The Menace of the First Amendment

The First Amendment rights of free speech, freedom of religion and conscience, freedom of the press and freedom to assemble collectively reflect the core values of a liberal democracy. They are core parts of our attempt to create unity without uniformity – to find a way for disparate and diverse groups and individuals to live together in peace and mutual respect.

On the one hand, they reflect our rejection of Augustine: the First Amendment sets out our commitment to limited government. Our government will not impose a uniform worship or aesthetic or understanding of the right way to live a life in its citizens, but will instead work to preserve a space in which individual citizens may maintain their commitments to values and groups without fear that others will coerce them into conformity.

On the other hand, they are a key part of our struggle against corruption: The First Amendment sets out prerequisites to a vibrant public opinion and the democratic elections that can protect our republican system from the omnipresent threat of elite domination.

Over the last generation, however, the Supreme Court has transformed the First Amendment into something quite different: Lochner revived. Using metaphors and doctrines that – as in Lochner's first run – are based in nineteenth century laissez-faire ideologies rather than constitutional values, the Supreme Court has transformed the First Amendment into a vast reservoir of protection of incumbent economic power. Instead of limiting collective pressures to conformity in order to preserve the manifold commitments of individuals and groups, and instead of protecting the debate and political activity vital to our republican democracy, the Supreme Court instead protects those who seek to transform past economic success into political power -- businesses that seek to subvert the creative destruction of capitalist markets – or to avoid the democratic control vital to any market. The Supreme Court's First Amendment, unlike the Constitution's, increases corruption, decreases citizen autonomy and subverts our political processes.

The solution is partly doctrinal: the complex of doctrines at the heart of the New Lochnerism are just as wrong as those underlying the old Lochner. Neither the text, history, structure nor values of the First Amendment support the Supreme Court's use of it to impose an immoral and wrong economic theory on an unwilling country. The Court's laissez-faire economics are incompatible with basic First Amendment values of free debate, individual freedom and collective self-government.

Just as important, however, the problem and its solution are institutional. The Court is not institutionally equipped to regulate the economy, as it recognized in Footnote Four. That is just as true when it seeks to find guidance in the First Amendment as when it sought it in the Fourteenth: the Eighteenth Century text of the First Amendment is no firmer a footing than the Nineteenth Century Fourteenth Amendment. It is basically silly to believe that any court could derive

First and foremost, they reflect our commitment to create one nation out of many people and many communities – without creating a Nation in the classical sense of a group sharing a common religion and way of life. The new Constitution was an experiment in a new kind of state. Americans would be Americans without agreeing on the most fundamental questions of how to live, how to worship, how to teach history, or what to view as good taste or acceptable cuisine. The goal was to create a single government able to govern political communities that still had established Catholic, Quaker, and Calvinist fading into Congregationalist churches, together with other religious minorities struggling, with various degrees of success, for official toleration or even full civil equality. One of the colonies-turned- states had a significant German speaking minority; another's original and still powerful elite was Dutch. Others, particularly on their Western frontier, were in near perpetual revolt against any central authority at all. Most importantly, for the first century, the country was deeply divided between those who viewed slavery as a profound moral wrong, an affront to the most fundamental principles of freedom and equality underpinning the new United States, and those whose economic life depended on it and who were inventing increasingly baroque defenses of the indefensible.

The First Amendment exemplifies this Eighteenth Century belief that Americans – Catholics, Baptists and (former) Puritans, slaveowners and free, merchant traders, famers and frontier traders – could live together in peace if they would just agree to avoid making collective judgments about some of the most critical aspects of their cultural life. Instead of killing each other to impose a common religion or common customs, or to resolve the most divisive moral issue of the day, they would simply create a state that stood apart from the most important issues before them -- a nation divided, half slave and half free, encompassing both Papists and anti-Papists and even, if at its margins, Jews, "Mahamotens" and other heathens.[1] By agreeing to disagree, they thought they could create unity without uniformity.

The First Amendment's sometimes disparate parts each represent a partial, characteristically Eighteenth Century liberal solution to the problem of how to live together in peace without agreement or suppression.

On the one hand, the rights of the First Amendment define limited government. Freedom of speech, religion and conscience – like private property itself – serve to carve out a zone of privacy, in which individual citizens and cultural or religious minority groups can live their lives according to their own values without having to conform to dominant norms.

