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Compelling Lessons in the First Amendment. Book Review Of: Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History. by Michael Kent Curtis

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COMPELLING LESSONS IN THE FIRST AMENDMENT

FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY. By Michael Kent Curtis.[1] Duke University Press. 2000. Pp. 512. $34.95.

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Michael Kent Curtis summarizes his book, *Free Speech, 'The People's Darling Privilege': Struggles for Freedom of Expression in American History*, in these two sentences:

> In the free speech controversies over the Sedition Act, slavery, and Civil War, most victories for free speech were not won in the courts. Instead, they were won in the forum of public opinion: free speech victories were won in elections that repudiated the Sedition Act; in Northern legislatures that refused to pass laws to silence abolitionists; in Congress, when it refused to pass the postal ban on antislavery literature and when it finally repealed the gag rule that prohibited congressional discussion of the abolition of slavery and in popular protests over suppression of antiwar speech that curtailed Lincoln administration reprisals against dissenters. (p. 417)

Curtis describes, in great detail, the conflicts over freedom of speech that engaged Americans throughout the first half of the 19th Century. As Curtis notes, these controversies over free speech for the most part were not undertaken in the courts. Throughout the antebellum period the federal courts largely failed to enforce the First Amendment against actions of the federal government, and in 1833 the Supreme Court held that the provisions of the Bill of Rights were not applicable against the States.[3] Freedom of expression, which the author says "had

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2. B.A. Yale University, 1972; J.D. Cornell Law School, 1977; Professor of Law, University of Akron.
3. See *Barron v. Baltimore*, 32 U.S. 243, 250 (1833) ("These [proposed] amend-

to be struggled for again and again and again" (p. 116), was not won in the courts, but was gained in election campaigns, in the legislatures, in community meetings, on the battlefield, and on the streets. In this thorough and readable work Curtis reveals the roots of popular American beliefs on freedom of speech, and thereby contributes to our understanding of the original meaning of the First Amendment.

This volume is emblematic of the growing awareness among constitutional law scholars that it is not sufficient to simply study what the Supreme Court has said about the meaning of the Constitution. Because the Constitution speaks in broad phrases—"due process of law," "equal protection of the laws," "freedom of speech"—it is necessary to read meaning into the Constitution. This interpretive process requires us to determine what the fundamental values of our nation are, and, in instances where those fundamental values conflict, we must weigh one value against another. This meaning must be found in the words and actions of generations of Americans as they have confronted one crisis after another and as a result have forged compromises between the rights of individuals and the needs of ordered society.

Lawyers are trained in the forms of legal argument. As a result, constitutional law professors are adept at teaching students how to analyze constitutional text and how to follow or distinguish Supreme Court precedent. However, many of us are not cognizant of the history and traditions that give meaning to our fundamental freedoms. Michael Curtis' book fills a portion of that gap.

Curtis traces the "struggles for freedom of expression" in three contexts: the adoption and ultimate rejection of the Sedition Act of 1798; the attempt to suppress anti-slavery agitation between 1830 and 1860; and the military suppression of antiwar views in 1863 under the Lincoln administration.

The early chapters provide a brief historical review of freedom of speech in England and in America during the colonial period, including the free speech efforts of Sir Edward Coke, the Levellers, John Lilborne, John Peter Zenger, and John Wilkes. In the concluding chapters, Curtis draws parallels between the struggles of the antebellum period and the major free speech conflicts of the 19th and 20th Centuries. For example, he sees

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ments demanded security against the apprehended encroachments of the general government—not against those of the local governments.").

the roots of *NAACP v. Alabama*[4] and *New York Times v. Sullivan*,[5] which arose from attempts to silence the civil rights movement in the 1950's and 1960's, in the Sedition Act and in the attempts of the southern states to suppress antislavery speech a century earlier. (pp. 410-413)

The emotional and thematic core of the book, and approximately half of its contents, describe the attempts by northern mobs and southern legislatures to silence the antislavery movement. (pp. 116-299) This portion of the book contains a number of compelling stories, describing, for example, the persistence of John Quincy Adams fighting the gag rule in the House of Representatives, the courage of Elijah Lovejoy pressing the antislavery message at the risk of his life, the emancipation debate of 1832 in the Virginia legislature, and the trials of William Lloyd Garrison and Daniel Worth. The heroism of the antislavery advocates justify the accolade that Justice Louis Brandeis accorded the generation of the Revolution: "Those who won our independence by revolution were not cowards."[6]

