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FREE SPEECH IDEALISM

Timothy Zick*

LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (HARVARD UNIVERSITY PRESS 2016). PP. 480. HARDCOVER \$46.50.

KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* (PRINCETON UNIVERSITY PRESS 2018). PP. 232. HARDCOVER \$24.95.

There are countless normative takes on what free speech means or requires, who ought to be its principal beneficiaries, and what limits it ought to countenance. Laura Weinrib's *The Taming of Free Speech: America's Civil Liberties Compromise* and Keith Whittington's *Speak Freely: Why Universities Must Defend Free Speech* both examine and propose what we might call ideal conceptions of freedom of speech. In Weinrib's account, free speech might have, but ultimately failed to support, a "right of agitation," a call to collective action by workers.¹ In Whittington's account, free speech serves the interests of the academic mission—to produce and disseminate knowledge.² Although both books present strong cases for their ideals, they highlight the inherent limitations and sometime contradictions of free speech idealism.

The setting of Professor Weinrib's book is the picket lines and raucous union halls of the 1920s and 1930s. As Weinrib observes in her ambitious and openly revisionist account, during this formative period, free speech was about collective concerns relating to property rights and economic power. At the time, the notion of "civil liberties" as individual rights enforceable in court was far from the minds of most labor agitators.³ Rather than privilege the noted opinions of Justices Holmes and Brandeis in early cases and the post-World War I reactions to authoritarianism as the incubators of the modern free speech right, Weinrib looks instead to the actions of labor agitators and the American Civil Liberties Union in constructing early conceptions of freedom of speech and "civil

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1. See LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* 1–2 (2016).

2. See KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* 6 (2018).

3. See WEINRIB, *supra* note 1, at 11.

liberties.”⁴

As they fought for the right to picket, boycott, and collectively restructure economic conditions, employees and labor unions gradually presented their claims in a constitutional free speech register and—reluctantly, as Weinrib shows—looked to the courts to protect their “civil liberties.”⁵ Professor Weinrib refers to this agenda as a fight for a First Amendment-based “right of agitation.”⁶ The right to agitate was a right to use collective tools of expression—picketing, strikes, etc.—and to call others to do the same, in order to produce a restructuring of the economic order. The narrative takes many twists and turns. Weinrib’s thick account examines public contention, the content of labor laws, judicial attitudes, litigation strategies, political conflicts, and the ACLU’s internal and external conflicts concerning the nature and meaning of free speech.

The ultimately disappointing ending, according to Weinrib, is that the courts did not recognize a “right to agitate” and the ACLU ultimately abandoned it as central to the organization’s civil liberties agenda.⁷ Instead, civil libertarians and business leaders made peace with a version of free speech that did not specially favor labor expression but rather ensured that labor and management (and everyone else) was free to express their views. As Roger Baldwin, the ACLU’s executive director, proclaimed in 1938, the ACLU had “no ‘isms’ to defend except the Bill of Rights.”⁸ As Baldwin put it a year later, “[w]e are neither anti-labor nor pro-labor. With us it is just a question of going wherever the Bill of Rights leads us.”⁹ This conception of freedom of speech, which Weinrib says “stripped civil liberties of their radical valence,”¹⁰ would eventually become the standard by which courts would measure all government regulations of speech—including those affecting employer and corporate expression. Hence was the right to free speech “tamed” and transformed into a general content-neutrality rule.¹¹

Professor Whittington’s book is one of several recent works that address what many fear is waning support for fundamental free speech principles and values on the nation’s public and private university campuses.¹² As Whittington observes, repression of campus speech is not a new problem, although he points out it is “newly relevant.”¹³ His book reviews the familiar litany of incidents on campus in which administrators have censored

4. *See id.* at 5 (asserting that the “new vision grew out of a state-skeptical brand of labor radicalism grafted onto a conservative legal tradition of individual rights”).

5. *Id.* at 9.

6. *Id.* at 1 (defining “right of agitation” as “a right of workers who were vulnerable in isolation to band together for a common goal”).

7. *Id.* at 9.

