatic Daniel Worth, the minister who had even been referred to in Helper's book as a Southern minister preaching against slavery?[270] On December 17, 1859, the *North Carolina Presbyterian* obligingly supplied Worth's name. "[I]t is notorious," the paper wrote, "that [Daniel Worth] has been inculcating, publicly and privately, his incendiary doctrines in Randolph and Guilford counties,

264. *Id.*

265. *Id.*

266. Tolbert, *supra* note 16, at 284-90. For a second powerfully researched article dealing with Worth, see Johnson, *supra* note 16.

267. Letter from Daniel Worth to Aaron Worth (Apr. 30, 1858), *in* Tolbert, *supra* note 16, at 290.

268. *Id.*

269. *Id.* at 291.

270. *An Abolition Emissary*, RALEIGH WKLY. STANDARD, Dec. 14, 1959, at 1, *in* Tolbert, *supra* note 16, at 291.

and the time has come when he should be compelled to abandon this work."[271] On December 10, 1859, the Council of State passed a resolution saying postmasters who delivered incendiary books or newspapers to the addressee should be prosecuted as circulators of the item.[272] Another resolution enjoined all public officers to subject out of state merchants, book dealers, tract distributors, and lecturers to "the strictest scrutiny."[273]

On December 21, 1859, Worth wrote to the American Missionary Association forecasting "times of trial."[274] "Since the unfortunate affair at Harper's Ferry, the county is in a tremendous ferment. Threatenings reach me from various quarters . . . ."[275] The North Carolina papers were filled with denunciations of Helper's book and the sixty-eight Republican Congressmen who endorsed it. The *Raleigh Register* reprinted excerpts from *The Impending Crisis* to show the enormity of the offense. It quoted a passage in which Helper demanded

> as the only true means of attaining to a position worthy of sovereign States . . . an energetic, intelligent, enterprising, virtuous, and unshackled population, an untrammelled press, and the freedom of speech. For ourselves, as white people, and for the negroes and other persons of whatever color or condition, we demand all the rights, interests and prerogatives that are guaranteed to corresponding classes of mankind in the North . . . .[276]

By Christmas Daniel Worth was under arrest.

Worth's arrest and preliminary hearing were reported widely in the North Carolina press. Raleigh and Greensboro papers of all political persuasions were unanimous in their condemnation of Worth.[277] In the *Greensboro Patriot's* account of the preliminary hearing, the editor said he had not read Helper's book, "but from extracts which were read on the trial" it was "infamous" and should "consign to infamy" all who circulated it.[278] "[T]hey will most assuredly receive condign punishment."[279] To the extent that Helper's book was a political issue, each party used it in an attempt to tar the other. Democrats charged that

271. *The Abolition Emissary*, N.C. PRESBYTERIAN, Dec. 17, 1859, at 1.

272. *The Council of State*, RALEIGH WKLY. STANDARD, Dec. 14, 1859, at 1.

273. *Id.*

274. Letter from Daniel Worth to American Missionary Association (Dec. 21, 1859), *in* Johnson, *supra* note 16, at 312.

275. *Id.*

276. *Hinton R. Helper's Infamous Book—What the Sixty-Eight Demand*, WKLY. RALEIGH REG., Dec. 14, 1859, at 1.

277. *Arrest of Rev. Daniel Worth*, RALEIGH WKLY. STANDARD, Dec. 28, 1859, at 3; *Arrest of Rev. Daniel Worth*, WKLY. RALEIGH REG., Jan. 4, 1860, at 1; *Arrest and Trial of Rev. Daniel Worth*, GREENSBORO PATRIOT, Jan. 6, 1860, at 3.

278. *Arrest and Trial of Rev. Daniel Worth*, *supra* note 277, at 3.

279. *Id.*

Whig Congressman John Gilmer had been mailed a copy by Helper. Gilmer denied knowing possession. Gilmer's supporters then claimed that Governor Ellis had received a copy of the book. Ellis responded that he had thrown the first copy he received out the window, and when a second copy of the book was sent to him, he used its incendiary pages to light his pipe.[280]

The Raleigh Standard noted efforts to circulate Helper's book and called for increased vigilance. "We would," it sternly lectured, "again remind Postmasters of their duties in this respect. Let every copy of Helper's book, and every copy of the *New York Tribune*, and every document franked by Seward, Wilson, Burlingame, John Sherman, and other abolitionists which may come to their offices, *be committed to the flames.*"[281]

Politicians, judges, and ordinary citizens united in their effort to suppress Worth and his associates. John T. Harriss, a farm laborer in Randolph County wrote Governor Ellis "a fiew lines concerning Daniel Worth he has bin circulating a seditious Book . . . by the title of Helpers impending Crisis one Jacob Briles, senr has one [as did Jacob junior] . . . and it can bea proven that they got them of this same Daniel Worth . . . ."[282] The Governor promptly wrote an irate letter to Judge Dick, a superior court judge. "The local magistrates . . . ," the Governor protested, "have been, up to this time wholly remiss in suppressing the most flagrant violations of Law—the circulation of incendiary books & papers, and the use of language calculated to incite slaves to insurrection . . . ."[283] Upon receiving Harriss' letter from the Governor, Judge Dick wrote the Governor to say that he "forthwith issued a warrant for Jacob Bryles [Briles] senr" instructing the sheriff "to search for books."[284] The Judge assured the Governor that all that properly could be done was being done, "and I fear that more will be done than ought to be done."[285] Had Worth been released on bail, the Judge said, he would have been hung. No one, the Judge promised, would escape against whom evidence could be obtained.[286] Following this promise, the press reported the arrest of a number of others suspected of involvement with the Helper

280. *See, e.g.*, GLOBE 36(1), *supra* note 2, at 188 (Rep. Gilmer); *Helper's Book*, GREENSBORO PATRIOT, Aug. 12, 1859, at 2.

