

THE ECONOMICS OF THE FIRST AMENDMENT

The Market for Goods and the Market for Ideas

By R. H. COASE*

The normal treatment of governmental regulation of markets makes a sharp distinction between the ordinary market for goods and services and the activities covered by the First Amendment—speech, writing, and the exercise of religious beliefs—which I call, for brevity, “the market for ideas.” The phrase, “the market for ideas,” does not describe the boundaries of the area to which the First Amendment has been applied very exactly. Indeed, these boundaries do not seem to have been very clearly drawn. But there can be little doubt that the market for ideas, the expression of opinion in speech and writing and similar activities, is at the center of the activities protected by the First Amendment, and it is with these activities that discussion of the First Amendment has been largely concerned.

The arguments that I will be considering long antedate the passage of the First Amendment (which obviously incorporated views already held) and there is some danger for economists, although not necessarily for American lawyers, in confining our discussion to the First Amendment rather than considering the general problem of which it is a part. The danger is that our discussion will tend to concentrate on American court opinions, and particularly those of the Supreme Court, and that, as a result, we will be led to adopt the approach to the regulation of markets

found congenial by the courts rather than one developed by economists, a procedure which already has gone a long way to ruin public utility economics and has done much harm to economic discussion of monopoly problems generally. This approach is confining in another way, since, by concentrating on issues within the context of the American Constitution, it is made more difficult to draw on the experience and thought of the rest of the world.

What is the general view that I will be examining? It is that, in the market for goods, government regulation is desirable whereas, in the market for ideas, government regulation is undesirable and should be strictly limited. In the market for goods, the government is commonly regarded as competent to regulate and properly motivated. Consumers lack the ability to make the appropriate choices. Producers often exercise monopolistic power and, in any case, without some form of government intervention, would not act in a way which promotes the public interest. In the market for ideas, the position is very different. The government, if it attempted to regulate, would be inefficient and its motives would, in general, be bad, so that, even if it were successful in achieving what it wanted to accomplish, the results would be undesirable. Consumers, on the other hand, if left free, exercise a fine discrimination in choosing between the alternative views placed before them, while

* University of Chicago.

producers, whether economically powerful or weak, who are found to be so unscrupulous in their behavior in other markets, can be trusted to act in the public interest, whether they publish or work for the *New York Times*, the *Chicago Tribune* or the Columbia Broadcasting System. Politicians, whose actions sometimes pain us, are in their utterances beyond reproach. It is an odd feature of this attitude that commercial advertising, which is often merely an expression of opinion and might, therefore, be thought to be protected by the First Amendment, is considered to be part of the market for goods. The result is that government action is regarded as desirable to regulate (or even suppress) the expression of an opinion in an advertisement which, if expressed in a book or article, would be completely beyond the reach of government regulation.

This ambivalence toward the role of government in the market for goods and the market for ideas has not usually been attacked except by those on the extreme right or left, that is, by fascists or communists. The Western world, by and large, accepts the distinction and the policy recommendations that go with it. The peculiarity of the situation has not, however, gone unnoticed, and I would like to draw your attention to a powerful article by Aaron Director. Director quotes a very strong statement by Justice William O. Douglas in a Supreme Court opinion, a statement which is no doubt intended as an interpretation of the First Amendment, but which obviously embodies a point of view not dependent on constitutional considerations. Justice Douglas said: "free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil and the like" (*Beauharnis v. Illinois*). Director remarks of the attach-

ment to free speech that it is "the only area where *laissez-faire* is still respectable."

Why should this be so? In part, this may be due to the fact that belief in a free market in ideas does not have the same roots as belief in the value of free trade in goods. To quote Director again: "The free market as a desirable method of organizing the intellectual life of the community was urged long before it was advocated as a desirable method of organizing its economic life. The advantage of free exchange of ideas was recognized before that of the voluntary exchange of goods and services in competitive markets." In recent years, particularly, I think in America (that is, North America), this view of the peculiar status of the market for ideas has been nourished by a commitment to democracy as exemplified in the political institutions of the United States, for whose efficient working a market in ideas not subject to government regulation is considered essential. This opens a large subject on which I will avoid comment. Suffice it to say that, in practice, the results actually achieved by this particular political system suggest that there is a good deal of "market failure."

Because of the view that a free market in ideas is necessary to the maintenance of democratic institutions and, I believe, for other reasons also, intellectuals have shown a tendency to exalt the market for ideas and to depreciate the market for goods. Such an attitude seems to me unjustified. As Director said: "the bulk of mankind will for the foreseeable future have to devote a considerable fraction of their active lives to economic activity. For these people, freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government." I have no doubt that this is

right. For most people in most countries (and perhaps in all countries), the provision of food, clothing, and shelter is a good deal more important than the provision of the "right ideas," even if it is assumed that we know what they are.

