

**THE POTENTIAL TENSION BETWEEN A “FREE
MARKETPLACE OF IDEAS” AND THE FUNDAMENTAL
PURPOSE OF FREE SPEECH**

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Metaphors serve as a device moving us from what we do understand to what we wish to understand. So, for example, in jurisprudential discourse about the importance of free speech for a robust democracy, we often use the term “marketplace of ideas” to suggest that fair competition in such a setting will encourage the best ideas to emerge.

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I. THE EMBRACE OF THE MARKET METAPHOR TO SUPPORT FREE SPEECH

Supreme Court Justices have an uncommon affection for the rhetorical power of the “marketplace of ideas” as a foundation for thought about the First Amendment.¹ In his study of the metaphor,² W.

1. W. Waits Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996). See also C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1992) (describing the popularity of the free marketplace of ideas metaphor as a buttress for freedom of speech arguments).

While the marketplace of ideas is consistently used to support First Amendment decisions, the Supreme Court also uses a second strand of argument in its First Amendment cases. See Robert Post, Symposium, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353 (2000). This rationale is different from, but certainly related in purpose to the “free marketplace of ideas” reasoning in defense of First Amendment protections. Post sees the second strand of argument as a defense of free speech because it enhances democratic self-government and supports democratic institutions. Post claims that a “democratic theory of the First Amendment differs in important respects from the marketplace of ideas theory, most notably because the former protects speech insofar as it is required by the practice of self-government, while the latter protects speech insofar as it is required to facilitate the pursuit of truth.” He then portrays First Amendment jurisprudence as a struggle between these two purposes.

For an articulation of the democratic purposes of the first amendment, see ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965).

Robert Kerr notes that Meiklejohn is often cited by the Court, though, as we will see, not with the frequency of the marketplace metaphor. Kerr writes, “Between 1951 and 1983, Meiklejohn was cited in 27 opinions—nine times in majority opinions, five in concurring opinions, and thirteen in dissents.” See Robert Kerr, *Justifying Corporate Speech Regulation Through a Town-Meeting Understanding of the Marketplace of Ideas*, 9 JOURNALISM COMM. MONOGR. 58 (2007).

2. Throughout the paper, we refer to the “marketplace of ideas” as a metaphor. On one hand, there is evidence that the progenitor of the term, Justice Holmes, intended to use the term for metaphorical purposes only. In other words, Holmes did not literally see speech as a product pitched by sellers and bought or rejected by buyers. See Darren Bush, *The “Marketplace of Ideas:” Is Judge Posner Chasing Don Quixote’s Windmills?*, 32 ARIZ. ST. L.J. 1107 (2000). Bush argues that we *should* not interpret this metaphor in a literal sense because the Supreme Court has not always done so and because to adopt the metaphor literally means to ignore the fact that the real world often diverges from the assumptions of the market metaphor. But the extent of divergence is significant for the metaphor is not functional to the extent that the attributes of actual markets do not resemble the give and take of public discourse. A metaphor gains credibility as rational support for a conclusion to the extent that its differences from what it is representing are not damaging to the logic implied in the application of the metaphor.

However, a considerable amount of the activity that takes place in the marketplace of ideas is undertaken by firms that own and run newspapers, radio stations, and television stations. This fact suggests that at least some of the behavior in the idea market can be understood to take place within actual markets, lending support for a more literal interpretation of the metaphor. For economic interpretations of the marketplace of ideas, see Richard Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1 (1986). See also Ronald H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974).

Our argument is based on an economic understanding of the marketplace of ideas, so we treat the metaphor literally. Like Bush, we acknowledge that the real world differs from the assumptions of the metaphor, but we argue that the problem is not that the market metaphor cannot be taken literally, but that it has been improperly applied because the Court has failed to account for

W. Hopkins found that, “[t]wenty-four of the forty-nine Justices who served on the Court for at least one year between 1919 and 1995 used the metaphor at least once.”³

Marketplace References by Justices⁴

Justice	Majority	Concur	Dissent	Con/Dis	Other	Total
Black	2		1			3
Blackman	5	3				8
Brandeis		1				1
Brennan	13	3	5	1		22
Burger	5					5
Douglas		2	5			7
Fortas	1					1
Frankfurter	1	2	1			4
Goldberg	1					1
Harlan				1		1
Holmes				1		1
Kennedy	3					3
Marshall	4	1	1			6
Murphy	1					1
O’Connor	3	3	2			8
Powell	9	1				10
Rehnquist	2		6		1	9
Rutledge	1					1
Scalia	1		1			2
Souter	1					1
Stevens	7	5	8			20
Stewart		2	1			3
Vinson	2					2
White	2		1			3
Percuriam	1					1
Totals	65	23	32	3	1	124

multiple types of market structures in its jurisprudence. The Court reasons as if any and all reifications of a “market” have identical effects on the quantity, quality, and effect of the resulting speech.

3. Hopkins, *supra* note 1, at 41.

4. This table is taken from *id.* at 43.

New judicial appointments since 1995 have similarly relied on the metaphor when reasoning about free speech.⁵

Justices used or referenced the logic of the marketplace metaphor in at least 97 cases and 125 opinions between 1919 and 1995.⁶ As seen in the table below, Justices have employed the metaphor more frequently since the 1970s.⁷

References to the “Marketplace of Ideas” in U.S. Supreme Court Cases by Year⁸

<u>Decade</u>	<u>Cases</u>	<u>Opinions</u>
1919	1	1
1920-29	1	1
1930-39	0	0
1940-49	5	6
1950-1959	4	7
1960-1969	11	12
1970-1979	27	35
1980-1989	29	37
1990-1995	19	27
Totals	97	126

The Court’s use of the metaphor continues unabated. Between 1996 and 2008, the Court has used the phrase “marketplace of ideas” in at least thirteen cases and as many opinions.⁹

Almost no area of First Amendment jurisprudence is left untouched by the marketplace of ideas metaphor: campaign spending,¹⁰ commercial speech,¹¹ protest demonstrations,¹² speech at schools¹³ and

5. See, e.g., *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008). In this case, Justices Roberts and Alito join Scalia’s majority opinion.

6. Hopkins, *supra* note 1, at 41.

7. *Id.*

8. Table taken from *id.* at 42.

9. The authors used “marketplace of ideas” as a search term in a Lexis Nexis search of the text of Supreme Court opinions.

10. *Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003); *Randall v. Sorrell*, 548 U.S. 230 (2006).

11. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

12. *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989).

13. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

universities,¹⁴ libel,¹⁵ picketing,¹⁶ privacy,¹⁷ broadcasting,¹⁸ freedom of the press,¹⁹ obscenity,²⁰ and freedom of speech.²¹

Despite its widespread use, the Supreme Court has never discussed the marketplace of ideas metaphor in terms of its appropriateness as a descriptor for the form of discourse that enhances democratic speech.²² Consequently, the Court has largely overlooked a fundamental question when determining the desirability of a market: how is the market for speech structured? Economists recognize at least four different types of market structure,²³ yet only one, perfect competition, has theoretical and social effects that clearly benefit the consumer.²⁴ Other types, forms, or structures of markets reallocate power among participants in markets in such a fashion as to benefit the producers, not the consumers.

14. *Healy v. James*, 408 U.S. 169, 180-81 (1972); *Bd. of Regents Univ. Wis. v. Southworth*, 529 U.S. 217 (2000). For a discussion of *Southworth* and the Court's use of the marketplace of ideas for higher education decisions, see Clay Calvert, *Where the Right Went Wrong in Southworth: Underestimating the Power of the Marketplace*, 53 ME. L. REV. 53 (2001).

15. *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

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

17. *Time Inc. v. Hill*, 385 U.S. 374 (1967).

18. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

19. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

20. *Miller v. California*, 413 U.S. 15 (1973).

21. *Abrams v. United States*, 250 U.S. 616 (1919).

22. See discussion *infra* Part IV. Hopkins, *supra* note 1, at 42-43, notes that:

Justices may consistently refer to the marketplace of ideas and may unabashedly note that the primary purpose of the First Amendment is to protect the marketplace, but their opinions are virtually devoid of definitions of the term or explanations as to how the model works. Indeed, more than one-third of the references to the marketplace of ideas are without citation—47 of the 125 opinions. And when citations appear, those citations are often to references that, in turn, are uncited. Only six majority or plurality opinions cite Holmes' dissent in *Abrams*, which is also without citation.

23. DAVID COLANDER, *MICROECONOMICS* (6th ed. 2006). We discuss each type in Part I.

24. JOHN GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973). Galbraith notes the "moral superiority of competition" among economists.

