

1-1-1993

Fast Food and False Friends in the Shopping Mall of Ideas

Steven L. Winter
Wayne State University

Recommended Citation

Steven L. Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. Colo. L. Rev. 965, 974 (1993)
Available at: <https://digitalcommons.wayne.edu/lawfrp/374>

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.

FAST FOOD AND FALSE FRIENDS IN THE SHOPPING MALL OF IDEAS

STEVEN L. WINTER*

When I entered law school in 1974, there was little doubt about the political valence of the First Amendment. Lunch counter sit-ins, civil rights marches, and anti-war demonstrations were recent, still vivid lessons in the value of free speech. For proof of the importance of a free press, we had only to consider the crucial role of investigative journalists in the Watergate drama or turn to the *Pentagon Papers* case.¹ In 1974, the decisions in *Buckley v. Valeo*² and the commercial speech cases³ were still two years away; in fact, not one of the "conservative" First Amendment decisions catalogued by Professor Schauer had yet been decided.⁴ For the left-liberal of that day, the fundamental First Amendment question was how *far* to extend the boundaries of freedom of expression. The radicals among us thought that there should be no boundaries at all.

Much is different twenty years later. As Schauer remarks, free speech jurisprudence has become the congenial cohort of corporations and conservatives.⁵ On the left, advocacy of state regulation of speech is no longer the isolated heresy of a few radical feminists like Catharine MacKinnon.⁶ Support for more state intervention has become a mainstay of contemporary First Amendment discourse not only for critical race theorists like Richard Delgado, Mari Matsuda, and Charles Lawrence,⁷ but also for mainstream

* Professor, University of Miami School of Law.

1. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

2. 424 U.S. 1 (1976).

3. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

4. Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993).

5. *Id.* at 948-52.

6. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 163-97 (1987).

7. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

liberals like Owen Fiss.⁸ The ironic role reversal is nowhere more clear than in the debate over campus hate speech: Henry Hyde and William Buckley have become First Amendment paladins; many who now argue for prohibitions on "offensive speech" are people who, twenty-five years ago, might have worn Paul Robert Cohen's slogan on *their* backs.⁹

A shift of this magnitude virtually demands an explanation. Professor Schauer suggests that, notwithstanding the historic alliance between progressives and First Amendment partisans, the free speech principle may have had an inherently conservative bias all along. He points out that in speech, as elsewhere, formal neutrality favors those who are already the beneficiaries of existing imbalances in economic and social power. Thus, he observes "that the marketplace of ideas is less metaphor than description, and that in the marketplace of ideas, like in most other markets, one can compete much more successfully if one has greater resources."¹⁰ For Professor Schauer, moreover, this advantage is a logical corollary of free speech theory and not a mere accident of fortune. He concludes "that there may be a closer affinity between free speech libertarianism and economic libertarianism . . . than has traditionally been supposed."¹¹

The problem with this particular explanation is that it leads to the historical conundrum with which Professor Schauer closes:

8. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

9. See *Cohen v. California*, 403 U.S. 15, 16 (1971) ("On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible.").

10. Schauer, *supra* note 4, at 949. Schauer distinguishes his thesis concerning the changing political valence of free speech doctrine from that of Jack Balkin, suggesting that Balkin emphasizes the manipulability of doctrine in a crude legal realist manner. *Id.* at 944-45; see also J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383-84. But Balkin develops both of the themes that Schauer alludes to here. First, Balkin argues that the legal realist attacks on the public/private distinction and the theoretical coherence of freedom of contract apply with equal force to freedom of speech. *Id.* at 383 ("[R]ecent left critiques of traditional liberal first amendment doctrine bear a striking similarity to the legal realist critique of the favored right of laissez-faire conservatives, free contract."). Second, he argues that, in the context of modern communications media, the distribution of wealth has a direct effect on the distribution of communicative power. *Id.* at 407 ("To put it bluntly, the more property one has, the greater one's ability to compete in the marketplace of ideas, just as in the ordinary marketplace.").

11. Schauer, *supra* note 4, at 951; but cf. Fiss, *Why the State?*, *supra* note 8, at 782-83 (noting that the First Amendment "has long served as the breeding ground of libertarian sentiment" and observing that Ronald Coase and Aaron Director had drawn the parallel between free speech and free market theory as early as 1974 and 1964, respectively).

