ANTEBELLUM PERSPECTIVES ON FREE SPEECH

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In his book, Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History, *Professor Michael Kent Curtis documents the political struggles over free speech rights that took place between the ratification of the Bill of Rights in 1791 and the adoption of the Fourteenth Amendment in 1868. Professor Curtis looks to these early free speech fights to help define the contours of contemporary speech rights. In this review, Professor Mark A. Graber discusses Professor Curtis's contribution to constitutional history, and the implications of* The People's Darling Privilege *for constitutional theorists.*

INTRODUCTION

Reviewers adopt one of three strategies when commenting on pathbreaking works in their field. The first strategy, after a few perfunctory words of praise, purports to state the central thesis better than the author. When successful, this tactic enables the reviewer to claim some credit for that thesis, particularly if the review contains subtle hints that the reviewer has also published important works on that subject matter. "Although the Torah offers ten commandments," such a review might assert, "the first is really extraneous and 'thou shalt not kill' might be more clear had the author declared 'thou shalt not murder.'"[1] The second strategy, after a few perfunctory words of praise, purports to identify the most minute flaws that exist in the text. When successful, this tactic demonstrates the reviewer's superior scholarly credentials, or at least establishes the humanity of the author of the book under review. "The Torah," a review in this spirit might proclaim, "provides the best extent account of creation, but readers will be frustrated by the lack of documentation for claims that people lived very long lives and put off by repeated accounts of dysfunctional families." The third strategy, after a few perfunctory words of praise, purports to outline the book the author really should have written. When successful, this tactic demonstrates that the reviewer is the

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[1] The appropriate footnote would declare:

> For a more rigorous statement of some of the themes explored in Genesis, see JEROME DAVID FRANK & JULIA B. FRANK, PERSUASION AND HEALING: A COMPARATIVE STUDY OF PSYCHOTHERAPY (3d ed. 1991) (discussing issues associated with morale, a central issue in many sibling relationships discussed in the Torah); Mark A. Graber, *Establishing Judicial Review? Schooner Peggy and the Early Marshall Court*, 51 POL. RES. Q. 221 (1998) (discussing myths of origin as they relate to the origins of judicial review in the United States).

scholar responsible for the important insights on the subject matter of the book under review. "The Torah," a review published by the *American Political Science Review* would probably declare, "contains wonderfully spiritual insights, but what is really interesting and not developed by the author are the important public choice implications of the Exodus story."

This review of *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History*[2] adopts the third strategy by briefly exploring some facets of Jacksonian constitutional practice and theory beyond the scope of that work. One of the above three strategies is called for because Professor Michael Kent Curtis of the Wake Forest University School of Law has written the seminal study of free speech law and practice before and immediately after the Civil War. His work deserves more than a few perfunctory words of praise for documenting the controversies over political expression that excited Americans from 1787 to 1868, demonstrating that a powerful strand of antebellum thought was committed to providing broad protection for political dissenters,[3] detailing how this popular support for free speech largely coexisted with a legal tradition that interpreted constitutional protections for free speech narrowly,[4] and firmly establishing that the persons responsible for the post-Civil War Constitution intended to prevent state officials from violating free speech rights.[5] The first two strategies for cutting pathbreaking works down to mortal size are doomed to failure. *The People's Darling Privilege* defies all reviewing efforts to improve the book the author actually wrote by restating central themes more clearly and better highlighting their significance. Curtis is a brilliant storyteller. His free speech narratives will benefit scholars who read for business and history buffs who read for fun. The prose is clear, the tales fascinating. Hunting for minute flaws in *The People's Darling Privilege* serves no useful purpose,[6] and, given the prodigious research Professor Curtis has done on antebellum free speech fights, is more likely to reveal the reviewer's ignorance. The third strategy is more promising for the simple reason that no book covers a subject matter from every conceivable perspective. *The People's Darling Privilege* studies free speech in antebellum constitutional politics primarily to learn more about free speech. Free speech in antebellum constitutional politics might also be studied to learn more about antebellum constitutional politics. Such a perspective yields complementary, though hardly more important, insights than those found throughout Curtis's work.

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[2] MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).

[3] *See id.* at 52-356.

[4] *See id.*

[5] *See id.* at 357-83.

[6] Readers may judge for themselves, however, whether the bright red background of the inside book jacket makes the text harder to read.

This review explores the book Curtis might have written had he been interested in locating the free speech fights documented by *The People's Darling Privilege* in the broader context of Jacksonian constitutional politics. The book Curtis did not write would emphasize that Jacksonian America was a place where most constitutional controversies were fought outside of courts. Numerous gulfs existed before the Civil War between existing judicial precedent and actual political practice. The popular free speech tradition that developed during the first sixty years of the nineteenth century was not an exceptional constitutional development, but the dominant mode of constitutional discourse in a society where, with apologies to Tocqueville, "[s]carcely any political [or constitutional] question ar[ose] . . . that [was] . . . resolved, sooner or later, into a judicial question."[7] This revised study of free speech practice in antebellum America would further highlight how Jacksonians attached the same, if not more, constitutional significance to legislative and executive decisions on constitutional matters as contemporary Americans attach to judicial decisions on constitutional matters. The constitutional politics of the 1840s and 1850s suggest that constitutional questions before the Civil War were more often settled outside the courts than by judicial decree.[8]

This Jacksonian understanding of popular constitutionalism structured how the antebellum popular free speech tradition influenced the post-Civil War Constitution. The book Curtis wrote demonstrates that Republicans were committed to ensuring that state governments would not violate free speech rights as those rights were understood in the popular free speech tradition that had supported antislavery

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[7] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 280 (Alfred A. Knopf 1994) (1835).

[8] A review this author did not write (except as part of a footnote!) would explore the distinctive intellectual and jurisprudential justifications of free speech in the United States. Contemporary democratic relativists make sharp distinctions between claims that free speech will lead to truth and claims that free speech is a central element of the democratic process. *See, e.g.*, THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7-11 (1966). For the influence of democratic relativism on twentieth century free speech theory, see MARK A. GRABER, TRANSFORMING FREE SPEECH 165-67 (1991); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 99-119 (1985). For a more general discussion of democratic relativism and democratic theory, see EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 205-10 (1973). Nineteenth century libertarians were not democratic relativists. Democratic processes were valuable precisely because they were the best means for discovering the truth. *See, e.g.*, CURTIS, *supra* note 2, at 414 (quoting *Freedom of Discussion*, BOSTON ADVOC., Jan. 3, 1838). I suspect no antebellum proponent of broad free speech rights would claim that "in a world in which there [are] no objective values, but only personal preferences, the politically and legally 'right' or 'rational' could only be defined as whatever the democratic process ground out." Martin Shapiro, *Recent Developments in Political Jurisprudence*, 36 W. POL. Q. 541, 543 (1983).

advocacy before the Civil War.[9] The book Curtis did not write explains why Republicans fought for a constitutional amendment that required state governments to respect the liberties set out in the First Amendment, while not seeking an amendment rejecting the common legal view that those liberties largely consisted of a freedom from prior restraints.[10] The way Republicans amended the constitution makes sense only on the antebellum assumption that sixty years of political practice outside of the courts had established that the Alien and Sedition Acts of 1798 were unconstitutional.

Contemporary constitutionalists should consider reviving those Jacksonian practices which attached constitutional significance to all settlements of constitutional questions, without regard to the political fora where the settlement took place. Present practices that privilege judicial precedents are unduly biased in favor of state power. Courts usually consider the constitutional limits on state power only when state officials take some constitutionally controversial action, such as passing a law many persons claim violates the First Amendment. During times when political institutions are controlled by proponents of limited national powers, measures that some persons claim violate constitutional rights are either defeated or not debated. To the extent courts generally support dominant national values, a court staffed with proponents of broad free speech rights is less likely to adjudicate free speech claims than a court staffed with proponents of narrower free speech rights. The political coalitions most likely to staff the federal judiciary with persons who interpret constitutional rights broadly are also the political coalitions least likely to pass legislation inconsistent with a broad understanding of free speech. Giving equal status to all decisions influenced by the constitutional meaning of free speech ensures libertarian movements that protect expression rights will have the same enduring constitutional value as less libertarian movements that limit expression rights.

I. THE BOOK PROFESSOR CURTIS WROTE

The People's Darling Privilege uses remarkably original constitutional history for fairly conventional constitutional purposes. Curtis has written the first detailed account of the major free speech fights that took place in the United States from 1787 to 1868, and the first work that documents the powerful strand of libertarian thought that developed during those years. His historiography is as original as his history. *The People's Darling Privilege* emphasizes how the American polity as a whole understood free speech rights. That narrative details how prominent political actors before, during, and immediately after the Civil War interpreted the First

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[9] *See* CURTIS, *supra* note 2, at 358.

[10] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *151 ("The liberty of the press . . . consists in laying no *previous* restraints upon publications . . . .").

Amendment. Curtis appropriately avoids the too often standard practice that largely confines constitutional history to judicial pronouncements and legal commentary.

This novel constitutional history and novel understanding of what counts as constitutional history have conventional constitutional purposes. The lessons *The People's Darling Privilege* teaches are the legal and instructive lessons that law professors who write constitutional history have traditionally taught. The popular free speech tradition in the nineteenth century, Curtis maintains, supports interpreting the twenty-first century Constitution as protecting broad free speech rights.[11] His work offers legal evidence that the persons responsible for the Constitution of 1868 intended to forbid state laws repressing speech analogous to antislavery advocacy, and pragmatic evidence that contemporary Americans should not restrict speech analogous to antislavery advocacy.[12]

A. *The Story*

The People's Darling Privilege details the rich antebellum tradition of free speech thought and debate that Professor Curtis has unearthed in this volume and in previous articles.[13] Recent scholarship had demonstrated that the American free speech tradition did not begin when the Supreme Court, in the wake of World War I, began considering the extent to which the Constitution permitted state and federal officials to outlaw political dissent.[14] Significant political controversies over free

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[11] CURTIS, *supra* note 2, at 429.

[12] *Id.* at 362-68.

[13] *See* Michael Kent Curtis, *Critics of "Free Speech" and the Uses of the Past*, 12 CONST. COMMENT. 29 (1995); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000); Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105 (1998); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996); Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKRON L. REV. 231 (2000) [hereinafter Curtis, *Teaching Free Speech*]; Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109 (1997); Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book,* The Impending Crisis: *Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113 (1993); Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 NW. U. L. REV. 785 (1995).

[14] *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (upholding a conviction under the Espionage Act of 1917 for circulating flyers critical of the war and the draft); Debs v. United States, 249 U.S. 211 (1919) (upholding a conviction for a speech criticizing the U.S. role in World War I); Abrams v. United States, 250 U.S. 616 (1919) (upholding conviction for circulating leaflets supporting revolution in allied Russia); Gitlow v. New York, 268 U.S.

speech occurred during the late nineteenth and early twentieth centuries. Those controversies provoked extensive scholarly commentary on the scope of constitutional protections for expression rights.[15] *The People's Darling Privilege* completes the story, demonstrating that the American free speech tradition is coextensive with the American constitutional tradition. Free speech controversies have occurred at every period in American history. Each generation of Americans has experienced a sustained political effort to restrict advocacy of certain policies and an equally vigorous response to defend the free speech rights of political dissenters.

The free speech fights of one political era can be understood only in light of the struggles over political dissent fought in the previous political era. The means chosen by the Jacksonians to repress antislavery speech in the 1830s were partly determined by the broad social consensus that had developed after 1800 that the Alien and Sedition Acts were unconstitutional.[16] Republican efforts to amend the Constitution after the Civil War were significantly influenced by the outcomes of the controversies over free speech that took place before the Civil War.[17]

Curtis deserves special credit for documenting the powerful libertarian strands in antebellum constitutional thought. The American libertarian tradition, *The People's Darling Privilege* demonstrates, dates from the eighteenth century, and did not begin with either Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*,[18] or the conservative libertarian treatises of the late nineteenth century.[19] "Between the ratification of the Bill of Rights in 1791 and ratification of the Fourteenth Amendment in 1868," Curtis details, "American citizens — activists, newspaper editors, ministers, lawyers, and politicians — developed and expanded a protective, popular free speech tradition."[20] His work establishes the credentials Elijah Lovejoy and John Quincy Adams have for a permanent place in the pantheon of free speech heroes: as activists who fought at great risk for the right to dissent.[21] When defending free speech, these and other antebellum Americans relied on general principles that remain vibrant at present and proved willing to interpret

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652 (1925) (upholding conviction under state law for publishing a socialist manifesto).

[15] *See* GRABER, *supra* note 8; DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); *see also* MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 3-70 (1992); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL (1986).

[16] CURTIS, *supra* note 2, at 136-54.

[17] *Id.* at 360-62.

[18] 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[19] *E.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (photo. reprint 1998) (5th ed. 1883); *see also* GRABER, *supra* note 8, at 17-49.

[20] CURTIS, *supra* note 2, at 4.

[21] *Id.* at 177-80, 216-17.

constitutional protections for expression rights as broadly as any contemporary civil libertarian.

