INTRODUCTION

In 1857 North Carolinian Hinton Helper published a searing indictment of slavery entitled *The Impending Crisis of the South: How to Meet It*. In his book, Helper insisted that slavery blighted the South, produced its economic backwardness, and undermined the freedom and economic security of nonslaveholding whites. His solution was political action in the Southern states to emancipate the slaves. According to Helper's plan, slave owners—the "lords of the lash" in Helper's rhetoric—would not be compensated for loss of their slaves. Instead they would be taxed to pay the costs for those former slaves who chose to leave for African colonies or to settle in the United States.[1]

In a state where almost three-fourths of the whites did not own slaves, widespread circulation of Helper's book and the political action it advocated might have posed a serious political threat to the slaveholding elite. It might have, but it did not. For years, violence and repressive laws had silenced antislavery speech. Helper's book became a bestseller in the North. But in his native North Carolina it was hazardous to circulate the book.

Helper advocated peaceful democratic action. "Give us fair-play," Helper implored, "secure to us the right of discussion, the freedom of speech, and we will settle the difficulty at the ballot box, not on the battleground—by force of reason, not force of arms."[2] But if slaveholders and their "cringing lickspittles" opposed democratic action with force, Helper recommended fighting back and recruiting the slaves. "In nine cases out of ten," he said, they "would be delighted to cut their masters throats."[3]

Leaders of the newly formed Republican Party were delighted with Helper's book. Here was a Southerner and a white man who dramatically pointed out the evils of the institution of slavery the Republican

Party had been founded to contain. Enthusiastic Republican politicians underwrote a plan to publish an abridgment of Helper's book as a Republican campaign document.[4]

Back in North Carolina, a few hardy souls sold and circulated Helper's book. One of these was the antislavery minister Daniel Worth. Worth preached against slavery in Guilford and Randolph Counties, sold copies of Helper's book and the Republican *New York Tribune*, and worked to convert people to the antislavery cause. The state prosecuted Worth under a statute that made it a crime to disseminate items that tended to cause free Negroes or slaves to be discontent with their lot. The fear was that this discontent, in turn, might lead to slave revolts. In 1859, North Carolina juries convicted the minister for distributing Helper's antislavery book to white citizens, and in 1860 the North Carolina supreme court upheld the conviction.[5]

The North Carolina supreme court did not mention the First Amendment (or even state constitutional protections for freedom of the press). But, if pressed, the judges probably would have explained that the First Amendment was beside the point because the Bill of Rights limited only the federal government, as the United States Supreme Court had said in 1833 in the case of *Barron v. Baltimore*.[6] Criticism of slavery was not protected speech or press under the state constitution, the judges might have continued, because criticism of slavery could have the "bad tendency" to foment discontent among free blacks and slaves, and this discontent could lead, in turn, to slave revolts. The judges might well have gone farther and explained that freedom of the press only kept government from requiring its prior approval before a book or newspaper was published (prior restraint) and did not block punishment after publication. At any rate, and for whatever reason, in the trial and later appeal of the antislavery minister, the North Carolina court did not address the issue of whether the state statute violated the right to freedom of the press.

The struggle over Helper's book highlights recurrent free speech issues. Would free speech be a national right of all Americans or would it be a matter left to state and local governments? Could fear that speech —even political speech advocating peaceful change—had a "bad tendency" to cause serious harm justify suppressing it? What, after all, was the meaning of the right to free speech, free press, and freedom of religion? Modern free speech doctrine has repudiated legal theories like those used to punish distributors of Helper's book. But the Supreme

Court came to its current protective view of free speech only very gradually and only in the twentieth century.

This book is not a survey of free speech history—obscenity cases, libel cases, labor cases, and the rest. Instead, it is the story of a few struggles for free speech in American history. The struggles recounted here occurred in major American political battles that erupted from 1798 to 1866: the struggle between Federalists and Jeffersonian Republicans over the 1798 Sedition Act, the fight over slavery and the attempts to suppress antislavery speech, and the attempts to suppress antiwar speech during the Civil War. These were the most significant national free speech controversies between 1791 and 1868. The dates mark the ratification of the first Bill of Rights (which limited only the national government) and the ratification of the Fourteenth Amendment, which eventually provided a "second" Bill of Rights—a truly national one that limited the states.[7] (Free speech ideas in the twentieth century are reviewed in chapter 17.)

These free speech struggles were not only about free speech. Fundamentally they were also struggles for democratic government. In these struggles, Americans had widely divergent ideas about the meaning of freedom of speech and about how literally to take the creed that in the United States "we the people" rule.

