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From Marketplace to Buffet: The Listener-Based Individual Autonomy Theory of "*the* Freedom of Speech"

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Perhaps no metaphor used in a judicial opinion[1] has been more widely accepted into common parlance than Justice Oliver Wendell Holmes Jr.'s reference to the "marketplace of ideas" in which ideas compete for popular acceptance.[2] Indeed, it has become a well-recognized and almost universally adopted doctrine of First Amendment jurisprudence.[3] At its core, Holmes's theory posits that a free-wheeling competition between ideas among the general population causes "correct" ideas to "win out" over time, inevitably driving falsehoods, heresy, and other "invalid" ideas out of that marketplace, and thereby causing "truth" to emerge.[4]

But, of course, actual marketplaces, where wares are offered for sale, do not operate free from any governmental regulation—and even when they are so regulated, they don't always produce economically sound (or fair) "winners" and "losers." Moreover, the "marketplace of ideas" metaphor was clearly the product of its age (early twentieth century laissez-faire economics) and the context in which it was fashioned: to justify Holmes's view that government is generally prohibited from regulating, through criminal penalties, so-called dangerous speech, particularly during wartime.

Over the past several decades, Holmes's conceptualization of the value of protecting "the freedom of speech" has drawn a growing chorus of critics, not only on economic and philosophical grounds but also because it offers an overly narrow, instrumentalist view of the value of free expression.[5] And, of course, the theory's naively over-optimistic prognostication of producing truth has been shown, time and time again, to be erroneous (one stark example: a vast majority of Republican voters in 2024 believe that Donald Trump actually won the 2020 presidential election, notwithstanding the irrefutable facts that prove the contrary).[6] In other words, "the marketplace of ideas" does *not* inevitably (or even predictably) lead the majority to adopt the "correct" ones, nor the popular discovery of truth.

In this brief article, I will not canvass the various alternative philosophical, legal, and historical theories of why the Framers of the Bill of Rights included "the freedom of speech" in that document, and what that phrase was, or *is*, intended to protect and to leave unprotected. The existing (and ever-expanding) academic literature offers myriad alternative justifications for why "the freedom of speech" is a part of our Constitution.[7] And, of course, no one justification is, or need be, exclusive of all others, nor must any one justification necessarily be "primary" or superior to all others. To that extent, then, "*the true meaning*

of the freedom of speech" or "*the central meaning* of the First Amendment" are both misnomers; in reality, there is no such thing.

I present here a decidedly "audience-centric" approach to what the First Amendment, *as a whole*, protects; this view places the greatest emphasis on the *individual autonomy rights* of *listeners*, *readers*, and *viewers* of speech. I argue that our Constitution precludes government, with rare exception, from regulating the ideas available *to each of us* to consume in an "endless buffet of food for thought" (as opposed to a "marketplace of ideas") because *the entire First Amendment* leaves us free to decide, as individuals, the ideas to which we choose to subscribe or reject, regardless of their "validity," "correctness," or "truth." In this conception of "*the* freedom of speech," the First Amendment protects, above all else, individual autonomy *to think independently*, regardless of whether our *thoughts* (not our actions) are "correct" or are completely lacking in empirical support, coherence, or even reason. By offering this perspective, I hope to spawn a further and deeper conversation, among legal scholars,[8] regarding the common theme of, and interplay between, the various clauses of the First Amendment.

The individual-focused "autonomy of thought" theory is first and foremost the product of a textualist analysis, the result of attempting to construe all of the First Amendment's clauses together in a holistic/gestalt way, premised on the assumption (right or wrong) that there was a *reason* all five liberties were combined in a single provision.[9] Without having conducted historical research, I do not claim that this theory is firmly rooted in the writings of the Founders at the time they drafted the Bill of Rights. One fairly solid piece of evidence, however, is James Madison's 1786 letter to Thomas Jefferson, immediately after the latter's "Statute for Religious Freedom"—which also included freedom of speech—was passed by the Virginia legislature under Madison's leadership.[10] Madison wrote, "I flatter myself that we have in this country extinguished forever the ambitious hope of making laws for the human mind."[11] And, of course, six years later, Madison also famously wrote that "Conscience is the most sacred of all property,"[12] where "property" was among the three rights expressly protected by the Fifth Amendment's Due Process clause.