The People's Darling Privilege advances the recent scholarly tendency to highlight the significance of constitutional debate outside the courts.[22] American constitutional development, Curtis and others remind us, is not a synonym for American judicial development. Antebellum debates over free speech have gone under contemporary legal radars because they took place almost entirely within legislative, executive, or electoral fora. Congress debated whether to receive antislavery petitions and whether antislavery literature was mailable. The attorney general in 1857 determined that a deputy postmaster need not deliver an abolitionist newspaper if its distribution was prohibited under local law.[23] Federal courts did not confront the relationship between the First Amendment and the postal power until the end of Reconstruction.[24]

This focus on the speech fights that took place in the elected branches of government highlights how, before and immediately after the Civil War, constitutional practice outside of the courts was far more libertarian than constitutional practice inside the courts. Curtis notes that "a chasm between the orthodox understanding of the right [to free speech] many judges would apply and the popular right many citizens exercised and thought they had."[25] Late eighteenth and nineteenth century judges rarely distinguished themselves by protecting political dissent.[26] Political advocacy thrived only when proponents of free speech won legislative and popular struggles. "[T]he popular view of free speech," which "grew up outside the courts (and often contradicted judicial doctrine)," Curtis declares, "had real-world effects — in elections, in legislatures, for at least some judges, and in actions by government officials."[27] The Sedition Act may have been

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[22] The seminal work in this literature is SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). Other important works include SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY (1992); NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES (1996); LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988); WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE (1996); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 406 (1986).

[23] Yazoo City Post Office Case, 8 Op. Att'y Gen. 489 (1857).

[24] *Ex parte* Jackson, 96 U.S. 727 (1877).

[25] CURTIS, *supra* note 2, at 3-4; *see also id.* at 12 ("The popular free speech and press tradition compares well with the stunted and crabbed view of free speech articulated by some judges and some commentators from the founding until the 1930s.").

[26] *See id.* at 8 ("From the Sedition Act through the Civil War . . . courts were too often hostile to dissenting speech when it was under attack."); *id.* at 9 ("Strong judicial protection of speech is . . . comparatively recent . . . . For much of American history . . . many judges have been less protective of free speech.").

[27] *Id.* at 4.

sustained by Supreme Court justices on circuit, but those measures were "repudiated in the election of 1800 . . . [and] [f]rom 1800 to 1860, most politicians treated the act as unconstitutional . . . ."[28] Elected officials and citizens proved more receptive than judges to free speech arguments made immediately before the Civil War. Curtis points out that "[i]n the Northern states, serious legal incursions on abolitionist speech, press, or petition were checked, not by courts, but by citizens urging a broadly protective understanding of free speech."[29]

B. *The Moral*

The People's Darling Privilege is written from the perspective of a law professor committed to protecting free speech and other fundamental rights. The lessons Curtis would have readers draw from his narrative are that fundamental liberties are sometimes better protected outside the courtroom than by judicial officials,[30] that the privileges and immunities clause of the Fourteenth Amendment was almost certainly understood in 1868 as banning state violations of First Amendment rights,[31] and that many present proposals for restricting speech unwittingly rely on theories used before the Civil War to justify repressing antislavery advocacy.[32] The constitutional history of free speech teaches these lessons because nineteenth century battles for expression rights were fought over the same terrain as contemporary struggles for expression rights. Curtis is primarily interested in such "recurrent free speech issues" as "[w]ould free speech be a national right of all Americans," and "[c]ould fear that speech . . . had a 'bad tendency' to cause serious harm justify suppressing it?"[33] The introduction to *The People's Darling Privilege* proclaims: "The Sedition Act debate and later [antebellum] free speech struggles implicate . . . issues that run through the story of free speech in the United States . . . ."[34]

These important presentist goals hardly make *The People's Darling Privilege* a work of legal advocacy or law office history.[35] Curtis meticulously details the bad as well as the good. Both the Alien and Sedition Acts and Lincoln's suppression of speech opposing the Civil War, Curtis freely acknowledges, are as much a part

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[28] *Id.* at 5.

[29] *Id.* at 6.

[30] *See* CURTIS, *supra* note 2, at 21.

[31] *See id.* at 19.

[32] *See id.* at 432.

[33] *Id.* at 2.

[34] *Id.* at 5.

[35] For the accepted jeremiads against law office history, see Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13, 125-32; Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

of the American free speech tradition as John Quincy Adams's successful fight against the gag rule.[36] Still, the persons responsible for the Constitution of 1868 learned certain lessons from the free speech fights of the past. The lessons they learned have present significance on their own merits and because they were embodied in legal texts still regarded as fundamental.[37]

Using constitutional history to privilege particular interpretations of the Constitution is a conventional legal practice. Most of the best works on constitutional history written by contemporary academic lawyers conclude that past practices provide powerful legal support for specific constitutional doctrines or practices. Akhil Reed Amar, in his acclaimed *The Bill of Rights*, tells "a tale that . . . ends up supporting most of today's precedent about the Bill of Rights."[38] "[T]his book," Amar declares in his last sentence, "has aimed to explain how today's judges and lawyers have often gotten it right without quite realizing why."[39] Michael McConnell analyzes Reconstruction debates at great length to prove that *Brown v. Board of Education*[40] was consistent with the original intentions of the persons responsible for the Fourteenth Amendment.[41] Bruce Ackerman has famously turned to history to establish a theory of constitutional amendment outside of Article V.[42]

Other constitutional histories emphasize the instructive functions of history. The past, in this view, demonstrates the practical and normative superiority of a particular constitutional choice. Lucas Powe's seminal history of broadcast regulation concludes that Americans ought not to interpret the First Amendment as permitting government "regulation of broadcasting" because "abuses" of

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[36] CURTIS, *supra* note 2, *passim*.

[37] *The People's Darling Privilege* and other recent works by eminent law professors demonstrate that academic lawyers are as capable as other scholars of producing distinguished historical scholarship, even when that scholarship has a presentist point. *See, e.g.*, RABBAN, *supra* note 7; Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997). Indeed, as noted below, virtually all historical scholarship has a presentist point. *See supra* text accompanying notes.

[38] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 307 (1998) [hereinafter AMAR, THE BILL OF RIGHTS]. Amar's THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES similarly looks to history to provide legal standards for interpreting the Constitution. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES x (1997) (using history to highlight "the need to construe the Constitution in ways that protect the innocent without needlessly advantaging the guilty").

[39] AMAR, THE BILL OF RIGHTS, *supra* note 38, at 307.

[40] 347 U.S. 483 (1954).

[41] Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

[42] BRUCE ACKERMAN, 1 WE THE PEOPLE 44-57 (1991).

government licensing "have occurred with unfortunate frequency."[43] David Rabban's wonderful *Free Speech in Its Forgotten Years* concludes by suggesting that his history of free speech fights in the late nineteenth and early twentieth century discredits present arguments for limiting expression rights. Contemporary calls for banning hate speech and other forms of expression, Rabban writes, "bear[] strong, although largely unacknowledged, parallels to arguments made by progressive intellectuals in the decade immediately preceding World War One."[44] Cass Sunstein uses the Supreme Court's decision in *Dred Scott v. Sandford*[45] as an example of what happens when justices fail to decide cases on the narrowest possible grounds.[46]

Non-lawyers are hardly immune to this genre. My *Rethinking Abortion* used history to provide legal and pragmatic reasons for keeping abortion legal.[47] Philip Klinkner and Rogers Smith conclude their history of racial equality in the United States by detailing the lessons they believe past practices teach about present policy.[48] Just as Curtis believes that certain "recurrent issues" structure all free speech fights, so Klinkner and Smith believe that "three factors . . . have thus far always been present when the United States has made strides toward greater racial justice."[49] Virtually any political or policy argument about the future must assume some continuity with the past. We cannot plan for a future that will be radically different from the past. Policymakers must assume that certain crucial features of the past have relatively enduring elements that will structure future debate.

Curtis uses history in both legal and instructive senses when defending free speech. His first book offered what are increasingly regarded as compelling reasons for thinking that the persons responsible for the Fourteenth Amendment intended to prohibit states from violating the liberties set out in the Bill of Rights.[50] *The People's Darling Privilege* provides more evidence for this historical claim about the meaning of the crucial constitutional provisions. Curtis details how the Reconstruction sponsors of the post-Civil War Constitution were particularly

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[43] LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 6 (1987).

[44] DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 381 (1997).

[45] 60 U.S. (19 How.) 393 (1856).

[46] *See, e.g.*, Cass R. Sunstein, Dred Scott v. Sandford *and Its Legacy*, *in* GREAT CASES IN CONSTITUTIONAL LAW (Robert P. George ed., 2000).

[47] MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS (1996).

[48] PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 317-51 (1999).

[49] *Id.* at 317. The three factors are: (1) an enemy identified as committed to racially inegalitarian or undemocratic practices; (2) the need to draft persons of color to fight that enemy; and (3) a strong movement for civil rights. *Id.*

[50] MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

concerned with providing constitutional guarantees that would prevent the repression of antislavery and analogous speech that had taken place in the antebellum South.[51] He documents how antislavery advocates framed the post-Civil War Constitution in light of the harassment and censorship they had experienced in Jacksonian America. Such persons as John Bingham, who had endorsed Hinton Helper's *The Impending Crisis of the South*[52] in 1858,[53] thought that the new Constitution more firmly protected the right to publish that tract. The problem with the antebellum Constitution, in this view, was that states had no obligation to protect such fundamental rights as free speech or, at least, the popular understanding supported by the Supreme Court's decision in *Barron v. Baltimore*[54] was that states had no national constitutional obligation to protect such fundamental rights as free speech. Republicans corrected this omission or ambiguity by more clearly writing into the Constitution a requirement that states respect fundamental rights.[55]

The main thrust of *The People's Darling Privilege* is instructive. "[F]ree speech struggles over slavery," Curtis believes, "help us to evaluate other suppression theories."[56] He uses history to convince readers that free speech should protect all arguments analogous to "the claim that slavery is a cruel and evil institution that should be abandoned."[57] His next to last chapter points out that various arguments used to limit speech at present could be and were previously used to suppress antislavery advocacy. Persons who would deny to adults literature that children should not read rely on the same premises used to deny to (white) citizens literature (black) slaves should not read.[58] The last pages of *The People's Darling Privilege* conclude, "[o]nce we understand the abuses of power that prompted the free speech tradition, we can better understand the risk of abandoning it."[59]

The instructive and legal arguments in *The People's Darling Privilege* do not have quite the same thrust. The instructive arguments explain why no governmental official should restrict speech analogous to antislavery advocacy. The legal arguments explain only why no state official should restrict speech analogous to antislavery speech. The Fourteenth Amendment, as the title of Curtis's first book makes clear, declares that "no state may abridge." Nothing in *The People's Darling*

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[51] CURTIS, *supra* note 2, at 358-64.

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

[53] Curtis, *Teaching Free Speech*, *supra* note 13, at 253.

[54] 32 U.S. (7 Pet.) 243 (1833).

[55] CURTIS, *supra* note 2, at 6-7 (discussing how the Fourteenth Amendment makes the Bill of Rights applicable to the states).

[56] *Id.* at 7.

[57] *Id.* at 384.

[58] *Id.* at 402-03; *see id.* at 384-413 (reviewing historical bases for suppression).

[59] *Id.* at 436.

Privilege or constitutional history suggests that the persons responsible for the post-Civil War Constitution thought they were amending the First Amendment.

This failure to amend the First Amendment creates several puzzles. To the extent a legal tradition existed that interpreted constitutional protections for free speech narrowly, Reconstruction Republicans apparently left that tradition standing, at least as applied to the federal government. If the purpose of the Fourteenth Amendment was to nationalize constitutional protections for free speech and the legal tradition of narrowly protecting free speech was left standing, then Reconstruction Republicans may have adopted a constitutional amendment that did not protect speech analogous to antislavery advocacy. If the post-Civil War Constitution is interpreted as requiring states to protect free speech rights as defined by the popular free speech tradition, then the persons responsible for the Fourteenth Amendment failed to nationalize protections for expression rights if the legal tradition still influenced how the unchanged First Amendment should be interpreted. These puzzles cannot be resolved within the book Professor Curtis wrote. They require two other books, one on Jacksonian constitutional practice, the other on constitutional theory.

II. THE BOOKS PROFESSOR CURTIS DID NOT WRITE

Two books might be written exploring the relationships between the First and Fourteenth Amendments. The first is a work of constitutional history examining the distinctive Jacksonian political practices that explain why Republicans thought nationalizing the First Amendment would bar state laws repressing speech analogous to antislavery advocacy, even though a legal tradition existed that understood the First Amendment as not necessarily prohibiting laws repressing antislavery advocacy. That work would detail Jacksonian understandings of popular constitutionalism that led Republicans to think the unconstitutionality of the Alien and Sedition Acts was settled constitutional law. The second is a work of constitutional theory exploring the justification of Jacksonian practice. That work might note how relying on judicial precedent alone gives a false picture of those constitutional settlements reached in any era where nonjudicial settlements have constitutional significance.

