

A Note on Commercial Speech in the Era of Late Capitalism

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It is not unreasonable to assume that the free speech clauses of the First Amendment are primarily concerned with political speech. As many have argued, free speech regarding politically relevant matters can be considered a prerequisite of a functioning democracy. The boundaries of political speech are less clear, however, and they have tended to expand over time as it was recognized that republican politics required more varied and wide-ranging speech than was previously thought. Although the contours of the appropriately protected speech were being established in Britain before the American Revolution, the Sedition Act controversy demonstrated that constitutionally protected speech would have to be conceptualized more broadly than was once the case in order to have a viable system of competitive elections.¹ Harsh and unruly criticism of government officials and political candidates would have to be incorporated into the free speech regime. The antebellum debate over slavery similarly made clear that free-ranging debate over social institutions and practices that were potentially subject to government action and political inquiry would likewise need to be protected as political.² The jurisprudential debates over seditious speech in the early twentieth century likewise indicated the scope of political speech that would need to be protected if the Declaration's claim to a right to alter the form of government was to be taken seriously.³ The citizenry not only needed to hear whether the Adams administration was departing from republican principles, but also whether socialism was an attractive alternative to republican capitalism.

Of course, there might well be social value in other types of speech, but that may not be reason enough to protect them under the free speech clauses. Free speech relating to religion, perhaps the origin of free speech rights, may be understood to be independently protected under the religion clauses of the First Amendment.⁴ We might well believe that other forms of speech are adequately protected by the structural features of American democracy. We might worry that a government empowered with the authority to regulate speech might use it to silence political dissent or criticism of the government itself or might act on behalf of religious majorities to similarly silence religious dissent or criticism. We might consider the value of artistic, scientific or commercial speech less fundamental, however, such that it is properly subject to a regulatory calculation,

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or we might think that the political salience of such speech is such that it is less prone to the temptations of abuse that beset political and religious speech and thus less in need of special constitutional and judicial protection.⁵ Economic activity or commercial speech would receive heightened protection only to the extent that it fed useful information into the political sphere. Thus, "peaceful" labor picketing may be constitutionally protected to the extent that, "[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem."⁶ On the other hand, since the point is to protect speech/activity relevant to policymaking rather than freedom of action as such or activity relevant to the economic dispute or competition, other forms of labor action are left outside constitutional protections.⁷

The metaphor of the marketplace of ideas fits this functionalist understanding of free speech. With its economic referent, it suggests a group of producers and consumers with exogenous preferences. The producers of ideas pump out speech in the hopes of winning market share, and the consumers gobble up those ideas that happen to match up with their preexisting preferences (the relevant preferences may not directly be for the idea itself but for something else that the idea might relate to – we have a preference for wealth and we are in the market for a good idea as to how to produce it).

The success of ideas in the marketplace depends on the ingenuity of the producers and the distribution of preferences among consumers. Sellers of socialism may not get very far in the American marketplace, but Horatio Alger stories can be blockbusters. In the competition among ideas in the marketplace, the good ideas will hopefully over time squeeze out the bad ideas. From a constitutional perspective, the goal is to regulate this marketplace so that it might be as free and as efficient as possible, for example by preventing artificial barriers to entry.

The Court has been increasingly sympathetic to the protection of commercial speech beyond its utility in informing citizens on matters relating to public policy. The interests of consumers in

receiving information on matters relating to their economic decisions has itself been recognized as relevant to the interpretation and application of the free speech clause.⁸ Such an expansion of the protections of commercial speech, however, may be subject to limitation in extending beyond the central constitutional commitments to political speech. It also fails to recognize that advertising, the primary form of commercial speech, “is no longer built around the idea of informing or promoting in the ordinary sense, but is increasingly geared to manipulating desires and tastes through images that may or may not have anything to do with the product to be sold.”⁹

I want to suggest that commercial speech (among others) should not be conceptualized as sharply distinct from political speech.¹⁰ While commercial speech may primarily serve the interests of economic producers and consumers seeking to make efficient transactions in the marketplace, it can also perform a political function that would entitle it to full First Amendment protection. In making this move, I want to shift metaphors from the “marketplace of ideas” to the “republic of signs.”¹¹ The point of the metaphorical shift is to recognize a different function of political speech. The marketplace of ideas metaphor emphasizes the ways in which speech informs citizens as to how best to exercise their preferences through voting. As the economic model of democracy would emphasize, in order for democracy to be effective, voters need information about the candidates, their issue positions, and the relationship between those issue positions and outcomes that voters care about.¹² A free-speech regime is concerned with preventing obstructions to that flow of information so that voters might make well-informed vote choices and electoral mechanisms might effectively aggregate social preferences.

