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Liberal Assaults on Free Speech

When the history of today's liberalism is written, the writers may marvel at that political persuasion's remarkable reversal of convictions regarding persuasion. Nothing more tellingly illuminates the contemporary liberal mind than the retreat from the defense of First Amendment guarantees of free speech.

This year's enactment of yet more campaign finance regulations that expand government restrictions on the quantity of political speech is just the latest confirmation of what professor Martin Shapiro of the University of California School of Law at Berkeley noted in 1996. He wrote that "almost the entire First Amendment literature produced by liberal academics in the past 20 years has been a literature of regulation, not freedom—a literature that balances away speech rights. . . Its basic strategy is to treat freedom of speech not as an end in itself, but an instrumental value." Perhaps emboldened by the liberal media's enthusiasm for campaign regulations, other would-be speech regulators have brought two lawsuits that suggest the future direction of liberal attempts to shrink First Amendment protections.

The Michigan Education Association (MEA), a teachers' union, is suing the Mackinac Center for Public Policy, a free-market think tank, charging that the center "misappropriated" the "likeness" of the MEA's president when it quoted him in a fundraising letter. MEA's president, announcing establishment of a think tank whose mission would be partly to counter the center's research and policy work, said: "Quite frankly, I admire what they have done."

When the center quoted this, supplying the center's name for the

pronoun, the MEA filed suit, demanding that it be given the center's mailing list and that it be given all funds contributed in response to the fundraising letter. It also demanded that a permanent gag order be imposed to forbid the center from referring to MEA officials in future fundraising letters. Welcome to the brave new world of speech regulation in Year One, A.M.F.—anno McCain-Feingold.

One aim of the political class in passing that campaign regulation—which is heading for a probably chastening rendezvous with the Supreme Court—was to restrict when and how issue advocacy groups can run any ad that so much as "refers" to a political candidate. In the same spirit, the MEA is asserting that a nonprofit public policy organization must get an opponent's permission before quoting it.

The Mackinac Center, assisted by the Institute for Justice, a Washington-based public interest organization of libertarian bent, will easily defeat the MEA's frivolous claim of "misappropriation." A real example of that offense would be Coca-Cola's using advertising featuring, without Michael Jordan's permission, a picture of him drinking a Coke. But Jordan drinking a Coke is not a newsworthy public event. The MEA's president speaking at a press conference is, and people may report it without being sued.

Furthermore, the U.S. Supreme Court has held that fundraising appeals by public interest organizations are not unprotected commercial speech. They enjoy full First Amendment protection because "solicitation is characteristically intertwined with informative and perhaps persuasive speech."

Another attempt to abridge First

Amendment protections is being mounted by critics of Nike's overseas labor policies. Nike responded to criticism by changing some policies but defending others in advertisements, press releases and letters to newspapers and athletic directors. Critics sued, saying that some Nike statements were false—and were commercial speech punishable under the law proscribing false "advertising." California's Supreme Court sided 4 to 3 with the critics, saying: "Speech is commercial if its content is likely to influence consumers," and some consumers are concerned about labor practices.

But the U.S. Supreme Court may side with the dissenters. They, and the American Civil Liberties Union, reject the idea that there should be asymmetrical protections of different sides in public issue debates. That is, they reject the doctrine that because a business's self-defense may have the incidental effect of helping it sell its product, the business's self-defense is commercial speech and hence, unlike the speech of its critics, can be regulated—and can provoke costly lawsuits.

This doctrine will have a chilling effect on debate, pressuring businesses to forgo self-defense in order to avoid the threat of lawsuits. Thus do liberals continue to constrict public debate to further their purposes.

When the history of today's liberalism is written, the writers may . . . tread lightly. Otherwise they may be sued by liberals demanding subordination of the historians' rights of freedom of expression to some greater social good that supposedly would be impaired unless the historians' speech is regulated.

You say it can't happen here? Notice what already is happening.