The Sources of Anti-Slavery Constitutionalism in America, 1760-1848

Wieck, William M.

Published by Cornell University Press

Wieck, William M.
The Sources of Anti-Slavery Constitutionalism in America, 1760-1848.

For additional information about this book
https://muse.jhu.edu/book/58451

For content related to this chapter
https://muse.jhu.edu/related_content?type=book&id=2379310
Of the three antislavery groups that emerged from the decade of schisms, 1837–1847, the moderate constitutionalists represented the mainstream of abolitionist effort. They were the dominant element of the Liberty party (fl. 1840–1847) and formed the party creed in the mold of their constitutional beliefs. When they saw that Liberty was no longer serviceable, they played a major role in forming the Free Soil coalition of 1848. Moderates provided what basis there was for the Republican party’s reputation for opposing slavery in the late 1850s. Being a centrist group, they clung to the United States Constitution and used conventional modes of political effort to attract nonabolitionist northern voters to their program. This characteristic, however, gave both their political organization, the Liberty party, and their constitutional doctrine a centrifugal tendency. Clear and distinct at their cores, both the party and its program tended to dissipate at the peripheries, losing voters to the regular parties and sacrificing principles for political power. As abolitionists, the moderates seemed manqué: unrealized, unfulfilled. The closer they approached conventional power in the northern states, the more they confused their reason for being. Rescued from irrelevance thanks to the political furor caused by the Kansas-Nebraska Act of 1854, which repealed the Missouri Compromise, they drifted into that menage of former Whigs, nativists, Independent Democrats, and Free Soilers, the Republican party.

The unified antislavery movement of 1833–1837 was put under stress by two forces simultaneously: the disruptive tendency of antislavery political action, and the controversies swirling around William
Lloyd Garrison. The first appeared when a group of abolitionists in upstate New York began to politicize what had been, till then, a benevolent reform movement. This immediately provoked opposition by Garrisonians and by some non-Garrisonian abolitionists, who feared the consequences of antislavery politics. At the same time, Garrison and his critics came to a falling out, due partly to Garrison’s attack on the political-action abolitionists, and partly to the criticism of Garrison mounted by his opponents in and outside the movement. (We will examine this second tendency in the ensuing chapter.)

Certain forms of abolitionist political action were neither novel nor controversial in 1837. Ever since endorsing “moral and political action, as prescribed in the Constitution of the United States” in the 1833 AA-SS Declaration of Sentiments, abolitionists had pursued various goals by political methods at the national, state, and local level. They memorialized Congress and the state legislatures, testified before state legislative committees, and litigated at all levels of the state court system. Recognizing that Americans were “eminently a political people,” some abolitionists hoped to make abolition “a practical question, something more than just an abstract theory.”1 The most promising way of achieving this seemed to be by political efforts aimed at repealing state and national laws that succored slavery. “Slavery is the creature of legislation, upheld & supported by law,” resolved a Massachusetts local auxiliary of the AA-SS in 1839, “and is to be abolished by law & by law only.”2

Non-Garrisonian abolitionists believed that political action was not only morally legitimate, but even a duty. John Pierpont, a Boston Unitarian minister and abolitionist, set forth the theological bases for antislavery politics:

Political action . . . embraces all that we do in reference to human laws: not only the enacting, the judicial declaring or exposition, and the executive administration or application and enforcing of laws; but also

1. Joshua Leavitt to Myron Holley, 12 July 1839, L. P. Noble to Myron Holley, 4 Dec. 1840, in Myron Holley MSS., N-YHS.
all steps or measures that, as Citizens, we adopt, either independently or in association with those whose sympathies and preferences are the same as our own, with a view to seeing that proper men are chosen to enact, declare, or administer them; [and] all that we will ourselves do, as subjects upon whom those laws are to act; as whether we will or will not obey them. . . . It is not merely my right—it is my duty . . . to obey [God] in using my political influence, my elective franchise, in his service, by placing those in political office who, I believe, will be faithful in his cause;—in other words, I am bound to act in behalf of morality through political instrumentalities.3

The principles Pierpont set out catechetically had already impelled New York abolitionists in the direction of electoral politics. In their efforts (1837–1838) to secure passage of a jury trial statute for fugitive slaves, Elizur Wright, William Jay, Gerrit Smith, and Henry B. Stanton quickly moved from merely petitioning the legislature (which proved futile) to the tactic known as “questioning,” that is, formally interrogating candidates for state office to sound out their position on specific slavery-related issues. Questioning implied that abolitionist voters had a duty to vote only for candidates who answered correctly.4 This soon raised the problem of political frustration: what should an abolitionist voter do when no candidate responds satisfactorily? Political-action abolitionists at first agreed with Garrison that the voter should “scatter” his vote, i.e., cast a write-in vote as a way of protesting the nonchoice presented to him.5 But they soon abandoned that tactic because proslavery dominance of both the regular parties meant virtual self-disenfranchisement for abolitionist voters.6

Contemplating the dilemma of wasting their political power or being absorbed in the proslavery parties if they voted their convictions or their party affiliation on nonslavery issues, abolitionists began

5. AA-SS resolution of 11 July 1838, copy in Elizur Wright Papers, LC.
to think, not in terms of the individual voting as a personal moral act, but of abolitionists voting *en masse* as a group political tactic. If abolitionists could concentrate their vote, they might elect someone sympathetic to their views or at least hold the balance of power, thereby providing an incentive for one of the regular parties to adopt their program or nominate acceptable candidates in the next election. But again the problem of frustration arose: what if the parties ignored them? Advanced proponents of political action in 1838 responded by recommending that abolitionists run their own candidates. By 1839, Alvan Stewart, Joshua Leavitt, Myron Holley, and Gerrit Smith called for abolitionist nominations, Smith even going so far as to urge putting up an entire abolitionist slate, the "Freeman's ticket."

