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## ARTICLES

### EARLY EFFORTS TO SUPPRESS PROTEST: UNWANTED ABOLITIONIST SPEECH

KATHERINE HESSLER\*

Protest beyond the law is not a departure from democracy; it is absolutely essential to it. It is a corrective to the sluggishness of "the proper channels," a way of breaking through passages blocked by tradition and prejudice. It is disruptive and troublesome, but it is a necessary disruption, a healthy troublesomeness.<sup>1</sup>

#### I. INTRODUCTION

Abolitionists were among the earliest citizens in the history of this country to protest government policy. They worked on behalf of slaves who were without legal standing to speak for themselves and brought attention to the evils of the government's support of slavery and the slave trade. The abolitionists spoke strongly against these evils and tried to persuade others to work to end slavery.<sup>2</sup>

The state and federal governments went to great lengths to restrict the message of the abolitionists.<sup>3</sup> Abolitionist speech, political speech which would receive First Amendment protection today, was first restricted and later prohibited by the Southern states. Similar attempts to quiet abolitionists were made by the

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<sup>1</sup> HOWARD ZINN, *DECLARATIONS OF INDEPENDENCE, CROSS-EXAMINING AMERICAN IDEOLOGY* 123 (1990).

<sup>2</sup> See WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY* 508 (1996). The abolitionists' speech was considered dangerous to the preservation of the Union. The Constitution represented a compromise between the interests of the slaveowners and those who wished to end slavery. A delicate balance between "free" states and "slave" states concerning current issues which affected slavery, such as the admission of new states to the Union, maintained this compromise. The Southern states considered the abolition movement a threat to this balance because of the potential unrest it could generate in the South. See *id.* at 284-98.

<sup>3</sup> See CRAIG R. SMITH, *SILENCING THE OPPOSITION: GOVERNMENT STRATEGIES OF SUPPRESSION OF FREEDOM OF EXPRESSION* 17-20 (1996); ZINN, *supra* note 1, at 194 (discussing the states' power to restrict First Amendment protections).

states in the North and by the federal government. For example, in response to the growth of abolitionist speech, Congress, in 1836, attempted to silence these protesters and to limit the dissemination of their message.<sup>4</sup> During this time period, any white citizen could petition Congress to consider a matter, and therefore, take advantage of this national forum.<sup>5</sup> Congress sought to quiet abolitionist dissent and limit their use of petition by passing a gag rule ("Gag Rule") forbidding legislators from discussing or receiving petitions from citizens regarding the issues of slavery and abolition.<sup>6</sup> Many members of Congress hoped that by restricting the abolitionists' access to this forum, and thereby silencing congressional discussion on slavery, the issue of slavery would quietly fade from the national scene as a topic of debate.<sup>7</sup> The Gag Rule, however, did not have this effect. Instead, it inflamed abolitionists who then focused their energies on obtaining a hearing in Congress on related issues.<sup>8</sup>

The Gag Rule's restriction on the right to petition garnered support for the abolitionists.<sup>9</sup> As the efforts of the abolitionists gained more notoriety, and attempts to suppress their work increased, the focus on the slavery debate, particularly in Congress, shifted to the limitations on free discussion about slavery. Abolitionists felt that "[i]t was the abolitionist attack on the political and constitutional pathology behind the deprivation of these constitutional liberties that eventually was to awaken the public mind of the nation to the underlying constitutional principles of human rights that condemned equally the repression of conscience and the institution of slavery."<sup>10</sup>

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<sup>4</sup> See MILLER, *supra* note 2, at 98-99, 333 (discussing proposals to limit the circulation of abolitionist literature via the mails).

<sup>5</sup> See *id.* at 105-07, 258.

<sup>6</sup> See *id.* at 210.

<sup>7</sup> See Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 NW. U. L. REV. 785, 849 (1995).

<sup>8</sup> See MILLER, *supra* note 2, at 302-04 (noting the increasing "avalanche" of petitions abolitionists sent to Congress in 1837).

<sup>9</sup> See Curtis, *supra* note 7, at 859.

<sup>10</sup> David A.J. Richards, *Public Reason and Abolitionist Dissent*, 69 CHI.-KENT L. REV. 787, 789 (1994). Whether the targeting of the advocates is a deliberate attempt to derail the debates or whether it is a simple reaction to the growing momentum of the groups is not the most important question. Rather, it is more important to ask whether those movements for social justice in our country will always face suppression when they become a threat to the status quo. In other words, will those who fight for the freedom of others generally have their own freedom jeopardized when they present a credible threat to the oppression they seek to overcome? The answer to this question may tell us something about ourselves as a people and a nation. It may tell us how much freedom and equality we truly believe in and upon whom we are willing to bestow liberty's mantle.

Further, the suppression of abolitionist speech made the lack of civil liberties clear. As Frederick Douglass said, "[t]he Republic has put one end of the chain upon the ankle of the bondsman, and the other end about its own neck." JAMES OLIVER HORTON & LOIS E. HORTON, IN HOPE OF LIBERTY, CULTURE, COMMUNITY, AND PROTEST AMONG NORTHERN FREE BLACKS 1700-1860 268 (1997) (quoting Frederick Douglass, NEW YORK INDEPEN-

An historical understanding of early abolitionist activism and the corresponding governmental response sheds light on current practices of the government in response to modern activism. Exploration of the relevant social, political, and legal context aids this historical understanding. Therefore, this article will examine, 1) protest as an abolitionist tactic, 2) the abolition movement and its proponents, 3) the legal efforts to suppress aspects of the abolitionists' protest, 4) abolitionist uses of the right to petition, and finally, 5) the congressional Gag Rule.

## II. ABOLITIONIST ACTIVISM

### A. *Protest as an Abolitionist Tactic*

The history of protest in the United States is long and varied and teaches us much about who we are as a people.<sup>11</sup> When examining political protests, it is important to do so in light of applicable perspective and circumstance. The individuals who worked for the abolitionist cause belonged to a social justice movement. They observed something they deemed to be unfair and worked to remedy the situation through nonviolent resistance,<sup>12</sup> active civil disobedience,<sup>13</sup> educa-

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DENT, Aug. 22, 1861). Rights must be universal or they are weak and threatened.

<sup>11</sup> One of the earliest protests in our history, the renowned Boston Tea Party, is remembered in our collective conscience in mythical terms. If a similar event took place today, it is not likely that we would use the same descriptions for it. For instance, the relatively new militia and "patriot" movements also find complaint with the taxation system in this country, as did those early Boston patriots. They employ, as types of protests, noncooperation and nonpayment of taxes. However, today these protests are met with arrest and the creation of new laws. See Farhan Haq, *Olympic - U.S.: Experts Wonder If Homegrown Terrorism Is Rising*, Inter-Press Service, July 31, 1996, available in 1996 WL 10768515; A.M. Rosenthal, *Laws Needed to Deal with Militias*, ROCKY MTN. NEWS, July 5, 1997, at 56A. Of course, the events which comprised the Boston Tea Party may have been viewed very differently at the time by the British, whose laws were violated, or the Native Americans, who were parodied in a lackluster effort to place the blame elsewhere. However, to the victorious rebels, the Tea Party came to symbolize political and personal independence — the embodiment of ideals so important to the Founders. See generally HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* (1980) (discussing the history of the formation of the United States).

<sup>12</sup> Not all the work of the abolitionists was nonviolent, as John Brown and Nat Turner's activities notably demonstrate. See Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1113-14 (1993). However, the underlying philosophy of the movement was generally based on nonviolence. See STAUGHTON LYND, *NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY* 25 (1966); RUSSEL B. NYE, *WILLIAM LLOYD GARRISON AND THE HUMANITARIAN REFORMERS* 57 (1955); JEAN FAGAN YELLIN & JOHN C. VAN HORNE, *THE ABOLITIONIST SISTERHOOD: WOMEN'S POLITICAL CULTURE IN ANTEBELLUM AMERICA* 294 (1994)[hereinafter *ABOLITIONIST SISTERHOOD*]; Curtis, *supra* note 7, at 798.

<sup>13</sup> See *ABOLITIONIST SISTERHOOD*, *supra* note 12, at 27-28; NYE, *supra* note 12, at 166-

tion,<sup>14</sup> religion,<sup>15</sup> and use of the legal process.<sup>16</sup>

Public speeches are a common tactic for most protesters. Activists today rely on the First Amendment for protection. First Amendment jurisprudence has changed over time, with great expansion since the 1960s,<sup>17</sup> and is still a develop-

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67 (noting the militant tactics of John Brown). See generally THE CONFESSIONS OF NAT TURNER AND RELATED DOCUMENTS (Kenneth S. Greenberg ed., Bedford Books 1996) (discussing Nat Turner's rebellious activities) [hereinafter CONFESSIONS].

<sup>14</sup> See ZINN, *supra* note 1, at 236. Initially, pamphlets and public meetings were the preferred methods of educating the public. See *id.* Later, newspaper articles and entire newspapers became popular vehicles for the dissemination of abolitionist information. "The *Liberator* [Garrison's paper] started with twenty-five subscribers, most of them black. By the 1850s, it was read by more than 100,000." *Id.*

<sup>15</sup> See MILLER, *supra* note 2, at 508.

<sup>16</sup> See *id.* at 400-08, 444-54 (citing *United States v. The Amistad*, 40 U.S. (15 Pet.) 518 (1841); *Pemberton v. Lockett et al*, 62 U.S. (21 How.) 257 (1858)). In *Amistad*, newly captured Nigerians took control of the slave ship they were being transported on, killed the captain and the cook, and ordered the remaining crew to return the ship to Africa. The ship, however, was taken to Connecticut where American authorities imprisoned the Nigerians. Spain and Cuba each called for the deportation of these prisoners in order to put them on trial for murder and piracy. The prisoners were vindicated in their trial in Connecticut and the case was appealed to the Supreme Court. The seventy-four year old John Quincy Adams argued the case before the Supreme Court in 1841 and won the freedom of the Nigerians. See *id.* at 399-408 (discussing *Amistad*, 40 U.S. (15 Pet.) 518)). In *Pemberton*, the Court entered a decree dismissing a bill that resulted from the mutiny of slaves aboard a ship known as the Creole. The slaves killed one of the Creole's owners and forced the ship to Nassau, Bahamas. British authorities made the slaves stand trial and hanged those they found guilty of murder while freeing the others. The "owners" of the freed slaves demanded compensation. Congressman Joshua Giddings of Ohio brought a resolution forward on behalf of the men of the Creole. Congress censured Congressman Giddings because of this resolution. Giddings resigned his seat, as was expected of any congressman after censure, but was reelected by his constituents to fill the seat he had vacated. See *id.* at 444-54 (discussing *Pemberton*, 62 U.S. (21 How.) 257). The Massachusetts Supreme Court outlawed slavery because it was in opposition to the state's constitution and the 1780 Massachusetts Declaration of Rights. See JOHN P. KAMINSKI, A NECESSARY EVIL? SLAVERY AND THE DEBATE OVER THE CONSTITUTION 17-18 (1995) (citing *Commonwealth v. Jennison*, (Mass. 1783) (unreported case), cited in 4 COMMONWEALTH HISTORY OF MASSACHUSETTS 37-38 (Albert B. Hart ed., 1927-1930)). Chief Justice William Cushing recognized that slavery allowed citizens to "hold Africans in perpetual servitude, and sell and treat them as we do our horses and cattle . . . [and that] the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such things [sic] as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract." *Id.*

<sup>17</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that a conviction for flag desecration is inconsistent with the First Amendment); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (stating that "nude dancing is not without its First Amendment protection from official regulation"); *Miller v. California*, 413 U.S. 15 (1973) (holding that obscene material is not protected by the First Amendment); *Gregory v. Chicago*, 394 U.S. 111 (1969) (explaining that peaceful and orderly demonstrations fall within the sphere of con-

ing area of law. Though the language of the First Amendment has not changed, the abolitionists of the 1800s were unable to take advantage of its protection of speech.<sup>18</sup> At that time, the states made their own laws regarding free speech because the First Amendment's mandates restricted Congress, not the states,<sup>19</sup> and

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duct protected by the First Amendment); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (finding that First Amendment rights were available to teachers and students who quietly and passively wore black arm bands to protest the Government's policy in Vietnam); *Brown v. Louisiana*, 383 U.S. 131 (1966) (finding that the rights of peaceable and orderly protest, exercised under the First and Fourteenth Amendment, "are not confined to verbal expression but embrace other types of expression, including appropriate silent and reproachful presence," such as a sit-in in a public library); *Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that state action, making it compulsory for children in public schools to salute the flag and pledge allegiance to the United States, violated the First and Fourteenth Amendments). For limitations on First Amendment rights, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (concluding that a National Park Service regulation prohibiting camping in certain parks does not violate the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in connection with a demonstration intended to call attention to the plight of the homeless); *United States v. O'Brien*, 391 U.S. 367 (1968) (holding that the 1965 Amendment to the Universal Military Training and Service Act of 1948, prohibiting the knowing destruction or mutilation of registration certificates, does not abridge First Amendment rights). See generally Michael Kent Curtis, *"Free Speech" and Its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419 (1996). For a discussion of First Amendment jurisprudence, see Michael Kent Curtis, *Critics of "Free Speech" and the Uses of the Past*, 12 CONST. COMMENTARY 29 (1995).