Curtis presents the events leading to the Civil War in a First Amendment context: the South suppressed antislavery speech (pp. 291, 295), and demanded that the North should do the same, while elements in the North eventually demanded that the South should become an open society. (pp. 279, 281, 284, 285, 286, 289, 297) Curtis also links the dispute over antislavery speech to the other free speech disputes of the period. The suppression of antislavery speech is presented as a form of sedition law (p. 299), while the meaning of the Vallandigham case takes on added significance because of the country's previous experiences in the sedition and antislavery disputes. (p. 356) Curtis states that as a result of these conflicts many Americans came to recognize that the free speech rights of *all* citizens must be respected, and that this recognition would "light the way for future generations." (p. 356)

The stories that Curtis tells resonate with events of the 20th and 21st Centuries. The killers of Lovejoy are cut from the same cloth as the killers of civil rights leaders. Those who burned down the abolitionist forum, Pennsylvania Hall, now burn down abortion clinics. The military prosecution of Clement L. Val-

4. 357 U.S. 449 (1958) (invalidating state law that required the disclosure of the names and addresses of members of the NAACP).

5. 376 U.S. 254 (1964) (protecting clergymen and newspaper from libel claim arising from published criticism of public officials).

6. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

landigham for his writings against the Civil War presages the current detention of Yasser Esam Hamdi, an American citizen being held in military confinement in the war on terrorism.[7]

Part I of this review describes a number of themes in First Amendment law that *The People's Darling Privilege* speaks to. Part II argues that our study of the First Amendment would benefit from a more thorough appreciation of this Nation's history.

I. SIXTEEN FIRST AMENDMENT LESSONS FROM *THE PEOPLE'S DARLING PRIVILEGE*

This book contains a valuable compendium of historical evidence regarding dozens of aspects of First Amendment doctrine. Curtis has collected hundreds of speeches, laws, resolutions, petitions, and editorials that relate what ordinary Americans thought about freedom of speech and press in the early years of our republic. Here is a sampling of sixteen points of First Amendment law that are informed by Curtis' research and analysis.

1. POPULAR SOVEREIGNTY DEPENDS UPON FREEDOM OF SPEECH.

In the United States, the people are sovereign. That is the very definition of a republic. Our nation was founded upon the principle that governments "deriv[e] their just powers from the consent of the governed."[8] Pursuant to this principle, our Constitution and statutes must be interpreted in accordance with the intent of the people who enacted them into law.

But without free access to information, people are unable to learn of abuses or to intelligently define their own wants and needs. (p. 90) Without freedom of speech and press people cannot persuade others, form alliances, or organize political parties. Curtis describes how the Sedition Act of 1798 prohibited criticism of Federalist officers, the gag rule in Congress and laws in southern states prevented open discussion of slavery, and military orders during the Civil War attempted to suppress anti-war sentiment. A common reaction to all three of these restrictions was that limitations on freedom of speech were, in effect, limita-

7. See Charles Lane, *Debate Crystallizes on War, Rights: Courts Struggle Over Fighting Terror vs. Defending Liberties*, Washington Post A1 (Sept. 2, 2002).

8. *Declaration of Independence* (1776).

tions on the right of the people to govern themselves. (pp. 68, 69, 90, 96, 192, 234, 323, 324, 349)

A closely related principle is that in a republic, the people are the masters of the government. This precept is described in the next paragraph.

2. GOVERNMENT MAY NOT CENSOR THE PEOPLE BECAUSE THE PEOPLE ARE SOVEREIGN.

At the core of constitutional law is the concept that the constitution is a law and that it is a law that is superior to mere statutes.[9] In *The Federalist* Number 78, Alexander Hamilton explained this principle by characterizing the relation between the people and their government as one of principal and agent:

> No legislative Act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves. . . .[10]

The implication for freedom of expression is that just as an agent may not silence the principal, the government may not silence the people. In the early years of the Republic this metaphor captured the imagination of a number of Americans. (pp. 73, 97, 100, 195, 325, 348)

3. THE ORIGINAL CONSTITUTION OF 1787 CONTAINS PROVISIONS PROTECTING FREEDOM OF SPEECH.

A common antifederalist objection to ratification of the Constitution was that it lacked a bill of rights. (p. 56) Curtis points out, however, that the original Constitution contained significant textual protection for freedom of speech. First of all, the Speech or Debate Clause immunizes Members of Congress for any statements made "in either House."[11] (p. 69) Immunity for legislative debate would be expected in a society where the legislature is sovereign, as Parliament was in England. In the United States, where the people are sovereign, it was argued that

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9. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (stating that the Constitution is the "fundamental and paramount law of the nation").