I further acknowledge that I am offering a rather counterintuitive construction of "the freedom of *speech*"—one that places *far less* weight on the rights of *speakers* than on the rights of their *audience*. As I will discuss below, however, a largely overlooked ruling from the U.S. Supreme Court from 1969 expressly found that the rights of recipients of speech *exceed* the rights of speakers to disseminate information. Indeed, the Court recognized that the First Amendment protects our right to consider ideas whose very expression could be *banned* under the Free Speech clause. In other words, the First Amendment guarantees that We the People have free *access to ideas*, in all forms, regardless of their social, political, artistic, or scientific worth.

Toward a More Expansive, and Intrinsic, Conceptualization of "the Right to Think Freely"

On its face, the First Amendment's so-called Free Speech clause speaks only of the rights of the *speaker*, whether the "speech" be communicated orally (standing on the proverbial soapbox in the town square or city park), in writing (whether it be the "lonely pamphleteer" or "the press"), or through myriad other forms of expression, including motion pictures, paintings, sculpture, dance (expressive conduct), clothing/fashion (a T-shirt emblazoned with the message "F*ck the Draft"), a burning cross, a swastika, or, in modern times, a series of digitized zeros and ones transmitted electronically. Of course, the Free Speech clause undoubtedly protects the rights of those who generate and disseminate ideas and messages. Thus, outside of a handful of recognized categories of "unprotected speech," all narrowly circumscribed by well-demarcated boundary lines, the government may not abridge individuals' and groups' freedom to disseminate ideas in all available media and forms.

The freedom of speech also must encompass, to some extent, a freedom to communicate, which necessarily entails a receiver of the communication. If the "freedom to speak" were permitted to be exercised only by one standing alone inside an empty closet or in a remote cave in the wilderness, it would amount to no freedom at all.[13] But beyond the rights of the speakers to transmit their message(s) to others, the Supreme Court has repeatedly recognized that "the First Amendment goes beyond protection of . . . self-expression of individuals to *prohibit government from limiting the stock of information from which members of the public may draw*."[14] The Court has held, unambiguously, "the Constitution protects the right to receive information and ideas"[15] and "[a]s a general principle, the First Amendment bars the government from dictating what we see or read . . . or hear."[16]

However, none of the liberties protected by the Constitution is absolute.[17] Accordingly, the right to *receive* information also must have limits. And Holmes's "marketplace of ideas" metaphor was itself a decidedly listener-focused conception of the freedom of speech; its raison d'être was not to protect the interests of speakers in having their ideas gain acceptance among their "consumers" but *our* right to be offered those ideas and to choose/purchase the "correct" ones so that the truth would carry the day. Under that economic free-exchange concept, even knowingly false and deceptive speech would be tolerated (i.e., not subject to regulation) because countervailing speech would eventually gain adherence and displace "bad" speech.

Putting to one side, for now, the empirical fallacies of this theory (premised on assumptions of rational decision-making and unfettered access to multiple countervailing viewpoints), this instrumentalist/consequentialist and collective/utilitarian view of the rights of listeners is far too narrow to recognize the intrinsic value in individuals receiving information: the freedom to think.[18]

The Instrumentalist Conception of the Right to Receive Information

The Holmesian view of the value of a free exchange of ideas is not founded on an individual liberty-based conception of the right—freedom of thought—but instead extols the free flow of information to the populace as a necessary condition for collective self-governance. Premised on the eloquent words of James Madison, this strand of the right-to-receive-information doctrine proclaims that "A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both." Undoubtedly there is truth to this: Deprived of such necessary information to make informed decisions, our democracy would almost surely perish.

However, this instrumentalist conceptualization can lead to an exceedingly narrow and paternalistic definition of the scope of information the First Amendment protects from government regulation, restriction, or outright bans. For example, using this formulation, Judge Robert Bork advocated that only information necessary to exercise the vote—core "political speech"—was within "*the* freedom of speech."[19] Therefore, in his view, government could act with impunity in limiting access to sculpture, paintings, poetry, music, comic books, and all non-core-political speech.

While Holmes's marketplace metaphor may not have been so narrowly circumscribed, restricted only to facilitating political decision-making, it shares a similar instrumentalist and collective notion of the right to receive information: Ideas empower society (not individuals) to make informed and, therefore, presumptively "correct" decisions.

