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=2379311
CHAPTER 10

The Garrisonian Critique

Where both radical and moderate constitutionalists adhered to the American Constitution, William Lloyd Garrison and his coworkers repudiated it as a "proslavery compact," the "covenant with death" and "agreement with hell" mentioned in Isaiah. ¹ They denounced the American union, called on individual Americans to repudiate their loyalty to it, and advocated secession by the northern states. "No Union With Slaveholders," which had begun as an ecclesiastical program, became a secular political objective. Garrisonian constitutional theories influenced non-Garrisonian abolitionists, even if negatively. But those theories are easy to misunderstand and criticize, and can be appreciated only in the context of Garrison's thought as it developed between 1835 and 1845. If not integrated with its non-constitutional components, Garrisonian constitutionalism seems to be the absurd and self-defeating jumble of sophistries criticized by Gilbert H. Barnes and Dwight L. Dumond.

Garrisonians developed their constitutional ideas only after they had worked out theories of perfectionism and nonresistance. Garrison and his associates elaborated a program of political action in response to the innovations of their opponents within the antislavery movement, then they developed parallel and consonant constitutional dogmas, which were little more than rebuttals of radical and Liberty political ideas. Hence a bald restatement of Garrisonian constitutionalism, wrenched out of the totality of Garrison's thought, would be misleading and implicitly false.

In the years from 1832 to 1838 Garrison dabbled in constitutional antislavery to such an extent that in 1838 Ellis Gray Loring thought

¹. Isaiah 28:18.
he was allied with Alvan Stewart in believing that slavery was un-Constitutional everywhere. He promoted various programs of political action, including the petition campaign and selective voting for candidates sympathetic to antislavery. Yet in the same period Garrison excoriated the government of the United States, the American people, and the Christian denominations as hopelessly corrupt; he also toyed with schemes of nonresistant pacifism. While all this was going on, his asperity was building up a reservoir of ill will among fellow abolitionists, to say nothing of persons outside the movement.

In 1836, Garrison simultaneously antagonized fellow abolitionists in theological and political quarrels, and began the development of his nonresistance theories. Both proved divisive to the movement. The quarrel between Garrison and others in the movement dates from Garrison’s condemnation of the well-intentioned but paternalistic American Union for the Relief and Improvement of the Colored Race, a short-lived resuscitation of the old Abolition Societies, and from Garrison’s skepticism about the divine institution of the Sabbath. These controversies had a dual impact. For Garrison, they jolted him loose from his religious orthodoxy and left him free to explore perfectionism. On the other side, it provided an occasion for conservative clergy to anathematize Garrison. A group of orthodox ministers in Massachusetts issued a “Pastoral Letter” in 1837, de-


nouncing the practice of bringing extraneous lecturers on controversial topics into churches without the consent of the minister, and condemning the practice of women lecturing in public. The Pastoral Letter, which did not allude to Garrison by name, was shortly followed by the “Appeal of the Clerical Abolitionists,” which explicitly rebuked Garrison’s harsh language and critical attitude toward all who disagreed with him.6

This challenge from orthodoxy came at a juncture in Garrison’s personal development. In early 1837, Garrison had been, as he told the perfectionist John Humphrey Noyes, “heaving on the subject of Holiness and the Kingdom of Heaven.”7 Pacifism appealed to him, and he wrote to the nonresistant Henry C. Wright that “in the kingdom of God’s dear Son, holiness and love are the only magistracy. It has no swords . . . no chains, for all are free. And that kingdom is to be established upon the earth.”8 Eagerly endorsing the command to Isaiah, Garrison urged, “‘Cease from man‘; beware of a worldly policy.”9 With the line from the Lord’s Prayer, “Thy kingdom come,” in mind, he concluded that “if that kingdom be within us, we enjoy, as to times and seasons, a liberty in Christ Jesus, unknown to those under the first covenant.”10 From thence, perfectionism was only a short way off.

Restated summarily, Garrison’s perfectionist beliefs by 1840 comprised several tenets. God made man capable of perfection, a state in which man was free from sin and from the vicious tendencies of human nature. Through His Son Jesus Christ, He called all men to this state of perfection: “Be ye therefore perfect, even as your Father which is in Heaven is perfect.”11 Men could attain perfection on earth, before their death, and could do so by an act of faith and will that transformed their actions. In this state, they would not only leave off sinning; they would be incapable of sinning, just as Jesus Christ was.