But leave aside the question of the relative importance of the two markets; the difference in view about the role of government in these two markets is really quite extraordinary and demands an explanation. It is not enough merely to say that the government should be excluded from a sphere of activity because it is vital to the functioning of our society. Even in markets which are mainly of concern to the lower orders, it would not seem desirable to reduce the efficiency with which they work. The paradox is that government intervention which is so harmful in the one sphere becomes beneficial in the other. The paradox is made even more striking when we note that at the present time it is usually those who press most strongly for an extension of government regulation in other markets who are most anxious for a vigorous enforcement of the First Amendment prohibitions on government regulation in the market for ideas.

What is the explanation for the paradox? Director's gentle nature does not allow him to do more than hint at it: "A superficial explanation for the preference for free speech among intellectuals runs in terms of vertical interests. Everyone tends to magnify the importance of his own occupation and to minimize that of his neighbor. Intellectuals are engaged in the pursuit of truth, while others are merely engaged in earning a livelihood. One follows a profession, usually a learned one, while the other follows a trade or a business." I would put the point more bluntly. The market for ideas is the market in which the intellectual conducts his trade. The explanation of the paradox is self-interest and self-esteem. Self-esteem leads the intellectuals to mag-

nify the importance of their own market. That others should be regulated seems natural, particularly as many of the intellectuals see themselves as doing the regulating. But self-interest combines with self-esteem to ensure that, while others are regulated, regulation should not apply to them. And so it is possible to live with these contradictory views about the role of government in these two markets. It is the conclusion that matters. It may not be a nice explanation, but I can think of no other for this strange situation.

That this is the main explanation for the dominance of the view that the market for ideas is sacrosanct is certainly supported if we examine the actions of the press. The press is, of course, the most stalwart defender of the doctrine of freedom of the press, an act of public service to the performance of which it has been led, as it were, by an invisible hand. If we examine the actions and views of the press, they are consistent in only one respect: they are always consistent with the self-interest of the press. Consider their argument that the press should not be forced to reveal the sources of its published material. This is termed a defense of the public's right to know—which is interpreted to mean that the public has no right to know the source of material published by the press. To desire to know the source of a story is not idle curiosity. It is difficult to know how much credence to give to information or to check on its accuracy if one is ignorant of the source. The academic tradition, in which one discloses to the greatest extent possible the sources on which one relies and thus exposes them to the scrutiny of one's colleagues, seems to me to be sound and an essential element in the search for truth. Of course, the counterargument of the press is not without validity. It is argued that some people would not express their opinions honestly if it became known that they really held these opinions. But this

argument applies equally to all expressions of views, whether in government, business, or private life, where confidentiality is necessary for frankness. However, this consideration has commonly not deterred the press from revealing such confidences when it was in their interest to do so. Of course, it would also impede the flow of information to reveal the sources of the material published in cases in which the transmission of the information involved a breach of trust or even the stealing of documents. To accept material in such circumstances is not consistent with the high moral standards and scrupulous observance of the law which the press expects of others. It is hard for me to believe that the main thing wrong with the Watergate affair was that it was not organized by the *New York Times*. I would not wish to argue that there are not conflicting considerations in all these cases which are difficult to evaluate. My point is that the press does not find them difficult to evaluate.

Consider another example which is in many ways more striking: the attitude of the press to government regulation of broadcasting. Broadcasting is an important source of news and information; it comes within the purview of the First Amendment. Yet the program content of a broadcasting station is subject to government regulation. One might have thought that the press, devoted to the strict enforcement of the First Amendment, would have been constantly attacking this abridgment of the right of free speech and expression. But, in fact, they have not. In the forty-five years which have passed since the formation of the Federal Radio Commission (now transformed into the Federal Communications Commission), very few doubts about the policy have been expressed in the press. The press, which is so anxious to remain unshackled by government regulation, has never exerted itself to secure a similar freedom for the broad-

casting industry.