<sup>18</sup> There are still disparities in the protection of speech. The courts are more willing to protect speech that society values. This willingness presents difficulties for the courts in debates over hate speech, see *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (holding that an ordinance unconstitutionally prohibits speech on the basis of the subjects the speech addresses when it "prohibits the display of a symbol which one knows or has reason to know 'arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender'"); pornography, see *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (holding that the definition of the word "pornography" in an Indianapolis pornography ordinance violated the First Amendment because it did not conform to the essential elements of "obscenity" as defined by the Supreme Court); nude dancing, see *Schad*, 452 U.S. 61; abortion, see *Rust v. Sullivan*, 500 U.S. 173 (1991) (finding that the Public Health Service Act, specifying that none of its federal Title X funds be appropriated to family-planning services where abortion is a method of family planning, does not violate First Amendment free speech rights of private fund recipients, their staff, or their patients); and criticism of government policy during a war, see *Tinker*, 393 U.S. 503. See generally Diane S. Swanson, *Physician Gag Clauses — The Hypocrisy of the Hippocratic Oath*, 21 S. ILL. U. L.J. 313 (1997) (discussing the restrictions that Health Maintenance Organizations place on communications between physicians and their patients).

<sup>19</sup> See U.S. CONST. amend. I (eliminating, as analyzed in the 1800s, the applicability of the First Amendment to the states by stating, "Congress shall make no law") (emphasis added).

because the Supreme Court had decided that the Bill of Rights did not apply to the states.<sup>20</sup> Therefore, the states had few limitations on their power to legislate.<sup>21</sup> For example, in response to the dissemination of anti-slavery literature, "the states of Georgia and Louisiana passed laws declaring the death penalty for anyone distributing literature 'exciting to insurrection' or with 'a tendency to produce discontent among the free population . . . or insubordination among the slaves.'" <sup>22</sup> The fact that these states felt comfortable passing such laws indicates that the First Amendment's protection of speech had not been sufficiently developed to be useful to the abolitionists.

Instead of seeking protection for speech, abolitionists used the right of petition guaranteed by the First Amendment.<sup>23</sup> Abolitionists' demands for protection and recognition of the right to petition Congress were as powerful then as are today's demands for protection of free speech under the First Amendment. Both were premised on the same principles — that citizens must be able to put issues before the people, through speech, and before the government, through petition, to ensure that minority issues are addressed, tyranny of the majority is avoided, and that government is accountable to its citizens.<sup>24</sup> The abolitionists' work tested the protection offered by the First Amendment and gave the public the opportunity to consider how to respond to the protesters and to the issues they presented.

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<sup>20</sup> See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833) (holding that the Bill of Rights did not apply to the states and, therefore, the Fifth Amendment, declaring that private property shall not be taken for public use without compensation, is intended solely as a limitation on the exercise of power by the United States government, and is inapplicable to the state's legislation).

<sup>21</sup> See ZINN, *supra* note 1, at 194.

<sup>22</sup> *Id.* See also Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 160 (1986).

<sup>23</sup> See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances."). See also PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 34-79 (1996). Petitions were not used only by the abolitionists to advance their cause; slaveowners petitioned for redress as well. Southerners tested John Quincy Adams' ideological commitment to present petitions by shrewdly submitting to Adams a petition that *he* would have to argue before Congress, asking for *his* expulsion from Congress as a public enemy and *his* removal from the Chairmanship of the Foreign Relations Committee. See MILLER, *supra* note 2, at 419-29. See also Higginson, *supra* note 22, at 145, 155-64 (describing the ratification of the First Amendment's right to petition and the "gag rule" to limit abolitionists' anti-slavery petitioning); Kara Elizabeth Shea, *Recent Developments, San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 VAND. L. REV. 1697, 1700-03 (1995) (describing the pre-constitutional origins of the right to petition).

<sup>24</sup> See Richards, *supra* note 10, at 788-89. Abolitionists' work was "basic to the integrity of American revolutionary constitutionalism . . . [and] the right of free conscience." *Id.* at 788.

No other issue of the day excited public passion as did the abolition of slavery and all its attendant concerns. John Quincy Adams noticed that the topic of slavery raised questions of "natural liberty" and morality, causing people to be "put on the moral defensive, in a fundamental and not just a derivative and partial way. . . . Discussion of [these issues raised] to public view our most basic understanding of the great concerns of justice and injustice, right and wrong, in human life."<sup>25</sup> He understood that the proponents of slavery tried to impute bad motives onto the activism of the abolitionists, thereby making the resulting attacks on the activists more virulent.<sup>26</sup> Slaveholders made insistent efforts to discredit the abolitionist, because he bore such deeply unwelcome moral messages — that slavery was unjust.<sup>27</sup> Perhaps this perspective is still relevant and can contribute to our understanding of reactions to some of the contentious debates of today,<sup>28</sup> such as the abortion controversy.

Like the protesters who work for the protection of the environment, animal rights, or gay, lesbian and bi-sexual rights, the anti-slavery protesters worked for a cause that initially had little societal support.<sup>29</sup> History has written and rewritten its assessment of the abolitionists.<sup>30</sup> And yet citizens still face great challenges in the struggle to define the levels of tolerance, diversity, and morality which will shape current society. The abolitionists were among the earliest people to put these questions before the public and our government.

#### B. *The Abolition Movement and Its Proponents and Opponents*

The work to end slavery in this country began shortly after the colonies started importing slaves.<sup>31</sup> Although there were slaves in every colony, there was also opposition to both the institution of slavery and the barbaric practices of the African slave trade.<sup>32</sup> Many abolitionists hoped that slavery and the slave trade

<sup>25</sup> MILLER, *supra* note 2, at 183.

<sup>26</sup> *See id.* at 183-84.

<sup>27</sup> *See id.*

<sup>28</sup> *See* Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1178 (1997) ("Many progressive ideas were at first rejected as wicked and only later accepted and cherished.").

<sup>29</sup> *See generally* David A.J. Richards, *Abolitionist Feminism, Moral Slavery, and the Constitution: "On the Same Platform of Human Rights,"* 18 CARDOZO L. REV. 767, 770, 841-42 (1996) (analogizing abolitionist feminism with the "contemporary outcasts from today's dominant political consensus (gays and lesbian persons)," commenting that we still face evils of sexism and homophobia because we have made constitutional interpretive choices poorly).

<sup>30</sup> *See Miller, supra* note 2, at 502-08 (discussing the changing historical perceptions).

<sup>31</sup> *See* HORTON & HORTON, *supra* note 10, at 6, 9-10; KAMINSKI, *supra* note 16, at 1-4, 7.

<sup>32</sup> *See* JAMES POPE-HENNESSY, *SINS OF THE FATHERS, A STUDY OF THE ATLANTIC SLAVE TRADERS 1441-1807* (1968) (discussing the inhumanity of the slave trade). *See also* KAMINSKI, *supra* note 16, at 7.



would end with the success of the American Revolution in 1776<sup>33</sup> because its proponents had been inspired to fight for "life, liberty, and the pursuit of happiness" after strongly claiming that "all men are created equal."<sup>34</sup> Those who harbored such hopes were disappointed.<sup>35</sup> The struggle to end slavery continued for almost one hundred years after the Founders wrote these sentiments.

The abolitionist movement grew in stages and had a period of conspicuous growth during the 1820s and 1830s. "It was one of those moments when a new moral perception swept through the community and a new movement was born."<sup>36</sup> Two significant changes highlighted this period in the anti-slavery

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<sup>33</sup> Although some slaves were freed by both sides after the Revolutionary War in return for their service in the war effort, the end of slavery for others was still many years away. For others, freedom would not come in time. See also HORTON & HORTON, *supra* note 10, at 55-56; KAMINSKI, *supra* note 16, at 4-14.

Surprisingly, a Georgia plantation owner eloquently put forth the proposition that the principles of the Revolution, applied equally to all people in the colonies:

To show the world that we are not influenced by any contracted or interested motives, but a general philanthropy for all mankind, by whatever climate, language, or complexion, we hereby declare our disapprobation and abhorrence of the unnatural practice of Slavery in America, (however the uncultivated state of our country, or other specious arguments may plead for it,) a practice founded in injustice and cruelty, and highly dangerous to our liberties, (as well as lives,) debasing part of our fellow-creatures below men, and corrupting the virtue and morals of the rest; and is laying the basis of that liberty we contended for (and which we pray the Almighty to continue to the latest posterity) upon a very wrong foundation. We therefore resolve, at all times to use our utmost endeavours for the manumission of our Slaves in this Colony, upon the most safe and equitable footing for the masters and themselves.

KAMINSKI, *supra* note 16, at 164 (quoting a Letter from Lachlan McIntosh to John Wereat (Dec. 17, 1787)) Perhaps less surprising is the fact that these sentiments did not outlast the economic difficulty faced by this man resulting from "the destruction caused by the [Revolutionary] [W]ar and the confiscation of slaves." *Id.*

<sup>34</sup> KAMINSKI, *supra* note 16, at 8 (quoting THE DECLARATION OF INDEPENDENCE (U.S. 1776)). See MILLER, *supra* note 2, at 70. Ironically, many blacks fought the British to help Americans achieve those ideals. See also HORTON & HORTON, *supra* note 10, at 55-76.

<sup>35</sup> See KAMINSKI, *supra* note 16, at ix-x.

Something dramatic had happened to the character of the American people in the intervening decade between the signing of the Declaration of Independence and the promulgation of the Constitution. The principles for which Americans were willing to die - *freedom, equality, and unalienable rights* - had given way to the Constitution's call for *justice, tranquility, defense, general welfare, and liberty*. Americans qualified their earlier expression of universal equality by applying it only to certain groups of people. They also wrote a constitution that strongly protected personal property. In the eighteenth century that meant condoning, sanctioning, and even rewarding the institution of slavery.

*Id.* See also. HORTON & HORTON, *supra* note 10, at 75.

<sup>36</sup> MILLER, *supra* note 2, at 66. Notably, David Walker's *Appeal . . . to the Colored Citizens . . . of the United States* was published in Boston in 1830, William Lloyd Garri-

movement. First, there was a new call for the immediate end to slavery, which replaced previous efforts focused on gradual emancipation.<sup>37</sup> Second, there was a renunciation of the idea of colonization<sup>38</sup> of the slaves in favor of a call to incorporate freed blacks among whites in society.<sup>39</sup> These changes marked the incorporation of free blacks, as well as freed and runaway slaves, into the movement and reflected the benefit of their participation. With the inclusion of black abolitionists, the critique of slavery became more thorough and detailed. Their perspective enlightened the white abolitionists and helped many overcome their racist acceptance of segregation.<sup>40</sup> These changes signaled the move toward a true acceptance of, and respect for, black abolitionists and their ideas.

Abolitionists worked to free the slaves and improve their living and working conditions. These efforts often caused the slaveowners to retaliate against the slaves.<sup>41</sup> The abolitionists listed this retaliation as one of the myriad evil effects of slavery on the slaves. In addition to the abominations perpetrated on the slaves, slavery oppressed whites and free blacks.<sup>42</sup> First, abolitionists lectured

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son's *Liberator* was first published in 1831, and John Greenleaf Whittier's *Justice and Expediency* was published in 1833. See *id.* at 67-68. Significantly, in 1833 the English Parliament voted to abolish slavery in the British-owned West Indies. This is significant because England's actions at this time were still important to the new Union. See *id.* at 73.

<sup>37</sup> The proposal for even gradual emancipation was radical enough to hurt the Chief Justice of the Supreme Court, John Jay, in his election campaign for governor of New York. See KAMINSKI, *supra* note 16, at 232-33 (citing the views of Chief Justice of the United States John Jay during the New York Gubernatorial Election of 1792). The first publication for the much more radical call for immediate emancipation may have been in 1829. See NYE, *supra* note 12, at 26.

<sup>38</sup> The colonizers felt it was best to send slaves to other countries or colonies, most notable at the time, Liberia, because many believed that the races could not, and should not, live together. See KAMINSKI, *supra* note 16, at 245, 247 (reproducing Thomas Jefferson's *Notes on the State of Virginia*, cited in *Thomas Jefferson: Writings* 264-67, 269-70, 288-289 (Merrill D. Peterson ed., 1984)); MILLER, *supra* note 2, at 67, 70, 73-75.