A. *The Historical Perspective*

Many constitutional histories highlight what is distinctive about particular modes of constitutional argument, or particular periods of constitutional history. The second paragraph of my *Transforming Free Speech* proclaims: "The understanding of expression rights that currently dominates scholarly debate is a product of the political and legal thought of the progressive era and was foreign to

the conceptions advanced by earlier defenders of free speech."[60] Judicial protection of free speech at the turn of the twentieth century, I believe, was identified with judicial protection of such individual liberties as the freedom to contract.[61] By the middle of the twentieth century, judicial protection of free speech had become identified primarily with judicial protection of other elements of the democratic process such as the right to vote.[62] Howard Gillman's enormously influential study of judicial decision-making at the turn of the twentieth century emphasizes the distinctive jurisprudential logics of a particular generation of constitutional thinkers. "[T]he real lesson of *Lochner v. New York*,"[63] he writes, "is that th[e] foundations [of that decision] are no longer available as a basis for determining the proper role of the judiciary in American politics."[64] Lucas Powe similarly concludes, "a nostalgia for the Warren Court is necessarily a nostalgia for the 1960s."[65] The Warren Court, in his view, is best understood in terms of the distinctive political conditions associated with the New Frontier and Great Society.[66]

Constitutional histories that focus on the distinctive forms of constitutional justification often have presentist concerns, just not the presentist concerns of those who believe history privileges a particular constitutional decision. The standard theme of many constitutional histories is that contemporary constitutional decision-makers should be far more concerned with advancing present values than upholding traditions based on discarded assumptions, abandoned political practices, or past circumstances. "The lingering debates over the best answers to these inescapable questions [about the judicial role] will inevitably continue," Gillman concludes, "but they should go forward unfettered by the fanciful claim that our burden is to rediscover ancient answers rather than forge agreement on the answers that seem best for us."[67] Jack Rakove reaches the same conclusion at the end of his Pulitizer Prize-winning account of the framing and ratification struggles. "Having learned so much from the experience of a mere decade of self-government, and having celebrated their own ability to act from 'reflection and choice,'" he writes, "would [the persons responsible for the Constitution of 1787] not find the idea that later generations could not improve upon their discoveries incredible?"[68] *Transforming Free Speech* concludes: "Contemporary libertarians will be true to our actual First Amendment tradition only if we also transform free speech so that our theories

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[60] GRABER, *supra* note 8, at 1-2.

[61] *See id.*, at 17-49.

[62] *See id.* at 122-64.

[63] 198 U.S. 45 (1905).

[64] HOWARD GILLMAN, THE CONSTITUTION BESIEGED 305 (1993).

[65] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 501 (2000).

[66] *Id.*

[67] GILLMAN, *supra* note 64, at 205.

[68] JACK N. RAKOVE, ORIGINAL MEANINGS 367 (1996).

reflect the values we cherish and respond to the threats we face."[69]

Highlighting the distinctive features of previous constitutional debates may also illuminate contemporary constitutional debates by highlighting the political, intellectual, jurisprudential, and sociological explanations for discontinuities between past and present. Sometimes these discontinuities make impossible recovery of past constitutional meanings. To the extent that "[i]ndustrialization undermined the social foundations that supported" Supreme Court decision making at the turn of the twentieth century,[70] Americans at the turn of the twenty-first century cannot coherently champion the freedom of contract in its pristine form. Historical research, however, may reveal alternative ways of conceptualizing the constitutional universe that are at least partly recoverable in our time. Recognizing how Jacksonians settled constitutional controversies outside of courts hardly compels contemporary Americans to adopt those or related practices. Nevertheless, understanding the Jacksonian foundations of antebellum free speech debates may enable citizens to think more creatively about present constitutional practices.

B. *The Story*

Scholars more interested in distinctive antebellum practices than an enduring free speech tradition would use the struggles over antislavery advocacy to spin a different narrative than the story told by *The People's Darling Privilege*. Curtis describes the tip of an iceberg when he highlights the existence of a popular free speech tradition that existed entirely outside of the courts. With the exception of a few issues associated with slavery, virtually all the major constitutional questions that arose in Jacksonian America were not resolved into judicial questions.[71] Keith Whittington has recently documented the extensive debates over the constitutionality of the tariff that were largely confined to the executive and legislative branches of the federal and state governments.[72] Few Americans know that many prominent northerners insisted that Texas was unconstitutionally annexed to the United States.[73] Antebellum Americans more generally engaged in wide-

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[69] GRABER, *supra* note 8, at 234. Curtis recognizes "the difficulty of applying nineteenth century ideas in a twenty-first century world." CURTIS, *supra* note 2, at 415. Many present challenges to a healthy system of free expression grow out of forms of business organization that were at most nascent in antebellum America. *Id.* Still, the emphasis in *The People's Darling Privilege* is on how the past privileges certain policy choices, rather than on how adherence to the past is unduly narrowly present political thinking.

[70] GILLMAN, *supra* note 64, at 203.

[71] Mark A. Graber, Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited 47-53 (Sept. 2000) (paper presented at the annual meeting of the American Political Science Convention) (on file with the author).

[72] WHITTINGTON, *supra* note 22, at 93-96.

[73] *See* FREDERICK MERK, SLAVERY AND THE ANNEXATION OF TEXAS 126 (1972).

ranging constitutional debates without any sense that they were stepping on a distinctive judicial province.[74]

Jacksonian America was a place where popular practice protected many rights that legal practice denied. "There were any number of instances during th[is] period[] [before the Civil War]," John Dinan writes, "when legislators, judges, convention delegates, or citizens preferred a policy on its merits but refrained from taking action because to do so would have violated regime principles."[75] This protective popular tradition may have been linked to the narrow legal tradition. Dinan believes that "[a]lthough judges possessed the authority to overturn laws that violated provisions of *bills of rights*, they generally declined to exercise this power on the view that the protection of rights was the proper domain of the legislature."[76] This analysis suggests that the popular and legal traditions before the Civil War were institutional traditions rather than distinctive understandings of civil liberties. Narrow judicial interpretations of rights were less assertions of what the Constitution meant than recognitions that elected officials were primarily charged with determining the scope of constitutional rights.

Antebellum Americans attached the same constitutional significance to constitutional settlements reached outside of the courts as they did to constitutional settlements inside the courts. Several important constitutional controversies in Jacksonian American were thought resolved by decisions reached by elected officials. When Justice McLean in 1855 declared that "the settled opinion now seems to be, that . . . [C]ongress may establish post-roads extending over bridges, but it can neither build them nor exercise any control over them,"[77] his reference to "settled opinion" did not refer to judicial opinion. No Supreme Court decision ever ruled on whether Congress could build post roads.[78] The constitutional ban on federal legislation building post roads was settled by legislative and executive debates during the 1830s and 1840s.[79] Whittington similarly notes that the constitutional status of protective tariffs was settled outside of the courts. The compromise of 1833, he documents, "achieved a binding quality that did largely remove from politics one of the most contentious issues of the period."[80]

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[74] *See* DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION 117-21 (1966).

[75] JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES 168 (1998).

[76] *Id.*

[77] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 442 (1855) (McLean, J., dissenting).

[78] *See* Searight v. Stokes, 44 U.S. (3 How.) 151, 166 (1845) ("[T]he constitutional power of the general government to construct this road is not involved in the case before us; nor is this court called upon to express any opinion upon that subject . . . .").

[79] *See generally* LINDSAY ROGERS, THE POSTAL POWER OF CONGRESS: A STUDY IN CONSTITUTIONAL EXPANSION 61-79 (Johns Hopkins Univ. Studies in Historical & Political Sci., Series 34, No. 2, 1916).

[80] WHITTINGTON, *supra* note 22, at 103.

Antebellum Americans claimed that popular debate could settle some constitutional decisions even in the face of a contrary Supreme Court decision. John Marshall and his brethren unanimously declared that Congress had the power to incorporate a national bank,[81] but consistent rejection by elected officials on constitutional grounds led Whigs in the years immediately before the Civil War to conclude that the national bank was constitutionally "dead."[82] Abraham Lincoln acknowledged the political overruling of *McCulloch* when, during his sixth debate with Stephen Douglas, the Illinois Republican declared: "Did not he and his political friends find a way to reverse the decision of that [Supreme] Court in favor of the constitutionality of the National Bank?"[83] The federal judiciary before the Civil War settled issues only when, as was the case in *Dred Scott v. Sandford*,[84] elected officials explicitly invited the justices to settle a matter that escaped political resolution.[85]

These Constitutional practices before the Civil War explain why Republicans amended the Constitution to nationalize protection for civil liberties rather than ratify amendments overruling legal precedents suggesting that the Alien and Sedition Acts were unconstitutional. What Republicans put into the new Constitution was structured by what they believed was already in the old Constitution. Curtis details how Republicans wrote into the new constitution legal rules they believed were not in or were ambiguously declared by the old Constitution. The Thirteenth Amendment was necessary because the antebellum Constitution permitted states to legalize slavery.[86] Section One of the Fourteenth Amendment was necessary because the antebellum Constitution did not clearly declare that states had no power to abridge certain fundamental rights.[87] Republicans did not write into the new Constitution legal rules they believed were already clearly in the old Constitution. A constitutional amendment making clear that the Alien and Sedition Acts were unconstitutional was not necessary because Republicans regarded the unconstitutionality of those measures as settled.[88] No one during the debates over slavery suggested that the First Amendment was limited to

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[81] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[82] ELBERT B. SMITH, THE PRESIDENCIES OF ZACHARY TAYLOR & MILLARD FILLMORE 41 (1988).

[83] Sixth Debate with Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858) *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 278 (Roy P. Basler ed., 1953).

[84] 60 U.S. (19 How.) 393 (1856).

[85] *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE 152-208 (1978); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 46-50 (1993); Wallace Mendelson, *Dred Scott's Case — Reconsidered*, 38 MINN. L. REV. 16 (1953).

[86] CURTIS, *supra* note 2, at 17-18.

[87] *See supra* note 55 and accompanying text.

[88] *See* MOORE, *supra* note 22, at 250.

prior restraints or that the Alien and Sedition Acts passed constitutional muster. Given that constitutional practice before the war apparently settled that the First Amendment protected speech analogous to antislavery advocacy, the only task for Republicans was to provide constitutional grounds for holding states to the same standards.

Jacksonian constitutional practice provides a second reason why the post-Civil War Constitution did not spell out the precise free speech standards that all governing officials were obliged to protect. Contemporary Americans are inclined to see courts as the primary protectors of fundamental rights. The language of the proposed Equal Rights Amendment makes fairly clear that the justices are to evaluate gender discrimination using the same standards they use to evaluate race discrimination.[89] Many Jacksonians did not regard justices as the primary protectors for civil liberties.[90] Republicans certainly did not intend to vest a national judiciary that less than a decade ago had handed down *Dred Scott* and was hostile to Reconstruction[91] with the primary responsibility for setting the national standard for free speech.[92] The crucial provision of the Fourteenth Amendment was Section Five.[93] That clause is best interpreted as giving the national legislature the power to create national standards for civil liberties, rather than as simply declaring a particular standard that Congress would enforce. "[T]he framing generation," William Nelson correctly concludes, "anticipated that Congress rather than the courts would be the principal enforcer of Section One."[94] Civil liberty was protected by giving a national government presumed sympathetic to antislavery and analogous speech the power to determine the scope of free speech rights.

The way in which the Fourteenth Amendment nationalized free speech suggests some caution about celebrating the civil libertarian credentials of John Bingham and his political allies. Republicans were quite concerned about protecting their speech, but their commitment to protecting political dissent was less apparent. Harsh denunciation of Reconstruction was not the sort of speech analogous to antislavery

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[89] *See* JANE J. MANSBRIDGE, WHY WE LOST THE ERA 48-52 (1986).

[90] *See supra* notes 22-29 and accompanying text.

[91] *See Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867) (finding unconstitutional an act of Congress requiring a loyalty oath for admission to the bar); Cummings v. Missouri, 71 U.S. (4. Wall.) 277 (1867) (finding unconstitutional several provisions of a state constitution requiring an oath of loyalty to be taken by any officer of the state, currently serving or later appointed); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (granting writ of habeus corpus to resident of non-secessionist state, arrested and tried before a military tribunal in that state).

[92] *See* Mark A. Graber, *The Constitution as a Whole: A Partial Political Science Perspective*, 33 U. RICH. L. REV. 343, 368 (1999).

[93] U.S. CONST. amend. XIV § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[94] WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 122 (1988); *see also* Graber, *supra* note 58, at 367-68.

advocacy that Republicans were willing to protect. James McCardle was convicted for writing scathing, racist denunciations of Reconstruction,[95] and kept in prison when Congress stripped the Supreme Court of the jurisdiction necessary to hear his appeal.[96] Moreover, the Constitution of 1868 was likely to protect free speech only as long as national majorities were committed to protecting free speech. When Republicans lost both their national majority and commitment to civil liberties, the institutional structures established after the Civil War proved incapable of securing the rights of either political dissenters or persons of color.[97]

C. *The Book on Constitutional Theory*

The book on constitutional theory that Professor Curtis did not write explores whether and how Jacksonian practice should influence contemporary understandings of the relationship between the Constitution of 1787/91 and the Constitution of 1868. Republican assumptions about what the Constitution of 1791 meant determined how they wrote the Constitution of 1868. What that Constitution means depends partly on whether those assumptions were right or whether the interpretive consequences of those assumptions were wrong. Given that the persons responsible for the Fourteenth Amendment intended to nationalize the protections set out in the Bill of Rights, to what extent do their distinctive understandings of those rights influence how Fourteenth Amendment rights should be interpreted? If those distinctive understandings influence how Fourteenth Amendment rights should be interpreted, do they also affect how the original amendments in the Bill of Rights should be interpreted, given that one purpose of the Fourteenth Amendment was to hold state governments to the same standard of rights protection as the federal government? Did the Fourteenth Amendment change the meaning of the First Amendment, or did the meaning of the First Amendment change sometime between 1791 and 1868 when a political consensus developed that the Alien and Sedition Acts were unconstitutional?