Some disagree about the desirability of competition. For instance, see JOHN GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (1952). Galbraith takes issue not so much with competition as theoretically desirable, but with practical economic reality rendering it largely obsolete. The rise of powerful sellers in the form of large corporations is foreign to competitive theory based on many small mom and pop firms. According to the theory of perfect competition, corporations should be weakened and made smaller using antitrust laws because of the harmful effects corporations can cause for consumers. According to his theory of countervailing power, powerful buyers (think Wal-Mart) can challenge the power of big sellers working to lower price on behalf of consumers because of their large share of demand. Galbraith advocates using antitrust law with more discretion so that big buyers who offset the power of big sellers are not sanctioned by the law. For more discussion about desirability of alternative market structures, see further discussion in the footnotes of Part I.

Because the Supreme Court, and much of legal scholarship, has neglected the question of market structure, each has taken the dominant model of capitalism, perfect competition, and blithely argued as if speech scenarios resemble information exchange networks in which all distributors of speech have an equal chance to persuade. Preserving an unregulated marketplace of ideas would not appear as desirable to the Supreme Court were it to consider the existence of non-competitive market structures.²⁵

The argument in this manuscript proceeds as follows. Section II outlines the theory and desirability of a perfectly competitive market structure. We also describe the social dangers of alternative market structures. Section III then links this descriptive material to the free marketplace of ideas metaphor by analyzing the extent to which the marketplace of ideas is perfectly competitive. Section III provides evidence from economics and legal scholarship indicating that the marketplace of ideas is not structured competitively. Despite this fact, the Court's decisions often assume that the marketplace of ideas is perfectly competitive. Recognizing real-world deviations from the competitive market structure may well lead to different decisions if protecting the fruits of free speech is the target public policy. In Section V, we examine some of the consequences of a non-competitive marketplace of ideas within mainstream journalism.

II. THE SIGNIFICANCE OF ALTERNATIVE MARKET STRUCTURES

A. *Perfect Competition*

The theory of market behavior begins with the assumption of scarcity—an insurmountable asymmetry between human aspirations for goods and the resources available to fulfill those desires.²⁶ Further complicating this narrative is the assumption that humans are rationally self-interested and greedy.²⁷ Thus, to give an individual any power is to hand power to one who will abuse it—in effect letting the fox guard the

25. Part of the confusion of the Court may well be caused by the use of the word “competitive.” In economics, the term is used to characterize a situation in which no producer possesses any control over the exchange process. In fact, it is the powerlessness of sellers in competitive markets that yields the positive social benefits promised in capitalistic theory. Understandably, someone untrained in economics may presume that the social benefits of market exchanges result as long as different suppliers are struggling (competing) to sell their output.

26. CHARLES E. LINDBLOM, *THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT* (2001).

27. COLANDER, *supra* note 23, at 188.

henhouse. Because of these obstacles, we must choose a coordination mechanism that not only allocates and distribute resources efficiently, but also allows us to achieve some level of peaceful relations and limit abuses of power. Our options include markets, the state, firms, family, tradition, civil society, or some combination thereof.²⁸

Economists see perfectly competitive markets as the best choice among alternative conflict resolution devices because markets allocate and distribute our resources *efficiently*, meaning achieving society's goals using as few resources as possible.²⁹ They argue efficiency should be a primary goal given scarce resources. Every divergence from competitive market outcomes is comparatively wasteful, thereby making scarcity an even more vexing problem than it need be. Competitive markets can also eliminate abuses of power.³⁰ However, for a market to achieve these goals, it must meet the stringent set of assumptions, both ontological and structural, of perfect competition.

The first such assumption is that of consumer sovereignty,³¹ meaning consumers in the aggregate have the power to steer the market's invisible hand in a socially desirable direction.³² For consumers to do so, they must have perfect information about the products they buy and the firms that produce them, as well as be calculating and rational in assessing this information.³³

But, the market in which consumers buy and firms sell must be optimally structured for consumers to be sovereign. The assumptions for a competitive market are that 1) the number of firms is large; 2)

28. LINDBLOM, *supra* note 26, at 107.

29. COLANDER, *supra* note 23, at 12.

30. GALBRAITH, *AMERICAN CAPITALISM*, *supra* note 24. "The competitive model provided an almost perfect solution of the problem of power . . . Given its rigorous prescription of competition, there was very little scope for the exercise of private economic power and none for its misuse."

31. *But see* Oscar H. Gandy, Jr., *The Irrationality of Rational Choice: Audience Segmentation and the real Digital Divide*, in *MEDIA, PROFIT, AND POLITICS: COMPETING PRIORITIES IN AN OPEN SOCIETY* 249-52 (Joseph Harper & Thom Yantek eds., 2003). Gandy argues that the stereotyping required for market segmentation as a strategy for maximizing the effect of political advertising is wealth producing, but community dissolving.

32. ROBERT E. LANE, *THE MARKET EXPERIENCE* (1991). GALBRAITH, *AMERICAN CAPITALISM*, *supra* note 24, at 13. For a discussion of consumer sovereignty, see ROBERT L. HEILBRONER & LESTER THUROW, *ECONOMICS EXPLAINED: EVERYTHING YOU NEED TO KNOW ABOUT HOW THE ECONOMY WORKS AND WHERE IT'S GOING* 166 (1998):

The term means two things. First, in a pure competitive market the consumer determines the allocation of resources by virtue of his or her demand—the public calls the tune to which the businessman dances. Second, the consumer enjoys goods that are produced as abundantly and sold as cheaply as possible. In such a market, each firm is producing goods the consumer wants, in the largest quantity and at the lowest cost possible.

33. COLANDER, *supra* note 23, at 191, 254.

individual firms produce a small percentage of the products; 3) there are no barriers to entry; 4) buyers and sellers are price takers and; 5) firms' products are identical.³⁴ If one of these assumptions is not met,³⁵ complete consumer sovereignty no longer exists and instead some individual producers obtain some power to manipulate the market and the market price, which results in distorted and undesirable social outcomes.³⁶

For example, if there are no barriers to entry, when existing firms begin selling defective products or raising prices above a level justified by the cost of production, new firms can easily enter that market and begin selling superior products at lower prices, forcing others to change their practices or forcing them out of business, consistent with the needs of the community. Sovereign consumers can easily move their business to the new firm and once again receive a good, cheap product. If there are barriers to entry, however, new firms cannot easily move in to out-compete the bad one. Here is where consumers begin to lose power; if they cannot easily find a substitute good, they may be forced to buy at a higher price or purchase an inferior good.

B. Deviations from Perfect Competition

At the time when the first market theorists, Adam Smith for instance, were writing, it is likely that the theoretical assumptions of competition closely resembled the existing economic marketplace.³⁷ However, with the emergence of corporations, economic reality diverged from the competitive market narrative. Economic theory, perforce, began to explore the implications of alternative market structures.³⁸ The

34. *Id.* at 254.

35. These definitional attributes or preconditions of competitive markets combine to maximize opportunities for participation, and this participation takes place among substantive equals. In that sense, competition is "free," meaning that there are no structural barriers to participation. Output gets to consumers in a forum where the many sellers participate on a level playing field. For a sophisticated treatment of the complexity of markets and the social implications of alternative market structures, see AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARDS A NEW ECONOMICS* (1990).

36. *See infra* Part II.B.

37. GALBRAITH, *AMERICAN CAPITALISM*, *supra* note 24, at 29. "The kind of competition that was implicit in the pioneering designs of the classical economists of the nineteenth century was not unrealistic. It described a world that then existed."

38. EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1932). Each of these works attempts to develop a theory of market behavior that incorporates the rise of large firms.

Galbraith notes that "the market system, in its admixture of monopoly and competition, does not conform in broad outline to the neoclassical model. The latter model is a rough description

of half of the economy; it has lost touch with the other, and in many ways decisive, half.” GALBRAITH, *AMERICAN CAPITALISM*, *supra* note 24, at 44.

While corporations challenged the competitive model assumption of many sellers, each without market power, the rise of corporations also challenged perfectly competitive assumptions about a firm’s behavior. *See* ADOLF BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

They argue that we should rethink the idea of a firm working for its own self-interest. That motivation may apply to Adam Smith’s baker, but not to the new corporations say the authors. Even if a CEO is motivated by self-interest, he needs to make sure all others in his enormous firm are as well and to coordinate that self-interest into one clear vision, which is very difficult.

