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Forgotten Constitutional History: The Production and Migration of Meaning Within Constitutional Cultures

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FORGOTTEN CONSTITUTIONAL HISTORY: THE PRODUCTION AND MIGRATION OF MEANING WITHIN CONSTITUTIONAL CULTURES

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ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS. By *William Lee Miller*. New York: Alfred A. Knopf. 1996. Pp. 577. $35.

FREE SPEECH IN ITS FORGOTTEN YEARS. By *David M. Rabban*. New York: Cambridge University Press. 1997. Pp. xi, 404. $34.95.

When was the last time you read a serious, recently published work of constitutional history that did not deal mainly with the work of the Supreme Court? When, even among those works, did the author look beyond the immediate litigants to give the reader a sense of an evolving constitutional culture — a culture in symbiosis with the larger political and social culture — its eddies and byways, as well as its mainstream?

My strong hunch is that anyone who can triumphantly respond to the implicit condemnation of narrowness in these questions will do so in large measure having read either or perhaps both William Lee Miller's *Arguing About Slavery*[1] and David Rabban's *Free Speech in Its Forgotten Years*.[2] Both books explore unfamiliar contexts of familiar constitutional terms; both thereby enrich and unsettle our complacent modern understanding of such terms; both should excite our historical imaginations and cause us to look for other untold or long-lost stories, which in turn might give us a more capacious and ironic understanding of constitutional institutions. What is more, both works tell us stories—ones with heroes and villains, themes of hope and betrayal, and, unfortunate as it may be,

* Associate Professor of Law, Rutgers Law School-Newark, and Member of the Graduate Faculty in History, Rutgers University-Newark. B.A. 1979, Butler; M.A. (History) 1980, Harvard; J.D. 1988, University of Chicago. — Ed. Ariela Gross some time ago gave me extremely sage advice on writing about the history of the right to petition, and I want to take this opportunity to thank her for that advice. I am indebted to William Bratton, Sarah Gordon, Maxine Mark, and George Thomas for their comments. I would also like to thank Amy Miller for her timely assistance in preparing this review.

1. William Lee Miller is Thomas C. Sorensen Professor of Political and Social Thought, University of Virginia.

2. David Rabban is Thomas Shelton Maxey Professor, University of Texas School of Law.

endings that are not necessarily happy. Each book also can teach us about writing history. Each raises questions about the historian's method. What is more, read together, they put before us the deepest of questions regarding the construction of constitutional meaning.

What is most interesting about each work, however, is something so obvious that it may easily be overlooked. These books are about political abstractions embodied in constitutional institutions, structured by our predecessors' reduction of those institutions to a few words on paper and succeeding generations' tortured fealty to those abstractions in the face of immediate, real-life, substantive pressures. For lawyers, each book therefore raises, implicitly at least, questions such as whether fealty should be to the precise historical meaning of each clause, whether the values embodied in certain constitutional language may become irrelevant to later polities, and, even more confusing to lawyers, whether such values may be said to migrate from one given constitutional clause to another. Each book thus raises, without answering, the question of what in such abstractions can command loyalty and passion.

THE STORIES[3]

The constitutional institution at the center of Professor Miller's story is the right to petition for redress of grievances.[4] As Professor Miller rightly notes, "[t]oday the right of petition looks rather pale beside those robust rights that have distinct constituencies, sharp disagreements, and sensational cases — freedom of the press, certainly, and religious liberty, and freedom of speech, or the cluster of rights in the middle articles of the Bill of Rights that protect the accused."[5] In another era, however, when Congress, indeed the federal government itself, was deliberately left to its own devices in the malarial swamp from which the District of Columbia arose,[6] the right to petition was thought, by some at least, to be a core constitutional institution. It embodied a vision of fair and representative government, one in which all the people, individually and collectively, could make governmental officials aware of their worries and

3. Because the episode discussed by Miller antedates the controversies Rabban discusses, and for analytic reasons I develop in the last half of this review, it makes sense to discuss Miller's book before Rabban's.

4. "*Congress shall make no law respecting* an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or *the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*" U.S. CONST. amend. I (emphases added).

5. Pp. 105-06; *see also* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition,* 66 FORDHAM L. REV. 2153, 2155-57 & nn.2-5 (1998).

6. *See* JAMES STERLING YOUNG, THE WASHINGTON COMMUNITY 1800-1828, at 13-37 (1966).

difficulties, and could even propose solutions to their concerns. The people would do so in formal documents styled petitions, and, by taking up their grievances in such forms, the people could require the officials to take cognizance of those grievances. In an era when communication over time and distance was limited to documents and messengers, and when physical isolation was profound, the centrality of such a device in a republican polity was palpable.[7]

Antebellum America, however, was no idyll of commonwealthmen, as the book's very title suggests. The bitterly divisive question of slavery hung in the background of American politics, especially of American constitutional politics, from the moment of the Founding forward, belying at a deep level the existence of a universal commonality of interest sufficient to keep all citizens united. Miller's story is the intersection of the constitutional institution which presupposed such a commonality and the institution of slavery. From the first federal Congress, antislavery petitions had been presented to the federal government.[8] At first they were cast in traditional petitionary form. They were measured, reasoned documents, formal prayers to legislators to take action where Congress could: to constrict the future reach of slavery, to eliminate it where Congress had the power, and to alter the Constitution to prohibit it entirely. Thus, as the country expanded westward, petitions variously sought to keep slavery from the territories, to condition those territories' statehood on its prohibition, and the like. For the District of Columbia itself, where the Congress functioned as landlord and town council, some prayers went so far as to request slavery's local prohibition.[9] Gradually, as antislavery sentiment crystallized, as the arguments grew more precise, numerous, and pointed, so did the vehicle for their expression. Petitions grew less formal, their tone less civil. As prayers turned to demands, they became shorter. The less attention they were paid, the more numerous they became.[10]

What had begun as a specific articulation by some Quakers and a vague disgust that existed at some level throughout the country became a political movement, rooted in religiously inspired moralism (pp. 80-84), a movement not quite secular but not sectarian, and with an extraordinarily pronounced regional character. The abolition movement never succeeded in claiming all those who felt discomfort with slavery. Its rhetoric was too radical, its adherents too

7. *See* Mark, *supra* note 5, at 2161-212.

8. *See* William C. diGiacomantonio, *"For the Gratification of a Volunteering Society": Antislavery and Pressure Group Politics in the First Federal Congress*, 15 J. EARLY REPUBLIC 169 (1995).

