

Michigan Law Review

Volume 90 | Issue 6

1992

Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism

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Recommended Citation

Gregory P. Magarian, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism*, 90 MICH. L. REV. 1425 (1992).

Available at: <https://repository.law.umich.edu/mlr/vol90/iss6/20>

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TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM. By *Mark A. Graber*. Berkeley: University of California Press. 1991. Pp. xi, 336. \$39.95.

In *Transforming Free Speech*, his first book, Mark A. Graber¹ challenges what he calls “the Myth of the Worthy Tradition” of contemporary civil libertarianism (p. 3). Graber sketches a critical history of American intellectuals’ defenses of expression rights since the late nineteenth century, arguing that the generation of post-World War I civil libertarians galvanized by Professor Zechariah Chafee, Jr. effectively suppressed the contributions of its conservative libertarian and radical predecessors. He contends that this suppression has left contemporary free speech advocates ill-equipped to address issues implicating both expression rights and resource allocation, such as campaign finance reform and media access, which stand among the most important contemporary free speech problems. Finally, he provides a blueprint for a modified civil libertarian defense of speech designed to encompass these key issues while vindicating the contributions of pre-World War I libertarians. Despite its occasionally underdeveloped treatments of complex topics, Graber’s book makes a compelling historical and legal case that adds an important critical perspective to the literature on the development of expression rights.

Graber begins his argument with a sympathetic portrait of the conservative libertarian defense of free speech, stressing that “[a] commitment to individual freedom from state regulation” (p. 19) led late nineteenth century conservative libertarians, such as John W. Burgess, Herbert Spencer, and William Graham Sumner, to advocate free speech rights as vigorously as they championed laissez-faire property rights (pp. 18-21). Graber contends that the defense of free speech that the conservative libertarians developed — based on their narrow readings of congressional and state power to infringe individual liberty under the Constitution — belied the need for the innovations that progressive civil libertarians claimed were necessary to vindicate radicals’ expression rights during World War I and the Red Scare (p. 40).

Graber contends that progressive thinkers of the early twentieth century set the stage for a new defense of expression rights by denying the premises of conservative libertarianism (pp. 50-121). That era’s leftist libertarians, led by Emma Goldman and Theodore Schroeder, rejected the conservative libertarians’ advocacy of property rights (pp. 53-65), while its new intellectuals, notably John Dewey and Roscoe Pound, recast rights as means to sociological ends rather than libertarian ends in themselves (pp. 65-74). But these thinkers failed to gener-

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ate a widely accepted new judicial defense of expression rights; Graber argues that progressive ideas actually hindered development of such a defense by endorsing increased legislative power to effect social reforms, leaving such progressive jurists as Justice Brandeis to tie their support for free speech to the Supreme Court's extreme solicitude for property rights in such cases as *Lochner v. New York*.² The end of that solicitude would doom this brittle basis for upholding expression rights (pp. 120-21).

Into the theoretical breach stepped Professor Chafee, Graber's primary villain, with a defense of free speech that found independent constitutional support for expression rights based primarily upon the societal interest in facilitating democratic participation.³ Graber sternly criticizes Chafee's methodology: he charges that Chafee "suppressed or distorted evidence that strengthened the conservative libertarian interpretation of the liberty of discussion" (p. 127) while toning down his own progressive philosophical views for the benefit of the conservative judicial establishment (pp. 126-40). On a theoretical level, Graber complains that Chafee's reliance on the law of criminal attempts as a model for his free speech jurisprudence unnecessarily narrowed protections for expression rights (pp. 147-51). More centrally, Graber laments Chafee's categorical distinction between democratic processes, which for Chafee were properly subject to judicial oversight, and substantive economic policies, which were not, for inhibiting the development of free speech doctrine (pp. 151-64).