The struggle for representative government had roots in England, and the English history of free speech and press was one factor that shaped American free speech debates. In seventeenth- and eighteenth-century England, there were strikingly different approaches to freedom of discussion—to free speech, free press, and freedom to express religious beliefs. (For the sake of brevity I will often refer to these freedoms collectively as freedom of speech.) The orthodox legal view developed in the king's courts and in a parliament composed of an oligarchic House of Commons and a hereditary House of Lords. It emphasized broad government power to suppress criticism of those in power and to suppress expression of unorthodox ideas. The opposing view was espoused by those who sought a more representative parliament and greater freedom of religion. These dissenters sought to limit government power over speech and to provide greater protection for freedom of discussion.

By the time of the American Revolution, there were two American approaches to free speech—an orthodox legal view and a more popular free speech tradition. There was a chasm between the orthodox understanding of the right many judges would apply and the popular right

many citizens exercised and thought they had. But the popular view of free speech had real-world effects—in elections, in legislatures, for at least some judges, and in actions by government officials. Between the ratification of the Bill of Rights in 1791 and ratification of the Fourteenth Amendment in 1868, American citizens—activists, newspaper editors, ministers, lawyers, and politicians—developed and expanded a protective, popular free speech tradition. Their ideas, struggles, and their legacy are the subject of this book. The free speech tradition was popular in two senses: it grew up outside the courts (and often contradicted judicial doctrine), and it had significant popular appeal.

Free Speech Battles from the Bill of Rights Through the Civil War: A Preview

The framers and ratifiers who supported the federal Constitution proposed in 1787 (without the Bill of Rights) generally said that the Constitution gave Congress no power over speech and press.[8] The First Amendment seemed to make things doubly secure. This "no federal power" consensus was soon challenged by the Federalists, who passed the Sedition Act of 1798.

The Sedition Act made it criminal to make false and malicious criticisms of the government, the Federalist president, or Congress—but not of the Republican vice president, the president's likely opponent in the next election. (At that time, before the Twelfth Amendment, the person who got the second highest vote total in the electoral college became the vice president.) The act had a sunset provision: it would expire with the end of the term of the Federalist president. As the Federalists who passed the Sedition Act made clear, the act punished assertion of false political ideas, arguments, and conclusions, as well as false facts. Jeffersonian Republicans made two attacks on the act. First, they insisted that the federal government had no power to pass it—it was simply without a delegated power over speech or press. Many Republicans appealed to states' rights. But this was often a states' rights appeal of a special sort: states' rights to protect the right of free speech from national legislation. Second, they contended that the act violated freedom of speech and press protected from federal action by the First Amendment.

In 1798 freedom of the press was already the people's "darling privilege," as Federalist congressman Harrison Gray Otis of Massachusetts put it during the Sedition Act debate. Otis said Jeffersonian Republicans

were misleading the people into believing that their "darling privilege" was threatened by the act. He insisted that this was not so. Freedom of the press meant only what William Blackstone's treatise on English law said it meant: one could publish a newspaper without first getting a license to do so from a government censor. But the government could punish those whose publications had a tendency to cause harm. By such an understanding there was less to free press than met the popular eye.[9] Otis quoted a host of legal authorities to show that protection for freedom of speech was far less sweeping than people might think. Implicit in Otis's words is the suggestion that Jeffersonian Republicans were appealing to a broader, popular misunderstanding of free speech.

The Sedition Act debate and later free speech struggles implicate three issues that run through the story of free speech in the United States: (1) Does the federal government have any power to punish speech? (2) What sort of speech will be protected under freedom of speech? and (3) Are state governments, as well as the federal government, prohibited from suppressing the freedom of speech and press referred to in the First Amendment?

The Sedition Act passed both houses of Congress, was signed by President Adams, and was upheld by Justices of the United States Supreme Court sitting as trial judges. But it produced substantial public opposition and was repudiated in the election of 1800. Thomas Jefferson, whose party had been the target of the act, was elected president, the act expired, and Jefferson pardoned those convicted under it.[10] From 1800 to 1860, most politicians treated the act as unconstitutional: it had been repudiated in the court of public opinion. The national government had little or no power over speech or press.

But that view of national power did not settle the matter of the scope of the "darling privilege." Instead, it raised the question of state power. After the Sedition Act, a major battle over the scope of free speech erupted over antislavery speech and the demand of the Southern elite that criticism of slavery be suppressed. Northern states refused to pass laws to silence abolitionists. Many in the North argued that such laws would violate free speech. Meanwhile, Southern states increasingly made criticisms of slavery a crime. That was the case, for example, for Hinton Helper's antislavery book, *The Impending Crisis of the South: How to Meet It*.

In the North, the federalism-based theory, by which the national government lacked power to suppress speech, protected antislavery speech.

