

Interrogating the Analogy of the Marketplace of Ideas, Interpreting the First Amendment

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Introduction

“Freedom of speech,” as a phrase and as a concept, often keeps company with “the marketplace of ideas.” Though the marketplace of ideas and freedom of speech each appear in other company, too, at times, they have an acknowledged long-term relationship. Indeed, the marketplace metaphor for the realm of ideas was called into being as a helpmeet to the concept of freedom of speech. This happened in a dissenting opinion written in 1919 by Supreme Court Justice Oliver Wendell Holmes in the case *Abrams v United States*. (Holmes was on the losing side of the decision, but nevertheless won a lasting victory over discursive terrain.) Vincent Blasi calls Holmes’ dissent “the canonical opinion that gave rise to the arresting figure of the ‘marketplace of ideas’” (Blasi 2004 p.2).

The arresting figure of the marketplace of ideas arose from the work of a famed United States Supreme Court justice just as a literal marketplace of ideas was taking shape in the United States at large. In the early twentieth century, it was increasingly possible to take one’s dollars into the market and purchase the services of communications professionals. Early instances of coordinated public relations campaigns were impressive enough that the federal government leapt into the practice of PR in conjunction with the leap into military engagement in the Great War, as it was then known (Ewen 1996).

There are many possible justifications for our first amendment right to freedom of speech, and many possible interpretations of what a guarantee of a right to free speech actually entails. Frederick Schauer calls the idea that free speech is the best route to arrive at truth the “ruling theory” of freedom of speech — not the sole theory, but the most widely recognized and cited. He continues, “Under this theory, often characterized as the marketplace of ideas, truth will most likely surface when all opinions may freely be expressed, when there is an open and unregulated market for the trade in ideas” (Schauer 1982 p.16). A theory in such wide circulation as the argument from truth certainly has been interrogated before. Blasi, for example, finds it unlikely that a free market in ideas will lead reliably to truth, and unlikely that Holmes would have thought so, but finds other, more persuasive dimensions in the free marketplace metaphor for free speech (Blasi 2004 p.2).

I propose to investigate the performance of the metaphor of the marketplace of ideas when it crosses paths with the literal marketplace of ideas. In particular, the paths of the literal and metaphorical ideas markets have crossed in two critical Supreme Court decisions of the past decade: *Citizens United v. Federal Election Commission* (2010) and *Janus v. American Federation of State, County, and Municipal Employees Council 31, et al* (2018).

A Brief Stop in the 1910s

The analytical and political challenges we confront in first amendment interpretation have historical roots in the early twentieth century. During the 1910s, several interrelated developments in the economics of communication, the government's own communications strategies, and first amendment jurisprudence generated conflicts and contradictions that we still wrestle with a century later. Our current media model, the way we fund the not-so-free flow of ideas, was established at the turn of the 20th century when the current model of advertiser driven media was established. By the 1910s, while publishers still sold reading matter to audiences and collected sizable subscription revenue, the core of their business was selling audiences to advertisers. A newly modernized advertising industry had evolved to mediate sales of audiences while preparing the content of the advertisements in periodical publications and in other communications media, as well (Laird 1998).

Public relations emerged as a new complement to advertising in the 1910s. PR professionals developed strategies to shape the content of speech and deliver that speech to intended audiences beyond the boundaries of designated advertising space. They honed techniques for controlling and framing access to information so that journalists' accounts and word of mouth transmission of stories would be tilted in their clients' favor (Ewen 1996).

The newly modernized communications industries, advertising and public relations, came into their own through active government policy that overall supported the interests of industry participants. Then, the decision to enter the Great War (World War I), led the federal government to commit to a massive PR effort of its own. The Committee for Public Information (CPI) hired advertising and PR professionals who made use of the newest techniques to intervene in meaning making on a large scale. The goal was to engineer consent for the war by combining dissemination of approved messages with suppression of contrary messages (Ewen 1996).

Meaning making had thus become the business of paid professionals on the payroll of business or government; less-resourced competitors for control of the narrative were confronted by dominating institutions. In this setting, Oliver Wendell Holmes wrote what is now one of the most pervasively used metaphors for analyzing the first amendment free speech standard. The case was this: anarchists opposed to the Great War printed and distributed pamphlets countering the CPI's pro-war messaging. They were arrested and charged with inciting resistance to the war effort and advocating an end to production of necessary war material, actions that had been recently criminalized by the Sedition Act of 1918. The case was appealed all the way to the Supreme Court, where in 1919 Holmes wrote in the anarchists' favor, arguing that even ideas that are widely believed to be dangerously wrong should have a chance to be tested in the "competition of the market." (Holmes 1919, and quoted in Blasi 2004). Although Holmes wrote in dissent, his words have outlived the decision so that the metaphor of a marketplace of ideas continues to shape first amendment scholarship and jurisprudence. It offers a widely accessible — though by no means universally accepted or unchallenged — common sense justification for a broadly tolerant approach to the governance of speech (Schauer 1982). Yet, it describes a competitive speech environment that offered a misleading picture of the communicative realm even when Holmes wrote, and perhaps more so now.

