The First Amendment as “Loser’s Revenge”

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Constitutional review has often been justified as a remedy for defects in the political process. That is particularly true for the First Amendment whose usage, since its activation in the early 20th century, has defended by the importance to the democratic system of protecting the free and open presentation of a full range of political ideas. That was the justification relied on by Oliver Wendell Holmes’ famous Abrams dissent; and also Alexander Meklijohn’s declaration that the First Amendment must be “an absolute” at least for political discourse. It is strongly relied upon by the Supreme Court when it acts to strike democratically enacted laws; that the court is fighting suppression of ideas because open debate, as the court said in Citizens United is a “precondition to enlightened self-government.”

Yet this — the First Amendment’s originally imagined role in politics — is now out of date and out of touch with how the First Amendment is now actually used in the political process. Today, the protection of political debate is a sideshow; instead, the Amendment is primarily used to target laws, usually economic regulation, that firms have failed to stop politically. In a great many cases it is simply used by the losers of a political process to take a second bite at the apple. Any defensible theory of Constitutional review using the law need deal with that reality.

The “loser’s revenge” role played by the First Amendment is well documented. The losing parties in political disputes have tried and frequently succeeded in using the judiciary to win fights, whether it comes to consumer and doctor privacy, Net Neutrality, securities regulation or health and safety regulations, just to name a few. The role played by the First Amendment in such contexts is decidedly different than that imagined when the First Amendment was activated by the Supreme Court in the early 20th century. For it is not protecting or facilitating a political debate that is threatened by government censorship, or protecting the rights of a minority group unrepresented in the political process. Instead of facilitating political debate, it more often ends it.

In light of these developments, this paper suggests an “anti-circumvention” standard should apply to parties who bring challenges to laws or regulations when they are evidently seeking a second bite at the apple in the political process. In other words, where a party enjoyed full and fair participation in the underlying political process, the judiciary should avoid using the First Amendment to give that party a judicially-granted victory afterward.

Practically speaking, the doctrine would call for a different outcome in cases like IMS v. Sorrell, described below, where the defendants sought to overcome their defeat in a highly contested legislative process at the state level. And we may already be seeing a nascent version of the doctrine in the D.C. Circuit, in areas in areas where the First Amendment is routinely, almost blandly deployed by the losers of regulatory struggles, as in telecommunications law. As I shall show, the First Amendment challenges that are “tacked on”

1 Meklijohn, “The First Amendment is an Absolute”

2 Citizens United.

3 The phenomenon is broadly referred to as “First Amendment Lochnerism.”
to lengthy regulatory challenges under the administrative procedure have often not been successful.

Most broadly, I suggest that the judge, when asked to strike laws using the First Amendment, should recognize that he or she is in one of three political contexts. In the first, the judge is asked to enforce the Amendment to facilitate debate by protecting political speech. In this context the judiciary is at the zenith of its legitimacy, engaged in a defense of democratic process itself.

A second category of case represents intervention may not be directly related to the political process, nor is its abrogation. Here the judiciary is typically protecting social, political, esthetic, moral, commercial or other ideas and experiences, and the judiciary must rely on the weaker justifications unrelated to protecting the democratic process, but to the speakers’ interest in speaking or the listeners’ interest in receiving information.

The third category are cases where the judiciary is asked to intervene either to end political debate, or asked by the losing side of a political process to nullify the results of a fully and fairly contested legislative or regulatory process. Here the judge is at a nadir of its legitimate reviewing power: when being directly asked to circumvent a functioning political process by a participant in that process. In this context, the judge should employ the anti-circumvention principle to raise the bar for the plaintiff in this position.

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\[The Original Justification for an Anti-Majoritarian First Amendment\]

At the risk of stating the obvious, courts, judges and constitutional scholars have long struggled to justify the judicial invalidation of democratically enacted laws. While this, the counter-majoritarian difficulty extends across constitutional review it has a special history in the First Amendment context. The judicial pioneers of the First Amendment tradition, Louis Brandeis, Learned Hand, and Oliver Wendell Holmes were opposed to judicial intervention, and each individually committed to principles of majoritarian rule and respect for the outputs of the democratic system. Each, living during the Lochner era, struggled to accept the idea of using the Constitution to interfere with laws enacted by elected bodies. Their justification for judicial review using the First Amendment, therefore, merits particular attention.