This tactic, known as "independent nominations," proved to be a preliminary to the organization of an antislavery third party. Alvan Stewart recommended formation of such a party to the Executive Committee of the New York State Anti-Slavery Society in February 1839, but even in that nursery of political action, upstate New York, this was premature, and the society took no action at the time. Undeterred, Stewart and Holley continued working throughout 1839 to promote the third party. Both were upstate New York lawyers, Holley having been trained in the law office of Chancellor James Kent and Stewart in the office of Kent's successor, Chancellor Reuben Walworth. Holley, who had served as a state assemblyman and as a commissioner of the Erie Canal, came to antislavery out of the anti-Masonic movement. Stewart, on the other hand, began his reform career with the teetotalling wing of the temperance crusade. A competent though not brilliant lawyer, he practiced in Utica, where he lost

7. Alvan Stewart to Francis Jackson, 23 July 1838, William Lloyd Garrison MSS., Department of Rare Books and MSS., used by courtesy of the Trustees of the Boston Public Library; Alvan Stewart, speech in New York City, 24 Oct. 1839, reprinted in *Emancipator*, 21 Nov. 1839; *Emancipator*, 26 Dec. 1839; Smith's proposed Freeman's ticket is reprinted in Fladeland, *Birney*, 179.


some of his clients because of his abolitionist activities and his prominence in the formation of the NYSA-SS, of which he served as president. He moved quickly from immediatism to both third-party political action and radical constitutionalism.\textsuperscript{10}

Stewart insisted that action within the existing parties was futile because slaveholding influence permanently nullified abolitionist efforts in them.\textsuperscript{11} This argument proved persuasive in New York state, and momentum for a third party built up quickly. An antislavery convention in Warsaw, New York (12 November 1839) nominated Birney for president and Francis J. LeMoyne of Pennsylvania as his running mate. Both declined, but a subsequent convention in Albany on 1 April 1840 formally created the Liberty party, renominated Birney, who accepted this time, and chose another Pennsylvanian, Thomas Earle, as its vice-presidential candidate. In keeping with contemporary practice, the convention did not adopt a platform. What ensued was a noncampaign, because Birney spent the summer and fall in England at the World Antislavery Convention. The result was foregone: in all the northern states, the Liberty candidate got less than one percent of the vote.\textsuperscript{12}

The Liberty party was the organizational home for moderate abolitionists for seven years, and its political efforts provided some of the principal occasions for working out moderate constitutional theory. It did not enjoy the support of all abolitionists, however; Garrisonians condemned it on grounds of tactics as well as principle, and even some non-Garrisonians sympathetic to political action criticized it or held aloof from its activities. Francis LeMoyne, William Jay, Lewis

\textsuperscript{10} With the exception of tenBroek's \textit{Equal under Law}, a brief appreciative notice in Dumond, \textit{Antislavery}, 293–295, and Sewell, \textit{Ballots for Freedom}, Stewart has been overlooked by modern historians of abolition. Though less well known than Garrison, Birney, Weld, the Tappans, et al., his influence was pervasive and he badly needs a modern biography. For contemporaneous evaluations, see Levi Beardsley, \textit{Reminiscences; Personal and Other Incidents; Early Settlement of Otsego County }\ldots\textit{ (New York: Charles Vinten, 1852), 155–175; introductory essay in Marsh, ed., \textit{Writings of Stewart}, 9–39; handwritten notes of Luther R. Marsh in Alvan Stewart Papers, New York State Historical Association, Cooperstown, New York.}

\textsuperscript{11} Alvan Stewart to Edwin W. Clarke, 14 Sept. 1839 and 17 Oct. 1840, Misc. MSS. Slavery; Stewart to Myron Holley, 16 Dec. 1839, Myron Holley MSS.; Stewart to Samuel Webb, 21 Nov. 1838, Alvan Stewart Papers; all N-YHS.

\textsuperscript{12} Figures are from a table in Theodore C. Smith, \textit{The Liberty and Free Soil Parties in the Northwest} (New York: Longmans, Green, 1897), 46.
Moderate Constitutional Antislavery

Tappan, Gamaliel Bailey, and John G. Whittier warned that the party would split the movement because it could not avoid taking positions on issues not related to slavery, which could only have a divisive effect among abolitionists.\(^\text{13}\)

Neither such criticism nor their meager showing in 1840 daunted the Libertymen. They reconvened in New York City on 12 May 1841, renominated Birney for president, and adopted a proto-platform condemning the "slave power" as the cause of most of the country's troubles.\(^\text{14}\) The party subordinated the staple issues of contemporary American politics—subtreasury, tariffs, public lands, and so on—to the overriding question of abolition. Historians refer to this as the "One Idea" platform. Some Libertymen soon found One Idea constrictive, and began insisting that the party adopt a position on non-slavery-related issues, partly as a matter of moral obligation to the extent that these issues had some moral significance, however attenuated, and partly to attract the interest of regular Whigs or Democrats. Birney and other Michigan abolitionists attacked One Idea vigorously in 1845. For a time, moderates encouraged this impulse within the party. The Cincinnati Philanthropist in 1844 had claimed that "the distinguishing feature of the Liberty Party is intended to be a regard for the moral influence exerted through the elective franchise. We design this not only in regard to slavery, but to apply in every other respect."\(^\text{15}\)

But the alternative to One Idea was dangerous, for taking a stand on extraneous issues quickly presented two problems. On one hand, political-action abolitionists might adopt expediential positions and trim their abolition principles to widen the appeal of antislavery by diluting it. On the other, positions on nonslavery issues were divisive,


because they would necessarily appeal either to Whigs or to Democrats. Once the political abolitionists began experimenting with non-slavery questions, they lapsed into multifariousness and inconsistency, adopting positions on both sides of issues ranging from the immediate and practical (e.g. homesteads and public lands policy) to the utopian (abolition of military forces). For these and other reasons, the Liberty party did not do well in later electoral contests.16 But lack of success did not deter Libertymen from working out a constitutional theory that complemented their political program. Liberty politics until 1845 derived from their constitutional theory. Rarely in American history has a political party's platform been so integrally shaped by constitutional thought.

