

Tribes Speech on Privacy

July 21, 2016

Laurence Tribe, Harvard Law School: There's almost an instinctive reaction on the part of some people, who think of themselves as liberal or progressive, that the First Amendment is not for everybody – that if it's invoked in a business setting, invoked to address some matter of economic regulation, it's really just an excuse for disagreeing on a matter of policy.

I think nothing could be more misleading than that. If we begin to say the First Amendment is really relevant to these people and not those, in this context not that, we are really down a very dangerous slippery slope.

A friend of mine, Robert Post, who is the dean of Yale Law School, has a very sophisticated theory about this. He talks about “domains” in the Constitution's First Amendment and you know, that's just a fancy way of saying that, in the domain like the managerial one occupied by a lot of those represented in this room, the First Amendment is a kind of -- I suppose as Justice Ginsburg would have put it -- a “skim milk Constitution.” I can't accept that. I must speak out whenever I conclude that the freedoms of expression are genuinely compromised, regardless of the context, whether it's managerial or openly political or educational or something else.

I don't really hesitate to say so, but I do pay special attention to the need to say why. Because a lot of people think that the First Amendment is just a slogan, it's a bumper sticker, it's a flag that can be used when convenient and sometimes it's abused. But I don't think this is one of those times. That's really why I briefed and argued a case that won in the Tenth Circuit against the FCC in 1999.

In a case called “US West v FCC”, I persuaded the U.S. Court of Appeals to throw out privacy rules that had been adopted by the FCC to govern telephone companies by restricting their right to use customer calling information in their marketing effort.

It was very similar really to the rules involved here. They said “there's a background assumption that the stuff cannot be used,” information can't be used unless the customer opts-in.

Of course it was also possible there, and is here, to protect privacy by allowing customers to opt-out. And the difference between opt-in and opt-out is not two letters or three letters, it makes all the difference in the world. I'll explain.

In the US West case where we won, on the difference between opt-in and opt-out, the Solicitor General's office reviewed the case, and I'm happy to say the government sensibly decided to throw in the towel. They decided to not seek review of the Tenth Circuit's decision in the Supreme Court.

Now the newly proposed privacy rules for broadband internet providers are at least as clearly unconstitutional. They're just a re-incarnation on steroids of the regulations that the Tenth Circuit held invalid. The only reason that this discussion is ongoing and the only reason the FCC apparently thinks it can get away with this, is that the Supreme Court has not yet fully spoken on this particular topic. Let me explain a little more fully.

First of all, the FCC's newly proposed rules would impose burdensome opt-in consent requirements for marketing by broadband providers for anything beyond an extremely narrow category of communication services.

For example, the FCC proposal would require an opt-in to permit speech before broadband providers could use customer information to develop and communicate online ads on social media to enable consumers to receive targeted, useful information in a timely manner. If you think based on what you know that your customer might be interested in a particular product or service, you're not allowed to use that inference to target that customer with information about that product or service, unless the customer overcomes inertia and says "count me in."

Second, the proposal would also require opt-in consent when the broadband provider seeks to use customer information to market what the FCC calls *non-communication-related* services like home security, music, and energy management services to its customers. It draws a content-based line between communications-related services and non-communications-related services.

One of the other peculiar and suspect features of the FCC's proposal is the way it singles out broadband providers for speech-suppressing regulation, while ignoring the fact that much of the very same information is available to and continually used by social media companies: web browsers, search engines, data brokers, and other players. In fact, Google, Amazon, and Facebook and other edge providers accumulate, use and share a lot more customer data than broadband providers. They're the biggest players by far in the online advertising market.

Broadband providers are basically the new kids on the block. They might introduce more competition into the online advertising space. They could drive down advertising rates, improve services for consumers and businesses, big and small alike, which increasingly use online marketing. So in this case it is David versus Goliath, and the FCC is taking the side of Goliath. While the FCC muzzles broadband providers, these others, Google, Amazon, Facebook, the Goliaths, are subject to a much more flexible and nuanced regulatory regime.

The Federal Trade Commission's privacy protection framework focuses narrowly on punishing deceptive or unfair practices, and not on ascribing greater value and importance to some speech within the regime. The FTC allows companies to market *all* of their services to their customers who don't opt out. It does not try to limit marketing to what the FCC calls "communications-related" services.