This distinction, Graber believes, left civil libertarians powerless to invoke judicial action against the material inequalities that have threatened open political discussion in the late twentieth century (pp. 165-69). He asserts that the process-policy dichotomy has prevented leading free speech advocates Alexander Meiklejohn and Thomas Emerson, despite their libertarian advances and criticisms of Chafee, from developing useful ideas about issues that combine concerns about expression rights and material inequalities (pp. 169-80). While the Burger Court frequently invoked property rights against calls for equalization of important opportunities for political participation — striking down federal limits on individual campaign contributions,⁴ affirming free speech rights for corporations,⁵ and denying constitu-

2. 198 U.S. 45 (1905); see pp. 112-21. Graber's characterization of Brandeis' position as a reflexive retreat into *stare decisis*, pp. 101-03, may be unfair. Graber's own account supports the possibility that Brandeis may have held a principled view that, if the Court intended to defend economic liberties, it could hardly do less for expression rights. See pp. 118-20 (describing Brandeis' judicial activism on behalf of expression rights).

3. Pp. 122-26; see ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920). The judicial foundation for Chafee's analysis was Justice Holmes' statement that the Constitution protected statements about matters of public importance unless they posed a "clear and present danger" of some social evil. *Schenck v. United States*, 249 U.S. 47, 52 (1919); pp. 122-23.

4. P. 190. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

5. P. 191. See *First Natl. Bank v. Bellotti*, 435 U.S. 765 (1978).

tional rights of access to mass media⁶ — civil libertarians remained preoccupied with less important disputes about when the government may regulate objectionable speech (pp. 198-206). The only civil libertarian discussion of the relationship between resources and expression rights has focused on the absolute question: Is money speech? Graber doubts that such an inquiry can lead to a coherent theory for adjudicating current free speech controversies (pp. 206-15).

Graber closes *Transforming Free Speech* with the blueprint for his own "somewhat new defense" of expression rights (pp. 216-34). He asserts that "libertarians['] . . . discussions of the central meaning of the First Amendment should address those practices that presently threaten most directly the system of freedom of expression" (p. 225), a principle that currently directs attention to the question: "When is money speech?" (p. 226; emphasis added). Graber's answer, set out here in unsatisfyingly brief form,⁷ takes its cue from Michael Walzer's axiom that a society satisfies the demands of democracy "when success in one institutional setting isn't convertible into success in another."⁸ Graber argues that the government "can never, or hardly ever, ban any argument or any manner of presenting arguments on the grounds of persuasiveness" (p. 230) but may "regulate the effect of material inequalities on the marketplace of ideas" (p. 233) by enforcing ceilings on campaign contributions and access rights for the materially disadvantaged (pp. 227-34).

Graber's account of free speech advocacy's historical development, although deft and largely convincing, encompasses too many important figures too quickly to avoid leaving a few puzzling questions. His real view of the conservative libertarian tradition remains obscure. While not blindly fawning,⁹ his praise for the conservative libertarians is effusive. But his own defense of expression rights makes clear that he favors a high degree of economic regulation inconsistent with the conservative libertarian view. Part of the problem lies in Graber's inadequate attention to the severe injuries that burgeoning corporations inflicted on Americans' welfare during the early twentieth century.¹⁰

6. P. 192. See *Columbia Broadcasting Sys. v. Democratic Natl. Comm.*, 412 U.S. 94 (1973).

7. Graber states that he will argue in greater detail for his own theory of free speech in a future book. P. 234.

8. P. 227 (quoting Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 321 (1984)).

9. See, e.g., p. 24 (conceding that conservative libertarians displayed greater concern with property rights of business interests than with expression rights); p. 37 (noting accord between conservative academic writing on free speech and restrictive judicial holdings on expression rights in the late nineteenth century). But Graber assigns at least partial blame for conservative libertarians' weaker moments on expression rights to external circumstances. See p. 24 (discussing "the low salience of First Amendment issues in the Gilded Age"). This contention is disingenuous: any era stained by fewer than its share of expression rights controversies is more probably an age of weak defenders of free speech than of extraordinarily tolerant governmental or social institutions.