10. Alexander Hamilton, *The Federalist*, Number 78, (McLean, ed.), at <http://lcweb2.loc.gov/const/fed/fedpapers.html> (last accessed November 20, 2002). Curtis traces this agency theory to the Levellers in 17th Century England. (p. 33)

11. "[A]nd for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const., Art. I, § 6, cl. 1.

this legislative immunity should be extended to individual citizens. (pp. 70, 100, 175, 195)

Another significant protection for Freedom of Speech contained in the body of the Constitution is the limited definition of "treason" contained in Article III: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."[12] (p. 50) James Madison noted that prosecutions for treason had been "the great engines by which violent factions ... have usually wreaked their alternate malignity on each other," and that the limited definition of treason "opposed a barrier to this peculiar danger."[13] The limited definition of treason was important because those who supported the Sedition Act of 1798 considered dissenting speech to be "treasonous." (p. 62) As one pro-government newspaper announced, "It is traitorous to be doubtful." (p. 61) Advocates of antislavery views invoked the narrow definition of treason in the Constitution to support their right to speak (p. 194), and after Clement L. Vallandigham was prosecuted for making antiwar speeches, both Democratic and Republican sources noted that criticism of the war was not treason. (pp. 326, 347)

4. FREEDOM OF SPEECH MAY BE THREATENED AS MUCH BY PRIVATE ACTION AS IT IS BY PUBLIC ACTION.

Although the Constitution does not directly apply to the acts of private individuals, when some members of society violently attack speakers because the speakers are expressing views they disagree with, freedom of expression suffers just as surely as if the government had outlawed the speech. Curtis cites many instances where newspapers or political leaders instigated or condoned mob violence to silence the antislavery movement. (pp. 140, 141, 142, 145, 146, 148, 149, 206, 219, 222, 246, 249) These leaders rationalized mob violence with the claim that mobs were "beyond the reach of human law" (p. 222) or that the mob should be praised for having "exerted a vigor beyond all law." (p. 141) The instigation to mob violence eventually evoked the response that in a democracy law is the expression of the will of the people, and that any individual or group who takes the

12. U.S. Const, Art. III, § 3, cl. 1.

13. James Madison, *The Federalist*, Number 43 (cited in note 10) (last accessed November 20, 2002).

law into its own hands is subverting democracy itself. (pp. 207, 233, 235, 247, 250, 255)

The most compelling story in Curtis' book is that of Elijah Lovejoy, the abolitionist editor who was shot defending his press from a mob in Alton, Illinois, in 1837. (pp. 216-240) Shortly before his death, after mobs had repeatedly threatened him and destroyed earlier presses, Lovejoy delivered an impassioned speech asserting his "right freely to speak and publish my sentiments." (p. 239) Lovejoy added, "I have asked for nothing but to be protected in my rights as a citizen." (pp. 227, 239) Curtis reports that Lovejoy's death "produced an immense public reaction" (p. 227) that led to a transformation in the way that Americans regarded both slavery and freedom of speech. (pp. 241-270) In particular, both before and after Lovejoy's death there were many calls for the protection of speakers and publishers. (pp. 192, 226, 239, 258) Lovejoy's murder was the catalyst for Abraham Lincoln's first public address, the speech to the Young Men's Lyceum, in which he denounced mob rule and proposed that obedience to the law should become the "political religion of the nation."[14] Many Americans eventually came to believe that government owes a duty to all citizens to protect them from private interference with the exercise of their rights.[15]

In modern times there are many examples of private action to subvert others' fundamental rights, including acts by the Ku Klux Klan. (219) The most sustained contemporary effort in this regard is the campaign of violence and intimidation that many members of the anti-abortion movement have waged against doctors, staff and patients of abortion clinics. In spite of the historical abuses and serious present danger of vigilantism, the Supreme Court has still not recognized that the American government has a constitutional duty to protect citizens from private action.[16] However, the principle of affirmative protection has been incorporated into First Amendment doctrine in a more limited sense. As Justice Black noted in dissent in 1951, before police officers may arrest a speaker who is inciting a crowd against

14. *Address Before the Young Men's Lyceum of Springfield, Illinois* (January 27, 1838), at Roy Basler, ed., *Collected Works of Abraham Lincoln*, 112 <www.hti.umich.edu/l/lincoln/> (last accessed November 20, 2002).