“Perhaps the principal question remaining, and one to which there may be no easy answer, is only about why it took so long.”¹² Indeed. If the conceptual connection between free speech and free markets is as strong and deep as Professor Schauer suggests, one wonders how it managed to evade both progressives and conservatives for most of this century. If the concept of *laissez faire* is the common core of economic and free speech theory, then the tardy emergence of the First Amendment’s inherent conservatism is a truly daunting enigma.

There *is* a problem here, but it is methodological rather than historical. The historical conundrum arises only because Professor Schauer treats the First Amendment as a monolith that embodies a single, analytic truth. He believes that there really is something that, in his own words, can be identified as “*the principle of freedom of speech.*”¹³ If one embraces an essentialist approach, reduces free speech to a single value, and concludes that autonomy (i.e., libertarianism) is that value, then the late appearance of the First Amendment’s conservative tilt does present a difficulty.¹⁴ But

12. Schauer, *supra* note 4, at 957.

13. *Id.* at 935, 955-57 (emphasis added). Fiss, in contrast, identifies “the autonomy principle” and “the public debate principle” as competing candidates for “the mediating principle that gives fullest expression to [the First Amendment] ideal.” Fiss, *Why the State?*, *supra* note 8, at 784-85.

14. In his comments at the conference, Schauer denied the charge of essentialism and acknowledged the historicity of “the free speech principle.” Frederick Schauer, Remarks at the University of Colorado Ira C. Rothgerber, Jr., Conference on Constitutional Law: Freedom of Speech in a World of Private Power, Boulder, Colo. (Mar. 19, 1993); *cf.* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 58 (1991) (explaining that what he calls “literal” or “acontextual” meaning need not connote “anything essential or natural or inexorable,” but rather “incorporates substantive moral, social, and political presuppositions that could be and may yet be otherwise.”). The problems with this clarification are two. First, it necessarily concedes my point: The fact that the First Amendment has only recently begun to display conservative tendencies presents no particular theoretical difficulty once one recognizes that “the” principle of free speech is an historical contingency. *See infra* text accompanying note 15.

Second, the clarification is not really responsive to the main thrust of my critique. It is true that Schauer’s position is not “essentialist” in the limited sense that it recognizes the historical contingency of the meaning of free speech. But it remains “essentialist” in the relevant sense because it assumes that the product of that historical contingency has a single, discrete character or essence whose meaning does not vary with context. Thus, Schauer’s approach is “essentialist” precisely to the extent that it treats the substance of the First Amendment as having an intrinsic meaning (and, thus, an inherent conservative tilt) regardless of the social circumstances in which it operates. In other words, the clarification notwithstanding, Schauer’s view is reductive, monistic, and acontextual. Accordingly, it remains vulnerable to the pluralist and contextualist critiques. *See infra* text accompanying notes 16-22.

if one takes the view that there is no single or exclusive conception of free speech, then the conundrum simply disappears.

Although I could very well be mistaken, it seems clear to me that—as an historical and conceptual matter—there have been not one, but several First Amendments. In that case, the fact that the current First Amendment betrays conservative inclinations while its predecessor proclaimed more progressive propensities is a contingent historical development no more mysterious or obscure than the fact that the framers' First Amendment was essentially populist and, thus, deeply majoritarian.¹⁵ The answer to the supposed historical conundrum might be nothing more profound than the observation that things change.

Of course, the more interesting and important question is, "Why do things change?" It is the more interesting question because the answer might provide clues to our own future. It is the more important question because the nature of the account or explanation of how we ended up with a First Amendment of this particular conservative tilt will affect our judgment about what cultural or epistemic conditions might allow reconstruction. I want to suggest several slightly different accounts, each of which highlights a different dimension of the historical dynamic of free speech.

Consider, first, the First Amendment's rich normative and conceptual potential. As Steve Shiffrin reminds us, there are "a host of First Amendment values" that include liberty, equality, self-realization, respect, dignity, autonomy, tolerance, and even romance.¹⁶ And, as he warns, any choice among these values entails a substantial normative loss. Not only is society "too diverse and too complicated to justify the expectation that monistic methodologies could be productive," but for many "the diversity and complication of social reality is itself positively valued."¹⁷ In a related vein, I have previously suggested that "the marketplace of ideas" metaphor was crucial to the emergence of the modern First Amendment. With this single gestalt, Holmes evoked the autonomy of the market, the spirited civic exchange of the public forum,

15. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 173 (2d ed. 1985) ("Everywhere unlimited liberty existed to praise the American cause . . . '[L]iberty of speech,' as Arthur Schlesinger so aptly said, 'belonged solely to those who spoke the speech of liberty.'").