The Individual Freedom to Believe What We Choose

As mentioned above, "the freedom of speech" appears alongside four other freedoms that all of us—both as individuals and in "assembly" with others—enjoy: to *believe* in and exercise freely whatever religion we choose, or none at all (free from government "establishment"); to gather, peaceably, with others who hold

similar beliefs and to exclude those who do not from those assemblies; and to (individually or collectively) petition our public servants to seek redress of our "grievances."

Why might all of these seemingly disparate freedoms appear together in a single amendment to the Constitution (originally listed as "Article the third" *not* the first)? They all embrace individual autonomy and the freedom of thought—the freedom from official coercion to subscribe to any ordained orthodoxy, be it religious, social, moral, or scientific/data-based in origin.[20] Thus, as the justices have recognized, the government cannot force any American to "pledge an allegiance" to any idea or proposition, be it this nation's foundational proposition that "all men are created equal," that democracy is a better form of government than a dictatorship, that humans evolved from apes, or that Earth is a spherical planet that completes its orbit of the sun roughly every 365¼ days.

At the founding of our Union, all "men" (and, with the expansion, over time, of those protected by the Constitution, all people) were guaranteed the fundamental right to think and believe whatever they chose. And, as Madison conceived of it, the Supreme Court has identified the *freedom of conscience* as the central liberty that unifies the various clauses in the First Amendment: "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of *individual freedom of mind*, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority."[21]

The freedom to *receive* the speaker's message, and to decide whether to accept or reject it, explains why the Freedom of Speech clause appears alongside the others in the First Amendment: All guard against government interference with individuals' freedom to *think* independently and to decide for themselves what to *believe*. In addition to the Free Exercise clause protecting the right to "practice" one's faith, there is also the clause that prohibits "the establishment [of religion]," which provides freedom *from* religion, prohibiting government from ordaining any set of beliefs by which the people must abide. Writ large, the First Amendment forbids any form of government-imposed orthodoxy of thought, be it religious, political, scientific, or "factual."[22]

The Audience's Rights Exceed Those of the Speaker

Our *individual* right to *receive* information and ideas is broader than the rights of any speaker to *disseminate* information. Each of us is entitled ("endowed by [our] creator," as it were) to receive information and ideas; *even if there is no human "speaker" involved*, the government is prohibited from restricting that entitlement absent the most compelling of interests and circumstances, as discussed below. This right encompasses our right to witness the wonders of nature in our everyday lives: to *hear* the wind rustling leaves on trees; to *watch* the sun rise or set; to *gaze* upon the stars above; to *listen* to the songs of birds, the bellowing calls of whales, the ocean's roar, the crack of lightning and thunder; and to *observe* and *appreciate* all that is communicated to us through our senses—even when no human "speaker" generates anything recognizable as "speech." The same is true for information generated by machines, including automated music composition, and, now, content generated by artificial intelligence.

Of course, bad *acts—conduct* causing harm to other individuals or to "the public welfare"—may be sanctioned and even prohibited prospectively. Certain crimes and civil wrongs can be committed through spoken or written words alone—e.g., fraud, extortion, blackmail, conspiracy, etc. But under the First Amendment, no person can be punished, or sanctioned in any way, merely for harboring "bad" or unpopular thoughts, even those that society might (almost) universally condemn. In another famous dissent, Justice Holmes declared that "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is *the principle of free thought*—not free thought for those who agree with us, but freedom for the thought that we hate."[23]

Throughout our nation's history, this foundational concept of individual liberty—freedom of choice, *freedom of thought*—has been embraced by the Supreme Court in interpreting the First Amendment. Indeed, in 1969, in *Stanley v. Georgia*,[24] the Court enshrined each individual's fundamental right to *read* whatever they choose—even "obscene" material that, taken as a whole, lacks any serious literary, artistic, political, or scientific value. In that case, Robert E. Stanley challenged his conviction for having violated a state statute that criminalized the knowing possession of obscene matter.[25] The Supreme Court ruled that the state statute could not be enforced because "the mere private possession of obscene matter cannot constitutionally be made a crime."[26]

