Book Review

FREE SPEECH IN ITS FORGOTTEN YEARS. By David M. Rabban.[1] Cambridge University Press. 1997. Pp. xi, 404.

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Rip Van Winkle-like, the First Amendment slumbered from 1800 to 1920. Or so we are accustomed to think. The typical constitutional law book speaks briefly of the origins of the First Amendment, devotes a few paragraphs to the Alien and Sedition Acts, and then leaps a century to the great dissents of Holmes and Brandeis. In the interim, free speech lay dormant as an issue.

That, at least, is the conventional wisdom. As David Rabban and others have shown, however, the conventional wisdom is wrong. It is true that the Supreme Court did not begin vigorously defending freedom of speech until well into the Twentieth century. But free speech was far from being a forgotten issue during the Nineteenth century. Free speech was a rallying cry for the anti-slavery forces which ultimately formed the Republican party, and remained a lively issue during the Civil War.[3] And, as Rabban has demonstrated, free speech continued to find its advocates even during the generally repressive years from the end of Reconstruction through World War I. Much of this period is little remembered today—how many people can name the Presidents from 1870 to 1920, let alone Supreme Court Justices? Yet we cannot expect to fully understand the later, more dramatic developments of the Twentieth century without grasping this background.

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3. See, e.g., Michael Kent Curtis, *The Curious History of Attempts to Suppress Anti-Slavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785 (1995).

With respect to the First Amendment, Rabban can take the primary credit among legal scholars for rediscovering this forgotten period of American law. His book sheds light on this shadowy corner of legal history, in the process raising puzzling questions about nineteenth century constitutional thought. I will first sketch his findings, and then offer some musings about the repressive caselaw of the day.

I

Several parts of Rabban's story are particularly striking. He begins with the saga of the "lost tradition of libertarian radicalism." (p. 23) Much of the ire of these forgotten libertarians was directed at the Comstock Act, which banned "obscene" mailings. The Comstock Act was passed in response to an unsuccessful criminal prosecution under an earlier statute—a prosecution aimed, not at what we would consider today to be pornography, but at a newspaper article alleging that the Reverend Henry Ward Beecher had had an affair with his best friend's wife. (p. 29) The targets of prosecution under the new law included birth control tracts (p. 30); pamphlets attacking marriage as oppressive to women and advocating "free love" (p. 34); advertising for contraceptives (p. 39); and portions of Whitman's *Leaves of Grass*. (p. 41) In response, the Free Speech League was formed under the leadership of legal scholar Theodore Schroeder. (p. 47) Like the ACLU of today, it defended speech of all kinds, including socialists, sexual libertarians, and others. (p. 48) Thus, Schroeder, with the help of the West Publishing Company, (p. 62) collected cases on advertising, blasphemy, obscenity, treason, and other categories of forbidden speech. (p. 63)

A second arena of free speech controversy involved the Industrial Workers of the World (IWW). The "Wobblies" made a point of using street corners for inflammatory speeches, exploiting the predictable police response as evidence of capitalist repression. (p. 87) The shrewdest police commissioners, in places like Denver and New York City, defused the controversies by protecting the IWW's right to free speech. (p. 101) Other cities allowed speech, but only outside the central business district, which many considered a sufficient opportunity for expression. (pp. 110-16) Thus, as Rabban says, free speech was a live public issue during the late Nineteenth century, "[t]he general public, officials at various levels of government, and even

members of the IWW expressed a wide range of views," often in terms "more sophisticated analytically, and more sensitive to free speech concerns, than typical judicial decisions of the period." (p. 128) (I will return to the question of the judicial decisions later.)

Another arena of active debate was legal scholarship. Contrary to the current conventional wisdom, Zechariah Chafee, Jr., did not originate free speech as a topic for scholarship. Rabban discusses the work of five influential earlier scholars—two of them remembered primarily for other reasons today, another who is more obscure (Freund), and two others (Schroeder and Schofield) who are almost entirely forgotten. For instance, Thomas Cooley is usually remembered today (erroneously, according to Paul Carrington[4]), as the apostle of *Lochnerism*. Actually, even his views on economic regulation were more liberal than that, and he was by nineteenth century standards a strong civil libertarian on speech issues.[5] He advocated broad protection for speech on topics of public concern, stressing that the press is "one of the chief means for the education of the people." (p. 201, see also pp. 197, 205)

