

Friends, Enemies and Speech

Debates in the 1970s asked whether freedom of speech was instrumental or an end in itself. Both sides seemed to desire to codify the 1960s, and those seeing speech as an end believed that was the way to make it most secure. I thought they lost the intellectual battle then and it has become increasingly clear they lost the political battle over the subsequent years. People believe in free speech for instrumental reasons - it is deemed to help them and their friends.

For most of the twentieth century liberals and their allies had plenty to say and often needed the protections of freedom of speech. Then, commencing in the 1970s, conservatives found the protections of free speech increasingly valuable, while by the 1990s liberals had lost their voice and therefore the need to protect speech.

The overarching theme of early twentieth century progressivism was the need to constrain the individual. Government and social reformers wanted to create a "new American," one who would accept social control for his or her own betterment. Thus as Mark Graber and David Rabban have detailed, progressives had little use for freedom of speech. Once America entered the Great War, progressives

in control of government instituted programs to suppress any dissent. They were successful in limiting dissent and, of course, prevailing judicially. Decisions from Schenck to Whitney reflected the progressives' values even as support for them eroded in the post-war climate.

With the Great Depression, freedom of expression found a substantial following for several reasons. First, the New Deal liberals remained progressives only in the belief that government could run the economy; the disdain for individualism was jettisoned without regret. Second, the prime target of local authorities were labor organizers and labor was a key New Deal constituency, with New Dealers believing it was essential that unions flourish. To do so they needed protection for organizing and free speech protection was a necessary corollary. Third, communists were important labor organizers in the CIO and with the Popular Front they represented (or at least appeared to represent) the New Deal left. A stock attack on the New Deal from the right suggested that it was too close to communism. Thus not only were communists friends of New Dealers, but their enemies were common enemies. Since the enemies wished to silence communists, New Dealers moved to protect them. Finally, Justices Holmes and Brandeis were icons for the New Dealers. There was a belief that the two

could do no constitutional wrong. Their opinions in Abrams, Gitlow and Whitney were acclaimed not only for their rhetoric, but also as exact guides to the meaning of free speech.

The pattern was repeated in the 1950s with civil rights and obscenity. Northern Democrats fully supported the efforts, whether individual, legislative, or judicial, to abolish Jim Crow. It was a no-brainer to believe that most of the efforts of the civil rights movement deserved constitutional protection.

Obscenity had parallels with the protection of communism. At the inception, obscenity was about artistic self-expression. Classics like Lady Chatterly's Lover or avant garde books like the bohemian Henry Miller's Tropic novels needed judicial protection. Furthermore, those pushing for censorship were reactionaries in the Catholic Church, protestant ministers from the non-mainstream demominations, and those on movie censorship board and vice-squads (often the same). The censors often seemed out of control, the artistic community was solidly opposed, and the supporters of censorship were not allies of liberals. Again, support for artistic freedom was a no-brainer.

The dominant First Amendment question of the 1960s was how to create the most speech-protective Constitutional

doctrine and the leading scholars of the era, Harry Kalven and Thomas Emerson offered different approaches. Kalven favored Alexander Meiklejohn's absolutism. The Court had hinted at this in New York Times v. Sullivan, and the theory offered a plus of getting out of the business of trying to define obscenity. Emerson favored a speech/action distinction, but like others who flirted with that approach, could not explain why some speech was action while some action was speech. There was a third possibility, reviving the clear and present danger test from its judicial and intellectual demise in Dennis. Surprisingly something like a new and improved clear and present danger test emerged out of the blue in Brandenburg.

At the end of the 1960s it looked like speech was very well protected and that the scholarly enterprise had succeeded. At that point scholars asked what had largely been unasked by their predecessors: "why do we (or should we) protect speech so well?" Efforts to offer a unitary theory of speech all demonstrated that some speech would necessarily be unprotected, but the two dominant approaches, promoting democracy and individual autonomy, each found champions. Then into this mix the Court made two fateful decisions. First, it decided that commercial speech was entitled to (some) constitutional protection

over Justice Rehnquist's prescient solo dissent. Second, in Buckley v. Valeo, it refused to sustain all of the post-Watergate campaign finance reforms. Specifically it concluded that candidates' expenditures (typically for advertising) could not be regulated. The commercial speech cases received immediate notice because it was clear that protecting commercial speech had nothing to do with either of the two dominant theories of the First Amendment. At least in retrospect (because it is deemed by many on the liberal side to be so wrong) it is stunning that Buckley v. Valeo received virtually no attention in the legal literature for a decade.

