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## ESSAY

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### A LOCKED IPHONE; UNLOCKED CORPORATE CONSTITUTIONAL RIGHTS

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The Roberts Court, extant for eleven years, has acquired the pejorative moniker, the “Corporate Court.”<sup>1</sup> In the same short time span, the Court has repeatedly landed in the doghouse with constitutional scholars for its blunderbuss use of the First Amendment to invalidate key laws, including those regulating money in politics.<sup>2</sup> (Maybe the Court’s next nickname should be the “Democracy Slayer.”) At times these aspects of ill repute intersect, as in the nearly universally reviled *Citizens United* decision granting corporations the constitutional right to spend an unlimited amount of corporate money on political ads in American elections.<sup>3</sup>

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1 *E.g.*, PEOPLE FOR THE AM. WAY, *THE RISE OF THE CORPORATE COURT: HOW THE SUPREME COURT IS PUTTING BUSINESS FIRST* (2010), [http://www.pfaw.org/sites/default/files/rise-of-corporate-court-final\\_o.pdf](http://www.pfaw.org/sites/default/files/rise-of-corporate-court-final_o.pdf) [<https://perma.cc/3W4A-NFSW>]; Jamie Raskin, ‘*Citizens United*’ and the *Corporate Court*, NATION (Sept. 13, 2012), <http://www.thenation.com/article/citizens-united-and-corporate-court> [<https://perma.cc/5N5H-L2E6>]; *The Corporate Court*, ALLIANCE FOR JUST., <http://www.afj.org/our-work/issues/supreme-court/the-corporate-court> [<https://perma.cc/F2CR-DE7H>].

2 *See, e.g.*, ERWIN CHEREMINSKY, *THE CASE AGAINST THE SUPREME COURT 6* (2014) (“[T]he Supreme Court usually sides with big business and government power and fails to protect people’s rights. Now, and throughout American history, the Court has been far more likely to rule in favor of corporations than workers or consumers . . . .”); ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 73* (2014) (“Ordinary commercial corporations are not vehicles of self-governance.”); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1549 (2008) (“Recent cases that illustrate ‘conservative activism’ include decisions that aggressively interpret the First Amendment to invalidate restrictions on commercial advertising and campaign finance regulations . . . .” (footnotes omitted)).

3 Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015, 5:00 AM EDT), <http://www.bloomberg.com/politics/articles/2015-09->

Empirical studies of the Supreme Court show that both negative reputations are richly deserved. As Judge Richard Posner and his co-authors showed in 2013, five of the most pro-business Justices since the mid-twentieth century served on the Roberts Supreme Court, and Justices Roberts and Alito are the two most pro-business Justices since 1946.<sup>4</sup> Moreover, a recent study by Harvard Law Professor John Coates showed, “[n]early half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals.”<sup>5</sup>

Unfortunately, the Court’s use of the First Amendment as a deregulatory tool is not unique to its campaign finance cases. The Court’s corporate speech jurisprudence is also grounded in a deregulatory First Amendment, which further undermines the ability of the government to regulate the economic marketplace. Although the unexpected passing of Justice Scalia in early 2016 might reset the path of the Supreme Court away from its pro-corporate anti-democratic trajectory, much is contingent on who the new Justice is.<sup>6</sup> In the meantime, as the U.S. Senate stalls on the confirmation process for a replacement Justice, corporate lawyers in the lower courts have shown no reluctance in trying to build on the Roberts Court precedents that have expanded corporate rights in the past decade. A case in point is Apple, Inc.’s tussle with the FBI.

In early 2016, a fight over a cell phone showed once again that corporations are eager to assert new and aggrandized corporate constitutional rights. The fact that this battle centers on a cell phone is no surprise as this technology has become a staple of modern life and a contested territory for law enforcement—who want to use the digital records in the phones as evidence in criminal cases—while individuals entrust more and more of their personal life and internal thoughts to these devices with a certain expectation of privacy. As Chief Justice Roberts once wrote: “modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”<sup>7</sup>

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28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot (“Americans . . . are united in their view of the 2010 Supreme Court ruling that unleashed a torrent of political spending: They hate it. In a new *Bloomberg Politics* national poll, 78 percent of those responding said the *Citizens United* ruling should be overturned . . .”).