The moderates of the Liberty party revered the federal consensus as the touchstone of their program. Speaking for the Liberty party in 1844, Arnold Buffum repulsed the charge that Libertymen meant to free slaves in the southern states: “We intend no such thing. . . . In relation to slavery in the states, politically we claim no right to interfere.”17 Salmon P. Chase explained that the framers of the Constitution in 1787 “had no power to change the personal relations of the inhabitants of any State to each other, but were charged with the duty of framing a general system of government for the people of all the States, leaving those relations untouched [. I]t was equally impossible for them to abolish slavery in the states where it existed.”18 Libertymen inserted into their Free Soil platform of 1848 a plank definitively proclaiming that “slavery in the several States of the Union which recognize its existence, depends upon the State laws alone, which cannot be repealed or modified by the Federal Government, and for which laws that government is not responsible. We therefore propose no interference by Congress with Slavery within the limits of any State.”19 In twelve years, this evolved into a Re-

publican guarantee for the security of slavery in the South. The Republican platform of 1860 promised to maintain "inviolate the rights of the states, and especially the right of each state to order and control its own domestic institutions according to its own judgment exclusively."\(^{20}\)

The correlative to a lack of a federal power to abolish slavery in the states was the lack of a federal power to establish it there—or anywhere else. Consistently in their platforms (Liberty 1844, Free Soil 1848, Free Democracy 1852), the moderates insisted that "the General Government has, under the Constitution, no power to establish or continue slavery anywhere," "no more power to make a slave than to make a king; no more power to institute or establish slavery, than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution, or derived by just implication from them."\(^{21}\) "Congress can neither create nor continue slavery anywhere, & in all places under the exclusive jurisdiction of Congress slavery is constitutionally impossible," Chase assured Lewis Tappan. "All practically important constitutional positions for antislavery men to [illegible] are the logical consequences of this."\(^{22}\)

Moderates denied federal power to establish slavery on two grounds. First, adopting the doctrine of "strict construction" usually associated with Jefferson's position in the Kentucky Resolutions (1798–1799), moderates claimed that neither explicit clauses nor implied powers "delegated" this capacity to the federal government, and the Tenth Amendment specifically reserved it to the states.\(^{23}\) Second, the Fifth Amendment's due process clause was a restraint on federal authority.\(^{24}\) Since enslavement deprived a person of liberty and property, Congress could not establish slavery in the District of

22. Chase to Lewis Tappan, 18 March 1847, Salmon P. Chase Papers, LC, ser. 1, cont. 12.
23. Joshua R. Giddings, A Letter from Hon. J. R. Giddings upon the Duty of Anti-Slavery Men in the Present Crisis (Ravenna: William Wadsworth, 1844), 3. (Giddings was a Whig, not a Libertyman, but his constitutional views were identical with those of the moderates).
Columbia, protect it in the territories, admit new slave states, or provide a federal mechanism for the recapture of fugitive slaves.25

Their reading of the framer’s intentions fortified moderates in this conviction. Unlike the radicals, they conceded that the draftsmen of the Constitution deliberately included securities for extant slavery in the text;26 unlike the Garrisonians, they viewed these concessions as a pledge that the national government should not be concerned in any way with the establishment or preservation of slavery.27 Seeing slavery “interwoven with domestic habits, pecuniary interests, and legal rights,” the framers did not attempt to abolish it, for the perfectly good reason that they had no power to do so even if they had had the inclination. But they attempted to subordinate their pro-slavery concessions to the more exalted libertarian principles of the Revolution and the Constitution. The framers meant to “keep the action of the national government free from all connection with the system; to discountenance and discourage it in the states; and to favour the abolition of it by state authority—a result then generally expected; and, finally, to provide against its further extension by confining the power to acquire new territory, and admit new States to the General Government.”28 They therefore avoided use of the words “slave” or “slavery” in the document and inserted their true libertarian aspirations into the Northwest Ordinance.

Given this antislavery impulse, though, what had happened since 1787 that caused the framers’ expectations to be so sadly betrayed? Surely Madison and the others had not meant to create a national authority that would wage war on unoffending Mexico to extend the power of the slave states? The moderates found their answer to these questions in the conception of a Slave Power. On the reality of this power, all abolitionists agreed. Francis Jackson, a Garrisonian, defined it as “a body of men, which, however it may be regarded by the Constitution as ‘persons,’ is in fact and in practical effect, a vast

25. [Salmon P. Chase], “Address of the Southern and Western Liberty Convention, Held at Cincinnati, June 11 and 12, 1845. To the People of the United States,” in Charles D. Cleveland, ed., Anti-Slavery Addresses of 1844 and 1845 (Philadelphia: J. A. Bancroft, 1867), 86.
28. [Chase], “Address of the Southern and Western Liberty Convention,” 84.
moneymed corporation, bound together by an indissoluble unity of interest, by a common sense of a common danger; counseling at all times for its common protection; wielding the whole power, and controlling the destiny of the nation.”\textsuperscript{29} Taking advantage of unwise concessions to slavery made by the epigone who succeeded the framers, such as the Fugitive Slave Act of 1793 or the toleration of slavery in the Louisiana Purchase area, the Slave Power “has over­leaped its prescribed limits, and usurped control of the National Government.”\textsuperscript{30} Seeing such power in the hands of their enemies, Garrisonians thought conventional political opposition “impossible or powerless,”\textsuperscript{31} but moderates disagreed. Harking back to the original justifications of antislavery political action, moderates maintained that slavery was a creature of law, and hence could be abolished only by repeal of laws supporting it.\textsuperscript{32} This could best be accomplished by placing abolitionists in legislatures and would require leading the American people to a true understanding of constitutional principles.\textsuperscript{33}

In order to inculcate these principles, moderates turned to \textit{Somerset}, and particularly to Mansfield’s statement that “the state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It’s so odious, that nothing can be suffered to support it but positive law.”

From this opinion the moderates concluded that slavery could be created by positive law, and had been in the southern states. But where it had not been so created, or where the positive laws necessary to sustain it could not have been enacted because the proper


\textsuperscript{31} [Stephen S. Foster], \textit{Revolution the Only Remedy for Slavery} (New York: AA-SS, [1855?]), 15.