On the other hand, the First Amendment rights help to resolve the most ancient problem of politics: who will guard the guards. Power corrupts, but the First Amendment aims, in what we might call its anti-incumbency goal, to ensure that neither power nor corruption is absolute. The freedoms to criticize, debate, organize and assemble protect public opinion and help to assure

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[1] The Supreme Court eventually decided, in Dred Scott, that this unity could not extend so far as to include free blacks as Americans. That decision was the beginning of the end of the original view. In reality, a house divided against itself, half slave and half free, could not long survive.

that public officials remain servants and not masters of the people. Debate helps ensures that incumbency is not self-perpetuating.

Together, they represent a distinctive approach to the problem of how to allow different people (and different peoples) to live together in a single political community in peace.

A. Limiting Government

The First Amendment has at its core a serious of overlapping principles based around the liberal ideal of collective abstention – a single state governing individuals of differing commitments by taking sides with none of them.

1. The Anti-Establishment Principle

The most important part of the abstention idea is the anti-establishment principle, in both its religious and secular forms. Because the state stands apart from the most important conflicts of religion and culture, citizens need not fear it will coerce them into a single mold – and therefore may safely limit their fights to control it. The First Amendment anti-establishment principle, thus, is a key way in which we limit the importance of politics (and, thus, seek to avoid the common problems of collapse into war or elite domination).

The anti-establishment principle also creates a space for individual freedom. Individuals are enmeshed in institutions that often attempt to demand total commitment – family, village, tribe, custom, church, army, profession, teams, employment, contract and debt. In the feudal societies from which Eighteenth Century Americans were emerging, individuals were born into a cascading sequence of such allegiances, with the demands of each reinforcing the constraints of all. But totalizing religions and hierarchal economic relations alike require a threat of force, and ultimately state sanctioned force, to enforce elite claims on subordinates. With a state that – at least in part – avoids enforcing and reinforcing the claims of those institutions, individuals can avoid or limit the claims of the groups to which they are tied.

As Frederick Jackson Turner contended, they could physically flee the constraints by moving West – out of Europe to the US and out of the constraints of law and custom by heading to the frontier. Just as importantly, they can limit any single institution's claims by joining a competitor (or even holding open the possibility of doing so). Moreover, when the state no longer coordinates and aligns the claims of totalizing institutions into a single feudal whole, many individuals can limit the claims of the groups to which they belong by invoking others: escaping the strictures of family at the workplace (and with the freedom a personal wage produces), inverting the workplace hierarchy at church, limiting a daily experience of subordination by joining one of Tocqueville's organizations in civil society. Even if you feel entrapped from 9-5, after hours you can join a different crowd altogether.

When the society offers multiple hierarchies, fewer people will be trapped at the bottom of all of them. The anti-establishment principle, thus, promotes both freedom and equality.

Fortuitously, the anti-establishment principle – which predates the rise of a capitalist market-based economy – also underpins the viability of a modern economy. Established economic incumbents, able to use political power to protect themselves from the relentless churning of markets and technical change, are the main threat to economic growth. At a certain point, an existing elite nearly always discovers that it is easier to use economic and political power to preserve existing privileges – or take a larger share of the existing economic product – than to attempt to stay on top in the midst of destabilizing growth.

As Schumpeter famously pointed out, modern economic progress depends on "creative destruction." Canals displaced highways, railroads displaced canals, steamships displaced tall ships, cars displaced horses and buggies and then streetcars and the railroads themselves, and in the years after the second World War, we rebuilt our physical landscape entirely to accommodate the demands of the automobile. In the coming years, we will need to rebuild yet again to accommodate the new masses yearning to work and live in our center cities, which will require a new transit system, displacing the internal combustion engine and, just as critically, reclaiming the real estate the last generation too profligately dedicated to roads and parking. Similarly, continued progress in computing will make existing investments in hardware and software worthless; new and more effective medical systems would reduce the value of existing franchises; modern green energy will reduce the outsize subsidies and profits of obsolete oil- and nuclear-based technology; sustainable agriculture threatens subsidized agribusiness.