They argue that the assumption that firms have profit as their sole goal needs to be rethought. If all profit goes to the owners, the shareholders, then none goes to the managers, who also need that motivation. This corporate type of profit motivation is distinct from the type a small business owner would get by increasing his profit by a small margin, which would produce significant motivation.

The assumption of consumer rationality has also come under sharp criticism. DAVID GEORGE, *PREFERENCE POLLUTION: HOW MARKETS CREATE THE DESIRES WE DISLIKE* (2001). George argues that markets help us make decisions that are not always in line with our best interest. Markets underallocate goods and services that cater toward our second-order preferences (preferences about our preferences) and instead over allocate those that fulfill our first order preferences. George uses the rise of consumer debt and unintelligent TV programming as examples.

Perhaps this view of humans often ruled by sensate pleasure and immediate gratification is captured by the musical groups Gillian Welch and the Drive-By Truckers. In her song “Look At Miss Ohio” (Welch writes of a woman who cheerfully says, “I want to do right but not right now” as she shrugs off her responsibilities. *SOUL JOURNEY* (Acony Records 2003). This lyric captures the paradoxical way humans can often see what is right, but choose to do otherwise. In a song by the Drive-By truckers and penned by Patterson Hood called “The Righteous Path,” Hood describes a character who is “[t]rying to hold steady on the righteous path / 80 miles an hour with a worn out map.” *BRIGHTER THAN CREATION’S DARK* (New West Records 2008). Here, Hood paints another picture of a person wanting to do right yet recklessly speeding, perhaps in the wrong direction.

As a result of our lack of foresight, individuals need to be pushed toward making better decisions because they will not always make good ones on their own. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009). Simply by changing retirement plans from opt-in to opt-out, the amount of individuals choosing to use a retirement plan increases dramatically.

Yet a lack of self-control is not the only problem hindering humans from acting rationally. Sometimes, rather than seeing the good and doing otherwise, individuals fail to ever recognize the good. Research in the emerging field of behavioral economics challenges the assumption that individuals always act in accordance with their rational self-interest. For a book detailing much of this research, see RICHARD THALER, *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* (1992). One example comes from experimental evidence of people playing the ultimatum game. Person A is offered a sum of money, \$10 for example. A decides how the money should be split between himself and person B. After a split is offered, person B can either accept or reject. If person B were rational, he would accept any offer that gives him money, even one cent, because any amount would make him better off than no money. However, experimental results show that player B is often affected by social norms of fairness and will reject offers of several dollars because he feels he has been treated unfairly. Thus, social norms can override rationality. Research in psychology also challenges individual rationality. Merely by changing the way a choice is framed, researchers can alter consumer preferences. *See* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, *SCIENCE* 211, Jan. 1981, at 453.

growth of major multi-national corporations, existing side by side with a multitude of small businesses, has greatly complicated our effort to understand the social effects of markets. Large corporations present a reality that is not going to disappear anytime soon. Yet, the theoretical and ethical strength of capitalism is based on the powerless sellers of competitive market theory. An extensive literature in economics attempts to examine the extent to which deviations from perfect competition are severe enough to mandate the exercise of greater social regulation of the behavior of actual markets.³⁹ In other words, the development of huge corporations raises questions about just how free actual markets are.

To the extent one recognizes the existence of non-competitive market structures, the use of markets as a method for solving our allocation and distribution problems is no longer as attractive. Many of

See also the work of Herbert A. Simon. Herbert Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955). Simon argues that rather than making rational choices that maximize utility, we make decisions that are satisfactory and sufficient, but fall far short of utility maximization. HERBERT SIMON, *MODELS OF MAN* (1957). Here, Simon argues that our rationality is bounded by the increasing complexity of the problems we are faced with.

Some writers, however, disagree that the seeming irrationality researchers document actually counts as irrationality. Instead, they argue that individuals choose to remain ignorant, in effect choosing to be rationally irrational. Because of the great amount of time it would take one to be well informed about consumption decisions, they instead rationally choose to spend their time otherwise. For an argument in this vein, see Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135 (1957). Downs argues that it is perfectly rational for voters to be ignorant and make uninformed votes. Downs writes:

[T]he incentive to become well informed is practically nonexistent. Therefore, we reach the startling conclusion that it is irrational for most citizens to acquire political information for purposes of voting. As long as each person considers the behavior of others as given, it is simply not worthwhile for him to acquire information so as to vote "correctly" himself . . . Hence ignorance of politics is not a result of unpatriotic apathy; rather it is a highly rational response to the facts of political life in a large democracy.

Id. at 146-47.

39. This literature is referred to as "second best," "monopolistic competition," "imperfect competition," "workable competition," or "contestable markets." For a discussion, see Dexter Keezer, *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 AM. ECON. REV. 699 (1949). See also J. M. Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940). The basic argument is that existing markets are close enough to those theorized about in competition that we can still assume that existing markets operate as theorized.

Critics of this literature note that competition does not come in degrees. Thus, the social benefits that accrue from it are either present or not. See Richard Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956). See also ETZIONI, *supra* note 35, at 201-02. Etzioni notes that:

when an economy moves toward perfect competition say as the result of deregulation of one industry, one cannot assume that such a step will yield some of the benefits of perfect competition. Competition is either perfect or it is not; like pregnancy, it cannot be had in degrees . . . the model of perfect competition simply does not deal with partial situations.

the benefits that competitive markets provide us disappear with monopolistic, oligopolistic, or monopolistically competitive markets.⁴⁰

1. Monopoly

The market structure of monopoly is an industry with only one firm. Unlike perfect competition, 1) there are significant barriers to entry and 2) the monopoly has significant market power in its ability to determine market price by deciding its level of output.⁴¹ The monopolist will produce at a lower output and charge a higher price than firms in a competitive market because its optimal strategy, in terms of its profit-seeking objective, is to charge a price that exceeds its cost of production. The very market incentives that protect consumers in competitive markets are now at work to dominate consumer interests. The monopolist misallocates society's resources because consumers purchase less of the monopolist's good than they would if the good were distributed in a perfectly competitive market at the lower equilibrium price.⁴² Because of the welfare loss resulting from monopoly markets, monopolistic markets lack the social legitimacy of competition. To some degree the operation of these markets become yet another venue in which those with superior bargaining power manage to effectuate terms of the trade that reinforce and exacerbate power inequalities.

2. Oligopoly and Monopolistic Competition

Modern markets rarely resemble in a major way either competitive or monopolistic markets. Instead, most firms and their customers interact in what are termed "oligopolistic" or "monopolistically competitive" markets. While actual markets may stray far from the definitional attributes of a competitive market in some cases, and sharply resemble those attributes in the case of other markets, one generalization applies to all non-competitive markets. Only competitive markets provide abundant and free access to the widest range of potential sellers—a highly significant point overlooked by those who wish to

40. However, these alternatives have benefits of their own. For example, while competition is efficient in terms of allocating and distributing resources, it lacks technological efficiency in that small firms do not have excess profit to devote to technological research and development as do larger firms in an oligopoly. For a discussion, see ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF FREE MARKETS* (1996).

41. COLANDER, *supra* note 23, at 276.

42. *Id.* at 285.

shanghai market rhetoric to buttress efforts resisting the regulation of speech.

Oligopoly market structure is characterized by 1) significant entry barriers and 2) a small number of firms—so small that each firm must consider the likely subsequent actions of other firms.⁴³ In an oligopoly, firms can implicitly collude, for example, through a price leader. They can thus work together to profit maximize, as a monopoly firm would, at a price well above cost that will create a welfare loss to consumers. This ability, like that of monopolists, also creates extra profits that can be used to gain power in the political realm.⁴⁴ For both reasons of efficiency and equal opportunity, oligopoly, like monopoly, is not as desirable as competition.⁴⁵

Another of the in-between market structures is monopolistic competition. Like perfect competition, monopolistically competitive markets have many sellers and no barriers to entry.⁴⁶ But unlike oligopoly, monopolistic competition firms act independently of one another, and they cannot, over time, maintain prices at a substantially higher level than their cost of production. Monopolistic competition is distinct from competition because there is product differentiation, and competition is in spheres other than price.⁴⁷ The ability of a firm to differentiate its product from that of competitors, for example, convincing consumers of a particular local dry cleaner that its process

43. *Id.* at 297.

44. For a discussion of the ethical implications of power in the economic realm spilling over into the political arena, see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983). He argues for the desirability of “complex equality” where society should attempt to limit the ability of individuals to transfer success on one realm of society, say the economy, to another, like politics.