<sup>39</sup> See MILLER, *supra* note 2, at 73-75. Another sub-issue was the dispute over compensation. Early in the abolitionist movement, activists felt it necessary to compensate slaveholders when their slaves were emancipated. Later, activists were swayed by black abolitionists and began to call for compensation to the slaves themselves upon emancipation. See *id.* at 71-72.

<sup>40</sup> See FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 371-373 (1855) (comparing U.S. and British attitudes on race); ZINN, *supra* note 11, at 180.

<sup>41</sup> Note in particular that after the Nat Turner rebellion many slaves and free blacks, not involved in the rebellion, were killed and their bodies displayed as a warning to others. See CONFESSIONS, *supra* note 13, at 19.

<sup>42</sup> See FINKELMAN, *supra* note 23, at 135; KENNETH S. GREENBERG, *HONOR AND SLAVERY* 43-45 (1996); HORTON & HORTON, *supra* note 10, at 203. "In Charleston, it was said to 'be more safe for a man to proclaim through this city that there was no God, than that slave-holding was inconsistent with his holy law.'" KAMINSKI, *supra* note 16, at 203 (quoting Letter from a gentlemen in Charleston, S.C., to his friend in New Jersey, dated March 31, *Freeman's Journal* (Philadelphia), (Aug. 11, 1790)).

about the harm to the slaveowner, who actually considered himself honorable by nature. The abolitionists claimed that slavery made the slaveowner a tyrant over other humans,<sup>43</sup> and thereby corrupted his honorable nature.<sup>44</sup> This corruption may have derived from some slaveowners' fear for their own safety and their growing brutality in response to these fears.<sup>45</sup> Other slaveowners may have grown accustomed to the servitude and suffering they imposed, and viewed the plight of the slaves as natural, thereby, in the abolitionists' eyes, damaging their own souls. Second, as the abolitionist movement grew, and the response from the public and the government strengthened against them, abolitionists also noted that the maintenance of slavery required the silence, suppression, and complicity of free citizens.<sup>46</sup> The continuation of the institution of slavery required abolitionists and others uninvolved with slavery to suffer the tyranny that the system inflicted on its opponents.<sup>47</sup> Thus, abolitionists, in addition to fighting for the rights of the slaves, had to begin to fight for their own liberty and right to speak against slavery.<sup>48</sup> This new aspect of their work became a central focus for many abolitionists.<sup>49</sup>

Many Southerners and Northerners wished to see the abolitionists silenced in order to end the unrest they caused.<sup>50</sup> Others agreed with the abolitionists' stance

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<sup>43</sup> See KAMINSKI, *supra* note 16, at 251 (reproducing Thomas Jefferson's *Notes on the State of Virginia*, cited in *Thomas Jefferson: Writings* 264-67, 269-70, 288-289 (Merrill D. Peterson ed., 1984)). Thomas Jefferson recognized that slavery made tyrants of the owners, and that this behavior was passed on to the children of the owners. See also FINKELMAN, *supra* note 23, at 135-36; GREENBERG, *supra* note 41, at 33-50.

<sup>44</sup> See MARJORIE SPIEGEL, *THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY* 101 (2d ed. 1989). "The owner of a slave destroys two freedoms - that of his slave and that of himself." *Id.* (quoting John Bryant).

<sup>45</sup> See FINKELMAN, *supra* note 23, at 135-36.

<sup>46</sup> For example, as a result of the Fugitive Slave Law of 1793 which authorized the recapture of runaway slaves, Northern whites could not employ free blacks without fear that these employees would be kidnaped and sold back into slavery. See *id.* at 80-81; KAMINSKI, *supra* note 16, at 202. Under the Fugitive Slave Law, whites were also deprived of their own state's laws which held that blacks were free in the North and that slavery was abolished in that state. See ZINN, *supra* note 1, at 236-38.

<sup>47</sup> Actions by the federal government to protect the interests of slave holders, imposing costs on those who did not own slaves, incensed Northerners. These actions included the spectacle of troops marching into Boston to capture a runaway slave in order to return him to Virginia pursuant to the Fugitive Slave Act, and at a cost, in 1850, of \$100,000. See MILLER, *supra* note 2, at 486. Indeed, when a slavery proponent from Kentucky, Congressman Graves, spoke against both anti-slavery petitions and against censuring a member of Congress for bringing one, he received a virulent attack from his pro-slavery allies. See *id.* at 235-36.

<sup>48</sup> See DOUGLASS, *supra* note 40, at 464 ("[S]lavery must be abolished at the south, or it will demoralize and destroy liberty at the north.").

<sup>49</sup> See Curtis, *supra* note 7, at 859.

<sup>50</sup> See MILLER, *supra* note 2, at 75-79. John Quincy Adams, a proponent of abolition, inquired about the introduction to Congress of a petition purporting to be from slaves. The House was incensed at his action and prepared to censure him, though the petition

on slavery but not with their methods.<sup>51</sup> When white abolitionists were beaten, censored, silenced, or impugned, many sympathetic white citizens concluded that the ill-effects of the tyranny of slavery could not be limited to indentured Africans.<sup>52</sup> Rather, it was becoming clear that the rights and interests of free, white citizens were being suppressed in order to maintain the institution of slavery.<sup>53</sup> Pervasive racism stifled the white citizens' discussion of the rights of slaves. As a result, instead of the debate focusing solely on slavery's ill effects on blacks, the effect of slavery on whites often took center stage politically and legally.<sup>54</sup> This was an indication of society's discomfort with the issues of race, slavery, and unequal rights.<sup>55</sup>

Opponents of the abolitionist movement put forward various arguments in support of slavery. Chief among them was that slaves, who had been sold or stolen from their homes in Africa, were property,<sup>56</sup> having the attributes of prop-

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was *in favor* of slavery. The question was not whether slavery was right or wrong, but whether a Congressman could be censured for introducing a petition from slaves on the topic of slavery. One would think that even a Northern Congressman who equivocated on the topic of slavery would rise to the defense of a fellow Northerner's right to bring a petition before the House. Only one did. *See id.* at 233-36.

<sup>51</sup> Scandals erupted in the North and South when meetings were held which admitted both men and women, both blacks and whites, and which allowed women and blacks to speak. *See id.* at 225-30.

<sup>52</sup> *See* FINKELMAN, *supra* note 23, at 149. Jefferson disliked slavery because it made tyrants of white men, passing tyranny on through their children. *See also* MILLER, *supra* note 2, at 77.

<sup>53</sup> *See* FINKELMAN, *supra* note 23, at 149; Curtis, *supra* note 7, at 859-60. *See generally* MILLER, *supra* note 2, at 77 (discussing the attack on William Lloyd Garrison, a white abolitionist).

<sup>54</sup> *See* FINKELMAN, *supra* note 23, at 80; KAMINSKI, *supra* note 16, at 234-37 (stating that mere membership in an abolition society was cause to vilify a white person); Curtis, *supra* note 7, at 859-60.

<sup>55</sup> *See* FINKELMAN, *supra* note 23, at x. "With the exception of real estate, slaves were the most valuable form of privately-held property in the United States at the end of the Revolution." *Id.*

<sup>56</sup> *See* KAMINSKI, *supra* note 16, at 4-7, 10-15, 16, 24-34, and 42-43. The belief that the status of slaves was that of property was not universal. Indeed, there is evidence of efforts to call for the end of slavery even before the Constitutional Convention met. The political desire to create a Union, however, was stronger than any desire to free the slaves. Therefore, the Constitution itself acknowledges the status of the slaves as property, without explicitly saying so, in requiring the return of runaway slaves to slaveholders, on demand, without the possibility of emancipation, even in those states that banned slavery. The Constitution went further in considering slaves three-fifths a person for taxation and representational purposes; levied taxes on imported slaves; prohibited the consideration of ending the slave trade before 1808; authorized Congress to require militia to suppress domestic insurrections — slave revolts; and limited the Privileges and Immunities clause to citizens, generally applicable only to white males. *See id.* at 42-43. *See also* Higginson, *supra* note 22, at 160 (discussing the claim that attacks on slavery were thought to be foreclosed in "the original compromises necessary to draft the

erty,<sup>57</sup> such as a lack of personhood, and were therefore not entitled to equal moral or legal consideration.<sup>58</sup> Also, many religious leaders of the time preached that the slaves were meant to be subjugated by those in power.<sup>59</sup> Another popular argument was that the slaves were better off in their present state with "benevolent masters"<sup>60</sup> than if they had been left to the savages of their native land.<sup>61</sup> Perhaps the most incredible argument of all was the proposition that slaves did not *feel* in the same way as white people. Intelligent people actually debated whether African slaves could feel pain, or whether their sensation of pain was the same as that of people.<sup>62</sup> The theory that slaves *felt* differently supported the belief that, like "brute animals," the torments of slavery itself, and the torture which resulted, were not only elements inherent to the nature of the slaves, but actually beneficial to them.<sup>63</sup> The development of theories supporting

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Constitution").

<sup>57</sup> See ZINN, *supra* note 1, at 233-34. "Indeed, when the Supreme Court in 1857 had to decide between Dred Scott's liberty and his former master's property, it decided for property and declared Dred Scott a nonperson, to be returned to slavery." *Id.* (discussing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)). See also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247; Ariela J. Gross, "Like Master, Like Man": Constructing Whiteness in the Commercial Law of Slavery, 1800-1861, 18 CARDOZO L. REV. 263, 264 (1996); Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property*, 18 CARDOZO L. REV. 473, 523 (1996); Mark Tushnet, *New Histories of the Private Law of Slavery*, 18 CARDOZO L. REV. 301, 301-02 (1996); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 432 (1987).

<sup>58</sup> See LEONARD CASSUTO, *THE INHUMAN RACE, THE RACIAL GROTESQUE IN AMERICAN LITERATURE AND CULTURE* 3, 20, 75-76 (1997).

<sup>59</sup> See KAMINSKI, *supra* note 16, at 35-36. Religious leaders believed that their arguments for slavery were supported by the Bible. See *id.*

<sup>60</sup> *Id.* at 202. "A state of bondage, so far from doing violence to the law of nature, develops and perfects it; and that, in that state [the Negro] enjoys the greatest amount of happiness, and arrives at the greatest degree of perfection, of which his nature is capable." SPIEGEL, *supra* note 44, at 39 (quoting R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* (1858)).

<sup>61</sup> SPIEGEL, *supra* note 44, at 67 (quoting James Boswell, eighteenth century pro-slavery writer). See also KAMINSKI, *supra* note 16, at 223.

<sup>62</sup> "Negroes . . . are void of sensibility to a surprising degree. . . . [W]hat would be the cause of unsupportable pain to a white man, a Negro would almost disregard." SPIEGEL, *supra* note 44, at 61 (quoting DR. MOSELY, *TREATISE ON TROPICAL DISEASES* (1787)). See also FINKELMAN, *supra* note 23, at 152, 162 (discussing the debate over whether the slaves felt pain and other emotions the same as whites). Thomas Jefferson was an early proponent of racist distinctions. See *id.*

<sup>63</sup> See GREENBERG, *supra* note 42, at 112-31; KAMINSKI, *supra* note 16, at 35-36; MILLER, *supra* note 2, at 439 (discussing Congressman Wise's outrageous claims in Congress, Jan. 25, 1842); SPIEGEL, *supra* note 44, at 67. "[The abolition of the slave-trade] would be extreme cruelty to the African savages, a portion of whom it saves from massa-

slavery became more important with increased attacks on slavery.

Thomas Jefferson was an important figure in the development of the identity and philosophies of our country. His contemporaries looked to him for guidance on many issues, including slavery.<sup>64</sup> Jefferson, though an eloquent writer of libertarian philosophy, had mixed feelings about slavery. He recognized that slavery was wrong.<sup>65</sup> Jefferson stated, "[i]ndeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever [sic]."<sup>66</sup> Yet he feared,<sup>67</sup> and held an apparent revulsion for,<sup>68</sup> blacks.

Jefferson was not alone among the Founders<sup>69</sup> or his contemporaries<sup>70</sup> in expressing ambivalence towards slavery, or fear and racism towards slaves.<sup>71</sup> Jefferson, who authored the sentiments of liberty and equality expressed in the Declaration of Independence, never intended those concepts to apply to free blacks or slaves.<sup>72</sup> At the same time he made his noble statements "the

cre, or intolerable bondage in their own country, and introduces into a much happier state of life." *Id.* (quoting James Boswell, eighteenth century pro-slavery writer).

