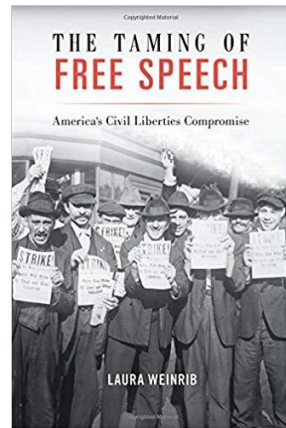


BOOK REVIEWS

Laura Weinrib. *The Taming of Free Speech: America's Civil Liberties Compromise*. Boston, MA: Harvard University Press, 2016. Pp. i + 461. ISBN 978-0674545717. Hardcover \$45.00.

Few recent Supreme Court decisions are as notorious as *Citizens United v. Federal Election Commission*. The 2010 ruling says that free speech law prevents the government from restricting corporations' independent political spending. Viewed as a major setback for campaign finance reformers, *Citizens United* has even triggered calls for a constitutional amendment to overturn the ruling. The slogan *free speech for people*, rather than for big business, has become a rallying cry.



But what if *free speech for people* is itself the novel suggestion? What if *Citizens United* didn't substantially upend the American free speech tradition, but simply carried it to a logical conclusion?

In a provocative recent history of free speech law, University of Chicago law professor Laura Weinrib mentions *Citizens United* by name only once, but its shadow looms large nonetheless. In her telling, the intellectual groundwork for *Citizens United* was laid nearly a century ago, through early labor activism and an uneasy consensus between the ACLU and the entrenched economic interests of the late 1930s. By agreeing to this bargain, Weinrib contends, the ACLU evolved into a uniquely respected defender of civil liberties, while abandoning its roots in the labor movement.

The Taming of Free Speech: America's Civil Liberties Compromise chronicles the emergence of modern free-speech doctrine, tracing the doctrine's roots back to the early struggle of the labor movement against wealthy industrialists. Weinrib's volume is a sweeping work that encompasses three distinct narratives: the development of the concept of "free speech," the role played by organized labor in pushing for civil liberties, and the ideological history of the ACLU. At times the breadth of her storytelling leads the book to lose its focus, as when she launches into extended discussions of the Scopes "monkey trial" regarding evolution or the development of obscenity law. But the book remains engrossing throughout, with a surprising thesis: in recounting the long history of governmental efforts to suppress "seditious" and "disruptive" speech, Weinrib makes clear that current popular ideas about free speech—such as the view that constitutional speech rights are both universal and nearly absolute—are far more historically novel than many Americans likely believe.

Her story begins in the early 1900s, shortly after the Supreme Court's controversial decision in *Lochner v. New York*. *Lochner* invalidated a worker-protection law on the grounds that it violated "liberty of contract" between companies and their workers, ushering in an era of pro-business Court rulings that led to longstanding skepticism about the judicial system among organized labor.

With the courts seemingly closed to them, labor activists pursued direct action in the form of protests and disruptions. These early civil-liberties advocates articulated an expansive vision of free expression—including concepts like the right to strike and agitate publicly against employers—that was closely linked to belief in the urgent need for economic redistribution. In an ironic quirk of history, the first ideas about modern civil liberties emerged from a radical collectivism that was deeply hostile to contemporary liberal notions of individual autonomy.

The *Lochner* line of cases came to a screeching halt when the Great Depression struck. As business interests issued a range of challenges to

Franklin D. Roosevelt's proposed New Deal, Roosevelt and his administration knew they needed the judiciary to approve their progressive reforms. By threatening to expand the membership of the Court and staff it with pro-New Deal appointees, Roosevelt successfully goaded the Court: Chief Justice Charles Evans Hughes beat the Court-packing plan with the "switch in time that saved nine." A new Court majority would uphold Roosevelt's New Deal reforms.

Enter the ACLU, which had begun life as a pro-labor activist group that shunned the prospect of "impact litigation." Now, facing a chastened Court willing to lend a constitutional imprimatur to Roosevelt's reforms, the organization began advancing novel arguments for civil liberties—arguments that could be powerfully grounded in the American tradition, but that also led to unforeseen social consequences.