As any First Amendment scholar knows, Holmes and Brandeis were so deferential to majority will that they signed off on the Supreme Court’s approval of sedition prosecutions during the First World War. Indeed, in what must count as a low moment in his career, Holmes actually authored the lead opinion upholding the prosecution of Eugene Debs, the presidential candidate sentenced to ten years in prison for decrying the draft during an anti-war speech.\[4\]

But sparked by Learned Hand, the two Justices eventually began to support the idea of a judicially enforceable First Amendment, and it is here we find the original and canonical justification for an anti-majoritarian First Amendment. As captured in Holmes’ famous dissent in Abrams, review was premised on a danger to the democratic majoritarian process itself. Holmes posited a fact now widely accepted: that free speech and debate are essential to the democratic process; a logically prior requirement for a well-functioning democracy.

\[4\] Debs.
The key premise in Holmes’ opinion is that political truth is unknowable, and that majority opinion is essentially dynamic in nature. “Time has upset many fighting faiths” Holmes announced, and suggested that the First Amendment protects the political debate through which a democracy decides what it believes in. And this idea — that the First Amendment, above all, protects a prior political debate — formed the foundation of First Amendment review, and continues to be relied upon when the Court seeks to justify its use of the First Amendment to strike democratically enacted legislation.

Take, for example, the *Citizens United* decision, which struck a ban on political corporate speech. The majority reached back to Holmesian justifications, presumably what it considered the strongest, to justify striking a law passed by Congress. The majority insisted that its actions were necessary to protect the political process: for “speech” it said “is an essential mechanism of democracy.” Moreover, “the right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government.”

When understood as a means for facilitating the democratic process, enforcement of the First Amendment is of a piece with other well-known other efforts to reconcile judicial review with the principles of majoritarian democracy. Perhaps the best known of these is John Hart Ely’s effort to portray and justify judicial review as a remedy for defects in the democratic process. In Ely’s depiction, enforcement of Constitutional rights was best described and justified as remedy for defects of representation (for example, voting rights) and participation (protection of minority groups without meaningful opportunities to participate in majoritarian politics). In this view, the First Amendment serves a similar role, albeit targeting a different problem: that the very process of democratic-decision making depends on information, or more precisely, the presentation of “option sets” to citizens and their representatives. Where the perceived set of realistic options is informationally narrowed or confined to a single option (support the war, support the President), then the deliberation and decision-making implied in democratic governance is hindered if not crippled.

To be sure, Abrams-style facilitation of democratic process is not the only justification for the First Amendment. In his famous *Whitney* concurrence, Brandeis put the matter slightly differently, stressing the many ways means in which freedom of thought and speech serve democratic values, including the development of democratic character, and, over the decades. But the primary vision of the First Amendment’s interaction with the democratic process remains one of facilitation — that “precondition to enlightened self-government.”

**From Enabling Debate to Ending It**

We have described a First Amendment envisioned as the great catalyst of political debate; but in our times, the law does less to enable debate so much as to end it. Consider a typical example of how the law operates in the 21st century.

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5 *Citizens United.*

6 Ely, Democracy and Distrust (1980).

7 See Tim Wu, the Attention Merchants, more more on the “option set” theory of political control.
In 2006 it first became public that commercial chain pharmacies — Rite-Aid, CVS, and so on — were selling private prescription records without the consent of doctors or patients. Pharmacies, pursuant to a federal regulatory mandate, are required to store an enormous amount of private data: at a minimum, they are required to record what medicine is prescribed by which doctors and to whom. At some point — it is unclear when, exactly — the pharmacies and a new generation of data-mining firms realized they were sitting on a gold mine of “big data.” Selling patient data might go too far, but they realized they could profit by selling the highly valuable prescribing information of doctors to firms who would, in turn, create marketing profiles to precisely target the doctors who tended to prescribe expensive drugs.