Other scholars also spoke out against narrow readings of the First Amendment. Roscoe Pound, the noted legal realist and Dean of the Harvard Law School, opposed the Blackstonian interpretation, which held the First Amendment merely to be a prohibition on prior restraints. (p. 192) Ernst Freund, a law professor at the University of Chicago, argued that advocates of anarchist views were protected by the First Amendment. (p. 198) He also anticipated today's public forum doctrine, rejecting the view of most courts that the government had absolute control of speech on public property. (p. 209) Schroeder, whose work with the Free Speech League was mentioned earlier, inveighed against the obscenity laws. (p. 199) He would have allowed punishment only given "the imminent danger of actual

4. See Paul Carrington, *Law As "The Common Thoughts Of Men": The Law-Teaching And Judging Of Thomas McIntyre Cooley*, 49 Stan. L. Rev. 495 (1997). For more on conservative supporters of free speech during this period, see Mark Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* 17-49 (U. of Cal. Press, 1991).

5. Some of Cooley's judicial opinions on the subject are also quite notable. See *Miner v. Post & Tribune Co.*, 13 N.W. 773 (1882) (requiring the plaintiff to prove malice in a defamation case involving matters of public concern); *Atkinson v. Detroit Free Press Co.*, 9 N.W. 501 (1881) (Cooley, J., dissenting) (holding critics of public officials "to the strict and literal truth of every statement, recital and possible inference" would "subject the right [of public criticism] to conditions making any attempt at public discussion practically worthless").

and material injury." (p. 207) Finally, Henry Schofield, a professor at Northwestern, anticipated *New York Times v. Sullivan*[6] by arguing that the First Amendment abolished seditious libel. (p. 195) (As an aside, it seems to me that it speaks poorly of the legal academy that we have such little memory of our own history, so that even Pound and Cooley are only vaguely remembered and the others are slipping out of sight entirely.)

A final, striking part of the story is the position taken by many progressives such as John Dewey. Until the disillusion of the post-World War I years, progressives were dubious about the conception of rights as unduly individualistic, and similarly unenthusiastic about freedom of speech. They had no patience for dissenting voices other than their own. (p. 218) (Sound familiar?) Dewey ridiculed radicals who protested censorship by invoking "all the early Victorian political platitudes," including "the sanctity of individual rights and constitutional guaranties." (pp. 246-47) Only after the war did Dewey emerge as an advocate of free speech. (p. 338) He continued, however, to reject the "individualistic" justification for civil liberties (p. 339); stressing instead the contribution of free speech to the public welfare. (p. 340)

How did all of this history come to be forgotten? The progressives, no doubt, were not eager to call attention to the change in their own position after the war. They were also anxious to disassociate themselves from the pre-war disputes over civil liberties for two reasons. First, many of the pre-war advocates of free speech, whether sexual libertarians or Wobblies, were political embarrassments. They were associated with labor violence like the IWW, or with disreputable views of sexuality involving issues ranging from public nudity to birth control. Second, the very existence of the pre-war disputes about free speech was best forgotten. By adopting the Rip Van Winkle story and assuming away the history between the Alien and Sedition Acts and World War I, the progressives avoided the necessity of confronting decades of unfavorable judicial precedents. Indeed, according to Rabban, Chafee deliberately concealed the existence of numerous First Amendment decisions, in order to argue that the World War I courts were unsupported by precedent. (p. 5) These restrictive decisions are discussed below.

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6. 376 U.S. 254 (1964).

II

It is tempting to bury the mistakes of our predecessors, dismissing them as merely the benighted product of a backward age. But, for all their failings, nineteenth century lawyers and judges were not hostile to the concept of free speech. A minority tried to move the law toward greater protection of free speech. Even the repressive majority consistently acknowledged the value of speech and acted on occasion to curb efforts at censorship. If they had been truly hostile to speech, they would have missed no opportunity to support suppression. Thus, the story is more complicated and deserves fuller discussion.

Rabban's primary focus is on the advocates of free speech, rather than their opponents, and so it is understandable that he devotes relatively little attention to the judicial opinions of the period. His treatment of the opinions seems largely dedicated to making two points.

Rabban's first point about the case law is that, contrary to the conventional wisdom stemming from Chafee's day, there was in fact a substantial body of judicial opinions about free speech, and they were largely dismissive of First Amendment claims. Indeed, "from the Civil War to World War I, the overwhelming majority of decisions in all jurisdictions rejected free speech claims," and "[n]o court was more unsympathetic to freedom of expression than the Supreme Court." (p. 131) Certainly, by late twentieth century standards, most judges were shockingly unreceptive to First Amendment claims.