Curtis and Reconstruction Republicans offer two potentially distinctive descriptions of the Constitution of 1868. Curtis declares: "One purpose [of the Fourteenth Amendment] was to make guarantees of free speech national and to require states to respect the rights set out in the First Amendment."[98] Prominent Republicans during Reconstruction similarly declared that the Fourteenth Amendment would prohibit states from violating "the personal rights guarantied

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[95] *See* Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1043-44 (1994).

[96] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512-15 (1868).

[97] *See* Graber, *supra* note 92, at 369-71.

[98] CURTIS, *supra* note 2, at 357.

[sic] and secured by the first eight amendments of the [C]onstitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances."[99] Other passages of *The People's Darling Privilege* highlight a different aspect of the Fourteenth Amendment. Curtis maintains that the persons responsible for the Constitution of 1868 were committed to preventing certain violations of free speech that had taken place in the past. "In the debates of 1864-66 on slavery and individual rights," he writes, "Republicans recalled the events of 1835-60. . . . Congressmen recalled mobs destroying antislavery presses and Southern laws banning antislavery speech, press, and religion."[100] Republicans in 1866 similarly declared that the Fourteenth Amendment would outlaw "despotic laws" that had been passed in the South "proscrib[ing] democratic literature as incendiary."[101] These descriptions of the postwar Constitution as requiring states to respect the First Amendment and as banning past state restrictions on free speech can be reconciled if the First Amendment before the Civil War barred national suppression of antislavery speech. Republicans obviously made this assumption. Had they thought the First Amendment merely forbade prior restraints on free speech or otherwise did not protect antislavery speech, the text of the post-Civil War Constitution might well have been different. Certainly, Republicans did not intend to ratify amendments that nationalized the Bill of Rights but did not protect antislavery and analogous speech.

Aspirational theorists need not be concerned with the potential differences between the dominant conceptions of free speech in 1791 and the dominant conceptions in 1868. Ronald Dworkin and others interpret most constitutional rights provisions as guaranteeing fundamental liberties rather than as freezing particular historical understandings.[102] Constitutional declarations of rights, Dworkin maintains, obligate government to respect the best concept of those rights, not any dominant conception of those rights at the time the Constitution was ratified.[103] Hence, constitutional aspirationalists need not determine the specific conceptions of free speech that animated Americans in 1791 or 1868, or whether those conceptions had evolved during those years. The Fourteenth Amendment protects free speech if the concept "privileges and immunities" or "due process" is

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[99] *See id.* at 362 (quoting U.S. Sen. Jacob Howard).

[100] *Id.* at 358.

[101] *Id.* at 364.

[102] The leading works of aspirational constitutional theory include SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION (1986); RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION (1998); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

[103] DWORKIN, *supra* note 102, at 134-36.

best understood as encompassing free speech. The First and Fourteenth Amendments protect antislavery and analogous speech if free speech is best understood as encompassing such advocacy.

The relationship between 1791 and 1868 is more complicated for constitutional interpreters who believe the specific conceptions of the persons responsible for constitutional provisions matter. Curtis makes a strong, probably compelling, case that by 1868 a consensus had been reached that the Alien and Sedition Acts violated the First Amendment.[104] Republicans assumed that nationalizing the Bill of Rights would prevent state governments from passing bans on advocacy analogous to the Alien and Sedition Acts. No consensus existed, however, in 1798 that the Alien and Sedition Acts were constitutional. Curtis fairly details the variety of Federalists arguments made in defense of those measures.[105] Time may have discredited those arguments. Nevertheless, they provide good reason for thinking that the Alien and Sedition Acts were consistent with the dominant legal understandings of free speech in 1791. Republicans, in short, may have been mistaken when they claimed that the First Amendment prohibited regulation of antislavery speech, at least if the First Amendment is interpreted consistently with certain prominent strands of thought in 1791. This mistake has ramifications for both the First and Fourteenth Amendments. Republicans attempted to provide a national standard of civil liberties, to require states to adhere to the standards set out in the First Amendment, and to guarantee that neither state nor federal officials could ban antislavery or analogous speech. Originalist premises suggest one of these three purposes cannot be achieved. The theoretical question is which purpose an originalist should toss.

These potential conflicts between the Constitutions of 1791 and 1868 transcend free speech. Prominent constitutional histories suggest that American understandings of many fundamental rights evolved between ratification and Reconstruction. Several scholars maintain that the constitutional meaning of the Establishment Clause changed substantially between 1791 and 1868.[106] Various state supports for religion thought constitutional when the Constitution was ratified were uniformly thought unconstitutional by the Civil War.[107] Akhil Reed Amar maintains that popular understandings of the Second Amendment evolved during

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[104] CURTIS, *supra* note 2, at 325-26.

[105] *Id.* at 63-94.

[106] *See* AMAR, THE BILL OF RIGHTS, *supra* note 38, at 41-42, 246-57; JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY 3-4 (1995); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1100-36 (1995); Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMP. L. REV. 95, 104-08 (1996).

[107] AMAR, THE BILL OF RIGHTS, *supra* note 38, at 253-54; Lash, *supra* note 106, at 1133-35.

the first seventy years of constitutional life.[108] Other commentators insist the due process acquired substantive meanings between 1791 and 1868.[109] The Fourteenth Amendment declares "no state shall deny . . . the equal protection of the laws," rather than "neither the federal nor state governments shall deny" because Republicans believed, perhaps wrongly, that the Constitution of 1787 already forbade federal action that violated equal protection. No one in 1868 advanced a coherent or even an incoherent justification for holding states to higher standards than the federal government.

Amar insists that the fundamental philosophy underlying the Constitution of 1868 differed considerably from the spirit of 1791.[110] His work claims that the persons responsible for the Bill of Rights were primarily interested in securing majoritarian government, while the persons responsible for the Reconstruction Amendments were primarily concerned with protecting (local) minorities.[111] To the extent Amar is right, the constitutional meaning of every provision of the Bill of Rights had evolved to some extent between 1791 and 1868. Unless these two constitutional orders are reconciled, Americans may find themselves governed by a schizophrenic constitution.

1. The Fourteenth Amendment and 1791

Justice Clarence Thomas focuses almost entirely on what constitutional rights meant in 1791 when discussing claims that states have violated fundamental liberties. His opinions frequently do not even indicate that the source of such claims is the Fourteenth Amendment, not the Bill of Rights. When discussing whether prisoners in state penitentiaries have a right to conditions of their confinement that do not constitute cruel and unusual punishment, Justice Thomas's dissent began by declaring: "At the time the Eighth Amendment was ratified, the word 'punishment' referred to the penalty imposed for the commission of a crime."[112] That opinion made no reference to those constitutional understandings that might have animated the Reconstruction Constitution.[113] Justice Thomas similarly ignored 1868 when in *McIntyre v. Ohio Elections Commission*[114] he declared, "what *is* important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights."[115] His

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[108] AMAR, THE BILL OF RIGHTS, *supra* note 38, at 258.

[109] John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 553-54 (1997); *see also* GILLMAN, *supra* note 64, at 19-60.

[110] AMAR, *supra* note 38, at xiii.

[111] *See id.* at xiv-xv.

[112] Helling v. McKinney, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting).

[113] *See id.* at 38-40 (Thomas, J., dissenting).

[114] 514 U.S. 334 (1995).

[115] *Id.* at 370 (Thomas, J. concurring).

lengthy analysis neither discussed constitutional understandings after the Civil War, nor even indicated that the Fourteenth Amendment is the source of a constitutional claim against state violations of free speech.[116] This performance is particularly remarkable. In the same case, Justice Scalia made clear in several places that originalists must consider the status of anonymous expression "in 1791 or in 1868."[117]

Interpreting the Fourteenth Amendment using 1791 standards is indefensible, unless no significant changes occurred between 1791 and 1868 in the dominant understanding of fundamental constitutional rights. The persons responsible for the Reconstruction Constitution were trying to prevent the sort of rights violations that took place in the South before and immediately after the Civil War. Nationalizing the Bill of Rights was the means to this end, not an end of itself. The common understanding of "privileges and immunities" in 1868 may well have been "the rights we and the persons responsible for the Constitution of 1791 think fundamental." Still, given that the Fourteenth Amendment was intended both to outlaw Black Codes and support federal legislation,[118] the text should be interpreted as having the meaning necessary to achieve those ends, unless the language of the text makes doing so impossible. Aspirationalists and originalists may debate whether the privileges and immunities clause should be interpreted as constitutionalizing the best understanding of the privileges and immunities or what persons in 1868 thought was the best understanding of privileges and immunities. The Reconstruction Republicans cannot plausibly be understood as constitutionalizing rejected understandings of the privileges and immunities of United States citizens.

1868 is only a reference point for determining the original meaning of language used in 1868. Justice William Brennan was a better originalist than Justice Thomas when, in *School District of Abington Township v. Schempp*,[119] he took account of changes in the dominant conception of freedom of religion before the Civil War. Brennan noted the suggestion, "with some support in history, that absorption of the First Amendment's ban against congressional legislation 'respecting an establishment of religion' is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches."[120] The original meaning of the First Amendment, however, was not necessarily the original meaning of the Fourteenth Amendment. After noting that "the last of the formal state establishments was dissolved more

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[116] *Id.* at 359-70 (Thomas, J., concurring).

[117] *Id.* at 372 (Scalia, J., dissenting).

[118] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 251-61 (1988).

[119] 374 U.S. 203 (1963).

[120] *Id.* at 254 (Brennan, J. concurring).

than three decades before the Fourteenth Amendment was ratified," Justice Brennan concluded that, "[a]ny such objective of the First Amendment ha[d] become historical anachronism by 1868 . . . ."[121] Commentators agree that Fourteenth Amendment rights must be interpreted by mid-nineteenth century standards.[122] Hans Baade declares: "To the extent that original 'intent' or 'understanding' are material under rules of constitutional hermeneutics *presently* prevailing, the 'crucial' date for the interpretation of the due process clause of the Fourteenth Amendment is 1868, the year in which it was enacted."[123]

2. The Bill of Rights in 1868

The more difficult issue is how provisions of the Bill of Rights ought to be interpreted in light of the Fourteenth Amendment. The persons responsible for the post-Civil War Constitution intended to establish a uniform standard of fundamental rights that would prevent both state and national officials from suppressing antislavery and analogous speech. The provision they choose — "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"[124] — clearly expressed their intention to change the constitutional powers of state governments. The words "no state" also apparently expressed an intention not to alter the constitutional powers of the national government. The national government in 1791, however, may have had the power to suppress antislavery and analogous speech.[125] The post-Civil War Constitution could secure all Republican goals only if the Fourteenth Amendment or some previous circumstance had so changed the meaning of the First Amendment that national officials who may have had the power to pass the Alien and Sedition Acts in 1798 no longer had that power by or after 1868.

The very limited commentary is divided on whether the meaning of the First Amendment changed by or after 1868. Michael Dorf insists that the Fourteenth Amendment did not amend any provision of the Bill of Rights. "[J]ust as the original 'Second Amendment did not enact the background understanding' circa 1791," he writes, "neither did the Fourteenth Amendment . . . enact the background understanding circa 1868."[126] Amar disagrees. He thinks "the Fourteenth Amendment has a doctrinal 'feedback effect' against the federal government,

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[121] *Id.* at 255 (Brennan, J., concurring).

[122] CURTIS, *supra* note 50, at 2-4; NELSON, *supra* note 94, at 2-5.

[123] Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1025 n.150 (1991).

[124] U.S. CONST. amend. XIV § 1.

[125] *See supra* note 105 and accompanying text.

[126] Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 328 (2000) (footnote omitted) (quoting LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 25 (1991)).

despite the amendment's clear textual limitation to state action."[127] "[T]he parallel language between the First Amendment and the Fourteenth," Amar declares, "should strongly incline us toward a unitary theory of freedom of speech against both state and federal governments."[128] Bruce Ackerman takes a similar position, claiming that the Bill of Rights should be interpreted consistently with the principles underlying the Fourteenth Amendment.[129] Laurence Tribe suggests that persons "comfortable with the 'time travel' . . . [might] treat[] the history of the late 1860s as somehow changing the meaning of a constitutional provision ratified in 1789."[130] Tribe has some sympathy for constitutional time travel:

> A revision to avoid conflicts with new constitutional text occurs when a constitutional amendment so alters the rest of the Constitution that, upon referring back to the constitutional provision in question, we are bound — unless we are satisfied with a Constitution that merely collects contradictions — to recognize a revision in that constitutional provision even if the amendment did not in so many words decree a change in that provision's words.[131]

Still, no constitutional contradiction would be created by holding state and federal officials to different standards when protecting fundamental rights. Many justifications of two-tiered protections exist.[132] The constitutional problem is that the persons responsible for the Constitution of 1868 do not appear to have intended to establish a two-tiered system for protecting fundamental rights. They used "no state" only because they were convinced the federal government was already obligated to respect their proposed standard of fundamental rights.[133]

The Republican assumption in 1868 that the First Amendment did not need alteration supports claims that the Fourteenth Amendment should be interpreted as at least influencing the First Amendment. The consensual constitutional understandings at one time typically have reasonable constitutional foundations. Persons in 1868 were unlikely to regard as uncontroversial interpretations of the

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[127] AMAR, THE BILL OF RIGHTS, *supra* note 38, at 243.