<sup>64</sup> See FINKELMAN, *supra* note 23, at 105-06; KAMINSKI, *supra* note 16, at 246-67.

<sup>65</sup> See FINKELMAN, *supra* note 23 at 107, 147-49; KAMINSKI, *supra* note 16, at 250-51 (reproducing Thomas Jefferson's *Notes on the State of Virginia*, cited in *Thomas Jefferson: Writings* 264-67, 269-70, 288-289 (Merrill D. Petterson ed., 1984)).

<sup>66</sup> KAMINSKI, *supra* note 16, at 251 (reproducing Thomas Jefferson's *Notes on the State of Virginia*, cited in *Thomas Jefferson: Writings* 264-67, 269-70, 288-289 (Merrill D. Petterson ed., 1984)).

<sup>67</sup> See *id.* at 247 (reproducing Thomas Jefferson's *Notes on the State of Virginia*, cited in *Thomas Jefferson: Writings* 264-67, 269-70, 288-289 (Merrill D. Petterson ed., 1984)). Part of his fear of blacks resulted from his recognition of the "ten thousand recollections, by the blacks, of the injuries they have sustained," and his belief that these circumstances would inevitably "divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race." *Id.*

<sup>68</sup> See FINKELMAN, *supra* note 23, at 152. Jefferson has been said to be the founder of a generation of racist theories, though he was related by marriage to slaves on his own plantation, slaves who were his wife's half-siblings. See *id.* See also HORTON & HORTON, *supra* note 10, at 76.

<sup>69</sup> See FINKELMAN, *supra* note 23, at 112.

<sup>70</sup> See GREENBERG, *supra* note 42, at 15, 39, 40, 127, and 130. See also MILLER, *supra* note 2, at 159. In 1843, John Quincy Adams noted the hypocrisy of the speeches of liberty, when he described a speech made by Daniel Webster, a slavery supporter, who was "spouting" about human rights, "with a Negro holding an umbrella over his head." *Id.* (quoting from the diary of John Quincy Adams).

<sup>71</sup> See ZINN, *supra* note 1, at 232. "The legitimization of slavery was the price of the new federal union, and the Founding Fathers shared . . . the assumption that blacks were culturally and genetically unsuited for democracy." *Id.* (citing Leon Litwack, *Trouble in Mind: The Bicentennial and the Afro-American Experience*, J. AM. HIST. (Sept. 1987)). See also HORTON & HORTON, *supra* note 10, at 25-76.

<sup>72</sup> See KAMINSKI, *supra* note 16, at 246-251 (reproducing Thomas Jefferson's *Notes on the State of Virginia*, cited in *Thomas Jefferson: Writings* 264-67, 269-70, 288-289 (Merrill D. Petterson ed., 1984)); MILLER, *supra* note 2, at 187-88. John Quincy Adams is one notable exception to the view that the sentiments in the Declaration of Independence

[F]ounders were themselves denying equal liberty to 697,000 human beings, or one-sixth of the population."<sup>73</sup> The fact that Jefferson and other Founders personally owned slaves may explain why they failed to bring the promises of liberty and equality to true fruition.

However, other early proponents of liberty and equality, like John Quincy Adams, did not have difficulty applying these concepts to the slaves.<sup>74</sup> Quaker minister James Neal, in the Massachusetts ratifying convention, compared the freedom of the Africans to the freedom of the whites.<sup>75</sup> "Can we who have fought so hard for Liberty give our consent to have it taken away from others?"<sup>76</sup> Abigail Adams, a potent political and moral thinker of her time, argued steadfastly against slavery.<sup>77</sup> She wrote to her husband, John Adams, that, "[i]t always

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should not apply to free blacks or slaves. Though he was not one of the Founding Fathers, as was his own father, John Adams, he was an extremely important political figure in the early years of the United States. He noted in his journal that, "[s]lavery is the great and foul stain upon the North American Union, and it is a contemplation worthy of the most exalted soul whether its total abolition is or is not practicable: if practicable, by what it may be effected, and if a choice of means be within the scope of the object, what means would accomplish it at the smallest cost of human suffering. . . . This objective is vast in its compass, awful in its prospects, sublime and beautiful in its issue." *Id.* (quoting from the diary of John Quincy Adams).

<sup>73</sup> MILLER, *supra* note 2, at 16.

<sup>74</sup> See *id.* at 189. John Quincy Adams believed in liberty for slaves and criticized the supporters of slavery, by stating that:

In the abstract [defenders of slavery] admit that slavery is an evil, they disclaim all participation in the introduction of it, and cast it all upon the shoulders of our old Grandam Britain. But when probed to the quick upon it, they show at the bottom of their souls pride and vainglory in their condition of masterdom. . . . It is among the evils of slavery that it taints the very sources of moral principle. It establishes false estimates of virtue and vice: for what can be more false and heartless than this doctrine which makes the first and holiest rights of humanity to depend upon the color of the skin?

*Id.* (quoting from the diary of John Quincy Adams). John Quincy Adams believed that, "[i]f the Union must be dissolved, slavery is precisely the question upon which it ought to break." *Id.* at 190 (quoting from the diary of John Quincy Adams). "If slavery be the destined sword of the hand of the destroying angel which is to sever the ties of this union, the same sword will cut in sunder the bonds of slavery itself." *Id.* at 193 (quoting from the diary of John Quincy Adams). It is interesting that the Southerners desired the protection of slavery and the Union and insisted that the Northerners and abolitionists threatened the Union by speaking against slavery. Here, Adams foretells that the Southerners' insistence on maintaining slavery would lead to the dissolution of the Union and the end to slavery itself. See *id.*

<sup>75</sup> See KAMINSKI, *supra* note 16, at 69. James Neal further stated that "we [whites] should lose our Liberties as the Africans lost theirs." *Id.* (quoting Quaker minister, James Neal).

<sup>76</sup> *Id.* (quoting Quaker minister, James Neal).

<sup>77</sup> See MILLER, *supra* note 2, at 162. Abigail Adams' thoughts on slavery and politics are evidenced in her writings and in those of her husband, John Adams, and her son,

seemed a most iniquitous scheme to me - to fight ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have."<sup>78</sup>

Contrary to the prevailing view of their fellow citizens, some Northerners supported slavery and some Southerners disliked slavery. The Grimké sisters were among the most well-known Southern anti-slavery speakers.<sup>79</sup> Though their home was in Charleston, South Carolina, they eventually moved to Philadelphia to crusade for abolition. Angelina Grimké, addressing the Massachusetts legislature,<sup>80</sup> stated that:

"[a]s a Southerner, as a repentant slaveholder, and a moral being I feel I owe it to the suffering slave, and to the deluded master, to my country and to the world to do all that I can to overturn a system of complicated crimes, built upon the broken hearts and prostrate bodies of my countrymen in chains and cemented by the blood and sweat and tears of my sisters in bonds."<sup>81</sup>

Abolitionists spoke about the equality of all people. David Walker, a free black man in Boston wrote that "[white slave owners] have no more right to

John Quincy Adams. *See id.*

<sup>78</sup> *Id.* at 162 (quoting Letter from Abigail Adams, in Massachusetts, to her husband, John Adams, after "he had gone to Philadelphia [in September of 1774]"). Abigail Adams also said of Southern slaveholders who spoke of liberty, "I have sometimes been ready to think that the passion for liberty cannot be equally strong in the breasts of those who have been accustomed to deprive their fellow-creatures of theirs." *Id.* Southerners knew first-hand the inequity of slavery. *Id.* at 509-10. "Mary Chestnut, the wife of a highly placed Southern slaveholder, would write in her diary with some disdain about those Yankee churchwomen who condemned slavery out of their book-reading. What did they know, compared to the real knowledge that thousands of Southern women had, of the real horrors of the institution?" *Id.* at 510.

<sup>79</sup> *See id.* at 79, 314-23. Angelina and Sarah Grimké, of Charleston, South Carolina, "wrote pamphlets urging Southern women, and the 'clergy of the South,' to work against slavery by moral suasion - documents which made the sisters famous in the abolition world, and notorious back home in South Carolina." *Id.* at 315.

<sup>80</sup> *See id.* at 316. Angelina Grimké was the first woman in the history of the United States to address a legislative body. She and others, including Abigail Adams, talked of women's rights, recognizing the similarities between the oppression of women and slaves and the need to work to end the oppression of both groups. *See id.* "We cannot push Abolitionism forward with all our might until we take up the stumbling block [of sexism] out of the road. . . . What then can women do for the slave, when she herself is under the feet of man and shamed into silence?" ZINN, *supra* note 11, at 120 (quoting Angelina Grimké, orating during a tour from New York to Boston and Providence in 1837). *See also* Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 311 (1996); Richards, *supra* note 29, at 769.

<sup>81</sup> MILLER, *supra* note 2, at 317 (quoting Angelina Grimké's remarks before a committee of the Massachusetts legislature on behalf of the abolition of slavery in February of 1838).



hold us in slavery than we have to hold them.”<sup>82</sup> William Lloyd Garrison, a white abolitionist, strongly believed in equal treatment and ridiculed the U.S. Government, saying, “I accuse the land of my nativity of insulting the majesty of Heaven with the greatest mockery that was ever exhibited to man.”<sup>83</sup> Reverend J. W. Loguen, an escaped slave, believed in the natural origin of equal rights and refused to rely on the Constitution for his rights. He stated:

“I received my freedom from Heaven, and with it came the command to defend my title to it. . . . I don’t respect this law - I don’t fear it - I won’t obey it! It outlaws me, and I outlaw it. . . . I will not live a slave, and if force is employed to re-enslave me, I shall make preparations to meet the crisis as becomes a man.”<sup>84</sup>

It has become an accepted theory that, though not explicitly stated, the Constitution was protective of slavery.<sup>85</sup> Frederick Douglass, in his famous Fourth of July speech in 1852, discussing the Constitution’s support of slavery,<sup>86</sup> stated

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<sup>82</sup> ZINN, *supra* note 1, at 236 (quoting David Walker’s 1829 pamphlet *Walker’s Appeal*). “Georgia offered \$1,000 to anyone who would kill David Walker. One summer day in 1830, David Walker was found dead near the doorway of the shop where he sold old clothes. The cause of death was not clear.” *Id.*

<sup>83</sup> *Id.* (quoting William Lloyd Garrison’s *The Liberator*, first published Jan. 1, 1831).

<sup>84</sup> *Id.* at 237 (quoting Loguen’s reaction to the Fugitive Slave Act of 1850). Harriet Tubman freed herself and hundreds of others from slavery, believing so strongly in freedom, that she carried a pistol to force slaves to seek their freedom. See ZINN, *supra* note 1, at 237. Sojourner Truth’s famous “A’nt I a Woman?” speech in 1851 helped further break the racist barriers within the abolition movement. ZINN, *supra* note 11, at 122.

<sup>85</sup> See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 2-3 (1992) (citing WILLIAM M. WIECEK, *SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760-1848* 62-63 (1977)); FINKELMAN, *supra* note 23, at 3-7; KAMINSKI, *supra* note 16, at 230; STAUGHTON LYND, *CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION* 153-54 (1967); ZINN, *supra* note 1, at 232. “It had been the genius of the founders to build safeguards for slavery into the Constitution without even mentioning slavery by name.” *Id.* (citing Leon Litwack, *Trouble in Mind: The Bicentennial and the Afro-American Experience*, J. AM. HIST. (Sept. 1987)); Derrick Bell, *Black History and America’s Future*, 29 VAL. U. L. REV. 1179, 1183 (1995); James Oakes, “*The Compromising Expedient*”: *Justifying a Pro-Slavery Constitution*, 17 CARDOZO L. REV. 2023, 2055-56 (1996). See also Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1029-32 (1993); William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 121-25 (1990); Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087, 1111 (1993); David A.J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187, 1189-96 (1992).