The *Stanley* Court began its reasoning by stating that "[i]t is now well established that the First Amendment protects the right to receive information and ideas."[27] But far more important, the Court's ruling emphatically recognized that the right to receive information *exceeds* even the rights of speakers, authors, and other information disseminators to convey that information. The justices acknowledged that the portion of Georgia's statute that criminalized the sale and *distribution* of obscene material—a narrowly cabined category of "unprotected speech"—was constitutional. That is because society has a compelling interest in forestalling the distribution of information that appeals, in a "patently offensive manner," to one's "prurient interest" in nudity, sex, or excretion *and* that also lacks any serious literary, artistic, social, or scientific value. The people, acting through their elected legislators, may exercise the collective police power of the state to keep obscene material out of the hands of impressionable members of society by banning its *distribution*, and this is justifiable because the definition of obscenity incorporates its lack of *any* redeeming social value.

Nevertheless, a very different calculus applies when the government seeks to punish those who merely *possess* (and presumably, therefore, wish to "consume" or view) such material. As the Court put it, "Th[e] right to receive information and ideas, *regardless of their social worth* . . . is fundamental to a free society."[28] The court recognized that "[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought *to protect Americans in their beliefs, their thoughts*, their emotions and their sensations."[29]

Acknowledging that Mr. Stanley challenged his conviction by asserting his "right to be free from state inquiry into the contents of his library," the court declared:

> If the First Amendment means anything, it means a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. *Our whole national heritage rebels at the thought of giving government the power to control men's minds*.
>
> . . . Whatever the power of the State to control *the public dissemination* of ideas inimical to morality, it cannot constitutionally premise legislation on the desirability of *controlling a person's private thoughts*.[30]

Stanley cited to, and quoted from, the most eloquent exposition of the individualistic, libertarian conception of the freedom of thought ever published in the pages of the *Supreme Court Reporter*—Justice Louis Brandeis's concurrence in *Whitney v. California*:

> [W]e must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which *a vast majority of its citizens believes to be false* and *fraught with evil consequence*.
>
> *Those who won our independence believed that the final end of the State was to make men free to*

> *develop their faculties. . . . They valued liberty both as an end, and as a means. . . .* 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; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine. . . .
>
> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. *It is the function of speech to free men from the bondage of irrational fears. . . .*
>
> [E]ven advocacy of [law] violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and *there is nothing to indicate that the advocacy would be immediately acted on.*
>
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, *no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.* If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[31]

In the decades following *Stanley*, the Supreme Court and lower courts across the land have recognized that the First Amendment prohibits the government not only from *punishing* people for what they read, view, or think; it also bars government from monitoring those actions by acquiring, via search warrant or subpoena, library checkout or bookstore purchase records showing what individuals choose to read.[32] For example, in Colorado, Joyce Meskis, the late owner of the Tattered Cover bookstore in Denver, successfully challenged the efforts of a police department to obtain the purchase records of one of her store's customers, as part of a criminal investigation. Writing for Colorado's Supreme Court, Chief Justice Michael Bender said:

> When a person buys a book at a bookstore, he engages in activity protected by the First Amendment because he is exercising his *right to read and receive ideas and information.* Any *governmental* action that interferes with the willingness of customers to purchase books, or booksellers to sell books, thus implicates First Amendment concerns.
>
> . . . [G]overnmental inquiry and intrusion into the reading choices of bookstore customers will almost certainly chill their constitutionally protected rights:
>
> > . . . [T]he spectre of a government agent will look over the shoulder of everyone who reads. . . . Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular, what the powers-that-be dislike. . . . Fear will take the place of freedom in the libraries, bookstores, and homes of the land.
>
> . . . In sum, the First Amendment embraces the individual's right to purchase and read *whatever books* she wishes to, without fear that the government will take steps to discover which books she buys, reads, or intends to read.[33]

Moving Beyond the Marketplace to a More Apt Metaphor

A metaphor is a linguistic device, having a physical embodiment or real-life practical situation serve as a "stand-in" to convey the essence of an abstract idea or theoretical concept. Examples are commonplace in both legal and popular lexicon: Pandora's box, fruit of the poisonous tree, a fishing expedition, needle in a haystack, sweat of the brow, second bite at the apple, tossing the baby out with the bathwater, the slippery slope, parade of horribles, etc.[34] My personal favorite is Justice Frankfurter's "to burn [down] the house to roast the pig."[35]