The republic of signs metaphor, by contrast, emphasizes that “the force of a political idea lies in its capacity to transcend thought and make itself part of everyday life in the material world.”¹³ Ideas are not only consumed by individuals seeking to act on their preferences. Ideas also help constitute individuals and their preferences. They are politically significant not only to the extent that they can inform citizens, but also to the extent that they can construct and mobilize citizens.¹⁴

This process is evident within the realm of obvious political expression. A great deal of political activity is first and foremost concerned with constructing political identity. One aspect of the rise of republican historiography of the revolutionary and founding era is its new emphasis on the interpenetration of community and individual, of the need to define community and to constitute individuals with the traits appropriate to that community.¹⁵ The first task of the revolutionary generation was to construct an American identity that could justify separation from the British Empire and convert treason into patriotism. Having successfully separated from Britain, the Americans had to construct themselves as republican citizens and abandon their previous identity

as imperial subjects while cultivating the individual character traits necessary to the maintenance of a republic.

In the nineteenth-century heyday of political parties, the construction of partisan identity in the electorate was a critical task. In contrast to the Progressive reformers of the early twentieth century, such as the League of Women Voters, which preferred to reduce politics to the rational exchange of information relevant to vote choice, party builders of the nineteenth century understood popular politics as being centrally concerned with the creation of affective ties between the political parties and portions of the electorate.¹⁶ Party success depended on preventing voters from identifying themselves as “independents” carefully weighing the competing slates and platforms offered by party elites, but instead on leading voters to identify themselves as Republicans, Whigs, or Democrats who would mobilize behind favored party banners.

While American parties often benefited from and encouraged the formation of ethnic and racial identities or even economic identities which could be incorporated within the party coalition, the formation of class identity was in greater conflict with pre-established partisan divisions.¹⁷ Nonetheless, while labor demonstrations and picketing may convey useful information about matters of public policy to voters, these activities more directly attempt to build worker solidarity and class identity. Constituting the identity of workers as workers has significant potential implications for the success of the labor movement vis-à-vis employers, but also has significant implications for future political action. The greater political dimension of such speech may not be in the information it provides to the general public that the Court noted in *Thornhill*, but in the constitutive effects on the political identity of workers. As Marx noted, the class struggle is first a struggle to constitute the classes and bring them into self-consciousness.

The constitution of the worker was the paradigmatic political effort of industrial capitalism. The era of late capitalism, however, is the era of the “postindustrial society . . . consumer society, media society, information society, electronic society.”¹⁸ It is centrally concerned with the production and consumption of sign systems.¹⁹ The identity being constituted and performed is defined less by work than by consumption. Notably, advertising, the paradigmatic commercial speech, in the era of late capitalism is less about conveying information about prices than it is with constructing a brand image that can in turn be appropriated by the consumer. Identity, including political identity, is formed through the pastiche of “commercial speech.” To some analysts, this process is relentlessly top-down, as the consumer is helplessly molded by Madison Avenue imagery. More plausibly, individuals are active participants in the process, drawing upon the detritus of commercial culture to recreate themselves.

Political identity coheres with the notion that “the personal is the political.” Explicit political action rests on the base of political identity, which is itself not a pre-social given but the result of ongoing social processes. In the era of late capitalism, commercial speech is an essential component of those social processes that help constitute political identity. As such, the social value of commercial speech lies not merely in its utility in conveying information that facilitates efficient economic exchanges but also in providing the raw materials upon which modern political culture is built. Consequently, commercial speech should be regarded as on par with other forms of speech as politically relevant.²⁰ Moreover, it is precisely the forms of commercial speech that are most feared by political authorities that should, in this light, be protected. The brand imaging of consumer goods is not about market efficiencies, but rather about personal identity and desire.²¹ Indeed, it is precisely because of the capacity of, for example, cigarette and alcohol advertising to help constitute personal identity that it is feared, regulated, and prohibited. Joe Camel and the Marlboro Man are deserving of constitutional protection precisely because they function in the cultural rather than the purely economic realm. This might also suggest that the “lesser” should not be included in the “greater” when it comes to commercial regulation.²² Though the state may have the authority to prohibit entirely certain commercial products and activities (e.g., gambling, narcotics, tobacco), it should not be understood to have an equal authority to prohibit the cultural production related to that activity. Commercial speech for illicit products may have the potential for the greatest identity-forming effects, and individuals should be no more denied the cultural signs of such activity than they should be denied the political rhetoric advocating the legalization of such activity. Having an independent cultural logic beyond simply matching consumers and producers, the protection of commercial speech should not hinge on the state sanction of the underlying commercial activity.