<sup>86</sup> In 1791, three free black men petitioned the South Carolina Senate for additional rights arguing that Article I, section 2 of the U.S. Constitution “counted them as free persons for the purpose of representation,” though slaves were only counted as three-fifths of a person for representation purposes. KAMINSKI, *supra* note 16, at 230. See also FINKELMAN, *supra* note 23, at 16. These free black men claimed that their state received benefits by including them in representational counts and by receiving the money they paid in taxes. Therefore, they asked the state to grant them the right to testify in court

that "[t]he rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought light and healing to you, has brought stripes and death to me. This Fourth of July is *yours*, not *mine*. *You* may rejoice, *I* must mourn."<sup>87</sup>

Discussions of slavery played a significant part in the founding of the United States. "A majority of Americans in 1776 favored the closing of the African slave trade and, at least philosophically, the idea of a general emancipation of slaves . . . ."<sup>88</sup> The slave trade was banned by the First Continental Congress as an economic boycott of British policies in 1774.<sup>89</sup> However, soon after the United States' formation, the issues surrounding the slave trade immediately arose again, with both merchants and abolitionists making their cases for and against reinstating the slave trade.<sup>90</sup>

Though it was wrong to consider slaves "property," that was not the only moral or legal question which arose from slavery. Other important questions were also considered. For instance, was it fair for the property (a slave) of slaveowners to be sacrificed for the liberty (freedom for the slave and liberty to speak for the abolitionist) of another person?<sup>91</sup> Should a third person's rights, such as the abolitionists', be restricted in order to maintain the myth that a person can be the property of another? In other words, does the struggle to protect property trump the struggle for freedom or liberty? Two liberties, freedom of speech and freedom from slavery, were denied in order to protect a person's right to hold slaves as property. How could the protection of property hold such a high value in the face of such deprivation of liberty? The Founding Fathers "struggled against 'enslavement' by King George III"<sup>92</sup> only to enslave others.<sup>93</sup>

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and enter into contracts. The South Carolina Senate, however, refused to accept their petition because "free blacks were unprotected by state constitutional guarantees." KAMINSKI, *supra* note 16, at 230.

<sup>87</sup> DOUGLASS, *supra* note 40, at 441. See also ZINN, *supra* note 1, at 232. Supreme Court Justice Thurgood Marshall stated, "[i]n this bicentennial year [of the Constitution], we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled." *Id.* (quoting Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii (May 6, 1987)).

<sup>88</sup> KAMINSKI, *supra* note 16, at x.

<sup>89</sup> See *id.* at 1.

<sup>90</sup> See *id.* at 2.

<sup>91</sup> See FINKELMAN, *supra* note 23, at 38. This question was answered by Chief Justice William Tilghman in the negative: "I know that freedom is to be favoured, but we have no right to favour it at the expense of property." *Id.* (citing *Marchand v. Negro Peggy*, 2 Sergeant & Rawle 18 (Pa. 1815)).

<sup>92</sup> *Id.* at 48.

<sup>93</sup> See *id.* During the Revolution, Samuel Johnston, wrote, "How is it that we hear the loudest yelps for liberty among the drivers of [N]egroes?" *Id.* (quoting the noted author, Samuel Johnston, cited in DONALD L. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERI-*

One of the answers to these questions is that the degree of liberty and political equality enjoyed by the white masses rested on the enslavement of the black masses.<sup>94</sup> Slaveowners did not want to lose the economic advantages gained by slavery.<sup>95</sup> Yet, whatever alleged benefit flows from the oppression of others is insufficient to warrant such oppression. There is no justice while there is oppression.

### 1. The Abolitionists

The abolitionists were a varied group of individuals, including whites, free blacks, freed slaves, and runaway slaves. Men and women worked together in both the North and the South to end slavery.<sup>96</sup> Given the limitations placed on slaves and free blacks,<sup>97</sup> legal redress for the crimes of slavery and advocacy for

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CAN POLITICS 1765-1820 80 (1971)). This question, ironically, was asked by the British, from whom the Founding Fathers sought freedom. *See id.* at 107-08 (quoting English diplomats and historians)

<sup>94</sup> *See id.* at 108. Slavery has resulted in the abuse of the white citizen, and it has "silenced every free pulpit within its control . . . [and has] made free speech and a free press impossible. . . ." CONG. GLOBE, 38th Cong., 2nd Sess. 138 (1865) (statement of Rep. Ashley).

<sup>95</sup> *See FINKELMAN, supra* note 23, at 47.

<sup>96</sup> *See id.* at 108. *See generally* THE ABOLITIONIST SISTERHOOD, *supra* note 12 (discussing the work of white and black women in the movement).

<sup>97</sup> *See GREENBERG, supra* note 42, at 34. Slaves were kept illiterate in part because slaveowners feared they would read abolitionist literature. Abolitionists sent literature to the South, hoping it would reach the slaves and other sympathetic individuals and organizations. In addition to the slaveowners' desired goal, this illiteracy policy had at least two other results. First, it penalized other free people who taught slaves to read; another act of tyranny perpetrated by free people on other free people in order to keep others enslaved. *See KAMINSKI, supra* note 16, at 246-51 (reproducing Thomas Jefferson's *Notes on the State of Virginia*, cited in *Thomas Jefferson: Writings* 264-67, 269-70, 288-289 (Merrill D. Peterson ed., 1984)). Second, It was used as an excuse for the mistreatment of slaves, whose enforced illiteracy was used as proof of their inferiority and the very reason for beatings. *See GREENBERG, supra* note 42, at 34; KAMINSKI, *supra* note 16, at 246-51. Another limitation put on slaves and free blacks concerned their ability to testify in court. As one author stated, assuming that slaves witnessed a murder, "[i]t was better to let a murderer go unpublished than to honor the words of slaves." GREENBERG, *supra* note 42, at 39. It is clear that the search for truth and justice was not the goal. *See id.* at 41. The irony in the fact that Southerners prided themselves on their honor and veracity, yet told the most abominable lies to, and about, the slaves, was not lost on the slaves. *See id.* Not many slaves were fooled by the stories Southerners told of the North — stories of slaves starving and wishing to return to slavery. In fact, slaves would have preferred living in poverty if it also came with freedom. *See id.* at 31. Although the slaves did not believe all these lies about the North, they were aware that not all Northerners were their friends, that some actively complied with the Fugitive Slave Law, and that when some visited or moved to the South they often conformed to local norms. *See id.* at 43. *See also* DOUGLASS, *supra* note 40, at 371-73.

The inability to obtain legal redress for crimes of slavery or to advocate against slavery

freedom and liberty was often publicly sought by others.<sup>98</sup>

Abolitionists questioned the practice of slavery on moral,<sup>99</sup> religious,<sup>100</sup> economic,<sup>101</sup> and political<sup>102</sup> grounds. As a result, these nonviolent activists<sup>103</sup> were beaten,<sup>104</sup> threatened,<sup>105</sup> and even killed.<sup>106</sup> By threatening the status quo, the abo-

placed severe limits on free and enslaved black people who were trying to improve their own conditions. Another devastating, and sometimes deadly, limitation was the lack of protection for free blacks from federal and state fugitive slave laws. Under these laws free blacks could be, and were, captured and returned to former masters in the South or sold to new masters. See KAMINSKI, *supra* note 16, at 40, 65, 238-39.

<sup>98</sup> Runaway slaves, free blacks and sympathetic white abolitionists spoke for the slaves who could not speak for themselves. Indeed, many made it their life's work, including Frederick Douglass, Harriet Tubman, Sojourner Truth, John Brown, and William Lloyd Garrison. Though white abolitionists often get much attention, black abolitionists were "the backbone to the antislavery movement." ZINN, *supra* note 11, at 180.

<sup>99</sup> See KAMINSKI, *supra* note 16, at 212. In a petition to the first Federal Congress in 1790, abolitionists from Pennsylvania wrote:

[We] observed with great Satisfaction, that many important & salutary Powers are vested in you for "promoting the Welfare & securing the blessings of liberty to the People of the United States." And as they conceive, that these blessings ought right-fully to be administered, *without distinction of Colour*, [sic] to all descriptions of People, so they indulge themselves in the pleasing expectation, that nothing, which can be done for the relief of the unhappy objects of their care will be either omitted or delayed.

*Id.* (quoting Petition from the Pennsylvania Abolition Society, Philadelphia, Feb. 3, 1790, in DAILY ADVERTISER (NEW YORK), Mar. 18, 20, 22, & 24, 1790, and NEW-YORK DAILY GAZETTE, March 26 & 27, 1790).

<sup>100</sup> See *id.* They began with the proposition that the slaves were human beings, "formed by the same Almighty being, alike objects of his Care & equally designed for the Enjoyment of Happiness the Christian Religion teaches us to believe . . ." *Id.*

<sup>101</sup> See DOUGLASS, *supra* note 40, at 345-46 (making the point that "[a]n old ox, worth eighty dollars, was doing, in New Bedford, what would have required fifteen thousand dollars worth of human bones and muscles to have performed in a southern port").

<sup>102</sup> See KAMINSKI, *supra* note 16, at 212. The Founders' philosophy logically led to freedom for the slaves. "[T]he Political Creed of Americans fully coincides with the Position [of freedom]." *Id.* (quoting Petition from the Pennsylvania Abolition Society, Philadelphia, Feb. 3, 1790, in DAILY ADVERTISER (New York), Mar. 18, 20, 22, & 24, 1790, and NEW-YORK DAILY GAZETTE, March 26 & 27, 1790).

<sup>103</sup> See Curtis, *supra* note 7, at 799. The American Anti-Slavery Society "renounced the use of violence by its members or by the slaves." *Id.* (citing *Declaration of the Anti-Slavery Convention*, U.S. TELEGRAPH, Dec. 21, 1833, at 69).

<sup>104</sup> See ZINN, *supra* note 1, at 236 (discussing William Lloyd Garrison's escape from these riots).

<sup>105</sup> See MILLER, *supra* note 2, at 76-77. "Throughout the North in 1834 and 1835, abolitionist speakers were greeted with rocks, eggs, threats, cancellation of arrangements, the breakup of meetings, editorial calls for repression by leading newspapers, condemnation by leading citizens." *Id.* at 76. See also Curtis, *supra* note 7, at 810; Curtis, *supra* note 28, at 1183.

<sup>106</sup> See SMITH, *supra* note 3, at 19-20; ZINN, *supra* note 1, at 236 (discussing the death

litionists became the target of individual and mob violence which "subjected courageous early abolitionist leaders like Theodore Weld and William Lloyd Garrison — who asked only to be heard — to unrelenting violence, threats of death, insult, ridicule and, in the case of Elijah Lovejoy, murder."<sup>107</sup>

Abolitionists in the North and the South "were branded as criminals and traitors."<sup>108</sup> They were called "fanatics" and "incendiaries" by the Northern press,<sup>109</sup> and criminals in the South.<sup>110</sup> Much of the violent opposition to the abolitionists indicated public antipathy towards the abolitionists, and emboldened the government in calculating its response to their activism. However, the mob violence which arose in an effort to suppress the abolitionists' message backfired. In fact, "[a]ttempts at forcible suppression would merely increase their support."<sup>111</sup> Mob violence often strengthened the resolve of more moderate anti-slavery proponents. For example, Gerrit Smith, a moderate colonizer, became sympathetic towards the abolitionists' message after witnessing mob action spurred by his Congressman.<sup>112</sup>

Perhaps the best known abolitionists were Harriet Tubman, Sojourner Truth, Frederick Douglass, William Lloyd Garrison, Nat Turner, the Grimké sisters, David Walker, and John Brown. Each had a different style. Douglass was a great orator,<sup>113</sup> Tubman was an active participant in freeing slaves,<sup>114</sup> and Brown and Turner led attempted, but unsuccessful, slave rebellions.<sup>115</sup> Garrison was a writer and speaker whose politics rankled some because he advocated the "dissolution of the Union."<sup>116</sup>

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of David Walker); Curtis, *supra* note 7, at 813; Curtis, *supra* note 28, at 1110.

<sup>107</sup> Richards, *supra* note 10, at 788. See also SMITH, *supra* note 3, at 20; Curtis, *supra* note 28, at 1110-11.

<sup>108</sup> Curtis, *supra* note 7, at 808.

<sup>109</sup> *Id.* at 809 (citing *Southern Sentiment*, WASH. GLOBE, Sept. 26, 1835, at 2).

<sup>110</sup> See *id.* at 805.

<sup>111</sup> *Id.* at 812. See also Curtis, *supra* note 28, at 1123-24, 1126, 1171.

<sup>112</sup> See MILLER, *supra* note 2, at 77. Additionally, "[t]hese violent attacks upon the freedom of speech and of assembly of abolitionists often had that result on sympathetic but not yet committed witnesses." *Id.* "Discomfort with rising mob violence in 1835-36, as well as its inefficiency, led some to explore legal methods of suppression." Curtis, *supra* note 7, at 813.

<sup>113</sup> See DOUGLASS, *supra* note 40, at 407-20, 429-64 (publishing Douglass' speeches and the reactions they inspired).

<sup>114</sup> See ZINN, *supra* note 1, at 237.

<sup>115</sup> See GREENBERG, *supra* note 42, at 1-7 (discussing Nat Turner's rebellions); ZINN, *supra* note 11, at 180-82 (discussing John Brown's rebellions).