[128] *Id.* at 244.

[129] Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 517, 537 (1989).

[130] 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 902 n.221 (3d ed. 2000).

[131] *Id.* at 67.

[132] *See, e.g.*, Russell N. Watterson, Jr., Note, Adarand Constructors v. Pena: *Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation*, 1996 B.Y.U. L. Rev. 301, 318-25 (discussing historical and textual support for differentiations between state and federal equal protection).

[133] Mark A. Graber, *A Constitutional Conspiracy Unmasked: Why "No State" Does Not Mean "No State,"* 10 CONST. COMMENT. 87 (1993).

Constitution of 1791 that had no historical grounding. Plausible arguments were made in 1798 that the Alien and Sedition Acts were unconstitutional, the most famous being the Virginia and Kentucky Resolutions.[134] The problem from the perspective of 1791 is that, in 1798, equally plausible arguments could be made that the Alien and Sedition Acts were constitutional. Rather than interpreting the Fourteenth Amendment as changing the meaning of the First Amendment, the better interpretation may be that the Fourteenth Amendment helped settle the meaning of the First Amendment. Reconstruction Republicans constitutionalized one plausible interpretation of the antebellum Constitution while rejecting what had previously been an alternative plausible interpretation of that text.

These attempts to achieve a synthesis between the Constitutions of 1791 and 1868 adopt a fairly traditional view of constitutional change.[135] The meaning of the Constitution changes only when a constitutional amendment is passed or, perhaps, when the Supreme Court hands down a constitutional decision. Given that virtually no relevant Supreme Court decisions were handed down on the constitutional meaning of the Bill of Rights between 1791 and 1868, Tribe and Amar assume that 1868 was the only time the constitutional meaning of free speech could have changed. "Feedback" may occur only when a constitutional amendment is ratified. Amar and others treat the free speech fights from ratification to Reconstruction as constitutionally significant only to the extent those controversies influenced Republican understandings of free speech in 1868. Had the post-Civil War amendments not been ratified, the controversies documented in *The People's Darling Privilege* would apparently be of no constitutional importance. Constitutional settlements reached outside of courts, this conventional wisdom suggests, are constitutionally authoritative only when implicitly embodied in a constitutional amendment specifically intended to resolve some other constitutional matter.

Tying previous constitutional settlements outside of courts to subsequent constitutional amendments on related issues creates constitutional paradoxes. Constitutional settlements on some questions are held hostage to constitutional settlements on other questions. Suppose a general consensus exists that state segregation laws are unconstitutional, but that no consensus exists as to the constitutionality of federal segregation laws. Three parties strive for political power. The first party pledges to pass a constitutional amendment declaring "the federal government will not deny to any person the equal protection of the laws." The second party pledges to pass a constitutional amendment declaring "the federal government will have the power to deny to any person the equal protection of the laws." The third party pledges to pass no constitutional amendment. One party wins decisive victory and successfully implements its constitutional vision. Fifteen

[134] CURTIS, *supra* note 2, at 75-76.

[135] Ackerman, *supra* note 129, at 517.

years later, historical studies demonstrate that the persons responsible for the Fourteenth Amendment did not intend to prohibit state segregation laws. Whether this new information influences state power to segregate, according to "feedback" and "time travel" understandings of constitutional change, depends on whether either constitutional amendment on federal power to segregate was ratified. Both proposed amendments presumed that state segregation laws were unconstitutional. Hence, Amar might interpret both amendments as either amending the Fourteenth Amendment or settling the meaning of the Fourteenth Amendment. If, however, neither constitutional amendment was ratified, the unamended Fourteenth Amendment remains the appropriate source for determining the constitutionality of state segregation statutes. States retain the power to segregate, at least according to originalism, because that was the original understanding in 1868. Whether the Constitution bans state segregation thus depends entirely on whether at a time when people think the Constitution bans segregation, they pass a constitutional amendment, *any constitutional amendment*, that might be thought to assume state segregation is unconstitutional. Civil rights supporters in this constitutional universe gain more when an amendment permitting the federal government to segregate is ratified than when that amendment is defeated.

Antebellum constitutional practices prevented holding some constitutional meanings hostage to theoretically unrelated constitutional meanings by infusing ordinary constitutional politics with constitutional significance. James Madison recognized political practice was necessary to settle many constitutional questions. Such settlements required evidence of a national consensus, but that consensus need not be embodied in a constitutional amendment. Madison declared: "All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[136] These "discussions and adjudications" need not be judicial. Four years before the Supreme Court handed down *McCulloch v. Maryland*,[137] President Madison declared that the constitutionality of the national bank had been established by "a concurrence of the general will of the nation."[138] Constitutional practice before the Civil War recognized that "a concurrence of the general will of the nation" at one time could be overruled by "a concurrence of the general will of the nation" at another time. Just as a series of legislative and executive actions established the constitutionality of the national bank in 1815,[139] so a series of subsequent legislative and executive actions established the unconstitutionality of

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[136] THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

[137] 17 U.S. (4 Wheat.) 316 (1819).

[138] James Madison, Veto Message (Jan. 30, 1815), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 555 (James D. Richardson ed., 1896) [hereinafter MESSAGES].

[139] *See id.*

the bank by 1850.[140]

The Fourteenth Amendment and the Bill of Rights are best interpreted as having incorporated the constitutional changes that took place between 1791 and 1868, rather than as a synthesis of distinct constitutional understandings in 1791 and 1868. The post-Civil War Constitution makes sense only when interpreted in light of constitutional developments on civil liberties matters that took place from ratification until the Civil War. These constitutional developments included the emergence of a general consensus after 1800 that the First Amendment was not limited to preventing prior restraints and that the Alien and Sedition Acts were unconstitutional.[141] The general consensus that the First Amendment protected speech analogous to antislavery advocacy did not include a further consensus on what speech was analogous to antislavery advocacy. Hence, the meaning of both the First and Fourteenth Amendments remained unsettled at the time they were framed. As Madison knew, the post-Civil War Constitution would require "particular discussions and adjudications" before more general free speech principles could emerge.[142] Still, treating the Reconstruction amendments as incorporating previous constitutional settlements outside of courts explains how Republicans could, without contradiction, nationalize free speech protections, hold state governments to First Amendment standards, and protect speech analogous to antislavery advocacy. The Fourteenth Amendment is coherent only when Section One is interpreted as obligating states to respect what the First Amendment had come to mean by 1860, and not what that amendment might have meant in 1791.

Prominent constitutional scholars are acknowledging that constitutional settlements outside of courts should have normative constitutional significance. Keith Whittington has done an extensive study of the general structure of constitutional debates outside of courts and the particular characteristics of four prominent constitutional matters settled almost entirely without judicial help.[143] Whittington observes: "Constitutional constructions [by elected officials] allow change in the effective meaning of the constitutional text, they are not analogous to textual amendments."[144] The political precedents established by constitutional decisions outside the courts function similarly to legal precedents established by judicial decisions inside the courts. Whittington notes: "Constructions remain binding on future political actors, even if they are not legally enforceable."[145] Barry

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[140] *See* Andrew Jackson, Veto Message (July 10, 1832), *in* 2 MESSAGES, *supra* note 138, at 576, 581-82.

[141] *See supra* notes 16-17, 20-21 and accompanying text.

[142] *See supra* note 136 and accompanying text.

[143] *See generally* WHITTINGTON, *supra* note 22; Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 POLITY 365 (2001).

[144] WHITTINGTON, *supra* note 22, at 218.

[145] *Id.*

Friedman and Scott Smith reject interpretive practices that limit constitutional exegesis to the intentions of those responsible for specific constitutional provisions. "[H]istory is essential to interpretation of the Constitution, but the relevant history is not just that of the Founding, it is that of *all* American constitutional history."[146] They particularly emphasize that "[w]hen mining our history, we need to look to the actions and positions of constitutional actors ranging well beyond the courts."[147] Most famously, Bruce Ackerman and other constitutional scholars highlight those constitutional moments in American history when various political actors were able to change constitutional meanings without using the formal constitutional amendment process. While Ackerman has primarily been interested in exploring the jurisprudential significance of such grand constitutional moments as ratification, reconstruction and the New Deal, he recognizes the possibility of mini-constitutional moments in which political actors achieve smaller constitutional changes through legislative, executive, or other political means.[148]

Investigations of the Constitution outside of the courts could be sharpened by looking for what Madison appropriately called "a concurrence of the general will of the nation."[149] This concurrence may come at a particular decisive moment or may be the product of evolution.[150] All branches of government, as well as such governing institutions as political parties, may participate in the development of these settlements. The best sign of a concurrence may be acceptance of some policy by the leading opposition party. President Clinton's claim that "[t]he era of big government is over"[151] may be a moment of tremendous significance for the constitutional status of New Deal arrangements. A decision by the Republican party to remove pro-life provisions from their party's platform might serve as a de facto settlement that *Roe v. Wade*[152] was correctly decided. The sharp distinction Whittington draws between constitutional settlements outside of courts, and legal precedents or constitutional amendments cannot be sustained. What people litigate and how they amend the Constitution depends on what they think is constitutionally settled. The Constitution of 1868 makes sense only on the assumption that significant constitutional issues were settled outside of courts between 1791 and 1868.

Treating political decisions as constitutional precedent prevents the constitutional deck from being stacked against many claims of individual rights. The judiciary in the United States only determines the constitutionality of laws

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[146] Friedman & Smith, *supra* note 37, at 5-6 (emphasis added).

[147] *Id.* at 63-64.

[148] *See, e.g.*, ACKERMAN, *supra* note 42, at 196.

[149] *See supra* note 138 and accompanying text.

[150] *See* ACKERMAN, *supra* note 42, at 196-98.

[151] The State of the Union Address by the President of the United States, 142 CONG. REC. H768 (daily ed. Jan. 23, 1996).

[152] 410 U.S. 113 (1973).

elected officials pass and executive officials enforce. The justices hear cases on the constitutionality of the death penalty only after elected officials have passed a bill punishing some crime by death and a prosecutor persuades legal authorities to impose capital punishment in a particular case. No government has a judicially enforceable obligation to punish some crime by death. Hence, no constitutional issues are raised when elected officials repeal, reject, or never consider bills imposing capital punishment for some crimes. That the Constitution prohibits excessive but not lenient punishments means that the Supreme Court is far more likely to hear a case raising the constitutionality of the death penalty when most elected officials believe the death penalty constitutional than when most elected officials believe the death penalty is cruel and unusual punishment. Elected officials, the evidence further suggests, try to appoint, and are usually successful in their efforts to secure, justices who agree with their constitutional understandings.[153] Thus, good reasons exist for thinking that the constitutionality of the death penalty is more likely to come before justices inclined to think the death penalty constitutional than justices inclined to think the death penalty unconstitutional.

The constitutional status of the national bank vividly illustrates the way an emphasis on judicial precedents may bias constitutionalism. From 1788 until 1828, national majorities generally favored the establishment of a national bank.[154] Throughout most of this period, a national bank existed whose constitutionality could be challenged. Several challenges reached the Supreme Court. In *McCulloch v. Maryland*[155] and *Osborn v. Bank of the United States*,[156] the Supreme Court ruled that the federal government had the power to incorporate a national bank. From 1828 until 1860, national majorities generally opposed the establishment of a national bank.[157] Presidents Jackson[158] and Tyler[159] each vetoed a bank bill. By the end of the Mexican War in 1848, Whigs had abandoned all legislative efforts to reinstate national banking.[160] In the absence of a national bank whose constitutionality might have been challenged, the Supreme Court after 1832 had no opportunity to reconsider *McCulloch*. Had a Jacksonian tribunal considered the matter, good reason exists for thinking the bank would have been declared

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[153] *See* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 60-92 (1985).

[154] *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 144-71, 251-325 (1957).

[155] 17 U.S. (4 Wheat.) 316 (1819).

[156] 22 U.S. (9 Wheat.) 738 (1824).

[157] *See* HAMMOND, *supra* note 154, at 326-717.

[158] *See supra* note 140.

[159] John Tyler, Veto Message (Aug. 16, 1841), *in* 4 MESSAGES, *supra* note 138, at 63.

[160] *See supra* text accompanying notes 82-83.

unconstitutional.[161]

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[161] By the end of Jackson's second term, political sentiment in Washington was that *McCulloch* would be overruled whenever the Taney Court was presented with a proper case. Thomas Hart Benton praised President Jackson on the Senate floor for "prepar[ing] the way for a reversal of that decision." Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 249 (1999) (quoting 13 CONG. DEB. 387 (1837) (statement of Sen. Benton)) (emphasis deleted). Daniel Webster in 1841 warned Whig associates in Congress that the Supreme Court would almost certainly declare unconstitutional any bank bill similar to the one sustained by the Marshall Court in *McCulloch*. *See* MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 306 (1987). Reverdy Johnson, a leading Democrat and member of the Supreme Court bar, was similarly "convinced that the Court would declare that it would be unconstitutional to establish a branch [of the national] bank in a state that had specifically refused to sanction it." NORMA LOIS PETERSON, THE PRESIDENCIES OF WILLIAM HENRY HARRISON AND JOHN TYLER 70 (1989). *See generally* Magliocca, *supra* at 226, 248-50.