A few illustrations may serve to show the overall tenor of the judicial decisions. Consider two Minnesota cases. In *State v. Pioneer Press Co.*,[7] a state law prohibited any newspaper accounts of an execution "beyond the statement of the fact that such convict was on the day in question duly executed according to law." As the court said, the "evident purpose of the act was to surround the execution of criminals with as much secrecy as possible, in order to avoid exciting an unwholesome effect on the public mind."[8] The court rejected the claim that "there are no constitutional limitations upon the liberty of the press, unless the subject-matter be blasphemous, obscene, seditious, or scandal-

7. 110 N.W. 867 (Minn. 1907). Another striking case is *State v. Haffer*, 162 P. 45 (Wash. 1916) (upholding a criminal prosecution for defaming the memory of George Washington).

8. Id. at 868.

ous in its character."[9] Instead, the court said, the "principle is the same" whenever a publication is "of such character as naturally tends to excite the public mind and thus indirectly affect the public good."[10] Thus, the court upheld an indictment against the newspaper for describing an execution.

Another case, about a decade later, involved what would now be called "hate speech."[11] The mayor of Minneapolis had banned what the court called a "photoplay," *The Birth of a Nation*. Among the community members consulted by the mayor, some denounced the play as historically false, as a "humiliating caricature" of blacks, and as "'canonizing' the lawlessness of the Ku Klux Klan."[12] Also, there was "some evidence that the production of the play in Minneapolis has resulted in disparaging remarks regarding negroes and in subjecting them to indignities in public places."[13] Finding that the question of license revocation was "one that calls for the exercise of official discretion," the court concluded that "reasonable people might differ as to the advisability of permitting the exhibition of this play"; hence, the mayor's action was upheld.[14] Notably, the court seemed oblivious to even the possibility that free speech might have been an issue in the case.[15] Indeed, a few years later, the Supreme Court held that movie theatres were merely a form of public entertainment, like vaudeville, "not to be regarded [as] part of the press of the country or as organs of public opinion."[16]

While many judges may have been oblivious to what we would now consider blatant censorship, others were not. Rabban's second point about the case law is that minority support for free speech did exist, showing that the prevailing opinion was not unchallenged. Legal protection for freedom of speech was "thinkable" by judges of the time; it was simply not a position that most accepted. Given the existence of these dissident opinions, Rabban says, we must conclude that the "possibility of substantial legal protection for speech" was within "the conceptual universe of American judges before World War I." (p. 132)

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9. Id.
10. Id.
11. *Bainbridge v. City of Minneapolis*, 154 N.W. 964 (Minn. 1915).
12. Id. at 966.
13. Id.
14. Id.
15. In a striking replay, the Minnesota Supreme Court was equally sympathetic to regulation of hate speech a century later in *R.A.V. v. St. Paul*, 464 N.W.2d 507 (Minn. 1991), rev'd, 505 U.S. 377 (1992).
16. *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915).

Some of these deviant opinions are quite striking in presaging themes of later First Amendment law. The best known case is undoubtedly *Coleman v. MacLennan*,[17] which the Supreme Court later relied on in *New York Times v. Sullivan*.[18] *Coleman* recognized a privilege to make statements about public officials "which are untrue in fact, although made in good faith, without malice and under the honest belief that they are true."[19] The court rejected a narrower rule of fair comment as "leav[ing] no greater freedom for the discussion of matters of the gravest public concern than it does for the discussion of the character of a private individual."[20]

In another decision with modern resonance, the Wisconsin Supreme Court struck down an early effort at campaign finance reform.[21] A state law prohibited ordinary citizens from spending money outside their own county for political purposes (political parties and candidates were exempt). "If this be not an abridgment of freedom of speech," the court said, "it would be difficult to imagine what would be."[22] According to the court, the statute would merely operate as a roadblock to reform, which usually results from private agitation long before any formal political party has taken up the cause. Yet under the statute, "no man, or group of men, can do a stroke of political work involving expense in any other county than their own, however legitimate and praiseworthy be the means which are used."[23] (Shades of *Buckley v. Valeo*!)[24]

A third example of the minority view is a New Jersey case regarding seditious speech, decided on the eve of World War I.[25] A state law made it a crime to "attempt by speech, writing, printing or in any other way whatsoever to incite or abet, promote or encourage hostility or opposition to any and all government."[26] The defendant was indicted for having made a vehement (and according to the court, probably libelous) attack on

