

First Amendment Deserves More Than Fleeting Friends

Floyd Abrams



Those who toil in the vineyards of First Amendment law come upon a wide range of temporary allies.

Liberals fly First Amendment flags in cases in which the right of the press to publish information relating to national security is involved; conservatives retire the colors in such cases. Conservatives march to defend the First Amendment in cases involving limitations on political advertising published close to elections; liberals see only money and not speech in those cases.

Liberals vigilantly seek to protect the rights of adults to receive not-quite-obscene materials on the Internet, but seem all but indifferent to UN-sponsored efforts to ban the supposed “defamation” of Islam. Conservatives care deeply about such efforts to stifle speech, but offer little if any protection to American students when they mouth off outside of their schools.

Then there are issues in which the ideological foes change sides depending upon whose ox seems for the moment to be at risk of being gored. For years, I represented a television network that was constantly being required to respond to complaints filed with the Federal Communications Commission claiming that one or another broadcast violated the Fairness Doctrine.

One entity filing numerous complaints seeking governmental intervention was the conservative

organization called Accuracy in Media (“AIM”). This group patrolled the airwaves in an effort to assure that its views, which generally discounted or minimized criticism of American institutions, were sufficiently presented.

When a documentary focused on problems with pension plans (in pre-ERISA days), AIM maintained that not enough satisfied pensioners had been shown. When another one discussed sex education in schools, AIM claimed that not enough criticism of such efforts had been broadcast.

Other conservatives joined the fray. When a memorable and prize-winning documentary exposed the plight of those suffering from hunger in America, angry members of Congress filed complaints with the FCC seeking a ruling from that government agency requiring interviews of speakers who would maintain that there was plenty of food to go around.

The Fairness Doctrine has long since been abandoned but there has recently been some suggestion from the left that it should be reinstated. A prime motivation appears to be liberal angst at the impact of right-wing talk radio commentators such as Rush Limbaugh and Sean Hannity. I have my own problems with those broadcasts, which seem to me often hateful in nature and degrading in their impact on the political process.

But protected they are — and should be — by the First Amendment. Those millions of people who listen to them should not be deprived of their opportunity to hear them in undiluted form. So the right is right in opposing the reimposition of the Fairness Doctrine, but I can't help wondering what the view on the right would be if talk radio veered in a different ideological direction.

And what will the position of liberal America now be on campaign finance issues, after the Obama campaign revolutionized fundraising by using the Internet with enormous success to raise almost \$750 million from nearly 4 million donors?

For years, the view from the left had been that money was not "speech" and thus not worthy of serious First Amendment protection in the campaign finance area. Moreover, it was felt that honorable and worthy presidential candidates should forego private contributions altogether and accept whatever sum federal law authorized.

In the 2008 campaign, John McCain, unable to raise enormous amounts of cash on his own, accepted more than \$84 million in federal funding. Obama raised more than nine times that amount, and (in contravention of his earlier promise to forego private funding) decided that private fundraising seemed a far better bet.

There is, of course, a serious case to be made that the vast appeal of Obama's campaign, which involved more individuals contributing more money to a candidate than ever before in American history, was a vindication of democratic principles. But the notion

that campaign contributions are anything but potentially corrupting has never found favor on the left before. It will be interesting to see if it does now.

One of the oldest of all political observations is that where you stand depends upon where you sit. Is it really too much to ask that those who claim that they care about the First Amendment — everybody, that is — stand in favor of free speech even when the speech at issue pains them ideologically?

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