Power to suppress—if any existed—had to be exercised by the states, and Northern states refused to suppress antislavery speech. In the South, that same federalism undermined free speech because it made freedom of speech or suppression a matter of local option. The South chose suppression.[11]

Finally, there was a major battle over the meaning of free speech during the Civil War. Then the earlier pre– and post–Sedition Act consensus—that the federal government (or the Congress) lacked power over speech confronted the Constitution's war power—and the "no federal power" over speech claim went up in smoke. A general, acting under a Republican administration that had been elected as the party of free speech, arrested a prominent Democratic politician for making an antiwar speech and tried and convicted him before a military commission.[12] But military arrests of antiwar speakers provoked massive public protests that such arrests violated free speech. The public uproar caused the Lincoln administration to moderate its course.

There is a common theme in the outcome of each story. The public reaction to the Sedition Act ensured that it would not be reenacted. In 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. The uproar over suppression of free speech during the Civil War also limited repression. In each case, attempts to keep criticism of the Federalists, of slavery, and of the war out of the public domain produced a strong public protest. Whether the popular tradition had more public support at any given time and place than the tradition of repression is open to question, but it is one beyond our power to answer with certainty. It is clear that it often had substantial support. Of course, free speech suffered defeats as well. Still, in response to the Sedition Act, the attack on antislavery speech, and the assault on antiwar speech during the Civil War, people espoused ideas that have since become central parts of free speech legal doctrine.

Response to attacks on antislavery speech played a prominent role in the movement to a national view of free speech. These struggles for free speech helped shape the Fourteenth Amendment, our "second Bill of Rights." Today, the Fourteenth Amendment is the legal mechanism by which the states are required to respect freedoms of speech, press, religion, and assembly articulated in the First Amendment. (The Fourteenth Amendment provides that persons born in the nation are citizens

of the United States and that "no state shall . . . abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law.") Since the states have frequently suppressed free speech, the Fourteenth Amendment is a crucial contemporary protector of free speech.

History and Free Speech Law

Understanding these free speech struggles, and the popular free speech tradition they illuminate, is important today for citizens, lawyers, and judges. Because free speech disputes from 1791 to 1868 are a crucial part of the background of the Fourteenth Amendment, they are significant for those who adhere to the view that the Constitution should be interpreted in accordance with the original intent of its framers or ratifiers. Similarly, they are important for those who think a constitutional provision should be understood based on the original meaning of the words in the constitutional text (such as "privileges or immunities of citizens of the United States"), and also for those who believe that history is simply one factor to be consulted in the search for constitutional meaning.

One method of legal analysis is to use a clear or paradigm case as a way to understand other problematic cases. Most Republicans concluded that the effort to suppress advocacy of peaceful abolition of slavery violated the central meaning of free speech, and today most of us would agree with them. So free speech struggles over slavery help us to evaluate other suppression theories. Finally, these free speech struggles are relevant because history provides vicarious experience, and experience is necessary for wise judgment.

The popular free speech tradition is also significant as a precursor of key modern free speech ideas. These ideas stand in vivid contrast to the theories that justified suppression of antislavery speech, theories used in the controversy over slavery and that survived the demise of slavery.

Free Speech Ideas Today

Since the 1930s, courts usually have protected speech about public affairs from government suppression.[13] Current free speech doctrine embraces the idea of a public domain where government typically may not suppress discussion on matters of public concern because of the ideas ad-

vanced. The public domain is bounded by the line that separates protected from forbidden expression and by another line that describes those places or situations in which speech receives its highest protection.[14]

Those who have benefited from the Court's tough rules to protect speech in the public domain have included students protesting segregation in South Carolina,[15] critics of the actions of Alabama officials during the struggle for integration,[16] a Klansman who said blacks should go back to Africa and Jews should return to Israel and who suggested violence might be necessary at some point,[17] school children who refused to salute the flag,[18] a state legislator who endorsed the claim that the war in Vietnam was genocide and who expressed sympathy for those who refused to serve,[19] a young man who burned the American flag as a protest,[20] and another who wore the slogan "Fuck the Draft" on his jacket.[21] Within broad limits, free speech doctrine denies the government the power to say which ideas are orthodox and acceptable and which ideas are beyond the pale. The rules apply generally to a wide range of points of view. A case protecting the rights of African Americans to protest segregation cited a case protecting a man who gave a racist speech.[22] Some critics charge that the Court has taken its broad and general rule against suppressing ideas on public affairs too far. But when freedom of speech is attacked, many think of the courts as the first line of defense.

The Courts as Protectors of Free Speech

Our contemporary emphasis on the role of the courts as protectors of free speech is altogether proper. One of the main objects of the Bill of Rights was to empower the courts to check abuses of liberty. When he introduced the Bill of Rights in the first Congress, James Madison optimistically suggested that "independent tribunals of justice will consider themselves in peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution."[23] For much of American history things often did not work out that way. From the Sedition Act through the Civil War and continuing through the first quarter of the twentieth century, courts were too often hostile to dissenting speech when it was under attack. Often when free speech battles

were fought and won in the political arena, courts were simply not involved.