8. WEINRIB, *supra* note 1, at 268.

9. *Id.* at 328.

10. *Id.* at 268.

11. *See id.* at 268–69.

12. *See generally* ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017); GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* (2014); SIGAL R. BEN-PORATH, *FREE SPEECH ON CAMPUS* (2017); JOHN PALFREY, *SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION* (2017). For a skeptical view that campus free speech is in crisis, see Thomas Healy, *Return of the Campus Speech Wars*, 117 MICH. L.J. 1063, 1066–69 (2019).

13. WHITTINGTON, *supra* note 2, at 3.

speech, attempted to impose orthodoxies, pressed for “trigger warnings,” created student “safe spaces,” and disinvited speakers whose messages they considered too controversial for campus.¹⁴ Whittington also considers the extent to which suppression of ideas has been inspired by student “demands” for freedom from speech they find offensive or hurtful.¹⁵

Whittington urges faculty, students, and administrators to view free speech not through the common lenses of self-government, search for truth, or speaker autonomy justifications, but rather as critical to the central mission of the modern university—“to produce and disseminate knowledge.”¹⁶ He worries that we are “in danger of giving up the freedoms of critical inquiry that we have wrested from figures of authority over the course of a century.”¹⁷ He urges public and private campus communities to embrace a “common commitment to taking ideas seriously, to exploring the unconventional and the unexpected, to examining critically what we might otherwise take for granted, and to holding accepted truths up for challenge and reconsideration.”¹⁸ Whittington’s central focus is on agitating and unsettling the mind, but in the controlled and constrained environment of the research university.

Although situated a century apart in terms of their contexts, the books remind us that we cannot derive the meaning of free speech solely from textual parsing or casebook reading. Rather, the meaning of free speech is contextual, contingent, and perpetually contested—in our institutions, on our streets, and through public discourse.¹⁹ A diverse collection of actors including courts, civil society organizations, politicians, professors, judges, and students all play their roles. Through their actions, the meaning of free speech evolves. The books remind us, too, that support for free speech is politically contingent.²⁰ In Weinrib’s account, conservatives initially saw free speech as subversive and only later came to embrace its “tamed” version.²¹ Similarly, conservatives on campus and elsewhere who originally opposed radical, civil rights, and anti-war speech have increasingly invoked free speech as they have found their communications and ideas under attack. Social justice, which was labor’s original free speech concern, is back with a vengeance on campus—in the form of liberal efforts to suppress speech.

Ultimately, the books rest on idealized conceptions of freedom of speech. Professor Weinrib’s account is about a vision of free speech as a revolutionary tool of economic disruption. If only the ACLU had not abandoned the workers’ rights to picket and boycott as its central platform and courts had embraced these expressive forms, the book suggests, the First Amendment would have become a tool of social progress rather than a watered down neutrality guarantee subject to being “weaponized” by businesses seeking to resist

14. For examples of censored speech, see *id.* at 51. For examples of attempts to impose orthodoxy, see *id.* at 125. For a discussion of “trigger warnings” and “safe spaces,” see *id.* at 57. For examples of disinvited speakers, see *id.* at 92.

15. See *id.* at 56.

16. *Id.* at 13.

17. *Id.* at 4.

18. WHITTINGTON, *supra* note 2, at 7.

19. See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1329 (2006).

20. See Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 942 (1993).

21. WEINRIB, *supra* note 1, at 1.

regulation and entrench power.²² In this retelling, the “taming” of free speech is a story about lost opportunities and the perils of compromise. By siding with free speech as a general principle, the ACLU erred—free speech radicalism and effective labor resistance were casualties of the organization’s abandonment of labor.