281. *Incendiary Documents*, RALEIGH WKLY. STANDARD, Jan. 4, 1860, at 1.

282. John T. Harriss to John W. Ellis (Dec. 30, 1859), *in* 1 PAPERS OF JOHN W. ELLIS 340 (1964).

283. *Id.* at 342-43.

284. *Id.* at 343-44.

285. *Id.* at 344.

286. *Id.* at 344-45.

book.[287]

At least one North Carolinian did criticize the prosecutions, but he wrote from the safety of his exile in New York City. Benjamin Hedrick, the deposed and exiled chemistry professor, wrote to his old friend Thomas Ruffin, formerly Chief Justice of North Carolina. He asked Ruffin to use his influence to "arrest the terrorism and fanaticism which now so much disturbs the South . . . . Some of the men recently arrested are among the best men in the state . . . ." Their persecution could only be arrested by intervention of upright citizens. Hedrick continued:

> In order that you may have an opportunity to know also what offense is laid to some of these men I send you a copy of Helper's book. You will find not a word in it is addressed to either free or slave negroes, That [sic] most of the sentiments that are current in the state and attributed to this book, are the fabrications of the *New York Herald.* Please examine the book and see if there is any thing in it that one freeman may not properly address to any other. For myself I am free to admit that I do not approve of every proposition advocated in the book, nor with the manner in which some good propositions are maintained. But unless we tolerate difference of opinion we must have despotism at once.[288]

Hedrick also sent Ruffin a copy of a searing indictment of slavery published in Greensboro in 1830. It argued that slaves were entitled to state constitutional protections of liberty and that they were the victims of kidnapping. Hedrick also alluded to an 1832 speech by Judge William Gaston of the North Carolina Supreme Court to show "[i]t was not then treason to discuss slavery, and to print opinions adverse to the system."[289] Hedrick later engaged counsel for Worth and raised money for his defense.[290]

Meanwhile, Judge Ruffin received correspondence about Worth from Reverend George McNeil, the editor who had "exposed" Worth. McNeil passed on a letter from Jonathan Worth, Daniel's influential cousin.[291] "In addition to the horror of having a minister of the Gospel, aged 68 years [sic] whipped," Jonathan Worth warned, "[t]he abolition-

287. *The Abolitionist George W. Vestal,* DAILY PROGRESS, Jan. 3, 1860, at 2; *The Abolitionists Worth and Turner,* DAILY PROGRESS, Jan. 3, 1860, at 2; *Abolitionists Worth and Turner,* RALEIGH WKLY. STANDARD, Jan. 4, 1860, at 1; *Arrest of A Suspicious Character,* WKLY. RALEIGH REG., Jan. 4, 1860, at 1.

288. From Benjamin S. Hedrick to Thomas Ruffin (Jan. 16, 1860), *in* 3 PAPERS OF THOMAS RUFFIN 64 (J.G. de Roulhac Hamilton ed., 1920).

289. *Id.* at 65. For the antislavery pamphlet, see *Address to the People of North Carolina on the Evils of Slavery,* MANUMISSION SOCIETY OF NORTH CAROLINA 5, 9, 13, 15 (reprint 1860) (1830).

290. Tolbert, *supra* note 16, at 298.

291. From George McNeill, Jr. to Thomas Ruffin (Mar. 12, 1860), *in* 1 PAPERS OF THOMAS RUFFIN 73 (J.G. de Roulhac Hamilton ed., 1920).

ists at home and abroad will turn it to account."[292] Jonathan Worth also complained about the statute under which Worth had been convicted:

> Judge Shepherd held at Montgomery last week, that an article in the religious creed of a Society declaring that Slavery is inconsistent with Christian religion, if printed and circulated among its members, would make the person circulating it indictable under this Statute, because all religious societies admit slaves as members and such an article would have an "evident tendency to make them dissatisfied with their social condition." This reasoning seems to be clear. It follows that all Quakers are indictable under this Statute and liable to ignominious punishment . . . . Its execution, according to this interpretation would produce general horror.[293]

Jonathan Worth would have limited the statute to those intending to "produce dissatisfaction among slaves" and said his cousin, except for his age and otherwise "exemplary character," was a fit case for the execution of the statute. All things considered, he hoped the whipping would be omitted and Daniel Worth would be permitted to leave the state.[294]

2. The Trials of Daniel Worth

Daniel Worth was charged with violating Section 16 of Chapter 34 of the North Carolina statutes, passed originally in the 1830s and revised in 1854.[295] Section 16 made it a crime to circulate "any written or printed pamphlet or paper . . . the evident tendency whereof is to cause slaves to become discontented with the bondage in which they are held . . . and free negroes to be dissatisfied with their social condition."[296] For the first offense, persons violating the statute were to be whipped, put in the pillory and imprisoned for not less than a year.[297] For the second offense the punishment was death.[298]