17. 98 P. 281 (Kan. 1908).
18. 376 U.S. 254 (1964).
19. *Coleman*, 98 P. at 286.
20. Id. at 292. Law and economics devotees may also be interested in another of the court's comments: "good reputation honestly earned is not only one of the most satisfying sources of a man's own contentment, but from a commercial standpoint it is one of the most productive kinds of capital he can possess." Id. at 285.
21. *State v. Pierce*, 158 N.W. 696 (Wis. 1916).
22. Id. at 698.
23. Id.
24. 424 U.S. 1 (1976).
25. *State v. Scott*, 90 A. 235 (N.J. 1914).
26. Id.

the Patterson, N.J., police force, and having thereby "then and there wickedly, unlawfully, and maliciously attempted to encourage hostility and opposition to the government of the city of Patterson."[27] The court pointed out that the law had been passed as the "product of feverish and political excitement" caused by the McKinley assassination.[28] The "great danger in enacting statutes under the stress of great public excitement and pressure," the court remarked, is that "such legislation is very apt to reflect the crude and undigested sentiment of a public upheaval at the cost of encroachments on constitutional rights."[29] Construing the statute more broadly, the court said, "would silence the public press, and preclude it from bringing into the light of day the evil spots in the administration of municipal and state affairs."[30] If only this sentiment had been more influential after the war broke out later that year.

Although these libertarian opinions are cheering, they were a distinct minority. More prevalent, as Rabban shows, were the many cases in which free speech claims were brushed aside under the "bad tendency" test or ignored by courts entirely. First Amendment claims were not unknown during these "forgotten years," they were merely, on the whole, unsuccessful.

These repressive rulings, which Rabban must be credited with rediscovering, deserve closer attention than he gives them. For these cases raise a puzzle. During the Civil War period, freedom of expression had significant support from important political figures—first the pre-war Republicans, who denounced southern suppression of anti-slavery speech, and then their opponents, who denounced the suppression of dissenters during the War.[31] Thus, the value of free speech had not been forgotten by society at the beginning of Rabban's story. And, as he makes clear, the legal thinking of the day provided some support for greater protection, had courts chosen to use them. What, then, accounts for the submergence of free speech claims from 1870 to 1920?

It seems clear that the courts did not reject the concept of free speech or embrace censorship in principle. Even the least sympathetic tribunals seemed willing to provide some protection

27. Id. at 235-36.
28. Id. at 236.
29. Id.
30. Id. at 237
31. See also *United States v. Hall*, 26 F. Cas. 79 (S.D. Ala. 1871) (holding free speech to be a "privilege and immunity" of United States citizenship).

to speech at the margin. Postal regulations are a case in point. In *Ex Parte Jackson*,[32] the Court upheld for the first time the power of Congress to exclude materials (in this case, lottery advertisements) from the mails based on content. The Court began with a broad principle: Congressional power "embraces the regulation of the entire postal system of the country," and the "right to designate what shall be carried necessarily involves the right to determine what shall be excluded."[33] In the Court's view, "the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."[34] Thus, excluding literature from the mails raised no First Amendment problem. From our current perspective, of course, this is a Neanderthal opinion in its willingness to license such broad restrictions on the mail (though it is only in the last twenty years that a lottery ad would have received First Amendment protection at all). But even so, the opinion is not completely hostile to individual liberties. The Court emphasized that letters and sealed packages were fully protected by the Fourth Amendment against any government surveillance; in addition, if Congress did choose to exclude some printed material from the mails, it could not prevent their dissemination by other means without violating the right to free speech. For, the Court said, if Congress could ban both the use of the mails and other forms of transportation, "the circulation of the documents would be destroyed, and a fatal blow given to the freedom of the press."

In later cases, the Court rejected expansive readings of postal statutes. In *American School of Magnetic Healing v. McAnnulty*,[35] the Court blocked efforts to prevent mailings by a business offering to heal illnesses through the "innate power" of the brain. There being no standard of "absolute truth" applicable to medical treatments, the utility of a treatment is "a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal."[36] In short, the Court said, "[u]nless the

32. 96 U.S. 727 (1877).
33. Id. at 732.
34. Id. at 736.
35. 187 U.S. 94 (1902).
36. Id. at 107.

question may be reduced to one of fact as distinguished from mere opinion," the statute did not apply.[37] In *Swearigen v. United States*,[38] the Court reversed an indictment for mailing a newspaper editorial. The editorial, calling the plaintiff "a liar, perjurer, and slanderer," a "black hearted coward," and a "companion of negro strumpets [who] revelled in [the] lowest debauches."[39] Calling the newspaper article "exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous," the Court nevertheless could not "perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."[40] Four Justices dissented, so obviously this was not an inevitable reading of the statute.