In each case, those whose fortunes depend on the status quo stand to lose even if the rest of us benefit far more. The incumbents are, therefore, tempted to use the power of the government to suppress innovation. General Motors famously bribed city councils all over the country to remove streetcar tracks, in order to reduce the threat that modernized mass transit would displace its automobile-centric development plans. Today, our attempts to address global warming, inefficient medical care, an unstable financial sector more directed to speculative gains than financing useful investments or long term commitments, and slowing innovation are stymied by powerful economic incumbents able to transform their past success into the political power necessary to block future progress.

The anti-establishment principle declares that struggles over religion, ideology and economic success should proceed without the heavy hand of the state weighing in on the side of the already powerful. It motivates not only the First Amendment bar on established churches but also the prohibition on aristocracy (the ultimate established party). So long as the state limits its role to providing the "Hedges that guide men in their ways" without seeking to direct its citizens in one direction or the other, we can proceed in our ways without worrying too much about the concerns of the state. If, however, a religious or economic or cultural group is able to seize the power of government to promote its own vision, the rest of us would have no choice but to join in the struggle, seeking to dominate the government lest it dominate us. The anti-establishment principle, by declaring that the state will not award permanent victor to any contender, reduces the stakes.

2. The Anti-Censorship and Free Exercise Principles

The anti-establishment principle leads directly to the anti-censorship and free exercise principles. The former requires the state to refuse to take sides in the struggles of individuals to find the good life as they see it, or of groups to find and keep adherents. It should, instead, refuse to allow any group of incumbents to turn a momentary political victory into a self-perpetuating establishment. The latter principles eliminate two of the main tools that incumbent establishments use to protect their incumbency.

The commitment to avoid religious war leads to a state that attempts to allow individuals and groups to practice (or not practice) their own customs without the nation having to come to an agreement about the best or proper way to practice. The commitment to free speech is, in its limited government form, almost identical: we can reduce the importance (and violence) of politics by having the government abstain from making collective determinations on issues of taste, cultural practices and similarly hard-fought issues. In those days, as Samuel says, each man did what is right in his eyes.

The constitutional protection of Santeria animal sacrifice, on this view, is closely related to the constitutional protection of naked dancing and, for that matter, famous novels: freedom of religious exercise and freedom of speech require allowing cultural dissidents to live according to their own values while minimizing censorship on behalf of majority norms. Just as the government should not ban minority religions, it should not censor or otherwise punish dissent from a collective culture, whether that means imposing standards of good taste or coercively eliminating sub-cultural practices viewed by others as vulgar. In both cases, the government should refuse to help local elites or temporary political victors entrench themselves by suppressing opposition.

Like the disestablishment norm, these anti-censorship and free exercise rights are simply part of a larger commitment to minimize our collective cultural practices, in order to reduce the importance of politics for those who might lose. The constitutional bar on requiring Pledges of Allegiance is closely related to the bar on requiring public prayer, and the constitutional bar on religious "test oaths" ought to lead to similar suspicion of loyalty oaths of all varieties. In each case, the First Amendment commitment is to prevent the successful from building on their success to prevent anyone else from succeeding.

3. Equal protection

Another form of this commitment is the equal protection principle: a commitment to treat all or almost all inhabitants as citizens and to make the state take the good of all citizens as its good. The First Amendment expresses a sense of our state as serving all of us – regardless of religion, political commitments, language, tastes or the other cultural markers of nations in the ethnic sense, we are all Americans. If we are all Americans, it follows – at least once we have accepted the fundamental limited government principle that we will not force conformity on one another – that our government must respect, so far as it can, all our fundamental commitments. The First Amendment's principles of disestablishment, free exercise, non-censorship are all aspects of the mutual respect that follows from a commitment to live together in a partnership for the common Welfare of all of us. They are, that is, subsets of a larger idea of equal protection, the idea that the law should protect all Americans.

B. Protecting Politics: The Anti-Corruption Principle.

The basic liberal innovation is the notion of limited government – making politics safe by making it largely unnecessary. If the government is committed to the good of all its citizens, to treating them equally, and to respecting their individual and group commitments by respecting freedom of expression and free exercise and refusing to censor or establish, then politics is far less important and far less dangerous. If the disestablishment principle extends to the economy as well, politics becomes less worth fighting over still. Or so one might think.

