

Disinformation in the Marketplace of Ideas

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It was just one line, nearly a throwaway; technically a subordinate clause.¹ Yet that one clause from Oliver Wendell Holmes's *Abrams* dissent breathed life into a metaphor, the "marketplace of ideas," whose lasting power is undeniable. Nor is it difficult to understand why. Yes, it may be incomplete, inaccurate, and possibly cribbed from John Stuart Mill, but the metaphor matches something we all see. Ideas and ideological programs are out there looking for adherents or "buyers." In Holmes's time, progressives, socialists, and fascists courted supporters, just as similar groups do now. Specific ideas like the flat tax or the legalization of marijuana seek their own buyers and usually go nowhere but may suddenly catch on, just as in the world of real products.

I leave it to others to criticize the metaphor.² What I want to suggest here is that it isn't taken seriously enough. Despite all the talk, the First Amendment offers incomplete protection for the marketplace of ideas. If we were halfway serious about the premise that the marketplace of ideas needs protection by courts, we'd be interested in *all* the ways that government or private parties can distort or block competition. But the First Amendment has no interest in most such distortions—especially those created by disinformation campaigns, which have rapidly become the speech control technique of choice in the early 21st century.

If we were speaking of competition in a real market,³ no one would pretend that burdens on selling are the only means by which the market may be distorted or corrupted. In reality, the figurative "marketplace of ideas" is lodged in the actual and less lofty markets for products of

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¹ "[T]hat the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919).

² See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15–30 (1982).

³ Richard Posner, in the 1970s, argued that the marketplace of ideas is indeed an actual market. See POSNER, *ECONOMIC ANALYSIS OF LAW* 627–38 (3d ed. 1986).

communication and culture.⁴ As both antitrust and trade law teach, the means of distorting fair competition are myriad. They include not only government bans on selling but also the actions of monopolies, subsidization, taxation, agreements to exclude rivals, and so on. Courts like to say things like, “it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”⁵ But the Court maintains an impoverished idea of what constitutes neutrality and what constitutes interference.⁶

To be sure, the First Amendment does make it difficult for government to selectively ban some viewpoints altogether, which is significant. But I believe that a determined government, with nothing standing in its way, can achieve much if not all of what it might want to achieve using disinformation campaigns as opposed to censorship. In the same way that reward can substitute for punishment, or subsidization can substitute for taxation, government, using information itself, can achieve significant control over the national information environment.⁷

What to do then? The reader may be disappointed to learn that I do not actually think courts can fully protect the marketplace of ideas from means of control or distortion that depend on disinformation or other techniques. Is it then such an enormous loophole, which makes the project of protecting a marketplace of ideas seem like a bad joke? No, but only because First Amendment scholars tend to ignore the fact that most of the protection of the marketplace of ideas from deliberate attack is done not by courts but by other institutions—information intermediaries, like the press, and in some cases citizens themselves.

Let me try to make my point clearer. My thesis is that disinformation techniques are a serious threat to the functioning of the marketplace of ideas and democratic deliberation, and therefore, it has fallen upon other institutions—especially the press and sometimes others—to fight them. How? They do so mainly by adhering to ethics of journalism: by refusing to print lies, malicious defamation, unsubstantiated rumors, and refusing to take direction from the government. And this role shows how much a different function of the

⁴ See TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 23 (2010).

⁵ Fed. Comm’n v. Pacifica Found., 438 U.S. 726, 745–46 (1978).

⁶ From a competition perspective, the obvious holes in the First Amendment’s protection are not hard to see: they include an indifference to distortions introduced by powerful private parties, especially speech monopolists, and the restrictions on buyers as well as sellers. I want to focus on the alternatives to censorship, namely disinformation campaigns.

⁷ See Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547 (2018).

