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FIXING FALSE TRUTHS: RETHINKING TRUTH ASSUMPTIONS AND FREE-EXPRESSION RATIONALES IN THE NETWORKED ERA

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ABSTRACT

The First Amendment makes no mention of truth. Assumptions about truth, however, have become the foundations for free-expression rationales, the very bases for such freedoms in a democratic society. The Supreme Court gradually, over time, wedded Enlightenment assumptions about truth to the marketplace of ideas rationale for free expression. This Article examines, in light of massive, widespread adoption of networked technologies and AI and Supreme Court decisions that have undermined the distinctive role of truth, whether truth should be removed or replaced as a crucial, justifying concept in freedom of expression. The Article examines the marketplace approach's history and assumptions, as well as alternative, philosophical understandings of truth and how the Supreme Court has communicated understandings about truth in its opinions. The Article concludes by outlining how installing revised truth assumptions, those that align more with discursive and phenomenological understandings, will better protect these freedoms, as well as the flow of information, in the twenty-first century.

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INTRODUCTION: A RUDIMENTARY BUT CRUCIAL QUESTION

The forty-five words that comprise the First Amendment make no mention of truth, yet understandings about truth have dictated how free expression safeguards have been defined, rationalized, and explained in the United States since the Supreme Court's first free-expression-related decisions.[1] This is not an accident; most of those involved in crafting the amendment in the late eighteenth century were children of the Enlightenment, people who generally assumed truth was objective and the same for all and that people were rational and capable of governing themselves.[2] Similarly, a line of prominent Justices, beginning with Oliver Wendell Holmes, wed their understandings and justifications for free expression to the marketplace of ideas theory, which assumes truth will generally succeed and falsity will fail in a relatively unregulated exchange of ideas.[3] Thus, the marketplace of ideas approach,[4] with its foundations in truth and its powerful role in how the Court has communicated how it understands First Amendment safeguards for free expression, has essentially been the needle that has sewn the idea of truth into the tapestry of the First Amendment, where it has persisted, largely as a result of the inertia Enlightenment assumptions have carried into the twenty-first century.[5]

Such a reliance on truth in interpreting the First Amendment and rationalizing free expression can perhaps find its nexus point in Justice Holmes's dissent in *Abrams v. United States* in 1919, when he explained, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[6] He continued, concluding, "That at any rate is the theory of our Constitution."[7] While earlier that year, in a trio of cases, the Court had squarely addressed the First Amendment for the first time, it was in *Abrams* that truth and the First Amendment were first intertwined.[8] They

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[1] *See* U.S. CONST. amend. I. *See generally* Abrams v. United States, 250 U.S. 616 (1919); Whitney v. California, 274 U.S. 357 (1927), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (tracing the evolution of First Amendment rights analysis).

[2] R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1074–76 (1995); Steven D. Smith, *Recovering (from) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1264–66 (2004).

[3] *Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2–4; Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1350–51 (1991).

[4] *See* Ingber, *supra* note 3, at 5.

[5] *See id.* at 2–5.

[6] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[7] *Id.*

[8] *Compare* Sugarman v. United States, 249 U.S. 182 (1919), Schenck v. United States, 249 U.S. 47 (1919), *and* Debs v. United States, 249 U.S. 211 (1919), *with Abrams*, 250 U.S. 616.

have thus remained.[9] Justice Louis Brandies stitched truth further into the First Amendment's justifications for expression in his famous concurring opinion in *Whitney v. California* nine years later.[10] He concluded the Framers believed the right "to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[11] Truth became even more a part of the First Amendment's fabric when Justices rejected Minnesota's truth *and* good motives requirements when they overturned a nuisance publication law in *Near v. Minnesota ex rel. Olson* in 1931.[12] The decision marked the first instance in which the Supreme Court struck down a law because it violated the Speech and Press Clauses of the First Amendment.[13]

This foundational and precedential stitching, however, has started to fray and snag in the networked era. Truth is under substantial pressure.[14] AI is being used to flood the marketplace with certain ideas and to push citizens from participation.[15] At the same time, deep fakes, videos that portray individuals as saying and doing things they never said or did, threaten to undermine citizens' ability to believe their own eyes and ears when it comes to making conclusions about what is happening in the world around them.[16] As these phenomena expand, individuals are becoming

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[9] *See generally Sugarman*, 249 U.S. 182; *Debs*, 249 U.S. 211; *Schenck*, 249 U.S. 47.

[10] 274 U.S. 357, 375–76 (1927), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (Brandeis, J., concurring).

[11] *Id.* at 375.

[12] 283 U.S. 697, 709–10, 721–23 (1931).

[13] *Id.* at 722–23.

[14] *See generally* Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146 (2018); Adi Robertson, *How to Fight Lies, Tricks, and Chaos Online*, VERGE (Dec. 3, 2019, 9:04 AM), https://www.theverge.com/2019/12/3/20980741/fake-news-facebook-twitter-misinformation-lies-fact-check-how-to-internet-guide [https://perma.cc/NDK5-AWQA]; Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RSCH. CTR. (Oct. 19, 2017), https://www.pewresearch.org/internet/2017/10/19/the-future-of-truth-and-misinformation-online/ [https://perma.cc/9Y4E-C9D4].

[15] *See, e.g.*, Molly K. McKew, *How Twitter Bots and Trump Fans Made #ReleaseTheMemo Go Viral*, POLITICO (Feb. 4, 2018), https://www.politico.com/magazine/story/2018/02/04/trump-twitter-russians-release-the-memo-216935 [https://perma.cc/J3QB-UVTV]; Tess Owen, *Nearly 50% of Twitter Accounts Talking About Coronavirus Might Be Bots*, VICE (April 23, 2020, 1:07 PM), https://www.vice.com/en_us/article/dygnwz/if-youre-talking-about-coronavirus-on-twitter-youre-probably-a-bot [https://perma.cc/DAM3-ZB7B]; Kate Starbird, *Disinformation's Spread: Bots, Trolls and All of Us*, NATURE (July 24, 2019), https://www.nature.com/articles/d41586-019-02235-x [https://perma.cc/3BYK-2VB7].

[16] Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1758 (2019) ("It leverages machine-learning algorithms to insert faces and voices into video and audio records of actual people and enables the creation of realistic impersonations . . . ."); Paul Chadwick, *The Liar's Dividend, and Other Challenges of Deep-Fake News*, GUARDIAN, https://www.theguardian.com/commentisfree/2018/jul/22/deep-fake-news-donald-trump-vladimir-putin [https://perma.cc/FEC9-RTG9] (July 23, 2018, 11:53 AM); Robert Chesney, Danielle Citron & Hany Farid, *All's Clear for Deepfakes: Think Again*, LAWFARE (May 11, 2020, 4:19 PM), https://www.lawfareblog.com/alls-clear-deepfakes-think-again [https://perma.cc/UHR4-LGDB].

increasingly fragmented and polarized as they settle into their self-made information echo chambers, spaces where intentionally false information, whether it is composed and shared by humans or AI, or suggested via tech giants' powerful and secretive algorithms, is often accepted and circulated by other community members because it reinforces pre-existing narratives within the group.[17] Thus, truth, in the choice-rich, virtual environments that host much of democratic discourse in the networked era, has become increasingly based upon the beliefs and narratives that dominate online communities, rather than the types of universal, objective realities Enlightenment thinkers and those who have subscribed to their beliefs conceptualized.[18] As a result, marketplace theory and its Enlightenment foundations regarding truth and rationality also become a problematic tool for rationalizing free expression.[19] In other words, the nature of truth, as it was understood when the First Amendment was constructed and later interpreted, in many ways diverges from how it exists in the networked era.[20]

As massive, widespread adoption of such technologies has splintered society's conclusions about what is true, the Supreme Court's decision in *United States v. Alvarez*, in the name of Enlightenment assumptions about truth, limited the practical role truth plays in First Amendment law.[21] In *Alvarez* in 2012, the Court deliberately separated limits on general false factual claims from those that connect with defamation, invasion of privacy, or "other legally cognizable harm."[22] Whereas the Court had traditionally drawn a line between false statements of fact and "false ideas,"

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[17] Itai Himelboim, Stephen McCreery & Marc Smith, *Birds of a Feather Tweet Together: Integrating Network and Content Analyses to Examine Cross-Ideology Exposure on Twitter*, 18 J. COMPUTER-MEDIATED COMMC'N 154, 166–71 (2013); W. Lance Bennett & Shanto Iyengar, *A New Era of Minimal Effects? The Changing Foundations of Political Communication*, 58 J. COMMC'N 707, 720–22 (2008); *see* MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 2–5 (2d ed. 2000). Scholars who tracked pro- and anti-vaccine groups on Facebook found "both narratives are subjected to selective exposure, and that the more active a user is on Facebook the smaller is the variety of sources they tend to consume." Ana Lucía Schmidt, Fabiana Zollo, Antonio Scala, Cornelia Betsch & Walter Quattrociocchi, *Polarization of the Vaccination Debate on Facebook*, 36 VACCINE 3606, 3610 (2018). Thus, via algorithms and personal preference, the worlds of these groups shrank and separated over time. *See id.* at 3609–11. Cass Sunstein contends that when citizens communicate only with like-minded others, they can only become *more* extreme in their positions, not less. *See* CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 69–71 (2017).

[18] For a discussion of the discrepancy between the Enlightenment conceptualization of truth and reality, see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 3–7 (1989); Ingber, *supra* note 3, at 15–18.

[19] *See* Ingber, *supra* note 3, at 15–18.

[20] *See id.* at 85–91.

[21] *See* 567 U.S. 709, 727–30 (2012) (plurality opinion) ("[H]is right to make those [false] statements is protected by the Constitution's guarantee of freedom of speech . . . ."); *see also* Casey G. Jones, *Borrowing Valor: A Comment on* United States v. Alvarez *and the Validity of the Stolen Valor Act of 2013*, 36 U. HAW. L. REV. 315, 341, 345–46 (2014) (highlighting that the *Alvarez* decision "protect[ed] knowing false statements of fact").

[22] *Alvarez*, 567 U.S. at 719 (plurality opinion).

Justices blurred that line by concluding limitations on false factual claims that do not connect with existing areas that limit expression, such as fraud, should be protected.[23] In the case, this meant the Stolen Valor Act, a federal law that criminalized making false claims of having earned military honors, was unconstitutional because it placed the government in the rather Orwellian position of determining what is true.[24] Justice Kennedy, in writing for the Court, concluded, "Truth needs neither handcuffs nor a badge for its vindication."[25] While using handcuffs and badges as metaphors created a memorable line in the opinion, the Court's rationale in the decision fundamentally altered the relationship between truth and the First Amendment.[26] The precedent expanded the Court's longstanding conclusion that "there is no such thing as a false idea" to a broad spectrum of factual claims, thus blurring the false idea versus false fact distinction the Court constructed in the 1970s and '80s.[27] In a broad set of cases, the Court had distinguished between facts and ideas, concluding "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements"[28] and "[t]here is no constitutional value in false statements of fact."[29] *Alvarez* raised questions, which the Court has not addressed in subsequent decisions, regarding whether such statements about the limited First Amendment value of false statements of fact remain relevant during a time in which misinformation and disinformation flow more readily than they have at any other period.[30] Ultimately, the handcuffs and badges imagery used in *Alvarez* doubled down on the Court's traditional, Enlightenment assumptions about truth's supremacy over falsity and the rationality of citizens.[31] Justices invested further in assumptions that generally rational individuals will be able to separate truthful statements from intentionally false ones that are meant to be believed,[32] rather than simply those that are parody or satire.[33]

The widespread adoption of networked technologies and the AI entities that have come with them were not the first phenomena to create rips and tears in the truth

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[23] *Id.* at 719, 729–30.

[24] *Id.* at 723–24 (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949)) (referencing the Ministry of Truth that was part of George Orwell's *Nineteen Eighty-Four*).

[25] *Id.* at 729.

[26] *Id.* at 723–30.

[27] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974); *see* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–73 (1976); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

[28] Brown v. Hartlage, 456 U.S. 45, 60 (1982).

[29] *Gertz*, 418 U.S. at 340.

[30] For further discussion of "false fact" statements as low value speech, see Brian Schlect, Case Note and Comment, *The* New York Times *Solution to the Ninth Circuit's 'Stolen Valor' Problem*, 48 IDAHO L. REV. 175, 182–84 (2011).

[31] *Alvarez*, 567 U.S. at 728–29.

[32] *See id.* at 727 ("The remedy for speech that is false is speech that is true.").

[33] For the definition of parody, see Kyonzte Hughes, *Parody & Satire*, FREEDOM F. INST. (Sept. 13, 2002), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/arts-first-amendment-overview/parody-satire [https://perma.cc/F986-YUCU].

assumptions that have been woven into the heart of Enlightenment thought, the marketplace of ideas, and, therefore, how the First Amendment is interpreted.[34] Legal scholars and philosophers have long questioned the assumption that truth will succeed and falsity will fail in a competition of ideas.[35] First Amendment scholar C. Edwin Baker concluded, "truth is not objective," explaining "people individually and collectively choose or create rather than 'discover' their perspectives, understandings, and truths."[36] Similarly, legal scholars have emphasized that information reaches people with different intensity and frequency and that people bring certain personal biases to the information they encounter, making it unlikely that truth can be generally objective and the same for all.[37] Such legal-scholarship-based conclusions align with broader philosophical critiques of absolute or objective truth.[38] American pragmatist William James, a friend of Justice Holmes's,[39] explained, "Purely objective truth, truth in whose establishment the function of giving human satisfaction in marrying previous parts of experience with newer parts played no role whatever, is nowhere to be found."[40] He continued, "The reasons why we call things true is the reason why they ARE true, for 'to be true' MEANS only to perform this marriage-function."[41] This idea that truth is *made* within each person, rather than *found* from without, has been supported by numerous thinkers.[42] American philosopher Richard Rorty, in his

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[34] *First Amendment Timeline*, FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/page/first-amendment-timeline [https://perma.cc/JR5C-3ZRM] (last visited May 6, 2021).

[35] JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA, at xiii–xiv (1973); Thomas W. Joo, *The Worst Test of Truth: The "Marketplace of Ideas" as Faulty Metaphor*, 89 TUL. L. REV. 383, 431–33 (2014); BAKER, *supra* note 18, at 12–14, 16; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 592–93 (1980) (Rehnquist, C.J., dissenting) (critiquing marketplace assumptions).

[36] BAKER, *supra* note 18, at 12–13.

[37] *See, e.g.*, Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 776–77 (1986) (questioning the marketplace theory and individuals' ability to evaluate information).

[38] *See generally* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO (1994) (describing how institutions effectively shape and restrain what is expressible within their purview to enhance productivity and freedom—through focus, comes order and freedom of action).

[39] Marcia Jean Speziale, *Oliver Wendell Holmes, Jr., William James, Theodore Roosevelt, and the Strenuous Life*, 13 CONN. L. REV. 663, 672–73 (1981) (describing at great length their friendship and relating how William "James described Holmes as 'the only fellow . . . I care anything about,' adding that even if Holmes was perhaps too intellectual, 'he sees things so easily and clearly and talks so admirably that it's a treat to be with him.'").