This is Hobbes's fundamental contribution to political theory, developed and expanded by Locke and many others in the liberal tradition. Lower stakes mean that we need not kill each other to dominate the state to prevent it from dominating us. In less extreme circumstances, it moves politics from the center stage it occupied for the Greeks, allowing people to concentrate on their private lives.

But Hobbes's successors quickly noted that his solution – concentrating all power in a unitary state with limited goals – would never work. Power corrupts, and power with no countervailing power to restrain it surely would tempt absolutely, regardless of the purported limits on the scope of government. A corrupt government could easily use the power Hobbes granted it for purposes he would have denied it.

The American constitution appears to be deeply influenced by the anti-corruption thinking of Montesquieu and his followers, among whom I would include the authors of the Federalist Papers. Along with limiting the scope of politics, these liberal thinkers urged, we must also ensure that political incumbents – both office holders and influential citizens who can influence officeholders or the electorate – use their power for the common Welfare and not for private gain.

The key method for accomplishing the anti-corruption goal is Montesquieu's separation and balance of powers. By distinguishing branches of the government, we can create powers that will limit each other. The Americans took Montesquieu further – not only separating national government into legislature, executive and judiciary, but dividing the legislature into two quite different houses; using citizen juries to restrain judges; banning a standing army and, instead, relying on a militia formed of civilians for most defense; and, of course, dividing sovereignty itself in a novel way, with multiple quasi-sovereign states competing with the Federal government.

Perhaps their most important theoretical innovation was placing sovereignty in the undivided People–beginning with the Constitutional convention itself, which derived its claims from the People itself rather than any preexisting institution.[2] The theory of the sovereign People meant that each institution could claim only partial legitimacy based on its partial representation of the popular will.

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[2] Grant Wood, Creation of the American Republic

Madison argued that the multiplicity of governmental institutions would serve to limit the influence of "faction," by which he meant groups pursuing self-interest instead of the common Welfare. Even if a corrupt faction managed to control one level of government, it would be unlikely to control all, and, just as individuals can find freedom in the space between competing institutions so too the nation may be able to find liberty by setting competing corrupters against each other.

The First Amendment supports this conception of competing spheres of influence in several ways.

First and most directly, as Robert Bork proposed, free elections – our basic system for removing corrupt rulers and asserting popular sovereignty – require free debate. An incumbent who can censor is an incumbent well on the way to establishing himself in office quasi-permanently.

Second, the more general anti-establishment principle of the First Amendment is part of the general principle that elected officials rotate – our system is one of limited political victories for limited times.

Third, the First Amendment's anti-censorship and anti-establishment ideals, together with its specific protection of freedom of the press, the freedom to assemble, and the right to petition each protect core parts of the competitive electoral process. These commitments restrain the government from suppressing the civil society activities that can become (as Tocqueville suggested) alternative power centers to the already multifarious government. And, of course, the right to criticize, debate, report and organize are key ways that the population keeps its public servants from becoming its masters.

Finally, the First Amendment's celebration of the rights to individuality, dissent, criticism and organization – both its limited government rights and its limiting government rights, its anti-political restrictions on the scope of politics and its political rules of political conflict – serve as a model for sectors it does not reach.

The original First Amendment restricted only the Federal government, but it quickly became a model for parallel rights in state constitutions. While several states still had established churches in 1789, within a few years nearly every vestige of establishment had been abolished and the states, like the Federal constitution, adopted the principles of free speech and freedom of religion. When the Supreme Court concluded, in the early twentieth century, that the First Amendment was binding on the states as well, the primary effect was to move litigation into Federal courts; language virtually equivalent to the First Amendment was already a matter of state law.

The First Amendment can also serve as a model for employment law. From the Progressive era, civil service statutes and tenure rights have long assured civil servants and educators of something like freedom of speech, especially the right to criticize superiors and to dissent from established doctrine, as well as freedom of religion including the essential right to hold government positions without regard to religion.

In the private sector, the struggle for First Amendment principles has been less successful. Unions have sought to guarantee their members the right to petition for redress of grievances and to criticize their employers; they have had only limited success. The 1964 Civil Rights Act finally extended freedom of religion to the private sector, opening private sector jobs to members of all religions with test oaths or similar religious requirements. Whistleblower statutes have extended limited rights of dissent and press to both public and private sector employees.