When knowledge of the practice became public, the American Association of Retired Persons and a number of state and national doctors’s associations condemned the practice as both unethical and a privacy violation — an intrusion into the doctor-patient relationship. Laws seeking to ban the practice were introduced in 13 states around the country.8 Publicity campaigns and out-reach surrounding the practices managed to engage the public sufficiently generate phone-in and email campaigns. As one State Senator in Vermont put it before voting “Is this the piece of legislation that I’ve received so many phone calls from, from constituents asking me to support?”

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8 Arizona: SB 1518 was introduced on January 30, 2007. The bill has not yet moved from committee.
District of Columbia: The SafeRx Act of 2007 (pdf) was introduced on November 16, 2007, and is in the D.C. Council Committee on Health.
Illinois: HB 1459 was introduced on February 21, 2007. The bill was referred to the Rules Committee on March 23, 2007.
Kansas: SB 229 (pdf) was introduced in the Kansas legislature on January 30, 2007.
Maine: LD 4 was enacted, and has been the subject of litigation. NOTE: Maine has passed MRSA 1711-E, which prohibits the sale of prescription drug information that identifies, directly or indirectly, patients or health care providers.
Maryland: SB 266 was introduced on January 30, 2007. No action has been taken since a Finance Committee hearing on March 12, 2007.
Massachusetts: SB 1275 is pending.
New York: The State Assembly is currently considering S2056 and S6992. S2056 was introduced on January 30, 2007 and referred to the Higher Education Committee on January 9, 2008. S6992 was introduced on March 23, 2007 and has been referred to the Health Committee.
North Carolina: SB159 was introduced on February 13, 2007, and has been referred to the Committee on Commerce, Small Business, and Entrepreneurship.
Rhode Island: S. 0653 (pdf) was introduced into the General Assembly during the January session. The bill was referred to the Senate Health and Human Services Committee on February 15, 2007.
Vermont: HB 92 was introduced into the House on January 23, 2007. The bill has not yet received a second reading.
Washington: HB 1850 (pdf) was introduced on January 30, 2007. The bill was returned to the Rules Committee for a second reading on March 15, 2007, and was automatically reintroduced for the 2008 session.
West Virginia: SB 434 was introduced on February 1, 2007. The bill was referred to the Committee on Health and Human Resources, and carries over into the 2008 session.
For their part, the pharmacies and pharmaceutical industry put up a healthy fight. They stressed the benefits of data-mining in terms of gaining a better understanding how drugs are used; academic institutions, for their part, weighed in to suggest that the prescribing data might be useful for research. Lobbyists were deployed across the country to discourage passage of the law, with arguments mainly highlighting the costs of the regulation and the potential benefits of data-mining. The laws’ proponent argued that the practices would inevitably raise the total cost of prescribed drugs to consumers and government. In short, the political debate over prescription record privacy was joined, and was by all accounts, yielded a fair and open debate of the kind envisioned by Holmes and other believers in an open debate in democracy.

The fight, moreover, was close one. On a state-by-state count, the pharmacies won the political battle in more states than they lost, managing to stop or at least delay passage of a new privacy law in some 10 states. But, apparently thanks to highly active medical societies, the laws did successfully pass in New Hampshire, and then Vermont and Maine. The Vermont, the medical society would later write that it “spent much of the 2007 Vermont legislative session championing the law…”

In many ways, the political battle over the prescription-privacy laws operated as both the democratic and federal process is supposed to. Agitated citizens and affected groups reacted to a practice they felt disagreeable and wrong and turned to their local representatives. The industry stressed the benefits and defended its actions, yielding what was, by all appearances, a fully and fairly contested political struggle. No one could claim that either pharmacies or data-miners were unable to represent themselves, or that they represent a kind of disenfranchised group (like the Jehovah’s Witnesses in the 1940s, without effective access to the legislative process. In fact, with its large annual lobbying budget some might say that the pharmacies and pharmaceutical firms were over-represented, though to be fair, in the New England medical societies they faced a worthy opponent.

