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Review of Free Speech in Its Forgotten Years

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BOOK REVIEWS

Free Speech in Its Forgotten Years

David M. Rabban. New York: Cambridge University Press, 1997, 404 pp., \$34.95

TERRANCE SANDALOW

FREEDOM OF SPEECH AND OF THE press are more broadly defined and receive greater constitutional protection in the United States than in any other country. Since these freedoms are customarily attributed to the First Amendment, one might assume they are a legacy from the founding generation. As students of constitutional history are aware, however, the extraordinary level of protection now accorded to commu-

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nicative activities in the United States is almost entirely the work of the twentieth century—indeed, of the last two-thirds of the century. The First Amendment is the vehicle by which protection has been provided, but the impetus for expansion of communicative freedoms has been the experience and values of the present century. The gulf that separates contemporary understanding of the First Amendment from that which prevailed in earlier years emerges with striking clarity in this absorbing book by David Rabban, a former AAUP staff counsel who is now professor of law at the University of Texas and the AAUP's general counsel.

As Rabban observes in his introduction, First Amendment scholars have largely ignored the years between the Alien and Sedition Acts of 1798 and the First World War, apparently on the assumption that free speech issues were neither frequently presented nor salient during that period. Rabban focuses on the half century before World War I to demonstrate that the opposite is true. Free speech claims were, for example, often made by a motley assortment of individuals and groups on the fringes of American society, including anarchists, advocates of free love, and less radical social reformers attempting to improve the conditions of life for women. But the claims these individuals and groups made, Rabban argues, did not rest on a belief that freedom of speech is a distinctive value that should be accorded special constitutional protection. They regarded it, rather, as an aspect of individual autonomy, properly free of governmental regulation for reasons equally applicable to all behavior. In both judicial and nonjudicial forums, neverthe-



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less, freedom of speech encompasses the right to use streets and other public grounds for parades, meetings, and rallies were also contested. Whether the IWW had other than tactical objectives in claiming the protection of freedom of speech for its activities is open to doubt. Nevertheless, as Rabban demonstrates, the arguments made by its members and by others on its behalf anticipated ideas that were later to become foundational for First Amendment analysis.

During the years between the Civil War and the First World War, however, attempts to gain constitutional protection for speech were rarely successful. With a few notable exceptions, as Rabban's survey of the case law reveals, judges consistently rejected claims for constitutional protection of commu-

less, the issues were often posed as questions about the appropriate limits of permissible speech.

The activities of the International Workers of the World (IWW), the "Wobblies," also generated controversy about the content of the nation's commitment to freedom of speech. The IWW's advocacy of the revolutionary overthrow of government and its espousal of "direct action" inevitably raised questions about the extent to which its activities fell within the boundaries of the idea of freedom of speech. Questions about whether, or the extent to

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nicative activities that today are considered to be at the very core of what the First Amendment protects. It is worth noting that the Supreme Court did not hold the First Amendment applicable to the states until the mid-1920s. Little would have changed, however, if the Court had reached that conclusion a half century earlier. The judicial conception of freedom of speech was simply too circumscribed to afford protection to those in need of it. Despite the First Amendment and cognate provisions in state constitutions, judges consistently upheld sanctions against speech if it was found to have a "bad tendency." The Supreme Court of Michigan and the Supreme Judicial Court of Massachusetts, illustratively, employed that test in upholding convictions for public display of a red flag, as did federal courts in upholding convictions under the Comstock Act for mailing material discussing sexual matters or containing information about contraceptives.

The bad tendency test was not the only doctrine courts employed to deny free speech claims that would be regarded as central to the contemporary understanding of the First Amendment. The Wobblies, for example, were frequently denied use of the public streets

for rallies either on the ground that municipal authorities were entitled to exercise the same control over municipal property that private landowners could exercise over their property or because the courts were willing to confer wide discretion upon municipal officials with respect to the conditions that might be imposed upon the use of municipal property.

The unreceptiveness of most courts to free speech claims did not go unchallenged. A number of legal scholars—some, like Roscoe Pound and Ernst Freund, whose names are still familiar and others, like Henry Schofield and Theodore Schroeder, who are now largely forgotten—argued for greater protection of speech than the courts were prepared to provide. Schroeder, the guiding force behind the Free Speech League, the only organization in the years prior to World War I that defended freedom of speech for all, was an especially interesting figure. Rabban's examination of the arguments developed by these men and of the place of freedom of speech in the thought of social progressives like John Dewey and Herbert Croly opens an important and heretofore neglected chapter in American intellectual history.

The ideas advanced and analyses developed by this disparate assemblage resonate with much of contemporary First Amendment law, but they did not even begin to take hold in the Supreme Court until after the First World War. And even then, they took hold very slowly, emerging initially only in the dissents of Justices Holmes and Brandeis that are generally regarded as ushering in the modern First Amendment era. Those dissents reflected a significant change in the views of the two justices, both of whom had voted to uphold the convictions of Eugene V. Debs and other critics of the war by employing the bad tendency test to justify the prohibition of speech that fell far short of incitement to illegal acts. The concluding chapters of the book attempt to explain the transformation in the justices' views and explore the emergence of new arguments, linking freedom of speech to democracy, that were to transform discussion about the appropriate boundaries of communicative freedoms.

Free Speech in Its Forgotten Years makes an important contribution to our understanding of the First Amendment. It is highly recommended reading for anyone interested in the history of our liberties. 