However, fundamental employment law still conflict with basic free speech principles: agents, during the course of their agency, must set aside their own values, in order to work instead for their principal and under the direction and control of their principal. This means that when employees speak on the job, or at least as part of the job, they must do so under the control of their employer, and they must act as if the employer's values were theirs as well. Moreover, the American legal presumption of employment at will means that employers normally have the right to fire employees for virtually any reason (or no reason at all) including because they have exercised either personal autonomy or political aspects of First Amendment freedoms. In particular, while criticizing the incumbent governmental officeholders is one of the core rights protected by the freedom of speech, criticizing your boss at work will nearly always get you fired.

II.

In the hands of the modern Supreme Court, however, the Amendment's rights are being transformed into something quite different: protection of institutions against the people and laws that ought to control them. Just as the Supreme Court has transformed the equal protection clause, enacted to overturn Dredd Scott and confirm that African Americans are full citizens, entitled to the full protection of the law into something quite different – a rule that we the people and our elected representatives may pass laws benefiting every subset of Americans, from veterans to opthamalogists, with the sole exception of African Americans – so too it has turned the First Amendment on its head.

Most dramatically, granting corporations First Amendment rights is not unlike granting rights to the State itself against its people: it is more likely to reduce liberty than enhance it.

Corporations are power structures much like government agencies. Like the government itself, they are essential to modern life. But as any eighteenth century political theorist would have recognized, had modern business corporations existed in their day, they are just as susceptible to capture and corruption as state agencies.

First Amendment values, that is, suggest that we ought to have rights of speech and dissent against our corporations, and that we ought to have equivalents to the general disestablishment and free exercise notions in the corporate sphere as well as the public sphere. Most of us spend much of lives working for corporations, but while at work we lack basic rights we take for granted as citizens: not only the right to vote or criticize, but even freedom from arbitrary searches or minimum due process in adjudications. Corporate elites, unlike political ones, are not even formally answerable to anyone but other elites, with the possible exception of the most egregious corruption. And the investment portfolios that ultimately control the boards of

publicly traded corporations are not expected to consider the public interest – and often could not do so if they wanted to, given the realities of competitive marketplaces and limited information.

Employees do, of course, retain the right to quit; they are not slaves. And if we had full employment, if our basic benefits (pensions, healthcare) were funded by the government and fully portable between firms, and if we all lived in large cities or were geographically mobile, "exit" might be enough to protect our rights. (Although employees whose working conditions are based on their ability to quit have strong incentives to spend far more energy remaining marketable than actually doing their current job, and prosperity is likely to suffer as a result). That is not our world. In this era of perpetually high unemployment, where the Fed has long since abandoned its obligations under the Humphrey Hawkins Full Employment Act, instead keeping inflation at punitively low levels regardless of the impact on employment, and the Treasury and Fed alike violate that law by allowing the currency to appreciate regardless of the resulting trade surplus (which reduces domestic jobs), the right to quit is, for most people most of the time only marginally less hollow than Locke's right to emigrate.

However, bringing our corporations into the eighteenth century by granting citizens the ordinary rights of free people against them is, at this stage in our politics, entirely utopian.

The more relevant issue today, is the rights of corporate elites against us. Under current Supreme Court doctrine, corporate elites have a right to spend corporate funds in order to influence American politics – to electioneer, to lobby, and to attempt to skew public opinion by funding scientific sounding studies, creating the appearance of scientific dispute where there is none, or creating the illusion of public opinion in the hope that appearance will become reality. Predictably, corporate managers will use this money for three primary purposes: to entrench themselves in office, to entrench their companies in the economy, and to use the power of the state to redistribute income and wealth upwards to those who already have much. In each case, basic liberal and First Amendment values counsel the opposite: this is a secular establishment, straightforward corruption of the political process, distortion of independent powers into an alliance against the national interest.

I have discussed the problems of corporate-funded speech at length elsewhere. The short version is that corporate law deliberately creates undemocratic, unanswerable managers. We expect the market to tame them and keep them working for our collective interest, or at least that part of our collective interest that seeks cheap consumer goods and services. But markets can only function within a structure of law that bars economic actors from using past economic success to guarantee future success. Economic incumbents will always be tempted to create monopolies, suppress rival or upstart technologies, manipulate temporary imbalances to create permanent "franchises" and generally change the rules to favor themselves. Successful economies must, somehow, resist this. Capitalism requires "creative destruction," but no elite willingly agrees to "shirtsleeves to shirtsleeves in three generations."