The consequences of Virginia Pharmacy showed in the early 1980s. Being able to advertise, more or less freely, offered a back door route to partial deregulation in some industries. Whether this was advisable or not, liberals had two reasons to be uneasy. First, this looked uncomfortably close to Lochnerism. Second, liberals like regulation (certainly much more than conservatives) and so the commercial speech doctrine worked in some instances against their interests. It was one thing to help lower income people with drug price information or to learn that personal injury lawyers offer contingent fees, it was quite

another to see a utility company attempting to influence electric consumption.

Most liberals - the ACLU was a notable exception - supported campaign finance regulation. They agreed that there was too much money being spent on political campaigns (without having to specify and justify a correct amount). In a world where everyone's vote counts equally it seemed unfair that the wealthy should be able to wield so much influence over how someone voted. There was a nostalgia for the pre-television era where supposedly voters would be better informed since they would not be inundated with 30 second ads. And then, of course, there was the brute political assumption that the New Deal hegemony was only broken by excessive money flowing into Republican presidential campaigns. If cash could be limited, then volunteers would again take precedence in political campaigns. Volunteers came from three different groups: organized labor, geezers in retirement, and college students. Happily each group was safely within the Democratic constituencies. The more campaign finance could be regulated the harder it would be for Republicans to maintain their unnatural claim on the presidency. For the first Schmoose Mark Tushnet put together a set of assumed

correct propositions and one of them was Buckley v. Valeo was wrongly decided.

Buckley and the commercial speech cases led to a top-down critique of emerging First Amendment doctrine at a time when the older issues of illegal advocacy, union organizing, and obscenity had seemed to pass from the jurisprudential domain. Then came a different assault on sexual materials, not from the pulpits, but instead from one wing of feminism. Catherine MacKinnon and Andrea Dworkin were able to persuade the Minneapolis City Council to adopt an ordinance banning "pornography" which had several definitions the key one of which was male dominance in any depiction of sex. They claimed that the subordinate role of women in American society was caused by pornography. In so doing they attempted to restructure the law of sex by switching from the moral harm rationale of Paris Adult to the assertion that pornography victimized women, both specifically and generally.

Minneapolis' Democratic mayor vetoed the ordinance on the ground that it was unconstitutional under the First Amendment. In what would be a telling move for liberals, Larry Tribe wrote the mayor protesting his actions and claiming that any decision on the ordinance should be made by the courts. Tribe's position was perfectly justifiable;

it just happened to be inconsistent with the views he offered in his recently published American Constitutional Law. He followed his allies, not his treatise.

A few years later Tribe got his judicial decision although it probably was not the one he desired (and definitely was not what Frank Michleman wanted). A three judge district court found that the MacKinnon-Dworkin ordinance was an attempt at thought control. The Big Court summarily affirmed and for all practical purposes the legal issue was over. The Warren and Burger Court free speech precedents successfully blocked what some feminists seemed to think was essential legislation. Women were victimized twice: once by pornography and once by what formerly was liberal constitutional doctrine. Nevertheless, the outcome was to move liberals into an equivalence with conservatives to demonize sexually explicit depictions (which remain unloved except in the marketplace).

As campus debates on race became "uninhibited, robust, and wide open" and included "vehement, caustic, and sometimes unpleasantly sharp attacks on" university policies relating to affirmative action, the ideas behind the feminist proposal were adopted and adapted in campus speech codes. Typically overbroad, the codes were hated by conservative faculty members who perceived them as vehicles

to prevent questioning of "politically correct" ideas on race, feminism, and gays. Indeed, in the wake of the Fifth Circuit's decision in Hopwood (forbidding the University of Texas from using race in admissions), my colleague Lino Graglia gave one of his typical over-the-top statements upon race. He claimed that the reason there were so few minorities ready for UT was that their cultures did not place emphasis on academic success and indeed frowned up it. I have read a similar statement by Jesse Jackson, but Graglia is not perceived as a friend to minorities and UT's president wanted to use UT's speech code to sanction him. (Our general counsel then pronounced the code unconstitutional). It was plain during the controversy that conservatives were supporting Graglia's right to speak and liberals were ambivalent (because race was trumping speech).

In 1986 Lee Bollinger published The Tolerant Society an essay claiming that we properly protect speech we hate because this offers one sphere to teach the importance and practice of tolerance. Doing so strengthens us as a society. Apparently tolerance of speech stopped at the boundaries of the University of Michigan because to the best of my knowledge Bollinger never publicly questioned his university's unconstitutional speech code.