[40] WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 64 (1907).

[41] *Id.*

[42] *See, e.g.*, William Berry, *The Truth Will Not Set You Free*, PSYCH. TODAY (May 6, 2012), https://www.psychologytoday.com/us/blog/the-second-noble-truth/201205/the-truth-will-not-set-you-free [https://perma.cc/H6W6-QWUX].

critique of the Enlightenment, contends, "[R]eality does not have a permanent structure, nor does the human mind. So, although sentences do not change their truth-values as time goes by, there is nevertheless no quasi-object called Truth, which stays the same for all eternity."[43] Political theorist Hannah Arendt contended the Enlightenment was a reaction to the realization that the human senses were not capable of accurately accounting for the outside world.[44] As a result of this revelation, people came to mistrust their senses and sought to find tests, measures, and processes to determine truth.[45] Ultimately, Arendt concluded truth *emerges* via discourse among free people, a conclusion the fellow German thinker Jürgen Habermas, and American pragmatist John Dewey, independently developed, with some philosophical differences.[46] Arendt also highlighted phenomenological thought, questioning the ability of individuals to escape their own biases and prejudices to see the world objectively.[47] She referred to people as living in "the prison of [their] own mind[s]" and to the difficultly of seeing without biases as similar to the challenge of "jumping over our own shadows."[48] Thus, the dominant conceptualization of truth within U.S. legal thought has found substantial criticism within legal and philosophical scholarship.[49]

Taken together, these precedential, technological, social, and philosophical concerns about the nature and role of truth in how First Amendment protections are rationalized raise questions about whether it should remain a foundational pillar of the marketplace approach and for how free expression is conceptualized more broadly.[50] Truth is not a part of the First Amendment's wording—it was added, largely via the marketplace approach.[51] In light of massive, widespread adoption of networked technologies and AI, as well as Supreme Court decisions that have undermined its distinctive role, should truth be removed or replaced as a crucial, justifying concept in freedom of expression? Would other concepts, such as meaning, language, or understanding, be more appropriate guides for rationalizing free expression in the

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[43] Richard Rorty, *The Continuity Between the Enlightenment and 'Postmodernism,' in* WHAT'S LEFT OF ENLIGHTENMENT?: A POSTMODERN QUESTION 19, 29 (Keith Michael Baker & Peter Hanns Reill eds., 2001) [hereinafter WHAT'S LEFT OF ENLIGHTENMENT?].

[44] *See* HANNAH ARENDT, THE HUMAN CONDITION 259–63 (2d ed. 1998).

[45] *See id.* at 259–64.

[46] *See id.* at 164; JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY 158–59 (1946); 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 170–71 (Thomas McCarthy trans., 1987) (providing examples of these thinkers' understandings of emergent truth via discourse).

[47] ARENDT, *supra* note 44, at 10–11, 288.

[48] *See id.* at 10, 288.

[49] *See* BAKER, *supra* note 18, at 12–13; Rorty, *supra* note 43, at 29; ARENDT, *supra* note 44, at 10–11, 164, 259–67, 281; DEWEY, *supra* note 46, at 158–59; 2 HABERMAS, *supra* note 46, at 170–71.

[50] *See, e.g.*, Joo, *supra* note 35, at 431–33.

[51] *See* U.S. CONST. amend. I; *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

choice-rich twenty-first-century information environment? Part I of this Article examines these rudimentary, yet crucial questions, first considering the marketplace concept and Enlightenment thought. Part II expands the discussion to exploring the concept and nature of truth more broadly, before Part III examines the Supreme Court's relationship with truth. The Conclusion draws the conceptual building blocks from the preceding Parts together to construct a revised set of foundational assumptions regarding truth and its place in rationalizing free expression.

I. THE MARKETPLACE METAPHOR

Marketplace theory's Enlightenment-sourced foundational building blocks, as well as its relationship with the First Amendment, are often understood as originating in Justice Holmes's dissent in *Abrams*.[52] This Article takes the important step of separating marketplace theory's origins from the Enlightenment, instead identifying a drawing together of the two over time, a process that started in earnest in the 1960s.[53] The informal, gradual marriage between the theory and Enlightenment assumptions, rather than the theory being initially constructed upon such assumptions about truth and human rationality, bears important implications regarding how the marketplace should be interpreted as the traditional building blocks of the theory struggle to hold in the networked era.[54] This Part examines the historical relationship between Enlightenment assumptions and the marketplace approach before considering the process in which the marketplace and Enlightenment assumptions were brought together by the Court.[55] This Part also delves into legal scholarship that questions the bedrock assumptions of the theory.[56]

A. Children of the Enlightenment

The fact that jurists installed Enlightenment-based foundations beneath the marketplace of ideas comes as little surprise when it is considered within the context of the nation's founding generation of thinkers.[57] Alexander Hamilton, John Adams, Benjamin Franklin, and, perhaps most notably, Thomas Jefferson and James Madison, were all substantially influenced by Enlightenment ideas.[58] As one scholar explained,

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[52] *See Abrams*, 250 U.S. at 630–31.

[53] W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMMC'N Q. 40, 42–43 (1996).

[54] *See id.* at 41–43.

[55] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 12–13 (1996).

[56] *See infra* Sections I.D–E.

[57] *See* RAKOVE, *supra* note 55, at 12–13.

[58] DARREN STALOFF, HAMILTON, ADAMS, JEFFERSON: THE POLITICS OF ENLIGHTENMENT AND THE AMERICAN FOUNDING 3 (2005).

the Framers' ideas regarding how to construct the new republic were based on "their absorption in the political theory of the Enlightenment."[59] The same author contended they applied such ideas to the unique problems they faced in post-colonial America.[60] More explicitly, Jefferson's "Life, Liberty, and pursuit of Happiness" contention in the Declaration of Independence overlaps significantly, though without citation, with John Locke's "lives, liberties, and estates," which he wrote as part of a broader discussion on government in 1689.[61] Later in the same passage, Locke provided a blueprint for democratic society, explaining, "Wherever, therefore, any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there, and there only, is a political, or civil society."[62] He concluded that in these conditions, a "commonwealth" is created.[63] Such Enlightenment ideas were prominent in Jefferson's first inaugural address in 1801, where he referred to truth succeeding and falsity failing among rational individuals.[64] Jefferson stated, "If there be any among us who would wish to dissolve this Union, or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it."[65] Madison, who drafted the initial speech and press provisions that would become the First Amendment, has also been associated with Lockean thought, as well as Scottish thinker David Hume, the late Enlightenment philosopher who, though his work partly inspired it, died only weeks after the Declaration of Independence was signed.[66]

Before Locke, British philosopher and central Enlightenment thinker John Milton rationalized freedom of expression in words that substantively overlap with Justice Holmes's conclusions regarding the First Amendment in *Abrams* in 1919.[67] In 1644, Milton contended, "Truth be in the field, we do injuriously by licensing and prohibiting

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[59] *See* RAKOVE, *supra* note 55, at 13.

[60] *See id.*

[61] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT) AND A LETTER CONCERNING TOLERATION 63 (J.W. Gough ed., 1976).

[62] LOCKE, *supra* note 61, at 45.

[63] *Id.* at 44.

[64] *See generally* 33 Thomas Jefferson, First Inaugural Address, *in* THE PAPERS OF THOMAS JEFFERSON: 17 FEBRUARY TO 30 APRIL 1801, at 148, 148–52 (Barbara G. Oberg ed., 2006).

[65] *Id.* at 149.

[66] Roy Branson, *James Madison and the Scottish Enlightenment*, 40 J. HIST. IDEAS 235, 236 (1979); Mark G. Spencer, *Hume and Madison on Faction*, 59 WM. & MARY Q. 869, 869–70 (2002); *see* 3 CHRISTOPHER J. BERRY, DAVID HUME: MAJOR CONSERVATIVE AND LIBERTARIAN THINKERS 20 (John Meadowcroft ed., 2013); Donald Livingston, *Hume and America*, 4 KY. REV. 15, 16 (1983).

[67] JOHN MILTON, AREOPAGITICA AND OF EDUCATION WITH AUTOBIOGRAPHICAL PASSAGES AND OTHER PROSE WORKS 50 (George H. Sabine ed., 1951).

to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"[68] He also contended, "Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making."[69] Justice Holmes, in finding Jacob Abrams and his fellow protestors had a right to communicate their anti-government messages, explained:

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[70]

Justice Holmes continued by concluding this "at any rate is the theory of our Constitution."[71] His words in *Abrams*, however, were written without footnotes or other attribution.[72] In other words, the introduction of the marketplace metaphor into American legal thought did not come with an explicit association with Enlightenment assumptions.[73] In searching for implicit connections, the evidence of a strong Enlightenment influence on the jurist is tenuous.[74] Justice Holmes, in his letters during the period, did not mention Enlightenment thought, though he commented to a friend, in a February 1919 letter, that he re-read British thinker John Stuart Mill's *On Liberty*, calling Mill a "fine old sportsman."[75] Upon his death in 1935, a catalogue of Justice Holmes's estate listed ten books by Mill, as well as ten works by Milton.[76] None of the Milton works were *Areopagitica*.[77] Instead, as examined in the ensuing Section, Justice Holmes espoused a philosophy of truth that contradicted the Enlightenment associations that have come to be wedded to the marketplace of ideas and his well-known dissent in *Abrams*.[78]

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[68] *Id.*

[69] *Id.* at 45.

[70] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[71] *Id.*

[72] *See id.*

[73] *See id.*

[74] *See infra* notes 75–77 and accompanying text.

[75] Letter from Justice Oliver Wendell Holmes, Jr. to Harold Laski (Feb. 28, 1919) (on file with Harvard Law School Library Digital Suite), http://library.law.harvard.edu/suites/owh/index.php/item/42882402/12 [https://perma.cc/78N2-PNDQ].

[76] ESTATE OF JUSTICE HOLMES: THE LIBRARY 435–36 (on file with Harvard Law School Library Digital Suite), http://library.law.harvard.edu/suites/owh/index.php/item/42864698/59 [https://perma.cc/UD9L-G8GW].

[77] *Id.* at 436.

[78] *See infra* Section I.B.

B. Holmesian Skepticism

Despite language that overlapped significantly with one of the Enlightenment's central thinkers regarding individual liberty and free expression, as well as his documented appreciation for Mill, Justice Holmes rejected Enlightenment assumptions about truth in many of his legal and scholarly writings.[79] Instead, he often communicated understandings about truth that aligned more with the pragmatic ideas of his one-time friend William James, despite his distaste for the term "pragmatism."[80] In *The Common Law*, a book he published in 1881, he contended, "The life of the law has not been logic: it has been experience."[81] Such a conclusion, which was followed by examples of factors that influence how laws are interpreted, aligns more with James's conclusions about truth being the outcome of personal experience than Enlightenment-founded assumptions.[82] Biographers have contended Justice Holmes's ideas about truth were substantially shaped by the Civil War, during which he was shot on three different occasions.[83] Such conclusions are supported in his legal opinions and scholarship.[84]

In *Natural Law*, he opened the article, which was published in 1918, a year before he wrote *Abrams*, with a direct attack on objective, universal truth.[85] He explained, "Certitude is not the test of certainty. We have been cock-sure of many things that

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[79] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

[80] Holmes rejected being labeled as a pragmatist. He also often spoke negatively about James, the father of American pragmatism, though they grew up together and were friends in early adulthood. *See* Letter from Justice Oliver Wendell Holmes, Jr. to Harold Laski (Mar. 29, 1917), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 37, 37 (Richard A. Posner ed., 1992) [hereinafter THE ESSENTIAL HOLMES]; *see also* LOUIS MENAND, THE METAPHYSICAL CLUB 337 (2001).

[81] *See* HOLMES, *supra* note 79, at 1.

[82] *See id.*; JAMES, *supra* note 40, at 223–24 (writing in his Lecture VI.—Pragmatism's Conception of Truth that: "[w]hen new experiences lead to retrospective judgments, using the past tense, what these judgments utter WAS true, even tho no past thinker had been led there. We live forwards, a Danish thinker has said, but we understand backwards. The present sheds a backward light on the world's previous processes. They may have been truth-processes for the actors in them. They are not so for one who knows the later revelations of the story.").

[83] Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 535–36 (1951); MENAND, *supra* note 80, at 38, 41, 46; *see* Oliver Wendell Holmes, Jr., Diary, Balls Bluff, *in* TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861–1864, at 27, 27–28 (Mark DeWolfe Howe ed., 1946).

[84] *See* Oliver Wendell Holmes, Jr., The Fraternity of Arms: Remarks at a Meeting of the 20th Regimental Association (Dec. 11, 1897), *in* THE ESSENTIAL HOLMES, *supra* note 80, at 73; Letter from Oliver Wendell Holmes, Jr. to Alice Stopford Green (Oct. 14, 1911), *in* THE ESSENTIAL HOLMES, *supra* note 80, at 3. For his journal entry after he was wounded in the war, see also Holmes, *supra* note 83, at 25–28.

[85] Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

were not so."[86] Then, in wording that mirrors the bitter disagreement between North and South—a disagreement that dramatically influenced his early adulthood, he stated, "[W]hile one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else."[87] The article continues by explaining everyone is "fighting to make the kind of a world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief."[88] Within his conclusions about human convictions and decisions about what individuals determine is true, he included a recognition that truth is subjective.[89] He reinforced such conclusions in 1929, when he explained to a friend that he was a "*bet*tabilitarian."[90] He explained, "I believe we can *bet* on the behavior of the universe in its contact with us. We bet we can know what it will be."[91] He referred to objective truth as "a mirage" in a 1929 letter to longtime friend Harold Laski, a socialist who was at the time a professor at the London School of Economics.[92]

Though it has received less attention, the themes Justice Holmes communicated about personal biases and experiences being dominant in determining truth surround his use of the marketplace metaphor in the *Abrams* dissent.[93] He explained: "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system . . . we should be eternally vigilant against attempts to check the expression of opinions that we loathe . . . ."[94] He also recognized that it is natural for individuals to seek to "sweep away all opposition" and he refers to "fighting faiths."[95] Thus, while the heart of the marketplace's primordial use in the Supreme Court's vocabulary does not include

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[86] *Id.*

[87] *Id.* at 41.

[88] *Id.*

[89] *See id.* at 41–43.

[90] Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Aug. 30, 1929), *in* THE ESSENTIAL HOLMES, *supra* note 80, at 108.

[91] *Id.*; *see also* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 474 (1995). *See generally* Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3 (1948).

[92] *See* Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Jan. 27, 1929), *in* THE ESSENTIAL HOLMES, *supra* note 80, at 107. Laski lectured briefly at Harvard, but his Marxist ideas, which were unpopular in post–World War I America, led to his departure. KENNETH R. HOOVER, ECONOMICS AS IDEOLOGY: KEYNES, LASKI, HAYEK, AND THE CREATION OF CONTEMPORARY POLITICS 38, 46–47, 49, 70, 74 (2003). During this time, however, he became friends with Justice Holmes, as well as then–law professor Felix Frankfurter and Walter Lippmann. *Id.* at 38, 47.