These predictions were quite realistic given the composition of the Supreme Court. As Representative Henry Wise noted, if the Whig Congress entertained hopes of rechartering the Bank of the United States, it should consider the composition of the Supreme Court, and then ask itself "if the distinguished gentleman, who removed the public deposites from the Bank of the United States [Taney] was not at the head of it, and if a majority of its members, was not of that school of politicians, who believed a Bank of the United States unconstitutional?" Magliocca, *supra* at 254 (quoting CONG. GLOBE, 27th Cong., 1st Sess. app. at 299 (1841) (statement of Rep. Wise)) (alteration in original). Before joining the Court, Roger Taney, Levi Woodbury, James Wayne, Philip Pendleton Barbour, John McKinley, Nathan Clifford, and John Catron all played prominent roles in Jacksonian fights against the national bank and American system. Taney and Woodbury were trusted members of Jackson's cabinet, TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 91 (2001) (discussing Taney); *id.* at 116-17 (discussing Woodbury), Woodbury was in Van Buren's cabinet, HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 99 (1974), and Clifford was the attorney general in the Polk Administration. HALL, *supra* at 133. Woodbury received serious consideration as a possible Jacksonian presidential candidate, *id.* at 117; Barbour was almost the Jacksonian nominee for the vice-presidency in 1832. *Id.* at 97. Woodbury, Wayne, Barbour, McKinley, and Clifford were Jacksonian leaders in Congress. *Id.* at 116 (discussing Woodbury); *id.* at 87 (discussing Wayne); *id.* at 96-97 (discussing Barbour); *id.* at 104 (discussing McKinley); *id.* at 133 (discussing Clifford). Henry Baldwin, Taney, Catron, McKinley, and Peter V. Daniel played major roles organizing Jacksonian forces in Pennsylvania, Maryland, Tennessee, Alabama, and Virginia respectively. ABRAHAM, *supra* at 89 (discussing Baldwin); *id.* at 90 (discussing Taney); *id.* at 93-94 (discussing Catron); *id.* at 95 (discussing McKinley); *id.* at 95-96 (discussing Daniel). The judicial majority on the Taney Court was either on record as believing *McCulloch* wrongly decided or virtually on record as harboring such sentiments. Five Taney Court justices, Chief Justice Roger Taney, Justices Philip Pendleton Barbour, Peter Daniel, Nathan Clifford, and Levi Woodbury had, while in political office, declared that the national bank was unconstitutional. CONG. GLOBE, 27th Cong., 1st Sess., app. at 180 (1841) (Woodbury); CONG. GLOBE, 26th Cong., 1st Sess., app. at 475 (1840) (Clifford); 39 ANNALS OF CONG. 1221 (1820) (Barbour); JOHN P. FRANK, JUSTICE DANIEL DISSENTING 113 (1964); CARL BRENT SWISHER, ROGER B. TANEY 190-95, 345 (1935). The other orthodox

McCulloch standing alone gives an unbalanced picture of the antebellum constitutional universe. The Jacksonian majority that successfully attacked the bank for thirty years will enjoy the same constitutional significance as the National Republican majority that successfully incorporated the bank for thirty years only when Jackson's veto is given the same constitutional significance as *McCulloch*.

The constitutional status of free speech before the Civil War is subject to the same biased interpretation when only judicial decisions are considered. We know that Federalist justices thought the Alien and Sedition Acts constitutional. Federalist justices sat on the bench when the constitutionality of the Alien and Sedition Acts was legally challenged, and sustained those measures. We do not know whether Jeffersonian or Jacksonian justices thought the Alien and Sedition Acts constitutional. When Jeffersonian and Jacksonian justices were on the bench, Jeffersonian and Jacksonian officials in the elected branches of the national government refused to re-enact those or analogous measures. The justices most likely to think the Alien and Sedition Acts unconstitutional had no opportunity to

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Jacksonian members of the Taney Court were either leading opponents of the national bank, *see* ALEXANDER A. LAWRENCE, JAMES MOORE WAYNE: SOUTHERN UNIONIST 72 (1943); Letter from Justice Catron to Ex-President Andrew Jackson (Feb. 5, 1838), *in* WALTER CHANDLER, THE CENTENARY OF ASSOCIATE JUSTICE JOHN CATRON OF THE UNITED STATES SUPREME COURT 28, 29 (1937); Edwin Countryman, *Samuel Nelson*, 19 GREEN BAG 329 (1907); John M. Martin, *John McKinley: Jacksonian Phase*, 28 ALA. HIST. Q. 7, 25-27 (1966), or identified with political factions or political leaders that regarded the bank as unconstitutional. SWISHER, *supra* at 444 (discussing the nomination of Robert Grier to the Supreme Court, and his opposition to the Bank of the United States); Christine Jordan, *Last of the Jacksonians*, 1980 SUP. CT. HIST. SOC'Y Y.B. 78, 80 (discussing Justice John Campbell and his opposition to rechartering the Bank of the United States). Only five justices who sat during the Taney era could be counted on as relatively sure votes for sustaining the national bank. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (finding unanimously, including Justice Joseph Story, that the Bank of the United States was constitutional); United States v. Shive, 27 F. Cas. 1065, 1067 (C.C.E.D. Pa. 1832) (Justice James Baldwin); 1 MEMOIR OF BENJAMIN ROBBINS CURTIS 115 (Benjamin R. Curtis, Jr., ed., Da Capo Press 1970) (1879); DONALD MALCOLM ROPER, MR. JUSTICE THOMPSON AND THE CONSTITUTION 296 (1987) (Justice Smith Thompson); *Letters of John McLean to John Teesdale*, BIBLIOTHECA SACRA, Oct. 1899, at 720 (Justice McLean). At no time did these five justices sit together.

Taney Court justices who fought the bank on constitutional grounds in the national legislature or national executive might nevertheless have thought the Court lacked the power to strike down a law authorizing the national bank. Still, the most probable swing votes on that question from 1845 to 1860, Justices Wayne and Catron, were militant opponents of the bank who retained strong Jacksonian political connections. Two other swing justices, Justices Grier and Nelson, exhibited no such judicial modesty after the Civil War when declaring that the government had no power to make paper money legal tender for private debts. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

consider the matter because their national political sponsors were more protective of speech than the Federalist officials who repressed political dissent during the 1790s.

The legal history of the Alien and Sedition Acts demonstrates that narrow legal traditions may not quite coexist with protective popular traditions. Legal free speech traditions result only at times when political officials repress political dissent. When proponents of a popular protective free speech tradition control the elected branches of government, no legal tradition of any sort can develop. No laws are passed that might be judicially challenged. If constitutional scholars insist, therefore, on privileging legal traditions when interpreting the Constitution, they will be primarily privileging constitutional practices at those times when elected officials are repressing rather than permitting political dissent.

III. CONCLUSION

Curtis has written a wonderful book on free speech theory and practice from the Bill of Rights to the Reconstruction. That other works can and will be published on this subject matter hardly diminishes his magnificent achievement. Scholars who wish to write about constitutional politics before the Civil War, general problems of constitutional interpretation, or other matters that require some knowledge of antebellum free speech practice will find *The People's Darling Privilege* a rich store of vital insights. A review discussing the books the author did not write must at least graciously conclude that these books can now be written only because of the book the author actually did write.

This review was published too late to incorporate the subtle assaults on free speech that took place during the first weeks after the despicable assaults on the World Trade Center and the Pentagon. No curbs have been placed on political dissent, and the possibility of substantial violations of First Amendment rights presently seems remote. Nevertheless, recent events highlight all the distinctive flaws Curtis observes afflicting contemporary free speech practice. The "increasingly concentrated mass medium of television"[162] has uniformly celebrated national unity and called for an end to all bickering. Americans are subject to constant "United We Stand" messages whenever they watch television, listen to the radio, read a newspaper, or even drive down the highway. Rarely have the mainstream media indicated that issues are being debated or are even subject to debate. Our enemies, both President Bush and most public commentators agree, must be defeated militarily and cannot be persuaded by argument that their cause is unjust.

The abolitionists whom Curtis celebrates felt differently about the relative merits of war and argumentation as means to combat evil. Many distinguished

[162] CURTIS, *supra* note 2, at 415.

antebellum opponents of slavery professed pacifism and maintained that moral suasion was the only legitimate response to injustice.[163] Lincoln would prove that war is sometimes an effective response to human depravity, though the failures of Reconstruction were in large part the result of efforts to impose justice by force of arms.[164] Perhaps military strikes against terrorism will prove as effective as the Union effort during the Civil War. History, however, suggests that might makes right only accidentally. Free speech is a central element of a faith system committed to thinking human beings in the long run as capable of recognizing justice, even when justice does not serve their immediate interest. War recognizes no such logic. Persuading those who oppose us as whole heartedly as jihadic warriors may seem a quixotic philosophical fantasy. The hard reality is that the human race will soon become extinct if war continues to be an alternative to talk.

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[163] *See* AILEEN S. KRADITOR, MEANS AND ENDS IN AMERICAN ABOLITIONISM 78-102 (1969).

[164] *See* MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 208 (1998) ("[A]chieving a genuine reconstitution would have required, in some fashion, the acquiescence of the vanquished South."). Claiming that southerners in 1868 might have been persuaded to the positions presently held by the NAACP is utter nonsense. The point is that racial justice will likely be achieved in the long run only when most persons are persuaded that racial justice must be done.

SPEECH, PRESS, AND DEMOCRACY

Paul Finkelman*

Professor Michael Kent Curtis's latest book, Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History, *chronicles the efforts of ordinary Americans to protect their right to freedom of expression from 1791-1865. Professor Paul Finkelman reviews this book, focusing primarily on Curtis's discussions of suppression of speech prior to and during the Civil War period and additionally providing some thoughts concerning the appropriateness of revoking free speech rights during times of war.*

The heart of a free society is the right — and in fact the duty — of the citizens to discuss politics and to criticize the government. It is part of what Alexander Meiklejohn called the "office" of citizen.[1] It is, of course, also a right that comes with more formal office-holding. The Framers of the Constitution understood this in the context of representative government. Thus, they enshrined this concept for members of Congress in the Speech and Debate Clause of Article I.[2] In 1789, the members of the First Congress did the same when they sent the Bill of Rights to the states. While Madison had great reservations about the efficacy of a Bill of Rights,[3] he understood that to guarantee that the national government would not infringe upon freedom of speech or the press, or certain other basic liberties, "was neither improper nor altogether useless."[4] By a quirk of good luck, the provision that guaranteed these rights ended up being the First Amendment to the Constitution.[5] Thus, the protections central to political liberty became symbolically "first" in American constitutionalism. When added in 1791, this amendment guaranteed that citizens, and indeed all people in the United States, like legislators, could discuss political issues unfettered.[6] Without the right of open political debate, democratic political processes would be hollow and weak; representative government would be almost meaningless if the people were not allowed to debate political issues and their

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[1] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE (1960).

[2] U.S. CONST. art. I, § 6, cl. 1.

[3] Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 302.

[4] 1 ANNALS OF CONG. 453 (Joseph Gales ed., 1789).

[5] It was originally proposed as the Third Amendment, but the first two amendments were not ratified.

[6] The amendment, of course, also protects non-political speech, and as I have argued elsewhere, there may be no real distinction between cultural speech and political speech. Paul Finkelman, *Cultural Speech and Political Speech in Historical Perspective*, 79 B.U. L. REV. 717 (1999).

representatives were constrained in their legislative debates. As Michael Kent Curtis notes in his book, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History*, "[r]epresentative democracy is the radical idea that ordinary people must be trusted to present, hear, and evaluate very divergent approaches and to make the right choices." [7]

The tension for representative government is, of course, that those in power do not like to be criticized. In early modern England, the Crown not only limited public debate, but even arrested members of Parliament who criticized the regime in their legislative debates. The Framers inserted the Speech and Debate Clause into the Constitution precisely with this history in mind.

In the United States it is not possible for a politician to openly suppress political rivals or critics. The Constitution limits this, and our political culture has long supported open debate. Thus, vigorous, sometimes rancorous, and often personally nasty debate has marked our political history since the colonial period. Politics has always been, and remains, rough and tumble — a verbal contact sport. In colonial New York, John Peter Zenger once placed an advertisement in his paper for a "lost spaniel" that resembled one of the governor's leading henchmen, and ran another advertisement which described a runaway "Monkey of the larger Sort" with "a Warr Saddle, Pistols and Sword" who "fancied himself a general."[8] The latter advertisement sounded suspiciously like a description of the governor himself. Zenger was only the first of many colonial printers to entertain and educate their readers at the expense of unpopular royal governors. This habit of attacking those in power continued after the Revolution. As Leonard W. Levy has noted, vigorous, even "seditious" criticism of the government was nearly "epidemic" — and virtually always unpunished — in the late colonial and revolutionary period.[9] What would have been libelous attacks in England became a mainstay of American politics. Cartoonists compared George Washington to a jackass and Abraham Lincoln to a gorilla.[10]

Even if American politics has always been a verbal contact sport, many American political leaders have shown a willingness to find whatever method they could to silence their opponents. Government officials in England, at least until the end of the eighteenth century, could always attack their critics by getting them indicted for seditious libel.[11] Even today, English private libel law and the British

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[7] MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 417 (2000).

[8] A BRIEF NARRATIVE OF THE TRYAL OF JOHN PETER ZENGER 26 (Paul Finkelman ed., Bradywine Press 1997) (citations omitted) [hereinafter BRIEF NARRATIVE].

