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The Right to Evade Regulation, Remain Unaccountable, and Mock Democracy

How corporations hijacked the First Amendment.

By: Tim Wu – June 10, 2013

Every time you fill a prescription at a drug store like Walgreens, the pharmacy keeps a record of the transaction, noting information such as your name, the drug, the dosage, and the issuing doctor. It's a routine bit of bookkeeping, and for a long time it raised few eyebrows. Then a firm called IMS Health starting buying up the data. Mining pharmacy records, the company assembled profiles of hundreds of thousands of American doctors and millions of individual patients, with names and other identifying details encrypted. IMS Health turned around and sold access to those files to pharmaceutical companies, making it easier for the firms to target (and reward) the physicians most likely to prescribe expensive, brand-name drugs.

Eventually, doctors and state officials caught on to what IMS Health was doing. Where the company saw a business opportunity, they saw a strategy that violated patient privacy and could increase health care costs. Three states--New Hampshire, Maine, and Vermont--decided in 2006 and 2007 to ban pharmacies from selling prescription records for commercial purposes. By late 2010, 26 other states were considering similar measures.

Had the issue remained subject to a normal democratic process, it would have continued to play out that way--through a gradual, state-by-state debate about whether so-called "prescription confidentiality" laws make for good policy. But IMS Health did not want that kind of fight. Instead, it filed separate suits against the three states that had first cracked down on its business, invoking the First Amendment. The selling of prescription records, the company asserted, is a form of free speech.

For most of U.S. history, such a claim would have been a dead letter in court. But when it comes to the First Amendment, we live in interesting times. In June 2011, the Supreme Court struck down the new data-protection laws, arguing that they discriminated against IMS Health. "The State," wrote Justice Anthony Kennedy for the majority, "has burdened a form of protected expression. ... This the State cannot do."

It was Kennedy, of course, who authored Citizens United, which established that independent political spending by corporations is shielded by the Bill of Rights as well. The IMS Health case, which drew much less attention, shows just how pervasive such free speech arguments have become. Once the patron saint of protesters and the disenfranchised, the First Amendment has become the darling of economic libertarians and corporate lawyers who have recognized its power to immunize private enterprise from legal restraint. It is tempting to call it the new nuclear option for undermining regulation, except that its deployment is shockingly routine.

Last summer, the tobacco industry used the First Amendment to have new, scarier health warnings on cigarette packaging thrown out on the grounds that the labels constituted a form of compelled speech. Ratings agencies like Standard and Poor's and Fitch, whose erroneous and possibly fraudulent AAA ratings of worthless securities helped cause the banking crisis, have leaned heavily on a defense that deems their ratings mere opinions and therefore protected by the First Amendment. The U.S. Chamber of Commerce is pushing to gut the disclosure requirements in new securities regulations, citing the free speech rights of hedge funds and publicly traded companies. Attorneys working for Google have argued that, since search results are speech, its rights are impinged by the enforcement of tort and antitrust laws. Southwest and Spirit airlines have employed the First Amendment to resist efforts to force them to list the full price of tickets. The incomplete, misleading cost, they have argued, is a form of free speech, too.

Fred Schauer of the University of Virginia calls such claims "First Amendment opportunism." Free speech is a cherished American ideal; companies are exploiting that esteem, as he puts it, "to try to accomplish goals that are not so clearly related to speech." The co-opting of the First Amendment has happened slowly, but not at all by accident. First, it was helped along by questionable court decisions. Today, it is being accelerated by a strange alliance between two groups: a new generation of conservative judges, who have repudiated the judicial restraint their forebears prized, and legendary liberal lawyers, like Floyd Abrams and Laurence Tribe, who, after building their reputations as defenders of free speech, are using their talents to deploy it as a tool of corporate deregulation.

What people think of as the American free speech tradition, is, like civil rights and the Super Bowl, a tradition that turns out to date back only a half-century. As late as the 1950s, cities or states could ban motion pictures they found distasteful, arrest a man for calling the local sheriff a fascist, and lock up declared members of the Communist Party, all without violating the Constitution.

The shift toward free speech as we now understand it can be attributed in part to the Jehovah's Witnesses. In 1935, the school board in Minersville, Pennsylvania, instituted a mandatory Pledge of Allegiance in its classrooms. Lillian and William Gobitas, children from a local Witness family, refused to participate, following church teaching that holds that seeking salvation from an "earthly emblem" is a sin. The Gobitas siblings were expelled. For good measure, a Catholic parish in the predominantly Catholic town announced a boycott of their parents' store, wrecking its business. Yet when the Supreme Court took up the case, it voted eight to one against the family. Justice Felix Frankfurter, a liberal Franklin Roosevelt appointee, wrote that to overturn the expulsion would be to make the Court a "school board for the country."