We tend to forget how recent robust national judicial protection is. Today, most Americans associate our free speech "rights," "liberties," "immunities," or "privileges" (as they were commonly called in the eighteenth and nineteenth centuries) with the First Amendment to the Constitution. (Such rights are typically protected by state constitutions as well.) Americans generally believe that they have a federal constitutional right to free speech and freedom of religion that belongs to them wherever they go in the United States. They understand free speech to be a national right and one that is enforceable in the courts. Many think—too simply, as most lawyers see it—that the government lacks power to deny free speech.

While Americans may disagree about the precise boundaries and content of free speech and free press, the freedom to discuss and advocate political, economic, scientific, and religious ideas is central to our idea of free speech. So is the right to criticize the conduct of government officials and private citizens who wield extraordinary power. Many would insist that there are limits even to these ideas of free speech. But some proposed limits would be flatly rejected by most Americans. For example, few would accept the notion that one is free to speak or write on political topics without prior permission from government but that the government could broadly punish such speech after it was expressed. Many would be skeptical of the claim that speech that expressed bad ideas about politics or religion should be suppressed because in the long run it would have a tendency to lead to unfortunate consequences. Probably most Americans would flatly reject the idea that while the federal government lacks power to abridge freedom of speech or of the press, state governments should be able to punish any political or religious speech if their constitutions and laws permitted. Today, the courts typically protect free speech in all these situations. But it was not always so.

Strong judicial protection of speech is a worthy tradition. It is also a comparatively recent one. For much of American history, as the case of the North Carolina antislavery minister Daniel Worth shows, many judges have been less protective of free speech. Indeed, there is an older judicial doctrine that was far more receptive to suppressing free speech. The older doctrine is a stark contrast to our modern ideas of free speech.

The Old View from the Bench and Elsewhere: A Crabbed and Stunted Free Speech

In 1833 in *Barron v. Baltimore*, the Supreme Court ruled that the guarantees of the federal Bill of Rights limited only the national government, not state or local governments.[24] (As a matter of original understanding, the decision probably was correct.) The *Barron* decision protected statutes that Southern states used against antislavery speech from Supreme Court review.

Most Southerners did not own slaves, and some opposed slavery. The restriction of antislavery speech by Southern statutes tended to keep slavery off the political agenda in those states. Legal and extralegal suppression of antislavery speech protected an entrenched economic elite from the democratic process and silenced those who wanted to speak against the horrors of slavery and for the humanity of the slave.

In 1856, the newly created Republican Party made a strong run for the presidency. The party had been founded to oppose the spread of slavery to the national territories, and many Republicans hoped local political opposition would end slavery in the states where it existed. But in 1856 and 1860 Southern laws and mobs kept supporters of Republican presidential candidates from campaigning in Southern states. Unhappily, the Southern approach to free speech was not unique.

The Bad Tendency Doctrine

From the Sedition Act through the Civil War, a number of scholars, judges, politicians, and legislators thought speech that had a tendency to produce harmful results was not protected speech. The "bad tendency" rationale, inherited from England, was a major theory justifying suppression. By this approach, speech that *might* cause harm in the long run could be suppressed. The bad tendency theory relieved the government of any need to prove imminent or even probable danger. Courts often said the truth of the statement that had a "bad tendency" was no defense.[25] Because of the uncertainty of causation in human affairs, the sweep of the bad tendency theory is vast. The North Carolina statute under which Daniel Worth was prosecuted was written in terms of bad tendency. Some Southerners thought the Declaration of Independence could lead slaves to revolt. Many Southerners were sure that the political

ideas of Abraham Lincoln's Republican party should be suppressed in the South because of their bad tendency.[26]

The bad tendency theory was not limited to the South or the period before the Civil War. In a 1914 case from Massachusetts,[27] the state court upheld the conviction of a man charged with carrying a red flag in a political parade. It was emblazoned in gold letters with the words "Finnish Socialist Branch, Fitchburg, Mass." The court found parading with the flag was a violation of a state statute that forbade parading with a red or black flag or with an inscription opposed to organized government. The rationale was that the legislature might reasonably conclude that the red flag might tend to produce "turbulence." A "rational connection with the preservation of public safety" was all that was required.[28]

No proof was needed that any turbulence occurred. No proof was necessary that disorder was likely. All that was required was that a rational person might believe that the flag had a tendency to cause turbulence—as all truly controversial ideas do. Today, a law that targeted carrying a flag because of its political message would violate the guarantees of the First Amendment, and simple concern about possible disturbance would not be enough to justify suppression.[29]

Modern commentators are rightly critical of the idea of a heckler's veto—that an arrest of a speaker can be justified because a hostile observer threatens violence.[30] They suggest that, whenever possible, the police should protect the speaker and restrain those who threaten violence. The Massachusetts court decision meant that the heckler did not need to cast his veto or even threaten to. A rational possibility that he would was enough.