[93] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Holmes, *supra* note 85, at 41–43.

[94] *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[95] *Id.*

any explicit association with Enlightenment thought, it does include clear associations with Justice Holmes's more pragmatic conceptualizations of truth, which find substantial support in his personal and legal scholarship—particularly in *Natural Law*, which was published a year before *Abrams* was written.[96] These observations aside, there is little doubt the marketplace approach has come to be intertwined with Enlightenment assumptions about truth and rationality.[97]

C. The Marketplace-Enlightenment Merger

No date or precedent marks an official installation of Enlightenment values as the foundational assumptions of marketplace theory.[98] The Court's opinions immediately after *Abrams* illustrate the relationship was not immediate.[99] In fact, Justice Holmes's marketplace metaphor languished, receiving little attention, until the 1960s.[100] Justice Holmes contributed substantially to that languishing.[101] At least half a dozen cases within the decade that followed *Abrams* provided opportunities for him to apply and build around the marketplace he outlined in 1919.[102] Yet, given several

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[96] *Compare id.*, *with* Holmes, *supra* note 85, at 43 (writing more conservatively during his court opinions about the features of speech and conceptions of truth than he does in his own jurisprudential scholarship).

[97] *See* STALOFF, *supra* note 58, at 81–82, 86–87.

[98] *See* Ingber, *supra* note 3, at 3 (discussing how while John Milton's and John Stuart Mill's ideas were ultimately ported into Constitutional jurisprudence, perhaps beginning with Justice Holmes's dissent in Abrams v. United States, 250 U.S. 616 (1919), there is no official endorsement of enlightenment values by the Court)*; see also* Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J.L. & HUMAN. 311, 312, 322–23 (1992).

[99] The first reference to the phrase "marketplace of ideas" actually occurs thirty years later, in United States v. Rumley, 345 U.S. 41, 56 (1953), after decades of relatively repressive rulings on speech.

[100] *See* Hopkins, *supra* note 53, at 41–42.

[101] For the rest of the 1920s, although Holmes found in favor of expansive free speech—for example, in Gitlow v. New York, U.S. 652, 673 (1925) (Holmes, J., dissenting), he and Justice Brandeis argued that even "indefinite" advocacy of overthrowing the government should be protected speech—Holmes did not mention further Enlightenment values or begin structuring a specific rule framework for parsing speech rights during his remaining tenure on the Court. *See* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 465–66 (1992) (writing "[w]hen one looks over the Progression of Holmes' free speech jurisprudence, one despairs of finding a coherent theoretical pattern or squaring his stance with positivist premises or with conventional theories of judicial deference to the will of the majority. At times Holmes seemed to exhibit a minimalist conception of speech . . . at other times he seemed to inflate protection for speech to the most important and imperative of constitutional principles.").

[102] *See generally* Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251

opportunities, he made no mention of it.[103] The Court heard three cases that involved anti-war speech, all similar to *Schenck v. United States* and *Abrams* from the year before, in 1920.[104] The Court, citing *Abrams* in each, upheld the convictions without mentioning the marketplace metaphor or exploring the depths of First Amendment safeguards on free expression.[105] Justice Brandeis dissented in each case, with Justice Holmes joining his opinion in two of them.[106] In *Schaefer v. United States*, which involved a German-language newspaper's anti-war statements, the Court communicated limitations on expression must be carefully weighed.[107] The Court explained, "[T]he power of Congress to interfere with the freedom of speech and of the press must be judged by an exercise of *reason on the circumstances*."[108] Justice Brandeis, with Justice Holmes joining, contended the articles could not be understood as a clear and present danger.[109] Justice Brandeis made similar arguments in the other two cases.[110] Thus, fewer than six months after the *Abrams* dissent, neither the Court nor the dissenters—in three different cases—employed the marketplace approach or rationalized their arguments using Enlightenment-related language about the furtherance of truth or the rationality of individuals when given the opportunity to encounter ideas.[111]

Similarly, in 1921 in *United States ex rel. Milwaukee Social Democratic Publishing Company v. Burleson*, Justices Brandeis and Holmes wrote separate dissents regarding the Court's decision to allow the postmaster general, under the Espionage Act, to make content-based decisions regarding which status of mail newspapers should receive.[112]

U.S. 466 (1920); Gilbert v. Minnesota, 254 U.S. 325 (1920). All three of these cases, decided a year after *Abrams*, provided Justice Holmes opportunities to build upon the marketplace concept or to associate it with Enlightenment ideas. He made no mention of either. For two other examples, see United States *ex. rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407 (1921); Whitney v. California, 274 U.S. 357 (1927).

[103] *See Pierce*, 252 U.S. at 253 (Brandeis and Holmes, JJ., dissenting); *Schaefer*, 251 U.S. at 482 (Brandeis and Holmes, JJ., dissenting); *Gilbert*, 254 U.S. at 334 (Brandeis, J., dissenting).

[104] *Pierce*, 252 U.S. at 253 (Brandeis and Holmes, JJ., dissenting); *Schaefer*, 251 U.S. at 482 (Brandeis and Holmes, JJ., dissenting); *Gilbert*, 254 U.S. at 334 (Brandeis, J., dissenting).

[105] *Pierce*, 252 U.S. at 253 (Brandeis and Holmes, JJ., dissenting); *Schaefer*, 251 U.S. at 477; *Gilbert*, 254 U.S. at 332.

[106] *Pierce*, 252 U.S. at 253 (Brandeis and Holmes, JJ., dissenting); *Schaefer*, 251 U.S. at 482 (Brandeis and Holmes, JJ., dissenting); *Gilbert*, 254 U.S. at 334 (Brandeis, J., dissenting).

[107] 251 U.S. at 482–83 (Brandeis and Holmes, JJ., dissenting).

[108] *Id.* at 474 (majority opinion) (emphasis added).

[109] *Id.* at 482–83 (Brandeis and Holmes, JJ., dissenting).

[110] *Pierce*, 252 U.S. at 271 (Brandeis and Holmes, JJ., dissenting); *Gilbert*, 254 U.S. at 338 (Brandeis, J., dissenting).

[111] *See Pierce*, 252 U.S. at 253; *id.* at 271 (Brandeis and Holmes, JJ., dissenting); *Schaefer*, 251 U.S. at 477; *id.* at 482–83 (Brandeis and Holmes, JJ., dissenting); *Gilbert*, 254 U.S. at 332; *id.* at 338 (Brandeis, J., dissenting).

[112] 255 U.S. 407, 417 (1921) (Brandeis, J., dissenting); *id.* at 436 (Holmes, J., dissenting).

Neither mentioned the marketplace or included Enlightenment ideas as part of their arguments.[113] Justice Holmes came the closest to drawing these ideas together in his dissent when he concluded, "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues."[114] Similarly, in *Gitlow v. New York* in 1925, Justice Holmes dissented when the Court upheld criminal charges against Benjamin Gitlow for publishing the "Left Wing Manifesto."[115] Justice Holmes, though he did not mention the marketplace concept or Enlightenment ideas, expanded on the exchange of ideas concept.[116] He explained, "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[117] He continued, contending Gitlow's views were not a danger and "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[118] The passage marks the closest Justice Holmes came to returning to the marketplace ideas before retiring.[119] When thought of together, the two cases, *Milwaukee Social Democratic Publishing Company* and *Gitlow*, provided clear chances for the esteemed Justice to expand and clarify the marketplace concept or to reinforce Enlightenment ideas.[120] While communicating concerns for free expression in both, he did not associate them with the marketplace or Enlightenment.[121]

Even in *Whitney v. California* five years later, in which Justice Brandeis penned one of the Court's most powerful arguments for free expression in his concurring opinion, *Abrams* went uncited and the marketplace concept was not specifically discussed.[122] Justice Brandeis's reasoning, which Justice Holmes joined, included significant Enlightenment influences.[123] Importantly, he interconnected Enlightenment ideas with understandings of the Framers' intent.[124] He explained, "Those who

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[113] *See generally id.* at 417–36 (Brandeis, J., dissenting); *id.* at 436–38 (Holmes, J., dissenting).

[114] *Id.* at 437 (Holmes, J., dissenting).

[115] 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting).

[116] *See id.* at 673.

[117] *Id.*

[118] *Id.*

[119] *See id.*

[120] *See id. See generally* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407 (1921).

[121] *See Gitlow*, 652 U.S. at 672–73 (Holmes and Brandeis, JJ., dissenting); *Burleson*, 255 U.S. at 436–38 (Holmes, J., dissenting).

[122] *See* 274 U.S. 357, 372–80 (1927) (Brandeis and Holmes, JJ., concurring).

[123] *See id.* at 375–77.

[124] *See id.*

won our independence believed that the final end of the State was to make men free to develop their faculties,"[125] a concept that aligns with Enlightenment understandings about the role of society.[126] He continued, "They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[127] Thus, Justice Brandeis brought substantial Enlightenment concerns into his opinion, but did so without drawing upon marketplace terminology.[128] Similarly, in the *Near v. Minnesota ex rel. Olson* prior restraint decision in 1931—the first instance when the Supreme Court struck down a law because it violated the First Amendment—*Abrams* and the marketplace concept went unmentioned.[129] Enlightenment ideas, however, were incorporated when Chief Justice Hughes published the entire letter the Continental Congress sent to Quebec in 1774.[130] The letter was constructed upon Enlightenment assumptions regarding truth and human rationality.[131] In regard to free press, the letter explained:

> [I]t is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone . . . the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression.[132]

The letter was written primarily by John Dickinson, a Quaker, former president of Pennsylvania and Delaware, and a member of the Continental Congress.[133] The

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[125] *Id.* at 375.

[126] *See, e.g.*, JOHN STUART MILL, ON LIBERTY 27 (1859) ("The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.").

[127] *Whitney*, 274 U.S. at 375 (Brandeis and Holmes, JJ., concurring).

[128] *See id.*; *see also* MILL, *supra* note 126, at 27.

[129] *See generally* 283 U.S. 697 (1931) (holding that the First Amendment protected speech without referencing any sort of Enlightenment philosophical framework or the marketplace of ideas).

[130] *Id.* at 717–18 (quoting Letter to the Inhabitants of the Province of Quebec (Oct. 26, 1774) (*available at* https://archive.org/details/cihm_36354/page/n5/mode/2up?ref=ol&view=theater) [hereinafter Letter to the Inhabitants of the Province of Quebec]); *see* John R. Vile, *Continental Congress: Letter to the Inhabitants of the Province of Quebec*, FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/862/continental-congress-letter-to-the-inhabitants-of-the-province-of-quebec [https://perma.cc/88JW-LFRH] (discussing the history of the Letter to the Inhabitants of the Province of Quebec).

[131] *See Near*, 283 U.S. at 717–18 (quoting Letter to the Inhabitants of the Province of Quebec, *supra* note 130).

[132] *Id.* at 718.

[133] *See* Vile, *supra* note 130.

Court's decision in *Near* interjected Enlightenment ideas into the Court's record, via the Quebec letter.[134]

Importantly, the correlation between the Supreme Court striking down the law in *Near* because it limited First Amendment freedoms and the intermingling of the marketplace of ideas and Enlightenment thought was reinforced in later cases.[135] In other words, the marketplace metaphor became marketplace theory when the Justices used Enlightenment ideas to rationalize supporting free expression arguments in the cases they faced.[136] This process started in earnest with two important free expression decisions just before World War II.[137] In *Thornhill v. Alabama* in 1940, the Court struck down a state law that criminalized picketing.[138] Justice Murphy, in writing for the Court, applied the clear and present danger test from *Schenck*, then, in rationalizing the Court's reasoning in striking down the law, explained censoring speech provides "no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[139] Earlier in the passage, he explained, "The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern."[140] A year later, in *Bridges v. California*, in which the Court overturned contempt of court convictions against a group of newspapers, Justice Frankfurter, who understood himself as a disciple of Justice Holmes's judicial approach, explained in his dissent, "A trial is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.'"[141] In rationalizing his stance that the courts must be protected, Justice Frankfurter explained, "Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power."[142] After World War II, in *United States v. Rumely*, Justice Douglas made a passing connection between Enlightenment thought and the marketplace in a concurring opinion that

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[134] *See Near*, 283 U.S. at 717–18 (quoting Letter to the Inhabitants of the Province of Quebec, *supra* note 130).

[135] *See generally* Thornhill v. Alabama, 310 U.S. 88 (1940); Bridges v. California, 314 U.S. 252 (1941); United States v. Rumley, 354 U.S. 41 (1953).

[136] *See* Hopkins, *supra* note 53, at 48 (describing how the Justices make discrete, situation-specific schematics for upholding free speech rights rather than one overarching framework); *see also* STALOFF, *supra* note 58, at 3–4; RAKOVE, *supra* note 55, at 13.

[137] *See generally Thornhill*, 310 U.S. 88 (reversing a conviction of a president of a local union for violating a law preventing labor picketing under First Amendment grounds); *Bridges*, 314 U.S. 252 (reversing a contempt of court finding against a union leader who published his correspondence with the Secretary of Labor during a litigation).

[138] 310 U.S. at 91, 106.

[139] *Id.* at 105.

[140] *Id.* at 104.

[141] 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting).

[142] *Id.* at 284.

supported the Court's decision to reject a House committee's claim that it could compel an author to provide the names of those who had bought many of his books.[143] Justice Douglas explained:

> Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas. The aim of the historic struggle for a free press was "to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government."[144]

In *Thornhill* and *Bridges*, and then in *Rumely*, Justices for the first time since *Abrams* brought Enlightenment ideas together with specific consideration of the marketplace of ideas.[145]

Cases such as these were the heralds of the precedential wedding between the marketplace concept and Enlightenment ideas, the ceremony for which started in the 1960s.[146] While the marketplace concept was cited fifteen times during the forty-year span between 1919 and 1959, the Justices referred to it a dozen times in the 1960s, thirty-five times in the 1970s, and thirty-seven times in the 1980s.[147] In constructing rationalizations for expanding free expression protections, the Justices drew from cases that referred to the marketplace and other decisions that espoused Enlightenment ideas, ultimately intertwining them in support of their reasoning.[148] Foremost among these cases was *New York Times Co. v. Sullivan*. Justice Brennan drew upon Justice Brandeis's Enlightenment-rich concurring opinion from *Whitney*, in which he contended the founders believed "in the power of reason as applied through public discussion," with documentation of Madison's Enlightenment-related concerns about the power of the government to limit the flow of information.[149] He did so within the same passage where he wrote the decision's most memorable line: "[D]ebate on public issues should be uninhibited, robust, and wide-open."[150] The passage also refers to the First Amendment as being created to "assure unfettered interchange of ideas for the bringing about of political and social changes desired

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[143] 345 U.S. 41, 56–58 (1953) (Douglas, J., concurring).

[144] *Id.* at 56.

[145] *See id.* at 56–58; *Thornhill*, 310 U.S. at 88, 91, 106; *Bridges*, 314 U.S. at 283–84; *see also* Hopkins, *supra* note 53, at 48; STALOFF, *supra* note 58, at 3–4; RAKOVE, *supra* note 55, at 13.