But all metaphors have their limits. Such shorthands are of little or no use in describing completely inapposite circumstances. No one would say that having to choose between two equably problematic alternatives (i.e., being "caught between a rock and a hard place") is "beating a dead horse" or "opening the floodgates." The marketplace of ideas metaphor was not meant to apply to all the myriad contexts in which government seeks to regulate speech to further the public good (e.g., defamation, harassment/threats, criminal conspiracies, false advertising, obscenity, child pornography, etc.). And, of course, Justice Holmes coined the marketplace metaphor decades before the Court developed its doctrines differentiating between "content-based" and "content-neutral" regulations and applying "strict," "intermediate," and "rational-basis" judicial review under the Due Process clause.

Instead, the "marketplace of ideas" metaphor was offered to address only the particular factual context in which it was conceived: When is government permitted to punish "incendiary" speech that may cause listeners to violate the law (through acts that impact third parties)? This question later gave rise to the now well-recognized category of unprotected speech known as "incitement to imminent lawless conduct," which, by categorical definition, requires both the speaker's subjective *intent* to cause such harm *and* an objective analysis of the particular speech at issue, in context, to determine if it was reasonably "*likely to* cause imminent" reaction by its recipients.[36] Under this doctrine, an antiwar protest leader who shouts to the crowd "we'll take back the streets *later*" cannot be prosecuted for inciting a mob to lawless action because his words, on their face, did not call for *immediate* unlawful action.[37]

Justice Holmes also coined another phrase that has become enshrined in both legal and popular parlance: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[38] He offered this as a concrete illustration of the type of speech, in a particular context, that would cause an immediate, reflexive response by the audience, i.e., one *without thinking*, that could cause serious bodily injury. No thought, just action.

Another recognized category of unprotected speech closely related to incitement—though it is rarely actually invoked to punish the speaker—is "fighting words." Like incitement, it is a narrowly confined category, applying only to those face-to-face utterances that would cause the listener (or is "likely to cause" the listener) reflexively to assault the speaker, as opposed to assaulting a third party. And, indeed, both "incitement" and "fighting words" embody the notion, as Justice Brandeis articulated a century ago in *Whitney*, that government regulation of speech is permissible *only* when "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion [or reflective thought]." *But only then.* Because, "[i]f there be time . . . to avert the evil by the processes of [rational contemplation] . . . the remedy to be applied is more speech, not enforced silence."[39] In other words, government may interfere, without "abridg[ing] the freedom of speech," only in those extraordinary circumstances where words or other expression, in the particular context in which they are uttered, would be "likely" to produce an immediate, "knee-jerk" (i.e., unthinking) response, like putting a flame to a puddle of gasoline—an immediate, unavoidable chemical reaction.

These two judicially recognized categories of *unprotected* speech, lying outside the perimeter of "the

freedom of speech," point the way to perhaps a more apt metaphor to describe when government may constitutionally interfere with the exchange of information between speakers and their audience, when the compelling governmental interest at stake is *preventing physical harm* (or other lawbreaking) "triggered" by speech. Some have suggested a different metaphor: a garden,[40] in which multiple ideas (seeds, if you will) are planted in the community of public discourse where some will "take root" and flourish and others will wither and die off. But the proponents of this metaphor acknowledge that it leaves unanswered the crucial questions of which seeds the government may (without violating the First Amendment) prohibit from being sown or which "weeds" should be removed to allow other, more valued, plants to flourish.[41]

My suggestion is to replace the concept of ideas competing in a "marketplace" for acceptance with an endless buffet of "food for thought." The "stock" of available information, which is always growing (and now at an ever-increasing pace[42]), may be seen as an ever-expanding repository (or smorgasbord) of ideas to which each of us is entitled to partake, regardless of whether the figurative foods available there are "healthy" and "nutritious" or simply "comfort"/"junk" food that satisfies our intellectual palate but offers zero calories for expanding our minds in any "positive" direction (if such is capable of being determined). Under this conception of "the freedom of speech," the government may regulate that buffet, by curtailing its offerings (and by punishing those who proffer "forbidden fruits"), only when exposure to the idea or information in question is instantaneously exceedingly dangerous, e.g., a luscious cupcake labeled "negative calories; causes weight loss!" yet, in truth, its poisonous contents immediately cause severe physical illness, including potential death.

