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Speech, Press, and Democracy

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SPEECH, PRESS, AND DEMOCRACY

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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.