16. See STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 5-6 (1990).

17. *Id.* at 7.

and the relativist notion of "truth" as that which succeeds in the competitive domain of public opinion. The market metaphor thus provided the conceptual complexity necessary to sustain the kind of robust legal development characteristic of modern First Amendment jurisprudence.¹⁸

From this more conceptually pluralist perspective, the conservative tilt of contemporary free speech doctrine can be seen as the direct consequence of its contraction to an exclusive concern with autonomy. To the extent that this account is correct, it corroborates Schauer's intuition that principles have political tilt. Indeed, the reduction of a complex area of law to a single principle, purpose, or policy is a tried and true method for narrowing its scope and reorienting its political valence. Consider in this regard the way in which the current Court has employed an exclusive focus on deterrence to narrow the scope of the Fourth Amendment's exclusionary rule.¹⁹

But this conceptual account of change in First Amendment law is only partially correct because it is incomplete in two important respects. First, it fails to consider the relevance of social context. It is frequently the case that an idea which seemed workable or congenial in one setting proves counterproductive or harmful in another. The invention of modern standing law is a good example. In the hands of its original creators, it seemed a promising device for protecting progressive legislation from the predations of the *Lochner* era Court. In the hands of the Burger and Rehnquist Courts, the very same concept has proved a lethal weapon capable of decimating entire classes of constitutional rights by rendering them unenforceable.²⁰ Moreover, the reverse political valence of current standing law is not a function of manipulation in a vulgar legal realist manner, but the direct and predictable product of the analytic structure of the doctrine.²¹

This is the real thrust of Jack Balkin's point about the ideological drift of the First Amendment. When the federal judiciary is using its injunctive power forcibly to prevent labor unions from organizing, protesting, and striking, the First Amendment's auton-

18. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1186-91 (1989).

19. See, e.g., *United States v. Leon*, 468 U.S. 897, 908-13 (1984).

20. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1452-78 (1988).

21. *Id.* at 1468-70 (discussing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)).

omy principle is a powerful progressive weapon. But when the target of progressive efforts expands to the terms and conditions of social life—to the way in which entrenched power arrangements structure one's very preferences, perceptions and abilities—then the public/private distinction embedded in the autonomy principle will prove a potent political obstacle. As the character of social conflicts change, the political tilt of a concept or position may be reversed or transformed beyond recognition.

The basic point is that one simply cannot speak about meaning in isolation from context.²² To take another example, consider Professor Schauer's analytically sound point that government neutrality toward free speech and formal guarantees of freedom of expression do not yield equality of access to the means of communication. But it does not follow that a regime of strict governmental equality always favors the interests of the powerful. In the context of the civil rights protests or the anti-war demonstrations of the 1960s, the high public dramas of moral conflict and Oedipal rebellion, respectively, all but insured the protestors' access to the nightly news. In that context, progressive forces did not *need* a

22. The problem is not that Schauer ignores context altogether, but that he understands context literally and simplistically as an external condition that may affect meaning at the margins. This allows him to acknowledge that context sometimes matters, but then to proceed as if it did not. Thus, Schauer explains in a footnote that the claim that concepts have "quite deep and relatively fixed political structure" does not entirely discount the role of context. Schauer, *supra* note 4, at 944 n.44. Nevertheless, he proceeds to compare concepts to objects cast in steel: "True, the steel could have been used to make a locomotive rather than a bridge, but once the bridge is made it is quite difficult to turn it into a locomotive." *Id.* at 945 n.44. However, as I explore in the next few paragraphs of text, what Schauer fails to recognize is that context problematizes and destabilizes meaning because it is integral to meaning. See *infra* text accompanying notes 22-32.

The analogy between meaning and a steel bridge is apt only if one ascribes to a highly reified view of language, as Schauer in fact does. See Steven L. Winter, *Confident, But Still Not Positive*, 25 CONN. L. REV. (forthcoming 1993) (identifying this demonstrably mistaken view of language as the fundamental problem of Schauer's positivism). Indeed, the analogy seems plausible because it is an instantiation of the basic conceptual metaphor IDEAS ARE OBJECTS. Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745, 753-57 (1992) (recounting the evidence which demonstrates that this metaphor is a vital and stable part of our conceptual system). But ideas do not have all the qualities of rigidity and inflexibility characteristic of concrete objects; to think so is to commit the fallacy of reification. See *id.* at 759. To recast Schauer's analogy, meaning is more like a steel bridge on a planet where the ambient air temperature is about 1450 degrees Celsius. A few degrees more and the bridge will start to droop; should the temperature reach 1500 degrees Celsius, the resulting mass of molten steel could be turned into a locomotive quite easily.