15. As Senator Lyman Trumbull stated, "Allegiance and protection are reciprocal rights." Cong. Globe, 39th Cong., 1st Sess. 1757 (1866).

16. See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (holding that the state was not liable for injuries inflicted by a father upon his child, even though the abuse had been reported to and was being investigated by caseworkers).

him, "they first must make all reasonable efforts to protect him."[17] Black's view was implicitly adopted by the Court in a trio of cases[18] from the 1960's where the Court ruled that demonstrators could not be arrested for disturbing the peace where "police protection at the scene was at all times sufficient to meet any foreseeable possibility of disorder"[19] or where officials "could have handled the crowd."[20]

5. THE GOVERNMENT MAY NOT UNDULY RESTRICT ACCESS TO THE PUBLIC FORUM OR TO THE MEANS OF MASS COMMUNICATION.

In the 20th and 21st Centuries the Supreme Court decided a number of cases involving restrictions upon various modes of communication. Some of these cases involved restrictions on the places where communication could take place, such as the streets of a company town,[21] airports,[22] or door to door solicitation.[23] Other cases have involved access to modern forms of communication, such as the radio,[24] the telephone,[25] the cable television platform,[26] and the internet.[27]

Michael Curtis describes in detail the attempts by the antislavery movement to gain access to the postal service (pp. 155-175) and to public meeting halls (pp. 140, 244-250) in order to spread their beliefs to the general public. In 1835 President Jackson's Postmaster General Amos Kendall took the position that the Post Office was obligated to obey the laws of southern states that outlawed the distribution of antislavery publications. (p. 158) President Jackson went even further, and proposed the adoption of a federal law that would "prohibit, under severe penalties, the circulation in the Southern States, through the

17. *Feiner v. New York*, 340 U.S. 315, 326 (1951) (Black, J., dissenting).

18. See *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. City of Chicago*, 394 U.S. 111 (1969).

19. *Edwards*, 372 U.S. at 232-233.

20. *Cox*, 379 U.S. at 550.

21. See *Marsh v. Alabama*, 326 U.S. 501 (1946).

22. See *ISKCON v. Lee*, 505 U.S. 672 (1992).

23. See, e.g., *Watchtower Bible and Tract Society, Inc., v. Village of Stratton*, 122 S.Ct. 2080 (2002).

24. See *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367 (1969).

25. See *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989).

26. See *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180 (1997); *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996).

27. See *Reno v. A.C.L.U.*, 521 U.S. 844 (1997); *Ashcroft v. A.C.L.U.*, 122 S.Ct. 1700 (2002).

mail, of incendiary publications . . . ." (p. 159) Similarly, the public officials of Boston initially refused to allow abolitionists to use Faneuil Hall for a public meeting (p. 244), and a mob burned down Pennsylvania Hall in Philadelphia, which had been dedicated to the discussion of public issues, particularly slavery (p. 248) Curtis describes the debate in Congress over Jackson's bill, and people's reaction to the denial of access to public meeting halls. Congress rejected the postal act (p. 174), while a Boston newspaper insisted that "Faneuil Hall is common property for the purposes of free meetings of the citizens, as much as the streets are common property for citizens to walk in." (p. 245) In these disputes we may trace the origins of the public forum doctrine and the emerging doctrine of protecting access to the means of mass communication.

6. FREEDOM OF SPEECH IS A "PRIVILEGE" OF UNITED STATES CITIZENSHIP.

In numerous quotations from speeches, resolutions, and newspaper articles, Curtis demonstrates that in the 19th Century the popular understanding of the word "privilege" was equivalent to the present term "fundamental right," and that freedom of expression was commonly referred to as a "privilege." (pp. 57, 189, 217, 230, 236, 269, 287, 315, 320, 321, 323) Furthermore, it is clear that by the end of the Civil War many Americans, including the drafters of the Fourteenth Amendment, regarded freedom of speech as a "privilege" of American citizenship. (p. 361, 364-368) As a consequence, the Supreme Court erred in the *Slaughterhouse Cases*[28] in 1873 when it narrowly construed the privileges of national citizenship under the Privileges and Immunities Clause of the Fourteenth Amendment (p. 374), and it has persisted in that error to the present day by failing to overrule the reasoning of the *Slaughterhouse* decision.