More generally, however, modern First Amendment doctrine is a revival of Lochner – the Supreme Court's attempt to impose the economics of Mr. Herbert Spencer on an unwilling nation.

The Supreme Court has used free speech doctrine to import 'laissez-faire' notions that the powerful ought to be allowed to exercise their power unrestrainedly -- that past economic luck or success should be easily transformed into political authority or blocking power to avoid market constraints – by barring core economic regulation necessary to make markets function properly, while simultaneously encouraging the corruption of politics.

The Supreme Court's consistent use of the First Amendment to entrench, rather than destabilize, elites leads to process questions: Is a free government compatible with a life-tenured judiciary untethered from text, history, or the traditional of liberal political theory? Can markets operate effectively if their primary regulators are judges trained to look backwards rather than forwards? Does Free Speech doctrine have anything useful to say about the appropriate role of corporate decisionmakers or the boundaries between advertising and consumer fraud, or electioneering and corruption?

III. Lochner Revived.

Much of modern "free speech" doctrine ignores the motivations and purposes of the First Amendment, both in their original context and as applied to a modern capitalist democracy. Instead, the doctrine centers around talismanic utterances of metaphorical slogans, applied in a way that consistently empowers economic incumbents, shrinks individual spheres of autonomy and lessens the ability of the people to collectively govern themselves. The First Amendment has taken the place of the Fourteenth, cancelling the great victory of Footnote Four. Once again, the Court is imposing an unworkable and unpopular economic theory on an unwilling nation.

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.

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 bringing defamation law under the doctrinal wing of the First Amendment, 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. 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.

This is a serious problem. The First Amendment states that Congress shall make no law restricting the freedom of speech. The Court has extended the Amendment to apply not only to Congress but to the other branches of the Federal government and to all branches of state government as well. If these types of economic regulation raise free speech issues, then a simple reading of the First Amendment suggests that they are unconstitutional: they seem to be "laws restricting the freedom of speech."

Now, I do not mean to suggest that the Court has struck down all these regulations. It has not. Instead, it has decided that "no law" means "some laws", and it has constructed a series of rules, some sensible and some less so, regarding when the Congress and other organs of our government may restrict behavior the Court views as aspects of the "freedom of speech."

In defamation, for example, it started by reaffirming the view, long since accepted by American law, that truth must be a defense to defamation. But it then created elaborate distinctions between public and non-public figures, "malicious" and inadvertent misstatements, and similar detailed doctrine that have effectively moved the tort of defamation from state-based common law courts to Federal courts purporting to interpret the Constitution.

Similarly, in the regulation of advertising (so-called "commercial speech"). For some reason, the Court's "freedom of speech," allows individuals to make false statements about public figures so long as they do not actually know the statement to be false – but makes a different distinction about advertising. The Congress, and other organs of the people, may, the Court has held, prevent commercial advertisers from making false statements, and may even require them to have some reason to believe their statements are not false.

But it may not prevent them from making true statements – apparently it is a violation of the freedom of speech to stop beer advertisers from promoting high alcohol beer or cigarette advertisers from promoting addictive, cancer causing, products that many non-users find invasive and offensive. The political branches may conclude that a free society should permit people to use these potentially dangerous drugs, but should discourage it. The Supreme Court thinks that the First Amendment means that either we must ban them or we must allow their producers to promote them without restraint; limited tolerance is not an option.

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, following J.P. Morgan, that ruinous competition could sometimes drive entire industries into insolvency. Ordinary economic theory and experience suggests they were right, at least in some instances: any time the marginal cost of production is less than average costs, unrestrained competition tends to lead to monopoly or market collapse. We have no passenger railroads as a result. Moreover, 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.

The main problem here is process. Some of the Court's distinctions make sense. Defamation lawsuits clearly can be a device for suppressing criticism. Some of them border on the nonsensical. Whatever the "freedom of speech" means, surely it is not the freedom to freeload. I see no threat to "freedom" when the nation rejects the extraordinarily unattractive alternatives of prohibition – with ills we know all to well – and 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 these are not issues for courts, let alone our unelected, life tenured Supreme Court. Judges are trained to look backwards, parsing precedents and similar authority for past decisions to follow. It seeks 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 – 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.