[146] *See generally* Hopkins, *supra* note 53 (discussing the evolution of the marketplace of ideas in depth from the 1910s to the present).

[147] *Id.* at 42.

[148] *See id.* at 43–48; *see generally* Kelso, *supra* note 2 (arguing that the Enlightenment values act almost like the silent hand shaping the general trend of modern Supreme Court jurisprudence, especially with respect to speech rights).

[149] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–74 (1964) (quoting Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

[150] *Id.* at 270.

by the people."[151] A year later, in the less-celebrated *Lamont v. Postmaster General* decision, Justice Brennan added a concern for the safety and flow of the marketplace to his ideas from *Sullivan*.[152] He did so in a concurring opinion regarding the Court's decision to strike down a law that gave the Postal Service the power to halt the distribution of Communist political information.[153] He explained, "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[154] Such a concern about the health of the marketplace gained increasing attention in the decisions that followed.[155]

Justice Douglas communicated concerns about the well-being of the marketplace in *Ginzburg v. United States* in 1966.[156] While the Court upheld obscenity charges against Ralph Ginzburg, Justice Douglas contended people are rational and capable of deciding what they wish to encounter and what is true.[157] He concluded, "[T]he First Amendment allows all ideas to be expressed—whether orthodox, popular, offbeat, or repulsive. I do not think it permissible to draw lines between the 'good' and the 'bad.'"[158] He continued, "The theory is that people are mature enough to pick and choose, to recognize trash when they see it . . . and, hopefully, to move from plateau to plateau and finally reach the world of enduring ideas."[159] Three years later, in perhaps the Court's most explicit expression of Enlightenment ideals as the foundation beneath the marketplace metaphor, the Court concluded in *Red Lion Broadcasting Co. v. FCC*, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[160] Justices surrounded this conclusion with citations from Justice Holmes's original use of the marketplace metaphor in *Abrams* and to the area in *Sullivan* where Enlightenment ideas and the marketplace concept met.[161] Thus, the Court's statement in *Red Lion* can be understood as the completion of Justices' gradual installation of Enlightenment ideas as the marketplace's foundational underpinnings.[162] At the same time, the statement marked the beginning of a split among Justices regarding the nature of the marketplace, a concern that first appeared in Justice Brennan's concurring opinion in *Lamont*.[163] The Court in *Red Lion* constructed more explicit rationales for "preserving" the

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[151] *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
[152] *See* 381 U.S. 301, 308 (1965) (Brennan, J., concurring).
[153] *Id.* at 307–10.
[154] *Id.* at 308.
[155] *See* Hopkins, *supra* note 53, at 46.
[156] 383 U.S. 463, 491–92 (1966) (Douglas, J., dissenting).
[157] *Id.* at 492.
[158] *Id.* at 491–92.
[159] *Id.* at 492.
[160] 395 U.S. 367, 390 (1969).
[161] *See id.*
[162] *See* Ingber, *supra* note 3, at 2–3.
[163] *See* Hopkins, *supra* note 53, at 44–47.

marketplace of ideas, leading Justices to debate how the marketplace should operate regarding the flow of ideas, particularly the discovery of truth.[164]

D. Expanding vs. Protecting the Marketplace

The Court's decision in *Red Lion*, in the name of the marketplace of ideas and allowing more voices, upheld the government's right to compel radio stations to provide air time to speakers who ordinarily would not have such access to the forums.[165] The Court reasoned the First Amendment's job is to "preserve" the marketplace of ideas, therefore citizens must have access to the public airwaves.[166] Such a concern aligns with Enlightenment reasoning that more ideas, rather than fewer, increase the chances truth will succeed and falsity will fail when rational citizens can evaluate a wide spectrum of perspectives.[167] The opinion, however, particularly the use of the word "preserve," had unintended consequences on marketplace theory.[168] It placed within the precedential record an idea that steps can be taken to *protect* the marketplace, a crucial concern in the twenty-first century.[169]

The protective role the Justices invoked was not immediately problematic, particularly in cases that followed in the early 1970s.[170] In *New York Times Co. v. United States*, Justice Stewart employed protective reasoning in rationalizing the Court's decision to reject the government's call to restrain newspapers from publishing information about the Pentagon Papers.[171] The decision emphasized protecting the marketplace *from* the government restrictions of information.[172] He explained in his concurring opinion that, "in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government," people must have access to a wide range of information.[173] A year later, in *Healy v. James*, the Court rejected a state university's decision to refuse a political group's application to found a chapter on its campus.[174] In the name of protecting the marketplace, a unanimous Court determined, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional

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[164] *Red Lion Broad. Co.*, 395 U.S. at 369, 400–01.

[165] *See id.*

[166] *Id.* at 390.

[167] *See* Ingber, *supra* note 3, at 3.

[168] *See Red Lion Broad. Co.*, 395 U.S. at 390.

[169] *Id.*

[170] *See generally* N.Y. Times Co. v. United States, 403 U.S. 713 (1971); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[171] *See* 403 U.S. 713, 714 (per curiam) (holding that "[t]he Government 'thus carries a heavy burden for showing justification for the imposition of such a restraint'"); *id.* at 727–30 (Stewart, J., concurring) (writing that "an informed and critical public opinion . . . alone can here protect the values of democratic government").

[172] *Id.* at 714 (per curiam).

[173] *Id.* at 728 (Stewart, J., concurring).

[174] *See generally* 408 U.S. 169 (1972).

ground in reaffirming this Nation's dedication to safeguarding academic freedom."[175] In both instances, protecting the marketplace aligned with citizens having access to the broadest possible range of ideas, which aligns with Enlightenment thought.[176]

Starting a year later, in *CBS v. Democratic National Committee*, justices diverged regarding what it meant to protect the marketplace.[177] The Court concluded radio stations do not have to accept all paid political advertising, finding the marketplace would not be well served if the "system so heavily weighted in favor of the financially affluent."[178] Justice Brennan, the author of the Court's opinions in *Sullivan* and *Lamont* several years prior, disagreed with the majority's rationales, which centered around *protecting* the marketplace.[179] He explained that Justice Holmes's dissent in *Abrams* had "become a dominant theme in applying the First Amendment to the changing problems of our nation."[180] Justice Brennan continued, drawing upon the *Red Lion* rationale, by contending a full range of ideas must be freely expressed on the public airwaves.[181] He also associated his findings regarding a wide-open marketplace with Enlightenment ideas.[182] He explained, "Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates."[183] Thus, in *CBS*, the expansive marketplace approach and a concern for protecting the marketplace itself—and the exchange of ideas it facilitates—diverged with the two concerns finding themselves on opposing sides of the Court's reasoning.[184]

These divisions among Justices' legal philosophies regarding the marketplace became more explicit in the *First National Bank of Boston v. Bellotti* and *Central Hudson Gas & Electric Corp. v. Public Service Commission* decisions in 1978 and 1980.[185] In *Bellotti*, the Court struck down a Massachusetts law that limited the extent to which corporations could take part in political debate regarding referendums.[186] Building upon the commercial speech cases that were decided in the preceding terms,[187] the Justices reasoned corporations have the potential to contribute valuable information to the marketplace of ideas.[188] Justice Powell, in writing for the Court,

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[175] *Id.* at 180–81 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
[176] *N.Y. Times Co.*, 403 U.S. at 728 (Stewart, J., concurring); *Healy*, 408 U.S. at 181.
[177] *See generally* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).
[178] *Id.* at 123.
[179] *Id.* at 170 (Brennan, J., dissenting).
[180] *Id.* at 183.
[181] *Id.* at 182–85.
[182] *Id.* at 189.
[183] *Id.*
[184] *See generally id.*
[185] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).
[186] *First Nat'l Bank of Bos.*, 435 U.S. at 767.
[187] *See generally* Bigelow v. Virginia, 421 U.S. 809 (1975); Va. State Bd. Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
[188] *First Nat'l Bank of Bos.*, 435 U.S. at 785 n.21.

explained, "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[189] The Court, in a 5-to-4 decision, found the law limited an expansive, open marketplace of ideas by discriminating based on the nature of the speaker.[190] Justice White and Chief Justice Rehnquist communicated concern *for* the marketplace of ideas in their dissenting opinions, contending the law helped protect the space for a free exchange of ideas from the nonhuman nature of corporate speakers.[191] Justice White, who wrote the Court's opinion in *Red Lion* nine years earlier, concluded, "Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas."[192] Chief Justice Rehnquist emphasized the nonhuman nature of corporations, referencing the Court's decisions from the late nineteenth and early twentieth century regarding corporate speech.[193] He contended the marketplace was for human communicators, explaining:

> The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity.[194]

Two years later, in *Central Hudson*, the same diverging visions regarding fostering an expansive, inclusive marketplace or *preserving* and safeguarding the space from harmful influences divided Justices.[195] Justice Powell, again writing the Court's opinion, contended government restrictions on public utility advertising limited the information—the range of ideas—within the marketplace of ideas.[196] Chief Justice Rehnquist once again dissented, this time specifically citing Enlightenment thinkers Adam Smith, John Stewart Mill, and John Milton, alongside Justice Holmes's dissent

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[189] *Id.* at 783.

[190] *Id.* at 785 n.21.

[191] *Id.* at 810–22 (White, J., dissenting); *id.* at 822–28 (Rehnquist, C.J., dissenting).

[192] *Id.* at 810 (White, J., dissenting).

[193] *See generally id.* at 824–28 (Rehnquist, C.J., dissenting) (first citing Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886); then Smyth v. Ames, 169 U.S. 466, 522 (1898); and then Nw. Nat'l Life Ins. v. Riggs, 203 U.S. 243, 255 (1906)) (discussing how while corporations are considered juridical persons for purposes of property ownership, they do not seem to him to require the natural rights afforded to individuals in order to function).

[194] *Id.* at 828.

[195] *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (holding that the government cannot ban outright certain kinds of language in advertisements and creating a four-part test to parse whether the language may be restricted).

[196] *Id.* at 581.

in *Abrams*.[197] Chief Justice Rehnquist explained the Framers did not intend to give "a merchant's unfettered freedom to advertise in hawking his wares as a 'liberty' not subject to extensive regulation in light of the government's substantial interest in attaining 'order' in the economic sphere."[198] Instead, calling upon Jefferson's first inaugural speech, which he contended included the marketplace concept Justice Holmes referenced in *Abrams*, Chief Justice Rehnquist found the marketplace should be regulated to protect it from misuse.[199]

The same divergent narratives were central to the divided Court's conclusions in *Citizens United v. FEC* in 2010. Justice Kennedy, in writing for the Court, directly criticized approaching the marketplace as something that must be protected from distortive influences, such as corporate spending or candidates being influenced by those who support their campaigns.[200] In rationalizing these conclusions, Justice Kennedy contended the Court's decision in *Austin v. Michigan Chamber of Commerce* in 1990, which found corporations receive certain advantages that can threaten the marketplace, was incorrect.[201] He explained the decision improperly considered protecting the market at the expense of fostering a free exchange of ideas, finding, "*Austin*'*s* antidistortion rationale would produce [a] dangerous, and unacceptable, consequence."[202] Justice Stevens, in his dissent, reinforced the concern for protecting the marketplace from *Austin*, and drew in *FEC v. Massachusetts Citizens for Life*, which was decided in 1986, contending "the integrity of the marketplace of political ideas" must be protected.[203] He contended legal tools, such as the Act in question in *Citizens United*, must be employed so the marketplace can function properly, essentially protecting it from harmful effects.[204] In particular, he emphasized that corporations, as nonhuman actors, are a danger to the marketplace as it was originally conceived.[205] He explained, the law "reflects a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral 'marketplace' of ideas, the marketplace in which the actual people of this Nation determine how they will govern themselves."[206]

It is often easy to think of the marketplace of ideas as monolithic, but Justices, in rationalizing their decisions in a variety of cases, have associated different concerns and characteristics with the theory.[207] While the majority of the Court usually contends

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[197] *Id.* at 592 (Rehnquist, J., dissenting).

[198] *Id.* at 595.

[199] *Id.* at 597–99.

[200] *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

[201] *Id.* at 348–52.

[202] *Id.* at 351; *see also* Austin v. Mich. State Chamber of Com., 494 U.S. 652, 658–59 (1990).

[203] *Citizens United*, 558 U.S. at 438 (Stevens, J., concurring in part and dissenting in part) (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986)).

[204] *See id.* at 437–38.

[205] *Id.* at 473.

[206] *Id.* (citations omitted).

[207] *See* Hopkins, *supra* note 53, at 44–47 (discussing the different concerns justices have

the marketplace rationale for free expression is derived when the largest possible amount of information is made available, regardless of the nature or position of the speaker, a variety of dissents have communicated concern for safeguarding the marketplace, thus protecting a space for human discourse.[208] Such a conclusion allows for limited government regulation of free expression, opening avenues for the marketplace, and its truth assumptions, to be reconsidered in the networked era.[209]

E. The Imperfect Marketplace

The marketplace, particularly its truth assumptions, has faced substantial criticism from legal and communication scholars.[210] The substance and reasoning behind such criticisms provide important insights regarding the way truth has been understood and sewn, via the marketplace, into how the First Amendment has been understood.[211] Perhaps the Supreme Court's most explicit critique of the marketplace's truth assumptions came from Chief Justice Rehnquist in his dissent in *Central Hudson*.[212] He contended the marketplace approach does not guarantee truth will succeed or falsity will fail.[213] He also disagreed with the majority's use of the metaphor to contend nearly any type of speech, including commercial and corporate, cannot generally be regulated.[214] Chief Justice Rehnquist concluded, "There is no reason for

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raised across contexts defending or defining free speech protections, and commenting on the way the "marketplace of ideas" as a metaphor has affected the evolution of legal protections for speech); N.Y. Times Co. v. United States, 403 U.S. 713, 720–23 (1971) (Stewart, J., dissenting); Healy v. James, 408 U.S. 169, 181–82 (1972); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 123 (1973) (holding that "the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth"); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 810 (1978) (White, J., dissenting) (claiming that political contributions "may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas"); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 570 (1980) (holding that a regulation that prohibits utilities from advertising the benefits of electricity consumption to raise their own revenue violates the First and Fourteenth Amendments); *Citizens United*, 558 U.S. at 352 (raising concerns that conglomerates could upend and circumvent the First Amendment protection afforded to media corporations by buying them out, were these conglomerates' speech regulated).

[208] *See, e.g.*, *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 592 (Rehnquist, J., dissenting); *Bellotti*, 435 U.S. at 810 (White, J., dissenting); *N.Y. Times Co.*, 403 U.S. at 720–23 (1971) (Stewart, J., dissenting).

[209] *See* Hopkins, *supra* note 53, at 44–47; *supra* notes 207–08 and accompanying text. *See generally* FISH, *supra* note 38; ROBERT HUGHES, CULTURE OF COMPLAINT: THE FRAYING OF AMERICA (1993) (arguing generally that the best way to protect truthful speech is to promote access to *everything*, without regulation, and to let individuals decide what they subscribe to—assuming that effective ideas will propagate, and weaker ideas will fail).

