

The Menace of the First Amendment (short version)

I. Lochner revived.

Modern doctrine transforms free speech into “freedom of economic elites” using a series of interrelated doctrines:

- the free market of ideas metaphor,
- the commercial speech doctrine,
- the money is speech trope,
- the “speech not speakers” reification, and
- the corporations are citizens notion.

Independently, each of these doctrines is wrong – untrue to the text, history and purposes of Freedom of speech, internally inconsistent, and requiring judges to make decisions better left to the political branches. Collectively, they have created a monster – a doctrine having little to do with freedom of speech but a great deal to do with limiting the power of our elected representatives to ensure that our markets work for us and not merely for those who profited in the past.

In the limited time available, I cannot walk through each doctrine to discuss the damage it has done. I will therefore make two broad generalizations:

First, the Court’s anti-nomian interpretation of the First Amendment is incompatible with freedom.

The marketplace for ideas is no more amenable to laissez faire theory than the economic marketplace is. Marketplaces collapse without law, because bullies quickly find that fraud and simple theft is easier than production and trade. Debate and discussion are no less susceptible to liars and loudmouths. The remedy for bad speech is never more speech, unless shouting matches are your ideal: what we need, instead, is rules and guidelines.

Second, the lesson of Footnote Four remains key. Lochner was wrong. There are no eternal principles for regulating modern economies to be found by careful reading of our ancient texts. This is no less true of the First Amendment than the Fourteenth.

Regardless of the merits, the process is wrong. Courts are the wrong institutions to be regulating our economy. We need forward looking compromises, not backward looking doctrine. We need a commitment to the principles of freedom, privacy, capitalist market – not rigid judicial doctrines that can only be changed by retirements at the top, or that are misleadingly focus us on irrelevant issues.

II. The Supreme Court has turned the First Amendment on its head. Much as it has distorted the Equal Protection principal of the Civil War Amendments, enacted to guarantee full citizenship to African Americans, into a “color blind” principle of inequality – that we may, collectively, enact laws to benefit any and every group in the United States, except for African Americans.

So too it has turned the anti-establishment, toleration and anti-corruption principles of free speech into, instead, a laissez-faire program of protecting incumbent elites from the political process. Instead of protecting us from corruption, today's first Amendment prevents us from limiting it. Instead of protecting our democratic and market systems of government by keeping them separate, it threatens to destroy both at once.

Most obviously, the Supreme Court's doctrine that money is speech has led directly to a vast increase in the power of money in politics – the very definition of corruption. Every republican theorist since Brutus, at least, has understood that private wealth can threaten republican government.

Corrupting as the notion of buying influence in the polls is, the Supreme Court's bizarre distinctions between expenditures and contributions and between direct and indirect expenditures have made matters far worse than any imaginable Congressional enactment could have.

Because of the Supreme Court's interpretation of the words "freedom of speech," rich men have an extraordinary advantage in running for office today, clearly incompatible with any sensible understanding of democracy or equal protection.

Moreover, its distinction between direct and indirect expenditures has done extraordinary damage to the party system without creating a viable alternative: today, wealthy non-candidates are free to spend all the money they have or can raise on negative campaigning, without any candidate being answerable for the resulting damage to the public sphere. Instead of improving the quality of the public debate and public opinion, the Supreme Court's First Amendment has given us Swift Boating, attack ads and sleaze.

Building on this existential error, the Supreme Court then concluded that the First Amendment requires that we allow corporate fiduciaries to abuse their trust. In its view, the words "freedom of speech" mean that we must allow corporate officeholders to use money that is not their own for purposes that are contrary to the very reason why we allow corporations in the first place.

A capitalist system can survive only so long as the political system can control the rules of the marketplace to restrain economic incumbents from using past success to end Schumpeter's creative destruction and guarantee themselves their positions for ever.