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Endnotes

1. On the Sedition Act controversy, see Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985); James Morton Smith, *Freedom's Fetters* (Ithaca: Cornell University Press, 1956).
2. On slavery and free speech, see Michael Kent Curtis, *Free Speech, "The People's Darling Privilege"* (Durham, NC: Duke University Press, 2000).

3. On early twentieth century free speech debates, see Mark Graber, *Transforming Free Speech* (Berkeley: University of California Press, 1991); David M. Rabban, *Free Speech in its Forgotten Years* (New York: Cambridge University Press, 1997).

4. Though the Supreme Court has recently been moving in the opposite direction, protecting religious speech through the free speech clause. See, e.g., *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

5. Of course, we might instead adopt the nineteenth century libertarian perspective that refused to single out some rights, or forms of speech, as particularly fundamental but instead emphasized that an individual should “be free in the enjoyment of all his faculties,” whether in self-expression or economic activity. *Grosjean v. American Press*, 297 U.S. 233, 244 (1936), quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

6. *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

7. On the limited constitutional incorporation of labor activity, see Ken Kersch, *Constructing Civil Liberties* (New York: Cambridge University Press, 2004); James Gray Pope, “Labor’s Constitution of Freedom” (Ph.D. dissertation, Princeton University, 2004).

8. E.g., *44 Liquormart v. Rhode Island* (1996); *Virginia Pharmacy Board v. Virginia Consumer Council* (1976).

9. David Harvey, *The Condition of Postmodernity* (Cambridge, MA: Basic Blackwell, 1989), 287.

10. Needless to say, the following has nothing to do with the originalist method of constitutional interpretation that I have elsewhere recommended. Keith E. Whittington, *Constitutional Interpretation* (Lawrence: University Press of Kansas, 1999).

11. The phrase comes from Anne Norton, *Republic of Signs* (Chicago: University of Chicago Press, 1993).

12. See, e.g., Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Row, 1942); Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957).

13. Norton, 1.

14. This may also put in a different light the constitutional relevance of offensive speech (e.g., Paul Cohen’s jacket), flag burning, and hate speech, which are not particularly informative but are constitutive and expressive.

15. See, e.g., David Waldstreicher, *In the Midst of Perpetual Fetes* (Chapel Hill: University of North Carolina Press, 1997).

16. On this middle-class reconceptualization of how politics should be conducted, see Michael E. McGerr, *The Decline of Popular Politics* (New York: Oxford University Press, 1986).

17. See, e.g., Amy Bridges, *A City in the Republic* (Ithaca: Cornell University Press, 1984).

18. Fredric Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism* (Durham, NC: Duke University Press, 1991), 3.

19. See Jean Baudrillard, *For a Critique of the Political Economy of the Sign* (St. Louis, MO: Telos Press, 1981).

20. This may also imply, however, that certain statutory protections for commercial speech, such as copyright, should be restructured so as to facilitate its use and reuse within the broader cultural arena. See, e.g., Jack M. Balkin, “Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information

Society,” *New York University Law Review* 79 (2004): 1; Yochai Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access,” *Federal Communications Law Journal* 52 (2000): 561.

21. See, e.g., Robert Goldman and Stephen Papson, *Sign Wars* (New York: Guilford Press, 1996); James B. Twitchell, *Lead Us into Temptation* (New York: Columbia University Press, 1999); Douglas

B. Holt, *How Brands Become Icons* (Boston: Harvard Business School Press, 2004).

22. For one consideration of this issue, see Marc S. Charisse, “Brothels in the Marketplace of Ideas: Defining Commercial Speech,” *Communications and the Law* 12 (1990): 3.