9. *See, e.g.*, p. 28.

10. *See* Mark, *supra* note 5, at 2225-26.

eccentric in too many ways for that.[11] Nonetheless, abolitionists grew in number and formed the vanguard of antislavery sentiment more generally. One of their political eccentricities — or at least an eccentricity of a large minority of abolitionists — was a willingness to countenance, at first simply as signatories on petitions, and later to encourage, as active speakers and circulators of petitions, women and free blacks to participate in abolitionists' work (though this encouragement ultimately split the movement). Quakers had, in their petitions to the early Congresses, allowed women signatories, but later abolitionists, some Quakers included, went much farther.[12] Chief among the tactics of abolitionists was a concerted attempt to keep antislavery at the forefront of American politics, and their chief vehicle was to petition Congress (pp. 107-12). The petition campaign was a conscious and sustained effort, suffused with moralism, but a political campaign nonetheless.

By the middle of the 1830s, slavery, which had bedeviled the workings of so many American institutions, thus collided with the constitutional institution of petition. A decade-long clash ensued in the Congress, more clearly and quietly in the Senate than in the House, but almost concurrently in both chambers. Southern senators, visibly irritated and insulted by the persistence of antislavery petitioning[13] and at least vaguely fearing that the Senate's constant focus on slavery might actually result in tangible victories for antislavery forces,[14] succeeded quickly and without much fanfare in having the Senate adopt a parliamentary device which automatically responded negatively to antislavery petitions (p. 144).

Southern representatives, who were no less irritated, insulted and fearful than their senatorial counterparts, achieved a much more hard-won success. What Miller does before telling the story of what was labeled the "gag-rule," the rule of the House barring reception of antislavery petitions, is to give enough background briefly to set the stage. We are reminded, to be sure, of the evolution of antislavery sentiment and abolitionism,[15] but Miller quickly moves to personalities rather than social forces and movements. Young Southern representatives, perhaps egged on by the statesmen of the Senate,[16] quickly rose to defend the honor of the South

11. *See* 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854. at 290-95 (1990).

12. *See* Deborah Bingham Van Broekhoven, *"Let Your Names Be Enrolled": Method and Ideology in Women's Antislavery Petitioning, in* THE ABOLITIONIST SISTERHOOD: WOMEN'S POLITICAL CULTURE IN ANTEBELLUM AMERICA 179, 179-85 (Jean Fagan Yellin & John C. Van Horne eds., 1994).

13. *See, e.g.*, pp. 117-29.

14. *See* FREEHLING, *supra* note 11, at 290-95.

15. *See, e.g.*, pp. 65-112.

16. *See, e.g.*, pp. 33-36.

from petitioners, hardly restrained by their more sage elders in the House. Why, however, was the victory so easily won in the Senate, yet so hard-won in the House? The difference may be summed up in one name: John Quincy Adams.

Adams is the hero of Miller's story. Southern defenders of slavery are the villains. No open abolitionist he,[17] Adams was instead a man more deeply committed to an abstraction of liberty contained in the Constitution — the right of political participation and communication as it was embodied in the ancient institution of petition (pp. 351-57). He fought the adoption of the gag-rule. He tested its contours at every opportunity.[18] Before the gag-rule became a permanent rule of the House, he tried to introduce antislavery petitions (p. 197); he tempted political fate by attempting to query the Speaker of the House concerning a "petition from twenty-two persons, declaring themselves to be slaves" (p. 230); he was subjected to cries and motions to censure him;[19] and he led the fight for the gag-rule's repeal. In these efforts he was joined by some, though not many, constitutional traditionalists and a slowly growing number of antislavery Congressmen.

Miller gives us an almost day-to-day recitation of the events as they unfolded from the gag's adoption in 1836 until its repeal in 1844. Along the way he takes time for some excursions into related matters. He briefly discusses the role of women in the petition campaign,[20] the struggles within the political parties, including those based on slavery,[21] the nature of antebellum Protestantism,[22] and other related topics. But, overwhelmingly, Miller's is a story of personality and conflict — Adams and allies, at first laid low, later triumphant (pp. 476-79). Adams, the hero, collapses in the House and dies within days, only a few years after the gag's repeal (pp. 458-59). Waddy Thompson, one of Adams's young antagonists, overreaching in the attempt to censure Adams, ultimately gone from the House at the gag's repeal, "[h]e would lose his fortune in the Civil War — and (would it be proper to add?) would then be to historical memory one of the obscurest of the obscure Whigs. Farewell to Waddy Thompson" (p. 478).

Despite his brief excursions into related matters, Miller's focus on personality dominates his interpretation of history. Slavery is

17. Freehling describes him as "a closet abolitionist," *see* FREEHLING, *supra* note 11 at 259, and "not publicly an abolitionist," *id.* at 342.

18. The most recent scholarly treatment is David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition,* 9 L. & HIST. REV. 113 (1991).

19. *See, e.g.,* pp. 429-44.

20. *See, e.g.,* pp. 48, 110-11.

21. *See, e.g.,* pp. 375-87.

22. *See, e.g.,* pp. 80-89.

largely reduced to nothing but a moral question, rather than an amalgam of class, racial, economic, religious, and other factors, including the moral one, making the creation of heroes (and villains) easier. Similarly — and more importantly from the perspective of legal and constitutional scholars, historians, and others — the institution of petitioning in Miller's account is equally unidimensional. Other than the claims of the constitutional traditionalists in the House who felt that the right had been abridged, we are left wondering what it was about the right to petition that inspired Adams and his small band of brothers, and what it was that failed of respect where so many others were concerned. We learn that the right to petition was "sacred," but its sanctity rings hollow to us, not simply because we do not regard petitioning as central to our political life, but also because Miller's treatment of petitioning imbues it with so little political and moral content, as contrasted with the unalloyed moralism of his analysis of slavery. We are thus left wondering what Adams was really doing, what informed his belief in petitioning. Miller's focus on personality at the expense of richer context thus has the perverse effect of making both his heroes and villains less complex, thus more prone to being, respectively, undermined or rehabilitated by those who know the institutional details. Such details would transform the historical roles of the participants from mere moralists to men of varying and nuanced moralities, moralities tempered by the vices forced on them by historical circumstance. While, for example, moral opposition to slavery is easy to understand, loyalty to the right to petition may seem merely eccentric or quixotic without such details.