Garrison carried these premises to a millenialist conclusion.\textsuperscript{12} Criticizing the Millerite premillenarian craze of 1842, Garrison insisted that the second coming had already occurred circa 60 A.D. and that the kingdom of God had therefore already been established on earth, rather than being something yet to come.\textsuperscript{13} He reasoned: "Let Christ fulfill his mission, for the government is laid on his shoulders; and he (in the persons of his followers, of course,) shall put down all rule, and all authority and power."\textsuperscript{14} His parenthetical qualification indicated that the true followers of Christ—presumably perfectionists—in themselves embodied God's reign on earth, and that all secular government should dissolve before them.

Momentous consequences followed from these perfectionist and millenialist beliefs. All earthly institutions, even those that Garrison had formerly thought basically good or capable of being turned to good ends, like the church and human government, were adapted to man in his sinful, preperfected state. They were necessary to restrain men from harming other men by giving in to their vicious propensities, but, like the state in Marx's communist society, they would wither away when the cause of them, man's sinfulness, disappeared. "If all men would come into the obedience of Christ," Garrison wrote in 1837, "there would be no need of prisons, or of penal enactments, or military bands, for there would be no criminals, and therefore none to punish."\textsuperscript{15} When men had become perfect, all, including females and blacks, would coexist as equals. The distinctions of rank, place, and function that set one man above others in the church or state would be swept away. So would the practices of church and state derived from the old Mosaic dispensation, such as Sabbath observance, taxation, and so forth.

Church and state necessarily had repressive arms—episcopal or clerical authority, jails, armies, taxes, courts—all of which relied at bottom on force or the threat of force, by which some men compelled other men to behave in ways ordained by those who controlled the instruments of force. These arms, like the church and state them-

\textsuperscript{14} \textit{Liberator}, 20 Sept. 1842.
\textsuperscript{15} \textit{Liberator}, 23 June 1837.
selves, became perverted into roadblocks to men traveling along to perfection. Because human institutions obstructed men from their divine goal of perfection, and because they rested on the sanction of force, perfectionist doctrine led finally to nonresistant pacifism.16

Garrison and fellow nonresistants rejected not only war but the entire apparatus that sustained governments in power. He summarized this position in a programmatic outline, the "Declaration of Sentiments Adopted by the Peace Convention . . . 1838," a nonresistance manifesto renouncing allegiance to all human government. Nonresistants disabled themselves from holding "any office which imposes upon its incumbent the obligation to compel men to do right," including all political office. This carried with it a rejection of voting: "If we cannot occupy a seat in the legislature or on the bench, neither can we elect others to act as our substitutes in any such capacity."17 The extreme logical outcome of this principle appeared in a remark of Henry C. Wright, who stated that he would not vote, even if by his one vote he could free all the slaves.18

Perfectionism thus came out, via nonresistance, as opposition to political action, a stance its opponents called "no-human-government." Garrison was annoyed at the label, preferring "the divine government theory" instead.19 What divided him from his opponents within the antislavery movement was his belief in the possibility of universal moral regeneration. Only when all men were brought to a state of spiritual perfection would true "abolition" take place—abolition from the enslavement of one person to the will of another, whether this subjection took the form of slaveholding, military command, tax-collecting authority, or the magisterium of the church. Garrison summed up this theory in announcing a change in the editorial direction of the Liberator in December 1837.20 This editorial note was the manifesto of Garrisonian protestanism within the one antislavery church. True or "universal" emancipation meant "the emancipation

of our whole race from the dominion of man, . . . and bringing them under the dominion of God, the control of an inward spirit, the government of the law of love, and into the obedience and liberty of Christ.” Any other or more limited reform, such as temperance or the abolition of slavery, was merely temporizing and limited. A perfectionist could not content himself with any partial reform, any more than he could dally with halfway measures like gradualism, for the success of any temporary expedient would still leave men unregenerated and prone inevitably to fall into the sin of force, into allegiance to the kingdoms of this world. From a perfectionist viewpoint, political-action antislavery was dangerous because it used corrupt instrumentalities to effect only a limited modification of mundane society, and stopped far short of the government of God, the only real universal emancipation.

Despite Garrison’s self-absolving professions of meekness and his labored efforts to explicate his thought beyond the possibility of misunderstanding, his abolitionist critics became convinced that he was anticlerical, anarchistic, and divisive. They saw his ideas as a diversion from the exigent needs of the movement, a gratuitous folie d’extrême. The New York abolitionists decided that it was time to take drastic action against the Boston heresiarch, his Liberator, and his Massachusetts Anti-Slavery Society. Elizur Wright objected to Garrison’s supposed linkage of antislavery, perfectionism, and nonresistance: “You can’t drive a three tined fork through a hay mow, though turn it t’other end to, and you can drive in the handle.” Gamaliel Bailey and William Goodell condemned Garrison’s nonresistance “heresies,” Goodell claiming that they were incompatible with “that essential feature of primitive [1833] abolitionism” as defined in the AA-SS Declaration of Sentiments.