10. See, e.g., PAUL L. MURPHY, *THE MEANING OF FREEDOM OF SPEECH* 129 (1972) (noting

The abuses of unfettered capitalists rendered earlier conservative libertarian social justifications for property rights¹¹ untenable, and this failure must have considerably aided Chafee's denial of the movement's importance.

At a deeper level, Graber never fully develops the connection he appears to want to draw between the conservative libertarian tradition and his own quite egalitarian vision of expression rights. Obviously, the conservative libertarians shared Graber's desire to forge a theory of expression rights in a context of ideas about material resources, but they and he have reached divergent conclusions through different methods. Graber considers the consequences of economic realities,¹² while the conservative libertarians asserted economic rights. If this is the only link Graber sees, the conservative libertarians are merely an important footnote to his history.

Conversely, Graber places too little emphasis on at least two figures who provide interesting support for his own views: David Riesman and Theodore Schroeder. Graber never mentions Riesman, who anticipated Graber's criticisms of the Holmes-Chafee clear-and-present-danger approach in a series of articles in 1942.¹³ The two scholars' critiques of civil libertarian theory are harmonious: Riesman complained that Holmes and Chafee paid too little attention to social policy¹⁴ and called upon government not only to guarantee expression rights but to provide facilities for their exercise.¹⁵ Riesman's apparent lack of influence may justify his absence from Graber's historical analysis, but his ideas make him an important forerunner of Graber's own theory of expression rights.

Graber discusses Schroeder at some length (pp. 54-65) but dismisses his broad, antistatist conception of expression rights as "a path not taken" (p. 65). This appears to be an accurate historical observation. But of all the thinkers Graber considers, Schroeder would seem the most likely to endorse Graber's own approach to expression rights,

the appeal of 1920s civil libertarians to "the depressed classes, primarily industrial workers"). For a discussion of the danger that monied interests came to pose to free speech itself, see THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 105-06 (1966) (arguing that modern capacities for private interference with expression rights require government restriction).

11. For an example of such a justification, see p. 20 (noting conservative libertarian belief that "government had to permit and protect even substantial accumulations of corporate wealth . . . to finance the major projects necessary for realizing truth in the modern world").

12. See p. 225 ("This emphasis on actual threats to the system of freedom of expression requires some empirical research.").

13. See, e.g., David Riesman, *Civil Liberties in a Period of Transition*, in 3 PUB. POLY. 33 (C. J. Friedrich & Edward S. Mason eds., 1942). For a discussion of Riesman's ideas, see Norman L. Rosenberg, *Another History of Free Speech: The 1920s and the 1940s*, 7 LAW & INEQ. J. 333, 348-54 (1989).

14. See Riesman, *supra* note 13, at 44 (noting the likely hesitance of the Court to engage in social policymaking).

15. See *id.* at 86-87.

based upon his combination of free speech extremism¹⁶ and concern for material justice (p. 55). Schroeder may have fit awkwardly into Graber's normative argument because, for reasons that he never fully explains, Graber limits his focus mainly to political expression, while Schroeder was concerned primarily with discussion about sex (p. 54). But Graber also oversimplifies Schroeder's work by exaggerating its philosophical affinity with the conservative libertarians, thereby avoiding full consideration of Schroeder's importance as a theorist.¹⁷

Graber thoroughly and accurately assesses the ideas of other free speech theorists. Most importantly, the record supports his far-reaching criticisms of Chafee. Reasons exist to question Graber's assertion that Chafee singlehandedly buried the memory of conservative libertarianism — other scholars played important roles in developing progressive civil libertarianism,¹⁸ and socioeconomic realities may have dealt the fatal blow to conservative libertarian precepts¹⁹ — but Graber commits no injustice in arguing that Chafee's tactics tended to obscure the history and weaken the foundation of expression rights.