Protests at abortion clinics provide the another area where liberals and conservatives have split on speech. Too often protesters would go to extreme lengths to harass women going to the clinics. This was countered by injunctions creating space for the women to enter the clinic without confrontation. Since protests often need proximity to the object of protest - see Adderley - the injunctions were not speech friendly. I heard no liberal outcry, undoubtedly because the constitutional right to an abortion trumped the speech claims. Liberals did react adversely to Rust v. Sullivan, however, but that was because both speech and abortion got trumped.

In the 1980s the religious right and the Republican platform began to attack Establishment Clause doctrine from a free exercise perspective. What secularists would call an appropriate barrier, Republicans labeled a denial of free exercise. Republicans scored some victories in cutting back on establishment doctrine, but not with their free exercise claims. Then in Rosenberger the religious right repackaged their claim once again, this time as a free speech issue. Liberals were dismissive of the idea and then stunned by the outcome which ordered, for the first time, actual funding of religious speech. On all the prior issues there are splits within the liberal camp - thanks to

the ACLU. But on religious speech liberals are united in their belief that separation is essential (and that the religious right is an unmitigated menace). There is no comparable way that liberals could enjoy the benefits of this new avenue, and perhaps Rosenberg was the proverbial straw that broke the camel's back.

One further item merits mention. Liberals ran out of ideas. Essentially liberalism of the 1990s consisted of a desire to expand some New Deal-Great Society programs, but that was it. Indeed, when faced with Republican Congresses liberalism was reduced to the demand that no New Deal-Great Society program should ever see its rate of growth slowed. When one is out of ideas there is not much pleasant to talk about. The concept of strong protections of speech seems patently absurd when nothing one could say matters and the other side is monopolizing debate. To no small extent the liberal unease at the First Amendment is fueled by the intellectual atrophy of the liberal agenda.

Could it swing back to where it was in the 1960s? Perhaps. There are three possibilities - the anti-globalization movement, the war on terror, and intellectual property imperialism. The antiglobalization movement has plenty to say about free and fair trade, and the protesters are going to have a very bad relationship with police

forces in any city holding globalization meetings. The same principles that harm protesters at abortion clinics can harm antiglobalization protesters. It should receive an increasingly sympathetic ear on the left especially if the Democratic Party moves into a protectionist mode. Nevertheless, if forced to choose between abortion and anything else, liberals are likely to go with the former.

Whether the war on terror will help is more iffy - although there is a visceral reaction against anything John Ashcroft says or does. If he would come out against freedom of speech, liberals would see something good again in the First Amendment as the reaction to the subpoenas at Drake illustrated. So far the only place where Ashcroft is on the record against speech comes in the various pornography areas, and I may have missed something, but I saw no objections from the left. The feminist movement may have so thoroughly convinced their allies that even John Ashcroft's imprimatur on a crusade won't damage it here. Thus the typical reaction to his efforts to stop porn are complaints that he didn't have his war on terrorism priorities straight when they could have helped.

On the other hand, when Ashcroft does have them straight, he has run into a lot of criticism for abandoning the constitution and civil liberties. So far these seem

strongest on privacy grounds. Should this swing into association, I could conceive a tugging of the civil liberties heartstrings. Still, this has a wild "the enemy of my enemy is my friend" quality since both Ashcroft and Islamists are way off on the right. On the other hand, all prior crusades against an enemy within have crossed the civil liberties barriers all too quickly.

I think intellectual property imperialism is the most likely to cause liberals to understand that free speech can be a good thing. Despite Chris Eisgruber's contribution, it does seem to me that there has been extraordinary overreaching on the part of copyright holders and the on-going battles seem to have a David and Goliath quality about them, sadly with Goliath prevailing. With the wrong side winning and free speech as the only weapon against it, perhaps this will turn liberals once again to love freedom of speech.

When McConnell v. FEC came down the Law & Courts list serve enjoyed a little fun at the expense of the attitudinalists. How should the decision and the split be characterized? The answer is rather simple. When the supporters of the law are mainly liberal, the opponents mainly conservative and the more reliably liberal justices vote for the law and the most reliably conservative vote

against it, then the decision is a liberal decision. It also further illustrates, as I have been suggesting, that the old liberal-conservative breakdown on free speech is a thing of the past. New issues and new participants have flipped the positions. Only the ACLU across the board and the conservatives on sex have not gotten the message.