The whole theory of the FTC's policy is based on the a commonsense notion of implied consent. It's based on the sound empirical judgment that, except where the customer affirmatively indicates otherwise by opting out, that kind of marketing falls within the reasonable expectations usually associated with the relationship between customer and company, within the expectations of the customer. Their response is to say, "Well, there is a difference between what you expect regarding communication-related services, and what you expect regarding things like the devices put on your front door so you can see who is coming when you are not right there at the time."

But in this highly technologized social media age, drawing a line between communication-related services and non-communication-related services is meaningless. People do not form their expectations depending on any such artificial and strictly legalistic line. The FTC, in contrast to the FCC (though the FTC is anything but perfect!), requires opt-in consent only with respect to the very narrow category of sensitive data, data about children, health, financial numbers, social security, your home location, or

where you or your car happen to be at any given moment. Now that is a line that makes sense even in the era of high-tech social media.

The FTC allows all other uses by information providers regardless of who they are, subject to an opt out consent mechanism that begins with a baseline of speech rather than a baseline of no speech.

The third point I'm going to make is that the FCC's proposal is also contrary one of the salutary pillars of the FTC's framework. It is not a pillar grounded in the Constitution as such, but it echoes important constitutional values. And that's the pillar of technology neutrality. The FTC applies the same rules to everybody. It doesn't single people out based on the particular technology they use. The FTC concluded in its 2012 privacy report that any privacy framework should be technology-neutral. It's extremely important when you are implementing constitutional norms that the implementation not be tied to a particular state of technology in an era when technology evolves rapidly and where different technologies merge and intersect in various ways. There is no surer way to guarantee that a regulatory regime will be out of phase with constitutional values than to couch it in terms of the temporary differences between some technologies and others.

The FTC found that the broadband providers are just another form of platform provider that may have access to a consumer's online activity. In fact the FTC has brought a lot more privacy enforcement actions against the big edge providers like Facebook than against broadband companies, but it doesn't do that on the basis of some technological quirk. In short, while the FTC's privacy framework is based primarily on an opt-out regime, and draws lines in accord with sensible criteria, the FCC's proposal flips the pro-speech presumption on its head – imposing an unprecedented and far-reaching opt-in regime targeted solely at broadband providers and covering all data, not just sensitive data.

The fourth thing I want to say is that one of the most puzzling questions to me, and one of the reasons I got really interested in doing this – because there are a lot of unconstitutional things to tackle out there – is the question of why the First Amendment implications of the FCC's proposal are not really front and center in this debate. Why is this treated as a debate about technical things and about economics rather than about constitutional principle?

We do sometimes get sidetracked by technical aspects of a controversy and lose sight of the fundamental constitutional principles that are at stake and that are a lot older than any of these new technologies -- principles that are more basic than the current technological setting. If you put the FCC rules in their proper context, what you see is that in a very wide range of circumstances the Supreme Court of the United States has consistently treated opt-in consent requirements for speech as particularly severe restrictions on constitutionally protected expression.

For many decades, really almost for eighty years, the Court has been sensitive to the psychological and economic realities of inertia. It has invariably recognized the virtues of a regulatory regime in which the fall-back presumption or baseline, if you will, is the presumption that one is permitted to engage in speech and in the processing of information that goes into speech, unless someone with a protected stake in that information, a privacy stake or a proprietary stake, says no – rather than the other way around -- rather than a prohibition against speech and information processing unless a protected individual says yes.

Let me give you some examples. One of the earliest and most influential cases is a case called *Martin v. Struthers* decided by the Supreme Court all the way back in 1943. There, the Court invalidated a city

ordinance that effectively operated as an opt-in consent requirement. The ordinance prevented door-to-door distributors of handbills, religious or otherwise, from reaching audiences that didn't affirmatively seek them out. So, it was a misdemeanor to knock on an unmarked door and say to the owner or occupant of the home, "I'm with the Jehovah's Witnesses," or, "I'm with the Trump campaign; I'm with the Clinton campaign..." You couldn't do that unless the occupant had in effect invited you in advance to approach by saying, "Solicitors welcome!" The Court held that this ordinance impermissibly burdened speech because it effectively required an affirmative invitation or opt-in by a homeowner. Under the principle of *Martin v. Struthers*, a governmental body cannot make it an offense for you to approach someone on the street and ask, "Can I talk to you for a minute?" unless the person being approached wears a sign saying, "All talkers welcome." But government *can* facilitate privacy and even isolation by forbidding the harassment of someone who is wearing a sign saying, "Don't talk to me unless I invite you to." So if somebody ignores that sort of sign and insists on hassling you anyway, he or she can be convicted of a misdemeanor.