The United States Supreme Court also too often embraced crabbed conceptions of free speech. In *Patterson v. Colorado,*[31] decided in 1907, the Supreme Court expressed doubt that the First Amendment limited the states. Even if it did, the Court continued, the amendment was limited to banning prior restraints (having to get a government license before publication) and did not preclude punishment even for true statements about public affairs. The Court upheld the contempt conviction of a newspaper editor who had criticized a disgraceful Colorado state supreme court decision. He had done so while a petition for rehearing was pending. The Court said the editorials had the bad tendency to interfere with the administration of justice. The truth of the criticisms was irrelevant.[32] (The Court did suggest that criticism might be protected after the

state court's decision was final.) With reference to criticism of other branches of government, the Supreme Court was more protective of free speech values.[33] State court decisions split on the right to criticize state officials, including judges;[34] some early cases were protective of free speech.[35]

According to free speech historian David Rabban, from 1870 through the First World War most courts tended to be hostile to free speech concerns and to justify suppression based on bad tendency. During and after World War I, courts used the bad tendency theory to uphold punishment of dissenters who criticized World War I, including some who confined their criticism to urging lawful means to oppose the war.[36]

Lawyers, judges, and law students are trained to look for constitutional law precedents in decided cases. After reading the bad tendency cases, they might conclude that the narrow, suppressive older judicial doctrine was how free speech was generally understood in the United States before the 1930s. But there was another approach, a robust and protective popular tradition that grew and gathered strength in the years before the Civil War. The "popular" free speech tradition grew up outside of the courts and was directed to the sovereign people and their representatives. It came primarily from activists, not from the Supreme Court of the United States or state supreme courts. The tradition was "popular" in another sense—it had significant popular appeal and it affected the behavior of politicians.[37]

A Popular Tradition for Protecting Free Speech

The idea of a broadly protective free speech guarantee welled up from American citizens—newspaper editors, ministers, politicians, antislavery activists, lawyers, and others who were responding to attacks on free speech. There had been seeds of such a protective tradition among dissenters in England. The popular free speech tradition compares well with the stunted and crabbed view of free speech and press articulated by some judges and some commentators from the founding until the 1930s. (There were, of course, also activists on the other side.)

The Nature of Free Speech

Those who espoused the popular pro–free speech tradition wanted broad protection for speech and press. They extended protection to un-

popular speakers who asserted ideas that they thought were wrong or even evil. They denied that the government had legitimate power to establish orthodoxy. By this view, free speech was a basic and inherent right of all Americans, and it broadly protected the right to speak and write about political, religious, and scientific topics. Government lacked the power to ban such speech. This view implicitly, and often explicitly, rejected the claim that speech with a bad tendency should be suppressed.

Many of those who adhered to the popular free speech tradition rejected suppression of unpopular dissenters because they feared that suppressing their ideas required delegating discretion, a discretion that was likely to be abused. They also seem to have believed that certain types of speech were simply protected by freedom of speech, and that was that. These citizens espoused the idea that protection of free speech must be general. Incursions on the rights of those engaging in dangerous speech —the abolitionists, for example—involved dangers for all. A broad reading of free speech was one part of the popular tradition. The other insisted that free speech must be protected in every state by a national constitutional guarantee.

The Nationalization of Free Speech

In the mid-1830s, Congress rejected even very limited national legislation against abolitionist speech. But in this case, arguments were often based on the division of powers between the nation and the states. A number of congressmen explained that the federal government lacked any power over speech and that the states themselves could provide any necessary remedies.

In contrast, many citizens, ministers, editors, lawyers, and politicians developed the idea of free speech as national instead of state-centered. Particularly after 1837, these free speech advocates began to proclaim that free speech was a national right or immunity, enshrined in the federal Constitution. They believed citizens had a right to exercise free speech in South Carolina and Massachusetts and anywhere else in the nation: state laws that abridged freedom of speech violated the federal Constitution. Activists, politicians, editors, ministers, and others developed the idea of a strongly protective national free speech guarantee enshrined in the federal Constitution *before* ratification of the Fourteenth Amendment in 1868 and long before 1925 when the United States Su-

preme Court finally assumed that states could not abridge the national free speech right protected by the First and Fourteenth Amendments.