7. THE REMEDY FOR BAD SPEECH IS MORE SPEECH.

Oliver Wendell Holmes and Louis Brandeis are justly credited with introducing the "counterspeech" principle into First Amendment jurisprudence. In 1919 Holmes stated that "the best test of truth is . . . to get itself accepted in the competition of the market,"[29] while in 1927 Brandeis explained that "[i]f there be

28. *Slaughterhouse Cases*, 83 U.S. 36, 75-80 (1873).
29. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[30] This same principle was articulated by both William Seward and Senator Oliver Smith during the debate over suppression of antislavery speech. (201, 253)

8. THERE IS NO ORTHODOXY HERE.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...."[31] Justice Jackson's ringing declaration in the 1943 *Barnette* case echoed the statements of Americans who were opposed to the Sedition Act (p. 100) or who advocated antislavery views (pp. 158, 172, 205) that government was powerless to prescribe what shall be orthodox. As one anti-Sedition newspaper sarcastically noted, "By influence of *Sedition* and *Alien* Bills all Americans will be one side, and a tranquility will prevail all over the United States, similar to that so happily enjoyed in *Constantinople*." (p. 72)

9. THE GOVERNMENT MAY NOT "PICK SIDES" BY PROSECUTING ONE SIDE OF A DEBATE AND NOT THE OTHER.

Viewpoint based laws restricting speech are unconstitutional.[32] The principal reason that the Supreme Court struck down a municipal ordinance outlawing "hate speech" in 1992 was the danger that government would force people to speak in a politically correct manner.[33] Laws that forbid the burning of the American flag[34] or wearing a black armband to school as a war protest[35] also suffer from the defect of being viewpoint based.

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30. *Whitney*, 274 U.S. at 377 (1927).

31. *West Virginia State Bd of Education v. Barnette*, 319 U.S. 624, 642 (1943).

32. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992). In contrast, laws that *subsidize* one viewpoint over another may be constitutional, because government itself is entitled to take a point of view. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598-99 (1998) (Scalia, J. concurring).

33. See *R.A.V.*, 505 U.S. at 391-392 (stating "In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.... St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

34. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

35. See *Tinker v. Des Moines Independent Sch. District*, 393 U.S. 503 (1969). But

Curtis describes at some length how the Sedition Act was carefully drawn to outlaw criticism solely of Federalist officials (p. 59), and provided for prosecution before juries carefully selected by Federalist officers. (pp. 67, 90) It protected incumbents and jailed challengers. (p. 97) Government officials were protected from libel but not from flattery. (pp. 99) "[T]he press is open to those who will praise, while the threats of the law hang over those who blame the conduct of men in power." (p. 90) Similarly, the gag rule in the antebellum Congress, the statutes forbidding dissemination of antislavery literature, and the prosecution of Clement Vallandigham were all viewpoint based.

10. STATEMENTS OF FACT MAY BE FALSE, BUT STATEMENTS OF OPINION CANNOT BE FALSE.

The Supreme Court has expressly recognized that while statements of *fact* may be false and therefore actionable as defamation, statements of *opinion* are never punishable as defamatory. In 1974 the Court stated: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."[36] The distinction between statements of fact and statements of opinion is now a touchstone of constitutional law. But this principle was not immediately obvious to 19th Century America. The distinction between fact and opinion and protection for freedom of opinion was asserted as a defense in the sedition cases (pp. 70, 73, 77, 83, 90, 97, 101), in the battle over antislavery speech (pp. 166, 237), and in the prosecution of C.L. Vallandigham. (p. 322)

11. SPEECH IS NOT CONDUCT.

The opponents of antislavery speech repeatedly characterized it with metaphors of fire and violence. Antislavery speakers are "the midnight incendiary who fires the dwelling of his enemy, and listens with pleasure to the screams of his burning victims" (p. 179), or "a man who should throw a lighted torch into your house at midnight." (p. 157) Curtis notes that "[i]mplicit in such metaphors was the idea that the South was living on a pow-

see *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding conviction for burning a draft card as antiwar protest).

36. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974).

der keg" (p. 182) and that abolitionists were applying the "spark." (p. 275) Antislavery advocates were described as firing a mortar over state lines (p. 202) or as breaking open cages of wild beasts and setting them on the populace (p. 246) and were characterized as "cutthroats and assassins." (p. 290)

These metaphors are misleading because they blur the distinction between speech and conduct. Critics of the Sedition Act distinguished between opinion and action (pp. 75, 92), and argued that the mere tendency of speech to bring about social unrest is not sufficient grounds to suppress it. (p. 92) In the 20th Century the Supreme Court eventually rejected the "bad tendency" test[37] and adopted the view of Holmes[38] and Brandeis[39] that speech may be punished only if it is likely to incite an immediate and serious violation of the law.[40]

12. MORE PROTECTION IS ACCORDED FOR SPEECH INVOLVING MATTERS OF PUBLIC CONCERN THAN FOR MATTERS INVOLVING PRIVATE INDIVIDUALS ONLY.

Over the last half century the Supreme Court has in many cases recognized that speech on matters of public concern is entitled to more constitutional protection than speech that merely injures the reputation of private individuals.[41] The most recent invocation of this principle occurred in *Bartnicki v. Vopper*[42] where the Supreme Court held that a radio station that broadcast a private conversation that had been illegally recorded by another person could not be punished because the conversation involved a matter of public concern.[43]

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37. An example of the "bad tendency" test is contained in *Shaffer v. United States*, 255 F. 886, 888 (9th Cir. 1919).

38. See *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting, stating that only speech that "is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils" may be punished.).

39. See *Whitney*, 274 U.S. at 377-78 (Brandeis, J., concurring, stating that speech may be punished only where evil to be averted is "probab[le]," "imminent," and "relatively serious.")

40. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that advocacy of violence may be punished only where such advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

41. Compare *New York Times v. Sullivan*, 376 U.S. 254 (1964) (defamation of a public figure regarding matters of public concern); with *Gertz*, 418 U.S. 323 (1974) (defamation of a private figure regarding matters of public concern); and with *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (defamation of a private figure regarding matters of private concern).

42. 532 U.S. 514 (2001).

43. See id. at 534 ("privacy concerns must give way when balanced against the interest in publishing matters of public importance.").

The Sedition Act treated criticism of government officials as libel, but the opponents of the Act distinguished between defamation of a person's private character and criticism of his official acts. (pp. 86, 90, 98, 102, 103) Similarly, the State of Maryland prosecuted and imprisoned William Lloyd Garrison for criminal libel after he condemned a shipowner for engaging in the slave trade. (p. 199) Garrison responded that he had the right "to interrogate the moral aspect and public utility" of trafficking in slaves. (p. 200) Another critic made the same argument against the proposed ban on carrying antislavery materials through the mails, distinguishing between speech that slanders the character of individuals with speech that examines the conduct of public men. (p. 167)

13. FREEDOM OF SPEECH IS NOT LIMITED TO FREEDOM FROM PRIOR RESTRAINTS; IT ALSO INCLUDES FREEDOM FROM SUBSEQUENT PUNISHMENT.

In 1769 William Blackstone contended that the English law of freedom of the press included only freedom from prior restraints, and afforded no protection against subsequent punishments. (p. 45) In other words, although government could not prevent a person from speaking or writing, once words were uttered or published the speaker or writer was subject to fine or imprisonment. This was the view of those who supported the Sedition Act. (pp. 65, 97) But opponents of the Sedition Act ridiculed this view (p. 71), in part because "the nature of the republican government requires broader protection for freedom of speech and press than that permitted in England." (p. 103)

14. THE PUNISHMENT OF SPEECH FOR WHAT SEEMS TO BE JUSTIFIABLE REASONS ALSO CHILLS PROTECTED SPEECH.

Critics of the Sedition Act argued that the law would not only punish those who publish falsehoods, but also people who "may honestly and innocently err in their political sentiments." (p. 90) As a result, it would "inspire the mind with terror" (99-100) and people "would be afraid of publishing the truth . . . ." (p. 69) Although truth was a defense to violation of the Sedition Act, it was noted that it was often difficult to prove truth to the satisfaction of a court. (pp. 69, 97) "In vain shall we attempt to estimate the precise extent of prohibition, or ascertain what we are permitted to speak, and at what point we are compelled to silence." (p. 100) These concerns presage the recognition by the

Supreme Court that freedom of expression needs "breathing space to survive."[44]