Moreover, we need rules of the game to counteract the inevitable tendency of markets to shift income and wealth upward, as those with more wealth use their better bargaining position to take a disproportionate share of the gains to trade and cooperation, let alone simply buying the loyalty necessary to just take what they want. Once it was an American commonplace that freedom could last only so long as no man had enough wealth to buy another.

Markets can only function within a tight network of regulation, meant to protect participants from overreaching, fraud and theft, to internalize costs so that prices reflect social utility and not simply raw power and to prevent Dickensian working conditions or extinction from pollution, and to prevent collapse from monopoly, upward redistribution of wealth to the point that customers disappear, the

distrust that creates markets for lemons, or the omnipresent threat of marginal costs dropping below average costs that JP Morgan called “ruinous competition”.

When economic incumbents can buy law, the system must collapse. It is easier to buy politicians or regulators to change the rules instead of playing by them. Capitalism is in danger when incumbent businesses can use past success to buy hidden or obvious subsidies, to stack the rules to exclude potential new competitors, or to get monopoly or similar privileges, to privatize gains and socialize losses, to create prison-industrial complexes or manipulate macro-economic conditions to ensure enough unemployment to keep wages down.

III. Doctrinal Development

The First Amendment began to rise over its banks a generation ago, when the Court decided that the traditional common law tort of defamation raises constitutional issues. To be sure, the Court was surely correct that a malevolent judiciary could use defamation law to censor unpopular ideas or punish dissidents. That might be a reason to limit defamation doctrine. Indeed, the historic First Amendment begins in the struggle to limit the English doctrine that any criticism of the king is actionable defamation.

But in converting common law into Constitutional law, the Court radically expanded the scope of “freedom of speech”.

The commercial speech doctrine soon expanded it still further. The commercial speech doctrine holds that advertising is “speech” for First Amendment purposes. It has been held to mean that laws restricting misleading advertisements, or effective advertisements for dangerous products, or advertising that limits price competition in the professions, are potentially restrictions on free speech, even if they may be exceptions to the rule that Congress (and other branches) may make “no” law restricting that freedom. Indeed, since the freedom to speak surely includes the freedom to refuse to speak, rules requiring manufacturers to disclose entirely true facts about their products, such as whether food producers feed their cows hormones that some consumers might consider cruel or use GMO products, seem to raise constitutional questions as well.

The freedom of speech, according to the Supreme Court, bars various traditional measures the professions have taken to limit the effects of competitive races to the bottom – the First Amendment, apparently, incorporates the views of the Chicago school of economics on the ill-effects of price controls and professional guilds. So lawyers must be permitted to advertise even if the political branches think that lawyer advertising will lead to ethical problems, and pharmacists must be allowed to discount prices even if the legislature concludes that reducing the pay of pharmacists, and thereby making the field less attractive, will cost society more than the lower prices will benefit it.

Newer economic regulations fare no better. The New Dealers concluded that ordinary competition makes it difficult to advertise commodity products – each producer will be better off free riding on the advertising of its competitors, so no one will advertise. In the depths of the Depression, the Congress concluded that agricultural competition was driving prices to unsustainably low levels while the lack of advertising meant that demand was lower than it might be. It created boards to limit production, set

prices, and compel producers to pay for advertising. The modern Supreme Court has repeatedly held that the advertising component of this program violates the “freedom of speech” of producers who wish to freeload or contest the board’s view that they are commodity producers.

IV. Process.

The main problem here is process.

Substantively, some of the Court’s distinctions are not irrational. Defamation lawsuits clearly have been a device for suppressing criticism, and while the traditional rules might result in a more responsible press and a better public debate, there is something to be said for the Court’s wild west views.

Some of them border on the nonsensical. The notion that officials spending money not their own to influence the political process is not corruption flies in the face of two thousand years of political theory. Whatever the “freedom of speech” means, surely it is not the freedom to freeload by refusing to pay for common expenses of a commodity product. I see no threat to “freedom” when the nation rejects the extraordinarily unattractive alternatives of prohibition – with ills we know all too well – or, on the other hand, helpless subservience to the profit motive, and instead decides to permit cigarettes or high alcohol beer but ban its advertising. In my view, a free market economy requires that consumers understand what they are purchasing, so GMO or BGH disclosure is essential to economic freedom, not a limitation on it.