45. The arguments concerning which market structure is best for society are far more complex than explained thus far. Non-competitive structures are better for certain goals, such as technological efficiency as already mentioned. Further, Heilbroner and Thurow, *supra* note 32, at 168 present evidence that the big firms of non-competitive structures are more efficient in terms of productivity per employee hour.

Also, one fundamental assumption behind arguments for competition’s superiority is that a market structure should be judged in terms of its benefits to consumers. If, however, we measure the desirability of a structure based on how it treats workers, non-competitive structures have the capability to be more socially beneficial in certain regards. See Chris Tilly, *Chapter 5.1 in the Tenth Edition of Daniel Fireside*, in CHRIS TILLY ET AL., *REAL WORLD MACRO* (10th ed. 2002). Tilly writes that bigger companies, because they have excess profit, can, if they choose, offer their employees many more benefits such as more training, health insurance, and higher rates of unionization. Because small firms in competitive markets are struggling to survive, they cannot afford to treat their workers as well. Tilly concludes, “[s]ince bigness and smallness both have their drawbacks, the best we can do is to use public policies to minimize the disadvantages of each.”

46. COLANDER, *supra* note 23, at 300.

47. *Id.*

for pressing blouses or shirts is distinct and superior from that of other dry cleaners, provides that firm some market power and an ability to control prices. If a firm can convince consumers its product or service is superior, it can restrict output in a manner akin to that used by a monopolist.⁴⁸

Using revenue for advertising is instrumental in differentiating a firm's product. Using resources on advertising creates another potential social inefficiency because the firms are using more resources to distribute a product than would firms under competition.⁴⁹ Like other alternatives, monopolistic competition is not as socially desirable as competition in that it wastes resources—a fundamental failing in a climate of scarcity.

III. COMPETITIVE ASSUMPTIONS IN THE MARKET FOR SPEECH AS WISHFUL THINKING

In most instances, markets provide efficiency, consumer sovereignty, and equal opportunity, but only to the extent that actual markets resemble purely competitive markets. In other words, the transformation of a private vice, greed, into a public virtue by market processes—the potential fruit of capitalism—is only one possible result of market processes. Likewise, the marketplace of ideas is desirable only insofar as it is perfectly competitive. Any other institutional arrangement perpetuates an information flow from voices ranging from a whisper to a deafening and repetitive roar. Divergence from competitive market attributes, when speaking of the quality of discourse in a democracy, rigs the outcome, not in a determinative sense, but certainly in a highly probable sense. To argue otherwise is to presume that the most reasonable and evidence-based arguments will be selected by citizens even when its source is a relative whisper.

48. *Id.* at 315. Heilbroner and Thurow, *supra* note 32, at 166, note that:

Prices in an “imperfectly competitive” market, where advertising seeks to make each product seem unique, will be higher than in a market where all products are obviously the same. Because they cost more, the volume of goods sold in such an imperfectly competitive market will be less than that sold in a perfectly competitive one.

49. COLANDER, *supra* note 23, at 305. One can argue that the cost in advertising is outweighed by the benefit to consumers received from having choice among various brands of products. Heilbroner and Thurow, *supra* note 32, at 167 suggest that few consumers would want to live in the competitive world where all products are completely standardized. For a discussion of this argument and a forceful refutation of the benefits of too much consumer choice, see BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004).

How is the marketplace of ideas structured?⁵⁰ One way to answer that question is to examine the market shares that the top firms have in the information sector of the economy. The table⁵¹ below indicates the market shares of the top four firms in terms of percentage of total subsector receipts. Generally, economists label an industry “concentrated” when the four-firm concentration ratio exceeds 40%.⁵²

Information Sector: NAICS Subsectors	Four-Firm Concentration Ratio
Newspaper Publishers	31.9
Periodical Publishers	25.6
Book Publishers	40.7
Software Publishers	39.5
Motion Picture and Video Industries	37.4
Motion Picture Theaters (except drive-ins)	42.1
Sound Recording Industries	60.9
Record Production	36.8
Integrated Record Production/Distribution	81.0
Music Publishers	55.4
Sound Recording Studios	9.7
Radio Broadcasting	43.9
Radio Networks	53.8
Radio Stations	47.0
Television Broadcasting	50.2
Cable and other Subscription Programming	63.9

50. See ROBERT L. KERR, *THE CORPORATE FREE SPEECH MOVEMENT* (2008), for an historical account of the increasing tendency to see corporations as just another individual offering a political perspective. As Kerr points out, however, the economic benefits granted by law to the corporate form when transferred into the political arena create a form of feudalism reducing the space within which public debate occurs. Options that challenge the sovereignty of large corporations are not discussed because those who wish to articulate them are overwhelmed by the volume of corporate speech.

51. Data taken from U.S. CENSUS BUREAU, *ESTABLISHMENT AND FIRM SIZE: 2002 (INCLUDING LEGAL FORM OF ORGANIZATION)* (2002). The data uses the North American Industry Classification System (NAICS) sector and subsector classifications.

52. Chris Tilly, *Is Small Beautiful? Is Bigger Better?: Small and Big Businesses Both Have Their Drawbacks*, in DANIEL FIRESIDE & CHRIS TILLY, *REAL WORLD MICRO* (2002).

Internet Publishing and Broadcasting	25.0
Telecommunications	45.6
Internet Service Providers	59.4
Web Search Portals	57.5
News Syndicates	57.7
Libraries and Archives	26.6

A few subsectors are well below the 40% threshold and their structure probably approximates that of perfect competition.⁵³ However, many subsectors approach and many far exceed the threshold. These data show that the marketplace of ideas is far from competitive. Instead, most subsectors resemble oligopoly.⁵⁴

53. These statistics do not give any evidence, however, of whether the individuals consuming in these sectors meet the ontological assumptions necessary for perfect competition discussed above.

Furthermore, even though some industries may be competitive, when some industries within the economy are not competitive, there is no theoretical support for assuming that society will yield the benefits of perfect competition. See ETZIONI, *supra* note 35, at 201. “The often stated promise that the specific industry, its customers, or the economy, will benefit—regardless of what happens elsewhere in the system—is not supported by economic theory.” As Etzioni illustrates with examples of industry deregulation and free trade, deregulating one industry, or breaking down trade barriers between two countries, will not bring about the benefits of perfect competition *unless all other industries are deregulated or all other trade barriers are eliminated at the same time*. Thus the supposed benefits of a marketplace of ideas are not realized unless *all* subsectors of the information industry are competitive as well as the rest of the economy.

54. For evidence that the marketplace of ideas is not competitive, but instead highly concentrated, see BEN BAGDIKIAN, *THE MEDIA MONOPOLY* (1983). See also Robert McChesney, *The Rise and Fall of Professional Journalism*, in INTO THE BUZZSAW: LEADING JOURNALIST EXPOSE THE MYTH OF THE FREE PRESS 363-81 (Kristina Borjesson ed., 2002). McChesney argues that “the largest ten media firms own all of the U.S. television networks, most of the TV stations in the largest markets, all the major film studios, all the major music companies, nearly all of the cable TV channels, much of the book and magazine publishing, and much, much more.” For a similar argument, see also ROBERT MCCHESENEY & JACK NICHOLS, *IT’S THE MEDIA, STUPID!* (2000). For a refutation of Bagdikian and the idea of increasingly uncompetitive media concentration, see BENJAMIN COMPAINE & DOUGLAS GOMERY, *WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY* (2000). For a detailed discussion of the work of Bagdikian and criticism of Compaine’s work, see C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2006). Further evidence of the pervasiveness of big media power in the marketplace of ideas, see Donald Simon, Comment, *Big Media: Its Effect on the Marketplace of Ideas and How to Slow the Urge to Merge*, 20 J. MARSHALL J. COMPUTER & INFO. L. 246 (2002). Simon discusses the Telecommunications Act of 1996 in depth. The Act largely rolled back or completely erased many of the restrictions previously in place that were intended to maintain a competitive market. For example, it erased limits on the number of TV stations individuals or firms can own, eliminated cross ownership regulations of multiple media types in the top fifty media markets, and dropped rules limiting the number of radio stations one individual or firm can own. For evidence of a lack of competition in the press, see Alberto Riefkohl, *Freedom of*

the Press and the Business of Journalism: The Myth of Democratic Competition in the Marketplace of Ideas, 67 REV. JUR. U.P.R. 446 (1998). Riefkohl writes:

There are fewer newspapers, there are fewer cities with more than one daily newspaper in competition with each other and there is much more concentration of ownership of media outlets. Many of the newspapers around the country are owned by national chains like Knight-Ridder, Gannett and the Hearst Corporation, which own 76% of all the newspapers and control over 80% of total daily circulation.