At his preliminary hearing, Worth admitted selling Helper's book, but denied that his object was to stir up insurrection. His was a mission of peace.[299] Worth was bound over for trial in Superior Court. He remained incarcerated pending trial. Meanwhile, an additional shipment

292. From Jonathan Worth to George McNeill Jr. (Mar. 10, 1860), *in* 1 PAPERS OF THOMAS RUFFIN, *supra* note 291, at 74.

293. *Id.*

294. *Id.*

295. Act to Prevent Circulation of Seditious Publications, N.C. REV. CODE ch. 34, § 16 (1854) (revising 1830 N.C. Sess. Laws ch. 5, at 10-11).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Arrest and Trial of Rev. Daniel Worth*, *supra* note 277, at 3. The following account of Worth's trial comes from fragmentary press accounts and from the few surviving appellate papers. These do not include the defendant's brief.

of Helper's book was seized and publicly burned.[300]

At Worth's first trial, in Randolph County, the prosecutor read the jury the indictment containing lengthy extracts from *The Impending Crisis*. The Guilford indictment (which is probably similar) quoted Helper's argument that slavery was a nuisance and non slaveholders were concerned with it just as they would be in the case of mad dogs; that slavery was worse than stealing; and that slave and free negro victims of crimes were not permitted to testify against white oppressors. The indictment also quoted the passage in which Helper compared, in the event of violent confrontation, the number of slaveholders who would be arrayed against nonslaveholders—independent of slaves who would often be "delighted with an opportunity to cut their masters throats."[301] Unlike the *New York Herald*, the indictment quoted the rest of the passage: a hope and belief that the matter would be adjusted without violence; a desire for peace, not war; and finally Helper's plea to give us "freedom of speech, and we will settle this difficulty at the [ballot] box, not on the battleground by force."[302] Though the indictment went on for some eighteen pages, the passages referred to are representative.

Jury selection was difficult because so many potential jurors were already convinced of Worth's guilt.[303] At trial the State proved that Worth sold the book. Jacob Briles, uncovered as a result of the letter from the farm laborer to Governor Ellis, became a witness for the state and testified against Worth. Counsel stipulated that the book need not be read. Worth offered no evidence. Unfortunately, the local newspaper did not report the "able and sometimes truly eloquent" arguments on both sides.[304] The court charged the jury that a book was within the reach of the statute even though the statute specifically listed only papers and pamphlets. Whether the book was incendiary was left to the jury to determine. The jury retired at 11 p.m. and returned a guilty verdict at 4 a.m. the next morning. Judge Bailey sentenced Worth to a year in prison and excused the whipping.[305]

The Guilford trial was a repeat performance with the same lawyers and judge, but this time the jury convicted in fifteen minutes.[306] Worth

300. Johnson, *supra* note 16, at 315.

301. Indictment, State v. Worth, Guilford County, North Carolina Department of Archives and History, 1-6 (1860).

302. *Id.* at 7-8.

303. *See* Johnson, *supra* note 16, at 317; *Randolph Superior Court*, GREENSBORO PATRIOT, Apr. 6, 1860, at 2.

304. *Randolph Superior Court*, GREENSBORO TIMES, Apr. 7, 1860, at 6.

305. *Id.; Randolph Superior Court*, GREENSBORO PATRIOT, Apr. 6, 1860, at 2.

306. *Trial of Rev. Daniel Worth*, GREENSBORO TIMES, May 5, 1860, at 6.

appealed, his bond was reduced, and he quietly slipped out of North Carolina. The authorities apparently wanted to avoid not only the provocative spectacle of an elderly minister of the gospel placed in the pillory and whipped—an outcome the judge had apparently foreclosed—but it seems they also wanted to avoid the spectacle of Worth's imprisonment. Worth went on a speaking tour of the North to raise the funds necessary to reimburse his bondsmen. If he could not raise the funds and if he lost his appeal, he said he would return to be imprisoned.

In a speech in New York, Worth insisted that Helper's book was not "addressed to the colored people,"[307] and he had never given the book to them. Worth said he had defended himself at the preliminary hearing, making what "they said was a regular abolitionist harangue."[308] "I quoted from Mr. Helper's book the language of Thomas Jefferson" to the effect that in a contest between slave and master, God would be on the side of the slave.[309] Worth reported that his friend Hinton Helper had contributed $50.00 to his bail fund.[310]

The North Carolina Supreme Court affirmed Worth's conviction.[311] It was not necessary to prove, the supreme court held, that the book was delivered to slaves or free Negroes or was read in their presence. "The circulation, within the State, is alike prohibited, whether it be amongst whites or blacks," Justice Charles Manly wrote.[312] "The Legislature seems to have assumed, that if a circulation, within the State, was once established, that its corrupting influence would inevitably reach the black."[313] Guilt turned on intent. A copy could be delivered by one person to another without incurring guilt, when it was delivered to gratify curiosity, "both parties to the act being equally opposed to the design."[314] With this observation, perhaps Manly had solved the paradox of why it was lawful for North Carolina papers to publish extracts from Helper's book while at the same time circulation of the book by its proponents was criminal. Finally, Manly had no problem finding the work inflammatory. Every passage of it, "in the most inflamatory [sic] words," declared that "the slave ought to be discontented with his condition, and the master deposed from his, and that the change should be