In the months following, the publicity the case generated turned Jehovah's Witnesses nationwide into targets. The ACLU recorded nearly 1,500 attacks on members of the religion in more than 300 communities; in some towns, their houses of worship were vandalized or set ablaze. As a small, widely despised group, the Witnesses had no real recourse in the political system. In 1943, the Supreme Court, in a rare move, reversed its earlier ruling and decided that Jehovah's Witnesses should be able to abstain from the Pledge without facing punishment. So did the modern First Amendment begin its career: as a form of protection for discrete and insular minorities who would otherwise face majority oppression.

From there, the free speech revolution spread slowly before exploding in the 1960s. Schoolchildren protesting the Vietnam War won the right to wear black armbands. A man's right to wear in public a jacket adorned with "FUCK THE DRAFT" was affirmed. Some types of sexually explicit speech got protection. Unsurprisingly, it was also during these years that conservatives staked their original, parsimonious position on the First Amendment. Politicians like then-Governor Ronald Reagan and Richard Nixon denounced what they viewed as a misuse of the Constitution to protect "subversives." Conservative legal thinkers such as Robert Bork and Justice William Rehnquist led an intellectual assault on an interpretation of the First Amendment that they considered sharply at odds with majority rule. "I like the freedoms of the individual as well as most," Bork wrote in 1971. But, he concluded: "Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." The battle lines were drawn. To the left, the First Amendment was becoming sacred writ; to the right, it was a living symbol of judicial excess.

The underlying legal reality, though, was not so simple. In the course of forging the world's most powerful free speech rights in the '60s, the Supreme Court had placed relatively few limits on the scope of its judicial review, compared with other parts of the Constitution. Perhaps, given the kind of cases coming before them, the justices failed to imagine that the mighty, as well as the marginalized, would come to make use of the First Amendment.

In 1970, a law student and aspiring law professor named Martin Redish sat down to write a paper. A liberal Democrat with a pronounced contrarian streak, he had developed strong views on the breadth of the First Amendment's reach. In his paper, Redish made a provocative leap, arguing that the new protections ought to apply to "economically-motivated" speech, as well as political. He used tobacco advertising as a primary example. President Nixon had just signed a law that banned cigarette ads and imposed warning labels on every package, and Redish believed that those measures amounted to discrimination against the industry.

Around the same time, another group was beginning to advance its own venturesome free speech theories. Dissatisfied with what they perceived as the big-government policies of the Nixon and Ford administrations, a new generation of conservative legal think tanks was taking root, including the Pacific Legal Foundation, formed in Sacramento by ex-Reagan staffers, and the Charles Koch Foundation (which would later become the Cato Institute), created by the Koch brothers. These organizations, unlike mainstream conservatives, saw a link between the First Amendment and the larger project of restoring the "economic liberty" that they believed had been eroding since the New Deal. But first, the notion that corporations could claim free speech protections had to find its way into law.

The economic libertarians got the chance to make that happen in 1975, when Michael Dukakis, then-governor of Massachusetts, signed a new law flatly barring corporations from spending money to sway the outcomes of state referenda that did not directly affect their businesses. The legislation passed just before a planned vote on a more progressive tax policy, and the timing seemed suspicious. Backed by briefs from the Pacific Legal Foundation and the U.S. Chamber of Commerce, Boston-based First National Bank challenged the ban, asserting that, like any citizen, it had a right to have a say in public elections.

One of the justices on the Supreme Court at the time was Lewis Powell, who is remembered as a moderate. But in private practice, Powell's views had been more extreme, and in 1971, he had urged the Chamber of Commerce to conduct activist litigation of precisely this nature. ("No thoughtful person can question that the American economic system is under broad attack," he had written in a memo to the Chamber, positing that "the judiciary may be the most important instrument" for turning the tide.) Presented with Massachusetts's sneaky prohibition and First National's novel attack on it, Powell cast the vote and wrote the opinion that wound up changing everything.

The hard question at the core of First National's suit--why should companies have the same rights as humans?--was never answered, much less addressed. Instead, Powell handled that challenge by sidestepping it. He determined that, in First Amendment cases, the identity of the speaker shouldn't matter. As he put it: "The proper question ... is not whether corporations 'have' First Amendment rights. ... Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect."

The idea that "speech is speech" is persuasive, but also wrong. Contrary to Powell's assertion, the First Amendment does actually care who is speaking. Children get fewer free speech rights than adults, for example (and a talking chimp would get none). Moreover, most scholars who have studied the issue believe that the constitutional Framers had a limited view of what the First Amendment was originally intended to cover, consistent with an era when "blasphemy" remained a prosecutable crime. While the "press" is named in the amendment, an intention to extend speech rights to all companies seems deeply implausible, given that corporations did not exist in anything like their contemporary form in the eighteenth century.