[210] *See generally* BARRON, *supra* note 35; Joo, *supra* note 35; BAKER, *supra* note 18.

[211] *See supra* note 210 and accompanying text.

[212] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 592–93 (Rehnquist, J., dissenting).

[213] *Id.*

[214] *Id.* at 592.

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."[215] While he cited Baker's critique of the marketplace's assumptions in his dissent,[216] his conclusions overlapped more with legal scholar Jerome Barron's harsher criticism of the marketplace approach from 1967.[217] Barron contended, "Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible."[218] Barron, whose ideas the Court generally rejected when he used them to argue Tornillo's case in *Miami Herald v. Tornillo* in 1974,[219] explained "if ever there were a self-operating marketplace of ideas, it has long ceased to exist."[220]

Broadly, Chief Justice Rehnquist and Barron, as well as other scholars, have shared a concern that the marketplace's Enlightenment foundations simply are not capable of carrying the weight of First Amendment interpretation and rationalization that Justices have come to place upon it.[221] In particular, scholars have found the truth assumptions of the theory problematic.[222] Baker concluded, "[T]he assumptions on which the classic marketplace of ideas theory rests are almost universally rejected."[223] He explained, "[T]ruth is not objective."[224] Of course, Baker was not rejecting all truth, simply the Enlightenment version of objective truth upon which the marketplace has come to rest. Baker posited the marketplace concept must be revised to remove objective truth with "the view that people individually and collectively choose or create rather than 'discover' their perspectives, understandings, and truths."[225] Legal scholar Frederick Schauer came to similar conclusions but associated them with human rationality concerns. He wrote, "[O]ur increasing knowledge about the process of idea transmission, reception, and acceptance makes it more and more difficult to accept the notion that truth has some inherent power to prevail in the marketplace of ideas . . . ."[226] Similarly, legal scholar Stanley Ingber explained, "In order to be discoverable, however, truth must be an objective rather than a subjective, chosen concept."[227] Perhaps Baker summed up these concerns when he

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[215] *Id.*

[216] *Id.*

[217] *See generally* Jerome A. Barron, *Access to the Press—a New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

[218] *Id.* at 1641.

[219] *See generally* 418 U.S. 241 (1974).

[220] Barron, *supra* note 217, at 1641.

[221] *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 592–93 (Rehnquist, J., dissenting). *See generally* Barron, *supra* note 217.

[222] *See, e.g.*, BAKER, *supra* note 18, at 12.

[223] *Id.*

[224] *Id.*

[225] *Id.* at 13.

[226] Schauer, *supra* note 37, at 777.

[227] Ingber, *supra* note 3, at 15.

concluded, "[F]reedom of speech may be defensible, [but] not because of the marketplace of ideas' supposed capacity to discover truth."[228]

In identifying these primarily truth-oriented concerns about the marketplace's assumptions, legal scholars have also drawn in questions about Enlightenment principles regarding human rationality and the structure of society.[229] Scholars have recognized each individual brings certain biases into any encounter with information.[230] Such biases undermine the likelihood that rational individuals will generally identify the same, universal "truth" as the idea that succeeds in the marketplace.[231] Baker reasoned this is "precisely because the value-oriented criteria—interests, desires, or aesthetics—which guide the development of perceptions, appear ungrounded, incapable of objective demonstration."[232] Conversely, when it comes to the message, rather than the receiver, a different set of concerns arise regarding human rationality and social structures.[233] As media scholars Robert Schmuhl and Robert Picard noted, the marketplace might function when there are only a few sources of information, but when there are countless sources, as there are in the twenty-first century, the approach's assumptions struggle.[234] There are inherent inequalities in the frequency and intensity in which individuals encounter messages, and the extent to which certain communicators have access to conveying ideas in the marketplace make the theory's axioms unlikely to come to fruition.[235] The authors explained, "[T]he belief of Milton or Holmes in a self-righting principle that yields truth is not only chancy but also doubtful."[236] These concerns have been exacerbated in choice-rich, fragmented virtual spaces, where individuals tend to construct echo-chamber-like networks.[237] Certain

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[228] BAKER, *supra* note 18, at 24.

[229] Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 651 (2006); Leonard M. Niehoff & Deeva Shah, *The Resilience of Noxious Doctrine: The 2016 Election, the Marketplace of Ideas, and the Obstinacy of Bias*, 22 MICH. J. RACE & L. 243, 269 (2017); *see* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 2.

[230] Bambauer, *supra* note 229, at 651; Niehoff & Shah, *supra* note 229, at 269; Blasi, *supra* note 229, at 2.

[231] *See generally* Govind Persaud, *When, and How, Should Cognitive Bias Matter to Law?*, 32 MINN. J.L. & INEQ. 31 (2014) (arguing that we should be more sensitive to human frailties in rationality when designing legal regimes than invoking philosophical principles); SUNSTEIN, *supra* note 17, at 72 (highlighting that individuals usually retain their original stances on issues, even in the face of new ideas and evidence, with the implication being that persuasion is often a feature of saturation, rather than rhetoric).

[232] BAKER, *supra* note 18, at 13.

[233] *See* Robert Schmuhl & Robert Picard, *The Market Place of Ideas*, *in* THE PRESS 141, 152 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

[234] *See id.* at 146.

[235] *See id.* at 145–47.

[236] *Id.* at 147.

[237] Himelboim et al., *supra* note 17, at 166–71; CASTELLS, *supra* note 17, at 3–4; Bennett & Iyengar, *supra* note 17, at 720.

messages will reach communities more often, because of the sources of information and individual narratives within them, while others do not reach them at all.[238] At the same time, certain messengers have more resources to share messages with greater frequency and to package messages in more attractive ways.[239]

All of these concerns about the marketplace point to the theory's Enlightenment foundations, particularly regarding the nature of truth.[240] Historian David Hollinger, in considering Enlightenment thought more generally, critiqued the era's efforts to resolve uncertainty by manipulating reality and oversimplifying complex social structures.[241] He explained, "The Enlightenment, it seems, has led us to suppose that all people are pretty much alike."[242] He also emphasized that it "blinded us to uncertainties of knowledge by promoting an ideal of absolute scientific certainty."[243] It is these concerns about the marketplace's underlying foundation in Enlightenment thought, rather than the marketplace itself, that scholars, in a variety of fields, have emphasized.[244] Thus, these criticisms, when considered in light of how Enlightenment ideas regarding truth have been installed as foundational supports to the marketplace approach, create a need for revised foundational assumptions for the Court's most dominant rationale for free expression.[245]

II. TRUTH AND ITS SYNONYMS

Despite the influential role Enlightenment-founded assumptions regarding the universal, discoverable nature of truth have had on U.S. social and political structures, they are not alone when it comes to conceptualizations of truth, particularly in regard to the flow of information and the development of understanding.[246] Using

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[238] *See* SUNSTEIN, *supra* note 17, at 138–42 (describing what makes some messages propagate through systems—because, for example, of ample media infrastructure support and independent verification—while others founder, being suppressed by the government or unpopular viewpoints).

[239] Ingber, *supra* note 3, at 15.

[240] *See, e.g.*, Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 243–45 (2017) (discussing the clash of the rationalist, Enlightenment philosophies with the scientific evidence that people base their thoughts on processes other than Enlightenment principles).

[241] David E. Hollinger, *The Enlightenment and the Genealogy of Cultural Conflict in the United States*, *in* WHAT'S LEFT OF ENLIGHTENMENT?, *supra* note 43, at 7, 8.

[242] *Id.* at 9.

[243] *Id.* at 8.

[244] *See* Hopkins, *supra* note 53, at 43.

[245] *See* Schauer, *supra* note 240, at 249–50 (arguing that assessing truth or the value of specific speech actually requires knowledge of the world beyond the scope of the individual speech acts being considered and their social context).

[246] *See* Berman, *supra* note 98, at 321. *See generally* Lester Gilbert Crocker, *The Problem of Truth and Falsehood in the Age of Enlightenment*, 14 J. HIST. IDEAS 575 (1953) (tracing

reasoning similar to the criticisms of Enlightenment truth discussed in the preceding Section, thinkers have constructed understandings of truth that account for the fundamental inability of human senses, and the human experience more generally, to make sense of the world in the way it truly is.[247] German thinker Georg Wilhelm Friedrich Hegel, for example, explained, "[T]here is a boundary between cognition and the Absolute that completely separates them."[248] He continued, "[I]f cognition is the instrument for getting hold of absolute being, it is obvious that the use of an instrument on a thing certainly does not let it be what it is for itself, but rather sets out to reshape and alter it."[249] Whether an individual is the instrument through which information is decanted into truth or a tool or mediator acts between, Hegel and many others have contended the absolute being or nature of something cannot be understood by human senses or the tools people create to measure phenomena in the world.[250] They contend meaning-making is a self-referential process that is unavoidably colored by human biases.[251] Heidegger explained, "Neither the ontical depiction of entities within-the-world nor the ontological Interpretation of their Being is such as to reach the phenomenon of the 'world.' In both of these ways of access to 'Objective Being,' the 'world' has already been 'presupposed.'"[252] Such realizations have led to more discursive and pragmatic approaches to how truth is understood.[253] This section examines conceptualizations of truth that are applicable to the problem of how free expression should be rationalized in democratic society, particularly in the twenty-first century. To do so, this Part explores meaning-making via phenomenological conceptualizations of truth, highlighting the place of prejudices and biases and the interaction that occurs between a person and information. It also looks at discursive thought, primarily as it has been understood by Habermas and Dewey, and American pragmatism, primarily through James's foundational work on the topic.[254] In examining these concerns regarding the nature of truth, this section provides conceptual building blocks regarding how the truth assumptions within free expression rationales can be revised or replaced.[255]

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the evolution of philosophical commentary on truth as a concept from Machiavelli to the modern age).

[247] *See* MARTIN HEIDEGGER, BEING AND TRUTH 36 (Gregory Fried & Richard Polt trans., 2010); HANS-GEORG GADAMER, TRUTH & METHOD 271–72 (2d ed. 2004); FRIEDRICH NIETZSCHE, THE GAY SCIENCE 334–35 (Walter Kaufmann trans., 1974); ARENDT, *supra* note 44, at 172–74.

[248] G.W.F. HEGEL, PHENOMENOLOGY OF THE SPIRIT 46 (A.V. Miller trans., 1977).

[249] *Id.*

[250] *Id.*; *see also* ARENDT, *supra* note 44, at 172–74; HEIDEGGER, *supra* note 247, at 92–93.

[251] *See* MARTIN HEIDEGGER, BEING & TIME 92–93 (John Macquarrie & Edward Robinson trans., 1962).

[252] *Id.* at 92 (emphasis omitted).

[253] *See* HEIDEGGER, *supra* note 247, at 92–93.

[254] *See* DEWEY, *supra* note 46, at 158; 2 HABERMAS, *supra* note 46, at 170. *See generally* JAMES, *supra* note 40.

[255] *See, e.g.*, Robert J. Antonio & Douglas Kellner, *Communication, Modernity, and*

A. Truth as a Self-Referential Process

Phenomenological thinkers understand truth as an emergent process that is fundamentally personal, referential, and biased.[256] Thus, while Enlightenment conceptualizations of truth assumed a sameness among individuals regarding human rationality and generally universal, externally discoverable truth, phenomenologists contend meaning-making occurs as a type of dialogue between the individual and their *being*—that which defines them—and the being or nature of the idea or text they encounter.[257] Thus, truth emerges in the give and take between a person—and all that influences their world view—and the information source.[258] Truth, in this sense, can also be recognized as meaning, understanding, or consensus.[259] German thinker Martin Heidegger explained, "Looking at something, understanding and conceiving it, choosing, access to it—all these ways of behaving are constitutive for our inquiry, and therefore are modes of Being for those particular entities which we, the inquirers, are ourselves."[260] Hans-Georg Gadamer, who was one of Heidegger's students, for a time alongside Hannah Arendt, emphasized, "A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text."[261] Thus, rather than generally complete truths and falsities encountering each other in a marketplace that is patronized by individuals who receive them in relatively similar ways, these thinkers understood truth as a dialogue between the individual and the text or idea that is colored by foreknowledge and prejudice.[262] Such an approach is not compatible with Enlightenment-founded truth assumptions.[263] Arendt likened the impossibility of a person encountering an idea in its true, primordial form to "jumping over our own shadows."[264] In this sense,

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Democracy in Habermas and Dewey, 15 SYMBOLIC INTERACTION 277, 291–92 (1992) (critiquing Habermas's and Dewey's conception of discourse as excessively narrow).

[256] RICHARD E. PALMER, HERMENEUTICS: INTERPRETATION THEORY IN SCHLEIERMACHER, DILTHEY, HEIDEGGER, AND GADAMER 87 (1969); HEIDEGGER, *supra* note 251, at 26–27; HEGEL, *supra* note 248, at 46.

[257] *See* PALMER, *supra* note 256, at 87 (describing Schleiermacher's "hermeneutical circle," a concept referring to the way listeners interpret speech or other symbol referents by means of things already within their purview—i.e., there is no one-way communication, just reshaping of already-held concepts into new constructions).

[258] HEIDEGGER, *supra* note 251, at 26–27.

[259] *Id.*

[260] *Id.*

[261] GADAMER, *supra* note 247, at 269. Gadamer, unlike Heidegger, did not join the Nazi Party. He has been criticized, however, for not publicly opposing Nazism. *See* KARL SIMMS, HANS-GEORG GADAMER 3–4 (2015).

[262] PALMER, *supra* note 256, at 87.

[263] *See generally* JAMES, *supra* note 40 (consistently attacking the Enlightenment notion that rationality is the path to truth on the grounds that rationality is tempered by personality and ipsilateral differences in thought, while on some level the events we experience are objective).