307. *Daniel Worth in New York*, GREENSBORO TIMES, May 19, 1860, at 2.
308. *Id.*
309. *Id.*
310. *Id.* at 2-3. *A Christian Minister in The South: The Story of Rev. Daniel Worth*, N.Y. TRIB., May 8, 1860, at 5. *See also, Church Anti-Slavery Society*, N.Y. TIMES, May 7, 1860, at 8.
311. State v. Worth, 52 N.C. 488 (1860).
312. *Id.* at 492.
313. *Id.*
314. *Id.* at 490.

effected, even at the cost of blood."[315] Worth's counsel seems not explicitly to have raised nor did the court explicitly consider claims that the statute violated free press or free speech. (The North Carolina Constitution had no explicit protection for free speech, but provided that "the freedom of the Press is one of the great bulwarks of liberty, and therefore ought never to be restrained."[316])

In 1860 the North Carolina Legislature amended the incendiary document statute. Worth's crime, circulating an "incendiary" book on the subject of slavery, was henceforth punishable by death for the first offense.[317]

IV. A NEW BIRTH OF FREEDOM

A. The Impending Crisis *and Application of the Bill of Rights to the States*

James McPherson has suggested that the Civil War was a second American Revolution.[318] Democrats repeatedly insisted that the Republicans were a revolutionary party. Indeed one of the characteristics of the Helper book that critics found outrageous was his suggestion that slavery was the unfinished business of the first American revolution.[319] In 1860 Senator James Chestnut, Jr., of South Carolina said the Republican party was governed by the Red Republican principles of France, though it had "changed its complexion" and "blacked its face."[320] The fundamental fallacy of the Republican party was that it held "that the Declaration of Independence is the basis of the Constitution . . . ."[321] When they considered the power and duties of the Government with reference to the domestic affairs of the states, Republicans, Chestnut said, "string their sophistical arguments" on the "abstract opinions" of the Declaration."[322] "This fatal error arises . . . out of the untenable postulate that all men, under all governments, are naturally and equally entitled to liberty, without reference to the well-being of society or to their

315. *Id.* at 493.

316. *Declaration of Rights*, N.C. CONST. § 15, *quoted in* 1836 PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA CALLED TO AMEND THE CONSTITUTION OF THE STATE 410.

317. 1860 N.C. Sess. Laws, ch. 23, at 39 (1860).

318. JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 23-42, 131-52 (1991). The extent to which the second American Revolution envisioned consolidation of power in the federal government is subject to dispute and any theory of full consolidation is hard to square with the evidence.

319. *E.g.*, GLOBE 36(1), *supra* note 2, at 1617 (Sen. Chestnut).

320. *Id.* at 1619.

321. *Id.* at 1617.

322. *Id.*

own fitness to enjoy and preserve it."[323]

In response to charges like those of Chestnut, Republicans insisted they were the true conservatives, conserving the heritage of liberty espoused by the Declaration of Independence and the leaders of the American Revolution. In 1860 Republicans repeatedly invoked the antislavery expressions of the Revolutionary Fathers. They cited antislavery statements of Thomas Jefferson, James Madison, and George Washington, and early antislavery resolutions from Georgia and other colonies.[324] And they cited Luther Martin, delegate to the Constitutional Convention from Maryland, again and again: slavery was incompatible with republicanism and had the tendency to destroy those principles on which it was supported.[325]

Secession by the South was, as some historians have suggested, a pre-emptive counter revolution. As Southerners saw it, Republicans would not be content with banning slavery from the territories. Republicans insisted, with Lincoln, that Americans should never forget that slavery was wrong everywhere. They hoped that the election of a Republican president and the use of patronage would establish an antislavery party in the Southern states. That party would then abolish slavery on a state by state basis. Senator Seward suggested that if free speech were restored in the South, the Republicans promptly would have as many supporters there as the Democrats did in the North.[326] Democrats insisted that election of a Republican president could never be accepted by all the states. Southern states would never tolerate Republican officeholders and postmasters who could not be expected to eliminate antislavery publications from the mails.[327]

Secession by the South did inaugurate the second American Revolution. Within five short years slavery had been abolished and Republicans had proposed an amendment to make blacks citizens and to secure civil liberty for all American citizens. The basis of their philosophy was, as Senator Chestnut suggested, the idea of the Declaration of Independence that government was established to secure individual rights. Republicans were no longer willing to allow local denials of basic rights. The need to protect citizens against state denials of their rights was reiterated time and again by the Republicans in the Congresses that proposed the Thir-

323. *Id.* at 1618.

324. *E.g.*, *id.* at 822-26 (Rep. Fenton).

325. *Id.* at 823.

326. LINCOLN'S SPEECHES 1859-1865, *supra* note 9, at 129-30; GLOBE 36(1), *supra* note 2, at 912-13 (Sen. Seward).

327. GLOBE 36(1), *supra* note 2, at 125 (Sen. Gwin); *id.* at 455 (Sen. Clingman).

teenth and Fourteenth Amendments. They insisted on giving all citizens the "shield" of "all the guarantees of the Constitution."[328] In the same debates Republicans recurred again and again to denials of civil liberty that had characterized the pre-Civil War years. The main exhibits in their litany of horrors were state denials of freedom of speech, press, and religion. The controversy surrounding the Helper book and the trial of Daniel Worth help us understand, from a distance of many years, what Republicans were talking about.