The minority opinion in the First National case strenuously made these points: "'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law,'" Justice Rehnquist wrote, quoting John Marshall. He added that "liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist." But the precedent had been established. Powell's decision made it easy for Justice Kennedy to say in Citizens United that corporations already enjoyed full First Amendment rights, just like any other "person," and had for decades. The identity of the speaker was irrelevant as settled law.

During the '70s, the Supreme Court also opened a second avenue of attack on regulation, by granting First Amendment protection to commercial advertising. The state of Virginia had banned pharmacists from advertising prices; attorneys for Ralph Nader's organization, Public Citizen, brought suit against that restriction, saying it interfered with consumers' ability to get better deals. The group was borrowing one of Martin Redish's central arguments, that economically motivated communication can serve the public interest, and when the case reached the justices, they sided with that view. But the consequences of protecting this specific form of corporate speech would be broader than it imagined. Rehnquist, again in dissent, foresaw the problem clearly: "The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse ... to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed."

Though the table was now set, it would take decades for the First Amendment's new deregulatory potential to find real purchase with the judiciary. Conservatives like Rehnquist and Sandra Day O'Connor, perhaps mindful of the First Amendment's liberal past, remained skeptical of broad new free speech claims. What corporations needed in

order to fully co-opt the First Amendment were judges willing to fling open the gates. They would arrive soon enough.

For several decades prior to the arrival of the New Deal, the federal judiciary reserved the power to throw out economic legislation, including basic protections like child labor laws. The period is known as the Lochner era, after a famous Supreme Court case that struck down a limit imposed by the state of New York on the hours employees could toil. Today, for a judge to say that Lochner was correctly decided is a controversial position, only slightly less extreme than an elite historian maintaining that the wrong side won the Civil War.

Judge Janice Rogers Brown of the D.C. Circuit Court of Appeals is one of the few sitting federal judges who takes that view. She has said that the end of the Lochner era, brought about by high court rulings upholding minimum-wage rules and other New Deal programs, was "the triumph of our own socialist revolution" and imbued the Constitution with an "underground collectivist mentality." Nominated in 2003 and held by the Senate for two years due to Democrats' objections, Brown wrote her first precedent-setting free speech opinion in 2012. It was a big one.

In 2009, Congress had passed the Family Smoking Prevention and Tobacco Control Act, which instructed the Food and Drug Administration (FDA) to enlarge and make full color the health warnings on cigarette packets; the revised notices would also contain graphic images, such as photos of patients dying of lung cancer. Brown cast the deciding vote in a two-to-one ruling that voided the new warnings and, in the process, added product safety warnings to the judiciary's First Amendment purview. Writing for the court, she found that the program was a form of compelled speech and a coercive subsidization of the government's views, and therefore ran afoul of the First Amendment right to not speak: The new labels, in her words, were "unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting." Curbing tobacco use may be a legitimate goal, she added. But for the larger, more evocative warnings to pass muster, Congress would have needed to provide adequate statistical evidence that they would get better results. In the absence of that proof, the labels were unconstitutional.

There is a reason that legislatures and government agencies have generally not been required to statistically prove the future effectiveness of new regulations: Such a test puts the judiciary in a position to wipe out laws nearly at will. In her ruling, Brown resurrected the spirit of Lochner by reconstituting its judicial overreach under the banner of freedom of speech.

As likeminded judges have joined the bench, corporations have brought increasingly significant anti-regulatory First Amendment cases across more areas of the law. Many of the claims are spurious forays, destined for dismissal. But even when First Amendment suits do not eliminate the law, they may weaken it, as well as intimidate legislatures and agencies contemplating future regulations by sending the message that expensive, time-consuming litigation is a near inevitability.

The campaign--and it is fair by now to call it that--is particularly active where companies deal with customer data or are required to make disclosures regarding their financial standing or the potential downsides of their products, as well as among firms whose business is by its nature informational. (Just about any law applied to an Internet or telecom company is now subject to a First Amendment challenge.) Consumers feel the

practical side effects in diminished corporate transparency, the misdirection in marketing come-ons, and the loopholes in privacy protections.

Just as the FDA was blocked in its bid to improve cigarette warning labels, so too are most efforts to curb dubious health claims now subject to a First Amendment attack. The FDA recently told green-tea sellers that their promises of lower odds of breast and prostate cancer were unsupported by science and demanded modifications to their product labeling. The D.C. Circuit struck down the FDA's move as unconstitutional. The Federal Trade Commission, meanwhile, has been waging battle against the pomegranate-juice company POM Wonderful, which boasts that the elixir in its $3.99 bottles reduces the chance of heart disease, prostate cancer, and erectile dysfunction. None of those things have been proven, but that did not stop POM from filing a federal First Amendment suit against the agency.