The marketplace of ideas metaphor germinated in an historical moment when a literal market in ideas was expanding in scope and falling under the sway of paid professionals and their employers. By 1919 ideas could, and still can today, be purchased from communications professionals. Audiences could, and still can, be purchased from attention merchants. In the metaphorical ideas market, we sell by persuading and buy by being persuaded; in the literal ideas market, a buyer purchases with money and a seller sells by delivering the speech or the audience the buyer paid for. These two marketplaces, metaphorical and literal, sit uneasily together. The first amendment says that government shall not interfere with people's right to speak freely, but as the marketplace of ideas becomes ever more literal, government becomes ever more entangled in establishing and enforcing intellectual property rights that shape what can be said by whom and to whom. These property relationships also shape the flows of economic resources resulting from the deployment of speech.

Some of the contradictions in the coexistence of metaphorical and realized (i.e. monetized) ideas markets, or The circulation of money and the circulation of ideas

Let's begin with a basic monetized exchange in the literal ideas market, $M - C$ where C is a speech commodity. Suppose that the speech is the end goal; money is the means of exchange used to pay the speaker to produce the desired speech. If the first amendment is interpreted in such a way that purchased speech is granted the same protections as non-commodified speech, then freedom of speech is not a right that applies equally to all. Instead, the more money you have, the more free speech you get. (Constitutionally free but not economically free.)

As a next step, suppose that we consider the exchange from the perspective of a profit-motivated speech-seller. From this vantage point, the speech is not an end in itself, but rather the means to the end of accumulation: $M - C - M'$ where C is a speech commodity. When speech production is a business proposition, speakers-for-hire produce the speech that will turn a profit. The history of PR shows us that producing speech for profit operates according to a very different epistemology than does the imagined process by which the metaphorical marketplace of ideas leads to the discovery of truth.

The argument from truth in the metaphorical marketplace of ideas depends on an enlightenment conception of objective truth. This objective truth can be approached through reasoned discourse and the weighing of competing arguments. Any particular belief is quite likely the product, at least in part, of human fallibility rather than the successful exercise of human reason, but continuing to accept new evidence and new arguments and continuing to exercise reasoned judgment holds out the possibility of approaching ever closer to the truth (Schauer 1982, pp.15-29). As Holmes famously wrote, "But when men have realized that time has upset many fighting faiths, they may come to believe ... that the best test of truth is the power of the thought to get itself accepted in the competition of the market..." (quoted in Blasi 2004, p.3).

The epistemology by which public relations operates is something else again. Early in the twentieth century, PR pioneer Ivy Lee was among the first to articulate a new idea of what constituted "fact." He talked about fact in subjective terms, rather than objective. Stuart Ewen observed, "If Enlightenment faith had held that facts were instruments of knowledge by which

informed citizens would rule their own destiny, now the 'fact' was being marshaled, from both sides of the aisle, as a dramatic device, a conscious play to the balcony. The presumed connection between 'the fact' and objective measures of evaluation was vanishing" (Ewen p.80). After World War I, publicists abandoned the premise that publicity was an appeal to reason and understood themselves instead to be in the business of aiming at subconscious levers for the manipulation of audiences (Ewen pp.127-132). Truth, in this practice, is not an objective constant to be discovered through the arduous application of reasoned debate. Instead, truth is subjective and variable. One's own subjective truth can become a shared truth with sufficient power to impose the same view onto or insinuate the same view into other minds.

Very often, speech produced as a capitalist commodity in pursuit of profit for, say, a public relations firm, also serves the profit goals of some other profit-seeking client. A business not producing speech as its core activity may use a portion of the surplus they control to purchase some speech supportive of their interests. The speech, let's say, persuades regulators or legislators or voters or some combination of those who operate the apparatus of the state to provide yet-more-amenable conditions for the continuing production and appropriation of surplus. The lobbying that led to the deregulation of the financial sector, and the ballooning share of total profit captured by the financial sector, fits this mold quite spectacularly. Their purchase of speech that persuaded those policymakers they needed to persuade facilitated greater profitability, and hence a larger speech-buying budget.