While Professor Miller's book reopens the story of a forgotten constitutional institution, Professor Rabban tells us a forgotten story about a very familiar institution and upsets some constitutional iconography along the way. The traditional story of free speech is that, with the exception of some incidents of suppression associated with the Alien and Sedition Acts in the waning years of the eighteenth century, free speech entered into our constitutional consciousness almost *ex nihilo* in the early twentieth century. World War I and its attendant suppression of pacifist, socialist, or otherwise seemingly suspicious speech spurred a reluctant Supreme Court to action.[23] Aided by Zechariah Chafee's pioneering scholarship,[24] Justices Brandeis and Holmes led the Court into the protection of political speech which, decades later, the Warren Court

23. *See, e.g.*, ALFRED H. KELLY, ET AL., THE AMERICAN CONSTITUTION AND ITS ORIGINS & DEVELOPMENT 140-41, 526-27 (6th ed. 1983).

24. *See* ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH (1920); Zechariah Chafee, Jr., *Freedom of Speech*, 17 NEW REPUBLIC 66 (1918); Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

broadened into protection of cultural expression more generally (p. 1). Wrong, says Rabban. Not just wrong, but perniciously so.

For decades before World War I, Rabban reveals, individuals and organizations pursuing a wide range of ends sought protection for their speech when harassed and prosecuted. Proponents of cultural transformation — including advocates of such scandalous objectives as sexual freedom and birth control (pp. 27-44), defenders of organized labor (pp. 77-125), and others — all made claims that their expression was protected. Their faith, or at least the faith they articulated, like that of Adams before them, was an an abstraction rendered by writing into a constitutional institution: freedom of speech.[25] And, like Adams, they had to wait, but not for a decade — rather, they had to wait for half a century or more before their faith was rewarded.

These cultural friends of free speech waited because the executive branch, the traditional organ suspicious of eccentric public expression, was abetted by a legislature with powerful conformist and seemingly majoritarian political impulses,[26] and by a judiciary that refused to read the First Amendment as anything but a supercodification of common law doctrines limiting prior restraint (pp. 132-46). All branches of government did what they did at least in part because the speakers were culturally marginal, their speech all the more so. They articulated concerns not just eccentric, but eccentric in ways perceived as antithetical to what was proper in a good society.[27] The judiciary, in the traditional story, thus broke ranks when Holmes and Brandeis, influenced by Chafee, redefined the First Amendment to protect political speech, carving out an exception in the pattern of suppression (p. 1).

However laudable the creation of that toehold for free speech, Rabban tells us that it was based in error, probably willful error. Rabban's most interesting subtale is his reconstruction, and consequent destruction, of Chafee's seminal articles in which Chafee attributed to Holmes an interpretation of the Free Speech Clause that Holmes never intended. Rabban says Chafee willfully read Holmes's opinion in *Schenck v. United States*[28] as narrowing the doctrine of prior restraint with its "clear and present danger" language when, in fact, no evidence for such a reading exists and much contradictory evidence abounds (pp. 322-26). Why, then, did

25. "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech,* or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphases added).

26. *See, e.g.,* pp. 249-56.

27. *See, e.g.,* pp. 28, 252.

28. Schenck v. United States, 249 U.S. 47 (1919).

Holmes go along with Chafee? Something more than the mutual loyalty of Harvard men must have been at stake.

Rabban notes that Holmes maintained that his analysis of free speech was consistent from long before *Schenck* until long after (pp. 346-47, 355). Rabban convincingly demonstrates otherwise. Nonetheless, he only skirts the edges of speculation about what might have motivated the change (p. 350). Chafee, through the good offices of Harold Laski, actually met with Holmes in the months before Holmes began to shift his views (pp. 353-54). Rabban is careful not to conclude that Chafee then, or at any other time, changed Holmes's mind. Nor does Rabban conclude that others who criticized Holmes for an astringent understanding of free speech, notably Ernst Freund of the University of Chicago Law School,[29] persuaded him of error. Nor, as Holmes made clear privately (p. 356), did he suddenly develop an appreciation for popular political discourse. We are allowed to infer, however, that Holmes was not beyond being influenced, and that the considered opinion of other learned members of the legal and political elite had its effect — not, perhaps, as pure persuasion, but as an indication that at least some of the speech at issue might be that of persons not quite so culturally marginal as generally supposed (pp. 346-49). Even if Holmes still viewed much of this speech as that of "an ass . . . drool[ing] about proletarian dictatorship" (p. 356), the fact that others of his ilk felt the drool worth defending may have led him to acknowledge that defense of speech, at least of political speech, had moved away from the periphery and somewhat closer to the core of respectability and acceptance. Indeed, that he even felt it incumbent to mention his defense of the right suggests that he was sensitive to the attention being paid to free speech.

Thus, like Miller, Rabban finds two groups of heroes. Free speech plaintiffs and their lawyers, like antislavery petitioners before them, exercised their rights and did so from the very margins of society. Their defenders — Adams, Brandeis, Hand, and the condescending Holmes — by their defense lent legitimacy to a broader understanding of the utility of tolerance and the democratic value of speech. Nonetheless, Rabban, like Miller, has cast his story in traditional terms: interest groups whose interests are best exemplified by important personalities.

Why did the plaintiffs believe in the right in the first place? I doubt very much that every birth control advocate, every defender of organized labor, and every other speaker of the unacceptable shared Thomas Cooley's rejection of the Blackstonian notion that the Free Speech Clause merely set out the governing common law

29. *See* Ernst Freund, *The Debs Case and Freedom of Speech,* 19 NEW REPUBLIC 13 (1919), *reprinted in* 40 U. CHI. L. REV. 239 (1973).

on prior restraint (pp. 177, 192). Holmes's curious metaphor, "the marketplace of ideas," also fails to capture the faith with which adherents of bad, losing, eccentric, unpopular, and sometimes genuinely pernicious ideas pursued them then and pursue those ideas even today; nor is the marketplace metaphor particularly apt for those who genuinely believe in free communication, even when they regard the content as drivel, or worse. Indeed, is there any evidence other than the tautological for the notion that the measure of the worth of an idea is its acceptance? Something deeper in the culture was at work; something deeper motivated generations of cultural radicals to keep articulating free speech claims in the face of the hostility of the courts. In contrast with Miller, who leaves us to wonder about the motivations of the constitutional traditionalists who defended the right to petition, Rabban links the right of free speech to the belief of libertarian radicals in "the primary value of individual autonomy against the power of church and state" (p. 23). Rabban argues that desire for such autonomy was what led its proponents and defenders to go to such lengths on behalf of an abstraction. General autonomy rationales, however, tend to lose out when weighed against immediate and keenly felt threats to more concrete interests.