<sup>116</sup> FINKELMAN, *supra* note 23, at 1 (citing WALTER M. MERRILL, *THE LETTERS OF WILLIAM LLOYD GARRISON* 303 (1973)). "The American States were, in Garrison's words, united by a 'Covenant with Death' and 'An Agreement With Hell.' Garrison and his followers refused to participate in American electoral politics, because to do so they would have had to support 'the pro-slavery, war sanctioning Constitution of the United States.' Instead, under the slogan 'No Union with Slaveholders,' the Garrisonians repeatedly argued for a dissolution of the Union." *Id.*

### C. Attempts to Restrict the Flow of Abolitionist Literature

One of the federal government's first widespread attempts to suppress abolitionist speech was by restricting the flow of Northern abolitionist literature, through the mails, to the South.<sup>117</sup> The Postmaster General of the United States was made responsible for censorship and seizure of such speech.<sup>118</sup> "Postmasters, with the encouragement of the postal authorities in Washington, took it upon themselves to suppress the pamphlets; the postmaster in New York, with that same encouragement, extinguished the conflagration of pamphlets at its source."<sup>119</sup> Groups of citizens in the South broke into post offices and burned the offending materials.<sup>120</sup> In December of 1835, President Andrew Jackson decried the "unconstitutional and wicked" behavior of the abolitionists and even proposed "a federal law prohibiting the circulation of their publications."<sup>121</sup>

One reason for this postal suppression was that the abolitionists sent anti-slavery literature "mainly to members of the Southern elite."<sup>122</sup> As a result, "Southern communities erupted in protest."<sup>123</sup> What followed was an attempt by some states to legislate what entered their borders. Some states tried to compel other states and the federal government not only to comply, but to assist in this effort even if it required restrictions within other states' borders.<sup>124</sup>

Southerners were convinced that the abolitionist literature that reached the South, along with the teachings of Black preachers, caused the Nat Turner rebellion.<sup>125</sup> They believed that Denmark Vesey, a free black man, had been inspired to organize a slave revolt in Charleston by reading Congressional debates on slavery.<sup>126</sup> Because the Southerners did not want *any* literature, including notes of the Congressional debates, to reach slaves or free blacks the Southern states mandated suppression of abolitionist speech and press. As a result, "Southern nullifiers and nationalists remained free to agitate the slavery issue," while the abolitionists' positions were excluded from the debate by the power of law and threats of violence.<sup>127</sup> Therefore, only voices in favor of slavery were heard in the South.

Amos Kendall, the Postmaster General in 1835, was a "close political associate" of President Andrew Jackson.<sup>128</sup> Kendall believed that postmasters owed an

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<sup>117</sup> See MILLER, *supra* note 2, at 93-99, 333; NYE, *supra* note 12, at 34-35 ("The cold type of the printer's case was a weapon he could grasp with his hands and turn into flame.").

<sup>118</sup> See Curtis, *supra* note 7, at 818-19.

<sup>119</sup> MILLER, *supra* note 2, at 94.

<sup>120</sup> See *id.*

<sup>121</sup> *Id.* at 97-98.

<sup>122</sup> Curtis, *supra* note 7, at 817.

<sup>123</sup> *Id.*

<sup>124</sup> See *id.* at 817-18.

<sup>125</sup> See GREENBERG, *supra* note 42, at 102.

<sup>126</sup> See MILLER, *supra* note 2, at 31.

<sup>127</sup> Curtis, *supra* note 7, at 849.

<sup>128</sup> MILLER, *supra* note 2, at 102.

"obligation to the law . . . but a higher [duty] to the communities in which [they lived]." <sup>129</sup> "Kendall let postmasters know that they did not need to be scrupulous about the laws protecting the mails and that they could feel free to exclude antislavery material, and so they did." <sup>130</sup> However, the publications which were suppressed included the *Boston Courier*, the *Philadelphia Saturday Evening Post*, the *Greenfield Gazette*, and abolitionist journals, as well as "religious journals, general magazines, and big-city Northern newspapers which sometimes discussed slavery a little too candidly." <sup>131</sup> As a consequence, it became increasingly clear to Northerners that slavery, "even if confined to the South, was incompatible with republican government. Not only was the enslaved black person denied every freedom, but now the white person was to be denied the freedom to talk about it." <sup>132</sup> This censorship, therefore, helped turn the tide in the North against suppression. In the Spring of 1836, Congress "passed a bill prohibiting any postmaster from detaining publications or preventing their delivery." <sup>133</sup>

Supporters of slavery did not let this prohibition discourage them. They went beyond seeking to outlaw abolitionist speech in the South, seizing it in the mails, and preventing its distribution to the South. <sup>134</sup> Southern states demanded that Northern states censor information produced within their own borders so that this abolitionist information did not find its way to the South. <sup>135</sup> In rejecting this further attempt at censorship, Senator Thomas Morris of Ohio succinctly characterized the North's position by stating that:

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

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<sup>129</sup> *Id.* (quoting a letter from Amos Kendall to the Charleston postmaster in 1835).

<sup>130</sup> *Id.* at 103.

<sup>131</sup> *Id.* at 104.

<sup>132</sup> *Id.* See also Curtis, *supra* note 7, at 859.

<sup>133</sup> MILLER, *supra* note 2, at 104. See Curtis, *supra* note 7, at 835-36.

<sup>134</sup> An example of the language sought to be suppressed tells us something about the nature of both the abolitionists and their opponents. Abolitionist publications stated that "God commands, and all nature cries out, that man should not be held as property. The system of making men property, has plunged 2,250,000 of our fellow countrymen into the deepest physical and moral degradation, and they are every moment sinking deeper." Curtis, *supra* note 7, at 823 (citing *Legislature of New York, Requisition of the Governour [sic] of Alabama*, EVENING POST (New York), Jan. 11, 1836, at 2).

<sup>135</sup> Congressman William Johnson of Maryland, "argued the impropriety and unconstitutionality of the people of the North attempting to deprive the people of the South of their slave property, which was valued [in 1839] at twelve hundred millions of dollars. . . . [I]t would be equally constitutional and proper [for the South to attempt] to deprive the North of all her manufacturing and other capital . . . ." MILLER, *supra* note 2, at 365 (quoting Congressman Johnson, advocating before Congress in 1840, against allowing any congressional debate on slavery).

thought, of speech, and of the press shall be so embarrassed as to be in many instances denied to us . . . .<sup>136</sup>

The South preferred to jeopardize the civil rights of Northern citizens rather than have the work of the abolitionists jeopardize slavery in the South. Those who opposed such suppression believed that "[t]o accept such restrictions would reduce the Northern citizen to 'a vassalage but little less degrading than that of the slaves whose condition we assert the right to discuss.'" <sup>137</sup> This point was clarified by the next effort to suppress abolitionist speech — the Gag Rule — which was introduced into Congress to restrict the reception and reading of the growing number of abolitionist petitions.

#### D. *The Abolitionists' Use of the Right to Petition*

The use of the petition to question the practice of slavery began with the birth of our country.<sup>138</sup> In October 1783, Quakers from Pennsylvania to Virginia peti-

<sup>136</sup> Curtis, *supra* note 7, at 833 (citing 12 CONG. DEB. 1168 (1836)).

<sup>137</sup> *Id.* at 843 (citing *Report Relative to Abolition Societies and Incendiary Publications on March 30, 1836*, in 1835-36 JOURNAL OF THE HOUSE OF REPRESENTATIVES (PENNSYLVANIA) 250 (1836)).

<sup>138</sup> A 1777 petition asked for the same rights for blacks that the colonists sought from England. See KAMINSKI, *supra* note 16, at 11. A 1783 Quaker petition asked Congress for the denouncement of slavery. See *id.* at 26. Many, if not most, of the anti-slavery petitions were presented by women. See ABOLITIONIST SISTERHOOD, *supra* note 12, at 179-99 (discussing the method and ideology of women's anti-slavery petitioning). Although they were not "free white men," their right to petition was not questioned in the same legal way as the blacks' right. See MILLER, *supra* note 2, at 327-30. The tone of the responses to women's attempted petitioning seemed to indicate that the Southerners easily dismissed these petitions because they came from women. See *id.* at 312. Many women, and some men, understood the link between the oppression of slaves and the oppression of women. One female abolitionist, from South Carolina, came to understand the rights of women more fully in arguing for the rights of slaves and said,

The right of petition is the only political right that women have . . . . If, then, we are taxed without being represented, and governed by laws we have no voice in framing, then, surely, we ought to be permitted at least to remonstrate. . . . The very least that can be done is to give [women] the right of petition in all cases whatsoever; and without any abridgement. If not, they are mere slaves, known only through their masters.

*Id.* at 316 (alteration in original) (quoting Angelina Grimké during her New England tour of 1837-1838). John Quincy Adams defended the right of women to petition, acquitting his mother well, when he refused to agree that the lack of women's ability to vote should mean that they likewise lacked the ability to petition. See *id.* at 322. He responded that this might be "adding one injustice to another." *Id.* (quoting Congressman Adams speaking before Congress in 1838). In the 1800s, thinking of rights for slaves inevitably led to thinking of rights for women. As the abolitionist Theodore Weld noted, the "[m]ind gravitates from a general principle to its collaterals. It begins with a case self-evidently clear and strong, and then takes up its ramifications." *Id.* at 323 (quoting Letter from Theodore Weld to his wife, Angelina Grimké).



tioned the Confederation Congress, attacking the renewal of the African slave trade and asking Congress " 'to discourage and prevent so obvious an Evil.' " <sup>139</sup> In 1777, Prince Hall, a slave freed in 1770, and seven other African Americans, petitioned the Massachusetts legislature for "the same rights that the colonists were fighting for in their conflict with Great Britain." <sup>140</sup> Methodists petitioned the Virginia legislature to end slavery in 1785. <sup>141</sup> Two days after the submission of this petition, proponents of slavery submitted a petition to this legislative body in favor of slavery. <sup>142</sup> In this petition, these proponents of slavery expressed their anger at the attempts to take away their "property" and accused their opponents of being "Enemies of our Country, Tools of the British Administration, and supported by certain deluded Men." <sup>143</sup> From these beginnings grew a movement of anti-slavery petitions which began to accelerate in 1828. <sup>144</sup> The right to petition has a long legislative history, particularly in England, and therefore in the American colonies, emanating from the Magna Carta. <sup>145</sup> Indeed, "[p]etitioning had played a particularly large role in the campaign against slavery in England. . . . [I]t also fit particularly well with the atmosphere of voluntary effort for social change by sheer moral suasion that spilled out of the Second Awakening." <sup>146</sup> The right to petition was so basic to "the republican government, for which the founding generation had fought," <sup>147</sup> that time to hear petitions was scheduled into the regular business of the House of Representatives. <sup>148</sup>

One Congressional response to anti-slavery petitions was to accept them and consign them to committees, where they would likely die without answer or their requests would be rejected. <sup>149</sup> Another response was to accept the petitions and immediately answer them in the negative. <sup>150</sup> Then came the tactic of tabling the petitions so that they would not even be given the courtesy of a reading, publication or assignment to a committee. <sup>151</sup> Southern Congressmen were not satisfied with these alternatives and consequently, a new parliamentary device

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<sup>139</sup> KAMINSKI, *supra* note 16, at 27 (quoting Quakers Petition the Confederation Congress (Oct. 4, 1783)).

<sup>140</sup> *Id.* at 11.

<sup>141</sup> *See id.* at 33-34.

<sup>142</sup> *See id.* at 35-36.

<sup>143</sup> *Id.* at 35 (citing Petition in Favor of Slavery (Nov. 10, 1785)) (Legislative Petitions, Pittsylvania County) (on file with the Virginia State Library).

<sup>144</sup> *See* MILLER, *supra* note 2, at 107.

<sup>145</sup> *See id.* at 106.

<sup>146</sup> *Id.* at 107.

<sup>147</sup> *Id.* *See also* Curtis, *supra* note 7, at 848.

<sup>148</sup> *See* MILLER, *supra* note 2, at 199. ("[O]n each of the first thirty days of a session [of Congress] there would be an hour devoted to calling the roll of states for the purpose of offering petitions; once those thirty days had elapsed, unless there was a suspension of the rules, every other Monday was petition day.").

<sup>149</sup> *See id.* at 120.

<sup>150</sup> *See id.* at 118, 120.