The trend toward fewer media outlets has been accelerated by amendments to the rules limiting broadcasting media concentration and cross ownership. For many years, the Federal Communications Commission has imposed limits on cross ownership of media to make sure the marketplace is not dominated by all of the same participants. In recent years, however, the regulations have been amended to allow more concentration of ownership. As of 1985, a corporation could not own more than seven AM radio stations and seven FM stations in the same market. This limit was later increased to twelve and in 1992 it was raised to thirty. As it currently stands, the regulation allows a corporation to own up to 25% of a big market and up to 50% in a small market.

For a challenge to the assumption of power equality that competition is based on, see Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1149 (1993). Weinberg writes, "In the modern marketplace of ideas, those with extensive institutional or financial resources can speak more loudly than those without; the average person has little ability to speak in any but the softest of voices."

Charles Lindblom challenges the notion of a competitive marketplace on several fronts. See CHARLES LINDBLOM, *INQUIRY AND CHANGE: THE TROUBLED ATTEMPT TO UNDERSTAND AND SHAPE SOCIETY* (1990). He argues that access into the marketplace is significantly restricted, many voices are marginalized or silenced, and that the process of socialization through institutions like schools and family significantly impair individuals' ability to reason and question and instead teach conformity. For evidence of the lack of voice some have, Lindblom notes that certain ideas never get a chance to compete due to the limited spectrum in which public debate often takes place. He writes that, "discussion and thought fall within a narrowed range, the consequence narrowness of thought impairing by undermining a competition of ideas."

Lindblom discusses this point further in CHARLES LINDBLOM, *THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT* 223 (2001). He writes that:

Between and within each of the two elites, mutual challenge is frequent, but not on the fundamentals of the social order. The two elites speak almost unanimously . . . on the "obvious" virtues of hierarchy and inequality, the competence of elites, the necessity of social solidarity, and the dangers of political agitation. Nor on the functions, privileges, and offenses of elites—clearly questions about fundamentals—do they challenge each other . . . Ideological homogeneity puts a touch of impropriety on questions about the "American Way," the Constitution, the private enterprise system, the corporation, and equality.

Weinberg makes a similar point: "The spectrum of views expressed through the media may seem broad only because it is all we are used to. It may seem broad only to those of us whose opinions are in the same ballpark." Weinberg notes that from the perspective of groups with minority status like gays or African Americans, public debate may seem constrained.

For a non-quantitative, theoretical argument supporting the idea of a competitive marketplace of ideas, see Lillian BeVier, *The Invisible Hand of the Marketplace of Ideas*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 233-55 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). BeVier argues that although individuals are not good at detecting truth and falsity in political information, there are other market checks in place that make the market for ideas function well. These include heterogeneous interests, diversity among buyers and sellers, free riding of non-searchers off of "searchers" (searchers have higher preference intensity for political

Further evidence that the marketplace of ideas is not competitive is gained from examining its outcomes. The Supreme Court and marketplace theorists argue that, when we have free trade in ideas, the truth will compete with falsehood, and truth will win out.⁵⁵ Just as one would expect high quality goods and services to be produced in a competitive market, we should observe high quality goods, in the form of truthful ideas, in a competitive marketplace of ideas. Yet, oftentimes falsehood is just as, if not more, successful than the truth.⁵⁶

news), the reputation of information suppliers acting as a signal of accuracy to consumers, and competition among the press acting as a surrogate for individual consumers.

For another argument that the marketplace of ideas is competitive and not in need of any government antitrust action, see the speech by Robert D. Joffe in James Goodale, *Panel I: The Changing Landscape of Jurisprudence in Light of the New Communications and Media Alliances*, 6 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 427 (1996). Joffe argues that media mergers should not be subject to antitrust law because the marketplace of ideas is competitive: there are many points of entry into the market, consumers have significant power to make the market cater to their preferences, and rapid technological advancement provides checks on any firm's market power. The evidence for this argument is necessarily anecdotal and speculative in nature.

55. This belief has a long history in both political and legal theory. "Let truth and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?" JOHN MILTON, *THE AREOPAGITICA* (1644).

"Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right." J. S. MILL, *ON LIBERTY* 44 (2007).

"... the ultimate good desired is better reached by free trade of ideas—that 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 (1919).

56. See Chip Heath & Jonathan Bendor, *When Truth Doesn't Win in the Marketplace of Ideas: Entrapping Schemas, Gore, and the Internet* (Working Paper, 2003), available at http://www.igs.berkeley.edu/research_programs/ppt/past/papers/Gore412.pdf.

Most who followed the 2000 presidential election remember the abuse Al Gore received for claiming that he "invented the internet." Actually, Gore never made such a claim, only one slightly resembling it. Gore stated in a CNN interview, "During my service in the United States Congress, I took the initiative in creating the Internet," a claim substantiated by many votes during his tenure. Yet, within months after the interview, Heath and Bendor's survey of Florida voters found that more people believed Gore made the false statement rather than his actual one, despite substantial advertising by Gore to combat claims that he made the false one.

For further evidence that truth has difficulty competing with falsehood, see Derek Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 *U. COLO. L. REV.* 649 (2006). Bambauer uses beliefs about weapons of mass destruction ("WMD") to show the failures of the marketplace to produce truth. The case for invading Iraq was heavily built around claims that Iraq possessed WMDs. After the invasion in 2003, no WMDs were discovered. "Nonetheless, in October 2004, half of Americans surveyed believed Iraq had either weapons of mass destruction, or a major program for such weapons. 72 percent of respondents supporting President Bush in the election felt this way, as did 26 percent of Senator John Kerry's supporters."

For further discussion about the gap between beliefs and reality, see MURRAY EDELMAN, *WORDS THAT SUCCEED AND POLITICS THAT FAIL* (1977). Edelman argues that social problems can be "solved" not by changing the source of the problem but by altering people's perceptions about it.

The Supreme Court's First Amendment decisions are heavily reliant on the use of the marketplace of ideas metaphor. But the implied competitive market does not resemble the defining characteristics of the extant market for ideas. The Court, however, often fails to account for a non-competitive market structure in its decisions.⁵⁷

Truthful products in the idea market are even more elusive given the very nature of economic transactions. Producers of a good idea are in the business of selling that idea to consumers. Successful producers will generally give their consumers what they want. Pandering to consumer tastes can have harmful consequences for truth when consumers of information are not looking for truth and instead seeking information that supports their own viewpoints. For a discussion of this phenomenon and evidence supporting it, see Matthew Gentzkow & Jesse M. Shapiro, *Competition and Truth in the Market for News*, 22 J. ECON. PERSPECTIVES 133, 133-54 (2008). See also Sendhil Mullainathan & Andrei Shleifer, *The Market for News*, 95 AM. ECON. REV. 1031, 1031-54 (2005).

For an argument that the truth does win out in the marketplace, see Christopher Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 689 (1986). Wonnell uses evidence from the natural and social sciences. Wonnell argues that:

elite disciplines do progress toward truth, and that *in such disciplines* free speech tends to accelerate progress. Furthermore, it is contended that such truths, once discovered, will in a free speech society tend over the long run to spread beyond the narrow group of people who formed the culture that was responsible for their discovery.

Id. But even were such claims true, elite disciplines and the democratic polity do not necessarily have shared training or tendencies. Hence, as a defense of the claim that truth rises to the top when discourse occurs, this argument contains abundant naiveté about how typical people process information and arguments.

57. See *supra* note 21. This failure is not always the case. In some rare instances, the Court has discussed the market structure of the idea market by recognizing that there are market failures, that market power is unequally dispersed, and that the number of sellers is small in some instances.

In *Central Hudson Gas & Electric v. Public Service Commission*, 477 U.S. 577 (1980), Rehnquist perceptively argued in his dissent that, "There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market."

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), Justice Stevens delivered the opinion of the Court arguing that, "By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas."

In *Associated Press v. United States*, 326 U.S. 1 (1945), Justice Black delivered the opinion of the Court arguing:

The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all, and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in

IV. THE DETERMINATIVE EFFECT IN COURT DECISIONS OF GETTING “THE MARKET” RIGHT

Were the Court to think about market structure as economists do, many of its decisions would be different.⁵⁸ We provide evidence for this possibility below using a specific court case to demonstrate how beliefs about market structure are pivotal to Justices’ decisions. To assume the market is competitive (as the Court often does) leads to one decision; to assume otherwise leads to a much different one.