One revealing fault that Graber does not discuss is Chafee's sycophantic practice, throughout his career, of denigrating the ideas, techniques, and allegiances of the radicals whose freedoms he defended.²⁰ The repressions of Communist states certainly deserved Chafee's rebukes, and by linking his advocacy of radicals' rights to derision of their words he may have gained a considerable tactical advantage with enemies of free speech. But by implying that only the ideologically pure might defend the liberties of the impure, Chafee's tactic crippled

16. Schroeder believed that the government should punish only speech that actually caused material injuries; similarly, Graber would hold courts to a very strict standard to convict for incitement to criminal conduct. *Compare* p. 56 with p. 231.

17. *See* p. 64 (asserting that Schroeder "rel[ie]d on the conservative libertarian defense of free speech"). Analysis of Schroeder's writings about sexual expression reveals that he frequently cited social benefits, as well as individual self-fulfillment, to support his calls for broad expression rights. *See, e.g.,* Theodore Schroeder, *More Liberty of Press Essential to Moral Progress, in FREEDOM OF THE PRESS AND "OBSCENE" LITERATURE: THREE ESSAYS* 7, 32 (1906) (claiming that free sexual discussion would alleviate various social problems and "insure a very general progress in public morals"). Graber notes this tendency only in an aside and only with respect to Schroeder's more general social views. *See* p. 57.

18. *See* MURPHY, *supra* note 10, at 262-65 (listing liberal practitioners, scholars, and jurists who joined in Chafee's push for expression rights in the 1920s).

19. *See supra* notes 10-11 and accompanying text.

20. *See* CHAFEE, *supra* note 3, at 187 (complaining that radicals' practice of displaying red flags in public betrayed their lack of "decent respect for the opinions of mankind"); ZECHARIAH CHAFEE, JR., *THE INQUIRING MIND* 100-01 (1928) (berating the dullness of the tract that led to the sedition prosecution in *Gitlow v. New York*, 268 U.S. 652 (1925)); Zechariah Chafee, Jr., *Thirty-Five Years with Freedom of Speech*, 1 KAN. L. REV. 1, 25 (1952) (describing Soviet representatives to the United Nations as "men who had masks instead of faces" and warning that the Soviets "have despicable clever allies in our midst"); ZECHARIAH CHAFEE, JR., *THE BLESSINGS OF LIBERTY* 112 (1956) (calling radical literature "so wordy, shopworn, and vituperative as to make reading it a complete waste of time"); *id.* at 129 (analogizing communists to "[m]aggots"). Graber does note Chafee's complementary practice of swearing his allegiance to property rights and the propertied class. *See* pp. 133-34.

his libertarian rhetoric. In light of his core belief that expression became punishable when it actually threatened to cause material injury (p. 149), his politically correct acknowledgement of communist evil also limited his defense of free speech.²¹

Graber also does a service by recalling the censorious tactics of some early twentieth-century progressives. He details how the progressive themes of national discipline and cultural nationalism and the progressive emphasis on administrative expertise led many would-be reformers to attack expression inconsistent with their social visions (pp. 78-86). Graber's analysis may disproportionately emphasize the illibertarian progressives — he fails fully to explain the reasons that this group strayed from leading progressives' support for free expression²² — but his analysis of their failings is thorough and convincing.

Graber shows similar acuity in asserting the practical importance of issues, such as campaign finance reform and media access, involving the role of material resources in controversies over expression rights. He goes too far when he implies that repression of lawless speech, civil libertarians' perennial concern, no longer matters (p. 13) — such repression will threaten freedom as long as there are political demagogues. But his relative priorities appear sound. Although several thinkers have argued for some degree of government control over material access to expression,²³ many contemporary civil libertarians too reflexively reaffirm their laissez-faire faith without adequately considering the complexities that mixed issues of expression and resources

21. By the 1950s, Chafee premised his defense of radicals' expression on the improbability of an imminent communist victory. CHAFEE, *THE BLESSINGS OF LIBERTY*, *supra* note 20, at 126-27 (stressing the small number of communists in the United States). He recognized that economic hardship might cause a growth of American communism, but, ominously, he did not argue for the continued importance of expression rights under such a circumstance. *Id.* at 128-29. No such compromising defense of free speech could ever hope to overcome McCarthyesque hysteria.