<sup>151</sup> *See id.* at 31-32, 120.

was conceived. The question of whether to *receive* a petition would be introduced and *that* question itself would be tabled.<sup>152</sup> But even this was not enough for the Senator from South Carolina, John C. Calhoun, who said that “[r]ather than receive such a petition against South Carolina, against those whom I represent, I would have my head dissevered from my body.”<sup>153</sup> Calhoun felt that, “discussion of abolition in Congress was more dangerous than abolitionist pamphlets in the South.”<sup>154</sup>

Congressman Henry Laurens Pinckney, also from South Carolina, suggested the infamous Gag Rule,<sup>155</sup> which proposed that “[a]ll petitions, memorials, resolutions, propositions, or papers, relating in any way, or to any extent whatsoever, to the subject of slavery or the abolition of slavery, shall, without being either printed or referred, be laid on the table and that no further action whatever shall be had thereon.”<sup>156</sup> Pinckney was deemed weak<sup>157</sup> because his report said “only that Congress *ought* not to touch slavery in the District, rather than that it was absolutely *forbidden* to do so.”<sup>158</sup> This slight distinction indicates both the vehemence of the position of the Southerners and the distance of that position from modern notions of freedom of speech. It would be outrageous to modern ears if today’s congressmen suggested that discussion of a topic be barred from Congress. Current members of Congress rely on their First Amendment right to free speech, as well as their legislative immunity, to protect them from the consequences of their debate and action.<sup>159</sup>

#### E. *The Southerner’s Proposed Gag Rule*

The South wanted to suppress anti-slavery petitions to Congress because “petitions demanding the abolition of slavery were the very sort of incendiary docu-

<sup>152</sup> See *id.* at 119 (“The ideologically freighted issue of reception would never be broached - you would not have to vote on it, one way or the other. The petition itself would be left dangling in some limbo of parliamentary indefiniteness, from which it would never return.”).

<sup>153</sup> *Id.* at 128 (quoting Senator Calhoun’s remarks to Congress, Feb 12, 1836).

<sup>154</sup> Curtis, *supra* note 7, at 847. See MILLER, *supra* note 2, at 116.

<sup>155</sup> See MILLER, *supra* note 2, at 141-43. The Gag Rule was in fact a resolution of the House and was deemed by the Speaker of the House to be in effect only for the duration of the session in which it was passed, whereas a rule would be permanent. See *id.* at 216. At the beginning of each new session of Congress, as part of regular business, the House adopted standing rules and passed resolutions relative to the self-governance of the House for that session. Therefore, the Gag Rule expired at the end of each session and had to be re-established by a majority vote at the beginning of each new session of Congress. See *id.* at 371.

<sup>156</sup> *Id.* at 144 (quoting the Pinckney Committee Proposal of May 18, 1836).

<sup>157</sup> He in fact was not re-elected to office, due partly to the controversy he created by proposing such “mild” language. See *id.* at 146.

<sup>158</sup> *Id.* at 145.

<sup>159</sup> See *id.* at 253-55 (discussing Adams’ position on free speech in Congress).

ments Southern states had made criminal."<sup>160</sup> Southern members felt these petitions insulted them and their representatives directly, as the petitions called into question the morality and legality of slavery.<sup>161</sup> White Southerners felt continuously threatened by the abolitionists' petitions because they believed such petitions were an effort to spur slave rebellions and the spilling of the blood of white Southerners.<sup>162</sup> Therefore, the suppression was meant to redress these Southerners' fears.

By January 1836, the question of how anti-slavery petitions were to be received in the House of Representatives was still unclear. When petitions were introduced, Congress officially did not receive some, and the status of others lay in question.<sup>163</sup> "By late January, the House was overflowing with unresolved motions and appeals on this subject, and wallowing in unanswered petitions, stacked on its tables in various stages of parliamentary undress."<sup>164</sup> This led to the formation of the Pinckney Committee and the passage of the Gag Rule, prohibiting members of Congress from discussing slavery.<sup>165</sup>

The Gag Rule was born as a result of the desire of Southern Congressmen not to discuss slavery, and of Northern Congressmen not to threaten the rights of Southern states or to go back on the Founding Fathers' compromise.<sup>166</sup> The Gag Rule which applied to congressmen was content-based, but viewpoint-neutral, applying equally to pro- and anti-slavery positions.<sup>167</sup> No discussion of slavery, abolition, or anything related, would be allowed in Congress.<sup>168</sup> As many had

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<sup>160</sup> Curtis, *supra* note 7, at 846 (citing CONG. GLOBE, 24th Cong., 1st Sess. 40, 75-77 (1836)).

<sup>161</sup> See *id.* at 847; MILLER, *supra* note 2, at 117.

<sup>162</sup> In response, Southern Congressmen called for the blood of abolitionists. In the words of Congressman Hammond from South Carolina, "I warn the abolitionists, ignorant, infatuated, barbarians as they are, that if chance shall throw any of them into our hands he may expect a felon's death." MILLER, *supra* note 2, at 39 (quoting Congressman Hammond's speech in the House, Feb. 1, 1836).

<sup>163</sup> See *id.* at 200-04.

<sup>164</sup> *Id.* at 204.

<sup>165</sup> See *id.*

<sup>166</sup> See Curtis, *supra* note 7, at 855 (discussing the preeminence of states' rights and the view that slavery was accepted in a pact to form the new country including the southern colonies).

<sup>167</sup> See *id.* at 849. This neutrality lasted until the debates about admitting Texas as a state began. In order to maintain a balance of free and slave states, Congress had been admitting slave and non-slave states in equal numbers. Texas, because of its size and the timing of its request for statehood, threatened to destroy this delicate balance because it would become a slave state. This possibility caused abolitionists to throw much of their energy into opposing the annexation of Texas to the United States. See MILLER, *supra* note 2, at 284.

<sup>168</sup> See Curtis, *supra* note 7, at 849. Supporters of slavery could not tolerate the mere discussion of slavery-related topics. In 1835, proponents of slavery, like William Sullivan of Massachusetts, feared that the "[f]ailure to suppress abolition . . . would lead to integrated schools, 'colored men' admitted to all the occupations of life, colored army com-

warned, repressing abolitionist petitions, while attempting to silence congressional discussion, caused the gag rule to become "a cause célèbre."<sup>169</sup> "It gagged congressman as well as abolitionists, underlining the abolitionists' warning that the suppression of their rights implicated the rights of others as well."<sup>170</sup>

Many Congressmen hoped that the passage of the Gag Rule would result in a reduction of the number of slavery petitions sent to Congress.<sup>171</sup> The Congressmen felt that the petitions would be ineffective because most members of Congress would not view them favorably and because, without reception or a reading, their contents would surely not reach the public.<sup>172</sup> However, the fact that vast numbers of petitions were being submitted was, itself, noteworthy and presented a problem for proponents of the Gag Rule who had hoped that the Gag Rule would eliminate the topic of slavery.<sup>173</sup> The next congressional session saw more than five times the previous number of anti-slavery petitions.<sup>174</sup>

John Quincy Adams, a representative from Massachusetts and former President, was ready for a fight. He intended to make very clear to his colleagues that suppressing the right of petition was wrong and that he aimed to protect that right.<sup>175</sup> By advocating against the suppression of the right to petition, he also took the opportunity to raise some of the very issues that were suppressed by the Gag Rule. Adams asked for the advice of the Speaker of the House in the introduction of an anti-slavery petition submitted by "nine ladies from Fredericksburg, Virginia."<sup>176</sup> It turned out that these ladies were free blacks and "mulatto"<sup>177</sup> women, which caused quite a stir in the House and raised the issue of whether free blacks had the right to petition.<sup>178</sup> Then, Adams asked the Speaker about presenting a petition from people who purported to be slaves.<sup>179</sup>

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manders, colored jurymen and colored legislators." *Id.* at 852 (citing T. R. SULLIVAN, LETTERS AGAINST THE IMMEDIATE ABOLITION OF SLAVERY ADDRESSED TO THE FREE BLACKS OF THE NON-SLAVE-HOLDING STATES COMPRISING A LEGAL OPINION ON THE POWER OF LEGISLATURE IN NON-SLAVE-HOLDING STATES TO PREVENT MEASURES TENDING TO IMMEDIATE AND GENERAL EMANCIPATION IN A LETTER TO THE AUTHOR FROM WILLIAM SULLIVAN, L.L.D. 44 (Boston 1835) [hereinafter SULLIVAN LETTERS]).

<sup>169</sup> *Id.* at 848.

<sup>170</sup> *Id.* at 849.

<sup>171</sup> See MILLER, *supra* note 2, at 215.

<sup>172</sup> See *id.* at 120, 222; KAMINSKI, *supra* note 16, at 33 (discussing the rejection of anti-slavery petitions in Virginia).

<sup>173</sup> John Quincy Adams, too, may have been hoping for too much in thinking that after the infancy of passing the Gag Rule once, "the House would not again try to interfere with the sacred right of petition." MILLER, *supra* note 2, at 215.

<sup>174</sup> See *id.* at 216.

<sup>175</sup> See *id.* at 217.

<sup>176</sup> *Id.* at 227.

<sup>177</sup> *Id.* This designation came from the Virginia representative, John Patton, who called into question the respectability of the women. See *id.*

<sup>178</sup> See *id.* at 228-30, 270.

<sup>179</sup> See *id.* at 230.

This caused pandemonium in the House, interrupted other business,<sup>180</sup> and resulted in days of discussion about censoring Adams for introducing an anti-slavery petition in the House.<sup>181</sup> This petition, not yet introduced, though purporting to be authored by slaves, was in fact a pro-slavery petition that also sought the expulsion of Adams from Congress.<sup>182</sup> This resulted in further discussion of censoring Adams as members of the House felt that Adams had "tricked" and "trifled" with them.<sup>183</sup> In a sense, Adams had tricked the members. Despite the Gag Rule, Adams managed to bring debate to the floor concerning the rights of free blacks and slaves to petition and showed that even pro-slavery petitions would be barred in an effort to preclude debate on slavery-related topics.<sup>184</sup>

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<sup>180</sup> Including the business of determining an appropriate answer to the question of whether free blacks could use the right of petition. *See id.* at 228-30.

<sup>181</sup> Not only were the members incensed about the introduction of a petition from slaves and the implicit implication that they had the ability to exercise that right, but further, members thought there was an understanding that the topic of slavery itself was not an appropriate one because the existence and continuation of slavery was recognized in the Constitution, as part of an agreement between the North and the South. *See id.* at 38.

<sup>182</sup> *See id.* at 239. This speaks to the thoroughness with which the members wanted to exclude slavery debate. They, unlike the Southern legislatures, wanted all discussion of slavery, pro or con, barred. Adams tested this resolve and also took away some of the arguments generally used against the submission of the petitions — that they threatened the Union, insulted the South and were perhaps constitutionally moot. Adams was able to take the opportunity to discuss what was banned in order to defend himself against the attempt to censure him. He also ably demonstrated the necessity of protecting the right to petition for its own sake, rather than because of agreement with what the position presented.

<sup>183</sup> *Id.* at 233-34.

<sup>184</sup> If the limitation on the right to petition, according to Adams, is initially "denied to slaves, then to free persons of color, and then to persons of notorious bad character . . . what becomes of the right to petition?" *Id.* at 270 (quoting comments by Congressman Adams to Congress, in February 1837). In response to this question, the House passed a resolution which passed 162 to 18, stating that slaves did not possess the right of petition secured to the people by the Constitution. *See id.* at 271. In the words of South Carolina Congressman Waddy Thompson, "[s]laves have no right to petition. They are property, not persons; they have no political rights, and even their civil rights must be claimed through their masters." *Id.* at 257 (quoting Congressman Thompson's comments in Congress, Feb. 6, 1837). In an effort to show how foolish and insulting an effort to present a petition from slaves was, Thompson stated, "he would just as soon have supposed that the gentleman from Massachusetts would have offered a memorial from a cow or horse - for he might as well be the organ of one species of property as another. Slaves were property." *Id.* (quoting Congressman Thompson's comments in Congress, Feb. 6, 1837). A New York Democrat, Aaron Vanderpool, agreed with his Southern counterpart and stated, "[t]he idea that slaves had a right to petition the American Congress is indeed too monstrous to justify any labored attempt at refutation . . . Had anyone, before today, ever dreamed that the appellation of 'the people' embraced slaves?" *Id.* at 259 (quoting Congressman Vanderpool's comments to Congress, Feb. 6, 1837). *See also* Higginson,

Despite their anger, Southern members of the House had difficulty supporting a vote to censure a distinguished elder statesman and past President.<sup>185</sup> Some members indicated that however abominable Adams' attempt to assert the right of slaves to petition, "they could not vote to censure him without compromising the liberty of speech guaranteed to every member in the hall."<sup>186</sup>

In response to pro-slavery members, Adams warned against any restriction of the right to petition. Based on a slippery-slope argument, Adams stated, "[w]hen you begin to limit the right, where shall it stop? . . . [I]f you attempt to fix any limit to it, you lay the foundation for restriction to any extent that the madness of party spirit may carry it."<sup>187</sup>

As before, these further efforts to suppress petitions backfired and the number of petitions increased at a "flood" pace.<sup>188</sup> The scope of the petitions also broadened beyond the previous focus of the institution of slavery and of the slave trade within the District of Columbia.<sup>189</sup> The petitions now covered many topics revolving around slavery, such as the introduction of new states into the Union, and more importantly, the propriety of the Gag Rule itself.<sup>190</sup> The abolitionists increased the number of petitions through a campaign to bring both the matter of the suppression of the right to petition, and the issue of slavery itself, before Congress and the public. The numbers of petitioners silenced grew into the hundreds of thousands.<sup>191</sup> Those who may not have been sympathetic to claims of rights for slaves and free blacks, often could not help but be concerned at the congressional suppression of the rights of whites. Therefore, the effort to speak against slavery effectively educated the public about the evils of slavery and specifically, that when the rights of some are limited, the rights of all are threatened.<sup>192</sup>

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*supra* note 22, at 164-65 (discussing the Gag Rule as a breach of the speech and debate privilege of the members of the House).