Garrison responded by seeing a conspiracy among the writers of the Pastoral Letter and the Clerical Appeal, procolonizationist clergy, and the New York abolitionists. He detected the priestly hands of the Reverends Orange Scott (Methodist), Charles T. Torrey (Con-
gregionalist), Alanson St. Clair (Unitarian), and Nathaniel Colver (Baptist) in a supradenominational plot, abetted by Henry B. Stanton, James G. Birney, Joshua Leavitt, Elizur Wright, the Tappans, and William Goodell, to subvert his leadership of the movement in Massachusetts. Of the movement's leaders in 1837, only Gerrit Smith, William Jay, Alvan Stewart, and Theodore Dwight Weld held aloof from the controversy.

Garrison was not entirely wrong. The New York leadership tried, with little success, to create rival state and local antislavery societies and a rival newspaper that would be, as Torrey put it, more "in accordance with our original principles of association." When Garrison exposed such scheming, the New York leaders of the AA-SS decided on a fight to the finish, and Garrison accepted the challenge. A special committee of the AA-SS transferred its organ, the Emancipator, to the NYCA-SS, safely in control of Garrison's opponents. The AA-SS itself was bankrupt, and its Executive Committee planned to disband it. Garrison, however, seized control by bringing a boat-load of his supporters to attend its annual meeting in May 1840. Lewis Tappan then led the New York group in a secession from the AA-SS and organized the rival American and Foreign Anti-Slavery Society (A&FA-SS). The schism was complete, and the animating spirit that had sustained organized antislavery in the 1830s was dead. After the schism, Garrison and some of his associates elaborated on their nonresistance principles to develop a theory of political action that would counter the rationale of their opponents, who were by then committed to third-party antislavery politics. It was out of these theories of political action that Garrisonian constitutionalism sprang.

A nonresistant, as Garrison had concluded in the Peace Convention manifesto of 1838, could not vote as a matter of principle, though he or she could participate in such things as petitioning, interrogating,

26. For a succinct analysis of Garrisonian political theory, see Wyatt-Brown, Lewis Tappan, 269–272.
and urging others to vote for “friends of the slave.” In 1839, Garrison insisted, “I have always expected, I still expect, to see abolition at the ballot-box, renovating the political action of the country . . . modifying and rescinding all laws which sanction slavery. But this political reformation is to be effected solely by a change in the moral vision of the people.” What would be sinful for nonresistants would not necessarily be so for other abolitionists; hence an abolitionist could vote, providing that he cast his ballot only in conformity to the principles of the AA-SS Declaration of Sentiments. A voting abolitionist would be “recreant to his duty” if he voted for a candidate who was sympathetic to slavery or who did not support antislavery positions, or if he failed to vote for a candidate who would support antislavery positions. For such abolitionists, voting and other forms of political action were not questions of principle, but rather of expediency, the wisdom of which was to be determined on expeditious grounds.

It was the problem of political frustration that decisively split Garrison from his opponents. Garrison insisted, as his opponents originally had, that the best response to the nonchoice of two pro-slavery candidates was either scattering (the write-in vote) or abstention. From there abolitionists could act as a balance-of-power group, which would in turn induce one of the parties to appeal to their program by putting up acceptable candidates next time. Thus abolitionists would swing one or the other of the regular parties around to an antislavery platform.

Antislavery third-party politics appalled Garrison as a matter of theory and tactics, and his abhorrence was increased when he noted that those most enthusiastic for political action were his personal enemies, the secessionists of 1840. He felt that abolitionists would best serve the cause of political antislavery by remaining in the two major parties, to purify them from within, and to bear with frustration patiently in the meantime. Further, since abolitionists of all persuasions were a minority of the American electorate, withdrawing

to form a third party would condemn them to permanent exclusion from political effectiveness, a form of self-disfranchisement worse than scattering or abstention.