Worse still, if these ordinary economic regulations are restrictions on free speech, much other law must be as well. Taken seriously, this 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.

One core problem is the assumption, embodied in the notion of the "marketplace of ideas," that any regulation is automatically a restriction on the freedom of speech. This metaphor, which dates back to Justice Holmes, is wrong at its core. But it had little importance until the First Amendment began to jump its banks, expanding into ever wider areas of the law.

As Owen Fiss pointed out near the beginning, the marketplace of ideas misunderstands how markets and ideas work. The metaphor is used to invoke an idea of free competition in which the state takes no side and allows ideas to compete among themselves for adherents. Its appeal, then, is to a version of the anti-censorship and limited government aspects of the First Amendment.

But the metaphor goes far beyond those ideals. The market it invokes is not a real one – real markets can exist only by virtue of extensive and intrusive regulation to assure the safety and honesty of participants, to make clear the composition of products, to enforce contracts, to set weights and standards that allow products to become commodities, to prevent fraud and deception, to bring buyers and sellers together, to provide and limit credit, to prevent or at least ameliorate bubbles and crashes, to stop the inevitable market processes of upward redistribution as those with more use their bargaining power to take more of the surplus to trade and cooperation, and so on. Instead, it is a purely imaginary fantasy.

The market that the "marketplace of ideas" seems to be a laissez-faire war of all against all. Real markets don't work like that. Economic markets work best when highly regulated: the stock market, our closest approximation to the perfect markets of economic theory, is our most regulated market. Buyers and sellers must be able to trust that what they see is what they'll get; the moment they suspect fraud, or even the possibility of fraud, misleading descriptions or strategic behavior, participants retreat into defensive behavior. In places where law is minimal, buyers buy only what they can test, and sellers accept only funds they can verify, with their teeth. Transactions are cash on the barrel – but even then, they only happen if the government can establish a time and place for the market, set and verify weights and standards, and guarantee safety on the roads on market day. More sophisticated markets require more trust and more predictability and more order – and therefore more law to stop those who would abuse it.

Moreover, markets tend to self-destruct if left to their own. Markets tend to redistribute wealth upwards: those with more are always in a better position to bargain than those who have no choices, and so the already rich tend to take more of the surplus to trade. But once someone has enough wealth to purchase the loyalty of followers, he – or they – need not restrict themselves to taking more of the surplus. A gang can simply take. Or stop others from selling. Without law, free markets look a great deal like Hobbes' war of all against all, or the wars of drug mafias. Even with law against physical force, the rich will find that they can get even better terms of trade if they unite further – as corporations and as oligopolies – while preventing those on the other side of the transaction from doing so. Innovation, almost always a threat to incumbents, becomes something they seek to suppress. As the powerful take what they can get, the less

powerful react by producing only what they think they can keep; the economy shrinks, but the richest may still do better (relatively, at least) even as they destroy the common good.

Public opinion is not a marketplace – opinions are not, or at least should not be, bought and sold. Indeed, opinions for sale is a clear instance of corruption, of self-interested market norms invading spaces where they have no business. Nonetheless, just as production and markets thrive best when law restricts the scope of abuse, free debate and discussion are possible only within a highly structured set of restraints. No rules means no speech: on any important issue, the loudest will just shout everyone else down, or the strongest gang will beat up the others.

In the real world, when a false claim is repeated often enough, it begins to seem plausible – we all depend on others to help us filter the true from the false and the useful from the useless, and it is easy enough, as every advertiser knows, to create the appearance of others vouching for a message without the reality. In the real world, however, discussions require moderators. When speakers are allowed to speak without limit, only the loudest, or the ones with the most guns, get to speak; others retreat or are stifled. When speakers are permitted to lie without restraint, the discussion degenerates and stops.

In the "marketplace of ideas," however, the best remedy for bad speech is more speech. So, we should view defamation law – the ancient rule that lying about a person is wrong – as a threat to freedom.

Here, the metaphor seems to misunderstand not only "marketplace" but "freedom". To be sure, Hobbes defines freedom as the absence of restraint. But this is not the ordinary use of the word, and surely not the meaning it has in the First Amendment. Freedom is not the same as anarchy. Freedom requires rules to restrain overweening power and leave individuals able to structure their lives in accordance with their values and desires and those of the people around them.