That's one case in context. Another is *Lamont vs. Postmaster General*, 1965. A lot of my students are surprised when I inform them that *Lamont* was the first case in American history where the Supreme Court struck down an act of Congress on free speech grounds. 1965—to somebody as ancient as I am, that seems like very recent history. I used to teach it as a recent case until the time came when most of my students didn't even have parents who were born before 1965! In any event, that case involved a law that basically said, "If you want to get mail from an organization that the Attorney General thinks is suspect because of its violent or subversive leanings, you must take steps to inform the Postal Service of your interest and, in effect, have your name posted along with the names of the "Ten Most Wanted." Otherwise, mail from these sources would be burned rather than delivered to you. Well, that was regarded by the Court in 1965 as an impermissible opt-in requirement. The Court later held that it's perfectly okay to have a rule that says, "If you've gotten too much unwelcome mail from some terrorist group or from this or that political campaign lately, you can inform the Postal Service to stop delivering mail from the source you've designated as unwelcome, at which point the government will dispose of that mail rather than dump more of it into your mailbox." And you can even have the government inform someone to stop flooding your mailbox with hand-delivered stuff. At which point the source must discontinue on pain of criminal prosecution. In other words, the government can enforce an opt-out rule even where it cannot enforce an opt-in rule.

The other case I have in mind was one decided 20 years ago, in 1996. In *Denver Area Educational Telecom Group Consortium, Inc. v. FCC*, the Court struck down what's called a "segregate-and-block" system for receiving supposedly indecent cable shows on the ground that such an opt-in system for potentially offensive or "adults only" communication impermissibly suppressed speech that some parents, but not others, would want their children not to receive. You can imbue viewers with the ability to exclude certain things from their homes and their kids if they take affirmative steps to do so, but you cannot constitutionally say that a whole bunch of stuff is excluded based on a presumption that families with children would find it unwelcome unless the busy if not overwhelmed parent says, "I've cleared it and it's fine with me for my kids to see it, so I'm going to opt-in."

And in the most relevant case, the case of *Sorrell v. IMS Health Inc.*, decided five years ago in 2011, the Court invalidated certain opt-in rules designed to protect doctor-and-patient privacy, a value of great and even constitutional magnitude, when those rules were adopted by the state of Vermont. *Sorrell* is especially relevant here. The case involved a Vermont statutory scheme designed to discourage, although it didn't completely cut off, the flow of pharmacy records about the prescribing practices of individual doctors—information that IMS Health and other companies would otherwise be able to

obtain from pharmacies and other entities involved in the course of filling patient prescriptions. The individual patients' names weren't being sought by those companies, so their privacy wasn't at issue. The statutory scheme was ostensibly aimed at protecting the privacy of those prescribing physicians who didn't affirmatively opt in to having their identities and prescribing practices shared with the pharmaceutical companies that were trying to figure out which doctors were worth approaching with some new or newly mixed medication, based on those doctors' prescribing habits. Rather than merely letting doctors *opt out* of having their identities and prescribing habits shared in this way with the pharmaceutical companies, the state scheme presumed that all doctors would rather keep such information to themselves unless they actively opted in to having it shared. Thus the Vermont law restricted the flow of relevant information by imposing an opt-in requirement mandating physician prescribers' consent before the records would be released.

The Court had no difficulty recognizing that this was an abridgment of free speech, even though it didn't ban anything outright. It just chose opt-in rather than opt-out, and it certainly didn't resemble a scheme to censor disfavored ideas or points of view. But the Court has avoided the speech-hostile view that the First Amendment is here *only* to protect the speech we hate, to protect dissidents and people who dissent. That may be its most fundamental aim, but that is not its only purpose. Its purposes include unfettering the flow of speech and of the information without which speech would become impossible - - not to have the government sit as a kind of colossus astride the flow of information and to decide what information is really valuable enough to give it a green light unless somebody says "No, no," rather than give it a red light unless somebody says "Yes, yes."