An antislavery third party would split the movement and dilute antislavery principles by dragging them into the political gutter, where they would be kicked around like any other question relating to banks, tariff, distribution, and the other sordid, trivial staples of routine party politics. Because abolitionists differed among themselves on these nonslavery staples, some being Whigs, others being Democrats, and some being independents with strong feelings about individual issues, the cause of the slave would be abandoned as the antislavery party fell apart because of wrangling among its membership on nonslavery issues. This would turn the antislavery party into just another collection of log-rolling, back-scratching, demagogic hacks. "Adventurers" would invade the party in hopes of spoils, and the force of antislavery would be dissipated.31

Thus Garrisonian abolition as of 1841. Then it began to undergo another transformation that led it to a new stance, one in which Garrisonians claimed that the Constitution was a proslavery document and therefore advocated personal disallegiance and sectional disunion. To Garrison, disunion was not a break from his prior thought, but a logical culmination of it.32 It is necessary to discriminate carefully and not confuse disunion with perfectionism, nonresistance, and other aspects of Garrisonian political theory.

Garrisonian disunion grew out of internal and external pressures on the antislavery movement in the 1840s. The come-outer impulse led many abolitionists, including some non-Garrisonians, to abandon parties, societies, and churches as corrupt.33 Memories of the violence of the thirties—mobblings, lynchings, rifling of mail—still rankled. Texas annexation and the war on Mexico led many, again including non-Garrisonians, to weigh the value of the union. Finally, the


Latimer incident in 1842 convinced Boston abolitionists that slavery existed in Massachusetts as well as South Carolina.

In October 1842, a Boston constable seized George Latimer as a runaway slave under the federal statute of 1793 and held him in a Boston jail. The antislavery community, electrified, pursued several courses of action. They created a paper, the *North Star and Latimer Journal*, edited by Henry I. Bowditch, antislavery physician and brother of William I. Bowditch. They sent monster petitions to the General Court and to Congress, demanding that the Bay State disassociate itself from fugitive recaptures; and through legal pressure in state courts, they so impeded efforts at Latimer's rendition that his supposed master relinquished his claim for four hundred dollars.

For the emergence of Garrisonian constitutionalism, the highlight of the Latimer episode was a rally held at Faneuil Hall on 30 October 1842. Among the speakers was Wendell Phillips, already acknowledged the movement's premier orator. He suggested dramatically that the true source of Boston's discomfiture was the United States Constitution itself.

There stands the bloody [fugitive slave] clause in the Constitution—you cannot fret the seal off the bond. The fault is in allowing such a Constitution to live an hour. . . . When I look on these crowded thousands and see them trample on their consciences and the rights of their fellow men at the bidding of a piece of parchment, I say, my curse be on the Constitution of these United States! (Hisses and shouts.)

The Constitution was obviously a quasi-sacred symbol that one profaned at his risk, even among abolitionists. This led Phillips to muse on its relationship to slavery and, within a few years, to produce the ablest defence of the Garrisonian "agreement with hell" thesis.

Garrisonian constitutional thought was also influenced by disunion ideas. Disunion in Garrisonian ideology was an ambiguous idea, or rather, set of related ideas. It began in the early thirties as an ecclesiastical program summed up in the phrase "No Union With Slaveholders," a demand that northern churches dissociate themselves from the proslavery ministry of the South and exclude slaveholders

35. A full file of this ephemera, together with the most complete collection of materials anywhere relating to the Latimer episode, may be found in the Massachusetts Historical Society, Boston.
An antiabolitionist constitutionalism from the sacramental community. But it took on a secular connotation as Garrison reread Isaiah 28:14–18:

Wherefore hear the word of the Lord, ye scornful men, that rule this people which is in Jerusalem. Because ye have said, we have made a covenant with death, and with hell are we at agreement... your covenant with death shall be disannulled, and your agreement with hell shall not stand; when the overflowing scourge shall pass through, then ye shall be trodden down by it.

Tied to ideas of the Slave Power, the religious notion of disunion led Garrison to the insight that "as a component part of the union, [slavery] is necessarily a national interest. Divorced from Northern protection, it dies; with that protection, it enlarges its boundaries, multiplies its victims, and extends its ravages." Garrison at first suggested disunion, in the sense of a breakup of the American federation of states, as an alternative to emancipation in the south, but by 1844 he demanded disunion per se. Disunion in this sense meant a secession by the free states of the North from the American union, and an individual's personal repudiation of his or her allegiance to the United States government. Disunion thus had a double rationale. By disavowing the union as an individual act, a northern abolitionist would clear himself from complicity with the system; and to the extent that the union supported slavery—as it did in Garrisonian constitutional theory—disunion would remove that constitutional buttress. Putting his idea in the form of an aphorism, Garrison adopted this slogan as an editorial masthead for the Liberator after 1842: "A repeal of the union between northern liberty and southern slavery is essential to the abolition of the one and the preservation of the other." (He overlooked the fact that his

37. [Evan Lewis], An Address to Christians of All Denominations on the Inconsistency of Admitting Slave-Holders to Communion and Church Membership (Philadelphia: S. C. Atkinson, 1831); [George Bourne], An Address to the Presbyterian Church Enforcing the Duty of Excluding All Slaveholders from the 'Communion of the Saints' (New York: n.p., 1833).