To put the point another way, note how easily the meaning of the steel bridge analogy changed *just by specifying context*. Like the steel bridge analogy, Schauer's reified view of language seems plausible only because he presupposes the existing, unspecified context. Quite literally, he takes it for granted.

substantive right of access. Conversely, the resort to old fashioned state repression by the powers-that-be of the period meant that the First Amendment's autonomy principle was a valuable and effective ally of progressive forces. Today, in the absence of sustained public attention, progressive forces are left in the disadvantageous position of formally free but substantively unequal competition in a very expensive media marketplace.

The second thing left out of a purely conceptual account is an explanation of how a concept acquires content to begin with. This leads us into heavily contested philosophical territory. But I take it as a postulate of our post-Wittgensteinian, postmodern period that, as Charles Taylor says: "The basic relation is that ideas articulate practices. . . . That is, the ideas frequently arise from attempts to formulate and bring to some conscious expression the underlying rationale of . . . [existing] pattern[s of behavior]." ²³ What is interesting here is that this insight radicalizes the point about the relationship between meaning and context. Thus, on further examination, the two things left out of our earlier conceptual account of change turn out to be the very same thing: The conceptual content and political valence of the First Amendment change over time because the larger meaning-conferring context changes constantly.

In the few moments that remain, let me sketch some examples of this process in the development of the right of freedom of speech.²⁴ Consider the contingent quality of what we so quaintly and unquestionably refer to as "the marketplace of ideas." The metaphor originates in Holmes's dissent in *Abrams v. United States*, where he argued that: "The ultimate good desired is better reached by free trade in ideas—that the best test of truth is the

23. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 204 (1989). As Taylor explains:

[M]oral ideals . . . for the most part exist in our lives through being embedded in practices. By 'practices' I mean . . . more or less any stable configuration of shared activity, whose shape is defined by a certain pattern of dos and don'ts. . . . The way we discipline our children, greet each other in the street, determine group decisions through voting in elections, and exchange things through markets are all practices. . . .

As articulations, ideas are in an important sense secondary to or based on patterns. A pattern can exist just in the dos and don'ts that people accept and mutually enforce, without there being (yet) an explicit rationale. And as children, we learn some of the most fundamental patterns at first just as such. The articulations come later.

Id.

24. Here, I am condensing a more detailed argument that is elaborated upon in Winter, *supra* note 18, at 1183-95, 1224-32.

power of the thought to get itself accepted in the competition of the market. . . ."²⁵ Given the similarity of the market practices of Holmes's day and ours, the "marketplace of ideas" seems a natural and self-evident metaphor for the freedom of speech idea. Indeed, we can only wonder why it took so long to emerge.

An important part of the answer is that, although the *market* metaphor was long available to free speech partisans, it did not always bear the same meaning. To take a famous example, Milton's seventeenth century polemic, the *Areopagitica*, was written during an era of imperial mercantilism. Milton invoked the *market* metaphor in his defense of free speech, but he used it to deride the notion of licensed printing: "Truth and understanding are not such wares as to be monopoliz'd and traded in by tickets and statutes, and standards. We must not think to make a staple commodity of all knowledge in the Land, to mark and license it like our broad cloath, and wooll packs."²⁶

As Fred Schauer and Stanley Fish both point out, for enlightenment intellectuals and their predecessors (like Milton), the driving force behind the ideal of freedom of speech was a strong concept of "Truth" and its inevitable victory over error and falsehood. Thus, in a famous passage, Milton argued that "though all the windes of doctrin were let loose to play upon the earth, Truth be in the field. . . . Let her and Falsehood grapple; who ever knew Truth put to the wors, in a free and open encounter."²⁷ Here, Milton has employed the conventional metaphor RATIONAL ARGUMENT IS WAR²⁸ which, in his mind, insures ultimate victory: "For who knows not that Truth is strong next to the Almighty; she needs no policies no stratagems, nor licensings to make her victorious; Those are the shifts and defences that error use against her power: give her but room, and do not bind her. . . ."²⁹ Indeed, Milton's only concern is with the danger of restraint. "Truth is compar'd in Scripture to a streaming fountain; if her waters flow not in a perpetuall progression, they sick'n into a muddy pool of conformity and tradition."³⁰ Not surprisingly, the operative met-

25. 250 U.S. 616, 630 (1919).

