TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM. By Mark A. Graber.[1] Berkeley, California: University of California Press. 1991. Pp. xi, 336. Cloth, $45.00; paper, $15.00.

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Taking no prisoners, this aggressively revisionist history immediately targets Harry Kalven, Jr.[3] "Contemporary libertarian arguments," *Transforming Free Speech* begins, "are neither traditional nor worthy." Portrayed as the primary influence on contemporary First Amendment discourse, Zechariah Chafee, Jr., receives sustained censure, especially for repudiating the "conservative libertarianism" of late nineteenth-century jurists such as Thomas Cooley, Christopher Tiedeman and John W. Burgess.

Conservative libertarians, according to Mark Graber, created a forward-looking, comprehensive view of speech issues. They espoused defamation rules, for example, that anticipated *New York Times v. Sullivan*. They opposed overseas expansion in the 1890s, foreseeing that divisions over foreign policy could fuel calls for curtailing speech rights at home. More important for his primary theme, Graber argues that conservative libertarians linked speech and economic issues in a coherent conception of individually based, judicially protected rights. They recognized "a sphere of private mental conduct that was as inviolate as their cherished sphere of private commercial conduct."

During and after World War I, however, scholars and jurists such as Chafee, Oliver Wendell Holmes, Jr., and Louis D. Brandeis helped to "transform" conservative libertarianism into the "civil libertarian" approach to speech issues. Criticizing functionalist histories, which see Chafee's generation simply responding to wartime censorship and gaps in existing free-speech doctrine, Graber denies that civil libertarianism represented "a necessary response" to repression. The older libertarianism, in fact, actually would have "afforded better protection" than the civil libertarianism invented during World War I and the 1920s. For example, in contrast to Chafee, who accepted the legitimacy of some controls, John W. Burgess (the only prominent conservative libertarian alive in 1917-

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3. See Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (Jamie Kalven ed., Harper & Row, 1988).

18) denounced all the speech regulations established by Congress and Woodrow Wilson's administration as unconstitutional.

Why did civil libertarians go wrong? Invoking political theorist Quentin Skinner and legal scholar James Boyd White, Graber concentrates upon the "intellectual environment," the "modes of rhetorical justification" that shaped and constrained civil libertarianism. This approach leads him to the general ideology of progressivism and the specific tenets of sociological jurisprudence. Adapting political progressivism to law, scholars such as Chafee and Roscoe Pound stressed the social dimensions of legal decision-making. In place of the individualistic, natural rights, anti-statist tilt of conservative libertarianism, civil libertarians emphasized the social context of all rights claims and the reformist potential of state-sponsored social legislation. This approach ultimately transformed free-speech doctrines.

In speech cases, civil libertarians' commitment to the intellectual assumptions of sociological jurisprudence produced a "central dilemma." While insisting that democratic societies protect dissenting expression in order to encourage diversity and invigorate public dialogue, they also considered a society "democratic only if elected representatives determined what social interests would be protected and promoted." "For reasons unrelated to expression rights, though clearly related to property rights," progressives jettisoned the conservative-libertarian conviction that courts jealously guard all individual liberties against socio-economic legislation. Inverting Cooley's calculus, progressives accorded freedom of speech "no higher constitutional status than freedom of contract." Their anti-*Lochner* convictions, in this sense, worked against strong judicial protection for freedom of speech.

