

The Always Evolving Academic Freedom

by Matthew Stewart

Academic Freedom: From Professional Norm to First Amendment Right, David M. Rabban, 2024, Harvard University Press. pp. 369. \$29.95 paperback.

David M. Rabban has written a comprehensive history, analysis, and defense of academic freedom. As a professor of law, he brings an understanding of legal trends and pertinent cases that is both wide and deep along with knowledge of academic culture and mores. His tenure as General Counsel of the American Association of University Professors (AAUP) and chair of its Committee on Academic Freedom and Tenure, assures that his scholarship is augmented by plentiful experience and practical knowledge. A more thoroughgoing study of academic freedom is unlikely to emerge any time soon. Rabban's scholarship is yoked to the argument that academic freedom merits the status of First Amendment right distinct from general free speech rights.

In its first year of existence, the AAUP immediately set itself the task of formulating a functional definition

of academic freedom. The goal was to insulate scholarly inquiry into sensitive and controversial areas from meddling boards, trustees, donors, or religious and civic leaders. While obviously not a legal document, the resulting 1915 "Declaration of Principles on Academic Freedom and Academic Tenure" stressed three points that have nonetheless remained central to subsequent legal analysis and judicial decisions.

First, academic freedom is inextricably tethered to the legitimate professional functions of university professors. Second, peer review is the justification for the professional norms that sustain claims to academic freedom rights. Peer review is key to academic self-policing and defines the corresponding duty attached to the right.

Third, the general political expressions of professors outside the classroom, library, and laboratory (extramural speech, for short), are also protected

by academic freedom. Then as now, this third point was contentious. Rabban declares forthrightly that the first two points should retain their vital role in legal justifications of academic freedom, but the third point should be rejected as inconsistent with the first two. Moreover, Rabban argues, claims to protection of extramural speech on academic freedom grounds undermine “the differentiation of a distinctive First Amendment theory of academic freedom,” the desideratum of the author, as his book’s title predicts (34).

Academic freedom began its formalized life, then, as a defense of the professoriate’s right to research and teach free from interference by non-experts who may be motivated by religious, political, or ideological differences, or by mere personal enmity. This right was justified by appealing to public welfare and the promotion of civic health in a democratic society, and by asserting “the benefit to society at large from the production and dissemination of knowledge by trained experts” (28). The legal system has repeatedly concurred with these general claims, though this general concurrence is attended by its share of legal tangles, thinly sliced findings and not altogether consistent language or reasoning from case to case.

Nonetheless, since 1915, judges have repeatedly “emphasized that universities contribute to the entire society through the advancement of knowledge and by preparing students for democratic leadership” (35). Moreover, several cases in the middle of the last century

used the same justifications to sustain the claim that universities themselves—not only the professors who labor for them—have an institutional right to academic freedom. In short what is good for the profession is good for the university, and what is good for the university is good for a democratic society.

At the top of the university power hierarchy, of course, reside boards of governors or trustees. Absent the protections of academic freedom, professors would serve solely at the pleasure of such boards, or, depending on the institution’s culture and practices, presidents and high-level administrators from whom the boards take their cues in rubberstamping. Absent academic freedom rights, faculty would be subject to both sound decision-making and whim alike, on the one hand dependent on the goodwill of their employers, on the other hand susceptible to punishment on grounds other than professional incompetence.

Founders, donors, wealthy alumni, and local powerbrokers of church or state could also influence hiring, firing, and retention on spurious grounds. What was true and necessary in 1915 remains true and necessary now. The list of possible anti-intellectual, anti-scholarship agents has not shrunk. It has now been augmented by lobbyists, NGOs, advocacy groups, and, remarkably, by some members of the professoriate itself.

The professoriate does provide a social good; moreover, the pursuit and dissemination of knowledge and the

search for truth are inherently worthy endeavors that ought to be supported on their own terms. Rabban argues that academic freedom ought to be considered a First Amendment right not only from a cultural and traditional point of view but as a matter of legal status. Here he sets himself apart from the oft-repeated civic-minded and democratic claims for academic freedom, declaring such effects to be useful byproducts. In fact, Rabban is skeptical that the “theoretically appealing argument” that academic freedom produces a superior democratic citizenry has consistently proven itself in practice (141). Rather, “the societal value of the contribution to knowledge through the expert academic speech of professors provides the most convincing justification for treating it as a distinctive category of First Amendment analysis differentiated from the general free speech rights of all citizens” (136).

Part of what makes academic discourse “distinctive” is its purpose-driven nature. It is defined by its will to discover and transmit knowledge. Rabban also points out that whereas ordinary free speech is “egalitarian and individualistic,” applying to one and all and dependent upon no one’s approval, academic freedom relates to speech that is “meritocratic and communitarian,” defined by the imprimatur it is granted by faculty peer groups (139).

Back to peer review as a central feature of the study, or, as Tocqueville would have termed it, the book’s “mother idea.” Acknowledging the imperfec-

tions and paradoxes that attend this practice, Rabban nonetheless expresses confidence that peer review is the best system we have and that it is adequate for the purpose of claiming this special right. “Two cheers for peer review,” he has said elsewhere. Given the current situation and temper of the academy, one is tempted to tone that down to one cheer.