Lest you think that I manifest a hostility to the American press, I would like to point out that the British press has acted in a similar fashion. In this case the contrast between actions and proclaimed beliefs is even stronger since what was established in Britain was a government-controlled monopoly of a source of news and information. It might have been thought that this affront to the doctrine of freedom of the press would have appalled the British press. It did not. They supported the broadcasting monopoly, mainly, as far as I can see, because they saw the alternative to the British Broadcasting Corporation (*BBC*) as commercial broadcasting and, therefore, as involving increased competition for advertising revenue. But if the press did not want competition for advertising revenue, they also did not want increased competition in the supply of news. And so they did their best to throttle the *BBC*, at least as a purveyor of news and information. When the monopoly was originally established (when it was still the *British Broadcasting Company*), the *BBC* was prohibited from broadcasting news and information unless obtained from certain named news agencies. No news could be broadcast before 7 p.m. and broadcasts likely to affect adversely the sale of newspapers faced other restrictions as well. Gradually, over the years, these restrictions were relaxed as a result of negotiations between the press and the *BBC*. But it was not until after the outbreak of World War II that the *BBC* broadcast a regular news bulletin before 6 p.m.¹

But, it may be argued, the fact that businessmen are mainly influenced by pecuniary considerations is no great discovery. What else would one expect from

¹ For a discussion of the attitude of the press to the monopoly of British broadcasting, see Coase, pp. 103-10 and 192-93.

the money-grubbers of the newspaper world? Furthermore, it may be objected, because a doctrine is propagated by those who benefit from it does not mean that the doctrine is unsound. After all, have not free speech and a free press also been advocated by high-minded scholars whose beliefs are determined by what is true rather than by more sordid considerations? There has surely never been a more high-minded scholar than John Milton. As his *Areopagitica* "for the liberty of unlicensed printing" is probably the most celebrated defense of the doctrine of freedom of the press ever written, it seemed to me that it would be worthwhile to examine the nature of his argument for a free press. Milton's work has another advantage for my purpose. Written in 1644, that is, long before 1776, we can see the character of the argument before there was any general understanding of how competitive markets worked and before the emergence of modern views on democracy.

It would be idle for me to pretend that I could act as a guide to Milton's thought. I know too little of seventeenth century England and there is much in Milton's pamphlet the meaning of which I cannot discern. Yet, there are passages which leap across the centuries and for whose interpretation no scholarship is needed.

As one would expect, Milton asserts the primacy of the market for ideas: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties" (p. 44). It is different from the market for goods and should not be treated in the same way: "Truth and understanding are not such wares as to be monopolised and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broadcloth and our wool-packs" (p. 29). The licensing of printed material is an affront to learned men and

to learning: "When a man writes to the world, he summons up all his reason and deliberation to assist him; he searches, mediates, is industrious, and likely consults and confers with his judicious friends; after all which done he takes himself to be informed in what he writes, as well as any that writ before him. If in this the most consummate act of his fidelity and ripeness no years, no industry, no former proof of his abilities can bring him to that state of maturity as not to be still mistrusted and suspected, unless he carry his considerate diligence, all his midnight watchings . . . to the hasty view of an unlicensed licenser, perhaps much his younger, perhaps far his inferior in judgment, perhaps one who never knew the labour of book-writing, and, if he be not repulsed or slighted, must appear in print like a puny with his guardian and his censor's hand on the back of his title to be his bail and surety, that he is no idiot or seducer, it cannot be but a dishonour and derogation to the author, to the book, to the privilege and dignity of learning" (p. 27). Licensing is also an affront to the common people: "Nor is it to the common people less than a reproach; for if we be so jealous over them, as that we dare not trust them with an English pamphlet, what do we but censure them for a giddy, vicious, and ungrounded people, in such a sick and weak state of faith and discretion, as to be able to take nothing down but through the pipe of a licenser" (p. 30). In the market for ideas, the right choices are made: "Let [truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter" (p. 45). Those who undertake the job of licensing will be incompetent. A licenser should be, according to Milton, "studious, learned, and judicious." But this is not what we are likely to get: "we may easily foresee what kind of licensers we are to expect hereafter: either ignorant, imperious, and remiss, or basely

pecuniary" (p. 25). The licensers are more likely to suppress truth than falsehood: "if it come to prohibiting, there is aught more likely to be prohibited than truth itself; whose first appearance to our eyes bleared and dimmed with prejudice and custom is more unsightly and unpalatable than many errors . . ." (p. 47). Nor does Milton fail to tell us that the licensing scheme against which he was writing came about as a result of industry pressure: "And how it got the upper hand . . . there was in it the fraud of some old patentees and monopolisers in the trade of book-selling" (p. 50).

In the formation of Milton's views, self-interest may perhaps have played a part, but there can be little doubt that his argument embodies a good deal of intellectual pride of the kind to which Director refers. The writer is a learned man, diligent and trustworthy. The licenser would be ignorant, incompetent, and basely motivated, perhaps "younger" and "inferior in judgment." The common man always chooses truth as against falsehood. The picture is a little too one-sided to be wholly convincing. And if it has been convincing to the intellectual community (and apparently it often has), it is surely because people are easily persuaded that what is good for them is good for the country.