38. Liberator, 6 May 1842.


literary parallellism misfired syntactically, so that disunion would bring about the abolition of northern liberty and the preservation of southern slavery.

Garrison made it clear that he demanded not merely a moral, token, or symbolic act, but actual personal disallegiance and actual secession from the Union by the free states. This carried Garrisonians well beyond their original beliefs, for a time at least. They now condemned voting by anyone, not just nonresistants, on the grounds that to vote for any public official, local, state, or federal, would be to endorse someone who would have to take an oath to uphold the United States Constitution, which supported slavery. Any act of allegiance to a government whose constitution supports slavery "means either to undertake myself to execute the law which I think wrong, or to appoint another to do so." Garrison declared voting to be "of Satanic origin, and inherently wicked and murderous. We must cease to sanction it . . . voting for men to have discretionary power over the lives and liberties of their fellow-men must be put in the same category with rum-drinking, profanity, lewdness, and every evil work."

Disunion was premised on the theory that the United States Constitution was a proslavery compact. Garrison and others arrived at this view in three ways. First, textual exegesis proved that the documentary Constitution was a bulwark of slavery in at least four particulars. Second, they took advantage of the publication in 1840 of the so-called "Madison Papers," James Madison's record of the 1787 Philadelphia debates. This was a traumatic revelation to abolitionists, for Madison's detailed coverage of the debates confirmed abolitionists' suspicions that the framers consciously wrote guarantees for slavery into the Constitution. Third, Garrison and his colleagues

44. Liberator, 20 Sept. 1842.
were pursuing their principal opponents, the supporters of the Liberty party, and were trying to controvert every Liberty position, theoretical as well as tactical. They entered with zest into the task of demolishing the Liberty construction of the Constitution as actually or potentially antislavery. After Texas and Latimer had sensitized them to the nefarious potential of the Union and the Constitution, they channeled their analysis doggedly into a proslavery interpretation and did it so effectively that the proslavery Alabama politician John A. Campbell suggested to John C. Calhoun that Wendell Phillips' *The Constitution a Pro-Slavery Compact* was "an able pamphlet . . . [which] we might circulate to great advantage excluding a few paragraphs."46

Garrisonian constitutionalism was a *post-hoc* rationalization for disunion. Unlike radical and moderate arguments, most of the Garrisonian output was compiled hastily and was not refined by exposure to courts or legislative bodies. Wendell Phillips, for example, belittled his influential pamphlet, *The Constitution a Pro-Slavery Compact*, in correspondence with an Irish friend: "As for my poor little thing—it was scissored and patched into existence in one day—and printed almost as quick to circulate at our annual meeting and keep Abby Kelley from teasing me awhile—she wanted something to sell after her lectures and I had to provide it."47 Garrisonian constitutionalism was nevertheless a respectable, internally consistent, coherent attempt to explain the relationship between slavery and the American constitution.48

Garrisonians, and Phillips in particular, began their inquiry with a positivist jurisprudential assumption: law is "a rule of civil conduct prescribed by the supreme power of a state, commanding what its subjects are to do, and prohibiting what they are to forbear," or, more simply, "a rule prescribed."49 This axiom was central to Gar-


49. Wendell Phillips, *Review of Lysander Spooner's Essay on the Un-
risonian constitutionalism; reject it, and the whole structure of Garrisonian legal thought collapses. Garrisonians did not deny the existence of a higher law or its primacy; they merely insisted that natural and municipal law be not confused with each other, and that only the latter be recognized as the law that earthly courts administer. In this view, they were in accord with the jurisprudential postulates of proslavery constitutionalism, especially as expounded by the American Hegelian, John Codman Hurd. Laws may be immoral and violative of higher law, yet still be of binding authority, as far as the judicial agents of the state were concerned. A judge may not consult his notions of natural law; rather, he must apply the law as given, without reference to postulates of morality. Nathaniel Bouton, an antiabolitionist minister, extended this idea even to private individuals, who he thought had to obey all laws, whether consonant with higher law or not. Squaring statutes with natural law was exclusively a function of legislators; both courts and individuals were bound to obey all enactments, whatever their personal moral reservations might be.