Rabban acknowledges that academic standards shift, that the expert findings of today are overturned tomorrow, and yesterday’s wisdom has become today’s anathema. What of those scholars—and he does provide instances—who are ahead of their times, who buck trends or who focus on sub-fields deemed to be unpromising niches but are later found to be groundbreaking, even crucial? Existing standards may well find such scholars unworthy of tenure or promotion. At its worst peer review might be seen as a sort of negative feedback loop, ensuring that those who color inside the lines will find their rewards, while mavericks, originals, and true geniuses are discouraged or derided.

One might be tempted to think that the humanities and various “studies” departments would be the worst offenders in this regard, given the levels of subjectivity inherent in the professional judgements that adhere to those sectors, not to mention their now-frequent politicization and penchant for confusing activism with disinterested scholarship. Yet Rabban’s examples include three Nobel Prize winners from the hard sciences. Readers of *Academic*

Questions may recognize the name of Katalin Karikó, for example. Winner of the 2023 Nobel Prize in Physiology and Medicine for her work on messenger RNA, Karikó had previously been demoted, had her pay reduced, had her lab taken away, and been told that she did not belong on the faculty. Rabban's book appeared before the investigative journalist Charles Piller's exposure of the shocking scientific misconduct that has misdirected and impeded Alzheimer's research. *Doctored: Fraud, Arrogance, and Tragedy in the Quest to Cure Alzheimer's* details the fraudulent studies and dogmatic "science" responsible for misdirected efforts and misallocated research money. While corporate greed and failures of governmental oversight play their roles in this story, Piller also reveals abject failures of peer review. The image and data fraud were eventually detected by unpaid investigators. This woeful recounting amounts to a Paul Bunyan-sized poster boy for several aspects of the replication crisis in science. The factors that contribute to this crisis have been enumerated repeatedly for some fifteen years without any improvement. How does this inertia speak for the gatekeeping capacities of the professions (it is recognized as a *crisis* after all, not just a fault or problem)?

Is this to cherry pick the worst instances of the failure of peer review, which mostly gets things right or have standards been slipping in all directions? Are there still two cheers for peer review or are we down to one? If academic freedom exists independent

from ordinary claims of free speech rights, and if its claim to special status rests upon the authority of scholarly knowledge, what will happen if trust in scholarly knowledge continues to erode and much of the blame for this erosion can be laid at the feet of the professoriate? The relative health of academic freedom has waxed and waned over the decades since 1915, and the present moment finds trust in the academy at a particularly low ebb.

Campus speech codes and other limitations of student expression have been another source of consternation both within the academy and in public opinion. Readers of *Academic Questions* do not need to be told that for some forty years the preponderance of institutional suppression of student speech has skewed against conservatives and classical liberals, while codes, prohibitions, and informal suppression have favored progressive desiderata. Indeed "favored" is too weak in some instances, where deliberate social engineering and double standards are obvious. While not a defender of speech codes per se, Rabban finds universities well within their rights (and well advised) to prohibit speech that only insults or antagonizes and thus poisons the academic atmosphere and harms students' ability to study and learn. Such gratuitous and counterproductive speech, he argues, must be differentiated from legitimate expression of controversial ideas or the voicing of questions and objections that counter the attitudes currently stamped with approval by the university. Despite

the claims of hurt or harm on the part of students or faculty, controversial *ideas* must be allowed a home in the university. As Rabban puts it, “Exposure to ideas, including ones that may be so offensive that they make it harder for some students to learn, is a fundamental part of the educational process” (235). In other words, academic freedom (expression of ideas) must not be limited on campus, but free speech should be limited when it intrudes upon the educational mission.

As with the question of peer review, I am less sanguine than Rabban regarding universities ability (and in some cases their desire) to sort academic speech apart from other questions of free speech. All will want to claim freedom for themselves, but many will not extend impartially to all who work and study there. On the one hand, his examples of gratuitous insults and bigoted statements are convincing. There is no place for such expression on campus. On the other hand, there is another list to be made, a long one that enumerates examples of universities caving in to student complaints concocted in response to legitimate ideas with which they disagree.

As an experienced academic, Rabban is aware of these problems and admits that universities “often seem to invoke [protection of the intellectual environment] as a pretext for punishing unpopular ideas” (243). What is to be done? Rabban advises that universities provide examples of prohibited speech and give a warning upon first offense rather

than mete out immediate punishment. While I would trust the author’s judgment in such matters, there are many I would not trust, and this solution sounds an awful lot like the status quo reformulated as status quo lite.

It is doubtful that even those readers who fervently share Rabban’s desire for a First Amendment status of academic freedom will find all his arguments convincing. My own demurrers are mostly ones of degree born of a dimmer view than the author has of institutional and professional behavior. Such disagreements in no way detract from the respect the book deserves for the assiduous scholarship and careful argumentation that characterize its densely packed pages. Readers with any interest in the topic will admire these qualities, and all who read will learn.

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