From this perspective, the First Amendment writings of both Holmes and Brandeis are found wanting. In a judgment that, ironically, parallels Harry Kalven's, Graber concludes that Holmes was never really interested in the problem of protecting speech.[4] Although Brandeis "sharpened" Holmes's musings about protected expression, he contributed no comprehensive free-speech theory of his own. Those Brandeis-inspired opinions of the 1920s and early 1930s that did uphold speech claims simply adopted an expedient pragmatism. "As long as conservative justices struck down laws that abridged the freedom of contract, liberal jurists unashamedly used those precedents to strike laws that abridged the freedom of speech."[5]

4. See, e.g., id. at 133-36.

5. For two different views, see the appreciative, and carefully argued account of the

Zechariah Chafee's voluminous writings bequeathed the most flawed legacy. By emphasizing social rather than individual interests and by limiting the judiciary's protective role, Chafee ignored conservative libertarianism's crucial insight: that doctrines about protected speech must confront economic relationships within public life. Steadfastly rejecting any general judicial power to strike down "reasonable" legislation in the name of individual liberties, Chafee justified protection of speech on instrumentalist grounds that squared with his anti-*Lochnerism*. Judicial scrutiny of free-speech claims, according to Chafee, should primarily look toward the broader *process* by which popular opinion took shape rather than the specific *rights* of individual speakers. A process-oriented approach to speech issues would, he hoped, encourage wise social and economic legislation—which the judiciary should not casually strike down—that rested upon fully informed public discussion.

Unfortunately, this circuitous strategy for legitimating "some form of judicial activism" on First Amendment issues "implicitly pretend[ed] that the distribution of economic resources did not affect the system of freedom of expression." Focused on governmental restraints, Chafee ignored broader economies of power and knowledge. Any remedies for "private restraints on fair discussion" must come from "an aroused public opinion and the enterprise of individuals and the community, with the possibility of affirmative governmental action in the background," he wrote in 1941.

Graber thus scolds Chafee for creating a free-speech tradition that remained "structurally insensitive" to the economic concentration that was already stifling dissenting speech. Later theorists such as Thomas I. Emerson and Vincent Blasi, though recognizing that "material inequalities threaten the democratic process," continued "to place the relationship between private property and free speech at the periphery" of First Amendment discussions. With mainstream scholarship still focused on the venerable free-speech versus illegal conduct debate—largely an issue of the past, according to Graber's analysis—"virtually all recent" discussions either ignore, slight, or fail to "resolve" the relationship between speech and property.

Intending to build upon Michael Walzer's work on political and property rights, Graber promises a subsequent study that will develop a "political libertarian approach to free-speech problems."

"old Court's" work in the area of protected speech offered in John Braeman, *Before the Civil Rights Revolution: The Old Court and Individual Rights* (Greenwood Press, 1988) and Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 Wm. & Mary L. Rev. 653 (1988).

Briefly outlining such a project, he first suggests that "only speech uttered for the purpose of causing criminal conduct is beyond the pale of the First Amendment." If this principle were applied retroactively to Supreme Court cases, only Benjamin Gitlow would have overstepped the protected sphere for dissenting speech.[6]

On problems of speech and property, Graber suggests that the threshold question should be "When is money speech? rather than Is money speech? Individuals have the constitutional right to convert their material resources into political expression [only] as long as the average member of the community can afford to invest similarly in politics." Apparently offered as an updating of the individualistic approach of Cooley's day, political libertarianism would deny special speech rights to corporations and labor unions; uphold the type of regulations on corporate contributions struck down in *Bellotti*;[7] accept the campaign spending limits invalidated in *Buckley v. Valeo*;[8] and, more generally, authorize legislation aimed at preventing wealthy persons from "convert[ing] material advantages into political expression."

Transforming Free Speech is an ambitious, valuable and provocative book. It effectively argues that contemporary scholarship might draw from more than a single "worthy tradition"; that histories of free expression cannot "stand apart from American political and intellectual developments"; and that any free-speech theory—including Graber's own—is historically contingent, "a product of its times." But as an attempt to re-imagine the past as a prologue to clearing theoretical space for the present, the book invites dissent on a variety of specific issues.

Although skeptical of various parts of *Transforming Free Speech*, including the claim that Chafee's framework still confines First Amendment discussions, I will note only two issues here: the book's narrow reading of "intellectual" history during the crucial "transformation" period, and a similarly constricted approach to what might be called the "cultural politics of speech." In terms of both these issues, the book's call for considering First Amendment issues against a broad historical backdrop seems only partially realized.