The battle also represented the federal system operating as envisioned. As we’ve seen, the new practice of selling prescription records prompted the adoption of different responses by different states; and as Brandeis put it, “a state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. …”

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9 As enacted, the Vermont version of the privacy law read, in relevant part, as follows:

[Pharmacies] shall not sell . . . regulated records containing prescriber-identifiable information, nor permit the use of [such] records . . . for marketing or promoting a prescription drug, unless the prescriber consents."

The New Hampshire law read:

“Records relative to prescription information containing patient-identifiable and prescriber-identifiable data shall not be licensed, transferred, used, or sold by any pharmacy benefits manager, insurance company, electronic transmission intermediary, retail, mail order, or Internet pharmacy or other similar entity, for any commercial purpose. . . .”

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an ordinary political process, the experience of the three New England states might have inspired others to follow; or prove to the enacting states that they’d made a mistake.

The state-by-state debate, in short, was in progress, but it was interrupted, when the political losers turned to the First Amendment to try and win through Constitutional litigation the political battle they had just lost. In their complaint, lawyers for the pharmacies and data-miners argued that they were “publishers” and that their resale of the prescribing data was “speech.” The new privacy laws were “censorship” that should be subject to the strictest Constitutional scrutiny. In this new casting, the debate, was no longer about the benefits of big data weighted against privacy or public health questions. Instead, the pharmacies were now were victims of censorship, employing doctrines invented for oppressed outsiders and political dissidents.

The courts, in embarrassing fashion, took the bait. The Second Circuit accepted the simple formula described above: the sale of data was speech, the pharmacies were speakers, ergo the privacy laws were censorship — indeed, targeted censorship. The state’s interests, meanwhile, were insufficiently “advanced” to justify the laws; hence they were unconstitutional. The exception was Judge Seyla of the First Circuit, who saw through the enterprise without difficulty. He pointed out that the pharmacies were really just selling a commodity that happened to be data, and evidently trying to get rid of new regulation they didn’t like. In his view, selling and speech are different activities, and for that reason he didn’t think the pharmacies were really in a different position than the sellers of “beef jerky” or any other commodity.

But the Supreme Court accepted the censorship narrative, in an opinion, Sorrell v. IMS, authored by Justice Anthony Kennedy. What is notable about Supreme Court’s opinion is a complete lack of attention to context or the underlying political process. Instead, Kennedy draws fully and richly on theory and rhetoric designed to protect the political dissident and the interests of listeners. We learn that the law “disfavors specific speakers,” i.e., pharmacies, and “content” (the private information). The speech burdens is at one point compared to those imposed on Martin Luther King and civil rights advocates in New York Times v. Sullivan, and the court also manages to suggests that nude dancing, or a cross burned in protest might be more readily regulated than the chain pharmacy engaged in the resale prescription data. In short, it is an opinion in the rich American tradition of using the highest rhetorical principle to defend a low result.

One criticism of the opinion is very basic: since when is selling data “speech?” But in this essay I focus on a different problem. Nowhere in the Supreme Court’s elevation of the pharmacies into speakers and the privacy laws into censorship is there any hint of an awareness that the judiciary is itself being used. Nowhere is it mentioned that the pharmacies were the actually the losers of a full and fairly contested democratic debate; that the many exceptions in the law are also the byproducts of that process, or any self-recognition that the courts are being asked to do something nearly the opposite of what the pioneers of the First Amendment intended. Indeed, the opinion instead manages to cite Holmes’ dissent in Lochner, apparently without irony.

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As the story of prescription privacy suggests, the originally imagined role played by the First Amendment in political debate does not resemble the role that the Amendment now plays in the political process. The pharmacy privacy case is no exception: as [X] has found, [y%] of
First Amendment cases are now targeted at economic regulation, and the use of the Amendment this way is widely described by scholars and journalists as “First Amendment Lochnerism.” The Constitution has been used to challenge other privacy laws, FDA regulations, consumer protection laws and various others regulations. Empirical studies suggest that the anti-regulatory usage of the First Amendment by business now exceeds its usage for any other purpose.