Any interpretation of law that deviated from this rigid positivism led to the "practical anarchy" of each man being a law unto himself. The real no-government men were those who pushed an interpretation of the American constitution that deviated from the canonical. Courts, particularly the United States Supreme Court, can apply "only the legal standard of morality." If a judge found himself obliged to administer an unjust law, he must resign. It was partly


50. John C. Hurd, Topics of Jurisprudence Connected with Conditions of Freedom and Bondage (New York: D. Van Nostrand, 1856), 38, citing extensively from Hegel's Grundlinien der Philosophie des Rechts. (The Topics was the first part of Hurd's magisterial The Law of Freedom and Bondage in the United States, published in 1858.)


54. "Constitutionality of Slavery," Mass. Q. Rev., 4 (1848), 463-509 at 464. Though sometimes attributed to Phillips, internal evidence (see fn., p. 494) indicates that Phillips was a friend of the author. The author, whoever he was, seems to have been a lawyer, well versed in jurisprudence and the English precedents.
on this basis that the Garrisonian Francis Jackson resigned his com-
mission as a Massachusetts justice of the peace.\textsuperscript{55} Judges must con-
sider themselves bound, not by absolute standards of justice, which
have not yet been attained on earth, nor by standards of relative
justice, which are constantly changing and subject to conflicting
interpretations, but by the intentions of the framers of the laws and
the common understanding of that intention as embodied in precedent
and the uniform practice of the people and their representatives.\textsuperscript{56}
Courts administer "the general system of National Law under which
they sit"; to fulfill that trust, their interpretation must be ultimate and
authoritative, and not open to challenge.\textsuperscript{57}

In the Garrisonians' positivism lies an irony. Elsewhere they and
their latter-day supporters defended their tactics by an agitational
rationale: it was necessary to adopt advanced positions to bring all
men to a heightened awareness of their moral obligation. Yet they
failed to see the same agitational value in the beliefs of their radical con-
stitutionalist opponents, an opportunity for using ethical and legal
precepts constructively to bring men out of an unquestioned rever-
ence for extant law and forward to a demand that mundane laws
square with natural justice. Under positivist assumptions, men were
doomed to accept the law as they found it, with all its deformity, and
abolitionists were precluded from working for change through and
with extant law and legal systems. The Garrisonians' postulates
locked them into a legal status quo that could be changed only by
a millenial and universal shift in public sentiment. In this way, as in
others, Garrisonian theory led functionally to de facto conservatism.

Rules of interpretation were another element of the Garrisonian
argument. They insisted that the Constitution be "expounded in its
plain, obvious, and common sense," and that ambiguities be resolved
by a resort to contextual analysis enlightened by the social conditions
of the framers.\textsuperscript{58} Seen in this light, the Constitution obviously did

\textsuperscript{55} Jackson to Gov. George N. Briggs, 4 July 1844, reprinted as an ap-
pendix to [Phillips], The Constitution a Pro-Slavery Compact.

\textsuperscript{56} "Constitutionality of Slavery," 487.

\textsuperscript{57} Phillips, Review of Spooner's Essay, 15, 57; William I. Bowditch,
Slavery and the Constitution (Boston: Robert F. Wallcut, 1849), 145. The
latter portion of this pamphlet, the constitutional argument, was reprinted
anonymously as The United States Constitution (New York: AA-SS, [1855?]).

\textsuperscript{58} "Constitutionality of Slavery," 483; Bowditch, Slavery and the Constitu-
tion, 117.
secure slavery in at least four respects, and did embody a one-sided proslavery compromise. As Garrison said, in a layman's misstatement of contract law, "The intent of a bargain is the bargain, whatever may be the language used, and I would not try to get rid of an obligation, however unjust, by a false interpretation of the instrument."59 This part of the Garrisonian argument was its least assailable historically, and it made nonsense of those parts of the radical constitutionalist effort that disingenuously construed away the slavery clauses.