Recasting the Stories

For the record, I am among those who hold to that faith in the value of free communication. Nonetheless, as with all faiths, the empirical support for the utility and virtue of free communication is thin, at best. (I hasten to add, however, that the empirical support for those who would limit speech in the name of the larger good has always struck me as equally, if not more, thin.) What might we gain, however, if we read both Miller and Rabban somewhat unconventionally, recasting their works sympathetically but doing so in ways consonant with the themes of their works? We need not read Miller as simply a story about antislavery forces clashing with Southern interests, the petitioners against the slavocracy. We might instead read it as one about an abstraction — the right to petition — pitted against concrete interests, those of slavery. Similarly, we need not read Rabban simply as a story about culturally marginal agitators battling a conformist majority personified in a hostile judiciary. We may, rather, view it as a story about proponents of an abstraction — the right of free speech — pitted against the interests of a polity weakly committed to this abstraction but led by a governing group intensely interested in the preservation of an established order. I do not mean to suggest that this is not already a component of the stories both authors tell, though it is a much greater part of Rabban's story than of Miller's. But even in

Rabban's work, the story of the autonomy rationale as the basis for a free speech faith sometimes sounds, as Rabban would be among the first to admit, a bit self-serving (pp. 381-93). We also know that all too often proponents of their own autonomy have precious little respect for autonomy claims of others.[30]

The theoretical implications for the First Amendment of wondering about the historical force of constitutional abstractions are clear. Every time the government seeks to suppress petitioners or speakers, it does so claiming that the greater good will be protected. Southerners trumpeted the gag-rule not just as a protection for Southern honor and interests,[31] but as a protection of the Union and the interests of a united and strong America.[32] Legal traditionalists claimed that the "bad tendency" test allowed for punishment of speech that led to social unrest, riot, division of the classes, and difficulties in the conduct of military policy.[33] In every case the claims were, if not true, at least plausible and difficult to refute.

Arrayed against claims of specific dangers, specific harms, and palpable injury were the necessarily inchoate interests of freedom and rights, abstractions removed from the concerns of those affected by their exercise. Modern political theorists of the public choice school have a powerful reason for suggesting that this reading renders the subsequent course of events implausible. According to such theorists, abstract and inchoate interests tend to lose to specific interests because attachment to more general concerns tends to be weaker, thinner, and more diffuse than attachment to specific interests. Hence we should not expect, the argument goes, a general public expression of belief in free speech, the right to petition, or any other equivalent claim, to be able to hold up against the concentrated and passionate claims of groups with specific rationales for limiting such freedoms, especially when they can point to immediate injuries and can conjure others.

Nonetheless, we know that both the right to petition and the freedom of speech, not the slavocracy and repressive cultural interests who used the federal government as their tool, ultimately triumphed. Why? Let us indulge a very simple public choice thought experiment grounded in these books. These works suggest at least two aspects of constitutional culture that deserve to be addressed from both historical and theoretical perspectives. First, it may be that our constitutional culture has created, and is itself a product of,

30. One thinks, in recent American history, of Nazi marchers in Skokie, Illinois, for example, or those who confiscate right-wing college newspapers, or violent antiabortion protestors who make full use of the panoply of available constitutional rights.

31. *See, e.g.*, p. 127.

32. *See, e.g.*, pp. 128-29.

33. *See, e.g.*, pp. 276-78.

a set of expectations about the conduct of government that is continually reinforced and strengthened by challenges to those expectations. That is, the general interest in the exercise of constitutional rights gives way to momentary specific interests, but, over time, the general interest outlives the specific interest and wins out, stronger and more resilient for the exercise. In other words, our constitutional culture may develop something like antibodies, to use an unfortunate analogy. Nonetheless, even that hypothesis does not really address the position advanced by the public choice theorists. The general and diffuse claim should still be defeated by the specific claim and should have no reason to rise again, since every social and political moment gives rise to reasons to limit expression.

In the case of the gag-rule, a Southern minority with an intense attachment to slavery overcame a weak majoritarian attachment to the right to petition. The right to petition had, after all, lost its centrality as a means of political participation, and the Southerners were careful to conjure dangers that might arise from petitioning — such as dissolution of the Union — that could actually rouse majoritarian fears. Furthermore, Southerners did their level best to separate the general institution of petitioning from its use by the most socially marginal petitioners, women and free blacks, whom they attacked with special virulence, ignoring — if they even knew it — petition's own history as the universal means of political participation. The gag was defeated, however, not as a result of the rise of pro-petition sentiment within the voting public, but rather as a result of the rise of an amalgam of political sentiments, including antislavery and sectional identification, among voters. Nonetheless, with the defeat of the gag-rule, public identification with expressive rights turned the prior efforts to stifle petitions into something with which to tar proslavery politicians.

Thus, the general claim for free expression persists, eclipsed but not defeated. Because it continues to exist as a social icon, it stands in opposition to the more specific claim even while in eclipse. It continues to resist and eventually, when the specific claim fades away, apparently emerges stronger than at the outset. This, then, is the second proposition worth exploring: that general support for free expression is not itself actually challenged.

Both Miller and Rabban provide some evidence for the second proposition. Miller's is quite emphatic — Southern representatives never actually attacked the right to petition, though a few made light of it,[34] even in the face of the continued rear-guard actions of John Quincy Adams in the House. When the proslavery

34. "Hitherto we have been fighting about mere abstractions. Hitherto we have been contending about the right of petition, and other minor and unimportant points." 12 CONG. DEB. 2494 (1836) (statement of Rep. Pinckney of South Carolina).

Representatives were dismissive, it counted against them (p. 106). Rabban's evidence is somewhat different. He shows that a wide variety of individuals and groups continually advanced free speech claims, claims they — or at least their lawyers — must have known were extreme long-shots at best, last-ditch desperation arguments at worst, given established doctrine and opinion. Nonetheless, the arguments were made. What is more remarkable, however, is the response that the arguments made by the believers in free speech and petition engendered.