Other have criticized this evolution; but that is not the direct purpose of this essay. Instead, it is to suggest how the judiciary can and should respond to the way that the First Amendment has changed its role in the political process, and given how far it has drifted from the justification just described. It is one thing, perhaps, to recognize that the Amendment may be employed even when unmoored to its original justifications. But it is something else entirely when the First Amendment is no long facilitating the democratic process, but being used by the losing party in that process to reverse an undesired outcome. My premise is that the judiciary must be sensitive to being used as a means for creating an anti-democratic fallback for political losers, by adopting an “anti-circumvention” standard.

The Anti-Circumvention Principle

The anti-circumvention principle advanced here would insist that the judiciary not ignore the political context in which a First Amendment case arises. While it would not regard the matter as dispositive, it would call upon judges to step back and distinguish between different kinds of First Amendment interventions and how strong the judiciary's justification to act actually is. This approach yields three basic categories in which the judiciary may First Amendment case.

The first category is one where the judiciary is asked to enforce the Constitution to protect a political speaker, and thereby facilitate political debate. In this context it is most strongly justified in invoking the Constitution; its justification for countering a majoritarian result lie in a defense of democratic process itself.

A second category of case is where judicial intervention is neither the direct facilitation of the political process nor its abrogation. Here the judiciary is typically protecting social, political, esthetic, moral, commercial or other ideas and experiences, and the judiciary must rely on the weaker justifications unrelated to protecting the democratic process, but the speakers’ inherent interest in speaking or the listeners’ interest in receiving information.

The third category are cases, highlighted here, are where the judiciary is asked to intervene either to end a political debate, asked by the losing side of a political process to nullify the results of a fully and fairly contested legislative or regulatory process, or both. This should represents a nadir of the judiciary’s reviewing power, for it is actually interfering with the political process, not facilitating it.

This hierarchy obviously does not mean the judiciary would never be justified in using the First Amendment to strike a law that was the byproduct of a fairly contested political

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11 See e.g., Hijacking, New Republic, Kessler,

12 Cf. Youngstown Sheet & Tube Co. v. Sawyer, Jackson, concurring.
process. For one thing, as already suggested, a law the bans political speech is still interfering with the democratic process even if was fairly arrived at. Hence, a full debate that led to a law banning members of the communist party from presenting their views would still be subject to strict scrutiny. Alternatively, a law that proceeded from a fully contested process, but was nonetheless irrational — for the court still has the duty "to determine the reasonableness of the legislature’s belief in the existence of evils and in the effectiveness of the remedy provided."13

These first two categories are already represented in First Amendment doctrine, in the typical representation that restrictions on “core” political speech are subject to the strictest scrutiny, while other forms of speech, on social, cultural or economic topics, is subject to a lesser degree of scrutiny. It is the third category that is new. But what, one might ask, differentiates category two and three? Is it not the case that the defendant can always and invariably claim that every First Amendment case represents the loser trying to strike down is the byproduct of a fairly contested political process?

The answer is “no.” A key is limiting the anti-circumvention principle to situations where it is explicitly obvious that the losing party in the fully contested political debate is, itself, trying to use the courts to reverse that loss. That does not actually characterize much real censorship, which is enacted without the input of the censored party. Many of the Supreme Court’s most important First Amendment cases, like the protection of the rights of Jehovah’s witnesses, or of unpopular, shocking artists, represent situations where the plaintiff was entirely unrepresented. It may go to far to say that the First Amendment is at its strongest when it acts to protect “discreet and insular minorities” but the judiciary certainly seems on stronger grounds defending those unable to protect themselves through the political process.