<sup>185</sup> See MILLER, *supra* note 2, at 235-36.

<sup>186</sup> *Id.* at 235.

<sup>187</sup> *Id.* at 267 (alteration in original) (quoting comments to Congress by Congressman Adams, in February 1837).

<sup>188</sup> *Id.* at 277.

<sup>189</sup> The abolitionists felt that questioning slavery and the slave trade in the Nation's capital was appropriate for two reasons. First, the District of Columbia did not exist when the Constitution was written and therefore, the restriction on a ban on the slave trade and the question of slavery itself were open ones, not settled in the compromise resulting in the Constitution. It was thought that the Constitution protected slavery because it existed at the time the Founders wrote the Constitution. The second reason was that slavery in our Nation's capital was a source of international embarrassment, and therefore, subject to debate. See generally ZINN, *supra* note 11.

<sup>190</sup> See MILLER, *supra* note 2, at 278.

<sup>191</sup> See *id.* at 282.

<sup>192</sup> See Curtis, *supra* note 7, at 859-60. "[T]he exorbitant [sic] claims of the South on the liberties of the free states - demanding that every thing that has heretofore been deemed precious to them should be surrendered, in order that the Slaveholder might be perfectly at ease in his iniquity." *Id.* at 859 (quoting Letter from James G. Birney to Ger-

After this battle, efforts to create a permanent and more comprehensive Gag Rule were redoubled.<sup>193</sup> However, efforts to eliminate the Gag Rule also grew and became increasingly successful with increased public awareness and understanding of the restriction of civil rights which flowed from the Gag Rule. At the beginning of the December Congress of 1844, Adams tried again to eliminate the Gag Rule and, by a vote of 108 to 80, won an unassailable victory.<sup>194</sup> Nine years after its proposal, the Gag Rule was finally defeated.<sup>195</sup>

The efforts to suppress abolitionist speech "produced a defense of freedom of expression. By 1859, a broad defense of free expression on the subject of slavery was a central part of the ideology of the Republican Party. In the eyes of many, free expression became a right of American citizens."<sup>196</sup> This result confirmed what proponents of abolition hoped, and opponents of abolition feared — that the dissemination of the abolitionist message would lessen support for slavery and increase support for civil rights. The abolitionists "believed that truth would vanquish error, and freedom of speech would destroy slavery,"<sup>197</sup> an ideal view of the power of free speech. Many had chided supporters of slavery in their attempts to suppress debate on the topic. "To silence them is impossible; however foolish and absurd may be their opinions they have a *right* to promulgate them . . . ." Attempts at forcible suppression would merely increase their support."<sup>198</sup> Others argued that if slavery could not be discussed, it could not survive.<sup>199</sup> Adams had warned his colleagues that "clamping down on the petitions would have the paradoxical result of opening the discussion they wanted to close, as well as undercutting core values of the country."<sup>200</sup> Adams argued for

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rit Smith (Sept. 13, 1835), in *LETTERS OF JAMES GILLESPIE BIRNEY 1831-1857* 243 (Dwight Dumond ed., 1966) [hereinafter *Birney Letter*]]. The abolitionists had reformed the debate over slavery into a debate over the liberty of American citizens. So it became clear that "slavery should cease in order that freedom may be preserved to any portion of this land." *Id.* at 860 (citing *Birney Letter*).

<sup>193</sup> See *MILLER*, *supra* note 2, at 371. "No petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any other State or Territory, or the slave trade between the States or Territories of the United States, in which it now exists, shall be received by this House, or entertained in any way whatever." *Id.* at 371 (reciting a stricter Gag Rule, Rule 21, of 1840). This version became Rule 21 (and later 23 and then 25) of the House of Representatives, a permanent rule, rather than a resolution which would expire at the end of each session. *Id.* at 370-71.

<sup>194</sup> See *id.* at 476.

<sup>195</sup> See *id.*

<sup>196</sup> *Curtis*, *supra* note 7, at 859.

<sup>197</sup> *Id.* at 866.

<sup>198</sup> *Id.* at 812.

<sup>199</sup> See *id.* at 846, 853. "[P]rinciples, opinions, institutions and usages, which cannot bear thorough examination and inquiry," they announced, "are unworthy of Americans, and ought to be abandoned." *Id.* at 860 n.419 (quoting *PROCEEDINGS OF A CONVENTION OF DELEGATES, ASSEMBLED FROM VARIOUS PARTS OF THE STATE OF NEW YORK, AT UTICA, IN THE COUNTY OF ONEIDA, ON 21, OCTOBER 1835*).

<sup>200</sup> *MILLER*, *supra* note 2, at 198. See also *Curtis*, *supra* note 7, at 866.

"deference to what has been heretofore the usage of this House, in deference to the right of petition, of freedom of speech, of freedom of the press, and freedom of religion."<sup>201</sup>

"By pulling on the string of this one among the bundles of liberties - the right of petition - the new nation . . . would manage to show itself that in the end those liberties are tied together; they are part of a single construct of liberty of thought and argument. The new nation also would demonstrate to itself that civil liberty was incompatible with the tragic deposit of its colonial past: human slavery."<sup>202</sup>

A stride toward the end of slavery was achieved when it was recognized that slavery also implicated the rights of citizens in general. "[A]s the focus shifted from freedom for the slave to the freedom of the Northerners to espouse the cause of the slave, abolitionists' pronouncements on abolition and freedom of expression got more attention from at least some segments of the Northern press."<sup>203</sup>

Americans began to realize that restrictions on their liberties flowed naturally from the continuation of slavery, and therefore many felt that it was "necessary, that Slavery should cease in order that freedom may be preserved to any portion of our land. The antagonistic principles of liberty and slavery have been roused into action and one or the other must be victorious."<sup>204</sup>

After this period in our history, protection for freedom of expression grew<sup>205</sup> and waned,<sup>206</sup> and "[d]uring the second Reconstruction of the 1960s, the spiritual descendants of the abolitionists were protected by the Federal Constitution against state efforts to suppress them - efforts Southern states used with such success before the Civil War."<sup>207</sup>

### III. CONCLUSION

The colonists talked of liberty during the Revolutionary War. They debated slavery during the founding of our nation, but found that the new Union could not tolerate the division that such discussion engendered. So they silenced, or tried to silence, those who would speak for or against slavery, valuing the *status*

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<sup>201</sup> MILLER, *supra* note 2, at 198 (quoting a speech by Congressman Adams, Dec. 21, 1835).

<sup>202</sup> *Id.* at 22-23.

<sup>203</sup> Curtis, *supra* note 7, at 809.

<sup>204</sup> *Id.* at 860 (citing Birney Letter).

<sup>205</sup> See *id.* at 866 (citing *Dennis v. United States*, 341 U.S. 494 (1951) (finding that a federal statute making it a crime for any person to knowingly or wilfully advocate the overthrow of the Government did not violate the First Amendment if there was sufficient danger of a "substantive evil" to justify the application of the statute)).

<sup>206</sup> See *id.* at 866 (citing *Debs v. United States*, 249 U.S. 211 (1919) (finding that, under the Espionage Act of 1917, the delivery of a speech, in words and under circumstances to oppose the World War I and obstruct the recruitment and enlistment of troops, did not violate the First Amendment)).

<sup>207</sup> *Id.* at 870.



quo over free expression and truth. The new nation hoped to avoid the division which would result from open debate. Yet this strategy neither avoided division nor gained true emancipation.<sup>208</sup>

Though the abolitionists did not achieve the end of slavery on their own, it is hard to imagine what would have happened without them.<sup>209</sup>

Not enough credit is given to the great Abolitionist movement of tens of thousands of black and white people, risking their lives and their freedom to demand the end of slavery. It was this movement that galvanized anti-slavery sentiment in the country between 1830 and 1860 and pressured Lincoln into his first actions against slavery and pushed Congress into passing the Thirteenth, Fourteenth, and Fifteenth Amendments, which made slavery and racial discrimination at least illegal.<sup>210</sup>

We sometimes forget that the catalysts for positive social, political, and legal changes were once vilified and marginalized. We need to stay vigilant in the protection of the rights of those who speak for those who cannot speak for themselves. In 1857, Frederick Douglass said:

Let me give you a word of the philosophy of reforms. The whole history of the progress of human liberty shows that all concessions yet made to her August claims have been born of struggle. . . . If there is no struggle there is no progress. Those who profess to favor freedom and yet deprecate agitation, are men who want crops without plowing up the ground. They want rain without thunder and lightening. They want the ocean without the awful roars of its many waters. The struggle may be a moral one; or it may be a physical one; or it may be both moral and physical, but it must be a struggle. Power concedes nothing without demand. It never did and it never

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<sup>208</sup> If there is any doubt that legacy of slavery survives today, one need only listen to debates about reparation or affirmative action; consider the burning of Southern black churches; see the Klan march; and recognize the legacy of racism and separatism we have never come close to overcoming. If we think the realities of slavery are gone, and that we only live with the legacy, the news will correct those perceptions. On a single day in a newspaper, two stories report of people being sold into slavery and maintained in involuntary servitude, one in New York city involving 62 mostly deaf and mute Mexicans and their children; and the other, 90 people, men, women and children, in Benin, West Africa. See *Around the World*, THE COLUMBUS DISPATCH, July 20, 1997, at 8A. The incident in Benin was not an isolated one, authorities there reported that already this year they have intercepted more than 700 young people being sent abroad for sale into forced labor.

<sup>209</sup> Through their work, the abolitionists "were a necessary but not a sufficient moral agency for the ending of slavery in America. They brought forward a worthy strain in American culture. For slavery to be ended there had to be some individual human beings who did what [the abolitionists] did . . . [T]here were some people - a very small number, on the margin of society, condemned and harassed - who nevertheless made it the first order of their life's business to oppose American slavery, and to insist that it was a grotesque evil that should be eliminated, and that in a little over thirty years, it was." MILLER, *supra* note 2, at 513.

<sup>210</sup> ZINN, *supra* note 1, at 61.

will.<sup>211</sup>

Without such reformers, not only would the rights of slaves, blacks and women be meager, but the rights of all would be weakened and diminished.

Many social justice movements today continue the struggle to protect and enlarge society's understanding of civil rights; they face a myriad of defensive responses. Some also face legislative attempts to silence them, not unlike those the abolitionists faced. For instance, animal rights activists are restricted from protesting hunting if it disturbs hunters. Environmental activists are prevented from speaking of the ills of pesticides present in fresh produce. The military will allow gays and lesbians to serve in the military as long as they do not speak of, or act on, their sexual orientation. Similarly, doctors in some circumstances are not allowed to advise their patients about abortion.

Our society has progressed since the 1800s when both sides to the slavery debate were silenced. Today only one side of the debate is silenced, speech in opposition to these social justice movements is not restricted. Doctors may warn their patients of the immorality they deem inherent in abortion. Heterosexual members of the military may speak of their sexual orientation and need not hide their activities. Agricultural businesses are free to declare that their products are safe and healthy. Hunters are free to promote hunting. Perhaps current social justice movements can learn from the ultimately unsuccessful attempts to suppress the speech of abolitionists. Focus on the suppression itself helped turn the tide for the abolitionists, and may do the same for these newer movements. Hearing the protests of these movements is necessary to maintain a timely and honest outlook on how well we are achieving the ideals set out by the Founders. They did not succeed, nor will we unless we open our hearts and develop a broader understanding of who is deserving of the range of civil rights so many of us enjoy.

We need to be certain what "liberty" and "justice for all" mean, and seek to make these ideals realities. In these times of hate speech, and confusion about the use of the First Amendment, listen to those who speak for others and not out of self-interest. Listen to those who advocate and employ nonviolence. Listen to those, who, if they succeed in helping others, will build a better world for all of us, because when the rights of others are jeopardized, our own rights are jeopardized, and when rights are protected and strengthened for others, they are protected and strengthened for us all as well.

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<sup>211</sup> *Id.* at 240 (quoting Frederick Douglass, Remarks in a speech about freedom (1857)).