The change begins with the rise of the commercial speech doctrine – which potentially subjects virtually all economic regulation to First Amendment review, in

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I. The First Amendment stems from and enforces a classic Eighteenth century liberal understanding of the problem of politics. Government is essential, of course, to preserve us from the war of all against all. But at the same time that they protect us, governments necessarily threaten us. The First Amendment is meant to reduce the threat in two ways.

First, it reduces the importance of politics by creating a private space outside of the political sphere. Europe was riven by religious wars for centuries. We would, instead, agree to disagree. Instead of fighting over which religion would dominate the state and then use the government's force to impose itself on dissenters, we would agree to keep the state separate from religion altogether. Thus, members of different religions could live together in peace under a single government that would neither establish a religion nor prohibit other ones. More important still, in a new nation more divided over other issues, slave states and free would coexist in a single union without reaching any agreement on the most important issue that separated them.

The Free Speech clause functions, in part, much like the religion clauses: it excludes a vast scope of the most important aspects of life –the very issues that the Greeks would have viewed as the center of politics – from collective decision. Committed individuals (and, as is always important in the American context, individual cranks) can live together in relative peace and mutual respect by agreeing not to use the political process to coerce each other. Conscience, taste, art, science, perhaps even the language we speak, would, like religion, be excluded from politics. We can, of course, freely debate them and seek to convert others to our views and to convince them to join our groups and share our commitments – but without invoking the power of elected officials or governmental agencies to force our commitments on others.

The speech clause, like private property, creates a space in which individuals, or groups, are (relatively) free from social constraints, able to follow the lead of their internal politics and dynamics at levels smaller than the nation. If we agree not to censor, then those with non-standard tastes may do as they please without regard to the collective views and those with unusual opinions may pursue them to their dead ends or important new places. We create a space for novelty and nonconformity in the arts and morality alike.

As the example of slavery makes clear, an abnegation of state power is not necessarily a reduction of power (or even state power) itself. Empowering substate groups is often the same as disempowering the less powerful members of those groups: deciding to 'live and let live' with slave holders means that free men agreed not only to not use the state to protect their fellows from slaveholders, but in fact stood by as the power of the state actively made slaveholding possible.

The First Amendment principle of depoliticization and non-intervention, thus, has two sides. It creates a free space in which people can take maintain their own commitments regardless of the view of state officials or the people to whom they ultimately answer. But restricting state power can also mean a space free for private power – including private power that could not exist without state assistance – to oppress with limited state constraints. If religions are entirely free, then the victims of their sacrifices must be totally unfree.

Second, the First Amendment seeks to restrain the corruption of power. That power corrupts was fundamental to virtually every account of politics long before Lord Acton. Government officeholders are obligated to "pursue justice" (in the words of Leviticus), to seek the Safety and happiness of the people (in the words of the Declaration of Independence) and to promote the common Welfare (in the words of the Constitution's preamble). To do that requires power – the power to stop those who would pursue their own interests at the expense of their neighbors. But office holders are not immune to the call of corruption: they too may place self-interest over the common good.

Even after reducing the importance of politics by narrowing its range, its power remains dangerous. We, like all democratic republics, therefore have a second anti-establishment principle: political elites serve only for a limited period and subject to periodic answerability to the public.

The authors of the original Constitution seem not to have contemplated parties at all. The electoral system they invented for presidential elections makes sense only if they did not expect elections to be referenda on policies or personalities or even tribal loyalties. Instead, elections were primarily meant to ensure that officials who put their own interests – or sold their loyalty to particular factions – would be removed.

The First Amendment plays an important role in this somewhat different anti-establishment principle as well. By barring censorship, it makes it harder for officials (and the factions to which they answer) to use the power of the government to maintain themselves in office. Freedom of speech and of the press makes it easier for critics of the incumbents to publicize official wrongdoing without suffering the fate of Socrates, or even the trial of John Peter Zenger. Protection for the right peaceably to assemble and to petition for redress of grievances, along with freedom of speech and the press, should allow for public opinion to develop and to restrain our elected officials should they ignore or mistake the common welfare.