\textsuperscript{33} Henry B. Stanton to Salmon P. Chase, 6 Feb. 1844, in Chase Papers, LC, ser. 1, cont. 8.
legislative authority lacked power to pass them, slavery could not exist. "Slavery is a creature of positive law," declared Pennsylvania Libertymen, "and exists within those limits, and within those limits only, where the laws that sanction it have force."\(^\text{34}\) An upstate New York abolitionist, Edwin W. Clarke, wrote that slavery "does not spring up like noxious weeds spontaneously [sic], requiring positive enactments to suppress it. Except when it is created and sustained by positive statutes it is unknown, it cannot in the nature of things otherwise exist."\(^\text{35}\) This was the constitutional and political heart of the Liberty position.

Libertymen in their political and forensic efforts played endless variations on this idea. The two most important variations were neo-Somerset ideas relating to extradomiciliary slaves and to slavery in areas under federal jurisdiction. A proper application of neo-Somerset in these two areas, moderates predicted, would interdict slavery's expansion and confine it to the southern states. The belief that slavery would stagnate and eventually die if confined strictly to the states where it existed as of 1840 was crucial to Liberty constitutional thought. Moderates proposed a "quarantine of slavery"\(^\text{36}\) in the expectation that slavery could not survive if it could not expand. Libertymen further assumed that the power of the federal government to impose this quarantine was conceded by all, a naive attitude in the light of southern resistance to territorial restriction in 1820 and to abolition in the District of Columbia in 1836.

Neo-Somerset as applied to extradomiciliary slaves was meant by moderates to lop off the penetration of slavery into the free states by masters either pursuing fugitive slaves or bringing in sojourning slaves. "If you choose to cling to such a system [slavery],—clinging to it; but you shall not cross our line; you shall not bring that foul thing here," declaimed the Pennsylvania Liberty party to the South.\(^\text{37}\) The constitutional basis of this position was Birney and Chase's Matilda argument of 1837, which had comprehensively set forth all arguments necessary to inhibit recaptures and demonstrated the unconstitution-

---

35. MS. draft, 29 March 1842, in Edwin W. Clarke MSS., N-YHS.
36. The phrase is Richard H. Sewell's, *Ballots for Freedom*, 121; see p. 171 for elaboration.
ality of the 1793 federal fugitive statute. Moderates, led by Chase, insisted through the 1850s that when slaves leave a slaveholding jurisdiction, they “become free, whenever and however they get out of a slaveholding state, simply because they are out.”

Under this interpretation, fugitives, sojourners, and in transitu slaves were freed, permanently, the moment they left slave jurisdictions. Moderates embraced the doctrine enunciated by southern supreme courts in *Harry v. Decker & Hopkins* (Mississippi, 1818), *Rankin v. Lydia* (Kentucky, 1820), and *Lunsford v. Coquillon* (Louisiana, 1824) that “slavery is against natural rights, and strictly local, and that its existence and continuance rest on no other support than State legislation.”

On these central tenets, Liberty moderates saw eye-to-eye with an important group of individuals, predominantly Whigs, who did not belong to abolitionist organizations or the Liberty party, but who opposed the expansion of slavery outside the extant slaveholding states. (Whether these individuals should be considered abolitionists is a definitional problem that need not be resolved here; what is important is that they agreed with many or all points in the Liberty party’s moderate constitutional program.) Early in 1842, Chase, on behalf of the Liberty party, wrote to the foremost Whig opponent of slavery’s expansion, Joshua R. Giddings, who represented the Ash-atabula district of northeastern Ohio in the United States House of Representatives, and who, together with John Quincy Adams, led a small Whig antislavery bloc known as “The Insurgency” there. “Slavery is a creature of state law,” Chase insisted to his fellow Ohioan, “local—not to be extended or favored, but to be confined within the States which admit and sanction it.”

Giddings, from his own constitutional position, agreed with this idea, and soon found an opportunity to introduce it, in elaborated form, into full-dress debate in the House.

The House had been in an Insurgency-induced ferment for several months. Giddings had carried on a one-man crusade against further

---


40. Salmon P. Chase to Joshua R. Giddings, 15 Feb. 1842, in Joshua R. Giddings Papers, LC.
federal support for the Second Seminole War, which he correctly saw as being waged by the federal government to protect the security of slavery on its southern flank by exterminating maroon colonies in northern Florida, expelling their Indian members to the west, and selling their black members back into slavery. In his Seminole War arguments, Giddings anticipated Chase's point by arguing that since slavery was exclusively a matter for state control under the Tenth Amendment, the federal government had no power to wage war or police territories to enhance its security.\textsuperscript{41} The gag was still in force, but the Insurgency, particularly Adams, had evaded and flouted it to the point where proslavery representatives tried, unsuccessfully, to censure Adams for twitting them about it. This failure had put the proslavery majority of the House in a foul mood at just the time Giddings chose to introduce moderate abolitionist ideas into congressional debate despite the gag.

Giddings seized on a spectacular incident, the \textit{Creole} mutiny (1842), to promote the constitutional principles he shared with Libertymen. An American vessel, the \textit{Creole}, was carrying some Virginia slaves on the high seas to New Orleans in the coastal slave trade. Somewhere outside Virginia's territorial waters, the slaves mutinied, seized the ship, killed a passenger, and sailed the vessel to Nassau, in the Bahamas. There British authorities detained nineteen of the slaves suspected of the murder, but set free the rest because slavery had been abolished in the British colonies. Officials of the Tyler administration, including Secretary of State Daniel Webster and Minister to England Edward Everett, demanded compensation for the freed slaves' owners from the British government.\textsuperscript{42} This prompted James G. Birney (then an exponent of the moderate position) to write an article, which Representative Seth Gates, another member of the Insurgency, secured for publication in the New York \textit{American}. Birney denounced executive efforts to uphold an extraterritorial continuation of the slave relationship onto the high seas and into a foreign nation's colonial holdings where slavery had been abolished.\textsuperscript{43}

\textsuperscript{41} The Florida War, Speech of Mr. Giddings ... in the House of Representatives, February 9, 1841 (Hallowell: Bangor Female Anti-Slavery Society, 1841), 6–7.

\textsuperscript{42} See the untitled Senate document, 27 Cong. 2 sess., ser. 397, doc 137 (21 Feb. 1842), including a letter from Webster to Everett, expounding the administration's proslavery position.