4 Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 (2013).

5 John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 224 (2015).

6 See Erwin Chemerinsky, *The Roberts Court and Freedom of Speech*, 63 FED. COMM. L.J. 579, 589 (2010) (“When Byron White was on the Supreme Court he was fond of saying, ‘Every time there is a new Justice, it is a different Court.’”).

7 *Riley v. California*, 134 S. Ct. 2473, 2484 (2014).

In 2016, a battle between two titans, the FBI and Apple, flared over whether a judge could order Apple to create a program to unlock the iPhone of the dead San Bernardino gunman.<sup>8</sup> Apple refused, asserting that building such an end-run around its encryption would make all Apple phones more vulnerable.<sup>9</sup> The FBI argued Apple's cooperation was needed in an anti-terrorism investigation.<sup>10</sup> The case ended when the FBI found a third party to unlock the iPhone in question for them without Apple's assistance.<sup>11</sup> But, in its opposition to the government's request for help, Apple asserted a particularly grand set of corporate constitutional rights, which if accepted by the courts, could have further undermined the government's ability to regulate the economic market, which is increasingly digital and where the coin of the realm is data.

As I discuss in my book, *Corporate Citizen?*, presently corporations in America are enjoying a bizarre confluence of solicitude from U.S. courts.<sup>12</sup> *Citizens United* (granting corporations more political rights) and *Hobby Lobby* (allowing for corporations to avoid the responsibility to pay for certain healthcare) have stolen the headlines,<sup>13</sup> but other lesser known cases like *Sorrell v. IMS Health* have also been indicative of this phenomenon.<sup>14</sup>

Historically, corporate lawyers have been first in line to claim constitutional rights for their incorporeal clients. Whether it was protection of property rights in *Terrett* in 1815, or coverage of the Constitution's Contracts Clause in *Dartmouth College* in 1819, corporations were both early litigants and early winners.<sup>15</sup> After the Civil War, corporations raced to the courthouse to assert rights under the Fourteenth Amendment's equal

<sup>8</sup> Order Compelling Apple, Inc. to Assist Agents in Search, In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus is300, California License Plate 35KGD203, No. 15-0451, (C.D. Cal. Feb. 16, 2016).

<sup>9</sup> Tim Cook, *A Message to Our Customers*, APPLE (Feb. 16, 2016) ("Compromising the security of our personal information can ultimately put our personal safety at risk. That is why encryption has become so important to all of us.").

<sup>10</sup> Government's Motion to Compel Apple Inc. to Comply with this Court's February 16, 2016 Order Compelling Assistance in Search, In re Search of an Apple iPhone Seized During the Execution of a Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. 16-0010 (C.D. Cal. Feb. 19, 2016).

<sup>11</sup> Devlin Barrett & Daisuke Wakabayashi, *FBI Opens San Bernardino Shooter's iPhone; U.S. Drops Demand on Apple*, WALL ST. J. (Mar. 28, 2016), <http://www.wsj.com/articles/fbi-unlocks-terrorists-iphone-without-apples-help-1459202353> [<https://perma.cc/U66B-ACT9>].

<sup>12</sup> CIARA TORRES-SPPELLISCY, CORPORATE CITIZEN?: AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE (forthcoming June 2016).