While the Chamber of Commerce angles for the ideal opportunity to get the courts to examine (and, it hopes, erase) parts of the Securities Exchange Act of 1934, it has also brought a First Amendment challenge to a new regulation requiring that shareholders be told about board candidates nominated by other shareholders--an attempt to ease the grip of insider directors and facilitate greater accountability for CEOs. Other financial firms have followed the Chamber's lead in crying "free speech" when it suits them. In 2010, the hedge fund Full Value Advisors used the First Amendment to attempt to shred a rule requiring the disclosure of stock positions in excess of $100 million. The regulation had been on the books for 32 years.

Last winter, the American Petroleum Institute, joined by the Chamber, pushed back against an anti-bribery measure passed as part of the Dodd-Frank Act. The law mandates the full disclosure of corporate payments made to foreign governments; among its backers was Bill Gates, who wrote that "it is in the most secretive jurisdictions that corruption, poverty and instability flourish and the risk to investors is greatest." After losing the fight in Congress, the oil companies, with conservative legal scion Eugene Scalia as their lead attorney, sought to convince a court that the law "forces U.S. public companies to engage in speech that they do not wish to make." That argument could describe almost any disclosure law, including the filing of tax returns.

Few industries these days can resist First Amendment defenses of even the most outrageous conduct. In 2007, Verizon was caught secretly monitoring customers on behalf of the federal government. The company asserted that what Congress calls illegal surveillance was actually a form of protected speech--and that Verizon has a prerogative to hand over customer records, especially in times of "armed conflict with foreign enemies." More recently, Verizon saw a threat to its First Amendment protections in the Federal Communication Commission's (FCC) net-neutrality rules. According to Verizon, if it wants to speed up some websites, and slow down others, it has a constitutional right to do so.

It is fair to ask whether any of the laws and strictures just described impose undue burdens; the appropriate scope of regulation is, of course, a hotly debated political issue. But before enactment, new regulations go through an extensive political and rule-making process in which the regulated corporations are well heard from, to say the least. The oil industry spent $140 million, for example, on lobbying efforts in 2012, including a massive effort to thwart the anti-bribery rule. Verizon spent years using its clout in Washington to weaken the proposed net-neutrality rules before trying to play a First Amendment trump card. These massive corporations are not the Jehovah's Witnesses,

unpopular outsiders needing a safeguard that legislators and law enforcement could not be moved to provide. They are active, influential participants in American politics turning to the Constitution for a second bite at the apple when the political process fails to give them what they want. Every time that strategy succeeds, the under-lying debate is placed beyond democratic decision-making, supposedly because the authors of the First Amendment would have wanted it that way two centuries ago. Whatever your politics, it seems a strange way to conduct economic and regulatory policy.

To mount its first amendment defense of its misleading pre-crash credit ratings, Standard and Poor's tapped Floyd Abrams, the liberal champion who was counsel to The New York Times during the Pentagon Papers case in 1971. Abrams was also counsel to Lorillard Tobacco Co. when it joined the cigarette makers' larger battle against the FDA's health warnings. The Verizon case challenging net neutrality was based on paid work done by Laurence Tribe, constitutional law professor at Harvard Law School. The first attorney on the telecom's First Amendment FCC brief was Walter Dellinger, an old-school progressive and prominent Clinton-era Justice Department lawyer.

The corporate takeover of free speech has stayed mostly off the political radar because of how it blurs any typical left-right divide. Unlike in the Rehnquist days, the right now embraces free speech for its power to cripple the regulatory state. Liberals who came of age in the '60s, however, still worship the modern First Amendment and can be reluctant to criticize their creation, giving cover to the other side. "Speech is so important, we must refuse to limit it. It doesn't matter who is speaking," Abrams told me. He described the conversion of economic conservatives to First Amendment activism as "a welcome development" and argued that judges are "faithfully applying the law" to the cases he and corporate counsels are bringing.

The judiciary's avidity for antiregulatory free speech arguments has its limits--Judge Brown is an extreme case. But what makes the First Amendment such a dangerous weapon is the way it offers judges great power in a venerated form. Free speech cases give them the chance to play heroic defenders of hard truths, in the model of Justice Oliver Wendell Holmes. But judicial review of free speech, while a beautiful idea, has wandered far from its former, defensible role. It now runs counter to Holmes's more important principle, which was that a judge's prejudices and opinions are insufficient grounds for the usurpation of democratic authority. What he wrote in 1905 is true of the First Amendment today: "A constitution is not intended to embody a particular economic theory. ... It is made for people of fundamentally differing views."

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