\textsuperscript{43} The article is reprinted in Birney Letters, II, 667–670; see also William
Giddings then combined Birney's argument with some ideas of his own and presented them as the "Creole Resolutions" on the floor of the House. The resolutions centered around the moderates' neo-
Somerset theory that the slaves became freemen once outside Virginia
waters. The federal government had no power to extend their slave
status onto the high seas or protect it there, because slavery existed
only by force of Virginia's municipal laws and "is necessarily con-
fined to the territorial jurisdiction of the power creating it." The
slaves, in mutinying, had merely assumed their normal status—freedom—and had resisted efforts to reenslave them. Though Giddings
and other moderates did not know it, such views found a sympathetic
audience in an unlikely place, the United States Supreme Court.
Joseph Story, writing an implicit rebuke to Webster, insisted that
whether a jurisdiction chooses to recognize the property status of
slaves coming into it by accident is entirely a matter of comity, not a
right that the claimant or his jurisdiction may demand.44

Democrats and proslavery Whigs then compounded the propa-
ganda value of the Creole Resolutions by moving a censure of
Giddings for expounding such doctrines. Having learned a lesson
from the effort to censure Adams, they immediately moved the
previous question, a parliamentary trick that had the effect of pro-
hibiting Giddings from speaking in his own defense. With Giddings
and other antislavery Whigs thus gagged, censure passed easily, but
Giddings turned his enemies' sword back on them.45 He resigned his
seat, returned to his Ashtabula district, campaigned for reelection,
and was returned by a landslide—eighteen to one over his Demo-
cratic opponent. His reelection was the first instance in national
elections when voters could be said to have voted in a referendum
on an issue relating exclusively to slavery. Giddings' triumphant re-
turn to his seat, together with the failure of the Adams censure, as-
ured the demise of the gag, which was repealed in 1844.

E. Channing, The Duty of the Free States; or, Remarks Suggested by the Case
of the Creole (Boston: William Crosby, 1842); The Creole Case, and Mr.
Webster's Despatch ... (New York: American, 1842); and "J.C.," "Case

44. Globe, 27 Cong. 2 sess., 342 (21 March 1842). Story to Daniel Webster,
26 March 1842, in C. H. Van Tyne, ed., The Letters of Daniel Webster (New

45. James B. Stewart, Joshua R. Giddings and the Tactics of Radical Politics
(Cleveland: Press of Case Western Reserve Univ., 1970), 73-76.
The constitutional affinity between the Whig Insurgency and the Liberty moderates in 1842 had important consequences for both. It led both groups to consider the possibility of coalition. Giddings earnestly wooed Libertymen, hoping to entice them into the Whig fold. In public and private correspondence, he reminded them that it had been Democratic administrations that had been the true enthusiasts for proslavery measures, whereas Whigs respected states’ and individuals’ rights. Whigs, he argued, supported the Liberty program of “the preservation of our own [state’s] rights; the repeal of all acts of Congress, passed for the support of slavery or the slave trade; to separate the Federal Government, and the free States, from all unconstitutional connexion with that institution, and to leave it with the individual States, where the Constitution placed it.”46 On the Liberty side, Chase and others also considered fusion. Absorption into the Whig party would have been unacceptable to Chase, who remained a lifelong crypto-Democrat, but fusion in a new antislavery party had much appeal to disaffected moderates who were disheartened by Liberty’s prospects at the polls.

While Chase and others were contemplating fusion, they continued to elaborate and extend their original Liberty principles, to tolerate occasional semiofficial restatements of Liberty views that placed them in the radical camp, and to work harmoniously with the radicals in their ranks. Even Chase, in private correspondence in 1844, went so far as to proclaim himself “a full convert to the [radical] doctrine that slavery and the Constitution are incompatible.”47 This impulse carried Liberty moderates a long way toward radicalism, as where they insisted that property rights in slaves did not enjoy the ubiquitous protection of natural law extended to ordinary property.48 Their constitutional position, which Chase in 1856 called the “denationalization of slavery entire,”49 suggested many programmatic political applications: abolition of slavery in the District of Columbia; abolition of


47. Chase to Lewis Tappan, 3 April 1844, in Chase Papers, LC, ser. 1, cont. 8.


the slave trade; congressional prohibition of removal of slaves out of their domiciliary state; abolition in the territories; refusal to admit new slave states; refusal to call up the militia of other states to put down slave insurrections; refusal to protect the carrying of slaves on the high seas; refusal to use slave labor in public works; selection only of abolitionists for federal appointive office; denial of the right of citizens of any but the original thirteen states to recapture fugitive slaves; denial of federal diplomatic and military power to support the interests of slaveholders anywhere outside the United States; and prohibiting slaveholding on federal properties like forts and ships. 50

The constitutional doctrines of the moderates had their political counterparts. Picking up a suggestion made in 1835 by abolitionists in Maine, moderates demanded that the federal Constitution be "wrested from the polluting and unholy alliance with slavery." To achieve this, they sought "the absolute and unqualified divorce of the General Government from slavery." 51 Divorce was a many-planked platform, sometimes aggressively antislavery, and broad enough in its appeal to hold the loyalty, for a time, even of the radicals. It embraced all the policy goals just noted, and differed from the radical position in only two particulars, though those two were crucial: the universal illegitimacy of slavery and the power of the federal government to abolish it in the states.