Opponents of slavery and leaders of Lincoln's Republican Party sought freedom for criticism of slavery, even in the South. Some worked out a protective legal theory to explain why the Constitution's First Amendment ("*Congress* shall make no law . . . abridging freedom of speech or of the press") protected free speech from state abridgment. By this view the Bill of Rights added new rights or immunities to the catalogue of national privileges protected by Article IV, Section 2, of the Constitution or by the guarantee of republican government.[38] In 1866 Republicans in Congress proposed the Fourteenth Amendment, which provided that no state should abridge the privileges or immunities of citizens of the United States or deny to any person life, liberty, or property without due process or deny equal protection to any person. Two of the three leading Republicans on the committee that framed the amendment explained that "privileges" of citizens of the United States included Bill of Rights liberties such as free speech and press. Free speech was often invoked by Republicans who defended their approach to Reconstruction (of which the Fourteenth Amendment was the centerpiece) in the congressional campaign of 1866.[39]

By the 1930s, the Supreme Court began squarely to reject the bad tendency theory and to hold that the First Amendment protected the people against state laws abridging their right to free speech.[40] In the 1960s, the Court embraced strong protections for free speech.[41] As these dates suggest, the Supreme Court was slow to extend strong protection for free speech.

The Uses of the Past

Is the Crabbed View the Original View? Is Current Doctrine Legitimate?

Law students, including those who eventually become judges, first learn the law from casebooks. Later in their careers, lawyers search for and find constitutional law in cases. In these sources, they rarely see detailed stories about the free speech battles over sedition, abolition, antiwar speech, and Reconstruction.[42] The omission is entirely understandable—casebooks are too big already, and cases deal with specific and

current problems. It is also quite unfortunate. Stories such as those in this book illuminate the central importance of free speech and the protection of dissent for individual liberty and American democracy. They show the long existence of a vibrant popular free speech tradition outside of the courts as well as the power of demands for suppression.

To the extent that a popular free speech tradition helped to prevent repressive legislation, it left no court decisions or statutes. As a result, it is invisible to the eyes of some law teachers, lawyers, and judges. What remains visible are court decisions that illustrate the development of robust Supreme Court protection for free speech after 1925.

Court decisions are the result of certain vectors. These vectors include the text of the constitutional provision; the structure of the Constitution or how the document is to function as a whole; prior judicial decisions; the history surrounding the provision; major political events, such as the Great Depression and the victory by the North in the Civil War; the ethical aspirations the provision reflects; and sound public policy.[43] The problem, of course, is that there is no consistent understanding of the weight to be given to the various vectors. One possible response to this problem is to follow a single method, the teaching of history.

The theory of original meaning focuses on the common public understanding of the words of a constitutional provision at the time of enactment. (The closely related idea of original intent typically focuses on the intent of those who framed or ratified the constitutional provision.) According to these ideas, now much in vogue, the words and legal concepts in the Constitution should be given the "common" meaning the words had at the time the constitutional provision was ratified or the particular meaning that their drafters or ratifiers intended. The unstated assumption is that the original understanding was crisp, clear, and generally shared. To many critics, free speech doctrines that the Court arrived at after 1925 seem unconnected to common understanding in 1868 or to the intentions of the framers and ratifiers of the First and Fourteenth Amendments, ratified respectively in 1791 and 1868. Of course, there are alternatives. For example, the Court may simply have been tardy in attending to the original meaning of the constitutional text.

The theory of original meaning is supported by ideas of popular sovereignty—the idea that the people ultimately rule. Since constitutional

provisions were ratified by representatives of the sovereign people (the argument goes), the common understanding of these provisions at the time of enactment should control and limit judicial decisions.

Some scholars and judges have emphasized the intent of the framers of a constitutional provision or the intent of delegates elected to ratify it. Others have emphasized the original meaning of the words in the text of the Constitution. Since both framers and ratifiers are, by democratic theory, merely representatives of the sovereign people, advocates of these approaches should go further: the popular understanding of citizens should control. As Justice Frankfurter argued, "[A]n amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption. . . . For it was for public adoption that it was proposed.' "[44] Justice Scalia insists that we should look, not only at the statements of the framers and ratifiers, but also and equally at "those of other intelligent and informed people of the time" to "display how the text of the Constitution was originally understood."[45] The problem, of course, is that with so many people involved, there will inevitably be many views.

While some seek the contemporary meaning of freedom of speech in the understanding of the constitutional text in 1791, when the First Amendment was ratified, those committed to such methods also need to examine the public understanding of the "privileges or immunities of citizens of the United States" guaranteed by the Fourteenth Amendment in 1868. By 1866, most citizens seem to have repudiated the Sedition Act and the idea of freedom of speech as limited to a protection against prior restraint. Many had repudiated the bad tendency approach. Similarly, by 1866 there was a widespread belief that freedom of speech was a privilege or immunity of American citizenship that limited, or should limit, state governments.