This is not to deny Rabban's basic conclusion that the courts were generally inhospitable when confronted with First Amendment claims, but they cannot simply be characterized as "hostile" to free speech. Pending further historical investigation, we can at least speculate about several factors that may have contributed to the generally unfavorable response. Here are some plausible candidates.

Lack of salience. The major issues of the day were economic, especially struggles between labor and business. Free speech seemed like a peripheral concern compared to these burning issues. Moreover, given the amount of dissent, the rise of "yellow journalism," the level of public unrest, and the general weakness of government compared to today, the threat of truly repressing public discourse may have seemed chimeric. Both liberals and conservatives, in other words, had "other fish to fry." Thus, there was little to oppose the legal inertia of past doctrine.

Fear of chaos. In reading Rabban's descriptions of the cases, and casually dipping into a few on my own, I had the sense of pervasive anxiety about maintaining social order. The opinions have an aura of fear that basic social order was breaking down, a fear undoubtedly fed by labor unrest, massive immigration, attempted revolutions in Europe, the rise of mass culture, and the whole process of industrialization. Courts seemed most

37. Id. at 106.
38. 161 U.S. 446 (1896).
39. Id. at 247 n.1.
40. Id. at 451.

protective of their own domain, liberally using contempt sanctions to fend off efforts to exert political pressure on them.[41]

Legal culture. In the legal thinking of the time, the common law had a special status as a kind of embodiment of natural (economic) law. In key areas such as defamation and contempt, the common law was quite anti-libertarian; this stance then seemed natural and uncontroversial. Also, the formalist thinking of the time was unsympathetic to the idea of "unconstitutional conditions," so it is unsurprising that the Court saw few constitutional barriers to controlling speech on public property,[42] by immigrants,[43] or through federal facilities like the mails. In addition, for a formalist, it is difficult to take a moderate position, because formalism does not lend itself to gradations of legal protection. Faced with a stark choice between categorical protection of speech and categorical regulation, conservative formalists opted for regulation.

Quite likely, each of these explanations played some role: any threat to personal liberty did not seem pressing; the public interest in maintaining social order seemed to be at risk; and many forms of repression seemed "natural" in light of the legal culture of the day. But of course, assuming that these factors were indeed operative, they did not operate equally at all times and all places, and a much fuller historical account would be needed before drawing any firm conclusions.

A better understanding of the Dark Age of American law might help shed light on later developments. There has been considerable discussion of the post-World War I revival of the First Amendment, including much debate about changing views of particular individuals such as Holmes, (pp. 342-71) but there has been comparatively little attention to the regressive views that were being rejected. If the three factors discussed above account for the unsympathetic reception of First Amendment claims from 1870 to 1920, their waning may help account for the revival of those claims thereafter. First, because of War War I and its aftermath, free speech issues had become more salient, having attracted the attention of mainstream progressives (a process Rabban explores in detail). Moreover, the wartime experience had shown that the threat of systematic repression of

41. Justice Holmes' opinion in *Patterson v. Colorado*, 205 U.S. 454 (1907), is a striking example.

42. See *Davis v. Massachusetts*, 167 U.S. 43 (1897).

43. *Turner v. Williams*, 194 U.S. 279 (1904).

opinion was real. Second, at least in some quarters, fears of unrest may have been muted by social changes such as the end of massive immigration, or perhaps concerns arose that excessively harsh repression would only fuel unrest. In retrospect, the massive repression prompted by World War I must have seemed a hysterical overreaction to a minor threat. And third, the legal culture that made many restrictions on speech seem natural was eroded by the rise of legal realism. The fact that the common law had long allowed broad restrictions on speech was perhaps less likely to be seen as a sufficient justification.

All this, of course, is speculation. My point is not to argue for any particular explanation of the post-1920 developments, but only to suggest that a better understanding of the roots of the earlier climate of repression might help illuminate the later change.

Trying to fit the development of First Amendment doctrine into some overall conception of the evolution of American society and legal culture would surely be a daunting task. Probably wisely, Rabban did not attempt such an analysis. But what he has done instead is significant enough. In the course of his research, he has unearthed a lost world of legal thought. By bringing the First Amendment's "forgotten years" back to light, he has done all of us a great service.