[264] ARENDT, *supra* note 44, at 10.

individuals cannot escape themselves and their biases to see the world as it truly is.[265] Arendt associated this concern with how Galileo's discovery of the telescope forever changed human understanding.[266] The tool allowed humans to extend their senses and to realize many *truths* people were once certain of, because they had perceived them with their senses, were incorrect.[267] The telescope introduced a fundamental skepticism regarding the truth-finding capabilities of the human senses.[268] Enlightenment thinkers sought to mitigate this doubt by creating systems and using tools to establish certainty.[269] Phenomenological thinkers contend, however, these tools and systems merely manipulate understanding, they do not reveal truth.[270] Arendt explained, "Instead of objective qualities, in other words, we find instruments, and instead of the . . . universe . . . man encounters only himself."[271]

Gadamer looked more deeply into the biases humans project upon their conceptions of the world.[272] He explained this phenomenon: "[W]e understand ourselves through the process of self-examination, we understand ourselves in a self-evident way in the family, society, and state in which we live."[273] Thus, the nature of things and ideas people encounter is masked by a haze of their personal biases and prejudices.[274] Phenomenologists assume, in order for a person to encounter an idea in its true form, they must complete the impossible task of removing themselves from the line of history of which they are irreconcilably a part.[275] Since people cannot escape the socializing, historical forces that define their being, their best hope is to identify and acknowledge their biases and prejudices when encountering ideas. Heidegger paid particular attention to this concern in his primary work, *Being and Time*.[276] He concluded, "[O]ur first, last, and constant task is never to allow our fore-having, foresight, and fore-conception to be presented to us by fancies and popular conceptions, but rather to make the scientific theme secure by working out these fore-structures in terms of the things themselves."[277]

Such conclusions regarding the lenses through which individuals encounter the world have led thinkers to question the human tools people have created to measure human experience and create "truth."[278] Gadamer explained, "The experience of the

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[265] *See id.*
[266] *Id.* at 259–61.
[267] *Id.* at 259–60.
[268] *See id.*
[269] *See id.* at 257–58.
[270] *See id.* at 260–61.
[271] *Id.* at 261.
[272] GADAMER, *supra* note 247, at 278.
[273] *Id.*
[274] HEIDEGGER, *supra* note 251, at 195.
[275] GADAMER, *supra* note 247, at 4.
[276] *See generally* HEIDEGGER, *supra* note 251 (recommending means for effectively removing bias from one's conception of history and the inherent limits of any such efforts).
[277] *Id.* at 195.
[278] *E.g.*, GADAMER, *supra* note 247, at 4.

sociohistorical world cannot be raised to a science by the inductive procedure of the natural sciences."[279] Arendt critiqued the Enlightenment-founded search for absolute scientific certainty, concluding "it will be difficult to ward off the suspicion that this mathematically preconceived world may be a dream world where every dreamed vision man himself produces has the character of reality only as long as the dream lasts."[280] She also warned that the tools and processes people use to *find* truth always threaten to put "man back once more—and now even more forcefully—into the prison of his own mind, into the limitations of patterns he himself created."[281]

The central concerns of phenomenological skepticism substantially overlap with legal scholars' concerns regarding the Enlightenment-founded assumptions that have become the foundation of the marketplace approach.[282] Phenomenological thought, however, constructs an antithesis to positivist truth assumptions, contending truth is self-made via rational, but worldly, individuals.[283] Using the foundations of the phenomenological framework, thinkers have constructed different understandings of how meaning-making functions.[284] The ensuing Sections examine two of those ways.

B. Discourse: A Concern for the Space and Flow of Information

Discursive thought builds upon phenomenological assumptions about the personal, self-referential nature of truth to put forth ideas for how meaning-making and the flow of information in democratic society should be understood.[285] The approach is antithetical to the Enlightenment-based marketplace model because it rejects the idea that truth and falsity compete, instead assuming truth *emerges* within the individual and as an agreement or consensus via discourse within a community or society.[286] In this sense, the entire idea of truth, from an Enlightenment perspective, is transformed to something more akin to meaning-making, understanding, or consensus, rather than

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[279] *Id.*

[280] ARENDT, *supra* note 44, at 286.

[281] *Id.* at 288.

[282] *See, e.g.*, Jared Schroeder, *Shifting the Metaphor: Examining Discursive Influences on the Supreme Court's Use of the Marketplace Metaphor in Twenty-First-Century Free Expression Cases*, 21 COMMC'N L. & POL'Y 383, 384–85 (2016).

[283] *Id.* at 386.

[284] *See, e.g.*, Antonio & Kellner, *supra* note 255, at 281 (listing some of the different models of meaning-making thinkers have developed).

[285] *See* Schroeder, *supra* note 282, at 397–99.

[286] To see this within Dewey's writings, see, for example, John Dewey, *The Inclusive Philosophic Idea*, *in* 3 JOHN DEWEY: THE LATER WORKS, 1925–1953, at 41, 49–51 (Jo Ann Boydston & Patricia Baysinger eds., 1984); John Dewey, *Creative Democracy—The Task Before Us*, *in* 14 JOHN DEWEY: THE LATER WORKS, 1925–1953, *supra*, at 224, 229–30; DEWEY, *supra* note 46, at 158. To see this concept in scholarship about Dewey's ideas, see, for example, Antonio & Kellner, *supra* note 255, at 284; Mark Whipple, *The Dewey-Lippmann Debate Today: Communication Distortions, Reflective Agency, and Participatory Democracy*, 23 SOCIO. THEORY 156, 161–62 (2005).

a discovery or victory of objective, universal truth over falsity.[287] Within such a shift, the discursive approach remains concerned with free expression among rational individuals but recalibrates the rationales for such protections to emphasize safeguarding *the flow of information* and the *space* in which people come together, whether such a space is actual or conceptual.[288] Dewey, a pragmatic thinker who studied Justice Holmes's writing extensively,[289] explained, "[T]he heart and final guarantee of democracy is in the free gatherings of neighbors on the street corner to discuss back and forth what is read in uncensored news of the day."[290] He continued, these interactions include "gatherings of friends in the living rooms of houses and apartments to converse freely with one another."[291] Intertwined in Dewey's conclusions is an understanding that individuals can only reach their full potential as citizens when they take part in such discourse.[292] He explained, "[A] good citizen finds his conduct as a member of a political group enriching and enriched by his participation in family life, industry, scientific and artistic associations."[293] Thus, intertwined with concerns for *the flow of information* and the *space* where it occurs, Dewey added an assumption that the individual benefits the community by taking part in discourse.[294] Such involvement, recursively, fulfills the individual.[295]

Habermas, who was influenced by Dewey's work, constructed discourse-minded theories of *the flow of information* and the *space* in which such interactions occur.[296] Both ideas provide important alternatives to the truth assumptions that currently reside as foundational rationales for free expression, via the marketplace approach.[297] In regard to *space*, Habermas conceptualized the public sphere, a conceptual place for discourse that is similar in purpose to the marketplace of ideas, but constructed it using different philosophical assumptions.[298] Habermas defined the public sphere

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[287] *See* Schroeder, *supra* note 282, at 397–99.

[288] *See* Dewey, *Creative Democracy—The Task Before Us*, *supra* note 286, at 227–28 (discussing the value of the free flow of facts and ideas in a democracy).

[289] *See* MAX H. FISCH, PEIRCE, SEMIOTIC, AND PRAGMATISM 6 (Kenneth Laine Ketner & Christian J.W. Kloesel eds., 1986) (noting a time when Dewey "made effective use of two pages of quotations from Holmes, gladly borrowing, as he said, 'the glowing words of one of our greatest American philosophers'").

[290] Schroeder, *supra* note 282, at 227.

[291] *Id.*

[292] *Id.* at 228–29.

[293] DEWEY, *supra* note 46, at 328.

[294] *Id.*

[295] *See id.*

[296] *See generally* Antonio & Kellner, *supra* note 255, at 278–82 (discussing Habermasian Theory and how it compares to Deweyean pragmatism).

[297] *See id.* at 278 (noting the significance of Habermas and Dewey as alternatives to the Enlightenment tradition, as well as other philosophy thought).

[298] *See generally* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 27–56 (Thomas Burger & Frederick Lawrence trans., 1993) (discussing the different social structures necessary for the construction of the public sphere).

as "the sphere of private people come together as a public."[299] He emphasized, as Arendt did before him, the public space must be reserved for private people who come together into the public to discuss pressing matters of concern.[300] Habermas contended the public sphere emerged at the same time as the European bourgeois middle class in the seventeenth and eighteenth centuries.[301] He explained once primarily private, household aspects of business began to emerge in the public as traders, merchants, and crafters established themselves as something altogether different than the ruling class or the servants who supported them.[302] Members of this emerging middle class formed publics.[303] These publics, once formed, were capable of reaching consensus or shared meaning regarding crucial issues and then exerting pressure on those in power to facilitate change.[304] The dynamics of their place in society, as compared to the traditional servant class, created a new type of actor in society.[305] The public sphere that emerged among this class required three primary elements to function: information, via the press; an engaged public that seeks to find solutions to the problems facing its community; and limited or no intrusion by the government in the public sphere.[306] Such a conceptualization of the space is similar to Arendt's understanding of the *polis*, which she described as "the organization of the people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be."[307] She emphasized that in the *polis*, everyone comes as an equal, whereas in private spaces, the head of the household, or a dictator, determines the community's path.[308]

In regard to *the flow of information*, Habermas and Arendt lamented these spaces struggle when the ingredients needed to sustain them falter.[309] Arendt contended when private interests, rather than public concerns, overwhelm the public realm, the space will fail to function properly and democratic freedom becomes threatened.[310] Habermas

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[299] *Id.* at 27.

[300] *Id.* at 28–29*; see* ARENDT, *supra* note 44, at 194–95 (stating "[b]efore men began to act, a definite space had to be secured and a structure built where all subsequent actions could take place, the space being the public realm of the *polls* [sic] and its structure the law; legislator and architect belonged in the same category").

[301] HABERMAS, *supra* note 298, at 20.

[302] *Id.* at 19–20.

[303] *See id.* at 22–23.

[304] *See id.* at 83–84.

[305] *Id.* at 22–23.

[306] *Id.* at 27–30.

[307] *See* ARENDT, *supra* note 44, at 198.

[308] *See* HABERMAS, *supra* note 298, at 31–32.

[309] *See* ARENDT, *supra* note 44, at 198; HABERMAS, *supra* note 298, at 27–30 (discussing the necessary ingredients of the public sphere).

[310] *See* ARENDT, *supra* note 44, at 199 (noting that the space ceases to exist without the continuous action that brought it into existence in the first place).

came to similar conclusions, finding that when the public sphere is inundated by news and information that does not contribute to discourse, it is overwhelmed by people who are not interested in discourse about matters of concern, or the government intrudes in the space, it will falter.[311] Thus, woven within the discourse-related conceptualization of the space is a concern for protecting the space from destructive elements.[312] Concern for the space, as already indicated in Habermas and Arendt's ideas, is inexorably associated with the flow of information.[313] Habermas explained, "an agreement cannot be imposed from without, cannot be foisted by one party upon the other—whether instrumentally, through direct intervention into the action situation, or strategically, through indirect influence."[314] Thus, in an emergent, discursive rationale for free expression, the government must not influence the space or flow of information.[315] Furthermore, individuals must come together with the intent to use what they know to come to a consensus or understanding—a truth—regarding the matter at hand.[316] This emergent truth can then take the form of public opinion and lead to the people exerting force in order to exact change or address problems.[317]

C. A Pragmatic Approach

Though Justice Holmes rejected the pragmatist label, particularly when such a label included him being associated with his old friend William James, the renowned jurist's ideas had substantial overlap with American pragmatic thought.[318] His dissent in *Abrams*, just sentences after he invoked the marketplace concept, included the rationalization that "[e]very year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."[319] Such a conclusion aligns with his famous contention from *The Common Law*, which was published in 1881, not long after Holmes's involvement in the Metaphysical Club, with James, Charles Peirce, and Chancy Wright,[320] that "[t]he life of the law has not been logic: it has been

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[311] *See* HABERMAS, *supra* note 298, at 21–24.

[312] *See id.*

[313] *See* ARENDT, *supra* note 44, at 199; HABERMAS, *supra* note 298, at 21–24.

[314] JÜRGEN HABERMAS, ON THE PRAGMATICS OF COMMUNICATION 299 (Maeve Cooke ed., 1998).

[315] *See id.*; *see also* Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 598 (1980) (Rehnquist, C.J., dissenting).

[316] *See* Antonio & Kellner, *supra* note 255, at 281.

[317] *Id.*

[318] Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Mar. 29, 1917), *supra* note 80; Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 543 (1988).

[319] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[320] MENAND, *supra* note 80, at 201.

experience."[321] This idea that the best anyone can do is *wager* or bet upon what is true or that experience determines individual truth—common themes in his writing—align substantially with American pragmatic thought.[322]

Pragmatic approaches to truth reject the absolute, universal truth assumptions of the Enlightenment, but do so in fundamentally different ways than the more emergent understandings found in discursive thought.[323] Pragmatic thought identifies a process-based, fluid approach to truth that acknowledges the limitations of human experience and personal biases.[324] As James described, "Truth HAPPENS to an idea. It BECOMES true, is MADE true by events. Its verity is in fact an event. . . . Its validity is the process of its valid-ATION."[325] Such a statement is diametrically opposed to traditional Enlightenment assumptions about universal, discoverable truth.[326] In pragmatic thought, when a person has new experiences, truth can change.[327] The new experience is filtered through the at times rigid biases of previous experience-born truths, often only adjusting individual conceptualizations slightly.[328] James wrote, "New truths thus are resultants of new experiences and of old truths combined and mutually modifying one another."[329] Despite such rigidity, truth is still understood as a liquid rather than a solid.[330] It is understood as something that can change shape based on new influences.[331] As with discursive thought, the very meaning of truth becomes something different in the pragmatic approach.[332] It becomes more synonymous with the definition of *reality*. Thus, while Enlightenment thought conceptualizes truth as monolithic and static and discursive thought understands it as similar to the definition of meaning, consensus, or understanding, pragmatism provides an approach to truth that is personal and malleable.[333] In this sense, reality is simply old

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[321] HOLMES, *supra* note 79, at 1.

[322] *See* Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Aug. 30, 1929), *supra* note 90; Cohen, *supra* note 91, at 4; Luban, *supra* note 91, at 474 n.78.

[323] *See, e.g.*, JAMES, *supra* note 40, at 259 ("On the pragmatist side we have only one edition of the universe, unfinished, growing . . . . On the rationalist side we have a universe in many editions, one real one . . . and then various finite editions, full of false readings . . . .).

[324] *See id.*

[325] *See id.* at 201.

[326] *See id.* (explaining how the pragmatist view is opposed to the intellectualist assumption that truth is a static relation).

[327] *See id.*

[328] *See id.*

[329] *Id.* at 201–02.

[330] *See id.* (explaining how new truths can change but are ultimately grounded in old truths that date back to our remote ancestors—in other words, asserting that there is an objective reality that is traceable through time).

[331] *Id.* at 255.

[332] *See id.* at 200–01 (discussing the fact that truth in pragmatism is different than a conception of static truth).

[333] *Compare* MILTON, *supra* note 67, at 50 (describing the static nature of Enlightenment

truth, which each person must square with new experience.[334] When experience causes a person's reality to change, the *truth* regarding that subject is revised.[335] James contrasted Enlightenment thought with his ideas about pragmatism, concluding, "The essential contrast is that for rationalism reality is ready-made and complete from all eternity, while for pragmatism it is still in the making, and awaits part of its complexion from the future."[336]

Such a dynamic, reality- and experience-based understanding of truth, while fundamentally different in its foundation from the marketplace's traditional assumptions, shares nearly identical concerns.[337] A pragmatic marketplace still places a premium on free expression, thus safeguarding individuals' abilities to encounter and form "new truths" that can cause them to revise their realities.[338] The approach, however, shares more in common with discursive thought in that it does not conceptualize ideas as being in competition, but rather emphasizes the flow of information and the space in which it occurs, since it is these aspects of free expression that foster pragmatic thought.[339] James's foundational understanding of pragmatic thought is far more individual-based, however, when compared with discursive ideas that assume community involvement.[340] Of course, while this Article placed him among discursive thinkers, Dewey's ideas span discursive and pragmatic thought.[341] Dewey's pragmatic thought, which was influenced by his experiences with James's work and Peirce's presence at Johns Hopkins when he was a graduate student there, added a place for community and citizenship to pragmatic ideals that were generally more inwardly focused.[342] In this regard, Dewey's ideas create an area of overlap between discursive and pragmatic thought.[343] Ultimately, all three of these areas—phenomenology, discourse, and pragmatism—while made of different materials, provide potential replacement parts for the troubled, Enlightenment foundations the Court installed beneath the marketplace approach.