First, when exploring conservative and civil libertarian thought, *Transforming Free Speech* follows a rather narrow path. At points it pursues "the not-so-great-person" mode of legal history: Had only previous theorist X solved earlier dilemma Y more

6. *Gitlow v. New York*, 268 U.S. 652 (1925).
7. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
8. *Buckley v. Valeo*, 424 U.S. 1 (1976).

effectively, we would have been spared today's doctrinal crisis Z. Thus, Zechariah Chafee "obscured earlier libertarian arguments," imagined a "mythical tradition" for his own views, and "stunted the development" of "more protective" principles. This formulation places too much weight upon legal thought in general and individual thinkers in particular; in addition, it appears to fly in the face of the book's own, better-conceived arguments about the historical contingency of legal discourse.

Yet even *Transforming Free Speech*'s best moments, some historians may find, too often fall back upon a reductionist, binary framework—conservative vs. civil libertarianism—that limits its view of free-speech debates. Fifty years separated Thomas Cooley's and Zechariah Chafee's initial writings on free expression, and (perhaps inevitably) *Transforming Free Speech* cannot adequately represent a half-century's intellectual history. To link the demise of Cooley's libertarianism to the rise of progressivism and sociological jurisprudence—and then to characterize the resultant civil libertarianism as a step backward in free-speech theory—simply ignores too much about these complex discourses and, more importantly, about other historical discussions of speech issues.

Articulated in its own historically contingent texts, conservative libertarianism, for instance, may have actually been "transformed" prior to the emergence of sociological jurisprudence. Thomas Cooley's earliest ideas about libel law, which always represented a minority position, underwent important transformations during the 1880s.[9] And well before Chafee (or other civil libertarians) had begun to write, the dominant legal approach to libel and many other speech issues had, arguably, already assumed the "neo-Blackstonian" form that Justice Holmes endorsed in *Patterson v. Colorado*.[10] The late nineteenth and early twentieth centuries, in other words, may have seen transformations *within* as well as *of* conservative libertarianism that do not fit into a binary approach.

Similarly, attempts to locate the historical contexts of specific legal texts may require more precise mapping than Graber's framework allows. For example, the works of John W. Burgess, cited as examples of the continuing vitality of conservative libertarianism during World War I, might also be read in light of Burgess's rabid pro-German sympathies. His final books, contemporaries in the historical profession argued, seemed more pro-German—and anti-

9. See, e.g., Norman L. Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* 178-206 (U. of N.C. Press, 1986).

10. 205 U.S. 454 (1907). See also the general discussion in Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* 1-7 (U. of Cal. Press, 1991).

Wilsonian—than libertarian.[11]

Moreover, conservative libertarian texts, drawn from whatever point in time, seem to fit awkwardly into any tradition critical of the impact of wealth upon speech. As Graber concedes, the primary link between conservative libertarianism and his political libertarianism is that both seek to join, though in obviously different ways, speech and economic issues. Yet if one seeks historical antecedents for the approach Graber sketches, texts by the opponents of conservative jurisprudence—anarchists, women's rights crusaders, labor organizers and agrarian populists, for instance—would seem more appropriate sources than those of Cooley, Burgess and company.[12]

Second, and more broadly, *Transforming Free Speech*, with its focus on the "intellectual environment," simply cannot examine the larger cultural politics that helped to shape debates about legally protected speech. To take only a single example, the book ignores a monumental change that interacted with both the conservative and civil libertarian discourses about speech: the rise of mass commercial culture. During the late nineteenth century, for instance, the legal writings of both Cooley and Brandeis were intertwined with changing modes of mass communication, especially those offered in celebrity-oriented journalism.[13] And during the first decades of this century, the free-speech debates that most engaged so-called progressives addressed new forms of commercial expression, especially motion pictures, advertising, popular theater and muckraking journalism.[14]

In this political-cultural context, *Transforming Free Speech*, which is implicitly shaped by the question "How can speech be given the broadest possible legal protection?," may give too little

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11. See, e.g., Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* 112, 241 (Cambridge U. Press, 1988).