Although *Texas v. Johnson*⁵⁹ does not explicitly use the marketplace metaphor, the logic of a competing marketplace is deeply imbedded in the Court’s argument. In this case, the question under consideration is whether a Texas law banning flag burning is unconstitutional. Justice Brennan delivers the opinion of the Court,

news and views has any constitutional immunity.

See also *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). Mr. Chief Justice Burger delivered the opinion of the Court. In the quote below, he articulates an argument heard in the case. Burger writes:

A true marketplace of ideas existed in which there was relatively easy access to the channels of communication . . . But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be “surrogates for the public” carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise, it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the “marketplace of ideas” is today a monopoly controlled by the owners of the market.

In *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974), Justice Powell delivered the opinion of the court stating:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie.

The development of restrictions for corporate political speech also recognizes power inequalities in the idea market. See discussion in conclusion and *infra* note 64.

58. The evidence that the Court does think like economists when ruling about the marketplace of ideas is mixed. See Darren Bush, *The “Marketplace of Ideas:” Is Judge Posner Chasing Don Quixote’s Windmills?*, 32 ARIZ. ST. L.J. 1107 (2000). Bush concludes that the “Supreme Court’s cases do not consistently follow economic theory . . . the court is hit-and-miss in its application of economic principles,” which includes rulings about the structure of the idea market.

59. *Texas v. Johnson*, 491 U.S. 397 (1989).

holding that burning the American flag is constitutionally protected speech.

One main reason supporting Brennan's ruling is that we should not stop bad speech by prohibiting it, but rather "persuade them that they are wrong."⁶⁰ In other words, we should let the market for speech, where good and bad speech conflict, weed out bad speech for us, rather than having legislatures or courts regulate it.

But for the Court to argue thusly, many of the assumptions of the ideal marketplace of ideas must be made. For people to be persuaded, they must have information and must be able to reasonably assess it. There must be a large number of voices, no barriers to entry, and all participants must have an equal voice in the marketplace so that no one voice has power to manipulate the results. Further, there must be some public sphere where this debate takes place so that ideas actually meet and clash.

If the court assumed that people have little or unbalanced information and are frequently not rational in assessing it, the court would then not be able to link their reason (that we should use more speech to persuade people they are wrong) to the conclusion that the speech should be allowed. Instead, the court might reasonably conclude that the speech should not be allowed because the conditions for reflective persuasion cannot be met.

If the Court instead assumed that the marketplace is dominated by a few powerful entities that have power over the flow of ideas, it would again likely reach a different conclusion because it would not have as much faith that the market could filter out bad speech. Rather, the speech market would become a shouting match and whoever had the biggest microphone would win, regardless of the truth or quality of the winner's speech.

V. JOURNALISTS, NEWS MEDIA, AND THE MARKETPLACE OF IDEAS

By looking closely at the habit among journalists of using the free marketplace of ideas to serve as a talisman for their mission as journalists, we can perhaps shine light on the Court's failure to look closely at market structure.⁶¹ Reporters, publishers, and editors, drawing

60. *Id.*

61. See ARTHUR CHARITY, *DOING PUBLIC JOURNALISM* (1995). "The press can help citizens make decisions just by setting standards of civility and open-mindedness more conducive to the marketplace of ideas and the concept of community." The Washington Post Co., Chicago Tribune Co., American Newspaper Publishers Assn., and twelve other newspaper publishers and professional organizations filed amicus curae briefs encouraging reversal in *Miami Herald*

from the freedom of the press included in the First Amendment,⁶² view their output as an indispensable element in the proper functioning of a democracy—an idea the Court has supported.⁶³

Journalists who view their work as providing fodder and forum for discussion⁶⁴ have been quick to warn of perceived threats to their continued existence.⁶⁵ We should expect, then, that the market for ideas in journalism, supported by its practitioners, roughly conforms to a competitive one.⁶⁶ A non-competitive marketplace of ideas within

Publishing Co. v. Tornillo. See also Steven M. Hallock, *Editorial and Opinion: the Dwindling Marketplace of Ideas in Today's News* (2007); Edward J. Epstein, *News from Nowhere: Television and the News* (2000). "(T)he basic purpose of broadcasting is . . . 'the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day.' . . . (I)t is absolutely 'essential to the welfare of the public' for these ideas and information to come from 'diverse and antagonistic sources.'" Laura Smith, *Consolidation and News Content: How Broadcast Ownership Policy Impacts Local Television News and the Public Interests*, 10 JOURNALISM COMM. MONOGR. 387-94 (2008).

For critiques of the idea that journalists have a special responsibility to contribute to the marketplace of ideas see, for example, JOHN C. CALHOUN, *THE IMPERATIVE OF FREEDOM* (1974); CLIFFORD G. CHRISTIANS, JOHN P. FERRÉ & P.MARK FACKLER, *GOOD NEWS: SOCIAL ETHICS & THE PRESS* (1990).

62. MITCHELL STEPHENS & JERRY LANSON, *WRITING & REPORTING THE NEWS* (1986). It is sometimes said that newspapers, or journalism at large, is the only profession protected by the Constitution. See, e.g., MICHAEL DAVIS & ANDREW STARK, *CONFLICT OF INTEREST IN THE PROFESSIONS* (2001); THOMAS H. BIVINS, *MIXED MEDIA: MORAL DISTINCTIONS IN ADVERTISING, PUBLIC RELATIONS, AND JOURNALISM* (2004).

63. In *Mills v. Alabama*, 384 U.S. 214 (1966), Justice Black wrote for the majority that "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs."

64. See, e.g., H. Thomas, *An Eye on History*, in *MY FIRST YEAR AS A JOURNALIST: REAL-WORLD STORIES FROM AMERICA'S NEWSPAPER AND MAGAZINE JOURNALIST* (Diane Selditch ed., 1995); M. Navaro, *Trust Your Instincts*, in *MY FIRST YEAR AS A JOURNALIST: REAL-WORLD STORIES FROM AMERICA'S NEWSPAPER AND MAGAZINE JOURNALIST* (Diane Selditch ed., 1995); Jeff Zaslow, *Gotta Get the Story*, in *MY FIRST YEAR AS A JOURNALIST: REAL-WORLD STORIES FROM AMERICA'S NEWSPAPER AND MAGAZINE JOURNALIST* (Diane Selditch ed., 1995); M.L. STEIN, S.F. PATERNO & R. CHRISTOPHER BURNETT, *NEWSWRITER'S HANDBOOK: AN INTRODUCTION TO JOURNALISM* 374-80 (2d ed. 2006); WALTER CRONKITE, *A REPORTER'S LIFE* (1996).

65. These threats come in different shapes and sizes. Broadcasters often fought the so-called Fairness Doctrine, which attempted to ensure fair treatment of all sides of a debate on radio and television. See *Groups urge FCC to say no*, BILLBOARD, Sept. 3, 1994. More recently, mass media, especially newspapers, see the Internet as a threat to survival. See Connie Shultz, *Tighter copyright law could save newspapers*, CLEVELAND PLAIN DEALER, June 28, 2009. Shultz, a Pulitzer Prize-winning columnist, argued that "[n]ewspaper owners, publishers and journalists" use their clout to argue for a change in copyright law that would prevent Websites from linking to articles on the original publisher's Website for the first twenty-four hours after posting.

66. To date, traditional mainstream mass media such as newspapers have not been subject to special treatment owing to their outsized influence on the discussion among citizens, relative to other instruments of free speech such as sandwich boards on speaker trucks. This lack of regulation might lead one to assume that those in charge of such oversight have judged the existing

mainstream journalism would endanger its ability to carry the robust debate that inspires so many in the profession.

Like the Supreme Court, journalists and editors who recognized the existence of a non-competitive market may come to different conclusions about the proper structure of their marketplace, and hence the position they take in front of the Court, especially as the Internet opens their trade to a wider range of potential practitioners.⁶⁷

Some evidence cited earlier suggested how competition among journalistic firms, such as television stations, did not conform to perfect market structures.⁶⁸ Additional characteristics of the institutionalized press also harm the functioning of the marketplace of ideas.

A. *Journalism and Perfect Information*

As mentioned above, a requirement of a perfect functioning marketplace is that consumers have perfect information about the products they buy and the firms that produce them. In mainstream media, important knowledge about producing firms is rarely made clear in the daily reports Americans consume from journalists.