[9] LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS x (1985).

[10] *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[11] Fox's Libel Act, 1792, Geo. 3 (Eng.). With this Act, England changed the law of seditious libel by allowing truth as a defense and allowing juries to decide the law as well as the facts in a case. *See generally* FEDERIC S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND,

Official Secrets Act provide powerful protection for those in power.[12] In the United States, politicians are subject to denunciation and abuse, while the high standard set out in *New York Times v. Sullivan* protects the press.[13] Under *Sullivan*, only "actual malice" — publishing something that is known to be false or publishing with reckless disregard for the truth — is actionable.[14] Since *Sullivan*, it has been virtually impossible for any politician to win a libel suit, and thus few have tried. Although George Bush "the Second" may be able to temporarily protect his father's papers — and therefore, his reputation — by manipulating rules on the release of certain documents,[15] the general openness of American society, combined with the Freedom of Information Act, will only allow him to protect the former president's reputation for a short time.

Because the American system of government was different than the British system, and because there was a powerful heritage of a free press in the colonial period, seditious libel was never a sure route for American administrations. Only twice, during the periods of 1798-1801 and 1917-1918, respectively, did the national administration have a Sedition Act with which to work. However, the Sedition Act prosecutions of 1798 undermined the use of such legislation at the national level.[16] The Act expired in 1801 and was not renewed. Only during World War I, when the Wilson Administration felt the need to impress upon a reluctant nation the importance of the war effort, did the national government seek broad powers to prosecute citizens under a new Sedition Act.[17]

Similarly, the clumsy common law sedition prosecutions brought by Jefferson and his allies effectively undermined the use of the state courts to protect politicians from those who would criticize them.[18] Jefferson and his allies pushed for the

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1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL (1952).

[12] Official Secrets Act, 1989, 37 & 38 Eliz. 2, c. 6 (Eng.).

[13] 376 U.S. 254 (1964).

[14] *Id.* at 279-80.

[15] Francine Kiefer, *A Fight Brews Over Ex-President's Papers*, CHRISTIAN SCIENCE MONITOR, Nov. 6, 2001, at 2.

[16] See generally CURTIS, *supra* note 7, at 115-16 (noting that Sedition Act prosecutions "disappear[ed] in the years between the Sedition Act and the Civil War"). Even during the Civil War Congress did not pass a sedition act.

[17] *See* Sedition Act of 1917; Espionage Act of 1918.

[18] Curiously, Professor Curtis avoided dealing with the vicious prosecutions brought about by Jefferson's desire to see his critics silenced. Curtis merely notes that Jefferson's legacy on this was "ambiguous." *See* CURTIS, *supra* note 7, at 101-02. He would have been better served by reading and learning from Leonard W. Levy's critically important book, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963). Curtis's very brief and unsatisfying discussion of *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804) fails to note that this state prosecution was brought at the behest of Jefferson, who could not tolerate Croswell's criticism of his administration. CURTIS, *supra* note 7, at 112-14. Even more peculiar is Curtis's failure to discuss the use of federal common law prosecutions by the

prosecution of Harry Croswell in New York, which led to his defense by the Federalist leader Alexander Hamilton[19] and an opinion supporting freedom of expression by the Federalist judge, James Kent.[20] After the War of 1812, as Curtis demonstrates in the heart of his book, suppression of political thought and discussion generally was acceptable only in the slave-holding South.[21]

With the traditional English route — sedition trials under statute or common law — unavailable to prosecute their critics, American politicians developed a unique style of dealing with whose speech they disliked. The classic move has been to demonize the speakers and their ideology. Usually, this demonization has come in the form of politicians questioning the patriotism of their political opponents. Too often, public leaders equate their own views with patriotism and accuse their opponents of somehow being suspect. In times of crisis, this is an especially common phenomenon. Most recently, for example, Attorney General John Ashcroft has implied that those who disagreed with his policies on military trials for civilians were giving aid and comfort to the enemy.[22]

Ashcroft is only the most recent in a long series of politicians who have sought to suppress their critics. As Curtis's book amply demonstrates, throughout our history there has been a constant tension between "the people's darling privilege" of free speech and the politicians in power who have been uncomfortable with the actual exercise of this privilege. Suppression has most commonly come from the political right, but liberals have not been immune from trying to silence their critics. Even those who have reputations for liberal thought and tolerance were not above suppressing their critics. The most repressive administration of the twentieth

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Jefferson Administration. During the Sedition Act crisis, Jefferson argued against any federal power to suppress speech and also opposed the entire concept of a federal common law of crimes. But during his presidency, his prosecutor in Connecticut brought a common law sedition charge against Federalist critics of Jefferson. This led to the decision in *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812), which determined that there was no federal common law of crimes. Curtis discusses this case, but fails to note its political context, or the fact that it was an instance of the Jefferson Administration attempting to create a federal common law of crimes to prosecute its enemies and of the Madison Administration pursuing this goal before the U.S. Supreme Court. CURTIS, *supra* note 7, at 114-15.

[19] To his credit, while an arch-Federalist, Hamilton opposed the Sedition Act.

[20] People v. Croswell, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

[21] Of course, this was not true for antebellum cultural speech, as the suppression of the Mormons and the blasphemy prosecution of Abner Kneeland in Massachusetts illustrate. *See* Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206 (1838); *see also* LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 43 (1957). Furthermore, after the Civil War the United States launched a full scale attack on cultural speech, especially as it related to sex, reproduction, and gender issues. *See* DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); Finkelman, *supra* note 6, at 726-27.

[22] Walter Shapiro, *Ashcroft has Strong Words for Critics but Weak Replies*, USA TODAY, Dec. 7, 2001, at 12A.

century was led by the progressive Democrat, Woodrow Wilson.[23] Thomas Jefferson, who retains a public image as an icon of liberty, urged his allies to prosecute his critics at the state level, with a meanness that rivaled anything his Federalist enemies had done during the Sedition Act crisis of 1798.[24]

The furor over Ashcroft's McCarthy-like attacks on critics of his policies does, however, underscore the importance and timeliness of *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History.* Curtis provides an unusual perspective for a law professor and a constitutional law scholar. He sees the evolution of freedom of expression coming from the people, rather than the courts, and argues that respect for freedom of expression has developed over time through popular movements, radical social activists, and political struggle. Judges, he often notes, were frequently opponents of freedom of expression and did little to extend this right.[25] He also points out that law professors, who focus too much on the modern Supreme Court, tend to forget the repressive nature of jurists throughout most of our history.[26] Curtis's book provides a welcome reminder of this history.

Curtis surely understands the value of judicial support for freedom of expression. He correctly believes that it "is essential" for democracy.[27] Yet he also argues that freedom of speech and freedom of the press are "too important to leave exclusively to judges, lawyers, and politicians." [28] Rather, they belong "to the American people,"[29] and must be protected by them.

I. UNDERSTANDING LAW THROUGH HISTORY

Curtis offers a deep and careful exploration of a series of historical struggles for freedom of expression. Although he does not explicitly set it out, his massive

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[23] *See generally* PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (1979).

[24] *See generally* LEVY, *supra* note 18. Again, one of the weaknesses of Curtis's account of freedom of expression is his failure to come to terms with Jefferson's role in the persecution of his critics. He lightly skips over Jefferson's role in seeking prosecutions of his critics at both the state and federal level. Indeed, one of the great ironies of freedom of speech is that the most important early Supreme Court decision protecting freedom of speech came as a result of federal common law prosecutions of Jefferson's critics. This led the Supreme Court to rule that there was no federal common law of crimes. *See* United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812). Curtis, who is perhaps overly enamored with Jefferson, notes the importance of the case, but fails to connect it to the Jefferson Administration. CURTIS, *supra* note 7, at 114-15.

[25] *See, e.g.*, CURTIS, *supra* note 7, at 269.

[26] *Id.* at 115-16.

[27] *Id.*, at 21.

[28] *Id.*

[29] *Id.*

evidence supports the concept of "demonization" and allegations of a lack of patriotism that have been used by opponents of freedom of expression throughout our history. Curtis is especially powerful in his discussions of the way conservative politicians, prosecutors, and jurists used this method to suppress opponents of slavery in the mid-nineteenth century. The opponents of the abolitionists painted them as trying to foment a race war or a civil war while advocating sexual immorality, a denial of religion, and the destruction of civil society. Ultimately, of course, these attacks on anti-slavery failed. Indeed, they backfired.

The history of speech and anti-slavery is critical for our understanding of how opposition to free speech works, and also how best to fight ideas with which we disagree. Before turning to this history, which constitutes the central portion of Curtis's book, it is useful to consider some other parts of the book.

After a brief chapter on the colonial period, Curtis spends three chapters exploring the Sedition Act of 1798. This sets up the heart of the book: nine chapters on the interaction between slavery, abolition, and free speech. He then offers two chapters on speech during the Civil War and two additional chapters which take us through the Fourteenth Amendment and then to modern issues of freedom of expression.

The theme throughout these chapters is the importance of popular support for free expression and the need of the people to struggle to make their voices heard. Curtis's discussion of the failure of the legal community to respect free speech is one of his most striking and important contributions. The federal courts upheld sedition prosecutions that occurred between 1798 and 1801, while judges throughout the South almost uniformly supported suppression of abolitionist speech. Leaders of the bench and bar, like Joel Bishop, Chancellor James Kent, and Francis Scott Key, supported the prosecution or suppression of those who challenged the status quo through speech or press.[30] Southern whites, like Hinton Rowan Helper and Daniel Worth, were threatened with imprisonment because they expressed the thoroughly plausible idea that slavery might not benefit non-slaveholding whites. Such ideas undermined the white hegemony necessary to preserve slavery, and naturally, as Curtis shows in great detail, these ideas were suppressed. As Curtis notes "[o]n the subject of slavery, the North Carolina court reduced free citizens to reading items the court found suitable for slaves."[31] Curtis follows these chapters with a discussion of the Civil War and the trial of Clement Vallandigham, who was prosecuted for statements made during the war. He ends his book where most constitutional law professors begin their courses; with a discussion of incorporation and the Fourteenth Amendment, and the modern jurisprudence of freedom of expression.

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[30] *Id.* at 195-98.

[31] *Id.* at 416.

Curtis staunchly defends modern First Amendment jurisprudence. For him, no limitation on political discussion is ever tolerable. He would limit speech that is inherently criminal, such as solicitations for bribery, extortion, blackmail, speech directly involved in criminal conspiracies, and perhaps (although this is not entirely clear) incitement to commit illegal acts. This seems plausible, and hard to reject, in the context of the twentieth century. He has little tolerance for the suppression of dissent in either World War I or the Cold War. He makes the point, quite persuasively, that there is no general wartime exception to freedom of speech. He endorses Brandeis's view of free speech, that "[o]nly an emergency can justify repression." [32] The lesson of history, he correctly notes, is that too often, we have allowed temporary fears and current political developments to justify the suppression of freedom of expression.

II. PRESS AND SPEECH IN THE COLONIAL PERIOD: THE IMPORTANCE OF *ZENGER*

Curtis begins his book with a novel approach: a discussion of the seventeenth century Levellers and their radical notions of democracy and freedom of expression. He follows this with an admirable analysis of the English libertarian philosophers — also called the radical Whigs — especially the work of John Trenchard and Thomas Gordon, who published under the name "Cato." [33]

From here, he takes us briefly through the *Zenger* case and the Revolutionary era. Curtis might have done more with *Zenger*, which is central to the development of American free speech.[34] Zenger was prosecuted for seditious libel for his attacks on the Royal Governor of New York. His attorney broke with traditional English law, arguing that truth should be a defense to libel.[35] Despite a charge by the judge (a political ally and appointee of the governor) to find Zenger guilty, the jury acquitted him.[36] One of Zenger's attorneys published an account of the case as *A Brief Narrative of the Tryal of John Peter Zenger*.[37] This book circulated throughout the eighteenth century and was reprinted in times of crisis as late as the 1950s.

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[32] *Id.* at 428 (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

[33] For more on Cato's Letters, see THE ENGLISH LIBERTARIAN HERITAGE (David Jacobson, ed.) (1965).

[34] *See generally* BRIEF NARRATIVE, *supra* note 8, at 1-69; Paul Finkelman, *Zenger's Case: Prototype of a Political Trial*, in AMERICAN POLITICAL TRIALS 25-44 (Michal Belknap ed., rev. ed. 1994).

[35] *Id.* at 51-52.

[36] *See generally* BRIEF NARRATIVE, *supra* note 8.

[37] *See* BRIEF NARRATIVE, *supra* note 8.

Part of the argument of Zenger's attorney centered on the geographic and political difference between America and Britain. Zenger's case, in a sense, set out why the United States could develop a more open system of freedom of expression: Because the colonies were far away from England, no amount of speech or press could *ever* be truly dangerous to the Crown. No matter how incensed the mob became in the colonies, it could not attack the King. Thus, free speech — or more precisely, publishing without restraints — was possible in the colonies because it was less threatening.[38]

Once speaking and publishing freely became common in the colonies, the habit set in and ultimately became deeply ingrained in our culture. Thus, the political and geographic context of *Zenger* helps us better understand the culture that led free speech to become the "darling" of the "people." To put it another way, the Leveller and radical Whig ideology of England made little headway there because such notions were truly threatening to the regime. However, these arguments seemed plausible, sensible, and just plain "right" in the American context.