At first glance Rabban's work seems at odds with the premise of the thought experiment. The cultural dissidents were the minority, after all, and they captured nothing, certainly not the institutions of government. But the premise of the thought experiment is the general but relatively weak public attachment to the right of free speech. The interest group that captured the government therefore would be an elite defending an established order out of fear that the cultural dissidents might gain majoritarian sympathy and alter that order. (Certainly not all of the dissidents fit the pattern, but even if birth control advocates, for example, were unlikely to capture majoritarian support, those in control of the government linked them to causes with such potential if in no other way than through parallel forms of suppression.) The elite defending the order was itself, after all, a form of minority interest group. The emergence of free speech as a protected right came about not when the general public demanded it, but rather when members of the elite themselves saw instrumental value in certain dissident expression, and then only for speech that embodied that instrumental value.

Opponents of antislavery petitions and of the expression of cultural and political dissidents were generally, though not universally, careful to portray themselves as not opposed to the exercise of the right to petition or the exercise of free speech either generally or in the abstract. Usually, in fact, their tactics often explicitly amounted to characterizing the exercise of either right as an abuse of the right or as something other than its exercise in the first place. Such attempts to isolate and distinguish the contested exercise from the abstraction thus allowed them to proclaim their continued support of the abstraction (p. 13).

These proclamations, even if they were — as they must have been in at least a few cases — nothing but lip service to the constitutional abstractions, were at least uttered. And they must have been uttered for a reason. Those proclaiming such fealty believed, they must have believed, that they would pay a political price for actually articulating opposition to free petition or speech. Furthermore, they must have felt that such a price was too high to bear in their support of more specific claims, even if the price was not very

high as an absolute matter. It was a relatively cheap political alignment to support the abstraction, relatively costly to oppose it.

No matter how thin the actual support for the abstract rights, however, the salient point is that individuals who opposed particular exercises of the right to petition or of free speech felt that they had something to gain by noting their support for the rights in the abstract. Of course, the corollary is that an appreciative public stood ready to hear such support (p. 13), indeed may have required it in order to entertain the claim that an exception should be made to the more general right or to listen to a claim that a particular act was not covered by the protection of such rights. Crudely put, no one has ever won an election in this country by running against freedom, at least in the abstract. In other countries, however, (and the twentieth century is littered with examples) politicians pay no price or may even curry electoral success with such opposition.[35]

Such speculation may demonstrate the persistence of a public constitutional culture resting on a belief in a set of abstractions, such as rights to petition and free speech. It does not, however, deal with the larger issue of how the specific interests challenging the particular expressions of the abstract rights evaporate. That is the other side of the public choice explanation — since the general belief, if it is only weakly held, cannot actually defeat the specific claim, the latter must itself lose support if the general belief is to come out on top. The explanation is, at least in part — as exemplified in these two works — that interest groups come and interest groups go. That is, minority interest groups that must capture the political structure to achieve their goals must strike deals with other minority interest groups, *à la* Madison in *Federalist No. 10*. When such alliances collapse, the interests of any particular minority are vulnerable, even to a rather weakly supported majoritarian position. Alternatively, the minority interest group must either disappear or become so marginal that it is unable to enforce its single-minded will on a majority with a set of diffuse and therefore weaker concerns. In either case, the story of collapse or decline is contextually specific. The decline of a proslavery group in Congress able to enforce its will on the rest is both a story of lost allies and marginalization. By 1844 the proslavery representatives had lost key allies in the House for a wide variety of political and other reasons (pp. 477-79). They were thus unable to muster the majority necessary to maintain the repressive gag-rule. The decline of strength in the House is, however, merely description and not explanation. It only describes membership in the House and does not itself explain the

35. *See, e.g.*, Stephen F. Cohen, *"Transition" Is a Motion Rooted in U.S. Ego*, N.Y. TIMES, Mar. 27, 1999, at B7; Lee Hochstader, *Once Upon a Ruble, Ah, Life Was Grand; Nostalgia Feeding Communist Comeback*, WASH. POST, Nov. 12, 1995, at A27.

underlying political shift. At least in part, the proslavery forces, including the House members themselves, helped to marginalize themselves by their continued support of the gag-rule (pp. 479-80). It was an issue in some of the campaigns for the House. While not central, perhaps, it played a role in demonizing proslavery sentiment and mobilizing a political center wary of the extreme claims made by the firebrand Southerners (p. 484).

The triumph of cultural proponents of free speech is at least as thickly contextual and more elongated than the decline of support for the gag-rule. The movements for sexual freedom, birth control, organized labor, pacifism, socialism, anarchism, and many others that Rabban notes as intimately connected to the history of free speech have been the subject of almost countless books and articles themselves. Nothing would be gained (and much lost) to sketch out here the history of any of these movements in this country, except to note the obvious: each has a rich and complex history, one in which success or failure cannot be measured by electoral margins in the House (or in any political body or bodies) but which must be measured by acceptance, often co-optation, of ideas. By most measures, therefore, all but socialism and pacifism have been successful, and even socialism and pacifism have achieved victories, both political and programmatic.[36]

None of this is to say, however, that the successes of such movements were expedited by the crude attempts at repression characteristic of the late nineteenth and early twentieth centuries. What may be true, however, is that such repressive efforts created a periphery of expression the suppression of which opened up a core of speech, political speech, that could — by the very creation of periphery and core — more easily be defended under the Free Speech Clause. Rabban's graceful explanation of the role of progressive political and social theorists is crucial in understanding the creation of that core and worth quoting at some length.

Originally,

> [t]he progressive position [was] that individual rights should be recognized only to the extent that they contribute to social interests[, and this position] applied in principle to speech as well as to liberty of contract. Pound explicitly acknowledged this point when he justified balancing social interests in free speech against competing social interests in the security of state institutions. The commitment of progressives to the creation of a harmonious community also limited

36. Indeed, some conservative thinkers believe that socialism has achieved full-blown programmatic victories. *See, e.g.*, MILTON & ROSE FRIEDMAN, FREE TO CHOOSE 311-12 (1980) (reprinting the Socialist Platform of 1928 and noting that virtually all of its provisions have been at least partially implemented in some form). While the pacifist movement has seemed hopelessly utopian, treaty restrictions on the size of naval vessels and on the use of chemical and biological weapons are examples of successful measures motivated by the horror of war.