One general cautionary tale of Weinrib’s account is that efforts to fashion free speech as a social justice tool are bound to fail. Labor speakers may have been among the first, but surely were not the last, to learn this lesson. Although the tone of the book suggests otherwise, there is reason to treat the rejection of a social justice freedom of speech as a victory rather than a defeat. A free speech right that allows governments and courts to favor certain ideals of justice or economic power invites, or at least allows, them to suppress other viewpoints and voices. Weinrib observes that the ACLU’s adoption of the classical liberal conception of free speech shifted “from the complicated calculus of the ‘right of agitation’ to a streamlined civil libertarianism that was impervious to inequalities in the marketplace of ideas.”²³ Arguably, the ACLU was aware of these inequalities but viewed them as a necessary cost. The flipside of Weinrib’s concern is that the power of government to favor certain speakers in pursuit of some notion of marketplace “balance” includes the power to disfavor other speakers.

Moreover, focusing on the right of agitation ignores or obscures the fact that a “tamed” free speech guarantee can indeed be quite radical. As Weinrib’s own extended account of labor unrest in Paterson, New Jersey, shows, labor agitation produced the modern public forum doctrine, which now allows *all* speakers regardless of viewpoint to access important public spaces.²⁴ In this and many other respects, a broadly applicable freedom of speech is critically important to facilitating dissent and opposition to would-be authoritarians. Indeed, one might reasonably argue that now more than ever we must have something like the negative free speech right the ACLU adopted. Imagine, in light of his many attacks on free speech and press norms, giving the current President, law enforcement and government agencies the power to skew debate in the interest of “balance” or their own view of “social justice.”²⁵

It is a salutary development, rather than a lost opportunity, that the ACLU branched out to defend the academic freedom principles that are so central to Whittington’s campus speech account. The same goes for the ACLU’s advocacy on behalf of access to sex education and contraception and various forms of political speech. A preoccupation with labor’s “right to agitate” for better pay and working conditions may have left other radicals vulnerable to governmental suppression and censorship. Agitation fails as an ideal because free speech does not belong to any particular person, organization, or cause. A universal conception of free speech casts a wide net while simultaneously securing widespread acceptance of the norm that government has no power to favor some speakers over others.

22. See Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html?auth=linked-google>.

23. WEINRIB, *supra* note 1, at 302.

24. *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939). Weinrib provides a detailed account of the events that led to the *Hague* decision. See WEINRIB, *supra* note 1, at 226–69 (discussing Paterson litigation).

25. See TIMOTHY ZICK, *THE FIRST AMENDMENT IN THE TRUMP ERA* (2019).

The fact that powerful interests can use the universal free speech right to advance their own views is a necessary corollary to protecting the same right on behalf of the politically powerless, for whom such rights are, of course, even more important.

In one final sense, the labor-centric “right of agitation” is again far too narrow. Weinrib’s history convincingly shows that the Supreme Court’s treatment of picketing, in particular, undermines even the “tame” free speech guarantee.²⁶ However, the problem in terms of agitation is actually much broader. In many contexts, courts have prioritized social order over agitation, dissent, and disruption.²⁷ In this sense, the concern with “taming” free speech is not that governments have denied particular speakers the right to agitate, but that they have subjected contentious speakers of all stripes to various forms of managerial suppression and control.

Whittington’s ideal free speech conception is, in some sense, the polar opposite of Weinrib’s. The agitation he is concerned with is not the radical or revolutionary sort. Rather, Whittington’s generally balanced, studious, and evenhanded account of free speech on campus views freedom of speech as relevant to academic inquiry, but also significantly constrained by it. The vision here is not the boisterous street, but the seminar room and other fora that facilitate the rational and deliberative pursuit and distribution of knowledge by trained professionals and their charges.

Agitation of the mind is thus acceptable, indeed critical, to the central mission of the institution. Whittington wants campuses to be “bastions of free thought and critical dialogue.”²⁸ His free speech model prizes civility, reasoned discourse, and the professional search for truth. However, other types of agitation and dissent are acceptable only insofar as they do not interfere with or disrupt that central mission. Thus, unlike Weinrib, Whittington does not pine for a radical ideal of free speech that upsets power structures, but advocates an ideal that largely works in service of some of those structures. That ideal takes the form not of the content-neutrality rule, which often does not apply on campuses (think, for example, of matters such as tenure decisions or classroom speech), but rather of a narrower free speech ideal informed by principles of academic inquiry.²⁹