During debates on abolition, James Wilson, Chairman of the Judiciary Committee in the 38th and 39th Congresses, cited the privileges and immunities clause of Article IV, Section 2 to illustrate slavery's denial of constitutional rights. "Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere . . . ."[329] Still slavery had suppressed free exercise of religion for those who took the golden rule as a rule for conduct. It had destroyed free speech and press. "The press has been padlocked, and men's lips have been sealed."[330] Many other Republicans also recalled slavery's denials of free speech.[331]

In 1866, as Republicans saw it, a new spirit of recalcitrance was evident in the South. Andrew Johnson wanted immediate readmission of the Southern States to Congress, but Congress balked. Southern states passed Black Codes that discriminated against blacks in rights to own property, to testify, and to contract and also denied them fundamental rights referred to in the Bill of Rights. Congressmen complained that constitutional rights of Unionists and blacks were once again being violated. Southerners once again suppressed free speech and other constitu-

328. GLOBE 39(1), *supra* note 68, at 728 (Rep. Welker); *id.* at 586 (Rep. Donnelly); *id.* at 632 (Rep. Kelley); *id.* at 1088 (Rep. Woodbridge) (on need to keep states within their orbits); *id.* at 1088 (Rep. Bingham); *id.* at 1183 (Rep. Pomeroy); *id.* at 1152 (Rep. Thayer); *id.* at 1263 (Rep. Broomall); *id.* at 1629 (Rep. Hart); *id.* at 1832-33 (Rep. Lawrence); *id.* at 2542 (Rep. Bingham); *id.* at 1072 (Sen. Nye); CONG. GLOBE, 39th Cong., 1st Sess. app. at 67 (Garfield); *id.* at 256 (Rep. Baker); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 49-56, 59, 63-91.

329. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson) [hereinafter GLOBE 38(1)].

330. *Id.*

331. *E.g.*, *id.* at 1313 (Sen. Trumbull); *id.* at 1439 (Sen. Harlan); *id.* at 2615 (Rep. Morris); GLOBE 39(1), *supra* note 68, at 1013 (Rep. Clarke); *id.* at 1263 (Rep. Bromall); *id.* at 1072 (Sen. Nye). *Cf.* GLOBE 38(1), *supra* note 329, at 114 (Rep. Arnold); *id.* at 1202 (Rep. Wilson); *id.* at 1971-72 (Rep. Scofield); CONG. GLOBE, 38th Cong., 2nd Sess. 138 (Rep. Ashley); *id.* at 193 (Rep. Kasson); GLOBE 39(1), *supra* note 68, at 157-58 (Rep. Bingham); *id.* at 1617 (Rep. Moulton); *id.* at 1627 (Rep. Buckland); *id.* at 1627-29 (Rep. Hart); CONG. GLOBE, 39th Cong., 1st Sess. app. at 255-56 (Rep. Baker). *See also* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 27-59, 131-53.

tional rights.[332]

In this situation Congressman John Bingham insisted that a constitutional amendment was needed to give Congress the power to enforce all the "guaranties of the Constitution."[333] In 1859 some Republican members of Congress insisted that the protection of the citizen's liberty depended on the action of his state and was beyond the power of the federal government. By 1866, before ratification of the Fourteenth Amendment, some leading Republicans were insisting that Congress could correct state legislation violating citizens' rights through its power to enforce the Bill of Rights. Bingham, to the contrary, insisted a constitutional amendment was necessary for that purpose. In 1866 no Republican in Congress said it was desirable to allow a state the "right" to deny individual rights.[334] In 1866 Republicans explicitly provided that no state shall "abridge the privileges or immunities of citizens of the United States."[335]

The word "privileges" had long been used in Anglo-American legal history to describe Bill of Rights type liberties.[336] (It also had been used in a different way in Article IV, according to one orthodox analysis.) Madison himself had described the freedom of the press and the rights of conscience as the "choicest *privileges* of the people" and again as "invaluable *privileges*."[337] So crucial were these privileges, indeed, that Madison favored a double security for them. He advocated federal as well as state constitutional guarantees against violating them. John Bingham repeatedly indicated that his purpose was to draft a constitutional amendment to enforce all the "guarantees of the Constitution" and to require the

332. Petitions presented by lawmakers from citizens demanded protection for rights of speech, press, assembly, and the right to bear arms. GLOBE 39(1), *supra* note 68, at 337 (Sen. Sumner); *id.* at 494 (Sen. Howard); *see also id.* at 462 (Rep. Baker) ("[T]he American citizen shall no more be degraded . . . by being required to surrender his conscience as a peace-offering to . . . an . . . aristocracy of class"); *id.* at 1617 (Rep. Moulton) (complaining of outrages against Union men and freedmen; "[t]here is neither freedom of speech, of the press, or protection to life, liberty, or property . . . ."); *id.* at 1629 (Rep. Hart) (insisting on the need to ensure that rebel states have a government that respects guarantees in the Bill of Rights); *id.* at 1837 (Rep. Clarke) (need for "irreversible guarantees" of civil liberty including for rights recognized and secured by the Constitution). For a fuller review, see CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 34-91.