Journalists are obviously limited in the observations and the extent of research achievable by deadline. These limitations influence the eventual product of a story. Each day's report is necessarily incomplete. But a "here is what we don't know" or "here is what we tried to know" section is usually not found in most stories to accurately reflect the reporter's contribution to the marketplace of ideas.

Besides the physical limitations of their work, there are difficult ethical choices reporters must make on a daily basis that impose informational gaps on their eventual readers. They sometimes must, for example, decide whether to offer help to a source, or acknowledge conflicts of interest to their superiors. These choices also eventually influence a story—but rare is the article that outlines either of these types of limitations on the reporters involved, a "here is how we tried to figure out what we're saying" section.⁶⁹

marketplace of ideas to be functioning relatively well. See J.A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1966).

67. SCOTT GANT, *WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE* (2007).

68. See *supra* note 54.

69. See Tom Goldstein, *The News at Any Cost: How Journalists Compromise Their Ethics to Shape the News* (1985), for a former reporter's outline of many of these ethical choices, which often have to be made in the midst of a developing story. For a more critical look at the topic, see NEIL HENRY, *AMERICAN CARNIVAL: JOURNALISM UNDER SIEGE IN AN AGE OF NEW MEDIA* (2007). To

Readers may also wish to know that the pressures individual reporters encounter are accompanied by larger, structural influences on their work. These forces are also rarely accounted for in individual stories articles or within mainstream media at large. Edward Herman and Noam Chomsky note five “filters,” exercised before any individual journalist begins a story, that affect the firms’ contribution to the marketplace of ideas.⁷⁰ For example, an overwhelming imbalance of power exists between those who purvey “official” information about the government or businesses and the journalists who process that information for consumers. Official sources, such as the U.S. Air Force, have thousands of public relations personnel working to influence news coverage with no corresponding institutionalized journalistic cadre to examine the accuracy of their work.⁷¹

Journalists, however, rarely mention the importance of public relations to their ability to write stories.⁷² In a more recent example,

be sure, these decisions are not easy ones. Some charity should be afforded to the journalists who make them. Yet, the basic point is that the decisions must be made, one way or another.

On the transparency of the process by which a story develops in the mainstream media and how some online organizations sought and seek to challenge that paradigm, see AXEL BRUNS, *GATEWATCHING: COLLABORATIVE ONLINE NEWS PRODUCTION* (2005).

70. The filters together are called the “propaganda model.” See EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988). Not all of the filters are necessarily hidden from view within the marketplace of ideas or even relevant to it. Herman and Chomsky list as a filter the power advertisers have over the press’ ability to continue publishing—but this is quite visible on the pages of the press and in commercial breaks in broadcasting. Another filter, describing the force of anticommunist ideology, obviously has less relevance with the end of the Cold War. In the introduction to a new edition of the book written in 2002, however, Herman and Chomsky argue that forces that influenced media against communism and left-wing movements has been replaced by equally powerful influencers in favor of capitalism.

It should be noted also that journalists themselves would likely recognize the existence and importance of these filters. See Denise E. DeLorne & Fred Fedler, *An Historical Analysis of Journalists’ Attitudes Toward Advertisers and Advertising’s Influence*, 22 *AM. JOURNALISM* 7 (2005).

71. *Id.* Though reporters will regularly cite official sources, both on and off the record, what is opaque is how public relations agencies serve a subsidization function for journalism by saving news media from the cost of discovering daily events in government or conducting additional research to understand a story. The cost savings for media can sometimes lead to surprising practices, such as accepting TV “news” segments on hot-button topics produced by advertising agencies or the government without noting the source of the video. Christopher Lee, *Federal Agencies’ Disclosure of Prepackaged News Urged*, *WASH. POST*, May 13, 2005, at A21. See also the Center for Media Democracy’ repository of so-called “video news releases” at <http://www.prwatch.org/fakenews3/summary>.

72. Perhaps the clearest way journalists come to depend on public relations workers comes from the doctrine of “objectivity,” which dictates that “both sides” of a story be told. So in stories about politics, for example, public relations officers provide statements that can be inserted into stories to provide “balance.” Over time, these statements (or photo opportunities, or copies of

reporters covering the U.S. invasion of Iraq in 2003 had to choose between “embedding” themselves with U.S. forces, under conditions dictated by the military, or independently financing their journey into the country—an expensive and dangerous proposition.⁷³

Also rarely noted by journalists is the financial interest media firms have in the continued success of other corporations, often ones their journalists report on. Media ownership has consolidated for decades, as noted above. Today, mainstream media are often just one holding nestled in a huge multinational firm. Those who pay the bills for journalists have a financial interest in protecting their other holdings from unpleasant news. The result is a clear conflict of interest that is not always noted in news stories.⁷⁴

Not only do firms have a financial interest in sanitizing what their news organizations cover, but the people who sit on boards of directors at these firms often also sit on boards at other firms. These directors represent yet another financial incentive to have journalists tread cautiously when formulating their “news” reports.⁷⁵

The discussion here is premised on the assumptions that corporations play an influential role in our day-to-day lives and that journalism helps shape discourse about the role of those corporations in society. If those assumptions are correct, the prevalence of conflicts of interests we find among the owners of mainstream media resembles exactly what a competitive marketplace would avoid: the fox guarding the henhouse.

speeches, etc.) serve as a subsidy to journalists who no longer need to spend time or money digging these items up themselves. See, e.g., STEPHENS & LANSON, *supra* note 62; HERMAN & CHOMSKY, *supra* note 70.

In fairness to Stephens and Lanson, however, while reminding reporters to “include quotes from council members” or balance “charges and countercharges,” they do also advise students to “bend a bit to make room for the views of so-called ‘extremists’ and splinter groups.”

73. News organizations did usually acknowledge their relationship with the military, but reporters themselves, not oblivious to when these filters are at work, acknowledged that whether they were embedded with the military probably resulted in different coverage from their independent colleagues. See Shahira Fahmy & Thomas J. Johnson, *Embedded Versus Unilateral Perspectives on Iraq War*, 28 *NEWSPAPER RES. J.* 98 (2007). Nor is it necessarily true that removing corporate influence from news coverage would serve as an elixir for the ills of filters. For an argument that independent or alternative media need their own set of scrutiny, see Chris Atton, *Alternative Media Theory and Journalism Practice*, in *DIGITAL MEDIA AND DEMOCRACY: TACTICS IN HARD TIMES* (Megan Boler ed., 2008).

74. NBC, for example, is part of General Electric, ABC is owned by Disney. See also Charles Davis & Stephanie Craft, *New Media Synergy: Emergence of Institutional Conflicts of Interest*, 15 *J. MASS MEDIA ETHICS* 219 (2000).

75. See Bridget Thornton, Brit Walters & Lori Rouse, *Corporate Media is Corporate America: Big Media Interlocks with Corporate America and Broadcast News Media Ownership Empires*, in *CENSORED 2006: THE TOP 25 CENSORED STORIES* (Peter Phillips ed., 2005).

B. *Barriers to Entry*

As in other sectors of the marketplace of ideas discussed in Part IV, barriers to entry exist in journalism that make it difficult for new organizations to compete with established media. The barrier is especially high for new firms that explicitly seek to bring critical views to the marketplace.⁷⁶

A second barrier to entry exists as well within established media, one that prevents critical voices from getting into print or on the air.⁷⁷ The Internet is beginning to whittle down those barriers, however, allowing both critical individuals and organizations greater visibility and chances for publicity than they would have had even ten years ago.⁷⁸

Nevertheless, most professional reporters and editors function in a market where they must draw many of their financial and informational resources from corporations that advertise and from the government that provides “access.”⁷⁹ Yet corporations and the government, through their ability to employ large numbers of Americans, make laws affecting all

76. Especially useful illustrations of this point can be found in histories of media created by organized labor. See JAMES F. TRACY, *A HISTORICAL CASE STUDY OF ALTERNATIVE NEWS MEDIA AND LABOR ACTIVISM: THE DUBUQUE LEADER 1935-1939* (2007); ROBERT MCCHESENEY, *LABOR AND THE MARKETPLACE OF IDEAS: WCFL AND THE BATTLE FOR LABOR RADIO BROADCASTING, 1927-1934* (1992).

77. Janet E. Steele, *Experts and the Operational Bias of Television News: The Case of the Persian Gulf War*, 72 *JOURNALISM & MASS COMM. Q.* 799 (1995). See also MICHAEL MASSING & ORVILLE SCHELL, *NOW THEY TELL US: THE AMERICAN PRESS AND IRAQ* (2004) for a discussion of the lack of critical views in mainstream media on Iraq before the war began in 2003.