Classical market liberalism abhors government-imposed constraints on market choices: sell what you want, buy what you want. Classical market liberalism also denies that government (or anyone else) has a responsibility to ease the resource constraints that limit an individual's participation. This logic applies as much in the literal market for speech as it does in the market for bicycles or backpacks. As a result, the better developed the literal marketplace of ideas, the more inequality of economic resources directly generates inequality of access to the exercise of free speech rights. The greater the inequality of access to the exercise of speech, in turn, the more biased toward the favorite notions of the already-well-resources public discourse is likely to be. Furthermore, when there is an economic resource constraint on the meaningful exercise of free speech rights, the marketplace of ideas conception of freedom of speech comes into conflict with also-powerful conceptions of freedom of speech that are rooted in notions of individual dignity or the development of individual capacities.

A literal marketplace of ideas distances speech from speaker. Those desiring that the speech be produced do not produce the speech themselves while those producing the speech may not believe what they say for hire. Authorship becomes obscured, which facilitates speech laundering. I conceive of speech laundering as an analog to money laundering. Money laundering takes money tainted by its origins and moves it into realms of economic circulation free of punitive sanctions. Speech laundering takes ideas tainted by the identity of their proponents and moves them into realms in which they appear more credible. Astroturfing, using money to create the illusion of grassroots support, is a type of speech laundering; the speech that a few wealthy proponents promote through astroturfing efforts would gain less traction if it were clear that the active speakers are few in number and great in wealth.

Two critical moments in marketplace of ideas jurisprudence

Clashes between these two marketplaces of ideas, metaphorical and literal, are at the core of two particularly contentious first amendment cases decided by the Supreme Court in the past decade, *Citizens United v. Federal Election Commission* (2010) and *Janus v. American Federation of State, County and Municipal Employees Council 31, et al* (2018). The *Citizens United* decision held, over a scathing dissent, that restricting spending in the literal marketplace (in which ideas and audiences are traded) amounted to an impermissible restriction on speech. Spending money in the literal marketplace of ideas, in this interpretation, is itself a speech act protected by the first amendment. Freedom of speech thus appears as a form of consumer sovereignty: the consumer/speaker can't be prevented from buying the speech/audience.

Justice Kennedy's majority opinion specifically notes the transformation of economic resources into speech within a commercialized communications system. "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas" (p.35). The marketplace of ideas analogy is woven into the argument throughout; the phrase "marketplace of ideas" appears three times and the phrase "political marketplace" (generally appearing to mean marketplace of political ideas rather than the "marketplace" in which elected representatives are "purchased" with votes) appears another three times.

This decision (along with its antecedents and consequences) exaggerates the contradictions that inhere in the marketplace of ideas conception of free speech when it becomes entangled with a literal marketplace of ideas. Kennedy's opinion acknowledges that different speakers have unequal economic resources. This does not, he argues, justify a government effort to suppress the speech of the wealthy. The FEC cannot select favored and disfavored speakers. (But the invisible hand of the market *can* select favored and disfavored speakers.) "*Buckley* [an earlier case cited as precedent] rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections'" (p.34).

Even while ruling in favor of their challenge to spending limits, the Court's decision rejected *Citizens United's* challenge to disclosure rules. Kennedy argued that the identity of the speaker is pertinent information in allowing the public to make informed decisions about how to interpret various claims (pp.51-52). However, actual practice since *Citizens United* has made money trails more shadowy and hard to follow, and so, despite the stated intent, has facilitated speech laundering.

Janus held that paying a fee to a union whose corporate political speech one disagrees with amounts to an impermissible coercion of speech. Thus, as in the *Citizens United v. FEC* decision, the Court ruled that spending money in the literal marketplace of ideas is itself a speech act protected by the first amendment. Again, free speech is taken to be an analogue to consumer sovereignty, but this time the issue is whether or not a person can be compelled to buy. The majority opinion was that, no, a person cannot be compelled to buy. Mark Janus need not pay any fee to the union. Everything the union does was held to be politically salient, so to respect his first amendment right to be free of coerced speech, Janus need not pay even the

reduced pro-rated fee charged to non-members, traditionally calculated to include the costs of bargaining and administering contracts and to exclude explicitly political activities (Alito 2018).

This is curious, since in *Citizens United* the fact that many people who are financially entangled with a corporation may not share the views amplified by said corporation's concentrated spending in the speech market was specifically dismissed as *not* a valid argument to limit the corporation's speech. (The definition of corporation in play here includes unions.) Could the logic that relieves Janus of the financial burden of supporting speech he doesn't condone relieve the financial burden of consumers who disagree with the lobbying of businesses from which we buy?