Moderates adopted the most comprehensive expression of their constitutional and political views in the 1844 Liberty platform, the lengthiest platform adopted by any American political party in the nineteenth century. They extolled "human brotherhood," called for "the restoration of equality of rights, among men, in every State where the party exists," promised that they would "carry out the principles of Equal Rights, into all their practical consequences and applications, and support every just measure conducive to individual and social freedom," called for laws prohibiting slaveholding in all


areas under federal jurisdiction including the high seas (an indirect attack on the interstate slave trade), demanded repeal of the federal number and fugitive slave clauses of the Constitution, urged repeal of racially discriminatory state laws, and "cordially welcome[d] our colored fellow citizens to fraternity with us in the Liberty Party, in its great contest to secure the rights of mankind." 52

These bold egalitarian statements, the uttermost Liberty salient toward radicalism the party ever achieved, were virtually repudiated within a year as the party's western wing rose to dominance. After 1841, the eastern leadership of the party disintegrated. Some easterners began an irreversible drift toward radicalism that left them a minority in the party by 1847; these included Alvan Stewart, Gerrit Smith, William Goodell, and James G. Birney. Myron Holley and Charles T. Torrey died prematurely.53 Elizur Wright and Henry B. Stanton dropped out of antislavery temporarily. Joshua Leavitt went to Washington in 1841 as a correspondent of the Emancipator where he worked with Theodore Dwight Weld as an abolitionist apostle to the Whigs. After the 1844 national elections, westerners dominated Liberty affairs, led by Ohio's Salmon P. Chase. The Ohio Libertymen included Gamaliel Bailey, editor of the Cincinnati Philanthropist, Sam Lewis, Stanley Matthews, future justice of the United States Supreme Court, the brothers Edward and Benjamin F. Wade, James H. Paine, Edward S. Hamlin, and Leicester King. In Illinois, Zebina Eastman, editor of the Chicago Western Citizen, and Owen Lovejoy, congressman and brother of the murdered abolitionist editor Elijah Lovejoy, spoke for the party.

The westerners, soon called "the expedients" by their opponents, rejected the radicals' broad political platform as impractical and their constitutional theory as unsound. They hoped either to convert one of the regular parties to antislavery or to amalgamate with elements from both the parties to form a new antislavery political coalition having the moderate program as its constitutional platform, and therefore did not want to scare off potential nonabolitionist allies. The emergence of western and moderate leadership within the Liberty

53. Holley died of natural causes in 1841. Torrey died in 1846 of consumption contracted while imprisoned in Maryland for his role in helping fugitives escape, and, in the movement's hagiology, was accorded martyr status second only to Elijah Lovejoy.
party was signalized by the Southern and Western Liberty Convention, held in Cincinnati, 11 and 12 June 1845, which had been called by Chase in an effort to broaden Liberty's appeal to Whigs and Democrats.

The Southern and Western Convention adopted a firmly moderate platform drafted by Chase. Vestiges of abolition appeared in planks calling for divorce, abolition of slavery in the territories, and interdiction of the interstate slave trade. But a new and distinctly western emphasis appeared in a plank declaring that the whole point to antislavery was "to discourage and discontinue the system of work without wages," an oblique anticipation of the later Free Soil position.54 Emphasizing this Free Soil posture, which appealed to the self-interest and even racism of whites, was the striking absence of the previous year's platitudes about equal rights and brotherhood. The westerners would have no nonsense about "cordially welcom[ing] our colored fellow citizens to fraternity with us"; the cordial welcome was to white Whigs and Democrats. This doubtless represented a politically sensible and expedient concession to the prevalent racism of the time,55 but it was a retrograde movement from the 1844 platform and did reflect western, antiradical views.

After 1845 the idea of divorce gave way to Free Soil, which in turn became transmuted into the slogan-doctrine "Freedom national, slavery sectional," a catchy restatement of neo-Somerset principles adapted to the American federal union. Adopted as the core of the Republican position in 1856, Freedom-national embodied the idea that freedom, the natural condition of men, should pertain everywhere except in jurisdictions that had established slavery by positive law. This doctrinal transformation, with its implication for narrowing the constitutional scope of the antislavery attack, can best be explained by the political hopes of the western moderates. As early as 1842, Chase had urged a plank of "Protection to Free Labor" as an element of the Liberty program,56 arousing Birney's suspicions that

he planned to dissociate abolition from Liberty efforts.57 Chase for his part, had opposed Birney’s renomination in 1844 and had never tried to conceal his own Democratic leanings. He had little faith in the staying power of the Liberty party as a political entity. “As fast as we can bring public sentiment right,” he explained to New Hampshire Senator John Parker Hale, “the other parties will approach our ground and keep sufficiently close to it, to prevent any great accession to our numbers.”58

As Chase was putting these ideas on paper in 1846–47, most Libertymen had by then decided that One Idea no longer sufficed. The real question for the Liberty party was not whether One Idea should be modified, but whether it should be diluted or supplemented. Radicals wanted to supplement it with broad, universal-reform planks, while Chase and his supporters hoped to dilute it as part of an appeal to nonabolitionist Democrats and Whigs. This determination suddenly hardened as moderates perceived the widespread popularity of the Wilmot Proviso (1846), which they considered “by far more important than any movement on the subject of slavery” since the Missouri debates.59

The Wilmot Proviso prohibited the extension of slavery into any territory acquired as a result of the Mexican War; in all such territory before Mexico’s forced cession, slavery had been abolished under the Mexican Constitution. Supporters of the Proviso correctly feared that slavery would follow the American flag. Nicholas Trist, President Polk’s commissioner treating with Mexican envoys to end the war, reacted to their demand that slavery be excluded from any ceded territory by assuring them

that the bare mention of the subject in any treaty to which the United States were a party, was an absolute impossibility: that no President of the U.S. would dare to present any such treaty to the Senate; and that, if it were in their power to offer me the whole territory described in our project, increased ten-fold in value, and in addition to that, covered a

57. James G. Birney, diary entry of 22 April 1842, James G. Birney Papers, LC.
foot thick all over with pure gold, upon the single condition that slavery should be excluded therefrom, I could not entertain the offer for a moment, nor think even of communicating it to Washington.60

But the Wilmot Proviso was not the result of an outburst of abolitionist idealism. Rather, it was a response by northern Democrats, and specifically by New York Barnburners, to southern efforts to control the Democratic party and force slavery into the territories. Under heavy pressure from their constituents, and pilloried as catspaws of the Slave Power, Democratic congressmen and their colleagues in all the northern state legislatures backed the Proviso as the least painful way of defusing the slavery controversy, which they saw as endangering the Union.61

The Wilmot Proviso and the Free Soil appeal were antislavery at its most ambivalent. On the one hand, the Proviso was, as its Democratic supporters touted it, “the White man’s resolution.”62 The exclusion of slavery from the territories was for some Freesoilers only the prelude to ridding America completely of black people by colonization. The heart of the issue raised by the Proviso was the “question of the white man against the Ethiopian.”63 But on the other hand, for many non-Democratic Freesoilers, the Proviso was just one logical early step in the progression toward a more thoroughgoing attack on slavery. Gamaliel Bailey saw it as a temporary stop on the way to complete divorce; Charles Sumner went further, seeing the conversion of some Democrats to Free Soil as sustaining “a broader conclusion, that is, the duty of no longer allowing the continuance of the evil any where within our constitutional action. They must become Abolitionists.”64 Perhaps one source of the Proviso’s appeal lay in this ambivalence.