15. THE MAJORITY SHOULD ACCORD FREEDOM OF SPEECH TO THE MINORITY, FOR TOMORROW IT MAY FIND ITSELF IN THE MINORITY.

Each of the major free speech disputes described by Curtis—over the Sedition Act, antislavery agitation, and antiwar agitation—contributed to a growing appreciation that the minority should be accorded freedom of expression. After 1800 the Federalist Party learned first-hand why the party in power should refrain from suppressing the rights of the opposition. As one newspaper put it after Lovejoy was shot, "Let one editor be shot for attempting to print a newspaper for a minority, and none are safe, for majorities are very fluctuating, and what is unpopular to-day may be popular to-morrow." (p. 238) Following years of struggle against mob violence, the gag rule, and the limits on the use of the post office the newly formed Republican Party stood for freedom of expression (p. 255) and ran under this slogan in 1856: "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Frémont." (p. 281) Finally, in reaction to the military's attempt to silence antiwar agitation under the Lincoln administration, both Democrats (pp. 321-325) and Republicans (pp. 326-329) came to believe that the dominant party was not constitutionally permitted to stifle opposing views, and Lincoln was forced to rescind these actions by the force of public opinion. (p. 352)

16. WHEN FREEDOM OF SPEECH IS SUPPRESSED BY VIOLENCE, CHANGE MAY BE BROUGHT ABOUT ONLY THROUGH VIOLENCE.

One of the principal stories that Curtis tells is of the publication, dissemination, and suppression of the book *The Impending Crisis of the South: How to Meet It*, by Hinton Rowan Helper. (pp. 1-2, 271-288) Helper's book was addressed to nonslaveholders of the South, and it contained economic and moral arguments against slavery. Helper intended to create an antislavery political party in the South. Chapter 12 of Curtis' book describes the frantic efforts of southern authorities to suppress Helper's book, while Chapter 13 (pp. 289-299) describes the per-

44. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

secution of Reverend Daniel Worth of North Carolina for circulating Helper's book.

Helper, like Elijah Lovejoy, sought to change minds and bring about revolutionary though peaceful change through the ballot. But the alternative to peaceful change is violent revolution. As Francis Lieber wrote to John C. Calhoun,

> If you fear discussion, if you maintain that the South cannot afford it, then you admit at the same time that the whole institution is to be kept up by violence only, and is against the spirit of the times and unameliorable, which means, in other words, that violence supports it, and violence will be its end. (p. 193)

Curtis' story of the suppression of the antislavery movement in the South raises a fascinating "what if." What if the South had allowed free discussion of emancipation and abolition? Would nonslaveholders—the vast majority of white southerners—have eventually perceived that slavery was not in their best interest? Would the Republican Party have gained adherents and votes in the South? Would slavery have been abolished without bloodshed? Would the Civil War have been avoided?

Similarly, after the Civil War, if there had been no reign of terror by the Klan and others, if African Americans had been accorded the right to organize and vote, would Mississippi and other southern states have become bastions of the Republican Party, and would the civil rights movement have peacefully matured as a political organization centered in the South a century earlier?

II. THE ROLE OF HISTORY AND TRADITION IN CONSTITUTIONAL ANALYSIS

Leading justices of the United States Supreme Court have observed that history and tradition wield a powerful influence on the Court's interpretation of the Constitution. Oliver Wendell Holmes traced the importance of tradition to the fact that the Constitution is "a constituent act"[45] that "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[46] In light of that, Holmes said that "[t]he case before us must be considered in the light of our whole experience and not merely in that of what was

45. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).
46. Id.

said a hundred years ago.... We must consider what this country has become...."[47] Likewise, Felix Frankfurter observed that:

> Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the constitution and to disregard the gloss which life has written upon them.[48]

In particular, the Court considers tradition to be the touchstone for determining what our fundamental rights are. Benjamin Cardozo defined our fundamental rights as those which are "so rooted in the tradition and conscience of our people as to be ranked as fundamental."[49] In recent years Chief Justice Warren Burger refused to accord constitutional protection to gay rights on the ground that to do so "would be to cast aside millennia of moral teaching"[50] Similarly, Chief Justice William Rehnquist rejected the right to assisted suicide because "this asserted right has no place in our Nation's traditions...."[51]

Perhaps the most common definition of fundamental right used today is Justice Lewis Powell's formula from *Moore v. City of East Cleveland*,[52] in which he said that our fundamental rights are those which are "deeply rooted in this Nation's history and tradition."[53] But Justice Byron White, dissenting in that case, articulated the central drawback to relying on tradition to define fundamental rights. Justice White said, "What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable."[54] And Justice John Harlan, in his celebrated dissent from the Court's denial of certiorari in *Poe v. Ullman*,[55] identified the core of the problem to be the fact that our Nation has often had competing traditions, and the role of the Court is to seek a balance among them. In *Poe*, Harlan stated that due process repre-