I do not believe that this distinction between the market for goods and the market for ideas is valid. There is no fundamental difference between these two markets and, in deciding on public policy with regard to them, we need to take into account the same considerations. In all markets, producers have some reasons for being honest and some for being dishonest; consumers have some information but are not fully informed or even able to digest the information they have; regulators commonly wish to do a good job, and though often incompetent and subject to the influence of special interests, they act like this be-

cause, like all of us, they are human beings whose strongest motives are not the highest.

When I say that the same considerations should be taken into account, I do not mean that public policy should be the same in all markets. The special characteristics of each market lead to the same factors having different weights, and the appropriate social arrangements will vary accordingly. It may not be sensible to have the same legal arrangements governing the supply of soap, housing, automobiles, oil, and books. My argument is that we should use the same *approach* for all markets when deciding on public policy. In fact, if we do this and use for the market for ideas the same approach which has commended itself to economists for the market for goods, it is apparent that the case for government intervention in the market for ideas is much stronger than it is, in general, in the market for goods. For example, economists usually call for government intervention, which may include direct government regulation, when the market does not operate properly—when, that is, there exist what are commonly referred to as neighborhood or spillover effects, or, to use that unfortunate word, "externalities." If we try to imagine the property rights system that would be required and the transactions that would have to be carried out to assure that anyone who propagated an idea or a proposal for reform received the value of the good it produced or had to pay compensation for the harm that resulted, it is easy to see that in practice there is likely to be a good deal of "market failure." Situations of this kind usually lead economists to call for extensive government intervention.

Or consider the question of consumer ignorance which is commonly thought to be a justification for government intervention. It is hard to believe that the general public is in a better position to evaluate

competing views on economic and social policy than to choose between different kinds of food. Yet there is support for regulation in the one case but not in the other. Or consider the question of preventing fraud, for which government intervention is commonly advocated. It would be difficult to deny that newspaper articles and the speeches of politicians contain a large number of false and misleading statements—indeed, sometimes they seem to consist of little else. Government action to control false and misleading advertising is considered highly desirable. Yet a proposal to set up a Federal Press Commission or a Federal Political Commission modeled on the Federal Trade Commission would be dismissed out of hand.

The strong support enjoyed by the First Amendment should not hide from us that there is, in fact, a good deal of government intervention in the market for ideas. I have mentioned broadcasting. But there is also the case of education, which, although it plays a crucial role in the market for ideas, is subject to considerable regulation. One might have thought that those who were so anxious to obstruct government regulation of books and other printed material would also find such regulation in the field of education obnoxious. But, of course, there is a difference. Government regulation of education commonly accompanies government financing and other measures (such as compulsory school attendance) which increase the demand for the services of intellectuals and, therefore, their incomes. (See E. G. West, p. 101.) So self-interest, which, in general, would lead to support for a free market in ideas, suggests a different attitude in education.

Nor do I doubt that detailed study would reveal other cases in which groups of practitioners in the market for ideas have supported government regulation and the restriction of competition when it would increase their incomes, just as we

find similar behavior in the market for goods. But interest in monopolizing is likely to be less in the market for ideas. A general policy of regulation, by restricting the market, would have the effect of reducing the demand for the services of intellectuals. But more important, perhaps, is that the public is commonly more interested in the struggle between truth and falsehood than it is in the truth itself. Demand for the services of the writer and speechmaker depends, to a considerable extent, on the existence of controversy—and for controversy to exist, it is necessary that truth should not stand triumphant and alone.

Whatever one may think of the motives which have led to the general acceptance of the present position, there remains the question of which policies would be, in fact, the most appropriate. This requires us to come to some conclusion about how the government will perform whatever functions are assigned to it. I do not believe that we will be able to form a judgment in which we can have any confidence unless we abandon the present ambivalence about the performance of government in the two markets and adopt a more consistent view. We have to decide whether the government is as incompetent as is generally assumed in the market for ideas, in which case we would want to decrease government intervention in the market for goods, or whether it is as efficient as it is generally assumed to be in the market for goods, in which case we would want to increase government regulation in the market for ideas. Of course, one could adopt an intermediate position—a government neither as incompetent and base as assumed in the one market nor as efficient and virtuous as assumed in the other. In this case, we ought to reduce the amount of government regulation in the market for goods and might want to increase government intervention in the market for ideas.

I look forward to learning which of these alternative views will be espoused by my colleagues in the economics profession.

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