The Proviso furnished a common ground on which Liberty moder­
ates could join hands with nonabolitionists from the regular parties. 
Late in 1846, Massachusetts Whig Charles Sumner invited Chase to 
participate in "a new chrystallization of parties, in which there shall 
be one grand Northern party of Freedom." Moderate leaders re­
ponded warmly; Stanton and Stanley Matthews urged Chase and 
the Libertymen to accept a nonabolitionist as presidential candidate 
of a fusion party on a Wilmot Proviso platform. Chase leapt at the 
chance, admitting in private correspondence that "I have always 
regarded the Lib. organization as a means to this end [the overthow of 
slavery]; I now regard it as nothing more. I feel ready therefore to 
give up the Lib. organ. at any time when I see that the great object 
can be accomplished without the sacrifice of principle in less time 
by another agency."

Fusion became a realistic possibility after 1846 because of the 
wide popular support in the north for the Wilmot Proviso. Factions 
from the regular parties had been cut loose by the dominant pro­
slavery majorities in both, and by the Texas-annexation and war 
policies of the Tyler and Polk administrations. The Democracy was 
splitting in the states. Voters in the southern part of Ohio had already 
sent the maverick antislavery Democrat Jacob Brinkerhoff to the 
House, the first Democratic opponent of slavery in Congress since 
the ouster of Ohio Senator Thomas Morris in 1839. In Massachusetts, 
potentially antislavery Democrats Marcus Morton and George Ban­
croft grew uneasy under Doughface party leaders like Benjamin 
Henshaw, Benjamin Hallett, and Robert Rantoul—and even Rantoul 
came around to antislavery in the 1850s. The New York Democracy 
was divided between William Marcy's proslavery Hunker faction, 
favored by Polk in patronage matters, and the angry Barnburner 
followers of former president Martin Van Buren, who had been 
denied the 1844 presidential nomination because of his opposition 
to Texas' immediate annexation.

1, cont. 12.
66. Stanton to Chase, 6 Aug. 1847 and 6 June 1848, Chase Papers, LC, 
ser. 1, cont. 13 and 14 respectively; Cincinnati Weekly Herald and Philan­
thropist, 21 April 1847.
67. Chase to John Thomas, 24 June 1847, "Diary and Correspondence of 
Chase," II, 118–120.
68. Charles G. Sellers, James K. Polk, Continentalist: 1843–1848 (Princeton:
The most serious defection occurred in New Hampshire and produced an antislavery Democratic leader of national stature, John P. Hale. Before annexation, the New Hampshire Democracy had been dominated by the Doughface leadership of Franklin Pierce, Senator Charles Atherton, who gave his name to one of the early gags, Levi Woodbury, and that ardent Jacksonian with the unlikely name of Edmund Burke. But Hale, backed by an amorphous antiannexationist group called the "Independent Democrats," opposed annexation in 1845 and was elected with Whig support, first as speaker of the state house and then to the United States Senate. What was known in Granite State politics as the "Hale Storm" had national repercussions.

Texas annexation also forced a split in the Massachusetts Whig party between a group known first as "Young Whigs" and the party regulars. (The terms "Conscience" and "Cotton" did not come into common use until 1846.) The Young Whigs included an extraordinary group of men: Charles Francis Adams, who was taking the baton passed on by his failing father; Charles Sumner, later a towering figure in the Senate during war and Reconstruction; Henry Wilson, later vice-president of the United States; Samuel Gridley Howe, an M.D. who had fought in the Greek revolution of 1827-1828 and who pioneered prison reform, public school education, and education of the blind and the mentally retarded; John Gorham Palfrey, former editor of the North American Review; Ebenezer Rockwood Hoar, future Attorney General of the United States; and Richard Henry Dana, Jr., author of Two Years Before the Mast and of The Seaman's Friend, a standard work on maritime law that attested to his considerable abilities as a lawyer.


69. See Richard Sewell's superb political biography, John P. Hale and the Politics of Abolition (Cambridge: Harvard Univ. Press, 1965), chs. 4-5.

70. By one of the many ironies in the history of antislavery, the Atherton of the gag was the grandson of the antifederalist Joshua Atherton who had opposed ratification of the Constitution in 1788 because of its proslavery character; Emancipator, 24 Jan. 1839.

Joining in transideological coalition with Garrison and Wendell Phillips on one hand, and John Greenleaf Whittier and Elizur Wright on the other, the Young Whigs started an antiannexation newspaper and organized conventions dedicated to keeping Texas out. At the September 1846 state Whig convention, the Conscience faction promoted four specific antislavery points: nonsupport of candidates who did not favor abolition of slavery in the states "by all constitutional means," a vague qualification conceivably reaching into the periphery of the radicals' position; abolition of slavery in the District of Columbia and the territories; prohibition of the interstate slave trade; and refusal to admit new slave states—a live rather than an abstract issue since the question of whether Texas was to be cloned into five separate slave states had not yet been settled. Sumner, addressing the convention, insisted that the Whigs go beyond mere nonextension to oppose "the larger continuance [of slavery] under the Constitution and Laws of the Union. . . . Emancipation should always be presented as the cardinal object of our national policy." But in 1847 the Conscience faction adopted the Wilmot Proviso as their central goal, retreating from their broader platform of the year before, and placed themselves in a position to coalesce with the moderates.

Thus by the summer of 1847, three groups were open to coalition or fusion: Conscience Whigs, Barnburner Democrats, and Liberty moderates. On 20 October 1847 the Liberty majority chose the independent Democrat, Hale, as its nominee for the presidential race next year. In June, 1848, the Barnburners nominated ex-President Martin Van Buren while the Libertymen called for a national Free Soil convention to meet in Buffalo on 9 August 1848.