26. John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing, To the Parliament of England*, in *THE PROSE OF JOHN MILTON* 265, 303-04 (J.M. Patrick ed., 1967) (1644) (all spellings as in original).

27. *Id.* at 327.

28. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 52-53 (1980).

29. Milton, *supra* note 26, at 327-28.

30. *Id.* at 310.

aphor for this conception of free speech is the "free flow of ideas."

If the "marketplace of ideas" metaphor only makes sense after the development of laissez faire capitalism, it is equally true that the rise of classical liberalism, with its commitment to the relativity of value, undermines Milton's faith in the power of "Truth" to sustain itself against all comers. Thus, the discontinuity between the framers' First Amendment, with its focus on the prohibition of prior restraints and the introduction of truth as a defense to charges of seditious libel,³¹ and the modern First Amendment, with its more libertarian emphasis, is a function of the radically different social contexts and the distinctive concepts they each make possible. As Leonard Levy suggests: "Neither freedom of speech nor freedom of the press could become a civil liberty until people believed that the truth of their opinions, especially their religious opinions, was relative rather than absolute. . . ."³² Thus, the modern First Amendment is a contingent historical development made possible by the rise of liberalism and laissez faire in the late nineteenth century.

I suggested earlier that a good explanation of how we got where we are might provide clues to our future. The social contingency of the assumptions and understandings that underlie First Amendment doctrine suggest that contemporary free speech theory does indeed face a serious crisis. As we gather here in the final decade of the twentieth century, the postindustrial processes of bureaucratization, consumerization, commercialization, and mass media saturation threaten substantially to transform our experience of the market. The Athenian agora is now the local shopping mall. As my colleague Steve Schnably points out: "The mall is not simply an agglomeration of stores, but a carefully planned environment designed to create a total experience by which we are expected to define ourselves as consumers."³³ The mall, moreover, is populated by a relatively ubiquitous and unchanging series of franchises with suspiciously postmodern names like The Gap, The Limited, Victoria's Secret, and the more politically ominous Banana Republic.

These developments are not politically neutral. As Mary Becker points out, they have a particularly real and deleterious effect on

31. LEVY, *supra* note 15, at 198-205.

32. *Id.* at 5.

33. Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 388 (1993).

women.³⁴ They also have implications for free speech doctrine. In this commercial context, the really grave problem is not that the autonomy principle underlying the First Amendment may have a hidden conservative tilt. It is that, in the age of pervasive consumer conformity, the notion of autonomy may itself come to seem incoherent. Reliance on the "free trade in ideas" as the bulwark of democracy and self-government seems vacuous when the "distinct tyranny of late twentieth century America" is a homogeneous corporate culture that thrives on the public's "insatiable appetite for amusement"³⁵ and its apparently unceasing need for ever more uniform badges of consumer status.³⁶ In short, the real danger is not that the First Amendment may turn out to be a false friend, but that it may leave us with the political and intellectual equivalent of fast food.

The danger, I hasten to add, is not merely speculative; the harbingers are already here. Speech is now a primary product of entire bureaucracies that design, market, and disseminate images and other symbolic forms through ever faster means of communication like the fax and the modum. As Professor Schauer observes, the Enlightenment notion that true ideas have some natural advantage in the deliberative process seems "somewhere between fragile and false" given the realities of contemporary marketing practices.³⁷ In Washington, corporations and trade associations now hire agencies to orchestrate "spontaneous" outpourings of grass-roots sentiment in forms that make it impossible for elected officials to identify as manufactured.³⁸ The refrain so familiar from the technological age—"is it live, or is it Memorex?"—has now been recast to suit the postmodern age of instantaneous, mass-produced public opinion. "[A]s they put it in the lobbying industry: is it grass roots or is it Astro Turf."³⁹ Undoubtedly, only Ronald Reagan's hairdresser knows for sure.

34. Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993).

35. Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1088 (1990).

36. JEAN BAUDRILLARD, *REVENGE OF THE CRYSTAL: SELECTED WRITINGS ON THE MODERN OBJECT AND ITS DESTINY, 1968-1983*, at 75-76 (P. Foss & J. Pefanis eds., 1990).

37. Schauer, *supra* note 4, at 953.

38. Stephen Engelberg, *A New Breed of Hired Hands Cultivates Grass-Roots Anger*, N.Y. TIMES, Mar. 17, 1993, at A1.

39. *Id.*