Whittington’s ideal conception of free speech is not the constitutional right or negative liberty we usually think of, but rather an ideal that guides operations and facilitates the university’s core mission. Thus, free speech is relevant only, or at least primarily, because it is “constitutive of the institution,” not because it facilitates self-government and debate on matters of public concern or provides opportunities for self-expression.³⁰ Rather, the point of free speech in the campus context is to help “make progress in refining our understanding of the world and in improving the understanding of others.”³¹

However, free speech on campus can serve all of these functions at once—as it does in other parts of society. It seems rather odd to adopt a free speech ideal that downplays

26. See Timothy Zick, *Parades, Picketing, and Demonstrations*, in OXFORD HANDBOOK ON FREEDOM OF SPEECH 1, 16 (Adrienne Stone & Frederick Schauer eds., 2019).

27. See Timothy Zick, *Managing Dissent*, 95 WASH. U. L. REV. 1423, 1433–34 (2018).

28. WHITTINGTON, *supra* note 2, at 6.

29. *Id.* at 7.

30. *Id.* at 29.

31. *Id.* at 30.

self-government concerns in the very environment in which future leaders will learn to self-govern. Understanding the rights and responsibilities associated with freedom of speech is an important part of that maturation process. To suggest to students that their interests in individual self-discovery merit little, if any, concern on campus may not turn universities into “enclaves of totalitarianism,”³² but it hardly suggests an “unfettered campus speech” environment.³³ In these respects, like Weinrib’s agitation ideal, Whittington’s academic ideal seems far too narrow.

When it comes to expression, campus speech communities are generally diverse places. Not all of the expression relates to the pursuit and distribution of knowledge. Students are there to learn, but not all of their free speech concerns relate to research and academic debate. Similarly, faculty and administrators have free speech interests that do not relate directly to the mission of their universities. Campus outsiders are presumably not committed to the academic mission, and yet frequently express themselves on campus. Whittington acknowledges that some of the most pressing free speech concerns on campus do not relate to mission-based content. However, he insists that administrators should resolve these concerns by consulting the central mission of the university.³⁴

There is obvious tension between the academic inquiry ideal, which allows officials to take content and sometimes viewpoints into consideration, and the neutrality model, which generally forbids such things. Whittington worries about the suppression of disfavored views. However, a robust academic freedom model gives institutions considerable power to favor mission-related messages.³⁵ He opposes selective vetoes of student invitations to “controversial” speakers on the ground that they should be open to a range of views as part of the academic enterprise.³⁶ However, following the principles of his ideal, it is not clear why administrators must allow known provocateurs to visit when their messages have nothing to do with the collection and distribution of knowledge.

The answer, from a watered-down and “tamed” neutrality perspective, is that the First Amendment prohibits at least public universities from making these sorts of judgments and restrains private universities, which are generally sensitive to free speech principles and norms, from doing so as well. More generally, the free speech ideal of freewheeling inquiry and “unfettered campus speech” is in considerable tension with the various standards and limits Whittington argues must constrain free speech on campus.³⁷ In short, while he invokes Mill and Jefferson, Whittington treats some of *their* ideas as potentially unwelcome on campus.

Owing to the many valuable lessons they teach, Weinrib’s and Whittington’s books are essential reading—not just for civil libertarians and campus administrators, but for anyone interested in how contemporary free speech principles came to be and how those principles influence everything from labor relations to the campus quad. One of the central

32. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969).

33. WHITTINGTON, *supra* note 2, at 8.

34. *Id.* at 7.

35. *Id.* at 51–57; see also Robert C. Post, *The Classic First Amendment Tradition under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* 106, 112–22 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) (suggesting several reasons why the “classic First Amendment” does not apply on campus).

36. WHITTINGTON, *supra* note 2, at 118–19.

37. *Id.* at 8.

lessons of both works is the inherent limitations, and sometimes contradictions, of free speech idealism. In the end, the authors confirm the value of an all-comers free speech guarantee that limits official power over expression of all kinds.