333. GLOBE 39(1), *supra* note 68, at 432.

334. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 34-130.

335. U.S. CONST. amend. XIV, § 1.

336. A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 141-43, 174, 179-80, 182, 412-25 (1968); 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (1825); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 64-65.

337. DOCUMENTARY HISTORY, *supra* note 17, at 1033 (Madison in the first Congress); CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 64-65, 74-77; Curtis, *A Reply to Professor Berger*, *supra* note 16, at 48.

states to obey them.[338] The Fourteenth Amendment did not purport to create new rights, but in the fashion of state and federal bills of rights, it secured those rights assumed to belong to the citizen from invasion by the states. The 1789 Congressional Resolution submitting the *original* proposal for a Bill of Rights to the states, described the Bill of Rights not as creating rights but as "further declaratory and restrictive clauses."[339]

Justice Black championed John Bingham as the father of incorporation and described Bingham as the James Madison of the Fourteenth Amendment.[340] Some scholars have answered Black's comparison of Bingham with Madison with *ad hominem* attacks on Bingham, with suggestions that a plan to require states to obey the Bill of Rights heralded the destruction of federalism, and with incredulity.[341] Still, Bingham did follow Madison's plan for a double security for basic constitutional rights, including those in the Bill of Rights. He used the word "privileges" to describe constitutional rights, including those in the Bill of Rights. That was one of the two words Madison used to describe such rights in Congress in 1789. Like Madison, Bingham was concerned with protecting minorities against the tyranny of the majority. Yet, he went further than Madison and included other constitutional privileges as well, like the protection against cruel and unusual punishment and against unreasonable searches and seizures. Perhaps experience with statutes that allowed whipping ministers who advocated an antislavery gospel and experience with searches of the mail and of travelers for incendiary documents led him to conclude that double security for these privileges was also required. Perhaps in 1866, when Bingham said that section one of the Fourteenth Amendment was needed to prevent states from inflicting cruel or unusual punishments,[342] he thought of the whip

338. *E.g.*, GLOBE 39(1), *supra* note 68, at 432.

339. Resolution of Congress March 4, 1789 transmitting proposed amendments to the states describing them as "declaratory and restrictive clauses." THE CONSTITUTION OF THE UNITED STATES AND THE DECLARATION OF INDEPENDENCE 20 (published by the Commission on the Bicentennial of the United States Constitution, Washington, D.C. 1991). *Cf.* Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 37 (1954-55).

340. Adamson v. California, 332 U.S. 46, 74 (1947) (Black, J., dissenting).

341. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 145-46 (1977); 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 462, 1289 (1971). For a very important and thoughtful defense of Bingham from the *ad hominem* attacks of his critics, see Richard L. Aynes, *supra* note 16. For a careful analysis of the post Civil War constitutional amendments in light of the original Constitution and federalism, see Michael P. Zuckert, *Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*, 22 PUBLIUS 69 (Spring, 1992); Michael P. Zuckert, *Completing the Constitution, The Thirteenth Amendment*, 4 CONST. COMMENTARY 259 (1987); *see also*, Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMMENTARY 123 (1986).

342. GLOBE 39(1), *supra* note 68, at 2542.

and the pillory, the punishments provided for outspoken opponents of slavery. There is much to be said for Justice Black's comparison of John Bingham to James Madison.

If the Civil War was the second American Revolution, the Thirteenth and Fourteenth Amendments gave birth to a transformed Constitution and Bill of Rights. The most revolutionary aspect of the change was the attempted transformation of the African American population from slavery (with badges of slavery for free blacks) to citizenship and equal civil rights. In another sense the change was less revolutionary. It was simply amending the Constitution to reflect the principles of the Declaration.

Compared to the racial revolution, proposed changes in the means of protecting basic liberties were far less revolutionary. The basic rights of English people and the rights of freedom of speech, press, and religion had been assumed to be the possession of all American citizens. These rights had been "protected" by the Bill of Rights against the federal government and by and large by state guarantees against the states. The Declaration of Independence indicated that government was organized to protect basic rights. So the idea that states had a state's right to violate such fundamental rights struck Republicans as absurd. The Fourteenth Amendment added a new enforcement mechanism—a "double security" to use Madison's phrase. The ship of liberty would henceforth have life boats as well as a double hull.[343] Perhaps that is why the change was so noncontroversial and was assumed to have been effectuated by so many leading Republicans at the time.[344] It is much like the system the Supreme Court, following a curious path, has finally arrived at today. There were four constitutional law treatises written shortly after the Fourteenth Amendment was proposed. Three of these, as Richard Aynes has noted, said that the amendment was designed to require states to obey Bill of Rights guarantees.[345]

Shortly after Congress proposed the Fourteenth Amendment to the

343. The metaphor comes from Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 23-34 (1988).

344. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 131-70; Michael Zuckert, *The Politics of Judicial Interpretation: the Federal Courts, Department of Justice and Civil Rights 1866-1876; No State Shall Abridge: the Fourteenth Amendment and the Bill of Rights*, 8 CONST. COMMENTARY 149-63 (1991) (book review).