Such is the nature of "incitement to imminent lawless conduct" and "fighting words"—communications that cause the "consumer" of such "food(s) for thought" immediately to react physically and violently, without any exercise of autonomous thought. But short of such instantaneously harm-producing utterances or communications, the government has no business (or authority, under the Constitution) telling us which ideas we may sample, taste, or consume in whole (adopt)—no matter how "distasteful" they may be to others, or even to the vast majority of us.

This meaning of "the freedom of speech" is fully consistent with our understanding of the First Amendment's freedom of, and from, religion. The government cannot declare that Christianity is the only "correct" religion, not Scientology, Mormonism, Islam, Judaism, Buddhism, etc., or proclaim that adherents of those faiths (or others), or atheists, are "wrong" and therefore prohibited from maintaining or practicing those *beliefs*. The same is true with respect to any set of individual thoughts, not merely those premised on faith that there is some higher being or force at work in the universe (or, alternatively, that there is none). The Gregorian calendar is no more "valid" or "correct" than the multiple alternative ones that serve as the demarcation of time for billions of people worldwide, including those living in the United States.[43] Each of us is free, from governmental interference, to *think* what we will, no matter how "wrong-headed" or irrefutably (factually) incorrect our thoughts may be. If you choose to *believe* that 2 plus 2 equals 27, that is your right, as is your right to so proclaim without being punished by the government for doing so (although, understandably, you may not get a job offer from NASA or any pharmacy).[44] So long as our *actions* do not harm others, and our pure expression, in context, does not itself produce cognizable harms to third parties (e.g., "true threats" or defamation), the government is forbidden from limiting the "stock of information" that we are free to consume,[45] as set out on the endless buffet of food for thought.

In keeping with the metaphor, I suggest you go chew on *that* for a while. And while you're at it, enjoy the rest of the mental feast; it's *your* right.

Endnotes

1. *See* George Lakoff & Mark Johnson, Metaphors We Live By (1980); *see also* Robert L. Tsai, *Fire, Metaphor and Constitutional Myth-Making*, 93 Geo. L.J. 181 (2004).

2. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see, e.g.*, *Marketplace of Ideas*, Wikipedia (Feb. 2, 2024), https://en.wikipedia.org/wiki/Marketplace_of_ideas.

3. *See, e.g.*, United States v. Rumely, 345 U.S. 41, 56 (1953); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748, 760 (1976); Reno v. Am. Civ. Lib. Union, 521 U.S. 844 (1997); McCreary Cty. v. Am. Civ. Lib. Union, 545 U.S. 844 (2005); Randall v. Sorrell, 548 U.S. 230 (2006); Walker v. Sons of Confederate Veterans, 576 U.S. 200 (2015); Matal v. Tam, 528 U.S. 218 (2017).

4. *See, e.g.*, Edwin C. Baker, Human Liberty and Freedom of Speech 4 (2018) ("The classic marketplace of ideas model argues that the truth (of the best perspectives of solutions) can be discovered through robust debate, free from governmental interference.").

5. *See, e.g.*, Morgan Weiland, *First Amendment Metaphors: The Death of the "Marketplace of Ideas" and the Rise of the Post-Truth "Free Flow of Information,"* 33 Yale J. L. & Hum. 366 (2022); Greg Lukianoff & Nadine Strossen, *Does Free Speech "Inevitably" Lead Towards Truth? Is the "Marketplace of Ideas" a Broken Metaphor?*, Fire (Mar. 18, 2022), https://www.thefire.org/news/blogs/eternally-radical-idea/does-free-speech-inevitably-lead-towards-truth-marketplace-ideas; John G. Francis & Leslie P. Francis, *Freedom of Thought in the United States: The First Amendment, Marketplaces of Ideas, and the Internet* (Univ. of Utah 2021), https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1302&context=scholarship; Zoe Sherman, *Interrogating the Analogy of the Marketplace of Ideas, Interpreting the First Amendment*, Am. Econ. Ass'n (2019), https://www.aeaweb.org/conference/2019/preliminary/paper/75tS48Dr; Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 Legal Theory 1 (1996).