In preparation for the fusion convention, the abolitionist component of the nascent Free Soil coalition downplayed their antislavery views. In March 1848, Joshua Giddings urged Chase, who needed no prodding in that direction, to organize the forthcoming Buffalo con-

72. Such cloning was provided for in the joint resolution on annexation, 1 March 1845, 5 Stat. 797. One hundred thirty years later, another southern conservative, Rep. James M. Collins (R., Tex.) proposed reviving the subdivision idea to increase the number of presumably conservative southern members as a means of offsetting liberal northern votes. New York Times, 1 March 1975, p. 19, col. 5.

73. The Works of Charles Sumner (Boston: Lee and Shepard, 1875–83), I, 313.
vention solely on the basis of the Wilmot Proviso. "I would say
nothing about abolition or anti-slavery," Giddings cautioned, "as
these terms frighten many people."74 There were only two real
questions to be settled at Buffalo: who would be the Free Soil presid­
ential candidate and how much vestigial antislavery would survive
in the platform.

The nomination was the more difficult question. Martin Van Buren
had made a career out of opposition to antislavery measures, and was
better known to his new Free Soil associates as "the northern man
with southern principles" than by his conventional political nick­
names, the Red Fox of Kinderhook or the Little Magician. Aboli­
tionists could not forget that, as Democratic presidential candidate
in 1836 and 1840, he had campaigned on a promise to veto any bill
for the abolition of slavery in the District of Columbia and had ap­
proved the gag.75 The faction promoting him, the Barnburners, were
the most avowedly negrophobic and antiegalitarian of Free Soil
coalition.76 Van Buren was a peculiar candidate for a fusion party
to any degree antislavery, but he had one insuperable advantage: he
and Hale were the only realistic fusion candidates, and most people,
including Hale himself, thought that Hale was just warming the seat
for the eventual Free Soil nominee.

The situation was ready for a logroll; Chase for the Liberty element
and Benjamin F. Butler for the Barnburners did the rolling. They
came up with a package that everyone (excepting a few forlorn
radical abolitionists present) could at least live with, and for which
some principled delegates could work up enthusiasm. Van Buren
got the nomination, and Charles Francis Adams was chosen as his
running mate, a graceful gesture to the Whig Conscience group. The
platform, composed by Chase and Barnburner Preston King, conceded
two Liberty points, nonextension and divorce, abstractly formulated;
it gave the Whigs and westerners internal improvements and free
homesteads, and the Barnburners a revenue tariff. Thus Free Soil
was born, and went into the campaign under the revealingly equivocal
slogan "Van Buren and Free Soil, Adams and Liberty."

74. Giddings to Chase, 16 March 1848, Salmon P. Chase MSS., Historical
Society of Pennsylvania.
75. Joshua Leavitt to Salmon P. Chase, 7 July 1848, Salmon P. Chase MSS.,
Historical Society of Pennsylvania.
Hist., 46 (1965), 311–329.
Van Buren then watered down the Free Soil antislavery formula even more. In his letter of acceptance, he reinterpreted the platform to imply "a spirit of considerate forbearance towards the institution [of slavery] in localities where it was placed under the control of Congress," except the territories.\textsuperscript{77} With this, the coalition scrapped what little potential it had had to become an egalitarian party prepared to face the problem of race relations in a society where slavery had been abolished, and instead opted for a western empire free for white men by being kept free of black men. The predictions of the opponents of independent political action in 1839 were realized: the moderates seemed to sell their libertarian heritage for a mess of political pottage.

Yet abolition sentiments among the Freesoilers were not wholly snuffed out. In 1849, the Boston \textit{Republican}, edited by Freesoiler Henry Wilson, insisted that the party would abolish slavery in the territories and the District of Columbia; abolish the slave trade; repeal the 1793 fugitive act; and "exercise all its constitutional power to discourage, localize, and destroy slavery." The Ohio ex-Libertyman Edward S. Hamlin insisted to Chase in 1850 that "our [Free Soil?] mission is to overthrow slavery \textit{in the States}, as well as to keep it out of the territories." To do this, Hamlin proposed to "make war upon the institution of slavery itself wherever it exists; and, when we have strength to legislate for its overthrow in the States, I think we shall find Constitutional powers through which to exert that strength."\textsuperscript{78} No radical abolitionist could ask for more.

But such reassurances did not satisfy abolitionist opponents of the moderates. They saw divorce, potentially so aggressive, as it was in the 1844 Liberty platform, shrivel to nonextension. "Non-extension is not abolition," warned the executive committee of the then-radical American and Foreign Anti-Slavery Society; the true mission of the Liberty party was to stand by "the great anti-slavery principles we avow, viz.: the entire divorcement of the national government from slavery."\textsuperscript{79} In 1842, Garrisonian Lydia Maria Child had predicted that "where the accession of numbers can be gained by compromise,

\textsuperscript{77} Quoted in Goodell, \textit{Slavery and Anti-Slavery}, 481.
\textsuperscript{78} Wilson and Hamlin as quoted in Sewell, \textit{Ballots for Freedom}, 198, 190 (italics in original).
\textsuperscript{79} \textit{Address to the Friends of Liberty, by the Executive Committee of the Amer. and For. Anti-Slavery Society} (n.p., n.d. [1848]), 4.
compromise will be made.”  

80 Radical constitutionalist Lysander Spooner verified her prediction after the Liberty party picked the nonabolitionist Hale as its presidential candidate in 1847: “While they have gained a candidate, they have lost their party. I do not see that they can do anything but join the Wilmot Proviso and anti-war men. They obviously have dared avow no principles that can avail in a contest for the abolition of slavery.” These were the consequences, Spooner believed, of accepting the constitutional doctrines of the “nincompoop” Chase.  

81 The sourness of Spooner’s attitude may have reflected the envy of an outsider as much as divergence of principles. But the outsiders of the movement in their own way made a significant contribution to abolition, and did so without the dissimulation of the Liberty moderates of 1848. In examining the outsiders’ constitutional theories, we can learn much about how Americans have confronted legally sanctioned injustice.

81. Spooner to George Bradburn, 8 Nov. 1847, Lysander Spooner Papers, N-YHS.