345. Judge Timothy Farrar, an abolitionist legal theorist, published his *Manual of the Constitution of the United States of America* in 1867. Like Bingham, Farrar argued that Article IV, Section 2 enjoined the states to obey privileges of citizens of the United States including those in the Bill of Rights. TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1867). But the provision was unenforceable and a dead letter. In the 1872 edition of his work, Farrar acknowledged decisions holding states could violate guarantees of the Bill of Rights.

states, it amended the federal Habeas Corpus Act to allow federal judges, acting "within their respective jurisdictions . . . to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution . . . or law of the United States."[346] The object of the statute, according to Senator Trumbull, Chairman of the Senate Judiciary Committee, was to protect a person held under *state* law in violation of the Constitution or laws of the United States.[347] Of course, the Act says nothing about which constitutional rights were protected against state action. Still, it further protected federal constitutional rights from state denial. The Habeas Corpus Act provided a mechanism by which a plan to require states to obey the Bill of Rights could be enforced and realized. As John Bingham said in 1871:

> Sir, before the ratification of the fourteenth amendment, the State could deny to any citizen the right of trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was done in half the States of the Union . . . .
>
> Under the Constitution as it is . . . no State hereafter can imitate the bad example . . . of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lessons of the New Testament . . . .[348]

In 1866, many in Congress seemed poised to readmit the Southern states upon their ratification of the Fourteenth Amendment.[349] The Republican party was not yet ready to insist on black suffrage. Republicans

He concluded that all those decisions were "entirely swept away" by the Fourteenth Amendment. *See* Aynes, *supra* note 16.

George W. Paschal was a respected and conservative lawyer and law teacher. In his treatise, he treated section one of the Fourteenth Amendment as applying the Bill of Rights to the states. GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED 290 (1868). Paschal noted that the amendment defined citizenship. "All else in this section," he said,

> has already been guaranteed in the second and fourth sections of the fourth article; and in the thirteen amendments. The new feature declared is that the general principles, which had been construed to apply only to the national government, are thus imposed upon the States. Most of the States, in general terms, had adopted the same bill of rights in their own constitutions.

Id.

John N. Pomeroy, the prolific and respected New York University Professor of Law, said that the Fourteenth Amendment would correct both *Dred Scott*, by securing constitutional protection to blacks, and *Barron*, by requiring the states to obey the guarantees of the Bill of Rights. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 147-53 (1868). *See also* CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 173.

Thomas Cooley's 1868 *Constitutional Limitations* seems not to have addressed the meaning of section one. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS (reprint 1987) (1868).

346. 14 Stat. 385 (1867).

347. GLOBE 39(1), *supra* note 68, at 4229.

348. GLOBE, 42(1) app., *supra* note 132, at 84.

349. JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 2-9 (1984); ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 359-61, 448-85 (1960).

knew that without the black vote, their chances of controlling governments in the Southern states were slim. That meant, in effect, that the only security for the rights of Republicans and their allies in the South might be the guarantees of the Thirteenth and Fourteenth Amendments. Nothing heightens respect for the guarantees in the Bill of Rights so much as the recognition that one may be the subject of prosecution. In the 1860s Republican signers of the endorsement for a compendium of Helper's book were being treated as criminals in the South. In February 1860, Abraham Lincoln exhorted Republicans not to be "frightened [from our duty] by menaces of destruction to the Government nor of dungeons to ourselves."[350] Indeed a major factor protecting Republicans from prosecution was the fact that they were beyond the physical power of the Southern states. By 1866 an endorser of the Helper book had become the Speaker of the House of Representatives. Three of the seven Republican House members of the Joint Committee that reported the Fourteenth Amendment had endorsed the book.[351] One of these three was John Bingham. John Bingham and the other endorsers of the book had personal and concrete experience with the importance of guarantees of free speech and the other guarantees of the Bill of Rights. When Bingham said that states would henceforth be required to respect these guarantees, it is likely that he meant what he said. To most Republicans at least, such a "completion" of the constitutional plan was unlikely to be controversial.[352]

B. The Impending Crisis *and Early Republican Understanding of Free Speech*

The controversy over Helper's book also gives some insight into early Republican understanding of the guarantees of freedom of speech, press, and religion. By the 1860s there was scholarly support for the idea that the freedom of the press meant a guarantee against prior restraint.[353]

350. LINCOLN'S SPEECHES 1859-1865, *supra* note 9, at 130, 150.

351. Schuyler Colfax was Speaker of the House. Ellihu B. Washburne, Justin S. Morrill, and John A. Bingham were members of the Joint Committee who had endorsed the compendium. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION AT THE FIRST SESSION THIRTY-NINTH CONGRESS iii (reprint 1969) (1866). For a list of Congressional endorsers, see, e.g., *Hinton Helper's Infamous Book—What the Sixty Eight Demand*, RALEIGH REGISTER, Dec. 14, 1859, at 1.

352. CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16, at 48-49, 53, 90; FEHRENBACHER, *supra* note 63, at 27.

353. *See* PASCHAL, *supra* note 345, at 256. Joseph Story seems both to embrace Blackstone's analysis of prior restraint and to justify suppression of items adjudged at trial to have a "pernicious tendency." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 703-07 (reprint 1987) (1833). For a more libertarian approach to the subject and a rejection of the idea of freedom of expression limited to protection against prior restraint, see COOLEY, *supra* note 345, at 414-30.