All methods for reaching judicial decisions are problematic, and original meaning is no exception. It seeks to use history to see that judges are faithful to the decisions of "the people" embodied in the Constitution. But what history means now and how it should be used are intensely controversial subjects. Political factions constantly strive to gain control of history.[46] Historian C. Vann Woodward cites the Commissar from George Orwell's novel *1984*: "Who controls the past controls the future; who controls the present controls the past."[47]

There is a paradox involved in the search for the true historical intent or meaning. We owe much progress in the history of liberty to

seventeenth-century and later generations of English people who misread the original meaning of the Magna Carta, transforming it from a triumph by feudal barons into a charter of liberty for all the English. Colin Rhys Lovell, the historian of English constitutional history, considers this "manifesto of feudalism" to be "one of the most notoriously misrepresented documents in English history, largely because succeeding generations of Englishmen read into its provisions meanings relevant to their own times."[48] Other landmark decisions that most of us revere are not easily explained based simply on a narrow interpretation of original understanding. As Charles Miller has noted, we make inconsistent demands on judges. "No other nation possesses a written constitution (still in use) as old as America's and no other nation worships its constitution with such reverence. Yet we expect the judiciary to be both contemporary and rational when expounding constitutional law."[49]

History and Constitutional Law

Still, history does play a significant role in judicial decisions. Communities naturally appeal to historic common values, and battles over history are one aspect of our struggle to define ourselves as a community. How we define ourselves is important, and history is an important part of that endeavor.

History can help to limit judicial discretion and to reinforce the view that government officials (including judges) are limited by the fundamental decisions that "we the people" reach.[50] But if we seek historical understanding, we should pursue not just the congressional history from the year or so in which a provision is proposed and ratified. We must not limit ourselves to congressional debates, legal texts, and the decisions of courts. For deeper understanding, we need history with a wider focus. People understand the world in light of their experience, and the free speech battles recounted here were part of the experience of those who framed and ratified the Fourteenth Amendment. They had witnessed more than thirty years of suppression of free speech and other civil liberties to protect slavery.

We also need to widen our focus in another way. We should remember that those who gave us the Constitution are not just framers assembled in Philadelphia in 1787. They include all the people who supported the document and its many amendments—the Republicans and antislavery activists (women as well as men, black as well as white) whose transfor-

mation of public opinion helped give us the Thirteenth and Fourteenth Amendments; the women and men, citizens, politicians, and feminists who gave us the Nineteenth Amendment; the Progressives and Populists who gave us the income tax amendment and direct election of senators, and so on. The framers are not simply James Madison, Alexander Hamilton, James Wilson, and the rest, but include, for example, John Bingham and Jacob Howard, leaders in the Thirty-ninth Congress that framed the Fourteenth Amendment.

In the largest and truest sense, the creators of the Thirteenth and Fourteenth Amendments include those who helped to transform national understanding on the issues involved—the abolitionist women who circulated and signed antislavery petitions and began to make women an active political force; the Grimke sisters, from Charleston, South Carolina, who fought against slavery, racism, and for free speech rights for women; Frederick Douglass, the former slave and famous orator; Harriet Beecher Stowe, who wrote *Uncle Tom's Cabin,* a best-selling novel that highlighted the cruelties of slavery; and the newly freed African Americans who petitioned the Congress that proposed the Fourteenth Amendment, asking Congress to protect them in their rights to free speech, free press, and free assembly and to keep arms.[51] The creators include William Lloyd Garrison, who fought against slavery and for racial equality and braved mob violence designed to suppress his ideas,[52] and Elijah Lovejoy, who died defending his press from an antiabolitionist mob determined to silence antislavery speech.[53] Another creator was Hinton Helper, the Southerner whose book indicting slavery became a Republican campaign document that it was a crime to circulate in his home state. The creators of constitutional provisions, of course, also include those who were opposed to moving too far and too fast. All these people helped define the privileges and immunities of free speech, press, and religion under the Fourteenth Amendment.

The Uses of Free Speech

Free speech has many functions. Its role as a centerpiece of democracy is only one. For example, it is a key aspect of individual freedom and it is important to scientific understanding. Those who espoused the popular tradition of free speech from the Sedition Act to the Civil War clearly thought of freedom of speech as more extensive than merely speech about politics.[54] The tradition emphasized that free speech is crucial for

individual transformation and progressive social change. Abolitionists claimed free speech even though many of them thought of themselves as discussing slavery as a matter of religion and morals, not as a political question.