This is due in large part to freely available blogging tools, such as Wordpress or Google’s Blogger.

78. Blogs such as Talking Points Memo and Instapundit were among the first to be considered serious counterparts to established media in the early 2000s. In recent years, social media, prominently YouTube, Facebook, and Twitter, have expanded the trend. Bloggers often argue they add to the marketplace of ideas by critiquing the work of the mainstream media (for example, by pointing out flaws in reasoning or missed counterarguments), by introducing viewpoints that reject mainstream thought on a current event, or by providing a community for discussion of topics at a depth outside of a general interest newspaper or magazine. For a discussion, see Rachel Smolkin, *The Expanding Blogosphere*, *AM. JOURNALISM REV.*, June/July 2004.

However, it is not clear that blogs, or online discussion in general, can escape the frames mainstream media use to describe an event. Discussions on blogs can simply debate a topic as discussed in the mainstream media without introducing radical new viewpoints altogether. See Melissa Wall, *Blogging Gulf War II*, 7 *JOURNALISM STUD.* 111 (2006).

For early histories of the influence of blogs, see, for example, STEWART ALLEN, *ONLINE NEWS* (2006); DAVID D. PERLMUTTER, *BLOGWARS: THE NEW POLITICAL BATTLEGROUND* (2008). On how social media can allow journalists to act as facilitator of conversation, soliciting participation rather than speaking didactically, see CHARLIE BECKETT, *SUPERMEDIA: SAVING JOURNALISM SO IT CAN SAVE THE WORLD* (2008).

79. *Supra* note 70.

citizens, or even work closely together in shaping regulation,⁸⁰ and because of this disproportionate influence, are also institutions that deserve the highest level of journalistic scrutiny.

Journalists who attempt to challenge these powerful interests are often quickly threatened with *de facto* censure through revoked advertising dollars or refusal to provide the responses that “balanced” journalism requires.⁸¹ A market for ideas of this mold provides strong material disincentives against those who desire widely diverse views within it, imprisoning journalists within narrow ideological limits.⁸²

Accordingly, to hear that senior producer for PBS’ then-“MacNeil-Lehrer NewsHour” openly says he primarily seeks “players” to provide analysis on his show, or that a producer for ABC’s “Nightline” seeks former players, think-tank experts above all, should come as no surprise.⁸³

VI. CONCLUSION

How is the marketplace of ideas structured?⁸⁴ How do beliefs about structure inform judicial decisions? The marketplace of ideas is not competitive in the economic sense. Yet the Court often rules as if it is. What are the implications?

By assuming often that the idea market is competitive, Justices are committing the reification fallacy. They are treating an abstract belief or hypothetical construct as if it represented a concrete event or physical entity.⁸⁵ In this instance, the Justices assume that existing markets are structured the same way idealized competitive markets are. In doing so, they treat the marketplace of ideas as inherently good, when in fact one must first determine what structure *actually* exists.

By committing the reification fallacy, here meaning assuming existing markets are competitive, the Court is thereby affirming the existing structure as socially legitimate. By assuming competition, the Court does not then need to call for any change to the existing market. If

80. See, e.g., ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* (2009).

81. See, e.g., David Colker, *GM Stops Buying Ads in The Times*, L.A. TIMES, Apr. 8, 2005.

82. Charles E. Lindblom, *The Market as Prison*, 44 J. OF POLITICS 324 (1982).

83. Steele, *supra* note 77.

84. Hallock, *supra* note 61. The virtue of the free-marketplace-of-ideas metaphor rests in the benefits from competition of diverse views. Hence, its usefulness depends on an explicit examination of market structure. Markets function in diverse forms; different forms have different degrees of social efficacy.

85. Jim Walker, *List of Common Fallacies*, <http://www.nobeliefs.com/fallacies.htm>.

the Court assumed the existing idea marketplace was monopolistic, where one voice had significant market power, the Court would likely call for more restrictions and oversight of this market. If the market is competitive, however, no changes are needed and legislators and courts would do better to keep their hands off as the Court has traditionally done.

An important point to remember is that the Court can “intervene” in the marketplace of ideas without restricting certain ideas from being considered. Robert L. Kerr,⁸⁶ invoking Alexander Meiklejohn,⁸⁷ makes a crucial distinction between two potential governmental roles in the marketplace of ideas, its substantive and procedural roles. In the former, the government attempts to restrict (or take a *laissez-faire* approach to) the substance or content of speakers in the marketplace. In the latter, the government attempts to rectify advantages or disadvantages certain speakers possess in the marketplace of ideas.

The goal of regulation is to make sure all ideas are heard that are necessary for self-government (as Meiklejohn says that “everything worth saying shall be said”), but that nobody dominates the debate through resource advantages. Meiklejohn uses a town-meeting metaphor where the government plays the role of moderator. As Kerr points out, under this role as moderator, the government “may prevent some participants from dominating the deliberation . . . but it may not decide which ideas are acceptable or unacceptable.”

The procedural protections may be necessary to insure fair access and maintain equal opportunity for the broad range of substantive points among speakers. Paradoxically, the very benefits often touted by those resisting regulation of speech in non-competitive markets are rarely realized because of the structural flaws in the extant market for ideas. Regulation of speech in a manner that would be consistent with the town-meeting model would provide greater opportunity for expression of multiple relevant viewpoints. Although writers like Martin H. Redish⁸⁸ and Robert Post⁸⁹ attempt to argue against regulating corporate speech on grounds of infringing free speech, they fail to distinguish between procedural and substantive regulations. A procedural

86. See Kerr, *supra* note 1.

87. See MEIKLEJOHN, *supra* note 1. See also Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

88. Martin Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998).

89. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

regulation, instead of reducing the number of viewpoints in a discourse, eradicates procedural advantages specific speakers have because of their superior resources.

Corporations are entities that have advantages not granted to individuals, including perpetual life, limited liability, and special tax treatment. Kerr writes, “. . . managers are permitted to transfer those advantages from the economic marketplace directly over to the political marketplace, diminishing true free trade in ideas because other participants are not provided with such significant advantages.” Without procedural regulations, individuals are at a disadvantage in the marketplace of ideas.⁹⁰

Crucially, when the Court relies on the *laissez-faire* approach to the First Amendment, the marketplace metaphor is ideological⁹¹ as opposed to utopian.⁹² The marketplace metaphor acts as a cleansing device, a soothing agent, that helps citizens swallow, digest, and accept that the end product of the “competition” of ideas is to stabilize, rather than challenge, the existing order.⁹³ Without a careful consideration of the actual structure of the marketplace of ideas,⁹⁴ the Supreme Court is failing to make First Amendment rulings in favor of the democratic, truth-oriented interests of the demos, and may instead be serving, protecting, and entrenching the interests of the few.

90. We can see the way the Court has placed restrictions on the idea marketplace without restricting ideas in their treatment of corporate speech. For an overview of corporate speech cases, see Kerr, *supra* note 1; ROBERT KERR, *THE RIGHTS OF CORPORATE SPEECH: MOBIL OIL AND THE LEGAL DEVELOPMENT OF THE VOICE OF BIG BUSINESS* (2005).

Kerr argues that after *First National Bank v. Boston*, 494 U.S. 652 (1978), when the Court struck down a state ban on corporate spending for referenda, the Court has moved toward a Meiklejohnian perspective, explicitly and implicitly, with respect to corporate speech. In several important cases, the Court has upheld restrictions for corporate speech so that the advantages corporations enjoy over individuals do not allow corporations to transfer their economic resources into the political speech market. Kerr notes that this tradition is in jeopardy though due to recent narrow decisions, particularly *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), where the dissenters in a 5-4 decision invoked a *laissez-faire* interpretation for corporate speech.

91. See KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 40 (1936). Ideology is a device that serves and protects the interests of the strong in society. Mannheim says, “There is implicit in the word ‘ideology’ the insight that in certain situations the collective unconscious of certain groups obscures the real condition of society both to itself and to others and thereby stabilizes it.”

92. The utopian mentality is “incongruous with,” “breaks the bonds of,” and “transcends” the existing order. *Id.* at 192-93. Its goal is the “destruction and transformation of a given condition of society.” *Id.* at 40.

93. For a discussion of the marketplace metaphor as a legitimization device, see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1.

94. MANNHEIM, *supra* note 91, at 164. The marketplace strengthens democracy not because the shelves are full of ideas, but because there are multiple kinds of products on the shelves. The Swedish subsidy of newspapers with conflicting voices is an illustration of this recognition.