Under that theory government could not censor books in advance of publication but could punish the author after circulation. In the cases of denial of free press complained of by Republicans, and certainly in the case of Helper's book, the problem that confronted Republicans was subsequent punishment, not prior restraint. Yet they repeatedly insisted that such subsequent punishment also violated the rights to freedom of speech and of the press.

After the Civil War and the ratification of the Fourteenth Amendment, the Supreme Court suggested that the Constitution protected the right to assemble and to petition the Congress from interference from any quarter, but did not protect free speech, assembly, or petition with reference to state concerns.[354] The Court made a structural argument, indicating that republican government by its very nature implied a right to petition.[355] Some have suggested that Republican arguments for free speech similarly might be limited to matters within the sphere of the national government.[356] (The first purely textual problem with this argument is that the Constitution provides in Article IV, Section 4, that the United States shall guarantee to each state a "Republican Form of Government."[357] Leading Republicans in 1866 insisted that free speech and other Bill of Rights guarantees were essential to a truly republican government.[358]) It is hard to see how free speech could be isolated into state and national boxes so as to eliminate free speech on matters of state concern. No state, after all, is an island isolated from national issues, nor is the nation isolated from state issues, as the battle over slavery shows. The power to amend the Constitution means that all local issues are potentially national ones. Before the passage of the Fourteenth Amendment, Republicans in the Senate explicitly indicated that states should not be permitted to deny free speech on domestic (local) as well as national issues.

On balance, the debates from the 36th, 38th, and 39th Congresses do not support the idea that most Republicans thought a bifurcated reading of freedom of expression was accurate or desirable. Republican complaints about denial of free speech and press rights included matters both directly related to the national government and those that were not. The Helper book itself was basically addressed to elimination of slavery in the slave states. Most Congressmen agreed that slavery, as a domestic issue

354. United States v. Cruikshank, 92 U.S. 542, 552 (1875).
355. *Id.*
356. Fairman, *supra* note 16, at 96-97.
357. U.S. CONST. art. IV, § 4.
358. GLOBE 39(1), *supra* note 68, at 1072 (Sen. Nye); *see also id.* at 1629 (Rep. Hart).

in the Southern states, was peculiarly a matter of state concern, a matter over which Congress had no power. But the suppression of Helper's book in the South, a book addressed to a matter of uniquely state concern, was seen by Republicans as a flagrant denial of free speech and free press.

Finally in 1859 and 1860 many Republicans championed a robust view of free speech in the controversy over Helper's book. Like James Madison at the time of the Sedition Act, they suggested a hard central core to the First Amendment that included the right to discuss public measures and public questions. And they supported this right even for those who advocated conduct they considered barbarous and horrible—human slavery and reopening the African slave trade. Implicitly at least they rejected the idea that speech on such matters should be suppressed because of its bad tendency. Indeed, one Republican showed Democrats how easily the bad-tendency test could be manipulated to make Southerners guilty of the kidnapping of free blacks in the North. He did so, however, not to embrace the bad-tendency argument, but to support his rejection of it.[359] Of course, history is rarely uniform. During the Civil War, Abraham Lincoln justified the arrest, military trial, and exile of a Democratic politician who had made an antiwar speech. Lincoln suggested that war-time emergency justified suppression of political expression with a tendency to cause desertion. Some post-Civil War judicial decisions invoked the bad tendency test to punish political expression that did not advocate violence.[360] Suppressions of free speech by the Lincoln administration produced some protests within the Republican party.[361]

IV. CONCLUSION

The laws protecting slavery from criticism were really sedition acts broadly defined. That indeed, was how supporters and opponents saw them. They made it a crime to criticize one legal and social institution and to advocate its abolition. Harry Kalven has suggested that freedom cannot survive sedition acts—acts that make some political speech criminal.[362] The controversy over *The Impending Crisis* suggests that he was

359. GLOBE 36(1), *supra* note 2, at 763 (Sen. Hale).

360. MCPHERSON, *supra* note 318, at 58-60. For some post war bad tendency cases see, e.g., Commonwealth v. Karvonen, 106 N.E. 556, 557 (Mass. 1914); Fox v. Washington, 236 U.S. 273, 276-77 (1915); Patterson v. Colorado, 205 U.S. 454 (1907).

361. MARK M. KRUG, LYMAN TRUMBULL: CONSERVATIVE RADICAL 207-08 (1965); PALUDAN, *supra* note 121, at 149.

362. HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT 15-16, 63-64 (1965).

correct. This second controversy over seditious speech, however, was far different from the first. This time the threat came from the states, not from the national government, and for that reason arguments about the lack of federal power to suppress speech were irrelevant. What was needed to help prevent other episodes like the suppression of Helper's book and other core political speech, was a set of national privileges which no state could abridge.[363] Section one of the Fourteenth Amendment was intended to meet that need.

363. Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 140-42 (1992). *See*, CURTIS, NO STATE SHALL ABRIDGE, *supra* note 16. For the retrospective views of Republicans who mentioned Worth's case, see GEORGE W. JULIAN, POLITICAL RECOLLECTIONS (1840 TO 1872) 171-73 (reprint 1969) (1883); 2 HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 668 (reprint 1969) (1872).