<sup>13</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>14</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

<sup>15</sup> *E.g.*, *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 47 (1815); *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 651 (1819).

protection and due process clauses.<sup>16</sup> Corporations have also become greedy for First Amendment rights. Two cases from the 1970s set this approach barreling downhill like a runaway train: *Virginia Pharmacy*, which granted commercial advertisements First Amendment protection, and *Bellotti*, which granted corporations the right to spend in ballot initiative fights.<sup>17</sup>

Uncharacteristically for a corporation, Apple was actually on the side of personal privacy in the Apple versus FBI fight. But typically, corporate interests and personal privacy interest are not so neatly aligned. Often the corporate interest is to squeeze personal information out of every transaction, repackage it, and sell it. As Professor Frank Pasquale notes, “personal data markets [are] a \$156-billion-a-year industry.”<sup>18</sup> In our information-based economy, a free speech doctrine that protects data and information as “speech” has incredible deregulatory potential.<sup>19</sup> And, as privacy experts have warned for years, once data is in the hands of a private company, it’s that much easier for the government to get its hands on it, too.<sup>20</sup>

Privacy advocates should rejoice that the Apple/FBI imbroglio is not being litigated to the Supreme Court because of a little noticed case from Vermont in 2011 called *Sorrell v. IMS Health* in which the Court ruled against a Vermont law that kept doctor’s prescription records out of the hands of corporate drug representatives.

In *Sorrell*, the issue was that drug representatives, also known as “detail men,” were using doctors’ prescription habits to brow beat doctors into prescribing more of their particular drugs.<sup>21</sup> The law allowed academics to

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16 See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 780 n.15, 795 (1987) (invalidating a ban on corporate spending on ballot initiatives while noting that “[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment”); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (overturning a discriminatory tax on the press because “[a] free press stands as one of the great interpreters between the government and the people”); *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (stating corporations are persons for the purposes of the Fourteenth Amendment).

17 *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bellotti*, 435 U.S. 765.

18 Frank Pasquale, Opinion, *The Dark Market for Personal Data*, N.Y. TIMES, (Oct. 16, 2014), <http://www.nytimes.com/2014/10/17/opinion/the-dark-market-for-personal-data.html> [https://perma.cc/Z389-KHYX].

19 See Amanda Shanor, *The New Lochner* (Sept. 2, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2652762>.

20 See Chris Soghoian, *Keeping the Government Out of Your Smartphone*, ACLU (Sept. 18, 2012, 11:48 AM), <https://www.aclu.org/blog/keeping-government-out-your-smartphone> (“Apple . . . will unlock phones and extract data from them for the police.”).

21 See Marcia M. Boumil, *Pharmaceutical Gift Laws and Commercial Speech Under the First Amendment in the Wake of Sorrell v. IMS Health, Inc.*, 8 J. HEALTH & BIOMEDICAL L. 133, 144 (2012) (“[I]n planning a marketing pitch to a particular physician, the company would use the information gleaned through data mining to tailor its presentation.”); Tamara R. Piety, *“A Necessary Cost of Freedom”? The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 12-17 (2012) (“If the seller can convince doctors to prescribe the new, patented drug rather than the older generic form of the drug, this is of obvious financial benefit to the drug company that manufactures it.”). See also *Sorrell v.*

have access to prescription records, but disallowed the sale of the data for commercial uses.<sup>22</sup> Three data mining firms (IMS Health, Verispan, and Source Healthcare Analytics) sued claiming that the law violated the First Amendment rights of the companies.<sup>23</sup> The Supreme Court invalidated the Vermont law that had protected prescription data from commercial uses.

Vermont had argued that data mining was merely conduct, not speech. An appeals court below accepted this argument: “[T]he First Circuit has characterized prescriber-identifying information as a mere ‘commodity’ with no greater entitlement to First Amendment protection than ‘beef jerky.’”<sup>24</sup> The majority of the Supreme Court rejected this characterization, noting: “dissemination of information [is] speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much [] speech.”<sup>25</sup>