> their conception of free speech. While often recognizing the social value of criticism, progressives ignored and occasionally condemned dissent that did not contribute to the community.
>
> . . . .
>
> The dual commitment of progressives to critical inquiry and community harmony created a tension at the core of their attitudes about free speech. . . .
>
> Progressive intellectuals frequently invoked the value of critical inquiry in science as a model for democratic life. . . .
>
> The tension between critical inquiry and community harmony, evident even in the limited realm of scientific theory, became exacerbated as progressives extended the model of science to social issues and had enormous implications for the role of free speech in a democracy. [pp. 212-14]

On Rabban's understanding, therefore, before World War I community harmony, structured along the ideals propounded by the progressives, dominated their own interest in critical inquiry. World War I was a catalyst in transforming the views of the progressives. The Espionage Act, and prosecutions commenced under its authority, moved the progressive center from complacency about critical inquiry to concern. As Rabban put it,

> Many progressive publicists, who had eagerly joined the Wilson administration and supported the war effort, became increasingly concerned about the repression of speech during and especially after the war. . . .
>
> . . . .
>
> The [emergence of modern First Amendment doctrine] reflected the continuing influence of progressive ideology and the debate over antiwar speech during which [it] developed. It is most striking that the postwar civil libertarians essentially limited the protection of the First Amendment to political expression. [pp. 302-03; footnotes omitted]

The progressive intellectual capacity first to create the tension between inquiry and community, and then to shift the balance from community to inquiry while retaining the dichotomy, effectively created a core of speech to be protected and a periphery that could be legitimately compromised. The progressives could thus simultaneously engage in a doctrinal revision, co-opt a libertarian streak in free speech rhetoric, and legitimate that position by leaving an "other," the repression of which they, along with a conformist majority, approved.

The progressive *volte face* highlights the final theoretical question raised by these books. For constitutional lawyers the question raises issues which may be extremely problematic. For constitutional historians used to exploring the changing meaning of text through the vehicle of court cases, it may be unsettlingly revisionist. For cultural and intellectual historians, however, it may be old hat.

Simply put, each book subtly asks whether what are today called "constitutional values," especially "First Amendment values," may not have been embodied in different bits of constitutional text over time. The books, especially taken together, suggest that such values may migrate from one clause to another, even within the same amendment, as the physical, social, and political circumstances of the country change.

Political speech may have actually been at the very core of First Amendment values all along. Indeed, Rabban makes such a claim (p. 13). The Founders, drawing on their experience and the vicarious experience of colonial and English history as they learned it, may very well have understood that political expression is foundational in any political culture dependent on participation by those outside an oligarchy. They no doubt believed that a certain breadth of political participation was necessary legitimately to ground their claims that this country's political institutions rested in popular sovereignty. They certainly claimed that they valued public commentary on the actions of the government. How, then, could political speech not be at the core of the First Amendment?

Rabban's reference to the progressives' idyllic vision of critical inquiry is telling. Not for them the hurly burly of an open and schismatic politics. Rather, criticism was originally to serve communitarian political ends. But, of course, the ordered and structured politics of community was not just a progressive vision. It was also a vision of the Founders. The vehicle for pure political speech at the Founding, at least the one which had a historical pedigree, was not the Speech or the Press Clause, but rather the Petition Clause, the clause at the center of Miller's work. Free speech as a distinct legal right, by contrast, was in its infancy. For most of English and much of colonial history, the right to petition protected and ensured the broadest popular access to the organs and officers of government,[37] so long as the communication was formally stated[38] and politely, that is, deferentially, phrased.[39] In this way political complaints served to reinforce rather than divide the political community. One of the stories — largely untold — of the late eighteenth and the early nineteenth centuries is the erosion of the petition as the primary vehicle for political expression and political expression's subsequent democratic reincarnation in the Speech and Press Clauses.

This migration of protection for political speech from petition to speech and press is but one form of the disruptive migration of meaning within constitutional culture that historians are now un-

37. *See* Mark, *supra* note 5, at 2161-91.

38. *See id.* at 2170-74.

39. *See id.* at 2165, 2186 & n.146.

covering. In another sphere — for example, the separation of powers — one thinks of the innovative work of Christine Desan on eighteenth-century legislative adjudication.[40] Such migrations disrupt a lawyer's search for continuity in constitutional meaning and remind historians who trace back the history of portions of texts that they should be keenly aware of anachronism. Read together, Miller and Rabban have provided the legal and historical communities with wonderful new lenses through which to understand the nineteenth-century disruption and transformation of the constitutional culture and meaning of free expression.

Perhaps most important of all, the works remind us that there was a constitutional history in the nineteenth century, but to uncover it we must often look in unfamiliar places, not contenting ourselves with received wisdom and twentieth-century categories of doctrine and structure. One implicit component of the received wisdom is that the nineteenth century was a century of relative peace as far as constitutional rights litigation is concerned[41] and that the forays of federal courts into the arena, notably in *Dred Scott v. Sandford*[42] and *Lochner v. New York*[43] (which is regarded as a nineteenth-century case in spite of its year of decision), suggest that the quietude may have been a good thing. Perhaps the conventional view is correct in that we did have to wait for Holmes and Brandeis, even for the Warren Court, before we could have the constitutional culture of which we are generally so proud today. Rabban and Miller, however, offer us a counterthesis, if we just know where to look.

Where might we look? Rabban and Miller implicitly offer useful suggestions. Miller's work suggests that we should look to other institutions of government, especially the Congress, to understand how fundamental rights were viewed.[44] Moreover, it also suggests that we look not just to other institutions, but other clauses of the Constitution as well. One example comes immediately to mind from the same era Miller explores. In addition to the petition campaign, abolitionists attempted to send pamphlets throughout the country, and especially into the South. The Post Office — really, postmasters — intercepted many of the pamphlets and refused to deliver them.[45] This, of course, amounted to censorship. So far as I

40. *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition,* 111 HARV. L. REV. 1381 (1998).

41. Rabban makes that point explicitly about free speech. P. 1.

42. 60 U.S. (19 How.) 393 (1856).

43. 198 U.S. 45 (1905).

44. Of course, Miller is neither unique nor novel in this regard. James Willard Hurst long ago made such a suggestion, both explicitly and implicitly in his own work. *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950).

45. *See* FREEHLING, *supra* note 11, at 291-92, 309-10.

know, this episode is little mentioned in the literature of legal history, despite its parallels to late nineteenth- and twentieth-century Post Office restrictions on the use of the mails for obscene and other forms of literature. Why do we know so little of this episode? Can the explanation be simply that no memorable litigation ensued?