Phillips heaped ridicule on the strained efforts of the radicals: "If the unanimous, concurrent, unbroken practice of every department of government, judicial, legislative, and executive, and the acquiescence of the people for fifty years, do not prove which is the true construction, then how and where can such a question be settled? If the people and the courts of the land do not know what they themselves mean, who has authority to settle their meaning for them?"60 Americans "may well take the Constitution to be what the courts and nation allow that it is, and leave the hair-splitters and cob-web spinners to amuse themselves at their leisure."61 Such rhetoric had a superficial plausibility, but it was rebutted by William Howard Day, a delegate to the 1851 State Convention of Colored Citizens of Ohio, who pointed out that the Garrisonians fell into the error "of making the construction of the constitution of the United States, the same as the constitution itself."62

Having laid a jurisprudential and interpretive groundwork, Garrisonians then surveyed the origins and establishment of slavery in America to rebut the historically oriented arguments of their opponents. Relying on the dictum of Mansfield in Somerset, as elaborated by Chief Justice Shaw in Med, they insisted that modern as well as ancient custom was a legally sufficient origin of slavery. The "positive law" that Mansfield had said was necessary to the creation of slavery included custom: "Positive law is the term usually employed to distinguish the rules, usages, and laws which are made by man, from those which God has implanted in our nature. It matters not whether

60. Phillips, Can Abolitionists Vote, 14.
these rules and laws are written or unwritten, whether they originate in custom or are expressly enacted by Legislatures." 63 Statutory law merely codified what custom had created. This explained away the radicals' argument that only positive—that is, statutory—law could create a system in derogation of natural right.

Phillips and others then turned to the problem of *Somerset*. First, they construed the case narrowly and limited its impact to England. Whatever its impact on the common law in the metropolis, it did not and could not affect the status of slavery in the colonies. Common law did not survive the sea crossing unchanged; rather, it was received in America only insofar as it was compatible with the customs and systems of law in the colonies. Thus if the colonial customs and laws had established slavery, *Somerset* left the institution unaffected. Further, like the proslavery legalists, the Garrisonians considered *Grace* to be the definitive reinterpretation of *Somerset*. 64 Slavery existed in the mainland colonies by virtue of custom as ratified by legislative enactments of the colonial assemblies.

Independence no more altered slavery's legitimacy than did *Somerset*. The laws of the provincial and state legislatures and the new state constitutions continued slavery intact. As to the Declarations of Rights in the early state constitutions, stating that all men are created free and equal, their impact was necessarily differential, depending on the social circumstances of the state. In a commonwealth like Massachusetts, where slavery was moribund by 1780, such a declaration recognized the freedom of all citizens; but in a commonwealth like Virginia, where nearly half the population was enslaved, a comparable clause applied only to freemen, with slaves being an implicit exception to its scope. 65

Since slavery was the creature of the states, national action could not disestablish it. Neither the Continental Congress that framed the Declaration of Independence nor the Confederation Congress that drew up the Articles was empowered by the states to meddle with their internal social institutions. Hence neither instrument could affect slavery or have any impact on municipal law concerning it. Black

slaves were an exception to the Declaration. Anticipating Taney's *Dred Scott* opinion, Phillips wrote that slaves "were regarded as an unfortunate, but still a very inferior portion of the human race. With this estimate of them, it was impossible, of course, for those who framed the Constitution to concede to them any of its privileges."66

Thus Garrisonian analysis got to its long suit, construction of the four proslavery clauses of the Constitution itself. Here the publication of the Madison Papers in 1840 became critical, revealing as it did in the words of John Quincy Adams, "the saturation of the parchment with the infection of slavery, which no fumigation could purify, no quarantine could extinguish."67 The relevant clauses, ambiguously worded, became quite clear in the light of the Philadelphia debates and the arguments in the state ratifying conventions. The "all other Persons" of the three-fifths clause were obviously slaves, and the clause itself was the touchstone of the Slave Power.68 The word "importation" in the 1808 clause could refer only to slaves, since its contextual correlative, migration, necessarily implied free agency.69 The fugitive clause, interpreted in the light of its textual matrix, the Northwest Ordinance, clearly referred to slaves in the phrase "Person held to Service or Labour."70 Finally, the insurrections and domestic violence clauses pertained to the uprisings of slaves as well as to other sorts of upheaval.

Evaluating the impact of the Constitution, Garrisonians concluded that "our fathers were intent on securing liberty to themselves, without being very scrupulous as to the means they used to accomplish their purpose. ... [T]hough they recognized occasionally the brotherhood of the human race, in practice they continually denied it. They did not blush to enslave a portion of their fellow man ... while they were ... boasting of their regard for the rights of man."71 The

67. John Quincy Adams, address at North Bridgewater, Mass., 6 Nov. 1844, quoted in [Phillips], *The Constitution a Pro-Slavery Compact*, 123.
69. [Bowditch], *United States Constitution*, 2.
Constitution took slavery "out of its former category of municipal law and local life, adopted it as a national institution, spread around it the broad and sufficient shield of national law, and thus gave to slavery a national existence."\(^\text{72}\) Garrisonians endorsed John Quincy Adams' assertion that "the preservation, propagation, and perpetuation of slavery [is] the vital and animating spirit of the national government."\(^\text{73}\)