Justice Kennedy, writing for the Supreme Court majority in *Sorrell*, concluded the Vermont law was unconstitutional under the First Amendment, “[o]n its face, Vermont’s law enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information . . . . The law on its face burdens disfavored speech by disfavored speakers.”<sup>26</sup> The majority thought of the law not as a protection of the privacy of patients, but rather as a form of targeted government censorship. Previous cases had given commercial speech less robust protections than political speech. In *Sorrell*, the Court reduced the saliency of this important distinction. Justice Kennedy established in *Sorrell*: “[a] consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.”<sup>27</sup>

One big loser in *Sorrell* was personal privacy. As Professor Wilson Huhn summarized, in *Sorrell*, “the Court found that the interest of the public in receiving information about matters of public interest trumps the privacy

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IMS Health Inc., 131 S. Ct. 2653, 2661 (2011) (“[Vermont’s] legislature further found that detailing increases the cost of health care and health insurance; encourages hasty and excessive reliance on brand-name drugs, before the profession has observed their effectiveness as compared with older and less expensive generic alternatives; and fosters disruptive and repeated marketing visits tantamount to harassment . . . .” (citations omitted)).

<sup>22</sup> See *Sorrell*, 131 S. Ct. at 2660 (quoting the Vermont statute).

<sup>23</sup> *Sorrell v. IMS Health, Inc.*, OYEZ, [http://www.oyez.org/cases/2010-2019/2010/2010\\_10\\_779](http://www.oyez.org/cases/2010-2019/2010/2010_10_779) [<https://perma.cc/6NXY-BM87>].

<sup>24</sup> *Sorrell*, 131 S. Ct. at 2666.

<sup>25</sup> *Id.* at 2667 (citations omitted).

<sup>26</sup> *Id.* at 2663.

<sup>27</sup> *Id.* at 2664 (quotation marks and citation omitted).

interests of private citizens.”<sup>28</sup> But the biggest loser in *Sorrell* was Vermont, and more generally, lawmakers. As Professor Jedediah Purdy has explained:

[T]he First Amendment has helped the Supreme Court do for the consumer capitalism of the Information Age what freedom of contract did for the Industrial Age: constitutionally protect certain transactions that lie at the core of the economy. This makes unequal economic power much harder for democratic lawmaking to reach . . . .<sup>29</sup>

Corporations have enjoyed an odd combination of winning rights previously reserved for citizens, while simultaneously being excused from responsibilities that attach to citizenship. This “heads I win, tails you lose” approach for corporate actors needs to be rethought. And the vacancy left by Justice Scalia’s death affords the Supreme Court a chance to take a different path that places individuals in pride of place in our democratic system. Apple argued that what was wrong with the court order to assist the FBI was that “[t]his amounts to compelled speech and viewpoint discrimination in violation of the First Amendment”<sup>30</sup> and it “violates Apple’s substantive due process right to be free from arbitrary deprivation of [its] liberty by government.”<sup>31</sup> For now Apple’s fight with the FBI is over. But the arguments that Apple made in its briefs are likely to pop up again in future corporate litigations. These arguments could end up further magnifying corporate constitutional rights, and reducing the ability of the government to regulate corporate actors. Next time, I doubt the public will be lucky enough to have the corporate interests and personal privacy interests overlap as much as they did in the now terminated Apple litigation.

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28 Wilson Huhn, *2010–2011 Supreme Court Term: Decision in Sorrell v. IMS Health, Inc.*, AKRON L. CAFÉ (June 24, 2011), <http://www.ohio.com/blogs/akron-law-cafe/akron-law-cafe/C3%A9-1.295890/2010-2011-supreme-court-term-decision-in-sorrell-v-ims-health-inc-1.297007>.

29 Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY J. (Winter 2012), <http://democracyjournal.org/magazine/23/the-roberts-court-v-america> [https://perma.cc/6J39-LLMP].

30 Apple Inc’s Motion to Vacate Order Compelling Apple Inc to Assist Agents in Search, and Opposition to Government’s Motion to Compel Assistance at 32, In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus is300, California License Plate 35KGD03, No. 16-0010 (C.D. Cal. Feb. 24, 2016).

31 *Id.* at 34 (alteration in original).