Weinrib's tale reaches its historical climax in 1940, when a major internal conflict broke out within the ACLU. Following a spate of company-sponsored violence against union protestors, the National Labor Relations Board issued an order barring the Ford Motor Company from distributing anti-union literature to its employees. The ACLU faced a dilemma: stand with labor, in the tradition of the early radicals who had birthed the organization, or defend Ford's right to express itself freely? When the ACLU decisively came down on the side of "free speech for everyone"—even powerful, prosperous speakers like the Ford Company—it heralded a sea change in the ACLU's popularity, and bridged a longstanding divide between the ACLU and political conservatives. A subsequent internal purge of Communist sympathizers from the ACLU's rolls further cemented this transition and cultivated even more public goodwill.

Subsequent free speech cases in the 1960s and 1970s would go on to enshrine a view of the First Amendment as a vehicle of individual expression, sharply contrasting with earlier perspectives. Today's outraged reactions to *Citizens United* are a testament to just how deeply this newer view has penetrated the American cultural consciousness.

Flag-burning is protected by the First Amendment, the modern argument goes, but corporate involvement in the political process is something different: free speech is about *people*, not groups, communicating their views.

Yet the earliest labor activists and the ACLU had pushed for free speech to be viewed as a *group*-oriented right: shorn of its leftist politics, this original theory—that free expression must be understood as a right exercised by collective groups, *including wealthy businesses*—lies at the heart of *Citizens United*. Given the free speech doctrine's genesis in the labor movement, *Citizen United's* holding takes on a deeply ironic dimension.

That irony underlies the provocative question at the heart of *Taming*: did the ACLU “sell out” by taking Ford's side? In one account, the 1940 debate was the moment the ACLU first found itself, emerging as a genuinely nonpartisan organization admirably willing to stand on principle in the face of severe pressure. From a different standpoint, the ACLU's decision to recognize “employer free speech” was a compromise of longstanding ideals, a sacrifice of labor interests on the altar of mainstream respectability. That free expression must be understood as a right that may be exercised by collective groups, *including prosperous businesses*, lies at the heart of *Citizens United*; to the opinion's liberal critics, this is the bitter fruit of the ACLU's long-ago betrayal.

In depicting the ACLU's internal dilemma, Weinrib highlights—whether intentionally or not—a persistent tension between competing visions of American justice: must law be based on principles that are blind to and impartial about the beneficiaries, or is it ultimately inextricable from its social and economic context? One might call these the philosophies of the late Justice Antonin Scalia and of Justice Sonia Sotomayor, respectively, and they are not easily reconcilable.

Weinrib's tone is often mournful, wistfully recalling a time when the ACLU was unabashedly pro-worker. But given the seminal impact of the organization after 1940, this regret is shortsighted. While the ACLU's

rejection of judicial consequentialism sits uneasily alongside modern progressive legal thought, that willingness to stand zealously on constitutional principle laid the groundwork for transformative victories to come, including *Brown v. Board of Education*. Any argument that would potentially subordinate constitutionalism to perceived economic inequities is a two-edged sword: judges become merely agents of either the “powerful” or the “powerless,” transforming the legal landscape into a zero-sum battlefield, and the balance of power can change dramatically.

By consistently arguing that constitutional protections apply to *everyone*—Ku Klux Klan protestors and labor radicals alike—the modern ACLU resists political classification along easy lines. And on net, the disadvantaged still benefit from this regime: adopting the “Scalian” notion that constitutional principles must be applied with absolute consistency—civic consequences be damned—cuts sharply against potential reactionary arguments that society must be protected from a threatening “other.” If the government cannot seize a major corporation’s property without due process, neither can it seize an immigrant’s property without due process: equal rights are equal rights.

With its controversial 1940 decision to defend the Ford Company, the ACLU morphed from a special-interest group to a national proponent of civil rights and civil liberties. And no matter one’s views on *Citizens United* itself, that transition has helped construct a social order in which virtually all Americans—wealthy and poor alike—have the freedom to speak up without fear.

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