Dissenting by proposing a different metaphor: the communications commons

Dissents to unpopular (with the left) interpretations of the first amendment's free speech guarantee are often still framed within the marketplace of ideas metaphor. For example, Justice Stevens, in his *Citizens United* dissent, described the concentrated spending power of corporations as a force that would corrupt the appropriate functioning of the marketplace of ideas (Stevens 2010). I propose instead to consider the metaphor of the commons. This metaphor, like that of the market, will run into its own thorny contradictions. But it will also, like the metaphor of the market, offer its own illuminations.

The shared, collective ownership of the commons entails two features relevant to this issue of speech. First, use rights are bestowed on the basis of membership (possibly equal per capita use rights, possibly distributed by some other negotiated formula), not by purchases. Furthermore, use rights are constrained by the responsibilities of stewardship (maintaining the commons for long-term use) and the needs of other members.

If we reconsider *Citizens United v. FEC* as a decision governing the communications commons, we make visible other lines of reasoning. Governance of a commons regularly constrains one user of the commons in order to ensure equitable access for other users. Contrary to the marketplace logic applied by Kennedy, under a commons logic, the wealth of the speaker may be a perfectly good justification for suppressing the speaker's speech to allow for equitable access by the less wealthy. The consumer is not fully sovereign. Furthermore, despite its stated intention to make the identity of speakers visible, *Citizens United* set off a bonanza of what speech laundering — using paid market transactions to obscure the interests bankrolling a speech campaign. Such speech laundering undermines the conditions for trust and thereby undermines the integrity of the communications commons. We find ourselves unable to believe in the stated motives of those who speak and unable to assume that they use their chosen words in accordance with our own usage (Sherman 2018). Since speech laundering degrades the communications resources that we hold in common, facilitating speech laundering violates the standards of stewardship.

Meanwhile, the decision and dissent in *Janus v. AFSCME* both identified speech so closely with the moment of exchange in the ideas market that the process of producing speech was obscured. If we think of the arena of public speech as commons in which people produce and use speech, it may strike us as curious that the debate centered on whether or not Mark Janus could be compelled to “speak” by *paying a fee*. Neither decision nor dissent dealt with the

internal process of *producing* collective speech within the union. If Janus disagreed with the existing corporate speech of the union that represented him, presumably he could have become a union member and participated in the deliberative process of producing that speech. Admittedly, he may not have swayed the collective to his view, but in the larger collective of the polity, citizens are not made exempt from taxes by virtue of personal disagreement with the speech acts of their government. When Kennedy's argument in the *Citizens United* decision, "The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas" (Kennedy 2010 p.35) is set beside the *Janus* decision, we have the curious result that corporate speech indirectly paid for by those with *no* avenue to exercise influence over the content of that speech is given more protection by this court than corporate speech indirectly paid for by those who *do* have an avenue to exercise influence of the content of that speech.

The commons metaphor applied to *Janus* provides a line of critique, but also raises thorny questions about the rights of a collective to act as a body and the rights of the individual. What social units are recognized as the authors of protected speech? There is no tidy solution, but an implicit full identification of *exchanges* in the literal marketplace of ideas with First Amendment-protected speech makes it difficult to even perceive the problem in terms of the social process of speech *production*. The problem of individual rights and groups rights is a recurring one. Nelson Lichtenstein argued that during the unionization surge of the 1930s, unions were widely seen as effective and legitimate defenders of workers' individual rights, including their rights to speak their minds at work and in employer-dominated company towns. During the 1960s, however, rights-seekers who had been left out by unions' active complicity in maintaining race and sex hierarchies (and, in some cases, unions' entanglement with corruption and organized crime) turned instead to the courts and government agencies as grantors and defenders of their rights. In the union-skeptic or union-hostile view, then, rights are granted by a government to an individual; collectives on an intermediate scale, smaller than the whole polity but larger than the individual, are seen as more likely to abridge than to secure the individual's rights (Lichtenstein 2002). A recent essay by Laura Weinrib rediscovers the role of labor radicalism in the early activities of the American Civil Liberties Union, when they pursued a strategy of defending labor agitation and collective action on first amendment grounds. Since then, shifting priorities and strategies moved the ACLU away from their labor partisan roots (Weinrib 2018). In contemporary thought, free speech looks more like a right that an individual may need to ask government to protect against the incursion of a collective, rather than a right that people may exercise *as* a collective or a right that people may assemble into collectives in order to protect for individual members. But it was not always so and need not remain so.

Conclusion

The Supreme Court's recent first amendment decisions have treated free speech as equivalent to consumer sovereignty in the literal marketplace of ideas. This runs headlong into contradictions with the political values underpinning the metaphorical marketplace of ideas. In this context, the metaphor obscures as much as it reveals. We have thought ourselves into a corner and we need a new complementary metaphor to think ourselves out. The metaphor of the commons may be just the cognitive pathway we need.

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