12. See, e.g., David Kairys, *Freedom of Speech*, in David Kairys, ed., *The Politics of Law: A Progressive Critique* 237 (Pantheon Books, rev. ed. 1990). *Transforming Free Speech* itself also discusses two important, often neglected figures who fit into neither the conservative libertarian nor the civil libertarian molds: Theodore Schroeder, a philosophical anarchist associated with Emma Goldman and with the Free Speech League; and Ernst Freund, the author of the classic treatise *The Police Power: Public Policy and Constitutional Rights* (Callaghan, 1904). Their writings, Graber notes, point to a "path not taken" by civil libertarians such as Chafee, but his important discussion of Schroeder and Freund remains limited within his overall, binary frame. See *Transforming Free Speech* at 54-65.

13. See, e.g., Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 562-63, 563-66 n.1 (Little, Brown, 5th ed. 1883); Louis D. Brandeis and Samuel D. Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

14. See, e.g., Lawrence W. Levine, *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America* (Harv. U. Press, 1988); J. Michael Sproule, *Progressive Propaganda Critics and the Magic Bullet Myth*, 6 Critical Studies in Mass. Comm. 225 (1989).

historical attention to another query, "Why is 'speech' deserving of special legal protection?" As mass commercial culture enveloped the very fabric of everyday life, variants of the "Why is speech special?" question were asked repeatedly during the period in which conservative libertarianism allegedly gave way to civil libertarianism.[15] What emerged by the 1920s was not simply a new set of legal doctrines, but much broader discourses about "free" speech which were rooted in complex economic, political, academic, as well as legal cultures.[16]

After 1900, discussions about the film making industry, again to note only one example, produced fierce debates about what kind of legal protection Hollywood's products deserved. During these discussions, people from legal and other professional (and nonprofessional) communities consistently linked speech and economic issues; equally important, their overlapping discourses helped to construct the complex relationship between "law," including Hollywood's own Production Code, and cinematic expression in the United States.[17] Indeed, Hollywood itself came to offer powerful cinematic representations, including ones highlighting the economic dimensions of speech controversies, that intersected with other cultural discourses about protected expression.[18]

Although *Transforming Free Speech* offers a very suggestive and valuable analysis of elite legal thought, its narrowly conceived intellectual approach tends to limit its view of an important period in the history of debates about legally protected expression. Histories of the First Amendment, especially those that seek to transform understandings about protected expression, might well look to a wider variety of cultural discourses in order to untangle the complex chains of signification that have helped to give meaning to one of the most powerful of all phrases in the twentieth-century lexicon, "freedom of speech."

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15. See, e.g., Norman L. Rosenberg, *Another History of Free Speech: The 1920s and the 1940s*, 7 J.L. & Ineq. 333 (1989).

16. See, e.g., Frederick Schauer, *The First Amendment as Ideology*, 33 Wm. & Mary L. Rev. 853 (1992); Kairys, *Freedom of Speech* at 250-66 (cited in note 12).

17. See, e.g., two recent cultural-legal studies: Lea Jacobs, *The Wages of Sin: Censorship and the Fallen Woman Film, 1928-1942* (U. of Wis. Press, 1991) and Stephen Vaughn, *Morality and Entertainment: The Origins of the Motion Picture Production Code*, 77 J. Am. Hist. 39 (1990).

18. See, e.g., John Denvir, *Frank Capra's First Amendment*, 15 Legal Stud. Forum 255 (1991); Rosenberg, 7 J.L. & Ineq. at 343-54 (comparing films of Frank Capra with First Amendment writings of David Riesman) (cited in note 15).