III. FREE SPEECH AND ANTI-SLAVERY

Curtis's most important contribution to our scholarly literature is his detailed discussions of the connection between slavery, the abolitionist movement, and freedom of expression. Although he is not the first scholar to discuss this,[39] no other scholar has investigated this issue in such depth, and none has put it in the context of legal analysis and First Amendment theory. In a series of powerful chapters, Curtis explores how abolitionists used First Amendment concepts to challenge slavery, and in turn how conservatives in the North and almost all whites in the South developed an ideology of suppression in an ultimately futile effort to quell debate on this subject.

Throughout the 1830s, abolitionists were mobbed, beaten, and harassed for their opposition to slavery. For more than a decade, the House of Representatives imposed a gag rule on itself, prohibiting the reading or reception of anti-slavery petitions. Mobs attacked post offices to prevent the delivery of anti-slavery literature that had been mailed to the South, and the Jackson Administration did nothing to defend this important federal institution. In Alton, Illinois, a pro-slavery mob killed the abolitionist publisher Elijah Lovejoy while he was defending his press.

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[38] *Id.*

[39] *See, e.g.*, GILBERT HOBBS BARNES, THE ANTISLAVERY IMPULSE, 1830-1844 (1933); CLEMENT EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH (1940); RUSSELL NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830-1860 (1949); LEONARD RICHARDS, GENTLEMEN OF PROPERTY AND STANDING: ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA (1970).

Southern states placed their own internal bans on free speech. By the eve of the Civil War, the South had become a closed society where free debate, at least over slavery, was both impossible and illegal. In 1860, for example, North Carolina made the circulation of critiques of slavery that might lead to slave revolts a capital offense.[40] In effect, Southern whites were willing to give up a portion of their own liberty to suppress the liberty of others. This is a powerful lesson, and one that makes Curtis's book a valuable contribution to our understanding of the importance of freedom of expression.

Curtis demonstrates, as historians of this period already knew, that despite the pressure and persecution, abolitionism remained a vital force for social change in antebellum America. The process caused First Amendment values to grow. As Curtis notes, "[t]he death of Lovejoy at Alton crystallized support for a broad and general view of free speech in the North and dramatically strengthened the view that mobs and the institution of slavery threatened liberty and representative government." [41]

There is a lesson here that goes to the heart of the dilemma of free speech in a democracy: How do we deal with truly evil speech? How can our society survive the hatemongers, such as the Nazis who would march in Skokie, and beyond? I make no comparison here between the content of abolitionist speech and that of modern hatemongers. While the modern hatemongers are *wrong*, and indeed *evil*, if any group in our culture and history was *right*, it was the abolitionists who challenged slavery and racism. They struggled for three decades to awaken Americans to the central crime of our society — slavery.

Yet, despite their rightness and righteousness, it was not inevitable that the abolistionists would prevail in their struggle to raise the immorality of slavery in the public forum. Nor was it inevitable that slavery would end in the United States as early as it did. As Curtis shows, they prevailed in helping to make slavery the central issue of American politics in part because they were able to tie their cause to First Amendment values. The great error of the pro-slavery forces was their willingness to suppress speech with which they disagreed. In the end, the pro-slavery forces simply underscored the abolitionists' basic point: Slavery was dangerous to the liberty of the people.

In the same way, it is dangerous to suppress the speech (as opposed to the actions) of the hatemongers. Suppression of the speech of the far right will only give it the ammunition to denounce the government as corrupt and repressive. Suppression only highlights the suppressed. This is an important lesson, and Curtis teaches it well in his wonderfully rich chapters on anti-slavery speech. It is also a

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[40] *See* CURTIS, *supra* note 7, at 296.

[41] *Id.* at 241.

lesson than can serve us well in the twenty-first century. The answer to the "falsehood and fallacies" of bad speech is "more speech." [42]

IV. WHEN SPEECH MIGHT NOT BE PROTECTED: REVOLUTION AND CIVIL WAR

Curtis offers a profound defense of free speech at all times and in all places. Despite my admiration for his work and for this position, there may be times when the government can legitimately suppress some speech. Moreover, an understanding of such exceptions can help us protect speech — especially political speech — in times of crisis.

Curtis briefly touches on free speech during the American Revolution in this book, and I wish he had explored the issue more fully. In his first chapter, he notes that the "revolutionaries engaged in many practices that clearly violate our current understanding of freedom of speech and press,"[43] including the use of both legal and extra-legal methods to suppress loyalist speech.[44] Here, and in a later chapter on the Civil War, Curtis's admirable devotion to freedom of expression undermines his usually sound analysis.

Freedom of expression, like any right, can never be absolute. In wartime, there is a temptation to suppress speech merely because the government can more easily get away with it. The ruthless suppression of dissent by the Wilson Administration, including jailing the highly popular Socialist politician Eugene V. Debs, remains a clear stain on the history of American freedom. Although the front was an ocean away, Wilson and his team used wartime fears to suppress labor organizers, Socialists, and social critics who did not accept the goals and policies of his administration.[45]

As Curtis and most others have noted, it is impossible to find a legitimate theory to support the Wilsonian era suppression. Similarly, the suppression of the McCarthy era is patently indefensible. So too are Attorney General Ashcroft's recent suggestions that those who disagreed with his policies are unpatriotic.

However, we might ask, are there times when suppression of political discussion and public speech might be justified? When even the most staunch civil libertarian might accept a degree of suppression? My questions here go beyond the Holmesian notion of a "clear and present danger" posed by the malicious speaker.[46] Of course, falsely shouting fire in a crowded theater with intent to cause a panic would be punishable.[47] So too would speech that is itself part of a non-speech crime, such as

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[42] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[43] *Id.* at 47.

[44] *Id.*

[45] *See generally* MURPHY, *supra* note 23.

[46] *See generally* Schenck v. United States, 249 U.S. 47, 52 (1919).

[47] Holmes's dissent did not include a "falsely" element. *See* Abrams v. United States, 250

extortion or bribery. But these are easy examples that do not touch on the more important and difficult issue of limiting political speech.

In other words, are there ever times when political speech may be suspended? It seems to me there are, and in fact, the Constitution sets them out quite clearly. Article I, Section Nine, Clause Two declares that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[48] This, it would seem, is the standard that would allow suppression of speech. It is a complex standard, with three clear elements. First, there must be a time of war or war-like setting. Second, there must be either a rebellion or invasion. This means that the conflict must be on American soil and must be on-going. Third, there must be a determination that the public safety requires such a suspension of rights.

If we apply this three-prong test to the history of liberty in the United States, we discover that most suppression of speech has been unwarranted. The Wilsonian suppression during World War I, for example, fails two of the three prongs: There was no invasion, no conflict on American soil, and the speech did not threaten public safety. This analysis would also apply to the Sedition Act crisis of 1798. The United States was in a quasi-war with France, which would satisfy the first prong. However, there had been no invasion and there was no threat to the public safety.

The American Revolution clearly stands out as an example of when suppression of speech (as well as the more dramatic suspension of habeas corpus) might have been legitimate. From the perspective of the newly-declared independent nation, there was an ongoing rebellion of loyalists, who were trying to undermine the new nation. Similarly, there was an actual invasion; thousands of British troops and Hessians had invaded the United States. The nation was in peril. Political speech that undermined the new national regime simply could not be tolerated.

The other moment in American history when the government might have legitimately suppressed speech was the American Civil War. Here there was clearly a war setting, a rebellion, and great threats to the public safety. Curtis examines this issue in two long chapters focusing on the arrest and trial of Clement Vallandigham, one of the most vocal opponents of the war effort and all that went with it.[49]

Vallandigham was a racist and a pro-slavery Confederate sympathizer. He was also a popular, effective, and shrewd politician. He attacked emancipation, the use of black troops, conscription, and Lincoln's other policies. He, however, was careful not to directly urge a violation of the law. His tirades against the draft always included the caveat that people should not directly break the law. His strategy was certainly clever. Vallandingham could attack the war effort and try to persuade all

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U.S. 616, 624 (1919) (Holmes, J., dissenting).

[48] U.S. CONST. art. I, § 9, cl. 2.

[49] *See* CURTIS, *supra* note 7, at ch. 14-15.

who would listen to resist the administration, but get himself off the hook by making sure that his speeches never directly urged illegal activity.[50]

The Lincoln Administration did not fall for this ruse, and Vallandigham was ultimately arrested, convicted by a military court, and in a brilliant move by Lincoln, exiled to the Confederacy.[51] Curtis stresses Vallandigham's refusal to advocate a violation of the law to condemn the administration for this assault on civil liberty. This argument does not hold up terribly well. Vallandigham openly gave aid and comfort to the Rebellion. He wanted to stop conscription, to stop the war effort, and to prevent emancipation. While carefully avoiding a technical violation of the law, he was urging others to do so. Lincoln understood this, asking, "[m]ust I shoot a simple-minded soldier boy who deserts, while I must not touch the hair of a wily agitator who induces him to desert?" [52] Lincoln thus understood that the agitator had to be suppressed, not only to save the Union, but to save the "simple-minded soldier boy."[53]

The circumstances of the Civil War make Lincoln's actions reasonable. This goes against the grain of civil libertarians. Curtis argues that "[r]ecent precedent tends to support the right to oppose a war (provided the speaker does not advocate violation of the law that is likely to come about very quickly) and to reject the bad tendency test, and the idea that failing to express patriotic sentiments might be criminal."[54] Such recent precedent is not merely correct. Rather, it is central to the preservation of democracy. Curtis is surely on firm ground in arguing that in representative democracy, "[p]eople liable to be conscripted, shot, maimed, or killed (and to have these things happen to friends and loved ones) should have a continuing right to consider the wisdom of the war in which such sacrifices are demanded."[55] But, the quote "recent precedent" to which Curtis refers, involved overseas conflicts where there was no invasion, no rebellion, and no immediate and ongoing threat to the public safety. This was surely not the case during the Civil War.

The Lincoln Administration in fact allowed great debate over the war policy. It did not suppress the opposition, and in the off-year elections in 1862 and 1863, anti-war Democrats did well at both the state and national levels. However, Vallandigham was more than just a candidate. Lincoln and his administration saw him (correctly, I think) as someone who encouraged others to violate the law, even

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[50] Mark Neely, Jr., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND THE CIVIL LIBERTY 65 (1991).

[51] *See* CURTIS, *supra* note 7, at 313-14.

[52] CURTIS, *supra* note 7, at 341. The quotation is from Abraham Lincoln, *Reply to Erastus Corning and Others*, June 12, 1863, in 6 COLLECTED WORKS OF ABRAHAM LINCOLN 266 (Roy P. Basler, ed.) (1953).

[53] Abraham Lincoln, *Reply to Erastus Corning and Others*, June 12, 1863, in 6 COLLECTED WORKS OF ABRAHAM LINCOLN 266 (Roy P. Basler, ed.) (1953).

[54] CURTIS, *supra* note 7, at 348.

[55] *Id.* at 349.

if he shrewdly avoided the precise language of the lawbreaker. In all other wars, this would not to have been sufficient to bring him to trial, certainly before a military tribunal. However, in the context of the Civil War, with the Rebellion ongoing on American soil, such suppression was constitutionally justified. This is indeed what the Framers anticipated, by providing for the suspension of habeas corpus.

V. THE CIVIL WAR LESSON FOR MODERN AMERICA

The lesson of civil liberties during the American Revolution and the Civil War is that in most times, and in most places, there is no legitimate reason to suppress speech. Suppression is legitimate only in the most narrow of circumstances. If we are in an actual war, and we are actually invaded, and there is a danger to the public, or if there is a civil war, and there is a danger to the public, then — and only then — may speech be curtailed.

As noted above, no other war in our history has fit this pattern.[56] Suppression during the quasi-war of 1798-1799, or the real war of 1917-1918, was in the end grotesquely political, designed not to strengthen the war effort, but to strengthen the party in power. Perhaps it is heartening that this suppression failed to achieve its goals, and the party in power was voted out of office. Significantly, Lincoln's party was not voted out of office because his suppression was very mild and in the context of a civil war, a circumstance in which most voters understood that the rules really had to be different.

Even the crisis beginning on September 11, 2001 does not reach the threshold of allowing suppression. There was certainly an attack against the Unites States, much as there was on December 7, 1941. This attack on September 11th required immediate, and short-term, emergency actions. But it was not an invasion and the immediate domestic emergency quickly passed. The subsequent war took place far from the United States. Given these circumstances, there was no need or constitutionally legitimate reason for a suspension of habeas corpus for the suppression of speech. The threats to society from terrorists were real and extremely frightening, but suppressing speech would hardly have diminished these threats. Significantly, most Americans rejected Attorney General Ashcroft's hysterical claims that people who disagreed with his policies were somehow unpatriotic.

This result is actually heartening, and dramatically underscores Curtis's main theme: that starting in the Colonial period, and continuing through more than two centuries of constitutional government, the American people have come to cherish their "darling privilege." Americans have learned that speech has a value independent of whether one agrees or disagrees with the speaker. The process of

[56] The only possible exception might be the War of 1812, where there was an actual, although short-lived, invasion.

communication and of argument makes a country stronger. We also know that, absent a rebellion or actual invasion, nothing really justifies the suppression of opinions. Finally, Curtis's important chapters on antislavery speech remind us that free speech can make a difference.[57]

[57] *See generally* CURTIS, *supra* note 7.