Similarly, we know that state constitutions contained clauses parallel to those found in the Bill of Rights and elsewhere in the Constitution. Despite a burst of enthusiasm for state constitutional protections that ensued as federal courts retreated from the progressive constitutionalism of the Warren Court, we know surprisingly little about state constitutional history, especially about how such rights clauses fared in state courts in the nineteenth century.[46] Indeed, the story may be that no litigation at all was grounded in such clauses. That is generally what we think, but do we think so simply because next to no serious work has been done on such actions? Perhaps, like so much other nineteenth-century litigation, records remain unpublished. To uncover such stories, perhaps we need simply to dig deeper, as William Treanor has done even on the well-covered ground of the power to declare war[47] (among other topics). Perhaps as Miller suggests, we should look to other institutions to see how constitutional meaning evolved. Perhaps, as Rabban does, we should just look a little further back in the *Decennial* and *Century Editions* of the *American Digest* and not look at such indices through the blinders of what is taken as the final word on the subject.[48]

David Hackett Fischer some years ago catalogued the professional sins of historians in *Historians' Fallacies: Toward a Logic of Historical Thought*. Fischer was professionally generous and did not criticize lawyers for their failings as historians. Lawyers as well as professional historians are, however, guilty of the worst forms of what he termed the "fallacy of presentism"[49] and the "fallacy of tunnel history."[50] No one can, of course, deny that at least some of the reason we study the past is to secure meaning for ourselves in the present. Nor, of course, can anyone present all of history in one gulp. Rabban and Miller, however, enlarge and expand our recognition of much, though admittedly not all, of the context and choices available to the historical actors. They are conscious that

46. Our knowledge is at its thinnest in the antebellum period.

47. *See* William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

48. Rabban looked at state cases dealing with speech in addition to uncovering lost scholarship and popular advocacy. P. 19.

49. DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 135-40 (1970).

50. *Id.* at 142-44.

what they write may, perhaps ought to, affect our current constitutional culture. In so doing they raise historiographical questions of the first order.

Rabban, in fact, deliberately raises many questions of interpretation of the history of ideas in the opening of his work (pp. 9-12, 17-19, 21), though his is otherwise a very conventional monograph. It is, therefore, a very important book for the story it tells and for what he has uncovered, not so much for the methodology he employs. He is correct, however, that many theoretical options present themselves, quite temptingly in some cases, to a modern historian. Indeed, something of a generational divide exists in the historical community. One need only sit in on a colloquium dedicated to the study of history to hear the different voices. Graduate students and newly minted Ph.Ds. speak, among other things, the language of literary criticism and are eager to apply it to historical sources. Whether that application will, in and of itself, expose layers of meaning that have gone unseen by older generations of scholars is an open question. I understand that Rabban intends to explore that very topic in future work on intellectual historiography. He notes that "[m]any scholars warn that an idea can have such radically different meanings for different people that any attempt to analyze it as a coherent subject is doomed to failure" (p. 9). Rabban apparently rejects such a conclusion — after all, the book continues for nearly four hundred more pages in an attempt to give coherent meaning to an episode of constitutional history — while accepting the clear reality of contingent meanings and multiple interpretations. I believe he is correct in his operating assumptions. Few, if any, interpretations are definitive, but many are more persuasive and enlightening than others. The more successful the interpretation, in my experience at least, the more one can count on the author having asked fundamental questions and having revisited original materials or visited materials previously unknown. That all knowledge is partial hardly defeats the claim that one interpretation is more useful — or, to be vulgar, simply better—than another.

Miller presents an altogether different historiographical concern. He explicitly raises no questions of historical method or interpretation. Like Rabban, however, he has visited original materials and told us an important story. Unlike Rabban, however, Miller seeks a popular and not an academic audience. (By further contrast, much of what Rabban has written was published during the 1980s and 1990s in law review articles (p. x n.4).) Moreover, Miller's work is dotted with explicit references to moral and political difficulties that have confronted the United States in the past

few decades, notably the civil rights movement[51] and the Vietnam War,[52] and he makes explicit his analogies in both the political and moral contexts.[53] He overtly seeks a certain kind of meaning — inspiration and moral reflection — by historical analogy.[54] Historical analogy, however, is problematic both as a matter of interpretation, as Fischer has noted,[55] and as a guide to thinking about present-day concerns, as Ernest May has demonstrated.[56]

Nonetheless, in seeking to identify both heroes and villains and to draw lessons from their conduct, Miller revives the oldest of American historical traditions. Before history became the province of academics and history departments came under the sway of German-trained historians (who viewed historical study as a science), American history was a literary endeavor, and the stories were contrived to inspire and to teach, above all to teach moral lessons, usually ones applicable to the polity as a whole. One eventual consequence of the introduction of Germanic scientism was the decline of history as literature. The rise of scientism also led to specialization, and with specialization came studies that separated the American polity into classes, factions, and interest groups. Historians who claimed that America was, as a polity, committed to an overarching political ideal, or even a group of political ideas, over time came in for enormous criticism and even contempt. With the demise of the "consensus school" of history in the 1960s and 1970s, the serious attempt to generalize about nationally unifying political themes was virtually abandoned.[57]

What is striking about both works is their quiet revival of the notion of a polity committed to a political ideal.[58] Unlike, say, the American liberal tradition in the grand and subtly tragic vision of Louis Hartz,[59] Rabban and Miller do not envision an ideologically cramped polity, cosseted by history. Rather, each sees a polity committed to a particular manifestation of a political ideal at some general level. This ideal is roundly compromised in fact but, despite the compromise, returns to live another day. This ideal is, in both

51. *See, e.g.*, pp. 74, 78, 82.

52. *See, e.g.*, pp. 316, 375.

53. *See, e.g.*, p. 3.

54. *See, e.g.*, p. 504.

55. *See* FISCHER, *supra* note 49, at 243-59.

56. *See* ERNEST R. MAY, "LESSONS" OF THE PAST: THE USE AND MISUSE OF HISTORY IN AMERICAN FOREIGN POLICY (1973).

57. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 251-52, 257-58 (1992).

58. *See, e.g.*, Miller pp. 22-24; Rabban p. 13.

59. *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955).

cases, one of expression and its capacity to structure the nation's social culture and political life.

One of the grand themes of the old morally didactic style of history as literature was the strength and uniqueness of liberty in America. America was morally superior to Europe's corrupt and decadent societies, and the histories celebrated that difference. By the late 1960s and certainly by the 1970s such celebratory views were thoroughly in disrepute, and historians emphasized conflict and social history. The historians emphasized social context even in political and intellectual history, and within social context the myriad groups that formed America jockeying for position in society. Gone from the story along with triumphalism were ideals or political themes that knit the country together. Moreover, historians had begun to give us subtler accounts of American debts, political and otherwise, to England and continental Europe. In these stories the theme of freedom and liberty was sometimes slighted or forgotten, sometimes told from its darker side, or displaced by the tale of the rise of liberalism from its ideological forebears, such as republicanism.