47. Id. at 433-34.
48. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J. concurring).
49. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).
50. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).
51. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).
52. 431 U.S. 494 (1977).
53. Id. at 503.
54. Id. at 549.
55. 367 U.S. 497 (1961).

sents "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."[56]

If we heed the admonitions of Holmes, Cardozo, Frankfurter, Harlan, Powell, White, Burger, and Rehnquist, it would behoove us to learn about our Nation's history to truly understand the Constitution. The Constitution is not only its text—it is not only what the Framers understood it to mean—it is not only what the Supreme Court has said that the Constitution means—its meaning must also be gleaned from how our people have behaved for generation after generation. It is this history that truly reveals the meaning of the Constitution and the fundamental values of Americans.

The study of the First Amendment in particular suffers from a lack of careful and thorough historical examination. One of the most famous scholarly works on the First Amendment is Robert Bork's *Neutral Principles and Some First Amendment Problems*.[57] Although purporting to be an analysis of the original intent of the framers of the First Amendment, Bork denigrated that intent, stating "The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended."[58]

There are a number of excellent casebooks on the First Amendment,[59] however the principal focus of most of these books[60] essentially begins in 1919 with the Supreme Court's decision in *Schenck v. United* States,[61] where Holmes first articulated the "clear and present danger" doctrine.[62] If one has a Court-centered understanding of Constitutional Law—that the Consti-

56. Id. at 542 (Harlan, J., dissenting).

57. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

58. See id. at 22.

59. See, e.g., Eugene Volokh, *The First Amendment: Problems, Cases, and Policy Arguments* (Foundation Press, 2001); Steven H. Shiffrin and Jesse H. Choper, *The First Amendment: Cases, Comments, Questions* (West Group, 3rd ed. 2001); William W. Van Alstyne, *The American First Amendment in the Twenty-First Century: Cases and Materials* (Foundation Press, 3rd ed. 2002).

60. Van Alstyne devotes an introductory chapter to historical issues including the *Patterson* case, Blackstone's views on freedom of the press, protections for freedom of expression in the original Constitution, the nation's experience under the Sedition Act, and other matters. Van Alstyne, *The American First Amendment in the Twenty-First Century* at 1-33 (cited in note 59).

61. 249 U.S. 47 (1919).

62. Id. at 52.

tution is what the Supreme Court says it is—then this approach makes perfect sense. The Supreme Court virtually ignored the First Amendment for a century after its adoption, and when it did finally turn its attention to freedom of expression the Court was hostile.[63] Not until 1957 in *Yates v. United States*[64] did the Supreme Court embrace the Holmes-Brandeis rationale that distinguished advocacy from incitement.[65]

But prior to *Yates*—prior to *Schenck*—even prior to the Civil War—this Nation had examined the role of freedom of expression in an ordered society in a number of contexts and had committed itself to a broad definition of that freedom. In this book Michael Kent Curtis fills the gap between Jefferson and Lincoln with stories of courage, drama, and sacrifice.

CONCLUSION

Like many Americans, I suffered from the "Mount Rushmore" vision of American History. Under this limited view, I revered Washington and Jefferson, adored Lincoln, and admired Teddy (who belongs on a mountain in a national monument), but I pressed the mental "fast forward" button through the dreary presidencies that punctuated the periods between these great men. Like the Elizabethans, we like our heads of state to be larger than life, Shakespearian figures around whom the drama revolves. But just as American history is not merely or primarily the history of Presidents, American Constitutional Law is not the merely or primarily the decisions of the Supreme Court. As Michael Curtis states, "[F]ree speech is too important to leave exclusively to judges, lawyers, and politicians. It belongs to the American people." (p. 21)

Curtis' book *The People's Darling Privilege* reinforces the fundamental principle upon which this nation was founded—that governments are instituted by us to secure our inalienable rights, and that all just powers of government are derived from our consent. The stories that Michael Curtis tells drive home the lesson that to make these self-evident truths manifest it is necessary that all persons be free to fully express themselves on matters of public concern. Without freedom of speech, democracy is impossible.

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63. See *Patterson v. Colorado*, 205 U.S. 454 (1908) (Holmes, J.).
64. 354 U.S. 298 (1957).
65. See id. at 324-25.