22. See p. 87 (noting that “[Jane] Addams, [John] Dewey, [Justice Louis] Brandeis and others maintained that the scientific method would not function efficiently and the community would not be fully unified unless the polity encouraged citizens to express a wide variety of opinion on matters of public interest”).

23. See LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 108-16 (1991) (reviewed in this issue by Dean Geoffrey R. Stone. —Ed.) (analyzing major Supreme Court cases on broadcast access and arguing for the benefits of a partial regulatory regime); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981) (surveying settings that arguably require some governmental regulation to ensure opportunities to communicate); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) (criticizing the Burger Court's laissez-faire tendencies in cases where expression rights collide with economic inequalities and advocating a significant role for state action in enriching public debate); Donald E. Lively, *The First Amendment at Its Third Century: Reckoning with the Ravages of Time*, 18 HASTINGS CONST. L.Q. 259, 284 (1991) (“When the media’s own potential for effective agency is implicated, freedom of the press has been pinched to the point that its functional capabilities are undermined.”). Graber does not evaluate Bollinger’s and Lively’s treatments, which are contemporary to his own; Emerson and Fiss do not satisfy him. See p. 215 (criticizing Emerson, with Chafee, for “treat[ing] property and free speech as two distinct realms of constitutional discourse”); pp. 211-12 (including Fiss among proponents of the overly simplistic idea that money is not speech).

present.²⁴ Graber argues provocatively that Chafee's civil libertarian structure, which placed economic policy decisions beyond majoritarian regulation, paralyzed his heirs in an era demanding increased attention to the relationship between money and speech (pp. 159-64). Graber invites his peers to decide for themselves whether mixed questions of speech and property deserve serious attention but admonishes them "not [to] tolerate scholarship that asserts these problems are of great practical importance but little theoretical interest" (p. 225).

Whether Graber's own defense of expression rights can lead civil libertarians out of their dilemma remains to be seen. Although his approach appears thoughtful and workable, its full exposition will have to address several questions. Most obviously, Graber must explain more clearly how his path to access regulations improves upon the simple conclusion that "money is not speech." Here, Graber's familiar comparison between restrictions on campaign spending and on high-decibel amplification, meant to demonstrate that straightforward campaign finance reform would stretch the Constitution (pp. 212-13), inadequately supports his portrayal of spending restrictions as a troublesome control on the degree of speech rather than an acceptable regulation of the manner of speech. Similarly, Graber's claim that to differentiate money from speech necessarily dictates government regulation of other political resources extraneous to the content of political ideas, such as good looks and eloquence (p. 214), ignores the nonmarket essence of these qualities. On his other flank, Graber will need to do more than assert the importance of access issues in order to placate sworn civil libertarian opponents of speech-related economic regulations. Moreover, both sympathetic and hostile readers will require a more systematic account of Graber's constitutional philosophy, hastily sketched here (pp. 217-23), which leads him to soften his advocacy of liberal access to material resources out of reluctant deference to "the direction of the Rehnquist Court" (p. 223).

Whatever the ultimate fate of his theoretical proscriptions, Graber has delivered a wake-up call to supporters of expression rights who fear only familiar threats. His critical, probing historical analysis conveys the variety and depth of ideas that have fueled the conceptual development of expression rights while exposing the flaws in that development. Graber's history supports his insistence that "philosophical and jurisprudential justifications of expression rights are not timeless verities but reflections of the unique political and legal climate

24. See, e.g., NAT HENTOFF, *THE FIRST FREEDOM* 269-82 (1980) (arguing against the fairness doctrine as a simple violation of the language of the First Amendment). Graber notes that issues combining expression rights and access to material resources have caused splits in the American Civil Liberties Union that have prevented that organization from responding coherently to such questions. P. 206. See also SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (1990) (reviewed in this issue by Professor David Cole. —Ed.).

of their era” (p. 216). He argues forcefully that modern civil libertarians should focus their justifications on mixed issues of expression and material resources.

— *Gregory P. Magarian*