The Garrisonian critique, despite its rejection of the Constitution itself, affected American constitutional development. It was correct in seeing that each of the clauses singled out for criticism had to be expunged or made a dead letter—which is what was done by the adoption of the Thirteenth through Fifteenth Amendments and supportive legislation—before the libertarian potential of the Constitution could be realized. The Garrisonians were most successful in pointing out the obvious, namely, that the clauses they noted not only related to slavery but secured and protected it. The Garrisonians were also on point when they insisted that a mere change in laws, even to the extent of legally abolishing the institution of slavery, would be an insufficient reform, a half-way measure that would not eradicate the evil, but merely palliate it. In seeking to reform the public sentiment that lay behind laws and constitutions and that inspirited them, the Garrisonians struck at the source of the problem.

Phillips insisted that the only path to justice "is over the Constitution, trampling it under foot; not under it, trying to evade its fair meaning."\(^\text{74}\) There he pithily summed up the difference between the Garrisonians and the political-action constitutionalists, and raised pertinent questions about the processes of constitutionalism. Must a just person reject an imperfect constitution, or even one that sanctioned and protected an evil like slavery, to work effectively for constitutional reform and to abolish injustice? Or is it possible to regard the constitution as an imperfect but amendable instrument of social organization, with defects to be excised and spongy areas to be improved, but still the only thing available in the here and now of a heterogeneous secular society that can serve as a means of changing a society's goals and structure? Whatever the agitational or inspirational value of insisting on universal moral regeneration and abso-

\(^\text{72}\) Disunion, 22.
\(^\text{73}\) Quoted in [Bowditch], United States Constitution, 12.
\(^\text{74}\) Phillips, Review of Spooner's Essay, 35.
lutist goals, is there a place in a democratic society for a legal order that accepts and incorporates the society's evils as well as its good? Can men in good conscience choose to work within that defective legal order for its betterment, or must they seek only its overthrow in the service of absolute justice? The Garrisonians insisted endlessly—and rightly so—on the uselessness of condemning slavery in the abstract, but is it equally useless to strive for perfect justice in the abstract, the kingdom of Christ on earth? Is there a place for less total ends and less absolute means?

The weaknesses of Garrisonian constitutional thought lay in their brittle assumptions. The origin of Garrisonian constitutionalism was disunion. But is disunion the only moral response to an evil social order? As a posture, it had obvious shortcomings: it promoted a solipsistic outlook, it encouraged moral narcissism, and its dogmatism repelled, rather than convinced, the unconverted. Another assumption was the legal positivism that informed Garrisonian constitutional thought. By rejecting the radicals' innovative use of natural law, the Garrisonians threw away, without trial, what might have been a powerful motive for change. Garrisonians denied the possibility of legal flexibility and adaptation. By insisting that the only acceptable change was total and revolutionary, they disdained more limited, yet more tangible, evolutionary change. To be specific: why should a justice of the peace like Francis Jackson, or lawyers like Wendell Phillips, Nathaniel Rogers, and David Lee Child necessarily have to resign their commissions or abandon their practice? Why not pursue the law from the bench or the bar as William Jay, Ellis Gray Loring, or Salmon P. Chase had done, working to rescue a fugitive slave in courts here or getting a sojourners law repealed there? Law and lawyers performed a useful office even when they did not hold out for the unattainable absolutes of Garrisonism.

The greatest defect of Garrisonian constitutionalism lay in its similarity to the jurisprudential assumptions of Taney's *Dred Scott* opinion. Both insisted that the Constitution was locked rigidly in the social and intellectual world of the 1780s; that its language was insusceptible of changing interpretation; that its categories could not be modified and eroded by time; that a constitution is a rigid, static, concrete instrument, rather than a plastic, fluid, and growing one. The Constitution was more ambiguous, more susceptible to interpretive modification, than the Garrisonians allowed. Its zones of obscurity,
including the fugitive slave and insurrections clauses, invited meliorist solutions. Lawyers, judges, and others could serve their sense of justice by interstitial modification. "Law is always becoming," Robert Cover has recently written. "We must speak of direction and weight as well as of position." But Phillips and Garrison saw only position: what the law had been. This catatonic Garrisonian constitutional posture best served the interests of the Slave Power.