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truth), *with* Schroeder, *supra* note 282, at 397–99 (discussing the nature of discursive truth), *and* JAMES, *supra* note 40, at 201 (discussing the nature of pragmatic truth).

[334] *See* JAMES, *supra* note 40, at 201–02.

[335] *See id.*

[336] *Id.* at 257.

[337] *See generally id.* James speaks at length about how reality impinges on one's mental conceptions or ideal states chronically, affecting one's thoughts and inference abilities.

[338] *Id.* at 207–08.

[339] *See id.*

[340] *Compare id.* at 45–84 (example of pragmatic thinker), *with* John Dewey, *The Development of American Pragmatism*, *in* 2 THE ESSENTIAL DEWEY 1, 8 (Larry A. Hickman & Thomas M. Alexander eds., 1998) (example of a discursive thinker).

[341] *See John Dewey*, STAN. ENCYCLOPEDIA PHIL. (Nov. 1, 2018), https://plato.stanford.edu/entries/dewey/ [https://perma.cc/78W3-RNZK].

[342] *See* Dewey, *supra* note 340, at 8.

[343] *See id.*

III. TRUTH, FALSITY, AND THE COURT

Truth has become indelibly interwoven into the fabric of the First Amendment.[344] Truth, however, is not a one-dimensional concept.[345] As the preceding Part examined, thinkers have offered understandings of truth that transform its meaning in fundamental ways.[346] Meanwhile, the marketplace, as a foundational and rationalizing tool for free expression, has taken on more than one meaning to Justices.[347] Ultimately, the way Justices have communicated they understand truth, via a variety of decisions in which truth, falsity, and free expression were central concerns, provides a final set of building blocks regarding how truth should be conceptualized and applied to interpretations of the First Amendment during a period of unprecedented technological and social change.[348] When examined together, Justices in free-expression cases communicated three primary concerns regarding the meaning and place of truth and democratic discourse: 1) concern for the *value* of the expression,[349] 2) examination of the communicator's *intent* when sharing the information,[350] and 3) the *nature* of truth as it applies to the First Amendment.[351] Importantly, Justices in these cases did

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[344] *See, e.g.*, Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1488 (2019) (discussing how even "high value lies" have been advanced as a hybrid speech category, as occasionally meritorious speech endeavors). *See generally* Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351 (2019) (weighing considerations of dangerous, misleading speech and free expression).

[345] *See* Dewey, *supra* note 340, at 8 (illustrating in an example of how an individual child parses the feeling of burning one's finger how many layers of thought and processing go into a simple cognitive assessment of a "true" sensation).

[346] *See* DEWEY, *supra* note 46, at 158; HABERMAS, *supra* note 46, at 170. *See generally* Crocker, *supra* note 246 (surveying the range of philosophical debates over the nature of truth since the Renaissance); JAMES, *supra* note 40.

[347] *See* Hopkins, *supra* note 53, at 43.

[348] *See* Ingber, *supra* note 3, at 3.

[349] *See, e.g.*, Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) (disclaiming the value of false statements as muddling the marketplace of ideas); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 767–77 (1986) (holding the First Amendment did not protect false ideas); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (upholding restrictive regulations of commercial speech, because "much commercial speech is not provably false, or even wholly false, but only deceptive or misleading" . . . that a state may write laws "dealing effectively with this problem"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (writing "there is no constitutional value in false statements of fact"). *See generally* Hopkins, *supra* note 53 (discussing various considerations and conceptualizations regarding the concept of a marketplace of ideas invoked by the Supreme Court across a range of cases).

[350] *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (holding that intentional lies spread on the airwaves were not protected by the First Amendment); St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (holding that unintentional purveyors of falsities should be protected by the First Amendment); Beauharnais v. Illinois, 343 U.S. 250, 300–01 (1952) (Jackson, J., dissenting); Near v. Minn. *ex rel*. Olson, 283 U.S. 697, 702 (1931).

[351] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 772

not seek to make philosophical contributions, but rather communicated these themes as they sought to rationalize precedential conclusions in First Amendment cases.[352]

A. The Value of Truth and Falsity

Justices conveyed consistent concern about the *value* truth and falsity offer in democratic discourse.[353] This concern came in two different, but related, forms. First, Justices generally communicated false facts have no value, while false ideas, which they understood as being synonymous with unpopular ideas, *can* be valuable to society.[354] Such a dichotomy aligns with the second theme regarding the Court's concerns about the value of truthful or false communication, which dealt with assessments of whether the messages were a public good or a matter of public concern.[355] Justices have often intertwined these concerns in the same passage, conveying understandings that falsity does not contribute to the public good and therefore does not have *value*.[356] In *Hustler v. Falwell* in 1988, the Court explained, "False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas."[357] Fourteen years earlier, the Court concluded in *Gertz* that "there is no constitutional value in false statements of fact."[358] In the same passage, the Court explained, "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."[359] Similarly, in the 1976 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* commercial speech decision, the Court explained, "Untruthful speech, commercial or otherwise, has never been protected for its own sake."[360] Justices concluded commercial speech can contribute to democratic society,

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(1984) (White, J., concurring in the judgment); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (voicing reluctance to bar media access to materials that would inform but scandalize its audience); *St. Amant*, 390 U.S. at 732.

[352] *See Hustler Mag., Inc.*, 485 U.S. at 52; *Phila. Newspapers, Inc.*, 475 U.S. at 767–77; *Va. State Bd. of Pharmacy*, 425 U.S. at 771; *Gertz*, 418 U.S. at 340; *Rosenbloom*, 403 U.S. at 52; *St. Amant*, 390 U.S. at 731–32; *Beauharnais*, 343 U.S. at 300–01; *Near*, 283 U.S. at 702; *Dun & Bradstreet, Inc.*, 472 U.S. at 772; *Cox Broad. Corp.*, 420 U.S. at 496. *See generally* Hopkins, *supra* note 53; Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996).

[353] *See, e.g.*, *Hustler Mag., Inc.*, 485 U.S. at 51–52.

[354] *See* Chen & Marceau, *supra* note 344, at 1488–91.

[355] *See, e.g.*, *Va. State Bd. of Pharmacy*, 425 U.S. at 770 (weighing the Court's concern that the "paternalistic approach" of regulating speech is "to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them").

[356] *See, e.g.*, *Hustler Mag., Inc.*, 485 U.S. at 51–52.

[357] *See id.* at 52.

[358] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[359] *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[360] 425 U.S. at 771.

and therefore has value.[361] Finally, in *Philadelphia Newspapers, Inc. v. Hepps* in 1986, the Court reasoned those who claim they have been defamed must carry the burden of proving what was published was false.[362] In rationalizing such a conclusion, the Court explained, the Constitution requires Justices to tip the scales "in favor of protecting true speech" and "[t]o ensure that true speech on matters of public concern is not deterred."[363]

In each of these cases, Justices communicated understandings that truth and falsity should be evaluated based on the *value* they contribute to society.[364] These conclusions came in the form of explicit findings that false statements of fact are valueless and related, more nuanced, discussions of the potential goodness, as a type of synonym for value, the ideas might contribute to society.[365] The relatively explicit statements about the value of intentionally false information can be contrasted with the Court's consistent conclusion that "[u]nder the First Amendment there is no such thing as a false idea."[366] Similarly, the Court in *Bose Corp. v. Consumers Union of the United States, Inc.* in 1984 reasoned, "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society . . . ."[367] Thus, the Court has associated ideas with having intrinsic value.[368] False statements of fact, however, are of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[369]

While the Court was consistent in these conclusions for more than half a century, Justices in *Alvarez* removed and reframed such a concern for the *value* of speech in regard to truth and falsity. The Court concluded criminalizing false factual statements that are made with the intent to mislead people was a content-based restriction.[370] The Court reasoned, "falsity alone may not suffice to bring the speech outside the First Amendment."[371] Instead, the Court reasoned falsity and some other factor, such as damage to reputation or fraud, would be needed to justify a narrow restriction on

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[361] *Id.* at 760.

[362] *See generally* 475 U.S. 767 (1986).

[363] *Id.* at 776–77.

[364] *See* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51–52 (1988); *Gertz*, 418 U.S. at 340; *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72. *See generally Phila. Newspapers, Inc.*, 475 U.S. 767.

[365] *See Hustler Mag., Inc.*, 485 U.S. at 51–52; *Gertz*, 418 U.S. at 340; *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72. *See generally Phila. Newspapers, Inc.*, 475 U.S. 767.

[366] *Gertz*, 418 U.S. at 339.

[367] 466 U.S. 485, 503 (1984).

[368] *See id.* at 503–04.

[369] *Id.* at 504.

[370] *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion).

[371] *Id.* at 719.

false expression.[372] Otherwise, "open and vigorous expression of views in public and private conversation" requires striking down a law that criminalizes false statements of fact that are meant to mislead.[373] Absent from the Court's decision were concerns about the valueless nature of intentional false statements of fact.[374] Thus, *Alvarez* conflicts with the otherwise consistent *value*-related concerns the Court has communicated in rationalizing a separation regarding false facts and false ideas.[375]

B. A Matter of Intent

Despite the Court's decisions to reject intent-based "good motives" and "justifiable ends" tests that were found in early cases such as *Near v. Minnesota ex rel. Olson* and *Beauharnais v. Illinois*,[376] Justices have continued to communicate concern regarding the intent of the speaker or publisher when examining truth and falsity issues in First Amendment decisions. This concern is perhaps most apparent in the Court's defamation decisions.[377] The landmark *New York Times Co. v. Sullivan* ruling drew the actual malice concept into the Court's reasoning, and in doing so made intent part of how truth and falsity are understood in a large group of First Amendment cases.[378] The Court reasoned a public official can win a defamation claim if they establish the publisher acted "with knowledge that it was false or with reckless disregard of whether it was false or not."[379] Later that year, in the *Garrison v. Louisiana* defamation decision, Justices emphasized unintentional falsity is unavoidable and should be protected, but "knowing or reckless falsehood" should not be.[380] The Court brought these intent-related ideas into a broadcast context in *Rosenbloom v. Metromedia, Inc.* in 1971.[381] Justices emphasized a "[c]alculated falsehood, of course, falls outside" First Amendment protection.[382] Instead, the Court weighed whether the broadcaster "negligently failed to ascertain the truth," considering the report's sources and information-gathering processes.[383] The Court explained a defamation conviction can be "sustained only upon clear and convincing proof that the defamatory falsehood was published

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[372] *Id.*

[373] *Id.* at 718.

[374] *See id.* at 717–18 (discussing how false statements are inevitable, and while they may not be inherently valuable in themselves, permitting them to a degree is a necessary feature of maintaining an environment that protects free speech).

[375] *Id.*

[376] Beauharnais v. Illinois, 343 U.S. 250, 254 (1952); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 702 (1931).

[377] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[378] *Id.*

[379] *Id.*

[380] 379 U.S. 64, 73 (1964).

[381] 403 U.S. 29, 52 (1971).

[382] *Id.*

[383] *Id.*

with knowledge that it was false or with reckless disregard of whether it was false or not."[384] Justice Harlan was not satisfied with the Court's reasoning, offering an intent-free approach.[385] In his dissent, he averred, "Where the State cannot point to any tangible danger, even knowingly erroneous publication is entitled to constitutional protection."[386] His conclusion aligns more closely with the Court's reasoning in *Alvarez*, where Justices explicitly acknowledged the speaker meant to lie and intended to mislead, but concluded his expression must be protected.[387]

Such examples of intent-free opinions regarding truth and falsity are in the minority.[388] Justices reinforced and built upon the majority's intent-focused reasoning from *Rosenbloom* in *Gertz* three years later.[389] Justices explained, "there is no constitutional value in false statements of fact," as the Court had in preceding cases, but added careless errors are also without value.[390] Justices reasoned, however, erroneous statements must be protected to avoid chilling speech and communicated concern that, if too much protection is given to private reputation, publishers who take "every reasonable precaution to ensure . . . accuracy" could still face massive damages.[391] Thus, those who intend to communicate truthful information but fail should be protected.[392] The reasoning was similar to the Court's conclusion in *St. Amant v. Thompson* in 1968, which emphasized that a person who publishes "in good faith and unaware of its probable falsity," should be safeguarded.[393] Similarly, in *Masson v. New Yorker Magazine, Inc.* in 1991, Justices reinforced the actual malice standard from *Sullivan*, but said that judges should avoid the term when working with juries.[394] Instead, they should frame jury instructions as "publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity."[395] Thus, the Justices generally communicated concern for the intent of the publisher, seeking to construct a barrier of protection for accidental error but, aside from Justice Harlan's *Rosenbloom* dissent and the Court's decision in *Alvarez*, they otherwise left intentionally false communication unprotected.[396] In doing so, the Court has placed questions about the communicator's intent into the heart of any discussion of truth and free expression.[397]

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[384] *Id.*
[385] *Id.* at 66 (Harlan, J., dissenting).
[386] *Id.*
[387] *See* United States v. Alvarez, 567 U.S. 709, 715–17 (2012).
[388] *See supra* Part I.
[389] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).
[390] *See id.*
[391] *Id.* at 346.
[392] *Id.*
[393] 390 U.S. 727, 731 (1968).
[394] 501 U.S. 496, 510–11 (1991).
[395] *Id.* at 511.
[396] *See generally* United States v. Alvarez, 567 U.S. 709 (2012); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 62–78 (1971) (Harlan, J., dissenting).
[397] *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979).

The Court's conclusion in *Herbert v. Lando* in 1979 represented this dynamic.[398] Justices explained "some error is inevitable," but previous decisions have limited "liability to instances where some degree of culpability is present."[399]

C. The Nature of the Thing

Justices did not delve into philosophical discussions regarding truth but, in rationalizing their decisions in cases dealing with truth, falsity, and free expression, communicated important assumptions about how they understood the nature of truth.[400] Justices consistently communicated understandings that the flow of information and truth are inexorably connected.[401] They conveyed concern about self-censorship if defamation standards were too easily met and generally contended truth and false statements can be proven or identified from each other.[402] Such conclusions, while they do not hang their hat on a single outlook on the nature of truth, indicate significant agreement among Justices regarding human rationality and its relationship with truth.[403] Essentially, Justices conceptualized the apprehension of truth as something that requires information and that truth is well-sourced and verifiable.[404] While this association between information and truth appears to align with marketplace assumptions, Justices were not consistent in how they framed the nature of truth.[405] While they placed significant faith in human rationality, they did not always associate Enlightenment objective and universal truth with their conclusions.[406] In *Garrison*, for example, the Court found "utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."[407] Such an emphasis on *ascertaining* truth, rather than discovering it, leaves the door open for different understandings about truth.[408] Similarly, in *St. Amant*, the Court combined "ascertainment and publication of the

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[398] *Id.*

[399] *Id.* at 171–72.