Still, the popular tradition especially emphasized free speech in relation to democracy, as well as free speech as an inherent human right. How well the democratic system is performing today—or has ever performed—is open to question. Without some broad protection of the right to dissent, democracy and intellectual enquiry cannot work.[55] Free speech protects the right to dissent, and dissent is crucial if the sovereign people are to have a chance to be part of the decision-making process and to be given full information and alternatives. Information and the opportunity to participate are, of course, required for intelligent and widely accepted decision making.

Democracy is a system in which the sovereign people have a continuing right to consider alternatives and to seek to shape their collective fate. By democratic theory, all citizens have a right to raise issues and to seek to put issues on the agenda as subjects for collective action. Democracy provides a framework for decision, not a result. An essential part of democracy is the idea that existing institutions, practices, ideas, leaders, and theories are subject to criticism and to revision or replacement. But at crucial times in American history the nation has failed to live up to its free speech and democratic ideals.

The absence of robust national protection for free speech has had heavy costs. Since slavery was insulated from free speech and democratic change, the issue was settled in the awful carnage of the American Civil War. Political violence drove Americans of African descent and their Republican allies from political power during Reconstruction, another rejection of free speech and democracy. The nation had fought one bloody war to preserve the Union and (as it turned out) to free the slaves. It lacked the will to fight a long guerrilla war to protect the political and constitutional rights of the newly free slaves and their Republican allies in the South.

Although leading Republicans had intended that the Fourteenth Amendment's privileges or immunities of citizens of the United States, which no state could abridge, would include the right to free speech, press, religion, and the right to petition, the United States Supreme Court essentially read the privileges-or-immunities clause out of the Constitution.[56] Not until 1925 did the Court suggest that the right to free

speech and press was protected against state action by the due process clause of the Fourteenth Amendment,[57] and not until the 1930s, 1940s, and 1960s did a broadly protective reading of First Amendment freedoms take shape in the Supreme Court. (There had, however, been some notably protective state court decisions under state constitutions.)

In the 1960s, advocates of integration and voting rights renewed the struggle, and this time the nation entered the battle for political and civil rights. Those who struggled for civil rights were protected by a First Amendment now squarely held to prohibit state denials of free speech and free press.

By the 1990s, however, some on the left (like some on the right) began to see broad free speech protection for dangerous ideas as a problem. Suggestions for action include selectively reviving the bad tendency test, enacting group libel laws (treating some racist or sexist speech as libel), expanding antipornography laws to reach hitherto protected expression, making flag burning a crime, prosecuting administration officials who criticize a special prosecutor, enacting laws designed to make it easier to recover damages from critics of food safety, and many more. All of these proposals focus on punishing speech because of its message. These suggestions are in serious tension with the popular free speech tradition recounted here and with current Supreme Court doctrine.

Focusing on our free speech tradition can provide wisdom and perspective. But while the past is like the present in some ways, it is different in others. Though the central ideas of the free speech tradition are necessary for free speech and democracy, it does not follow that they are sufficient. Still, because many free speech problems tend to recur, the ideas of the past are not so alien from present concerns as they might seem at first.

Before embracing broad and vague exceptions to free speech, critics might consider how theoretical justifications for suppression have been invoked in the past.[58] In the nineteenth century, many claimed that because the Constitution recognized and legitimized the concept of slavery, criticism of the institution was impermissible—in essence abolitionism was "unconstitutional" speech. Such ideas were essentially attacks on the democratic process. It was far from clear to many at the time that banning abolitionist speech advocating peaceful change was an attack on democracy. They probably saw the elimination of abolitionist speech as a narrow, discrete, and easily contained exception to free speech. As slavery became a central political issue, and as suppression

extended to almost all antislavery speech, the fallacy of seeing a ban on antislavery speech as a limited and narrow exception became clearer.

The battle for democracy and free speech recounted in the following chapters was largely a popular battle. The idea of popular protection for free speech might sound strange to modern ears. Today, quite properly, many think of courts as protecting free speech against popular majorities. Without free speech for those who are in the minority today (but who, with free speech, might become a majority tomorrow), popular government is an illusion. Ironically, protecting minority speech needs popular support for its long-term survival. The idea of appealing to public opinion to protect basic liberties has a long heritage.

Judicial protection for freedom of speech and of the press is essential, and deeper understanding of the popular free speech tradition is important for judges and lawyers. But the free speech tradition ultimately belongs to the American people and derives strength from their commitment to it. A deeper general understanding of the meaning of free speech is crucial. Like the *Titanic* or a supertanker, liberty requires redundant safety devices—lifeboats as well as a double hull.[59] It needs courts, juries, public support, a system for broad access to the debate, and understanding by politicians. Politicians, lawyers, and judges have a special duty to protect free speech. But free speech is too important to leave exclusively to judges, lawyers, and politicians. It belongs to the American people.