The key factor that led to the ruling in *Sorrell* was that the information in the records in question provided the necessary raw material to enable more targeted and effective marketing of potentially valuable medications that could work to the benefit of patients and doctors alike. The information in question was data that would allow drug manufacturers to effectively and efficiently locate those doctors treating the patients who might be most in need of a new drug and identify those doctors who were early adopters and likely to be the most willing to prescribe the drug in question. Deterring that activity by using an opt-in requirement and thereby reducing the efficiency of provider outreach is obviously closely parallel to what the FCC is doing here -- employing an opt-in requirement to restrict uses of customer data to help broadband providers identify those customers most in need of and likely to want particular services.

So what these cases all show is that we are not talking about some bizarre new doctrine applying the First Amendment outside its traditional wheelhouse just to enhance business profits in one or another industrial sector. We're not talking about wrenching a majestic constitutional guarantee out of its natural setting to achieve purposes alien to the system of free expression. Rather, we -- and here I mean to include both myself and those of you here who choose to invoke the First Amendment to challenge how the FCC is proceeding -- are resorting to the fundamental architecture of the American constitutional structure and of the legal system of which our Constitution is the foundation. And we are resorting to that architecture by employing an idea that the Supreme Court has recognized across many contexts over the past half century and more. It's the simple idea that, as a practical matter, opt-in requirements make a huge difference, and it's not just a difference in theory. The reason is obvious. Efforts to solicit opt-ins from one's potential audience are often not worth the cost. Doing so for the small percentage of likely affirmative responses will simply be too expensive to be worthwhile. The result will be artificial inefficiencies introduced into the flow of truthful and valuable information, and thus an unnecessary blockage to the free flow of that information. And that's exactly the result the FCC rule I've been discussing would inevitably yield.

Now, as all of you know, the fact that something implicates the First Amendment isn't the end of the legal conversation. In a way, it's only the beginning. Because then the question is, what are the reasons that the government has for imposing the kind of inhibition to the free flow of protected speech and unfettered information? Do those reasons justify what the government is doing in terms of inhibiting speech? My conclusion here is that the FCC's proposed rules almost certainly could not survive any meaningful degree of First Amendment scrutiny – and certainly could not survive any version of heightened scrutiny, either strict scrutiny or something only slightly less, that the Supreme Court has applied for nearly three quarters of a century to opt-in rules of the sort that the FCC proposes to adopt for its broadband privacy regime.

For one thing, the regulatory asymmetry between broadband providers and major digital platforms not only is a factor in triggering the First Amendment, but also is an important factor in showing the First Amendment's standards are not satisfied. That is, the asymmetry shows that the FCC's proposed rules are not sufficiently tailored to any important governmental interest. By essentially blocking broadband provider entry into the online advertising market and singling out new entrants in the online advertising space for regulatory obstacles more stringent than those applicable to the established market leaders – market leaders whose threat to privacy concerns is obviously no less than what is posed by the new kids on the block – the FCC's proposal is exposed as an Emperor Who Has No Clothes. It's a nakedly anti-consumer measure, rather than a pro-privacy measure, and it can't survive First Amendment scrutiny.

The other thing the FTC's existing review for privacy regulation shows is that there exists an obvious less speech-suppressing alternative that would fully address the government's legitimate interest in protecting consumer privacy – namely, an opt-out, rather than an opt-in regime.

So it feels to me as though we have come full circle in the past 17 years. In 1999, in the case I argued where the government decided to toss in the towel, *US West*, the FCC basically behaved as though it could regulate telephone use of customer proprietary information without worrying about that peculiar and pesky First Amendment – a constitutional provision that the FCC, like more than a few regulatory agencies, habitually assumed was significant only in cases involving things like speech by the NAACP or by the Communist Party, not plain old information bearing on the interests of ordinary consumers in their everyday lives.

That of course was the government's basic position when I got up to argue. The government's lawyers basically asked, "What does the First Amendment have to do with economics, with economic regulation? That's the domain of money, not the domain of speech." Of course they couldn't answer questions like "How come the *New York Times* is protected even though it tries to turn a profit?" Money and speech are inseparably intertwined here, as they are nearly everywhere.

So here we are almost two decades later and we are having the same conversation. Only this time the FCC is going one step farther. It is proposing to silence David while allowing Goliath to speak even more. I guess Santayana was right about the perils of ignoring history. And that is why I think the First Amendment case here is very strong as well as very important. Thanks so much for your kind attention.