But the more important point is that these are not issues for courts, let alone our unelected, life tenured Supreme Court applying our difficult to amend Constitution. Judges are trained to look backwards, parsing precedents and similar authority for past decisions to follow. If they are doing their job, they seek authority to follow and principles to apply.

Our economy is dynamic and changing. There are few unchanging principle for regulating it. Our Eighteenth Century Constitution, even with its Nineteenth Century amendments, has little or nothing to say about modern advertising or corporate way of doing business or the dynamics of modern national markets or the workings of a modern election – none of them existed when the texts were written. There are no unchanging principles of economics for the Court to find.

Even if there were, the words “Freedom of Speech” do not tell us what they are. Courts are not composed of businesses, consumers, employees, economists or industrial sociologists. Judicial procedures have no obvious way of incorporating the views of citizens or relevant constituencies, let alone legitimately balancing competing interests or values when they conflict. Moreover, constitutional adjudication is rigid, inflexible and unpredictable: once a decision has been made, there is no obvious mechanism for correcting errors (or questioning value judgments) short of judicial retirements.

Our political processes are dysfunctional. Nonetheless, politicians are permitted to consider the views of the population on its values and interests. Appointed regulators and civil servants are, at least under some administrations, permitted or encouraged to explore various technical solutions to identified problems and to follow up in a consistent manner to see whether regulations work as expected. When

the process fails, there is at least a possibility that unhappy citizens will be able to organize to reopen the issue.

No principle, let alone principle of Free Speech, tells us when we should change the rules of competition to increase or decrease the amount of information consumers have in making purchases or limit or increase the power and wealth we give to incumbent businesses.

Worse still, if these ordinary economic regulations are restrictions on free speech, much other law must be as well. Taken seriously, the doctrine seems to have no limit. If courts believe that labels requiring farmers to disclose whether they feed their cows hormones violate the farmer's freedom of speech, it is hard to see why labels requiring them to list preservatives or allergens do not raise constitutional issues.

More dramatically still, if labeling raises constitutional issues, then securities regulations must as well. Our Federal securities regulation – which most observers believe is critical to the success of our stock market – is basically a truth-in-labeling act. It requires sellers of securities to create and distribute vast quantities of information, at the seller's expense. This is forced speech on a level far surpassing the farm board or GMO advertising the courts have found unconstitutional.

Moreover, the securities regime requires both issuers and candidates to provide still more information in connection with corporate elections. All this material – including even the script of telephone conversations with corporate voters soliciting their votes – must be submitted to the SEC for review and prior approval by its staff. Publishing unapproved campaign material is a criminal violation. If the First Amendment applies here, this must be unconstitutional: John Peter Zenger's struggle against prior restraint is the historical origin of our First Amendment, and this is nothing if not a system of prior restraint.

Finally, the Exchange Act, as interpreted by the Supreme Court, provides both criminal and private and SEC initiated civil actions for virtually any untrue or misleading statement in any of these disclosures. If the standards of Constitutional defamation law applied here, most of these actions would be impermissible – given the random fluctuations in stock prices under the best of circumstances, the social interest in protecting diversified stock market portfolio investors from unintentionally misleading disclosures cannot possibly be as strong as our interest in protect individual citizens from false and defamatory statements that injure the reputations or income of real people.

The parade of horrible is without end. Virtually all human actions involve speech, either literal or figurative. So, this broad understanding of the "freedom of speech" threatens to bring all law within the scope of the First Amendment.

Corporate law does not belong in the Constitution. Neither does defamation law, campaign finance law, or basic issues of market regulation such as advertising of potentially dangerous or immoral products, professional self-regulation or price fixing. These are political issues that should be left to the political branches.

Footnote Four is dead. Long live Footnote Four.