But does this give the judiciary the impossible task of assessing the validity of an underlying regulatory or legislative process? I think not, for the judiciary is already in that business anyhow; and this offers a good excuse to discuss the particular relationship between the Administrative Procedure Act, or state equivalents, and First Amendment review. For when a challenge is made under the APA, the judiciary is already called upon to adjudge the underlying process that yielded the rule or ruling in question. And upon some reflection it should seem apparent, I think, that a First Amendment challenge tacked onto a failed APA challenge should, for these reasons, usually be subject to the anti-circumvention principle.

While it is impossible to prove there is reason to think that the D.C. Circuit has, over time, already become hostile to such APA tacked-on 1st Amendment challenges by political losers. For example, in the telecommunications field, where every regulated party is plausibly a “speaker,” the opponent of a given regulatory scheme can always bring some kind of First Amendment claim. However, with rare exceptions, the D.C. Circuit has uniformly rejected such challenges, perhaps because it simply so obvious that they are an effort to circumvent the

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13 New State Ice Co. v. Liebmann, 285 U. S. 262, 286–287 (1932) (dissenting opinion)
underlying regulatory process. The most recent example was the effort to negate the Net Neutrality rules enacted in 2015; in which sellers of broadband services claimed that the right to block or discriminate among speakers was a form of editorial speech. The Court dismissed the argument without difficulty; given that this was the FCC’s third effort to write a Net Neutrality rule given the very public debate over the rules, it was perhaps obvious that deciding the matter on First Amendment grounds would be an extreme abrogation of power to the judiciary.

Further Objections

So far I have presumed that the legitimacy of judicial intervention is at least partially a byproduct of its role in the political process. That may not give the First Amendment all of its legitimacy, but certainly some of it, enough to convince even a convinced majoritarian that there are at least some circumstances where the judiciary is entitled to act.

But some defenders of the Court’s interventions might suggest that the process concerns are irrelevant given that the First Amendment is a free standing right lodged in humans and corporations. Some may even believe that the framers of the Constitution had this idea in mind when they added the First Amendment to the Constitution. In this view it then simply the duty of the Courts to enforce the First Amendment as written, so as to prevent any “abridging of the freedom of speech”

This response takes us into a much broader debate surrounding Constitutional interpretation but we might focus on at least two responses. The narrower response focuses on the specific history of the First Amendment, which activated the right as a right designed to protect the political process. A broader response simply asserts that regimes relying on free-floating Constitutional rights have tended to be fragile and risk democratic repudiation. The Lochner period in the Court’s jurisprudence is perhaps the most famous example of such an unhinged, free floating rights jurisprudence; some of the Warren Court’s positions have also eroded. The jurisprudence of the First Amendment, unanchored to any democratic justification, will similarly prove fragile, and that is an approach that any believer in a stable First Amendment jurisprudence ought be wary of.

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14 See, e.g., United States Telecom Ass’n v. Fed. Commc’ns Comm’n, 855 F.3d 381, 382 (D.C. Cir. 2017) (FCC's 2015 Open Internet Order does not violate the First Amendment); Cablevision Sys. Corp. v. F.C.C., 649 F.3d 695 (D.C. Cir. 2011) (Federal Communications Commission (FCC) regulation restricting vertically integrated cable companies from denying rival multichannel video programming distributors (MVPD) access to popular terrestrially delivered programming served important governmental interest of promoting competition in MVPD market, and thus did not violate First Amendment free speech and association rights of cable operators and video programmers); Am. Family Ass’n, Inc. v. F.C.C., 365 F.3d 1156 (D.C. Cir. 2004) (Under rational basis test, point system of the Federal Communications Commission (FCC) for the award of noncommercial educational (NCE) broadcast licenses did not facially violate free speech clause of the First Amendment); Ruggiero v. F.C.C., 317 F.3d 239 (D.C. Cir. 2003) (Statutory provision that permanently barred anyone who had ever operated unlicensed radio station from obtaining low-power FM radio license was reasonably tailored to satisfying substantial governmental interest in ensuring that those who were granted such licenses complied with broadcasting regulations, and did not violate First Amendment).