[400] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 772 (White, J., concurring in the judgment); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 472 n.3 (1975); St. Amant v. Thompson, 390 U.S. 727, 731–32 (1968).

[401] *See Dun & Bradstreet, Inc.*, 472 U.S. at 772 (White, J., concurring in the judgment); *Cox Broad. Corp.*, 420 U.S. at 496; *St. Amant*, 390 U.S. at 731–32.

[402] *See Dun & Bradstreet, Inc.*, 472 U.S. at 772 (White, J., concurring in the judgment); *Cox Broad. Corp.*, 420 U.S. at 496; *St. Amant*, 390 U.S. at 731–32; *see also* Chen & Marceau, *supra* note 344, at 1488–91.

[403] *See Dun & Bradstreet, Inc.*, 472 U.S. at 772 (White, J., concurring in the judgment); *Cox Broad. Corp.*, 420 U.S. at 496; *St. Amant*, 390 U.S. at 731–32.

[404] *See Dun & Bradstreet, Inc.*, 472 U.S. at 762; *Cox Broad. Corp.*, 420 U.S. at 472 n.3.

[405] *See Dun & Bradstreet, Inc.*, 472 U.S. at 768 n.2 (White, J., concurring in the judgment); *id.* at 749 (Brennan, J., dissenting); *Cox Broad. Corp.*, 420 U.S. at 487 n.16.

[406] *See generally* Garrison v. Louisiana, 379 U.S. 64 (1964) (holding the state's criminal libel law to be unconstitutional).

[407] *Id.* at 73.

[408] *See id.*

truth about public affairs" into the same statement, linking rationality and truth.[409] Finally, Chief Justice Rehnquist, in his dissent in the *Central Hudson Gas & Electric Corp. v. Public Service Commission* case, rejected absolute truth as the purpose of the First Amendment.[410] He explained, "The free flow of information is important in this context not because it will lead to the discovery of any objective 'truth,' but because it is essential to our system of self-government."[411]

Justices conveyed concern for the flow of information and human conclusions regarding what is true.[412] What form that truth took, objective or more emergent, was not consistently indicated.[413] This does not mean Justices did not communicate these rationales without an assumption about the objective or subjective nature of truth in mind.[414] Instead, it contends that they consistently communicated concern for information flow and human rationality when conveying their understandings of truth.[415] In *Beauharnais*, Justice Jackson dissented when the Court upheld Illinois's group libel law.[416] He contended Beauharnais never had a chance to *prove* his ideas were true or, more importantly, as a result of the decision, future ideas will be limited "instead of being received and evaluated."[417] A decade later, Justices in *Communist Party of the United States v. Subversive Activities Control Board* upheld the board's right to require a group to register as a Communist entity.[418] In its reasoning, the Court weighed whether "an informed American observer, in the exercise of independent judgment and sensitive to the best interests of the United States, might not also reasonably have arrived at the view held by the Party."[419] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court reasoned commercial speech is protected because of "its contribution to the flow of accurate and reliable information relevant to public and private decision-making."[420] Rationales such as these emphasize protecting the flow of information, indicating truth and

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[409] St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

[410] *See* 447 U.S. 557, 598 (1980) (Rehnquist, C.J., dissenting).

[411] *Id.*

[412] *See id.* at 592–93, 598.

[413] *Compare Garrison*, 379 U.S. at 73 (holding that the First Amendment precludes censuring speech unless the speech causes potentially great harm because the free exchange of ideas, even falsehoods spoken credulously, "contribute to the free interchange of ideas and the ascertainment of truth"), *with St. Amant*, 390 U.S. at 731–32 (writing that "[p]ublishing with such doubts [as to the veracity of the claims within a body of journalistic writing] shows reckless disregard for truth or falsity and demonstrates actual malice . . . . Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation.").

[414] *See generally* Beauharnais v. Illinois, 343 U.S. 250 (1952).

[415] *See id.*

[416] *Id.* at 287–305 (Jackson, J., dissenting).

[417] *Id.* at 300–01.

[418] *See generally* 367 U.S. 1 (1961).

[419] *Id.* at 64.

[420] 425 U.S. 748, 781 (1976) (Stewart, J., concurring).

information are related.[421] They do not, however, require that such truth be objective and universal.[422] Instead, Justices communicated they understood truth as something that requires information.[423] Their rationales regarding the nature of truth do not communicate truth is emergent or malleable, but neither do they explicitly require absolute, universal truth.[424]

Aside from Chief Justice Rehnquist's conclusions, the absence of a consistent and explicit discussion of a specific understanding about the nature of truth in Justices' free-expression rationales does not mean they did or did not accept traditional Enlightenment assumptions that have been used to undergird the marketplace.[425] The absence of such explicit supports, however, means that no established conceptualization of truth stands in the way of revisions regarding truth and twenty-first-century understandings of free expression.[426]

CONCLUSION

The word "truth" does not appear in the First Amendment.[427] Truth has become, however, a foundational tool for how Justices communicate how they understand free expression and how they justify extending First Amendment safeguards—often striking down state and federal laws in the process.[428] Justices have not selected just any version of truth.[429] Beginning in 1919, Justices started weaving an Enlightenment-founded conception of truth into their free-expression rationales.[430] By the 1960s,

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[421] *See id.* at 763–64 (majority opinion).

[422] *Id.* at 777–81 (Stewart, J., concurring); *id.* at 787–88 (Rehnquist, J., dissenting).

[423] *See id.* at 771 n.24 (majority opinion).

[424] *See, e.g.*, *id.* at 748.

[425] *See id.* at 787–88 (Rehnquist, J., dissenting). *See generally* John A. Powell & Stephen M. Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 ST. LOUIS U. L.J. 1035 (2010) (describing how normative philosophical inquiry from the Enlightenment has led to approximations of scientific inquiry reaching into the realm of philosophy and other sorts of epistemologies, adding to and not excluding the Enlightenment's rational discursive mode of asserting knowledge).

[426] *See, e.g.*, Kelso, *supra* note 2, at 1084 (discussing how Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer consistently interpret the Establishment Clause according to the Enlightenment's secular approach).

[427] U.S. CONST. amend. I.

[428] *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 709–10, 717, 721–23 (1931).

[429] *See* MILTON, *supra* note 67, at 50; Letter from Justice Oliver Wendell Holmes, Jr. to Harold Laski (Feb. 28, 1919), *supra* note 75; Cohen, *supra* note 91, at 3–4; HOLMES, *supra* note 79, at 1; THE ESSENTIAL HOLMES, *supra* note 80, at 108; Letter from Justice Oliver Wendell Holmes, Jr. to Harold Laski (Mar. 29, 1917), *supra* note 80; Chen & Marceau, *supra* note 344, at 1488–91. *See generally* Whitney v. California, 274 U.S. 357 (1927); United States *ex. rel.* Milwaukee Soc. Democratic Publ'g v. Burleson, 255 U.S. 407 (1921); Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Gilbert v. Minnesota, 254 U.S. 325 (1920).

[430] *See* Kelso, *supra* note 2, at 1074–76.

Enlightenment-based rationales for free expression had been installed in the marketplace of ideas approach, making them the dominant conceptualization for free expression.[431] Enlightenment truth, however, comes with significant conceptual baggage, the weight of which has become increasingly unwieldy in the twenty-first century as networked technologies have fundamentally changed how people communicate and, crucially, understand the world around them.[432] This Article identified fundamental problems with the foundational truth assumptions the Court has used to support its First Amendment rationales and identified conceptual building blocks of alternative understandings of truth.[433] It has also examined how the Supreme Court has articulated understandings of free expression and truth, ultimately seeking alternative rationales for First Amendment protections in a significantly changed, and changing, information environment.[434] Crucially, elements for such revisions already exist within the Court's discourse and find substantial support in philosophical conceptualizations of truth.[435]

The Enlightenment-based truth rationales provide a faulty foundation upon which to construct First Amendment rationales in the twenty-first century.[436] They must be replaced, like expired batteries, with truth assumptions that recognize the self-referential, personal nature of how citizens come to understand the world around them.[437] They must also be replaced with discourse-based assumptions that add concern for community and the development of truth, via consensus and interaction among citizens, to the more phenomenological building blocks regarding the personal nature of truth.[438] Using such conceptual building blocks, those in which truth is more synonymous with meaning-making and understanding than it is with absolute certainty and a competition between truth and falsity, would allow for meaningful, but not radical, revisions to free-expression rationales, and thus the flow of information in the networked era.

As rationales for free expression, these assumptions would reinforce existing Supreme Court opinions in which Justices contended steps much be taken to *protect* the marketplace from harm. Justices disagreed, primarily beginning with *CBS v. Democratic National Committee*, in a variety of cases regarding whether a wide-open marketplace, one that places a premium on encouraging as much information as possible, or a protected marketplace, one that allows limited regulation to safeguard the flow of information from distortion, best aligned with the First Amendment.[439]

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[431] *See* Hopkins, *supra* note 53, at 42–48; *see also* Chen & Marceau, *supra* note 344, at 1488–91; Powell & Menendian, *supra* note 425, at 1111.

[432] *See also* Powell & Menendian, *supra* note 425, at 1111.

[433] *See id.*; *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 787–88 (Rehnquist, J., dissenting).

[434] *See also* Hopkins, *supra* note 53, at 43–47.

[435] *See* Kelso, *supra* note 2, at 1074–76.

[436] *See* Powell & Menendian, *supra* note 425, at 1111.

[437] *See id.* at 1111–15.

[438] *Id.*

[439] *See generally* 412 U.S. 94 (1973).

Working from fundamentally flawed Enlightenment assumptions that truth generally vanquishes falsity in a free exchange of ideas, a majority of Justices eventually sided with the wide-open marketplace, thus, for example, striking down campaign finance regulations, allowing corporations human-like free-speech protections, and vastly expanding commercial speech rights.[440] A shift that reconceptualizes truth as a liquid rather than a solid, something that is formed and changes, via discourse with others and internal, personal processes, would buttress arguments that the marketplace must be protected from distortion. Such an understanding would also align more closely with the conceptualizations of truth that Justice Holmes, who introduced the marketplace concept into the Court's vocabulary in 1919, communicated in his legal and personal writings.[441] In his article *Natural Law*, published a year before his groundbreaking First Amendment–related opinions in 1919, Justice Holmes explained, "[W]hen differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours."[442] Justice Holmes understood truth as something personal and subjective, which can lead individuals to come to different conclusions about reality.[443] An approach to truth that is more aligned with these understandings, which encompass more process- and discourse-based approaches would include, for example, upholding carefully tailored limitations on artificially intelligent communicators that, as a result of their nonhuman nature, can push human speakers from the marketplace and create false impressions that a consensus has been reached regarding an issue.[444] Similarly, such an adjustment in truth foundations would allow a different outcome in a case similar to *Citizens United*, where lawmakers sought to protect the marketplace from distortion, but Justices, drawing from Enlightenment assumptions about truth, struck down such limitations.[445] More broadly, reconceptualizing truth foundations in free-expression rationales would better align with the fragmented and polarized nature of online discourse in which truth can vary significantly from community to community.[446]

Such a careful, nuanced shift in foundational assumptions would not be a significant departure from the Court's concerns.[447] Aside from opinions that support

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[440] *See* Hopkins, *supra* note 53, at 47; Powell & Menendian, *supra* note 425, at 1111.

[441] *See* Cohen, *supra* note 91, at 3–4; HOLMES, *supra* note 79, at 1; Letter from Justice Oliver Wendell Holmes, Jr. to Harold Laski (Mar. 29, 1917), *supra* note 80; Holmes, *supra* note 85, at 40–41.

[442] Holmes, *supra* note 85, at 41.

[443] *Id.*

[444] *See generally* McKew, *supra* note 15; Owen, *supra* note 15; Starbird, *supra* note 15.

[445] Citizens United v. FEC, 558 U.S. 310, 348–52 (2010).

[446] BRIAN MCNAIR, CULTURAL CHAOS: JOURNALISM, NEWS AND POWER IN A GLOBALISED WORLD 136–38 (2006); Shanto Iyengar & Kyu S. Hahn, *Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use*, 59 J. COMMC'N 19, 34 (2009); Jared Schroeder, *Marketplace Theory in the Age of AI Communicators*, 17 FIRST AMEND. L. REV. 22, 41–42 (2018).

[447] *See generally* Barry McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J.

safeguarding the marketplace, rather than encouraging maximum information protection, Justices communicated in cases that concerned free expression and truth that protecting its *space* and *flow* were of primary concern.[448] Justices communicated understandings that the *value* of the speech, the *intent* of the speaker, and the *nature* of the ideas were crucial considerations when evaluating free-expression claims.[449] While these concerns were viewed from generally Enlightenment-based lenses, a shift to an understanding of truth that is more discursive and phenomenological in its assumptions would not change the Court's concerns regarding the value, intent, and nature of the expression. In other words, it would not shift *what* Justices evaluate. It would, however, influence *how* the Court evaluates free-expression claims. Justices might be led to consider how a law influences the flow of information and the health of the marketplace, rather than whether it allows the maximum potential information to be communicated. Absent assumptions about truth vanquishing falsity, Justices would be more likely to consider protecting the ability of individuals to encounter ideas and conduct discourse about issues they face so truth can emerge via consensus or understanding among communities. Such communities can thus work with others to create solidarity and affect change in democratic society.

Ultimately, this Article emphasizes that the Enlightenment truth assumptions that have come to appear as weathered and timeless as the original version of the Constitution in the National Archives, have only been in place as primary rationales for free expression since the 1960s.[450] They are not original to the document Justices interpret when they evaluate First Amendment questions and were not present in Justice Holmes's dissent in *Abrams* or similar cases that followed. Instead, they are a set of lenses that, in light of significant changes in the flow of information and how individuals understand themselves and others, have come to skew judicial interpretations in unproductive ways.[451] A careful renovation of these foundational, supporting understandings of truth, which buttress free-expression rationales, could provide a stronger set of rationales for free expression in the twenty-first century.

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249 (2004) (arguing that the modern trend for First Amendment analysis should focus on preserving access to information rather than conditioning a statement's truthfulness as a prerequisite of its deserving constitutional protection).

[448] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (holding that the First Amendment is meant to protect speech that "contribute[s] to the free interchange of ideas and the ascertainment of truth").

[449] *See, e.g.*, Hustler Mag., Inc., v. Falwell, 485 U.S. 46, 52 (1988); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 767–77 (1986); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971); St. Amant v. Thompson, 390 U.S. 727, 731–32 (1968); Beauharnais v. Illinois, 343 U.S. 250, 300–01 (1952) (Jackson, J., dissenting); Near v. Minn. *ex rel*. Olson, 283 U.S. 697, 702 (1931); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 772 (1984) (White, J., concurring in the judgment); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975). *See generally* Hopkins, *supra* note 53.

[450] *See* Kelso, *supra* note 2, at 1076.

[451] *See* Powell & Menendian, *supra* note 425, at 1111–15.