Rabban and Miller, however, refocus our attention on the theme of liberty and freedom but without the self-congratulatory tone of earlier writers. Instead they tell us about conflicts within the larger theme, the struggle and compromises, the political and intellectual tactics, and, to some degree at least, the social context of freedom and liberty. In doing so they have begun a difficult task, one that differs from the tasks undertaken by previous historians. Whereas the triumphal style took freedom and liberty as both given and good, and whereas a more modern school took a degree of freedom for granted and either slighted its impact or told tales of its dark side, Rabban and Miller have undertaken to explain why and how people involved in the conflicts so dear to modern historians valued such freedom and liberty, and to describe the efforts made on behalf of an abstraction and the compromises made in its name. They put flesh, not simply words, to belief systems of individuals, groups, and, ultimately, American society as a whole. These are, then, works which should assist historians, not just in their particular contributions, but for the larger theme of which the works are emblematic. Both authors have given life to the history of constitutional institutions, and we are enormously in their debt for their efforts.

Omissions

One of the stocks-in-trade of book reviewers is to say that it is not their job to criticize one author for writing the book the reviewer wished the author had written, and then to make such criti-

cisms anyway. I will not bother to deny that I am about to engage in such a paralepsis.

Miller, having drawn our attention to what he rightly notes is a neglected episode in American history and having thereby illuminated the use of a nearly invisible constitutional institution, tells us far too little about the institution of the petition itself. He wants to tell a story about heroic opposition to slavery, and the gag-rule is his vehicle. While he thereby materially enriches public understanding of the right to petition as well as of antislavery, Miller would have profited by a richer historical explanation of the petitioning the Quakers and other abolitionists undertook. The gag-rule is not just an episode in antislavery, of course, but is also an episode in the history of petitioning.

I have already suggested that this inattention renders Adams's opposition to the gag-rule a historical curiosity. If Miller had better explained the institution itself, he would have situated Adams as simply the last of a school who regarded petition as the core form of political communication with governmental institutions and personnel.[60] The advent of sophisticated communication and transportation systems, the vehicles of centralized political parties, the explosion of printed media, and, above all, the growth of the franchise itself, had rendered petitions and petitioning less important.[61] Adams was thus not quixotic, but old-fashioned.

Similarly, the petitioning by women and others was not really unprecedented, as Miller seems to suggest, in the nineteenth century[62] or even earlier.[63] The scale of their participation, however, was. Moreover, at least some of the women tapped into a long tradition of participation by petition and were far from shy about their political sentiments in conducting the petition campaign. As Lydia Maria Child noted, for example, "[t]he fact is, you cannot raise a solid anti-slavery structure upon an aristocratic ground-work. There is no moral cement by which the two things can be held together."[64] Such women were not, as Miller puts it, "a powerless and marginal handful of practitioners of a new sort of reform" (p. 65). Marginal they were, but powerless, no. The indication of the

60. *See* Mark, *supra* note 5, at 2223, 2225.

61. *See id.* at 2226-2228, 2230.

62. *See* LORI D. GINZBURG, WOMEN AND THE WORK OF BENEVOLENCE: MORALITY, POLITICS, AND CLASS IN THE NINETEENTH-CENTURY UNITED STATES (1990).

63. *See* Mark, *supra* note 5, at 2182-85.

64. Lydia Maria Child to Ellis Gray Loring, August 16, 1838, Ellis Gray Loring papers, 1828-1919, Box 2, folder 122, Schlesinger Library, Radcliffe College, Harvard University. *See also, e.g.,* Angelina E. Grimké, *Appeal to Christian Women of the South,* Vol. 1, § 2 (September 1836), THE ANTI-SLAVERY EXAMINER, 25 reprinted (Westport, Ct.: Negro Universities Press) ("Let them embody themselves in societies, and send petitions up to their different legislatures, entreating their husbands, fathers, brothers and sons, to abolish the institution of slavery.").

threat they posed was the venom with which they were attacked. Moreover, as moral and political agents, they acted with the constitutional tool available to them, a tool of significant historical power.

Miller's story would thus have been materially and subtly enriched if he had described petition as a constitutional vehicle in eclipse. The petitioners would have been paid more attention in a different political culture. The petition campaign itself, the petitions circulated, and the understanding of the political obligations of the House would all have been different in a different era. Such an era was within living memory, indeed was within the memory of John Quincy Adams. Failure to provide the details of petition's constitutional role weakens Miller's story. It does not detract from the heroism of Adams and Miller's other champions, but their stature, and that of the petitioners themselves, especially the women, would have been different had Miller incorporated a richer understanding of the institution they put in service of their beliefs, both antislavery and pro-petition.

Similarly, for all its breadth and profound revisionism, Rabban's story would have been richer had he been able to focus more of his attention on the debate about free speech within the executive branch and Congress, and among the cultural dissidents themselves. In places we are given such context, as in discussions within Congress and the executive about the wisdom, constitutional and otherwise, in adopting and using the Espionage Act (pp. 248-55). Elsewhere such discussions are curiously absent. All the more curious, since what emerges with crystalline clarity from Rabban's work is the judicial hostility to novel claims for free speech. The dissidents to whom he refers, and certainly their lawyers, knew of the hostility. Where, then, did their claims come from? Some cultural tradition, some institutional embodiment of their claims — claims which were made after all, as if they were not novel — had to have informed such beliefs. Belief in personal autonomy is one thing. Belief that such autonomy is embodied in the Free Speech Clause, quite another. My complaint is, however, probably premature. Rabban promises to push his revisionism back further (p. 20), and I eagerly await that work.

I freely admit that these criticisms are minor ones. These are important books, especially when read together. However difficult constitutional lawyers and some historians find assimilating these works, all will benefit from the ways in which they expand our legal and historical imaginations. They suggest, at a minimum, that we should not, either as lawyers or historians, think that only courts and grand thinkers add to our understanding of constitutional meaning. They suggest that we should revisit the clauses of the Constitution which today are dormant, not simply to uncover their

history and to give a richer picture of the constitutional whole, but to suggest ways in which, in an altered political culture and an altogether different physical and social context, these dormant clauses may embody values we have engrafted onto other clauses today. Finally, of course, they counsel caution in accepting received wisdom wholesale. Constitutional meaning is, after all, a cultural product, the contextual production of which merits our close attention.