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First Amendment really matters: namely its protection of the press and other platforms from government when they try to protect public deliberation from disinformation campaigns. In other words, it is through the protection of editorial independence, or now the content moderation policies of major platforms, that the First Amendment plays its main role in fighting disinformation's corruption of the marketplace of ideas.

This First Amendment protection is sometimes called the protection of "editorial discretion,"⁸ but it deserves a better title. And it seems that the protection for editorial discretion should not be some kind of free-floating right but one that depends on the degree to which it is used to cultivate a working marketplace of ideas, either by itself or as part of a broader ecosystem of contending thought.

What then of platforms that seek to amplify disinformation or refuse to police it? Here lies the true real weak spot in the American design: it is utterly dependent on actual independence of the press, or other major speech institutions, from government. If that becomes eroded, if the entire press and major speech platforms are unified with government, then together they can do what they want: run disinformation campaigns and prevent disfavored speech from being heard by anyone. That's what makes the tradition of editorial independence so important, for it is really a protection against government's power to terrorize the press.

Some would accept the basic premise that the government can use disinformation campaigns as an alternative to censorship but get stuck at the point of wanting anyone to do anything about it. The hesitation comes from some version of the idea that one man's disinformation is another man's sacred truth and that the cure is worse than the disease. In other words, unlike censorship, which everyone thinks they know when they see it, the feeling is that disinformation and propaganda are inherently subjective categories and forms of speech, so there is nothing to be done.⁹

But this is a mistaken view, for disinformation is not such a vague thing, and doing nothing is also a choice. Those who run disinformation campaigns know what they are doing. The techniques are known. They amount to bad-faith efforts to deliberately corrupt public deliberation on important questions by using lies, the inculcation of fear and chaos, dissemination of conspiracy theories, and bad-faith discrediting of experts. It is a mistake, one fortified by academics, to suggest that

⁸ *E.g.*, *L.A. v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986).

⁹ *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709 (2012); *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011).

anything persuasive can be seen as propaganda, making a hamburger advertisement a form of thought control. We are speaking of techniques whose goal is to distort, corrupt, or even destroy deliberation and replace it with much cruder and uglier replacements.

The techniques of disinformation can be understood as efforts to destroy the functioning of a marketplace of ideas. One way is by preventing it from reaching any kind of resolution between contesting ideas. I do not think what Holmes had in mind was never-ending combat; he envisioned a process that did its best to reach majoritarian answers, even if imperfect to the problems of the day.¹⁰ But disinformation techniques prevent the market process from reaching any kind of conclusion by denying facts and maintaining division. At an extreme, the marketplace of ideas becomes a barren slugfest that exists for the spectacle itself and its identity-reinforcing capabilities, similar to how Orwell believed that a State might want continuous war for reasons unrelated to military victory.¹¹ It can be taken as a sign of a healthy deliberative process if, at some point, the losing side accepts the loss and the adherents' views become outliers. In contrast, a country that cannot overcome divisions over long periods ceases to function as a single deliberative unit.

What does this perspective offer for our times? As the cliché goes, *Abrams* retains its relevance but in a way much different than usually understood. Its genius lies in recognizing a competitive, deliberative process at the core of democratic government and majoritarian decision-making. But to the extent that it was taken to suggest that banning censorship offers sufficient protection for that process, it was mistaken, even in its time. Instead, as a practical matter and for most of history, it falls to intermediaries, the press and other institutions, to do the day-by-day work of protecting and promoting a marketplace of ideas.

This lesson is of particular importance when we consider the major speech platforms of our time, Facebook, Twitter, YouTube, and others, all of which once thought that editorial discretion might just be an artifact of another time.¹² In fits and starts, at least some of them seem to have learned that with the promotion of speech comes responsibility, one that, unexercised, threatens the republic in which they were born.

¹⁰ "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge." *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹¹ GEORGE ORWELL, 1984, at 241 (1949).

¹² See Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001, 2008–10 (2019).

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The protection of a healthy marketplace for ideas turns out to be harder than it looks.