6. Nikki Schwab, *69% of Republicans Now Believe Biden's 2020 Win Was Illegitimate: New Poll Released Before Trump's January 6 Arraignment Shows GOP Supporters Believe There WAS Widespread Fraud*, Daily Mail (Aug. 3, 2023), https://www.dailymail.co.uk/news/article-12369641/69-Republicans-believe-Bidens-2020-win-illegitimate-New-poll-released-Trumps-January-6-arraignment-shows-GOP-supporters-believe-widespread-fraud.html.

7. *See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. (1989); Frederick Schauer, Free Speech: A Philosophical Enquiry (1982); Thomas I. Emerson, The System of Freedom of Expression (1970); *see also* David Hudson, *Arguments for Freedom: The Many Reasons Why Free Speech Is Essential*, Fire (Nov. 1, 2022), https://www.thefire.org/news/arguments-freedom-many-reasons-why-free-speech-essential.

8. Several prominent legal scholars have previously articulated an "autonomy-based" approach to the Free Speech clause, though with a decidedly speaker-based perspective. Among the chief proponents of this approach have been Edwin C. Baker, Human Liberty and Freedom of Speech (2018); Martin Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 646 (1982); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972); and Lawrence Alexander, *The Impossibility of a Free Speech Principle*, 78 Nw. L. Rev. 1319 (1984).

9. In *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991), Professor Akhil Reed Amar argued that the first 10 amendments to the Constitution should be considered collectively, not individually, to fully understand their intended meaning. This Article suggests using the same approach in interpreting the five separate clauses of the first of those amendments.

10. Jonathan Barth, *"Liberty of Conscience is Every Man's Natural Right": Historical Background of the First Amendment*, 35 J. Pol'y Hist. 435, 447–48 (2023).

11. *Id*. at 448 (quoting James Madison to Thomas Jefferson, Jan. 22, 1786, *in* 1 The James Madison Letters 214 (1884)); *see* J. Madison, *Report on the Virginia Resolutions*, *in* 5 The Writings of James Madison 143 (Gaillard Hunt ed., 1900) (discussing the First Amendment and noting that "The freedom of conscience and of religion are found in the same instruments which assert the freedom of the press."); *but see* David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. Pitt. L. Rev. 493, 531 (1990) ("While the record is certainly inconclusive as to the exact scope of the Framers' concern with protecting speech, there is precious little to suggest that the first amendment was intended to guarantee self-fulfillment.").

12. J. Madison, *Property*, March 27, 1792, *in* 14 The Papers of James Madison 266–68 (Robert A. Rutland et

al. eds., 1983), https://constitutingamerica.org/on-property-by-james-madison-reprinted-from-the-u-s-constitution-a-reader-published-by-hillsdale-college. The full quotation is "Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right."

13. *See, e.g.*, Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing [readers, viewers, and listeners] are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

14. First Nat'l Bank of Bos. v. Belloti, 435 U.S. 765, 783 (1978); Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976) ("[Under the First Amendment's guarantee of the] Freedom of speech . . . the protection afforded is to the communication, to its source and to its recipients both."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.").

15. Kleindienst v. Mandel, 408 U.S. 753, 763 (1972) (citations omitted).

16. Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002).

17. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.") (citations omitted).

18. *See* Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. Pa. L. Rev. 678, 685 (1982) ("to allow individuals to choose only what some external force determines is 'rational' and 'intelligent' is effectively to deprive them of self-rule").

19. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20 (Fall 1971) ("Constitutional protection should be accorded only to speech that is explicitly political.").

20. *E.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("The right of freedom of thought . . . guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all.").

21. Wallace v. Jaffree, 472 U.S. 38, 52 (1985); *see also* McDonald v. Smith, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of that Amendment"); *see also* Baker, *supra* note 4, at 5 ("In this liberty interpretation, first amendment protections of speech, assembly, and free exercise of religion are merely different markers bounding a single realm of liberty of self-expression and self-determination."); Timothy Zick, *Recovering the Assembly Clause*, 91 Tex. L. Rev. 375, 383–84 (2012) (reviewing John D. Inazu, Liberty's Refuge: The Forgotten Freedom of Assembly (2012)) ("[T]here is apparently some connective tissue that binds the First Amendment's provisions together."); Bryan Austin & Christian Cotz, *The Most Sacred Property*, First Amend. Museum (2021), https://firstamendmentmuseum.org/the-most-sacred-property ("It is no wonder, then, that [Madison's] First Amendment, which protects the freedoms of religion, speech, press, assembly, and petition, can all be distilled into his firm and resolute belief, that 'Conscience is the most sacred of all property.'").

22. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("First Amendment freedoms are most in danger when the government *seeks to control thought* or to justify its laws for *that impermissible end*. The right *to think is the beginning of freedom*, and speech must be protected from the government because speech is the beginning of thought.") (emphasis added); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) ("at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"), *overturned, on other grounds*, Janus v. AFSCME, Council 31, 585 U.S. 878 (2018).

23. United States v. Schwimmer, 279 U.S. 644, 654–55 (1919) (Holmes, J., dissenting).

24. 394 U.S. 557 (1969).

25. *Id.*

26. *Id.* at 559.

27. *Id.* at 564 (citations omitted).

28. *Id.* (emphasis added).

29. *Id.* (citations omitted).

30. *Id.* at 566 (italics added). The Supreme Court quoted from the dissenting opinion of Ohio Supreme Court Justice Thomas J. Herbert in *State v. Mapp*, 166 N.E. 2d 387, 393 (Ohio 1960) (Herbert, J., dissenting): "The right of an individual to read, *to believe or disbelieve*, and to *think without governmental supervision* is one of our basic liberties, but to dictate to the mature adult what books he may have in his private library seems . . . to be a clear infringement of his constitutional rights as an individual." (emphasis added). *See also* Redish, *supra* note 18 (arguing for a non-instrumentalist view of individual autonomy).

31. Whitney v. California, 274 U.S. 357, 374–77 (1927) (Brandeis, J., concurring) (italics added).

32. *See* United States v. Rumely, 345 U.S. 41, 57–58 (1953) (Douglas, J., concurring); *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000) ("The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control."); *In re* Grand Jury Subpoena to Kramerbooks & Afterwords, Inc., 26 Media L. Rep. (BNA) 1599, 1601 (D.D.C. 1998) (requiring the government to "demonstrate a compelling interest in the information sought . . . [and] a sufficient connection between the [bookstore purchase records] and the grand jury investigation. . . .).

33. Tattered Cover v. City of Thornton, 44 P.3d 1044, 1052–53 (Colo. 2002).

34. *See* Isabelle Richard, *Metaphors in English for Law: Let Us Keep Them!*, 8 Lexis: J. in Eng. Lexicology (2014), https://doi.org/10.4000/lexis.251; Ljubica Kordi, *Metaphors Lawyers Live By*, 36 Int'l J. Semiotics L. 1639 (2023), https://doi.org/10.1007/s11196-023-09975-0.

35. Butler v. Michigan, 352 U.S. 380, 383 (1957).

36. Brandenburg v. Ohio, 395 U.S. 444 (1969).

37. Hess v. Indiana, 414 U.S. 105 (1973).

38. Schenck v. United States, 249 U.S. 47, 52 (1919).

39. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

40. Robert Sparrow & Robert E. Goodin, *The Competition of Ideas: Market or Garden?*, 4 Critical Rev. of Int'l Soc. & Pol. Phil. 45 (2001).

41. *Id.* at 56 ("Of course, merely alluding to this metaphor does not resolve the question of how we are to decide which ideas should be left alone to flourish and which should be treated as 'weeds.' It leaves unanswered the question as to who has the responsibility of ensuring that the garden of ideas is a productive one (who is the 'gardener'?) or the dangers of allowing the state (or indeed anyone) to adopt that role.").

42. *See, e.g.*, Fabio Duarte, *Amount of Data Created Daily (2024)*, Exploding Topics (June 13, 2024), https://explodingtopics.com/blog/data-generated-per-day.

43. *See* Deanna Ritchie, *Different Calendars Humans Have Used Throughout History*, Calendar (May 15, 2023), https://www.calendar.com/blog/different-calendars-humans-have-used-throughout-history.

44. That's not to say that mis- and disinformation campaigns, which may succeed in subverting our democracy, are not serious problems. They are. The point is it is not the government's place, under the First Amendment, to engage in restricting such pernicious (and blatantly false) speech, unless any such regulation satisfies the most stringent form of judicial scrutiny.

45. The Supreme Court has expressly recognized this quantitative approach, saying, "[w]hatever is added to the field of libel is taken from the field of free debate." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).